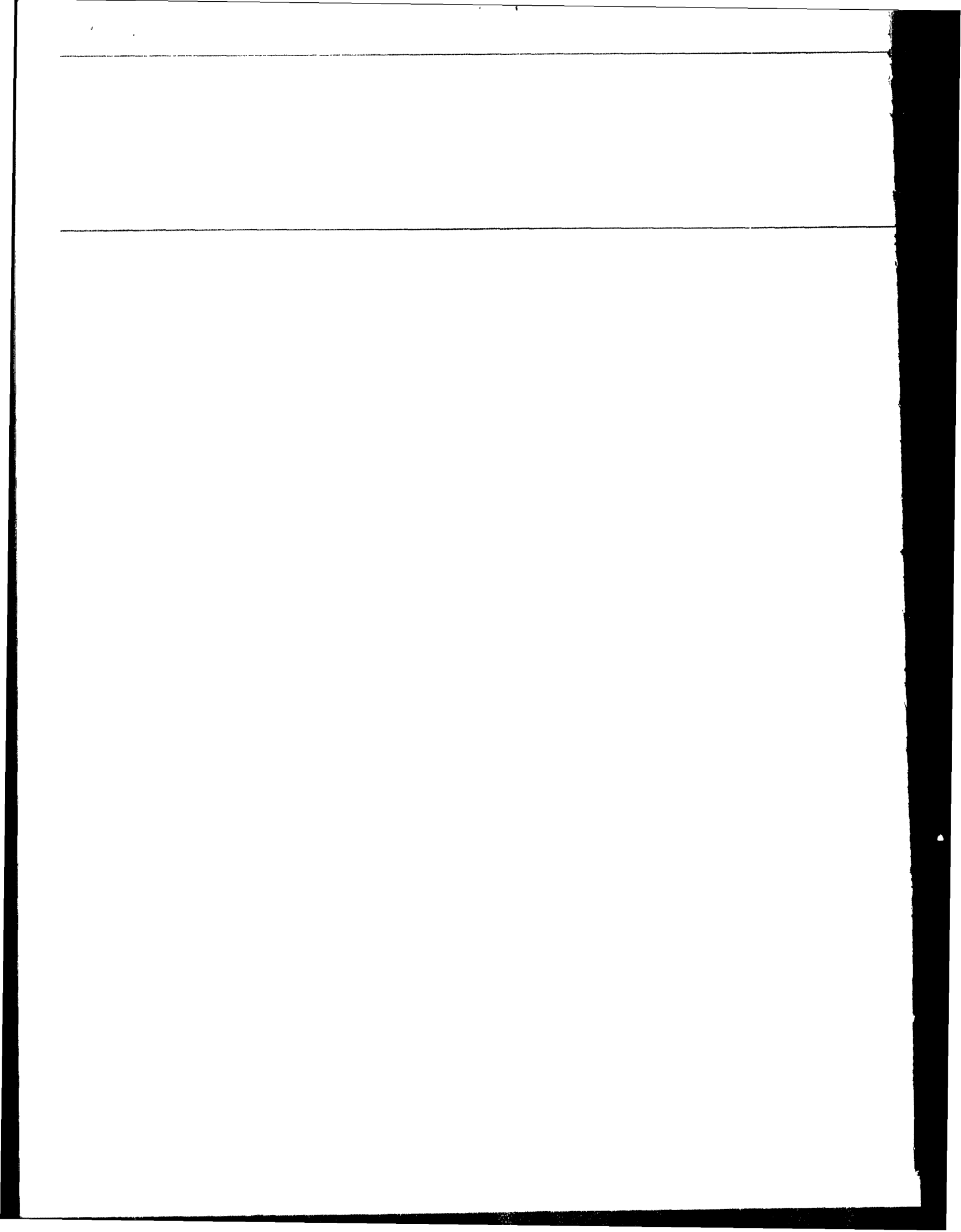


January 1992

TENNESSEE VALLEY AUTHORITY

Issues Surrounding Decision to Contract Out Construction Activities







**United States
General Accounting Office
Washington, D.C. 20548**

**Resources, Community, and
Economic Development Division**

B-247236.1

January 31, 1992

The Honorable Wendell Ford
United States Senate

The Honorable Albert Gore, Jr.
United States Senate

The Honorable Howell Heflin
United States Senate

The Honorable Jim Sasser
United States Senate

The Honorable Bud Cramer
House of Representatives

The Honorable John J. Duncan, Jr.
House of Representatives

You requested that we review the Tennessee Valley Authority's (TVA) decision, announced on May 10, 1991, to contract out for all construction and major modification work. You were concerned that several thousand TVA employees would lose their jobs as a result of this decision. TVA has traditionally used its own employees to perform most of its engineering, construction, and modification work. The contracting-out decision represents a significant change from TVA's historical reliance on an in-house construction work force.

On October 30, 1991, we briefed your offices on the status of our work. As agreed, this report summarizes and updates the information presented at that briefing. Specifically, we examined the (1) basis for TVA's decision to contract out for construction and major modification work; (2) rationale for certain procedures TVA has followed in complying with the Government in the Sunshine Act (P.L. 94-409); (3) effect of the decision on TVA employees, including the number and type of employees affected; and (4) effect of the decision on TVA operations.

Results in Brief

TVA decided to contract out for construction and major modification work to alleviate construction problems, improve productivity and efficiency, and allow TVA officials to focus the in-house work force on operations and

maintenance activities. This decision—announced in May 1991—was not based on the results of a cost-benefit analysis. However, on the basis of an August 1991 analysis, TVA projected that the contracting-out decision would result in potential savings of \$106 million per year. TVA officials believe the August 1991 estimate is based on very conservative assumptions about the gains to be made. Moreover, according to new estimates TVA supplied to us in mid-January 1992, TVA now believes the potential exists for about \$191 million in annual savings. About 75 percent of the earlier \$106 million in estimated savings is highly dependent on assumptions that the contractors will achieve increased productivity and efficiency levels. We believe that the assumptions TVA used in making both of its estimates may be optimistic.

Events leading up to and resulting in the contracting-out decision have also raised the question of whether the procedures TVA followed complied with the Government in the Sunshine Act. Under TVA procedures, members of TVA's Board of Directors are ex officio members of TVA's Executive Committee, which reviews and coordinates matters, such as contracting issues, that will be referred to the Board for final action. Executive Committee meetings, unlike Board meetings, are not open to the public. To the extent that two or more members of TVA's three-member Board of Directors did participate in substantive deliberations at Executive Committee meetings concerning the contracts before referral to the Board for final action, we believe a violation of the Government in the Sunshine Act occurred. However, the procedural defects in the Executive Committee meetings would not invalidate the contracts signed after approval by the Board. Although disagreeing with our conclusion, as of mid-January 1992, TVA was examining the Executive Committee's structure but had not decided whether changes were needed.

The contracting-out decision will reduce and change the composition of TVA's work force. These changes will occur over the next year as the contracting-out decision is fully implemented. For example, by March 1992 TVA expects to have eliminated nearly all of its temporary trades and labor positions; in May 1991, TVA had over 4,900 such positions. TVA also plans to eliminate about 500 permanent salary positions that had provided administrative and personnel support for temporary trades and labor employees. At the same time that TVA announced its contracting-out decision, it also announced its decision to eliminate over 300 annual trades and labor positions as a result of recently negotiated labor agreements with its unions.

According to TVA officials, it may be a year or longer before measurable effects of the contracting-out decision on TVA operations become apparent. TVA is still in the process of awarding contracts—nine totaling about \$1.3 billion have been awarded to date—and contractors are just now beginning to initiate work under the contracts. TVA has not yet assessed contractors for performing services and meeting both milestones and anticipated productivity and efficiency increases. However, as the employees affected by the decision leave and the contractors complete work over the next few years, TVA should be able to quantify the extent to which implementation of the decision has (1) alleviated construction problems, (2) improved productivity and efficiency levels, and (3) achieved anticipated savings.

Background

TVA, a government-owned corporation created in 1933, supplies power to electric distributors serving customers in Alabama, Georgia, Kentucky, Mississippi, North Carolina, Tennessee, and Virginia. As a government corporation, TVA has a great deal of independence in deciding how it is to be operated and managed. Thus, TVA operates, to a certain degree, with the autonomy and flexibility of a private corporation, including having the ability to enter into competitively awarded contracts for supplies and services. All powers of the corporation are vested in its three-member Board of Directors. The President of the United States, with the advice and consent of the Senate, appoints the members of the Board to serve in 9-year, overlapping terms of office and designates one member as Chairman.

The Government in the Sunshine Act generally requires that agencies headed by a collegial body, whose members are appointed by the President, conduct official agency business only in an open forum in which the public may be informed of and participate in the transactions taking place. The 1976 Sunshine Act was intended to heighten public awareness of agencies' administrative processes and increase accountability for agency action. Meetings of TVA's Board of Directors are subject to the Sunshine Act. Two directors constitute a quorum with authority to carry out the Board's functions, and TVA's regulations specify that all Board meetings be conducted in accordance with the Sunshine Act. The TVA Board has entrusted day-to-day management and general supervision of the Authority's affairs to TVA's Executive Committee, which consists of senior TVA officials. The directors also serve on the Executive Committee in an ex officio capacity.

Throughout TVA's history an in-house work force has performed most of TVA's engineering, construction, and modification work. However, in the past few years TVA has experienced problems in constructing nuclear power plants and in modifying nuclear, fossil, and hydro power plants.

TVA's work force has consisted of (1) temporary trades and labor, (2) permanent salary, and (3) annual trades and labor employees. Temporary trades and labor employees are intermittent, seasonal blue-collar workers who TVA releases when they complete their assignment. Historically, TVA employs more temporary trades and labor workers during the spring and fall because most major modification work is done during these periods of reduced energy demand. The permanent salary employees are white-collar workers, such as office workers and engineers. Annual trades and labor workers form TVA's permanent blue-collar work force.

