

DOCKETED
USNRC
April 11, 2002
2002 APR 19 PM 12:42
OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | | |
|---------------------------------------|---|-------------|--------|
| In the Matter of: |) | Docket Nos. | 50-327 |
| |) | | 50-328 |
| TENNESSEE VALLEY AUTHORITY |) | | 50-390 |
| |) | | |
| (Sequoyah Nuclear Plant, Units 1 & 2; |) | | |
| Watts Bar Nuclear Plant, Unit 1) |) | | |
| |) | | |

TENNESSEE VALLEY AUTHORITY RESPONSE TO
JEANNINE HONICKER REQUEST TO REPLY

Tennessee Valley Authority ("TVA") herein responds to the "Request of Jeannine Honicker to Reply to Response of Tennessee Valley Authority to My Proposed Contentions" ("Honicker Request"), dated April 8, 2002. In her Request, Ms. Honicker ("Petitioner") seeks permission from the Atomic Safety and Licensing Board ("Licensing Board") to reply to TVA's April 4, 2002, response to Petitioner's proposed contentions in this proceeding.¹ For the reasons discussed below, Petitioner's Request should be denied.

I. BACKGROUND

The Licensing Board in its February 7, 2002, Order defining the schedule and requirements for filings in this proceeding specifically addressed motions regarding replies to responsive pleadings. The Licensing Board stated that "[t]he Commission's Rules of Practice,

¹ See "Response of Tennessee Valley Authority to Proposed Contentions Filed by We The People and Jeannine Honicker" (April 4, 2002) ("TVA Response").

10 C.F.R. Part 2, Subpart G, do not provide for any right of reply to a responsive pleading.”² Thus, the filing of such replies, as sought by Petitioner herein, becomes a matter of discretion, rather than right. *See also Detroit Edison Co.* (Enrico Fermi Atomic Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978) (stating that Commission regulations “provide expressly that the moving party shall have no right to reply to an answer in opposition to his motion”). In this regard, the Licensing Board expressly states that a motion for leave to file a reply to a responsive pleading must “demonstrate good cause for permitting the reply to be filed.” Scheduling Order, slip op. at 6. Applying this standard to the Honicker Request, it is necessary to conclude that Petitioner has failed to make the requisite good cause demonstration.³

II. ARGUMENT

In her Request, Petitioner asserts that “[t]o show good cause why I should be permitted to reply will require that I show you the errors that TVA made in their response to my contentions.” Honicker Request at 2. TVA interprets this to mean that Petitioner’s purported “good cause” for seeking to reply is grounded in the need to identify certain “errors” in the TVA Response. This argument fails for two reasons: (1) purported errors, alone, do not constitute “good cause”; and (2) Petitioner has not identified any errors in the TVA Response.

² *Tenn. Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), “Memorandum and Order,” __ NRC __, slip op. at 6 (Feb. 7, 2002) (“Scheduling Order”).

³ In the context of motions practice, Commission licensing boards have declined to exercise such discretion except “upon a strong showing of good cause.” *Commonwealth Edison Co.* (Byron Station, Units 1 and 2), LBP-81-30A, 14 NRC 364, 372 (1981) (*citing Tx. Utils. Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 NRC 150, 155-57 (1981)). At least one licensing board has explained its reasoning in denying a moving party’s request to reply to an answer, noting that 10 C.F.R. § 2.730(c) “puts a party on notice that its original motion should be exhaustive in support of and/or in explanation of the subject matter.” *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1, 1987 WL 383710, at *1 (NRC, Jan. 13, 1987).

Turning to the first of these two reasons, at least one licensing board has denied a motion to reply, based on a claim that there had been “misrepresentations” in the applicant’s answer, for lack of good cause. *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), Docket Nos. 50-443-OL-1, 50-444-OL-1, 1987 WL 109481 (NRC, Mar. 24, 1987). In denying the motion, the licensing board in that matter explained that “[t]he Board itself is quite capable of discerning misrepresentations, if any, and whether apparent or not.” *Id.* The same rationale holds true in this case – the Licensing Board is capable of identifying any “errors” contained in the pleadings filed by any party. It is not necessary for Petitioner to take on that role vis-à-vis the TVA Response.

