

July 30, 2013

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	Docket Nos. 50-327-LR
)	50-328-LR
TENNESSEE VALLEY AUTHORITY)	
)	ASLBP No. 13-927-01-LR-BD01
(Sequoyah Nuclear Plant, Units 1 and 2))	

TENNESSEE VALLEY AUTHORITY'S NOTICE OF APPEAL OF LBP-13-08

Pursuant to 10 C.F.R. § 2.311(a), Tennessee Valley Authority ("TVA") hereby submits, together with the attached Brief, this Notice of Appeal of the Atomic Safety and Licensing Board's July 5, 2013 Memorandum and Order (Ruling on Petition to Intervene and Request for Hearing), LBP-13-08, which held in abeyance in the above-captioned license renewal proceeding a contention raising waste confidence matters that the Commission is addressing generically through rulemaking. TVA respectfully submits that this waste confidence contention should have been dismissed and, as all other proposed contentions were found inadmissible, the petition to intervene and request for hearing should have been wholly denied.

Respectfully submitted,

/signed electronically by David R. Lewis/

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**TENNESSEE VALLEY AUTHORITY'S BRIEF
IN SUPPORT OF APPEAL OF LBP-13-08**

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES..... ii

I. INTRODUCTION 1

II. STATEMENT OF CASE 2

III. STANDARD OF REVIEW 6

IV. ARGUMENT..... 6

 A. The Board Erred As A Matter of Law When It Held The Environmental Portion Of
 Contention B In Abeyance 6

V. CONCLUSION 11

TABLE OF AUTHORITIES

Cases	Page
<i>Calvert Cliffs Nuclear Project, LLC</i> (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 N.R.C. 63 (2012)	<i>passim</i>
<i>Entergy Nuclear Operations, Inc.</i> (Indian Point, Units 2 and 3), CLI-10-19, 72 N.R.C. 98 (2010)	10
<i>Exelon Generation Co., LLC</i> (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 N.R.C. __ (Oct. 23, 2012)	6
<i>NextEra Energy Seabrook, LLC</i> (Seabrook Station, Unit 1), CLI-12-5, 75 N.R.C. 302 (2010)	6
<i>New York v. NRC</i> , 681 F.3d 471 (D.C. Cir. 2012)	<i>passim</i>
<i>Potomac Electric Power Co.</i> (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79 (1974)	2,4,10
<i>Tennessee Valley Authority</i> (Sequoyah Nuclear Plant, Units 1 and 2), LBP-13-08, 78 N.R.C. __ (July 5, 2013).....	<i>passim</i>
 Statutes and Regulations	
10 C.F.R. § 2.311	6
10 C.F.R. § 2.311(a)	1
10 C.F.R. § 51.23	3
10 C.F.R. § 51.53(c)	3
10 C.F.R. Part 51, App. B, Table B-1	3
 Federal Register Notices	
75 Fed. Reg. 81,032 (Dec. 23, 2010).....	3
75 Fed. Reg. 81,037 (Dec. 23, 2010).....	3
78 Fed. Reg. 14,362 (Mar. 4, 2013)	2
78 Fed. Reg. 37,282 (June 20, 2013)	2,6,8

Other Authority

SRM, COMSECY-12-0016, Approach for Addressing Policy Issues Resulting
from Court Decision to Vacate Waste Confidence Decision and Rule (Sept. 6, 2012) 4,7,8

SECY-13-0061, Proposed Rule: Waste Confidence – Continued Storage of
Spent Nuclear Fuel (June 7, 2013) 8

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**TENNESSEE VALLEY AUTHORITY’S BRIEF
IN SUPPORT OF APPEAL OF LBP-13-08**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), Tennessee Valley Authority (“TVA” or “Applicant”) hereby appeals the Atomic Safety and Licensing Board’s (“Board”) July 5, 2013 Memorandum and Order (Ruling on Petition to Intervene and Request for Hearing) (“LBP-13-08”) in the license renewal proceeding for the Sequoyah Nuclear Plant (“Sequoyah”). In LBP-13-08, the Board, relying on the Commission’s decision in *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 N.R.C. 63 (2012), held in abeyance a contention raising waste confidence matters that the Commission is addressing generically through rulemaking. TVA submits that this waste confidence contention should have been dismissed and, as all other proposed contentions were found inadmissible, the petition to intervene and request for hearing should have been wholly denied.