TVA's Basis for Deciding to Contract Out

According to senior officials, including the Chairman of the Board of Directors, TVA decided to contract out for construction and major modification of facilities primarily to alleviate construction and modification problems and to improve its level of productivity and efficiency. This contracting-out decision also reflects a new management approach—focusing TVA's in-house work force on operations and maintenance activities. In August 1991 TVA projected about \$106 million a year in savings as a result of its decision. In mid-January 1992, TVA officials told us that they now believe the potential exists for savings of about \$191 million annually. We believe that the assumptions TVA used in making its estimates may be optimistic.

Factors Influencing the Decision

TVA has been unable to maintain adequate productivity levels for construction at its nuclear power plants and efficiency levels for modification work at its fossil and hydro plants. For example, according to the President of its Generating Group,¹ TVA has been unable to complete construction of the Watts Bar Nuclear Plant, in part because of poor productivity. TVA has also reported that productivity for modification work at its Browns Ferry Nuclear Plant is about one-half of the industry average. According to TVA officials, TVA has been unable to hire and retain the construction managers needed to achieve industry productivity levels. TVA officials attributed this problem to the finite duration of such work at TVA

¹The Generating Group has overall responsibility for TVA's nuclear, fossil, and hydro power-generating programs and facilities.

and to contractors' offering better career opportunities for construction managers.

TVA officials believe that contractors can conduct maintenance and/or major modification work more efficiently than TVA. These officials expect contractors to achieve increased productivity and efficiency levels because of the contractors' expertise and ability to better control the work force, as well as the competitiveness of the industry, which forces contractors to keep up with the latest techniques. According to TVA officials, contractors will earn an incentive fee that is based on achieving an agreed-upon performance, such as specified productivity levels. TVA officials believe that the willingness of contractors to enter into such an agreement is evidence that contractors believe that they will achieve productivity and efficiency increases.

According to TVA officials, the business experience of TVA's management and current practices within the utility industry also influenced the decision. TVA and union officials noted that most utilities contract out for the construction of and modification to power-generating facilities and rely on an in-house work force for day-to-day operation and maintenance activities. Furthermore, according to the President of the Generating Group, because of its contracting-out decision TVA was able to negotiate new labor agreements with its unions that provide, among other things, wage reductions. For example, under one new labor agreement, TVA received a 5-percent wage reduction for maintenance and major modification work. TVA believes this change better reflects current practices within the utility industry.

Anticipated Savings

TVA did not perform a cost-benefit analysis before deciding to contract out. However, in August 1991, TVA projected that using contractors would result in about \$106 million a year in savings. TVA's estimate was based on (1) enhanced productivity and efficiency as a result of better management of the construction work force by contractors; (2) a reduction in purchases of supplemental power from other utilities; and (3) the elimination of permanent salary and annual trades and labor positions, and wage concessions agreed to in new labor agreements. Because TVA used assumptions that may be optimistic, the extent to which TVA may achieve its anticipated savings is unclear. In addition, TVA's savings estimate does not take into account offsets such as severance benefits.

About \$80 million of TVA's savings estimate relies heavily on the assumption that contractors will increase productivity and efficiency levels, which is also projected to result in a reduction in purchases of supplemental power from other utilities. The assumptions TVA used in making this estimate may be optimistic for a number of reasons. First, TVA assumes that all contractors will achieve the forecasted improvements in productivity and efficiency levels. This may or may not occur. Second, of the \$43.1 million in savings expected from contractors' improving productivity and efficiency levels, about \$22 million is an extrapolation based on an anticipated 25-percent savings for modification work at one of TVA's fossil plants. However, according to TVA officials, TVA deferred about half of the work at the plant, in part, because it had underestimated the scope and cost of the work. The unexpected changes to the scope of work raise questions about the assumptions used for this portion of the savings estimate.

The remaining \$26 million in projected savings results from eliminating permanent salary and annual trades and labor positions, and receiving wage concessions in the new labor agreements. About \$21 million of the \$26 million results from the new agreements. According to TVA officials, TVA would not have been able to eliminate the annual trades and labor positions or obtain wage reductions in the new labor agreements without the leverage gained by deciding to contract out for construction and modification work. TVA attributes the remaining savings to eliminating permanent salary positions. The extent to which these and the other projected savings are realized should be known over the next few years.

In mid-January 1992, TVA officials, including the President of the Generating Group, told us that they believed the original savings estimate and assumptions that TVA had made in August 1991 were not at all optimistic. Instead, these officials believe that the original estimate was based on some very conservative assumptions about the gains to be made. They now believe it is more likely that the annual savings will be greater—about \$191 million. This new information, however, has not changed our opinion concerning TVA's assumptions. We highlight in appendix I the assumptions that TVA made in both its \$106 million and \$191 million savings estimates.

TVA is not specifically required to use the cost comparison guidance established by the Office of Management and Budget (OMB) in Circular A-76.² However, we believe that if TVA had used this guidance it would have probably produced more reliable cost estimates for many of the individual components within its savings estimate. TVA did not perform cost comparison analyses under the Circular, contending that it is not covered by the Circular. Although OMB apparently disagrees with TVA's position, OMB has not pursued this issue. In our opinion, TVA's contention is essentially correct. Cost comparison analyses were not required. (See app. I for more details on TVA's basis for deciding to contract out.)

Government in the Sunshine Act

Questions have also been raised concerning the procedures the TVA Executive Committee followed in making the decisions to recommend construction contracts to the Board. With few exceptions, the Sunshine Act requires that all deliberations of the TVA Board that determine or result in the conduct or disposition of agency business be made at open, public meetings. Under TVA procedures, members of TVA's Board of Directors are ex officio members of TVA's Executive Committee, which reviews and coordinates matters that will be referred to the Board for final action. Executive Committee meetings are not open to the public.

Board members may, and frequently do, participate in Executive Committee meetings. Attendance at Executive Committee meetings is not recorded, and it cannot be determined whether Board members participated in meetings at which matters concerning construction contracts were discussed prior to referral to the Board for final action. However, to the extent that two or more members of TVA's Board of Directors did participate in substantive deliberations at Executive Committee meetings concerning these matters, before referral to the Board for final action, we believe violations of the Government in the Sunshine Act occurred.

Indeed, the structure of the Executive Committee creates the potential for a violation to occur each time a meeting is held. The ex officio membership on the Executive Committee of TVA's Board members means that two or more members of the Board may participate in Executive

²OMB Circular A-76 applies to "executive agencies." It provides that the government generally should not engage in commercial and industrial activities but should obtain products and services by contracts with private firms. Circular A-76 requires agencies to examine their needs regularly and to determine which activities might be contracted out. When a contract is being considered, the Circular requires the agency to perform a cost comparison analysis to determine whether a contract or in-house performance would be more economical. Specific guidelines for these cost studies are found in a supplement to the Circular—the Cost Comparison Handbook.

Committee meetings, which are not open to the public, and at which important, substantive matters are discussed before these matters are submitted to the Board for approval at open, public meetings. However, the procedural defects in the Executive Committee meetings would not invalidate the contracts signed after approval by the Board. Although disagreeing with our conclusion, TVA's General Counsel informed us on January 13, 1992, that TVA was in the process of examining the Executive Committee's structure, but that TVA had not made any final decisions on whether changes were needed. (A more detailed analysis of Sunshine Act issues is presented in app. II.)

Effect on TVA Employees

Three employee groups are affected by TVA's decision to contract out—temporary trades and labor, permanent salary, and annual trades and labor employees. Some of the changes in TVA's work force have already taken place, while others will occur over the next year as the new contractors begin work. The annual trades and labor employees will also lose their positions as the result of a new joint understanding between TVA and its unions.

Temporary trades and labor employees are the largest group affected. The total number of temporary trades and labor positions at TVA varies during the year, depending on actual work requirements. For example, as of May 31, September 30, and November 30, 1991, TVA had 4,917, 5,195, and 3,171 employees in these positions, respectively. According to TVA officials, as a result of the contracting-out decision, TVA will not hire any temporary trades and labor workers in the future. By March 1992, TVA expects to have eliminated virtually all of these positions. TVA expects (1) the contractors to hire some of the same temporary trades and labor workers through referrals from their union halls and (2) the number of such workers employed by contractors to remain comparable to what TVA had employed in the past. Furthermore, TVA projects that because of increased work demands, the need for temporary trades and labor workers will increase significantly over the next several years and will probably peak at about 12,300 in fiscal year 1994. According to TVA officials, in the past TVA used local union halls to obtain trades and labor workers. As stipulated in the new labor agreements, TVA contractors, with few exceptions, must also use local union halls to obtain trades and labor workers.

TVA also expects to eliminate about 500 permanent salary positions that provide administrative and personnel support for the temporary trades and labor work force. As of November 30, 1991, TVA had eliminated 334

permanent salary positions. TVA anticipates eliminating the remaining permanent salary positions as the temporary trades and labor employees leave.

On May 10, 1991, TVA also eliminated 333 annual trades and labor positions. This action resulted from a new joint understanding with TVA unions to eliminate eight construction-oriented crafts from TVA's operations and maintenance work force. According to TVA officials, reducing the number of unions will simplify and improve relations with TVA's maintenance work force.

The permanent salary and annual trades and labor employees whose positions were eliminated have the option of resigning or of entering TVA's Employee Transition Program. If an employee resigns within the first 30 days after being notified that his or her position was eliminated, the employee receives an enhanced severance package, including a \$5,000 incentive payment. TVA started the Employee Transition Program in January 1991, a few months before TVA announced its contracting-out decision. Employees who enter the program receive their customary salary for up to 6 months, in addition to training and employment assistance.

As of November 30, 1991, a total of 1,369 TVA employees have chosen to participate in the program, and 378 employees were still in the program. However, according to a TVA official, TVA has not tracked, nor does it plan to track, whether these employees are in the program as a result of the decision to contract out construction and major modifications or for some other reason. (See app. III for more details on the effect of TVA's decision on employees.)

Effect on TVA Operations

It is too early to determine the full effect of contracting out on TVA operations because TVA is still implementing its decision. For example, by November 30, 1991, TVA had awarded nine multiyear contracts, worth about \$1.3 billion for the engineering, construction, and major modification of nuclear, fossil, and hydro power-generating facilities. For the fossil and hydro facilities, for example, TVA has awarded two 3-year contracts, and both contracts have options that allow TVA to extend them for up to 4 additional years.

