

**RAS 7130**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**DOCKETED 12/10/03**

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-390-CivP; 50-327-CivP
TENNESSEE VALLEY AUTHORITY	)	50-328-CivP; 50-259-CivP
(Watts Bar Nuclear Plant, Unit 1	)	50-260-CivP; 50-296-CivP
Sequoyah Nuclear Plant, Units 1 & 2	)	
Browns Ferry Nuclear Plant, Units 1, 2 & 3)	)	
	)	ASLBP No. 01-791-01-CivP
	)	
	)	EA 99-234

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NRC STAFF RESPONSE TO TENNESSEE  
VALLEY AUTHORITY'S MOTION TO STRIKE

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December 10, 2003

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c) of the Commission's regulations, the NRC Staff (hereinafter "Staff") now responds to "Tennessee Valley Authority's Motion to Strike" ("Motion to Strike") dated December 4, 2003. As more fully explained below, the Staff opposes this motion.

BACKGROUND

On October 2, 2003, pursuant to a Commission Memorandum and Order,<sup>1</sup> the Staff filed a brief on the issue of civil penalty mitigation ("Staff Mitigation Brief"). Tennessee Valley Authority ("TVA") filed a response to the Staff Mitigation Brief on November 3, 2003 ("TVA Response"), and the Nuclear Energy Institute ("NEI") filed a response on November 4, 2003 ("NEI Response"). As permitted by the Commission Order, at 7, the Staff filed a reply to the Responses of TVA and NEI on November 21, 2003 ("Staff Reply"). Portions of this reply are challenged in the Motion to Strike.

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<sup>1</sup> *Tennessee Valley Authority* (Watts Bar Nuclear Power Plant, Unit 1, Sequoyah Nuclear Plant, Units 1 & 2, Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-03-09, 58 NRC \_\_ (June 26, 2003) ("Commission Order").

## DISCUSSION

The Motion to Strike requests that the Commission strike Parts I and II of the Staff Reply. TVA bases this request on its perception that Parts 1 and 2 contain arguments not raised initially in the Staff Mitigation Brief. In support of its motion, TVA correctly points out that federal courts generally will not consider an issue raised for the first time in a reply brief. Motion to Strike at 2. However, “[w]here an appellee raises a[n] argument not addressed by the appellant in its opening brief, the appellant may reply.” *Pachla v. Saunders System, Inc.*, 899 F.2d 496, 502 (6<sup>th</sup> Cir. 1990) *citing Bennett v. Tucker*, 827 F.2d 63, 70 n.2 (7<sup>th</sup> Cir. 1987). Thus, federal case law does not support TVA’s Motion to Strike.

TVA seems to ignore that the Commission specifically authorized the Staff to file a reply “addressing the arguments presented in TVA’s response brief (and, if filed, NEI’s *amicus* brief) on the mitigation issue.” Commission Order at 7. Thus, the question is not whether the arguments in the Staff Reply were the same as those in the Staff Mitigation Brief, but whether they reasonably respond to arguments raised in the TVA and NEI Responses. Part I of the Staff Reply argues that Section III of the Enforcement Policy implicitly limits the Board’s discretion to mitigate a civil penalty. This responds to TVA’s arguments that “[n]either the Enforcement Policy nor the regulation limits the authority and discretion of the Board to mitigate civil penalties,” and that “[t]he fact that the Staff initially applies the Enforcement Policy does not mean that the policy confers any exclusive discretion to the Staff with respect to determining civil penalty amount.” TVA Response at 3-4. Part II of the Staff Response argues that the Board’s mitigation of the penalty in this case was not consistent with the Enforcement Policy. This responds to TVA’s argument that “the Board’s mitigation of the civil penalty was consistent with the Commission’s Enforcement Policy,” (TVA Response, at 5) and NEI’s argument that “the Licensing Board’s actions comport with the dictates of the Enforcement Policy . . . .” (NEI Response at 4). Parts I and II of the Staff Reply do

not raise new arguments, but instead respond to arguments raised by TVA and NEI. Accordingly, these portions are appropriately included in the Staff Reply.

CONCLUSION

Because Parts I and II of the Staff Reply address arguments raised in the TVA and NEI Responses, the Staff respectfully submits that these portions of its Reply were appropriately included and that the Commission should deny TVA's Motion to Strike.

Respectfully submitted,

**/RA/**

Dennis C. Dambly  
Counsel for NRC Staff

**/RA/**

Shelly D. Cole  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 10<sup>th</sup> day of December, 2003

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	)	EA 99-234

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO TENNESSEE VALLEY AUTHORITY'S MOTION TO STRIKE" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (\*), or by electronic mail as indicated by a double asterisk (\*\*) on this 10<sup>th</sup> day of December, 2003.

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