As discussed below, TVA respectfully submits that the Board erred in interpreting *Calvert Cliffs* as requiring the waste confidence contention to be held in abeyance. The Commission’s directions in *Calvert Cliffs* applied only to contentions that were pending or “filed in the near term” a year ago, when the Commission issued that decision, and were given at that time because the Commission had “not yet determined a course of action” for addressing the vacature and remand of its waste confidence rule. *Calvert Cliffs*, CLI-12-16, 76 N.R.C. at 66, 68. The Commission has

since decided to address the remanded waste confidence issues generically by further rulemaking, and has made it clear that it “will not approve any license renewal application for an operating nuclear power plant until the issues identified in [*New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012)] are appropriately addressed by the Commission.”¹ As a result, the Commission’s prior directions in *Calvert Cliffs* are no longer applicable, and no purpose is served by holding the waste confidence contention in this proceeding in abeyance. Such contention should have been rejected consistent with the Commission’s longstanding instructions that “[l]icensing Boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.” *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85 (1974). For this reason, as set forth fully below, TVA respectfully requests that the Commission reverse the Board’s decision to hold the waste confidence contention in abeyance, and wholly deny the request for hearing in this proceeding since no other contentions have been admitted.

II. STATEMENT OF CASE

This proceeding involves TVA’s January 7, 2013, application for renewal of Operating License Nos. DPR-77 and DPR-79 for Sequoyah Units 1 and 2 (“LRA”). On March 5, 2013, the Nuclear Regulatory Commission (“NRC”) published a notice accepting the LRA for docketing and providing an opportunity for hearing. 78 Fed. Reg. 14,362 (Mar. 5, 2013). The Blue Ridge Environmental Defense League (“BREDL”), Bellefonte Efficiency and Sustainability Team (“BEST”), and Mothers Against Tennessee River Radiation (“MATRR”) (collectively the “Petitioners”) petitioned for leave to intervene and requested a hearing on eight proposed

¹ Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282, 37,293 (June 20, 2013) (“Part 51 Revisions”).

contentions, denominated Contentions A through E, and Contentions F-1, F-2, and F-3.² Petition at 10-27.

As pled by Petitioners, Contention B states:

NRC cannot grant the Sequoyah license renewal without conducting a thorough analysis of the risks of the long-term storage of irradiated nuclear fuel generated by Sequoyah Units 1 and 2.

Petition at 12. Petitioners asserted that, in light of *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), which vacated the NRC's Waste Confidence Decision (75 Fed. Reg. 81,037 (Dec. 23, 2010)) and Temporary Storage Rule (75 Fed. Reg. 81,032 (Dec. 23, 2010), amending 10 C.F.R. § 51.23), TVA's LRA could not rely on the NRC's generic determination regarding the safety and environmental impacts of long-term spent fuel storage. *Id.* at 12-14. Petitioners argued that TVA's environmental report was therefore "fatally deficient" in not discussing "the lack of options for permanent disposal of the irradiated fuel" (*id.* at 14), and that "until there are new rules approved by the Commission and accepted by the Court, either NRC must suspend a final decision on the LR, or TVA must complete an environmental impact statement encompassing on-site and beyond-60 year high-level radioactive waste storage." *Id.* at 14.

On May 31, 2013, TVA filed an answer opposing the Petition, arguing that all eight contentions were inadmissible.³ TVA argued that Contention B was inadmissible because (among other reasons⁴) the environmental issues raised in that Contention will be addressed generically by

² Petition for Leave to Intervene and Request for Hearing by the Blue Ridge Environmental Defense League, Bellefonte Efficiency and Sustainability Team, and Mothers Against Tennessee River Radiation (May 6, 2013) ("Petition").