According to TVA officials, it may be a year or longer before measurable effects on operations, such as the anticipated productivity and efficiency increases, become apparent. However, as all employees affected by the

decision leave TVA and contractors complete work over the next few years, TVA should be able to assess how implementation of the decision has improved productivity and efficiency levels and achieved anticipated savings. (See app. IV for more details on the effect of TVA's decision on operations.)

Conclusions

Not surprisingly, TVA's decision to contract out for construction and major modification work has generated considerable interest. Members of Congress and the public have expressed concern about the basis for TVA's decision and its effect on TVA, its employees, and its customers. Because TVA is still implementing its decision, there are uncertainties about (1) whether the contracting-out decision actually will alleviate construction problems and improve productivity and efficiency levels, (2) the actual effect on employees, and (3) the potential savings resulting from the decision.

We believe that the Executive Committee's structure invites procedural violations of the Government in the Sunshine Act. This is because two or more members of TVA's Board of Directors may participate *ex officio* in deliberations of the Executive Committee, which reviews contracts before they are recommended to the Board. Even though any possible violations, in our opinion, do not provide a basis for setting aside any of the newly awarded contracts or any other action of the Executive Committee or the Board, there is a need to restructure the Committee to avoid violations in the future.

Recommendation to the Chairman, TVA Board of Directors

To avoid procedural violations and/or the appearance of any potential conflict with the Government in the Sunshine Act's provisions, we recommend that the Chairman of TVA's Board of Directors restructure TVA's Executive Committee so that the three members of the Board of Directors do not serve on the Committee.

Matters for Consideration by the Congress

Because of the interest and concern generated by TVA's contracting-out decision and because it is too early to determine the full effect of the decision, the Congress may wish to require TVA to provide it with semiannual reports for the next 3 years on the implementation of TVA's contracting-out decision. If the Congress determines that such reporting is appropriate, it could receive the first semiannual report by June 30, 1992. The report could provide information on the (1) number of temporary

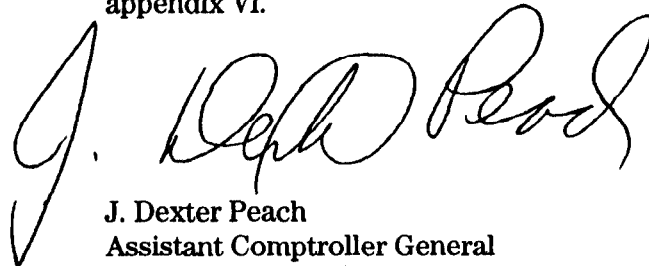
trades and labor workers hired by the contractors; (2) number of permanent salary and annual trades and labor employees affected by the decision, and whether these employees resigned or received new jobs through the Employee Transition Program; and (3) productivity, efficiency, and savings actually achieved as a result of TVA's contracting-out decision.

We performed our work between July 1991 and January 1992 according to generally accepted government auditing standards. We visited TVA offices in Chattanooga and Knoxville, Tennessee, and other selected locations and held discussions with labor union and TVA officials, including the Chairman of TVA's Board of Directors. Additional information on our scope and methodology is contained in appendix V.

As agreed with your offices, we did not obtain written agency comments on a draft of this report. We did, however, discuss the facts with responsible TVA officials. In general, they disagreed with our conclusion concerning the Sunshine Act issues and our view that the savings estimates are based on assumptions that may be optimistic. We have incorporated their comments where appropriate.

As arranged with your offices, we plan no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies to the Chairman of TVA's Board of Directors; the Director, Office of Management and Budget; and other interested parties. We will also make copies available to others upon request.

This report was prepared under the direction of Victor S. Rezendes, Director of Energy Issues, who may be reached at (202) 275-1441 if you have any questions. Other contributors to this report are listed in appendix VI.



J. Dexter Peach
Assistant Comptroller General

Contents

Letter		1
Appendix I		14
Basis of the Contracting-out Decision	Management Concerns Prompted the Decision	14
	New Labor Agreements	16
	Anticipated Savings	16
	TVA Not Required to Follow OMB Circular A-76	19
Appendix II		20
Analysis of Sunshine Act Issues Affecting TVA's Executive Committee	Provisions of the Sunshine Act	20
	The TVA Board and the Executive Committee	20
	TVA's Legal Analysis	22
	GAO's Analysis	23
	Corrective Action	29
	Remedy for Prior Violations	30
Appendix III		32
Impact on TVA Employees	The TVA Work Force	32
	Elimination of Temporary Trades and Labor Positions	32
	Reduction in Permanent Salary Positions	34
	Reduction in Annual Trades and Labor Positions	35
	Options for Salary and Annual Trades and Labor Employees	35
Appendix IV		37
Effect on TVA Operations	Contract Awards as of November 30, 1991	37
Appendix V		40
Objectives, Scope, and Methodology		
Appendix VI		42
Major Contributors to This Report		
Tables	Table III.1: TVA Work Force as of May and November 1991	32

Contents

	Table III.2: Length of TVA Service of Temporary Trades and Labor Employees	34
	Table IV.1: TVA Contracts Awarded to Implement the Contracting-out Decision	38
Figure	Figure III.1: Fluctuations in Generating Group's Temporary Trades and Labor Work Force	33

Abbreviations

GAO	General Accounting Office
OMB	Office of Management and Budget
TVA	Tennessee Valley Authority

Basis of the Contracting-out Decision

To alleviate construction problems, improve productivity and efficiency, and concentrate the in-house work force on operations and maintenance activities, the Tennessee Valley Authority (TVA) announced in May 1991 that it had decided to contract out for all construction and major modification work. In addition, TVA entered into new labor agreements that will provide wage concessions, among other things. TVA did not base its contracting-out decision on a cost-benefit analysis. However, in August 1991, TVA forecasted \$106 million a year in savings, primarily on the basis of anticipated productivity and efficiency increases to be achieved by the contractors. The majority of these savings are based on assumptions that may be optimistic. In mid-January 1992, TVA increased the range of potential savings to about \$191 million. We also found that TVA was not required to perform an Office of Management and Budget (OMB) Circular A-76 cost comparison as a prerequisite to contracting out all construction and modification work.

Management Concerns Prompted the Decision

According to TVA officials, the contracting-out decision was based on the need to alleviate construction problems and improve productivity and efficiency levels. In addition, in accordance with their business experience, TVA officials wanted to align TVA with industry practices by focusing its in-house work force on the operations and maintenance of existing facilities.

TVA has had a poor construction record with its nuclear power plants and has been unable to complete construction on schedule. The President of the Generating Group pointed out that TVA has been constructing the Watts Bar Nuclear Plant for almost 20 years, several years longer than anticipated. According to a TVA official, TVA historically has been a construction-oriented organization, experiencing success in building fossil and hydro power-generating facilities by maintaining a constant work force and moving it from job to job, thereby developing expertise. The official also noted that TVA has experienced difficulty in building nuclear power plants because of the greater complexity of a nuclear plant compared with fossil and hydro power plants. In addition, construction work has become more cyclical instead of constant. According to TVA officials, TVA has been unable to hire and retain the construction managers needed to achieve industry productivity levels. TVA officials stated that this problem has developed because the work is of finite duration and contractors offer better career opportunities. According to senior officials, contractors are an absolute necessity for completing the nuclear plants in a timely manner and for avoiding purchasing supplemental power, which

is associated with high electrical rates. TVA officials expect that contracting out and concentrating the in-house work force on operations and maintenance activities will result in higher levels of productivity at nuclear construction sites.

According to the President of the Generating Group, TVA has been unable to maintain adequate productivity levels at either its construction sites or operating plants in recent years. He cited poor productivity as a problem in completing the nuclear power plants. The President also pointed to engineering problems and poor management of the construction work force as problems in completing the Watts Bar Nuclear Plant. In addition, TVA has reported that productivity for modification work at its Browns Ferry Nuclear Plant is about one-half of the industry average.

TVA officials anticipate that construction efficiencies achieved by contractors will improve equivalent availability¹ at TVA's fossil and hydro plants. According to TVA officials, TVA's failure to properly plan for and coordinate maintenance and/or modification work has resulted in equivalent availability that is lower than industry averages. For example, TVA's equivalent availability at fossil plants is 72 percent, compared with an 81-percent industry average. TVA officials believe that contractors can conduct maintenance and/or major modification work more efficiently than TVA.

TVA officials expect contractors to achieve increased productivity and efficiency levels because of the contractors' expertise and ability to better control the work force and the competitiveness of the industry, which forces contractors to keep up with the latest techniques. TVA officials also noted that contractors are willing to forgo profit, as stated in various incentive clauses included in their contracts, if they cannot achieve productivity rates greater than those attained by TVA in recent years. TVA officials also believe that using contractors will relieve TVA from the daily management of the construction work force and allow them to focus on operations and maintenance activities.

Moreover, according to TVA and union officials, most power utilities contract out for construction of and major modifications to power-generating facilities. Thus, TVA officials believe that by contracting out they will align TVA with prevailing industry practices. According to the Chairman of TVA's Board of Directors, this decision is in accordance with

¹TVA officials stated that equivalent availability is a common measure of productivity within the power utility industry. Equivalent availability is used to describe the percentage of time that a power plant is capable of producing power.

TVA's charter and his 1988 goal of operating TVA in a more business-like manner.

New Labor Agreements

Prior to the contracting-out decision, TVA negotiated a joint understanding and two new labor agreements with the Tennessee Valley Trades and Labor Council.² These agreements align TVA with other utilities by setting different wage rates for construction. According to a Council official, the Council agreed to reduced wage rates in part to guarantee that contractors will hire trades and labor workers through local union halls. The new labor agreements were announced together with the contracting-out decision.