Petitioner, moreover, has failed to demonstrate any errors made by TVA in its Response to her proposed contentions. Petitioner first argues with regard to her Contention 2 that TVA is somehow in error because she relied on an NRC-issued document,⁴ which admittedly incorrectly summarizes information provided at a public meeting on irradiation of tritium-producing burnable absorber rods (“TPBARs”) in lead test assemblies (“LTAs”) at Watts Bar (“WBN”). Honicker Request at 2. The TVA Response, however, explains that the dates of WBN LAR irradiation stated in Attachment 2 to the NRC Meeting Summary are incorrect and provides the correct information.⁵ Not only is the TVA Response not in error, it expressly corrects the error contained in an NRC-issued document.

In addition, the correct information regarding the 18-month irradiation cycle for the LTAs has been accurately described in other publicly available documents which Petitioner did not

⁴ Attachment 2 to “Summary of the NRC’s October 2, 2001, Public Meeting in Evensville, Tennessee, Regarding Tennessee Valley Authority’s Tritium Production License Amendment Request” (Jan. 30, 2002) (“NRC Meeting Summary”).

⁵ See TVA Response at 43-44.

reference in her proposed contentions.⁶ Petitioner's failure to examine such documentation is no one's "error" but her own. The Commission clearly and unequivocally has stated that the burden of producing an admissible contention is placed squarely on the Petitioner.⁷ She should not be granted a second bite at the apple due to her failure to shoulder that burden.

Petitioner's second attempt to "show errors" by TVA with regard to her Contention 2 also does nothing of the sort. Petitioner argues that both TVA and the NRC "only show their conclusions" as to expected tritium emissions from use of TPBARs at WBN and Sequoyah ("SQN") "with no calculation method cited," and that both TVA and the NRC "should be held to even higher standards of proof." Honicker Request at 2. There is no showing of error here, merely an attempt to shift the burden of proving an admissible contention from Petitioner, where it properly rests, to TVA and the NRC Staff. As noted above, this is directly contrary to Commission regulation and practice.⁸ To the extent Petitioner's request for "even higher standards of proof" challenges Commission regulations in 10 C.F.R. Part 2 which govern agency adjudicatory practice, this is also impermissible in an individual licensing proceeding.⁹

⁶ See, e.g., DOE/EIS-0288, "Final Environmental Impact Statement for the Production of Tritium in a Commercial Light Water Reactor" (Mar. 1999) ("DOE/EIS-0288") at 1-13; Enclosure 4 to "Watts Bar Nuclear Plant (WBN) - Unit 1 - Revision of Boron Concentration Limits and Reactor Core Limitations for Tritium Production Cores (TPCs) - Technical Specification (TS) Change No. TVA-WBN-TS-00-015" (Aug. 20, 2001) ("WBN LAR") at 3-31.

⁷ See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998) ("The Commission reemphasizes that . . . the burden of coming forward with admissible contentions is on their proponent") (discussing 10 C.F.R. § 2.714(b)(2)); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 213 (2001).

⁸ See note 7 *supra*.

⁹ See 10 C.F.R. § 2.758(a); see also *Dominion Nuclear Conn.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001).

Petitioner then cites a footnote in TVA's Response¹⁰ which enumerates SQN tritium releases in liquid effluent. Honicker Request at 2. Petitioner, however, points to no error by TVA in its Response. Instead, she only attempts to rephrase her contention using new information. This in no way constitutes good cause for a reply. As noted, the TVA information cited by Petitioner is contained in DOE/EIS-0288, which has been publicly available for some time and which Petitioner failed to reference, let alone engage, in her proposed contentions.