³ Tennessee Valley Authority's Answer Opposing the Petition for Leave to Intervene and Request for Hearing by the Blue Ridge Environmental Defense League, *et al.* (May 31, 2013) ("TVA Answer").

⁴ TVA also argued that Contention B was barred as an impermissible challenge to 10 C.F.R. § 51.53(c) and the generic Category 1 determinations in 10 C.F.R. Part 51, Appendix B, Table B-1. TVA Answer at 18-19. Following publication of the Part 51 Revisions (*supra* note 1), which amended the Category 1 findings relating to spent fuel

the Commission through a rulemaking. TVA Answer at 20. TVA pointed out that, in a September 2012 Staff Requirements Memorandum (“SRM”), the Commission directed the Staff to develop a new generic environmental impact statement to support an updated Waste Confidence Decision and temporary storage rule. *Id.*; see SRM, COMSECY-12-0016, Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule, at 1 (Sept. 6, 2012) (ADAMS Accession No. ML12250A032). TVA asserted that controlling legal precedent prohibited acceptance in individual licensing proceedings of contentions that are, or are about to become, the subject of general rulemaking. TVA Answer at 20, citing *Douglas Point*, ALAB-218, 8 A.E.C. at 85.

The NRC Staff (“Staff”) also submitted an answer, arguing that Contention B should be held in abeyance based on the instructions in *Calvert Cliffs*, and the other seven contentions should be dismissed.⁵ The Staff acknowledged the Commission’s issuance of the SRM directing the Staff to develop a generic EIS to support an updated waste confidence decision and proceed with a rulemaking, but noted that the Commission maintains the option to conduct some environmental analyses of waste confidence issues on a site-specific basis in support of licensing decisions. Staff Answer at 25. In addition, the Staff observed that the Commission has not yet provided additional direction with regard to waste confidence-related contentions. *Id.* at 25-26.

storage, TVA withdrew this argument. Tennessee Valley Authority’s Notice Regarding Changes to NRC Rules (June 25, 2013).

⁵ NRC Staff Answer to Petition for Leave to Intervene and Request for Hearing by the Blue Ridge Environmental Defense League, Bellefonte Efficiency and Sustainability Team and Mothers Against Tennessee River Radiation (May 31, 2013) (“Staff Answer”).

On June 7, 2013, the Petitioners filed a reply to TVA and the Staff.⁶ Noting the Staff's position that Contention B should be held in abeyance, BREDL again asserted "unless TVA can show in its LRA how it plans to complete an environmental impact statement encompassing onsite and beyond 60-year high-level radioactive waste storage, the Commission must suspend a final decision on the LR until there is a new rule approved by the Commission and accepted by the Court." BREDL Reply at 5.

In LBP-13-08, the Board determined that BREDL has standing to intervene, but denied the intervention requests of BEST and MATRR due to a lack of standing.⁷ LBP-13-08, slip op. at 42. The Board further determined that Contentions A, C, D, E, F-1, F-2 and F-3, and the "safety-related portion" of Contention B⁸ were inadmissible (*id.*), but held the "environmental-related portion" of Contention B in abeyance, pending further order of the Commission. *Id.* at 16, 42.

With respect to the environmental portion of Contention B, the Board concluded that it was substantially similar to petitions that were previously filed with the NRC in twenty-two other reactor licensing proceedings in the immediate aftermath of the decision in *New York v. NRC*. *Id.* at 16. The Board observed that the Commission in *Calvert Cliffs* directed that "these contentions – and any related contentions that may be filed in the near term – be held in abeyance pending our further order." *Id.* at 16, quoting *Calvert Cliffs*, CLI-12-16, 76 N.R.C. at 68-69. Concluding that *Calvert Cliffs* "is binding on this Board," the Board stated that "Contention B is 'clearly a related

⁶ Reply of Blue Ridge Environmental Defense League, Bellefonte Efficiency and Sustainability Team and Mothers Against Tennessee River Radiation re: Petition for Leave to Intervene and Request for Hearing (June 7, 2013) ("BREDL Reply").