The joint understanding eliminates eight construction-oriented crafts from TVA's operations and maintenance work force. According to TVA officials, the reduction in the number of unions will simplify and improve TVA's relations with its work force. The two labor agreements are the Construction Project Agreement and the Project Maintenance and Modifications Agreement—both are beneficial to TVA and the Tennessee Valley Trades and Labor Council. For example, the Construction Project Agreement gives TVA a 10-percent wage reduction for workers on construction projects. The Project Maintenance and Modifications Agreement grants TVA a 5-percent wage reduction for maintenance and major modification work. Both agreements ensure that the new contractors must hire temporary trades and labor workers through the union halls.

Anticipated Savings

TVA did not base its decision to contract out on a cost-benefit analysis. However, TVA anticipates that contracting out construction and major modifications and concentrating on operations and maintenance activities will save it \$106 million a year. The assumptions upon which this August 1991 savings estimate is based may be optimistic. TVA expects this savings to result from five changes:

- increased productivity and equivalent availability (\$43.1 million);
- reduced purchases of supplemental power (\$37.1 million);
- elimination of some permanent salary employees (\$4.5 million);
- elimination of eight minor maintenance crafts (\$10.6 million); and
- reduced wages (\$10.5 million).

²The Tennessee Valley Trades and Labor Council is comprised of one representative from each of the 15 trades and labor unions working in the Tennessee Valley.

According to the President of the Generating Group, the savings estimates and assumptions made in August 1991 were not at all optimistic. In fact, in mid-January 1992, TVA estimated that the potential exists for about \$191 million in annual savings.

Productivity and Power Savings May Not Be Realized

About \$80 million or 75 percent of the savings estimate is based on assumptions that may be optimistic. For example, TVA assumes that all contractors will achieve the forecasted improvements in productivity and efficiency levels. Furthermore, power cost savings are contingent on the assumption that contractors will achieve forecasted productivity and efficiency levels. In addition, TVA's savings estimate does not include offsets, such as severance benefits and costs of the Employee Transition Program. (See app. III for a further discussion of this program.)

The \$43.1 million in savings expected from contractors' improving productivity and equivalent availability may be optimistic. For example, over one-half of this figure, or about \$22 million, is an extrapolation based on an anticipated 25-percent savings for modification work similar to work that TVA had underway at Widows Creek fossil plant. However, TVA officials stated that TVA had deferred about half of the work at Widows Creek because it had underestimated the scope and cost of the work. Furthermore, according to these officials, TVA had problems in procuring some material to complete the work. The unexpected changes to the scope of work raise questions about the assumptions used in this portion of the savings estimate.

Furthermore, the \$37.1 million that TVA is projecting from power cost savings may not be fully realized. These savings are also contingent on contractors' achieving all productivity and equivalent availability goals. However, as the Widow's Creek experience illustrates, the assumptions related to achieving increased productivity may be optimistic.

TVA's savings estimate does not include offsets, such as severance benefits and the cost of the Employee Transition Program. According to TVA officials, the guiding principles for preparing the savings estimates were timeliness and understandability. However, excluding offsets from the estimate may overstate the savings claimed by TVA.

TVA based about \$25.6 million, or about 25 percent, of its projected savings on the elimination of employees and the reduction of wages through the

new labor agreements. Of this total, \$4.5 million comes from the elimination of permanent salary employees and \$21.1 million from the elimination of and wage reductions for trades and labor employees. According to TVA officials, TVA will not realize the entire \$4.5 million savings until all permanent salary employees affected by the decision have retired, resigned, or moved to another position within TVA. Furthermore, TVA estimates that a joint understanding between it and the Tennessee Valley Trades and Labor Council, which eliminated eight construction crafts from TVA's maintenance force, will result in \$10.6 million in savings. In addition, TVA projects that new wage rates negotiated with the unions will result in \$10.5 million in savings—\$3.4 million from the Construction Project Agreement and \$7.1 million from the Project Maintenance and Modifications Agreement. Regarding the \$21.1 million in potential savings, TVA officials, including the President of TVA's Generating Group, told us that TVA would not have been able to eliminate the annual trades and labor positions or obtain wage reductions in the new labor agreements without leverage gained by its decision to contract out for construction and modification work.

TVA Increased Range of Potential Savings in January 1992

In mid-January 1992, TVA officials, including the President of the Generating Group, told us that they believed the original savings estimates and assumptions TVA made in August 1991 were not at all optimistic. Instead, these officials believe that the original estimate represented the lower end of the range of potential savings. TVA believes the potential exists for about \$191 million in annual savings. This new information, however, has not changed our opinion concerning TVA's assumptions. We highlight below the major assumptions TVA is using to arrive at the \$191 million savings estimate.

- The original estimate for fossil and hydro power general construction efficiency and productivity was based on a contractor bid on a specific project (Widows Creek Unit 8), compared with TVA in-house estimates. According to TVA, that savings factor was applied—not as a dollar amount but as a percent differential—only to very similar projects already budgeted to arrive at an estimate of \$27 million savings. TVA believes that there is the potential to realize that savings factor on all fossil and hydro power capital projects, which would increase the savings to \$50.4 million.
- TVA's original estimate for clean air scrubber construction was that a contractor could realize a 5-percent efficiency improvement over TVA estimates. According to TVA, that figure is the lowest improvement rate heard in several discussions with other utilities that have moved from

in-house to contractor-managed work. TVA indicated that one utility with an excellent partnering relationship with a contractor has experienced a 28-percent improvement, and TVA could have the same potential, with savings of up to \$15 million.

- According to TVA, the most conservative assumption it used in the original analysis was only a 1-percent improvement in fossil outage schedule performance. The President of TVA's Generating Group believes that because TVA's current outage record is poor, contractor expertise in planning, scheduling, and executing work of this nature could result in as much as a 10-percent improvement, with a corresponding savings in power costs of \$26 million.
- TVA projected in the original analysis a 1-percent increase in fossil plant equivalent availability. TVA stated that its performance has been well below industry average (72 percent versus 81 percent). TVA now believes that an increased focus on plant operation and maintenance, coupled with the benefits of contractor expertise, quality, and efficiency, should give it at least typical industry values. Discounting some of that improvement to account for equipment upgrades alone, TVA believes that a 5-percent increase in availability would increase that portion of its power cost savings to \$39.8 million.

TVA Not Required to Follow OMB Circular A-76

We generally agree with TVA's conclusion that it is not covered under OMB Circular A-76 and was not required to perform A-76 cost comparisons as a prerequisite to contracting out. That circular states the government's strong policy in favor of contracting out commercial activities, such as construction, when private firms are available to do the work. It also requires that decisions on contracting be made on the basis of economy and that, with few exceptions, contracts be used whenever they prove less expensive. A supplement to the circular sets out specific requirements for conducting cost comparisons on individual contracts. Despite the fact that TVA is not subject to A-76, if these techniques had been applied, more reliable cost savings information would have been developed on individual contracts. However, TVA maintains that it was not required to conduct such cost comparisons because OMB Circular A-76 does not apply to TVA. Although OMB officials informally told us they disagree with TVA's position, OMB has not pursued the issue with TVA.

Analysis of Sunshine Act Issues Affecting TVA's Executive Committee

The Executive Committee, TVA's top management group, is responsible for day-to-day management of the Authority's affairs. The Executive Committee is composed of seven employees, all senior TVA executives, and the three members of the Board of Directors, who serve ex officio. Because meetings of two or more of TVA's Board of Directors are subject to the Sunshine Act and Executive Committee meetings are held in private, the Committee structure creates a substantial potential for Sunshine Act violations. A violation occurs any time two or more Board members participate in substantive deliberations of the Executive Committee. Executive Committee records are extremely limited and thus do not permit us to identify specific instances of violations. However, the Executive Committee clearly carries out official business that, if conducted by the Board, would have to be done in open meetings. TVA could rectify this problem by restructuring the Executive Committee so that Board members are not part of this management group. Meanwhile, any violations that have occurred in the past do not invalidate the contracts already signed with the Board's approval.

Provisions of the Sunshine Act

The Government in the Sunshine Act was enacted in 1976 (5 U.S.C. section 552b). According to its purpose statement, the act was intended to heighten public awareness of the administrative process and increase accountability for agency action (P.L. 94-409, section 2, 90 Stat. 1241). The act applies to collegial bodies empowered to execute collectively the responsibilities of a federal agency.¹ Such bodies must give advance public notice of their meetings, permit public attendance at those meetings, and maintain verbatim records of all business transacted at meetings. For purposes of the act, a "meeting" takes place whenever and wherever a quorum of the collegial body (or a subdivision thereof) engages in "the joint conduct or disposition of official agency business" (5 U.S.C. section 552b(a)(2)).

The TVA Board and the Executive Committee

Meetings of TVA's presidentially appointed three-member Board of Directors are subject to the open meeting requirements of the Sunshine Act. Two directors make up a quorum with authority to carry out the Board's functions, and TVA's regulations specify that all Board meetings be

¹The act is limited to those bodies in which a majority of individual members are appointed by the President and confirmed by the Senate.

conducted in accordance with the Sunshine Act (16 U.S.C. section 831a and 18 C.F.R. Part 1301).²

Like the boards of many large entities, the TVA Board has entrusted day-to-day management and general supervision of the Authority's affairs to a committee of top officials. The senior TVA managers who sit on the Executive Committee are TVA employees. In addition, the Directors also serve on the Executive Committee in an ex officio capacity.

Formation and Activities of the Executive Committee

Before the Executive Committee was formed in early 1991, similar management responsibilities were carried out by other management groups—the Operations Committee and the Management Committee—composed of senior managers and officials. Members of the TVA Board also participated in the actions of these groups, but the structure of those bodies was never formally agreed upon or set down in writing.

In contrast, when the Executive Committee was formed, its purpose and composition were announced in an Organizational Bulletin. The Committee consists of the Senior Executive Officer, who serves as chair; the presidents of TVA's three major operating groups; the Senior Vice Presidents for Communications and Employee Development, and for Finance and Administration; and the General Counsel. The Organizational Bulletin also documents the three directors' ex officio role.

According to TVA's General Counsel, the Executive Committee meets weekly or more frequently at the call of the chair. The Committee hears, analyzes, and comments on important management initiatives, and provides a forum for communication and coordination among the various operating and staff groups. A significant function of the Committee is to review and coordinate matters that will ultimately be referred to the Board for final action.