Finally, in reference to previous filings in this proceeding submitted months before TVA's Response, Petitioner complains that "TVA has not supplied the models they used [to calculate doses] or the assumptions they used in the models," and asserts that "TVA has a history of changing the numbers to suit their purposes." Honicker Request at 2-3. What Petitioner has not done, however, is demonstrate any error in TVA's Response to her proposed contentions, or meet her burden to produce an admissible contention. Petitioner cites no requirement (as there is none) that TVA supply her with dose calculation models, and only supports her argument by making an *ad hominem* attack on both TVA and the NRC. Such demands and attacks on a party to a proceeding are insufficient to support a finding of admissibility for a contention, let alone good cause to admit a reply to a response.¹¹

¹⁰ See TVA Response at 43 n.116 (*citing* DOE/EIS-0288 at 5-20).

¹¹ See *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993) ("A contention that simply alleges that some matter ought to be considered does not provide the basis for an admissible contention.") (footnote omitted); *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 329 n.37 ("[M]embers of the public cannot be allowed to litigate before the Commission any and all issues that occur to them without demolishing the regulatory process.") (citations omitted); *Dominion*, CLI-01-24, 54 NRC at 366 ("We cannot allow admission of contentions premised on a general fear that a licensee cannot be trusted to follow regulations of any kind.").

III. CONCLUSION

Petitioner has failed to demonstrate good cause sufficient to permit her to file a reply to TVA's Response. Not only has she failed to "show errors" in TVA's Response to her proposed contentions, but even if she had done so, such "errors" do not support a demonstration of "good cause."¹² As a result, Petitioner's Request should be denied.

Respectfully submitted,



David A. Repka
Kathryn M. Sutton
L. Michael Rafky
WINSTON & STRAWN
1400 L Street, NW
Washington, D.C. 20005-3502
Telephone: (202) 371-5700

Edward J. Vigluicci
Harriet A. Cooper
TENNESSEE VALLEY AUTHORITY
400 West Summit Hill Drive
Knoxville, TN 37902-1499
Telephone: (865) 632-7317

Counsel for Tennessee Valley Authority

Dated in Washington, D.C.
this 11th day of April, 2002

¹² See *Seabrook*, 1987 WL 109481.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---------------------------------------|---|--------------------|
| In the Matter of: |) | Docket Nos. 50-327 |
| |) | 50-328 |
| TENNESSEE VALLEY AUTHORITY |) | 50-390 |
| |) | |
| (Sequoyah Nuclear Plant, Units 1 & 2; |) | |
| Watts Bar Nuclear Plant, Unit 1) |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of "TENNESSEE VALLEY AUTHORITY RESPONSE TO JEANNINE HONICKER REQUEST TO REPLY," in the captioned proceeding, have been served on the following by deposit in the United States mail, first class, this 11th day of April 2002. Additional e-mail service has been made this same day as shown below. For the party marked by an asterisk (*) additional service has been made by overnight delivery due to lack of either e-mail or facsimile.

Thomas S. Moore, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(e-mail: tsm2@nrc.gov)

Dr. Peter S. Lam
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(e-mail: psl@nrc.gov)

Dr. Thomas S. Elleman
Atomic Safety and Licensing Board Panel
704 Davidson Street
Raleigh, NC 27609
(e-mail: elleman@eos.ncsu.edu)

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Rulemakings and Adjudications Staff
(original + two copies)
(e-mail: HEARINGDOCKET@nrc.gov)

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Steven R. Hom
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(e-mail: srh@nrc.gov)

Donald J. Moniak
Blue Ridge Environmental Defense League
P.O. Box 3487
Aiken, SC 29802
(e-mail: donmoniak@earthlink.net)

Jeannine Honicker
704 Camellia Drive
LaGrange, GA 30240
(e-mail: djhonicker@msn.com)

Jared K. Heck
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(e-mail: jkh3@nrc.gov)

Ann Pickel Harris, Director *
We The People, Inc.
341 Swing Loop Road
Rockwood, TN 37854

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right.

David A. Repka
Winston & Strawn
Counsel for Tennessee Valley Authority