⁷ TVA and the Staff did not dispute BREDL's standing to intervene, but both argued that BEST and MATRR lacked standing. TVA Answer at 3; NRC Answer at 5.

⁸ The Board found Contention B inadmissible to the extent it asserts that *New York v. NRC* undermines or invalidates the safety portion of Sequoyah's LRA. LBP-13-08, slip op. at 16. As the Board correctly explained, "[t]hat decision did not involve 10 C.F.R. Part 54 and it cannot provide support for the claim that TVA's safety analysis now fails to satisfy Part 54." *Id.*

contention . . . filed in the near term” and that “we are unaware of any ‘further order’ by the Commission that resolves the [Waste Confidence Decision or Temporary Storage Rule] situation.” *Id.*⁹

III. STANDARD OF REVIEW

The Commission’s rules of practice at 10 C.F.R. § 2.311 allow an appeal as of right on the question of whether a hearing request should have been wholly denied. *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 N.R.C. ___, slip op. at 3 (Oct. 23, 2012). The Commission generally defers to Board rulings on contention admissibility in the absence of an error of law or abuse of discretion. *Id.*; *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 N.R.C. 301, 307 (2012).

IV. ARGUMENT

A. The Board Erred As A Matter of Law When It Held The Environmental Portion Of Contention B In Abeyance

TVA respectfully submits that the Board erred as a matter of law in interpreting *Calvert Cliffs* as requiring Contention B to be held in abeyance. On its face, the Commission’s instructions in *Calvert Cliffs* applied only to contentions that were pending or filed “in the near term” when the Commission issued that decision a year ago. No party argued, and the Board provided no support for concluding, that a contention filed a year later should be considered one filed “in the near term.”

Moreover, the phrase “in the near term” must be interpreted in context. In *Calvert Cliffs*, the Commission provided such instructions because it had “not yet determined a course of action” for addressing the *New York v NRC* ruling. *Calvert Cliffs*, CLI-12-16, 76 N.R.C. at 66. The

⁹ The Board also noted that, in the June 30, 2013 final rule revising the rules governing environmental review in license renewal proceedings, the NRC states: “In accordance with CLI-12-16, the NRC will not approve any site-specific license renewal applications until the deficiencies identified in [*New York v NRC*] have been resolved.” LBP-13-08 at 16-17 n.4; citing 78 Fed. Reg. at 37,293. The Board viewed this statement as further support to hold Contention B in abeyance.

Commission stated that it was “considering all available options for resolving the waste confidence issue, which could include generic or site-specific NRC actions, or some combination of both.” *Id.* The Commission’s instructions to hold contentions related to the waste confidence issue in abeyance were necessary at that time because the Temporary Storage Rule barring admission of contentions was no longer in effect and, in the absence of instructions, the multiple contentions that were being submitted while the Commission was determining what to do would otherwise have been admissible. Thus, the reasonable interpretation of *Calvert Cliffs* is that contentions “filed in the near term” referred to contentions that were filed while the Commission was determining whether to address the remanded waste confidence issues generically or in individual cases.

In the year that has elapsed since *Calvert Cliffs*, there have been several significant developments making it clear that the Commission will address the *New York v. NRC* decision through a generic rulemaking, and therefore it is no longer necessary to hold contentions on this topic in abeyance because they are now inadmissible as the subject of a general rulemaking by the Commission.