The Committee has no written charter and operates informally. No set quorum is required to conduct business. Informational agendas are circulated in advance of meetings, and brief minutes are prepared. The minutes summarize issues presented but do not memorialize specific discussions. Attendance is not recorded, and Committee action is taken by consensus, not by vote. Each Committee member is polled at the

²TVA regulations mirror the act's definition and requirements. The regulations specifically provide that "members shall not jointly conduct or dispose of TVA business other than [in a meeting that conforms to the requirements of the Sunshine Act]."

conclusion of a discussion for his or her opinion. When seeking consensus, however, the Board members present are not polled.

The lack of attendance records makes it difficult to determine which Executive Committee meetings were attended by Board members. However, TVA's General Counsel advised us that Board members often attend. At times two or even all three directors are present. We learned that, when present, directors sometimes take an active role in discussions and, according to the General Counsel, "profit from" being exposed to the issues under discussion and the opinions expressed. Because of the minimal documentation of discussion at the meetings, we could not determine either the frequency or the extent of directors' active involvement in the Committee's discussions. While we can assume that the Directors' contributions to the proceedings are not taken lightly, we cannot gauge the degree of influence their involvement may have on the decisions of other participants.

TVA's Legal Analysis

TVA's General Counsel provided us with his analysis of the Sunshine Act requirements as they concern the Executive Committee's operations. The analysis concluded that the Executive Committee operates properly as currently structured.

The General Counsel's analysis states that, since the Executive Committee is composed principally of employees, rather than "members" of the collegial body (i.e., the Board of Directors), the Committee is not a body covered by the Sunshine Act in its own right. The analysis also concluded that the Executive Committee is not a "subdivision" of the Board.³

Moreover, the General Counsel reasoned, even if the Executive Committee were covered by the act, the meetings of the Executive Committee are not meetings as that term is defined in the act.⁴ According to the analysis, Executive Committee meetings are no more than "preliminary

³The Sunshine Act applies to "agencies," which are defined as collegial bodies, the majority of whose members are presidential appointees, and to "subdivisions thereof authorized to act on behalf of the agency" (5 U.S.C. section 552b(a)(1)).

⁴The act defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business" (5 U.S.C section 552b(a)(2)).

discussions” because all matters requiring a final decision by the Board are referred to the Board for later action at an open meeting.⁵

Applicability of ITT Decision

The TVA legal analysis cites Federal Communications Commission v. ITT World Communications, Inc. (466 U.S. 463 (1984)) in support of its proposition that preliminary discussions may take place in private and its conclusion that Executive Committee meetings do not violate the Sunshine Act. The analysis particularly relies on dictum references in the ITT opinion to the legislative history of the Sunshine Act. These references confirm the Supreme Court's view that useful preliminary discussions conducted in private among officials subject to the Sunshine Act can sometimes be proper. On the surface, these dictum references seem to support the conclusion that Board members' participation in Executive Committee deliberations is permissible. However, on further examination it is clear that this dictum is inapplicable because the facts assumed in connection with the Supreme Court's observation are significantly different from those at issue here. Specifically, the Court's comments are clearly prefaced on an assumption that the “preliminary discussions” take place without a quorum present.

Looking beyond the dictum cited by TVA to the holdings in ITT, the Supreme Court determined, first, that external conferences (sponsored by foreign governments and held overseas) on subjects related to, but outside the scope of authority of, a body subject to the Sunshine Act were not “meetings” under the act because the discussions could not lawfully result in the conduct of agency business. In addition, the Court held that the act does not apply to meetings, the procedural aspects of which are in the control of an entity not subject to the Sunshine Act. Both holdings are clearly distinguishable from the TVA facts. Here, the Board of Directors created the Executive Committee. It has full authority to act on business matters discussed at the Executive Committee meetings, and, if it wished, the Board could change the procedures to be followed within the Executive Committee.

GAO's Analysis

We agree with TVA's view that the Executive Committee is not subject to the open meeting requirement in its own right. The Executive Committee is not an “agency” as defined in the act. An “agency” consists of a collegial

⁵TVA's legal analysis also mentions court cases that state that procedural meetings at which no substantive business is transacted (e.g., meetings to schedule meetings) are not required to be open to the public. The analysis does not suggest, however, that the Executive Committee activities are not substantive.

body, or a subdivision thereof, a majority of whose individual members are presidential appointees confirmed by the Senate. Although the three TVA Board members fit the statutory description, the seven TVA senior executives constitute the majority of the Executive Committee.

We also agree that the Executive Committee is not a "subdivision" of the "agency" (i.e., the TVA Board).⁶ The TVA Executive Committee is charged with the responsibility of day-to-day management of TVA affairs. The Board has delegated to the Committee responsibilities that are separate from Board functions. The Committee meets to carry out those responsibilities whether Board members attend or not. Accordingly, the Committee cannot fairly be considered a "subdivision" of the TVA Board.

As we see it, however, the question presented by the TVA case is not what status should be accorded to the Executive Committee, but whether participation by two or more directors in substantive deliberations of the Committee constitutes a meeting of the Board. If so, irrespective of the fact that the Board meeting is taking place in an Executive Committee session, the Sunshine Act requires that it be open.

Meaning of the Term "Meeting"

The critical factors for determining whether a particular gathering is a Sunshine Act meeting are (1) the capacity to engage in the official business of the collegial body heading the agency and (2) the substantive content of the discussion.

On the first point, if a quorum of the members of the collegial body is present in a setting where business decisions can be made, the location of the discussions and the participation of staff or others is irrelevant. The act's legislative history states clearly that social events, conference calls, and even chance encounters can be the occasion of a "meeting."⁷ Thus, it is possible that, if two or three Board members were present, Executive Committee meetings could take on the character of Board meetings that must lawfully be open to the public.

⁶The "subdivision" concept was explained in *Hunt v. Nuclear Regulatory Commission*, 468 F. Supp. 817 (D. Okl. 1979), *aff'd*, 611 F.2d 332 (10th Cir. 1979), *cert. denied*, 445 U.S. 906 (1983), which held that adjudicatory hearings of Atomic Safety Licensing Boards are not subject to open meeting requirements because Nuclear Regulatory Commission Commissioners do not serve on the Boards.

⁷S. Rep. No. 354, 94th Cong., 1st Sess. 18; H. R. Rep. No. 880, 94th Cong., 2d Sess. 3. The report documents that the capacity must exist to carry on agency business. It cites a specific example of a luncheon at which one Board member was a speaker and the other two Board members were in the audience. Such a gathering would not constitute a "meeting." This analysis was confirmed in the ITT case, discussed above.

The second test of whether a meeting should properly be open relates to the content of the discussions taking place. When a quorum is present, the act specifies the content of "meeting" as

"deliberations [that] determine or result in the joint conduct or disposition of official agency business" (5 U.S.C. section 552b(a)(2)).

Under the act's content definition, there is no question that gatherings where decisions are made by a recorded vote of the collegial body are "meetings" subject to the Sunshine Act. Furthermore, the act defines "meetings" to include "the joint conduct . . . of official agency business." The United States Circuit Court of Appeals for the District of Columbia Circuit (D. C. Circuit) has held that the "joint conduct . . . of official agency business" requires scheduling open meetings for deliberations on matters that are under consideration, even if they do not require a vote to conclude (Pacific Legal Foundation v. Council on Environmental Quality, 636 F. 2d 1259 (D. C. Cir. 1980)). The D. C. Circuit has also stated that when the conduct of agency business requires a joint discussion of matters by the members of the collegial body, and a meeting is held for that purpose, the meeting must be open (Railroad Commission of Texas v. United States, 765 F. 2d 221 (D. C. Cir. 1985)).⁸

Beyond these threshold situations, there is a large gray area into which fall meetings like those of TVA's Executive Committee. Attempting to define this gray area, the House Report on the Sunshine Act stated:

"The conduct of agency business is intended to include not just the formal decisionmaking or voting, but all discussion relating to the business of the agency" (H. R. Rep. No. 880, 94th Cong., 2d Sess. 8.). (Emphasis in original.)

In our view, under this somewhat imprecise standard, whenever a serious exchange of views takes place among the requisite number of members on issues affecting agency policy, practice or action, such discussion must be undertaken in a public forum. (See, Common Cause v. Nuclear Regulatory Commission, 674 F. 2d 921 (D. C. Cir. 1982)). A contrary interpretation would be incompatible with the act's clear objective of ensuring openness. The act requires that every meeting must be open unless the agency's General Counsel certifies in advance that 1 of only 10 statutorily

⁸Other cases interpreting the Sunshine Act have established that meetings need not be held to dispose of routine or noncontroversial matters that could be resolved by notational voting. See, for example, Communications Systems, Inc. v. Federal Communications Commission, 595 F. 2d 797 (D. C. Cir. 1979).

recognized circumstances exist on which to justify the closing all or part of a meeting (5 U.S.C. section 552b(c)(1)-(10)).

**Scope of Executive
Committee Deliberations**

Applying the broad content standard to the matters placed before the TVA Executive Committee, it is clear that official business is transacted at Committee meetings. The Organization Bulletin announcing the creation of the Executive Committee summarized the scope of its activities as follows:

"The Executive Committee. . . shapes long-term business strategies, recommends major program initiatives, and guides the day-to-day operations of TVA."

In response to our question about the subject matter of Executive Committee sessions, the General Counsel responded:

"Typically, matters that one group is proposing, working on, or needing input on may be raised by a Committee member for coordination and to obtain the views of other groups. Also, items which any group is intending to seek TVA Board approval of are generally reviewed by the Executive Committee. In this way, the views of all major TVA organizations can be reflected in a proposal that is ultimately presented to the Board."

Minutes of several Executive Committee meetings show that official business is conducted and disposed of at the Executive Committee. Although there is no attendance record, the brief summaries in the minutes show that discussions concerning construction proposals, environmental cleanup, pending contracts, personnel issues and other official concerns took place at the meetings. In attending to these matters, the Committee was engaging in the conduct of official agency business, and if two or more Board members participated in the meetings where those substantive deliberations took place, Sunshine Act violations occurred.