First, on September 6, 2012, the Commission directed the Staff to “proceed directly with development of a generic environmental impact statement (EIS) to support an updated Waste Confidence Decision and temporary storage rule.” SRM, COMSECY-12-0016 at 1. The Commission required the Staff to establish a schedule to “publish a final rule” and EIS within 24 months from the date of the SRM. *Id.* The Staff was directed to “pursue[] a timely rulemaking” that provides ample opportunity for public comment. *Id.* at 2.¹⁰

¹⁰ In the SRM for COMSECY-12-0016, the Commission also cautioned that site-specific analyses of waste confidence issues should be conducted “only in rare circumstances in which there is an exceptional or compelling need to proceed otherwise,” and that in such cases, the Staff must submit an information paper to the Commission prior to

Second, in response to the Commission’s directive in COMSECY-12-0016, on June 7, 2013, the Staff provided the Commissioners with a proposed rule that would revise the generic determination regarding the environmental impacts of spent nuclear fuel storage. *See* SECY-13-0061, Proposed Rule: Waste Confidence – Continued Storage of Spent Nuclear Fuel, at 1 (June 7, 2013). The proposed rule is supported by a draft generic environmental impact statement (“GEIS”) regarding waste confidence. *Id.* at 2. According to the Staff,

the proposed rule would conclude that the analysis provided in the [GEIS] generically addresses the environmental impacts of continued storage of spent nuclear fuel; and supports determinations that it is feasible to safely store spent nuclear fuel beyond the licensed life for operation of a reactor and to have a mined geologic repository within 60 years following the licensed life for operation of a reactor.

Id. at 1-2. The proposed rule will be subject to typical rulemaking procedures, including notice in the Federal Register and an opportunity for public review and comment. *Id.* at 2, 6.

Third, as noted by the Board, in its recently published Revisions to Part 51, the Commission stated:

In accordance with CLI-12-16, the NRC will not approve any site-specific license renewal applications until the deficiencies identified in the court’s decision have been resolved.

* * *

Upon issuance of the generic EIS [to support a revised Waste Confidence Decision and Rule] and revised Waste Confidence Rule, the NRC will make any necessary conforming amendments to this rule. As referenced previously, *the Commission will not approve any license renewal application for an operating nuclear power plant until the issues identified in the court’s decision are appropriately addressed by the Commission.*

78 Fed. Reg. at 37,293 (emphasis added).

beginning such a site-specific review. SRM, COMSECY-12-0016 at 2. The Staff has not identified in an information paper to the Commission compelling circumstances requiring a site-specific analysis here, nor do such circumstances exist.

The Board viewed the Commission’s most recent statements as supporting its decision to hold Contention B in abeyance (LBP-13-08 at 16-17 n.24), but such support is not apparent. The statements supporting the recent rule make no mention of holding newly raised or pending contentions in abeyance. Rather, the Commission’s statements indicate that the Commission will address waste confidence issues generically by rulemaking, and will not renew any license until these issues have been addressed.¹¹

The Board also erred in construing *Calvert Cliffs* as applying to any new waste confidence contention until further Commission order. *See* LBP-13-08, slip op. at 16 (“we are unaware of any ‘further order’ by the Commission that resolves the WCD or TSR situation”). The Commission’s instruction in *Calvert Cliffs* that pending or near term contentions be “held in abeyance pending our further order” applies only to those contentions that were then pending and those further contentions filed in the near term while the Commission was still deciding how to address the remanded issues. As worded, *Calvert Cliffs* does not hold that all future contentions regarding waste confidence issues should be held in abeyance until the Commission orders otherwise. Even if the Commission’s instructions were meant to encompass future contentions while it was determining how to address waste confidence issues, the Commission instructions set forth in the