**Later Action
Predetermined**

In addition to the requirement for Sunshine Act observance when conducting or disposing of official agency business, the authoritative publication, An Interpretive Guide to the Government in the Sunshine Act, states that open meetings should be held when discussions are

"sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency."⁹

The Interpretative Guide has been relied upon by several courts and this particular passage was quoted approvingly by the Supreme Court in the ITT case.¹⁰

Applying this precept to the TVA situation, we reviewed the public record of a judgmentally selected Board meeting to determine whether it contained evidence that Board decisions had in fact been predetermined in the Executive Committee. We compared the record of the August 19, 1991, Board meeting to discussions in two earlier Executive Committee meetings held in July and early August and found evidence that suggested possible violations. We selected the August 19 Board meeting because several major construction contracts were approved on that date. All the contracts approved on August 19 had been discussed in the two earlier Executive Committee meetings.

In particular, the minutes of the August Executive Committee meeting show that the Committee discussed and made changes to contracts that were soon to be referred to the Board for approval. The Committee discussed the terms of several contracts being negotiated and agreed on modifications. For example, the Committee reshaped the scope of work on one major contract discussed at the meeting and directed a recomputation of the cost-benefit analysis supporting that contract. The Committee discussion concluded with agreement to recommend both modified contracts to the Board for approval. If two or more Board members participated in the meeting described above, it is very possible that the favorable action taken on those contracts at the Board meeting held 2 weeks later was a direct result of the discussions in the Executive Committee.

All three Board members attended the August 19 meeting, and they approved five contracts with a combined value of \$353 million over 3 years.¹¹ All five of the contracts had been discussed at the July and August Executive Committee meetings for which we have summary minutes. Two

⁹R. Berg and S. Klitzman, An Interpretative Guide to the Government in the Sunshine Act (Washington, D.C.: Administrative Conference of the United States, 1978), pp. 2-3.

¹⁰Federal Communications Commission v. ITT World Communications, Inc. (466 U.S. 463, 471 (1984)).

¹¹The fifth contract approved at that meeting was for 10 years. It was a \$29 million addition to an existing contract for nuclear fuel supplies.

of the contracts were among those modified at the August meeting described above.

At the open Board meeting, all five contracts were explained to the Board in the very cursory terms. For example, a description of one contract for nuclear plant work said there were "some safety incentives" in the contract. Each of the five contracts was unanimously approved with no discussion and only a few minimal comments from the Board members. Board members asked no questions, nor did any member of the public. The whole approval process for all five contracts took a total of 17 minutes.

The perfunctory proceedings at the public meeting strongly suggest to us that the Board had extensively discussed these contracts and may have decided to approve them in advance of the August 19 public meeting. This conclusion is also borne out by one Board member's comment about one of the contracts approved. He said:

"I think obviously what you're doing here is after an awfully (sic) lot of study and an awfully (sic) lot of discussion is the best way to proceed with that. And we've met and discussed this many, many times. I know your staff spent hours and hours and hours on it, with consultants and others, the very best advice you can get, I think, and I'm convinced it's the right thing to do." (Emphasis added.)

We do not know where the many discussions referred to took place. Furthermore, while the Board member's reference to "we" suggests that other members of the Board participated, it is not entirely certain who was involved in the discussions. Nevertheless, this comment confirms that there were substantive discussions before the Board meeting that enabled at least one member to make up his mind in advance of the public meeting. If the discussions referred to did not take place at an open Board meeting, and one or both of the other Board members participated in them, whether they occurred in the Executive Committee or elsewhere, they were a violation of the act.

This is not to say that individual Board members are precluded from informing themselves about matters they will be asked to decide. For example, in Republic Airlines v. Civil Aeronautics Board, the D. C. Circuit found no violation of the Sunshine Act when members of the Civil Aeronautics Board (always less than a quorum) conferred extensively with staff to discuss issues in a complicated matter pending before the Board (756 F. 2d 1304, 1319 (D.C. Cir. 1985)). The court noted that obtaining

information is "common to any body of responsible public officials preparing to make an important decision." In addition, the Republic court, after reviewing the transcript of the Board's open meeting for evidence of whether the decision was made in secret before the meeting, concluded that no violation had occurred. The court said:

"[A]lthough individual Board members may have had definable public policy orientations when entering the hearings, the decision was not cast in stone at the outset." Id. at 1319.

Unlike the situation in Republic, our review of one important TVA Board meeting on August 19, 1991, showed that the Board needed less than 20 minutes of only cursory discussion to approve over \$350 million in multiyear construction contracts. This suggests that the Board members' decision to approve the contracts may well have been made in advance of the open meeting—to borrow from the Republic opinion, that "the decision was . . . cast in stone at the outset."

As the Senate Committee explained in its report:

"The meetings opened by section [552b] are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decisionmaking process, not merely its results, must be exposed to public scrutiny" (S. Rep. No. 354, 94th Cong., 1st Sess. 18).

Corrective Action

The current arrangement of the Executive Committee is obviously convenient for TVA. On the other hand, the benefit to TVA is offset by the denial of the statutorily guaranteed right of public access to the agency's decision-making process. Moreover, since Board members can attend any Executive Committee meeting, the substantial potential for a violation of the Sunshine Act exists each time a Committee meeting is scheduled.

Our recommendation to eliminate the possibility of future Executive Committee violations of the open meeting requirement is to restructure the Committee. Although there is no guarantee that other Sunshine Act violations will be avoided,¹² if the Executive Committee were to be reconstituted without the Board members as participants, at least the institutionally created potential for violations would be eliminated.

After restructuring, the directors would no longer be able to privately influence management decisions and proposals requiring Board

¹²In the case of a three-member Board like TVA's, virtually every business discussion between Board members other than at a public meeting could present a violation of the Sunshine Act.

endorsement in advance of public meetings. Likewise, TVA executives would not have an official private channel through which they could send opinion and analysis as well as information to the Board. Board members' opinions could not be sounded out in advance and less favored matters tabled, rather than exposed to scrutiny before the public. Without Board members on the Executive Committee, all matters requiring Board input would have to be discussed and resolved at open meetings.

This change will undoubtedly affect the way business is conducted by TVA, but it should not impair the Board's functioning or decision-making ability. Moreover, the practice of using a public meeting as the only forum for joint discussion about TVA's business activities would, if followed, clearly involve the public in a way that is consistent with the Sunshine Act.

Remedy for Prior Violations

The Sunshine Act has a provision for judicial review (5 U.S.C. section 552b(h)). Within 60 days of a closed meeting, any person may request the federal courts to review whether the closing was proper. The reviewing court may order appropriate relief. The typically accepted relief is to order the transcripts of improperly closed meetings to be made public. It is highly unlikely that a court would invalidate any of the contracts or agreements executed by TVA thus far even if violations were found.

The rule is that, absent bad faith or extreme prejudice, substantive decisions of an agency will not be overturned on account of procedural defects relating to the Sunshine Act. Thus, unintentional Sunshine Act violations do not provide any legal basis to void the action that is the subject of the suit (Pan American World Airways v. Civil Aeronautics Board, 684 F. 2d 31 (D. C. Cir. 1982)).

We have no reason to doubt the good faith of the Board in structuring the Executive Committee as it did or in participating in any Executive Committee discussion or decision. The TVA General Counsel presented a legal analysis supporting a conclusion opposite to ours, and the Board obviously relied on that analysis. Similarly, on the basis of available facts, there is no prejudice, because each matter that required Board approval was presented to the Board at a public meeting before final, though perfunctory, approval was given on behalf of the Authority.

The typical remedy ordered by the courts for Sunshine Act violations is the release of transcripts of improperly closed meetings. See, for example, the Pan Am, and Railroad Commission of Texas, cases cited earlier. In this

**Appendix II
Analysis of Sunshine Act Issues Affecting
TVA's Executive Committee**

instance, however, no transcripts can be released because none exist. This does not mean that a court would be powerless to fashion some other remedy.

We note that the federal courts are authorized to grant injunctive and declaratory relief for violations of the Sunshine Act (5 U.S.C. section 552b(h)(1)). Assuming, for example, that the Executive Committee is not reconstituted, if our conclusions about violations of the Sunshine Act were confirmed by a court in subsequent litigation, the parties could request the court to enjoin Board members from participating in Executive Committee meetings or to disband the Committee altogether.

Impact on TVA Employees

TVA will eliminate all of its temporary trades and labor positions and will reduce its permanent salary work force by about 500 positions. When it announced its contracting-out decision, TVA also announced that it was eliminating over 300 annual trades and labor positions. Rather than immediately terminating the affected salary and annual trades and labor employees, TVA has allowed them to participate in its Employee Transition Program.

The TVA Work Force

In May 1991, TVA's work force had 24,507 employees¹ trades and labor, annual trades and labor, and permanent salary employees. By November 1991, TVA's work force had decreased to 22,511, a difference of 1,996, primarily because of the decrease in temporary trades and labor employees. Table III.1 shows the composition of TVA's work force at the end of May and November 1991.

Table III.1: TVA Work Force as of May and November 1991

Employee type	1991	
	May	November
Temporary trades and labor	4,917	3,171
Annual trades and labor	5,971	6,196
Permanent salary	13,619	13,144
Total	24,507	22,511

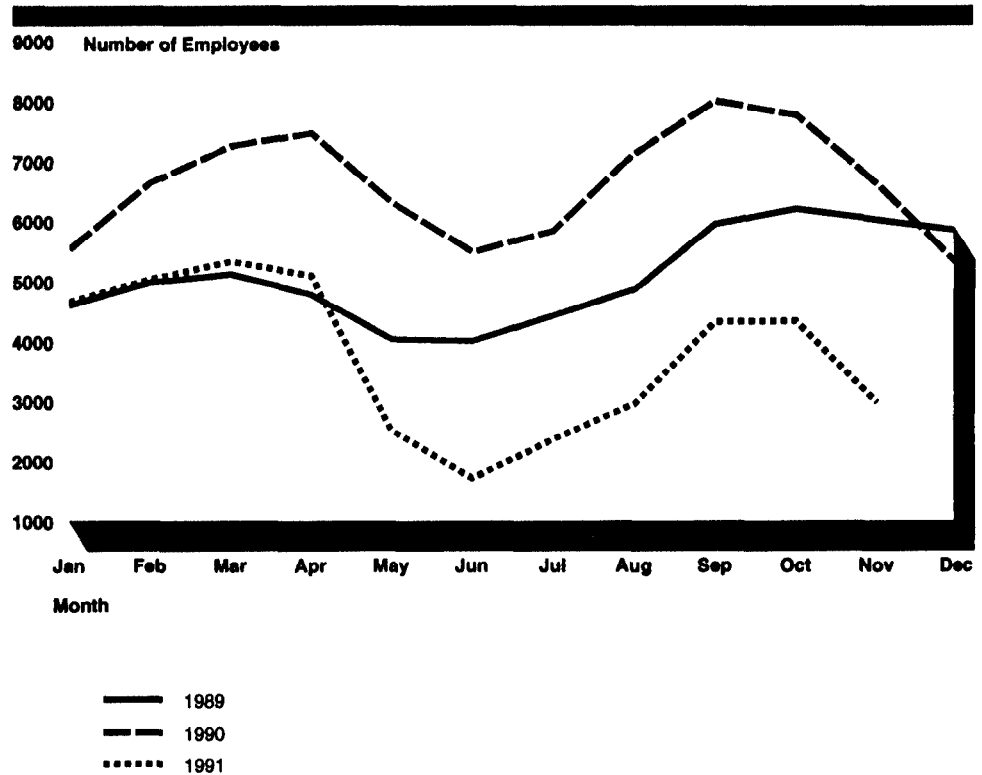
Elimination of Temporary Trades and Labor Positions

According to TVA officials, TVA plans to eliminate virtually all of the temporary trades and labor positions from its work force by March 1992. Temporary trades and labor positions are intermittent, seasonal, blue-collar positions, and the workers who fill these positions are hired for a particular assignment and released at its completion. The number of temporary trades and labor positions depends on TVA's work load. For example, as of May 31, 1991, TVA had 4,917 employees in these positions. On September 30, 1991, TVA had 5,195 employees in temporary trades and labor positions. By November 30, 1991, the number of employees in temporary trades and labor positions had decreased to 3,171, or by about 36 percent since May 1991. Figure III.1 shows the fluctuations of TVA's Generating Group² temporary trades and labor work force.

¹Temporary salary employees are not included in work force totals.

²The Generating Group employs the majority of TVA's temporary trades and labor employees. For example, in July 1991, the Generating Group employed about 72 percent of the temporary trades and labor employees.

Figure III.1: Fluctuations in Generating Group's Temporary Trades and Labor Work Force



As of January 15, 1992, TVA had 580 temporary trades and labor employees. This number included 506 employees who were under reduction-in-force procedures but were not working or being paid by TVA at that time. Sixty-one employees are still working on TVA projects and, according to a TVA official, should be released by March 1992. Six of the remaining 13 employees have workmen's compensation cases, and TVA must retain them while their cases are adjudicated, up to a maximum of 45 days. In addition, TVA will have seven temporary trades and labor employees for about 1 year because these employees are Desert Storm veterans with continued employment rights.

Most employees hired for TVA's temporary trades and labor positions have worked at TVA for relatively short periods of time. An April 1991 TVA analysis shows that 54 percent of the temporary trades and labor employees had less than 1 year of total employment at TVA. (See table III.2.)

Table III.2: Length of TVA Service of Temporary Trades and Labor Employees

Length of service	Percent of employees
Less than 1 year	54
1 to 2 years	25
2 to 5 years	17
More than 5 years	4

TVA's senior officials anticipate that this group will be the least affected by the contracting-out decision because, in their opinion, contractors will hire comparable numbers of, and some of the same, temporary trades and labor workers. They point out that the new labor agreements stipulate that contractors, with some exceptions, must obtain trades and labor workers through union hall referrals. Also, the labor agreements stipulate the wage rates that contractors must pay the trades and labor workers. TVA has also projected that its need for temporary trades and labor workers will increase significantly over the next several years, potentially peaking at about 12,300 workers in fiscal year 1994.

Reduction in Permanent Salary Positions

TVA expects to eliminate about 500 permanent salary positions, or about 2 percent of its overall work force that existed as of May 1991. The employees occupying these positions are white-collar annual employees—office workers, custodians, and public safety officers. The permanent salary employees in the affected positions provided administrative and personnel support and management for the temporary trades and labor work force. About half of these positions were eliminated immediately, while others will be gradually phased out.

As of November 30, 1991, TVA had eliminated 334 of the 500 salary positions. Of these, 206 positions were eliminated from the Watts Bar Nuclear Plant construction site. According to TVA officials, TVA decided to contract out the completion of Watts Bar in part because of difficulties in managing the work force. The remaining 128 of the 328 eliminated salary positions were from various TVA units that supported the temporary trades and labor work force in activities such as payroll. TVA expects to gradually eliminate the remaining positions from the salary work force. These reductions will occur as the contractors assume management responsibility for temporary trades and labor workers.

Reduction in Annual Trades and Labor Positions

When it announced its contracting-out decision on May 10, 1991, TVA also announced that it was eliminating 333 annual trades and labor positions, 1.4 percent of the overall work force. These positions form TVA's permanent blue-collar work force. The reductions primarily resulted from the joint understanding between TVA and the Tennessee Valley Trades and Labor Council that reduced from 15 to 6 the number of crafts that operate and maintain TVA facilities. The eliminated crafts are sheet metal workers, carpenters, asbestos workers, bricklayers, iron workers, painters, cement masons, roofers, and Teamsters.

In addition, TVA and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America reached a separate agreement that eliminated Teamsters from plant, equipment, maintenance, and coal yard operations. The agreement reduced the number of Teamsters positions in the annual trades and labor work force. Furthermore, the Teamsters will not be a part of the six-union council covering operations and maintenance work at TVA plants. However, the Teamsters will continue to perform work involving warehousing and materials handling at TVA.

Options for Salary and Annual Trades and Labor Employees

TVA offers several options to salary and annual trades and labor employees whose positions it has eliminated. Employees who resign are eligible to receive (1) severance benefits, (2) early access to the TVA Retirement System (if vested), and (3) continued access to TVA health insurance for 18 months (employee pays full premium cost). Furthermore, employees who resign within 30 days of receiving notice that their position will be eliminated receive a \$5,000 incentive payment. In addition to these benefits, employees can also accept an hourly assignment with TVA.

Another option available to affected permanent salary and annual trades and labor employees whose positions were eliminated is TVA's Employee Transition Program. TVA established the Employee Transition Program in January 1991 to assist these employees by finding positions internally, providing retraining, and offering outplacement services. TVA established this program before announcing its contracting-out decision. TVA offers access to the program to any annual trades and labor or salary employee displaced for any reason such as reorganization, budget reductions, or the decision to contract out. Employees entering the program will continue to receive their customary salary for up to 6 months. If a program participant is not placed at the end of 6 months in a TVA position or has not entered a

training program that will qualify the employee for another TVA position, TVA will terminate the employee through reduction-in-force procedures.

As of November 30, 1991, 1,369 employees had chosen to participate in the Employee Transition Program. According to a TVA official, TVA has not tracked whether these employees are in the program as a result of the decision to contract out or for any other reason, such as reorganizations or budget reductions. The program has been able to place 465 participants, or 34 percent, within TVA. However, these results may be misleading because some of the participants were placed in temporary assignments within TVA. Thirty-eight percent, or 526 participants, either resigned or were terminated using reduction-in-force procedures. As of November 30, 1991, 378 employees were still participating in the program.

TVA does not plan to track the effect of the contracting-out decision on permanent salary and annual trades and labor employees. However, we tracked 253 permanent salary and 284 annual trades and labor employees who decided to enter the Employee Transition Program as a result of the contracting-out decision. TVA was able to place 69, or about 27 percent, of the permanent salary employees. Seventy-one, or about 28 percent, of the permanent salary employees resigned. TVA terminated 91 permanent salary employees, or about 36 percent, through reduction-in-force procedures. Additionally, 22 permanent salary employees are still participating in the program.

TVA placed 90, or about 32 percent, of the annual trades and labor employees who opted to participate in the program. Sixty-seven employees, or about 24 percent, resigned after entering the program. TVA terminated 111, or about 39 percent, through reduction-in-force procedures. Sixteen annual trade and labor employees are still participating in the program.

Effect on TVA Operations

TVA is still implementing its contracting-out decision. Therefore it is too early to determine the decision's full effect on TVA's operations. TVA has taken various actions to implement its decision, including eliminating employees (as discussed in app. III) and awarding multimillion dollar contracts.

Contract Awards as of November 30, 1991

As of November 30, 1991, TVA's Generating Group had awarded nine contracts totaling about \$1.3 billion as a result of the contracting-out decision.¹ For its fossil and hydro facilities, TVA has awarded two 3-year contracts. Both contracts include options that allow TVA to extend the contracts for up to 4 years. In addition, according to TVA officials, TVA ultimately plans to have one major design contract and one major construction/modifications contract for each of its four nuclear power plants. TVA has already awarded such contracts for three of its nuclear power plants—Browns Ferry, Watts Bar, and Sequoyah. In addition, TVA has awarded a contract for specialized engineering services to assess the feasibility of completing its fourth nuclear power plant—Bellefonte. These contracts ranged from \$25 million for Stone and Webster Engineering Corporation for design services at the Sequoyah Nuclear Power Plant to \$240 million to F.D. Engineers and Constructors, Incorporated for supplemental maintenance and modification of fossil and hydro plants in TVA's Western Region. The nine contracts are discussed in more detail in table IV.1.

¹According to TVA officials, the Generating Group is the most affected by the decision to contract out because it will no longer perform construction and/or most modifications.