¹¹ The NRC Staff’s position that Contention B should be held in abeyance was based in part on the fact that, in its September 2012 SRM, the Commission supported maintaining the option to conduct some environmental analyses of waste confidence issues on a site-specific basis. Staff Answer at 25. The Commission’s statements in the June 20, 2013 final rule indicate that the Commission is going to complete its generic rulemaking before issuing any renewed license, thus belying the Staff’s concern. Further, a final Staff decision on issuing the renewed licenses for Sequoyah is not scheduled to occur until February 2015 (and the Sequoyah licenses do not expire until September 2021), so there is no apparent need to consider waste confidence issues on a site-specific basis. Moreover, any attempt to address waste confidence issues on a site-specific basis in this proceeding would necessitate new information and analysis in the NRC Staff’s supplemental environmental impact statement, which Petitioners could challenge at that time. *See Calvert Cliffs*, CLI-12-16, 76 N.R.C. at 67 (“To the extent that the NRC takes action with respect to waste confidence on a case-by-case basis, litigants can challenge such site-specific agency actions in our adjudicatory process.”); *Id.* at 69 n.11 (“Should we determine at a future time that case-specific challenges are appropriate for consideration, our normal procedural rules will apply.”).

SRM for COMSECY-12-0016 constituted the Commission's further direction regarding how it decided to proceed – through generic rulemaking.

Because the Commission's instructions in *Calvert Cliffs* were not applicable to Contention B, the Board also erred as a matter of law in not following, as advocated by TVA, the long-standing precedent that “[l]icensing Boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.” *Douglas Point*, ALAB-218, 8 A.E.C. at 85. *See also Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-10-19, 72 N.R.C. 98, 100 (2010) (directing denial of the admission of waste confidence contentions that were the subject of general rulemaking).¹² The Commission has determined that it will address the court's decision in *New York v. NRC* through a generic rulemaking proceeding, and a proposed rule is before the Commission. Thus, Contention B clearly raises issues that are “about to become” the subject of general rulemaking. As the Commission observed in *Indian Point*, “[i]f petitioners or intervenors are dissatisfied with our generic approach to the problem, their remedy lies in the rulemaking process, not in this adjudication.” *Indian Point*, CLI-10-19, 72 N.R.C. at 100.

Further, no purpose is served by holding this Contention in abeyance. *See supra* note 11. The Commission has made it clear that no renewed license will be issued until the remanded issues have been addressed. Holding Contention B in abeyance affords the Petitioners no greater rights or remedies than they already will be afforded through the waste confidence rulemaking process,

¹² This decision in CLI-10-19 related to matters that were being addressed in the previous waste confidence rulemaking that was ongoing in 2010, not the current rulemaking under development to address the remanded issues.

and thus accomplishes nothing other than to delay and potentially complicate¹³ what should now be a closed proceeding.

V. CONCLUSION

For the foregoing reasons, TVA respectfully submits that the Board committed an error of law when it failed to dismiss Contention B in its entirety. TVA therefore requests that the Commission reverse the Board's decision in LBP-13-08 holding the environmental portion of Contention B in abeyance and, because no other contentions were admitted, wholly deny the Petitioners' request for hearing in this proceeding.

Respectfully submitted,

/signed electronically by David R. Lewis/

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¹³ For example, because Contention B is held in abeyance, the Board has scheduled a conference to assist the Board in developing an initial scheduling order, to include consideration of the following matters typically indicative of a granted hearing request (*see* Order Scheduling Initial Scheduling Conference (July 12, 2013) at 2):

- The value and need to obtain regular reports from the Staff as to its projected schedule for completion of its safety and environmental evaluations.
- The advisability of requiring notification if a party believes that the Commission has issued an order or taken any action that affects the "abeyance" status of Contention B.
- The value of setting time limits for the filing of "timely" motions for leave to file new or amended contentions under 10 C.F.R. § 2.309(c)(1)(iii).
- The value of setting rules and time limits for the filing of dispositive motions, such as motions for summary disposition.
- The requirement that all motions (except motions for new or amended contentions) be filed no later than ten days after the occurrence or circumstances from which the motion arises.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Tennessee Valley Authority's Notice of Appeal of LBP-13-08, and Tennessee Valley Authority's Brief in Support of Appeal of LBP-13-08, have been served through the E-Filing system on the participants in the above-captioned proceeding, this 30th day of July, 2013.

/signed electronically by David R. Lewis/

David R. Lewis