**Appendix IV
Effect on TVA Operations**

Table IV.1: TVA Contracts Awarded to Implement the Contracting-out Decision
Dollars in millions

Contractor	Total contract dollar value	Duration	Peak number of people	Total number of staff hours	Description of contract
F.D. Engineers and Constructors, Incorporated	\$240.0	3 years, with two 2-year options	Fluctuates seasonally	7,500,000	Employment and management of all labor necessary for supplemental maintenance and modification at fossil and hydro power plants in TVA's western region
Gilbert/ Commonwealth Incorporated, Union Boiler Company and Morrison Knudsen Corporation	240.0	3 years, with two 2-year options	Fluctuates seasonally	7,500,000	Employment and management of all labor necessary for supplemental maintenance and modification at fossil and hydro power plants in TVA's eastern region
Bechtel Corporation	175.0	2-1/2 years, with two 1-year options	2,238 in 1992	886,204	Primary design and engineering contract for Browns Ferry Nuclear Plant
Stone and Webster Engineering Corporation	145.0	2-3/4 years, with two 1-year options	1,050- 1,355, May, through October 1992	4,188,000	Primary modification and maintenance contract for Brown's Ferry Nuclear Plant
Ebasco Services Incorporated	175.0	3 years, with two 1-year options	1,091 in February 1991	3,000,000	Primary design and engineering contract for Watts Bar Nuclear Plant
Ebasco Constructors	112.8	2-1/2 years	900 in August 1992	3,300,000	Primary modification and maintenance contract for Watts Bar Nuclear Plant
Stone and Webster Engineering Corporation	25.0	5 years, with one 3-year option	about 125	2,500,000	Primary design and engineering contract for Sequoyah Nuclear Plant
Bechtel Corporation	70.0	3 years, with two 2-year options	850	2,400,000	Primary modification and maintenance contract for Sequoyah Nuclear Plant
B&W Nuclear Service Company	68.3	2 years, with two 1-year options	475 from May to September 1992	732,000	Specialty engineering and technical services for the Bellefonte Nuclear Plant assessment
Total	\$1,251.10				

In 1990, TVA began using incentive fees to allow contractors to receive awards for achieving significant performance and meeting key milestones. The value of the incentive fees is based upon TVA's evaluation of the services performed. According to TVA officials, contractors can make a

profit only if they meet contractual standards, such as scheduled milestones and productivity and/or efficiency levels.

According to TVA officials, it may be a year or longer before measurable effects of the contracting-out decision on TVA's operations become apparent. TVA is still in the process of awarding contracts, and contractors are just now beginning to initiate work under the contracts. TVA also has to assess contractors for performing services and meeting milestones and for anticipated productivity and efficiency increases.

Objectives, Scope, and Methodology

We received requests from Senators Wendell Ford, Albert Gore, Jr., Howell Heflin, and Jim Sasser, and Representatives Bud Cramer and John J. Duncan, Jr. that we examine TVA's decision to contract out for all construction and major modification work. As agreed, we examined the (1) basis for TVA's decision to contract out for construction and major modification work; (2) rationale for certain procedures TVA has followed in complying with the Government in the Sunshine Act; (3) effect of the decision on TVA employees, including the number and types of employees affected; and (4) effect of the decision on TVA operations.

To determine the basis of TVA's decision to contract out for construction and major modification work, we interviewed TVA officials responsible for the decision, including the Chairman of TVA's Board of Directors. In addition, we reviewed records pertaining to the decision, including those on recent organizational changes, and the new joint understandings and labor agreements with affected TVA unions. We discussed with TVA officials the relationship and anticipated effect of these changes on the contracting-out decision and the cost savings TVA had projected.

We examined TVA's authorizing statute and the applicability of OMB Circular A-76 guidelines to TVA's contracting process. In addition, we performed a separate analysis of the Government in the Sunshine Act's applicability to TVA.

We discussed with TVA officials the different assumptions TVA used in making its August 1991 projection of \$106 million in annual savings from the contracting-out decision. We also discussed our various concerns about the assumptions with TVA officials responsible for the savings projections. We did not, however, prepare an independent estimate of possible savings or of costs resulting from TVA's contracting-out decision. In addition, we received new information from TVA in mid-January 1992 showing that TVA now believes the potential exists for about \$191 million in annual savings. We discuss this new information in appendix I to reflect the latest data available from TVA.

To determine the impact on TVA employees, we interviewed TVA officials, such as human resource managers, and reviewed data from TVA's computer system. We did not verify the accuracy of the data generated by TVA's computer system. Using the computerized data, we determined, to the extent possible, the number and types of employees affected. We also obtained information on the options and services provided to employees under the Employee Transition Program.

To review the effect of the decision by TVA on its operations, we interviewed various TVA officials, such as those responsible for contract management and TVA's Inspector General. We also reviewed GAO and TVA Inspector General reports on TVA's labor and contract management activities. In addition, we reviewed computerized contractual data and contracts to obtain information resulting from the decision. We focused on TVA's Generating Group because it has management responsibility for performing maintenance on and operating TVA's nuclear, fossil, and hydro plants and for awarding multimillion dollar contracts for such work. Furthermore, the Generating Group's work force had the largest number of employees affected by TVA's contracting out-decision.

We met with TVA officials and visited TVA offices in Chattanooga and Knoxville, Tennessee. We also met with and discussed various concerns about the decision and its effects with representatives from the Tennessee Valley Trades and Labor Council, TVA Salary Policy Panel, and selected unions.

We did not obtain written agency comments on a draft of this report. We did, however, discuss the facts with responsible TVA officials. In general, they disagreed with our conclusion concerning the Sunshine Act issues and our view that the savings estimates are based on assumptions that may be optimistic. We incorporated their comments where appropriate.

We conducted our work from July 1991 through January 1992 according to generally accepted government auditing standards.

Major Contributors to This Report

**Resources,
Community, and
Economic
Development
Division, Washington,
D.C.**

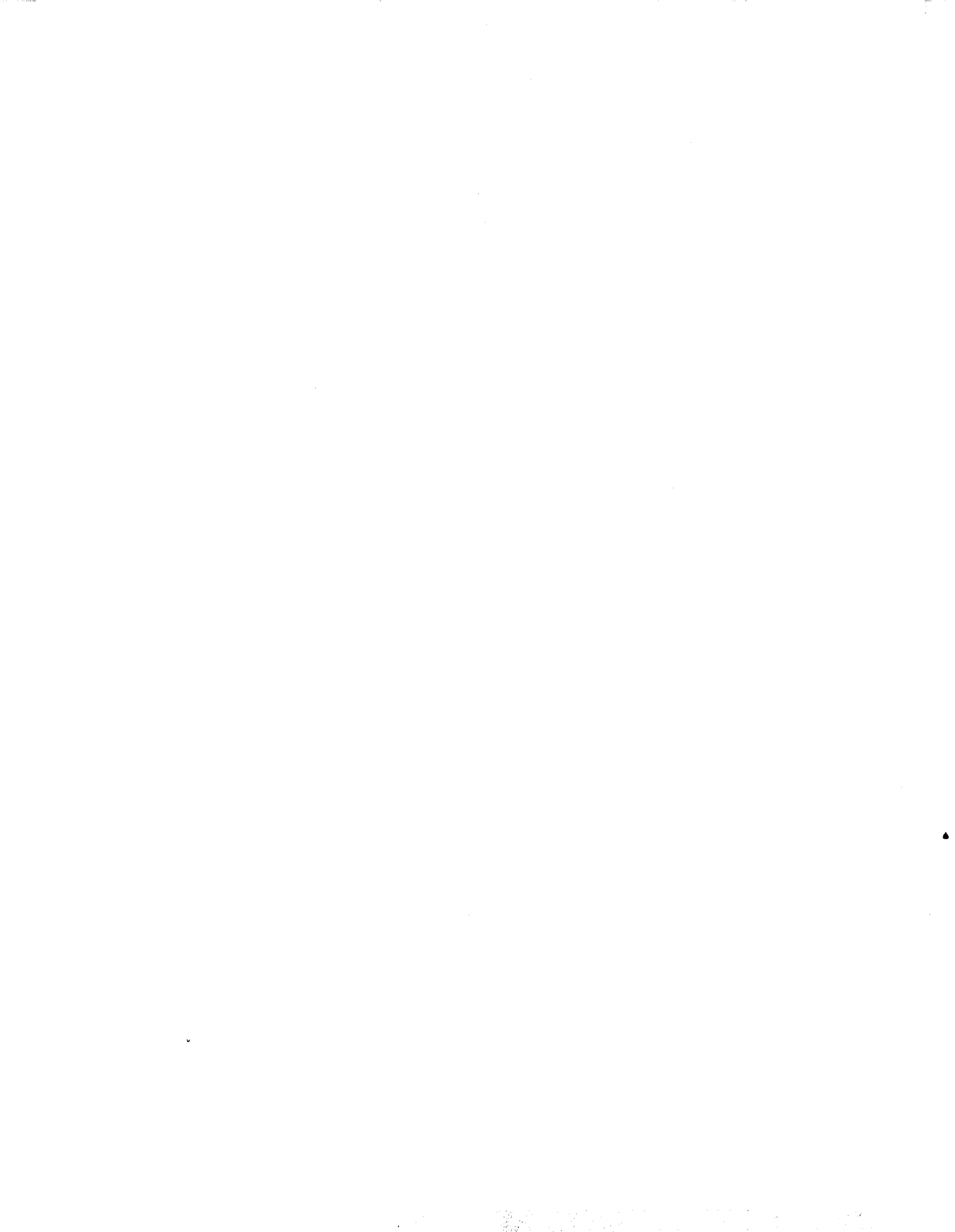
**Judy A. England-Joseph, Associate Director, Energy Issues
Jay R. Cherlow, Assistant Director, Economic Analysis
Judy K. Pagano, Senior Operations Research Analyst**

**Office of General
Counsel**

Margie Armen, Senior Attorney

**Atlanta Regional
Office**

**John P. Hunt, Jr., Assistant Director
Joanna M. Stamatiades, Evaluator-in-Charge
Jose A. Ramos, Jr., Site Senior
John S. Warren, Jr., Evaluator**



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