

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)	
)	
(Sequoyah Nuclear Plant, Units 1 and 2))	

NRC STAFF BRIEF IN OPPOSITION TO TENNESSEE VALLEY AUTHORITY
PETITION FOR REVIEW OF LBP-13-08

Christina L. England
Beth N. Mizuno
Mitzi A. Young
Counsel for NRC Staff

August 26, 2013

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
PROCEDURAL BACKGROUND	2
LEGAL STANDARDS	4
ARGUMENT	7
A. TVA Cannot Appeal Under 10 C.F.R. § 2.311 Because No Hearing Has Been Granted and the Board Has Not Ruled on All Pending Contentions	7
B. TVA Cannot Appeal Under 10 C.F.R. § 2.341	8
C. TVA Has Not Identified Any Error or Abuse of Discretion in the Board’s Ruling on Contention B	9
D. TVA Cannot Raise Arguments for the First Time on Appeal	14
CONCLUSION	15

TABLE OF AUTHORITIES

Page

ADMINISTRATIVE DECISIONS

Commission:

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124 (2007), *aff'd*, *New Jersey Dep't of Env'tl. Prot. v. NRC*, 561 F.3d 132 (3d Cir. 2009) 7

Calvert Cliffs Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63 (2012) 1, 3, 12, 13

Detroit Edison Co. (Fermi Power Plant Independent Spent Fuel Storage Installation), CLI-10-03, 71 NRC 49 (2010)..... 7, 16

Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-07, 55 NRC 205 (2002) 6

Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-11, 59 NRC 203 (2004)..... 5

Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-06, 59 NRC 62 (2004)..... 6

Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-11-14, 74 NRC 801 (2011) 6

Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98 (2010) 10

Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-09-06, 69 NRC 128 (2009) 6

Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station, CLI-08-2, 67 NRC 31 (2008) 6

Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-07-01, 65 NRC 1 (2007) 6, 8

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-06-15, 63 NRC 687 (2006) 5

Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-09, 71 NRC 245 (2010) 11, 12

Safety Light Corp. (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79 (1992) 6

South Texas Project Nuclear Operating Co. (South Texas Project Units 3 & 4), CLI-09-18, 70 NRC 859 (2009) 5

Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 & 4), CLI-11-08, 74 NRC 214 (2011) 10

U.S. Dep't of Energy (High-Level Waste Repository), CLI-10-10, 71 NRC 281 (2010) 9

Virginia Elec. & Power Co. d/b/a Dominion Virginia Power and Old Dominion Elec. Coop. (North Anna Nuclear Power Station, Unit 3), CLI-12-17, 76 NRC 207 (2012)..... 4, 13

Atomic Safety and Licensing Appeal Board:

Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 NRC 79 (1974)..... 10

Puerto Rico Elec. Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34 (1981) 15

Atomic Safety and Licensing Board:

Northern States Power Co. (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP-12-24, 76 NRC ____ (Dec. 20, 2012)..... 14

Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 & 2), LBP-13-08, 78 N.R.C. __ (July 5, 2013)..... *passim*

REGULATIONS

10 C.F.R. § 2.311..... *passim*

10 C.F.R. § 2.311(c) 4

10 C.F.R. § 2.311(d) 4, 5, 7

10 C.F.R. § 2.341..... *passim*

10 C.F.R. § 2.341(b) 5

10 C.F.R. § 2.341(f) 5, 6, 9

MISCELLANEOUS

Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282 (June 20, 2013) 12, 13

August 26, 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)	
)	
(Sequoyah Nuclear Plant, Units 1 and 2))	

NRC STAFF BRIEF IN OPPOSITION TO TENNESSEE VALLEY AUTHORITY
PETITION FOR REVIEW OF LBP-13-08

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the Staff of the U.S. Nuclear Regulatory Commission (Staff) submits its answer to the Tennessee Valley Authority's (TVA) appeal of the decision of the Atomic Safety and Licensing Board (Board) in LBP-13-08, which concerns the application for license renewal filed by TVA for Sequoyah Nuclear Plant, Units 1 and 2. In LBP-13-08, the Board ruled on a petition to intervene and request for a hearing on the application, but it neither granted nor denied that request. The Board held a portion of the petitioners' contention concerning waste confidence in abeyance but concluded that all of petitioners' remaining contentions were inadmissible. As set forth more fully below, TVA cannot appeal under 10 C.F.R. § 2.311; TVA has not sought and does not meet the standard for discretionary interlocutory appeal under 10 C.F.R. § 2.341; and should the Commission exercise its inherent supervisory authority to take up this matter *sua sponte*, the Board's decision to hold the waste confidence contention in abeyance was correct in light of the Commission's instructions in *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012). TVA's appeal should, therefore, be rejected, and the Board's decision in LBP-13-08 should be upheld.

PROCEDURAL BACKGROUND

This proceeding concerns the January 13, 2013, application filed by TVA to renew its operating licenses for Sequoyah Nuclear Plant, Units 1 and 2, (Sequoyah) for an additional 20 years.¹ The current operating license for Sequoyah Unit 1 expires on September 17, 2020, and the current operating license for Unit 2 expires on September 15, 2021.²

The NRC accepted the license renewal application (LRA) for review and published a Notice of Opportunity for Hearing in the *Federal Register* on March 5, 2013.³ On May 6, 2013, the Blue Ridge Environmental Defense League (BREDL), Bellefonte Efficiency and Sustainability Team (BEST), and Mothers Against Tennessee River Radiation (MATRR) filed a petition to intervene and request for a hearing on eight proposed contentions, designated Contentions A through E and Contentions F-1, F-2, and F-3.⁴

In Contention B, BREDL, BEST and MATRR asserted: “The 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.”⁵ The contention challenges the applicant’s analysis of the environmental impacts of the storage of spent fuel and its reliance on the NRC’s determination in 10 C.F.R. § 51.23, the Waste

¹ License Renewal Application, Sequoyah Nuclear Plant, Units 1 & 2, Facility Operating License Nos. DPR-77 and DPR-79 (Jan. 7, 2013) (LRA) (Agencywide Document Access & Management System (ADAMS) Accession Nos. ML13024A006, ML13024A007, ML13024A008, ML13024A009, ML13024A010, ML13024A011, ML13024A012, and ML13024A013).

² LRA at p. 1-1 (ADAMS Accession No. ML13024A011).

³ See Tennessee Valley Authority, Notice of Acceptance for Docketing of Application and Notice of Opportunity for Hearing Regarding Renewal of Sequoyah Nuclear Plant, Units 1 and 2 Facility Operating License Nos. DPR-77, DPR-79 for an Additional 20-Year Period, 78 Fed. Reg. 14,362 (Mar. 5, 2013).

⁴ 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 at 27 (May 6, 2012) (ADAMS Accession No. ML13126A404).

⁵ *Id.* at 12.

Confidence Rule.⁶ The petitioners demanded that “until there are new rules approved by the Commission and accepted by the Court, either NRC must suspend a final decision” on the Sequoyah license renewal application or “TVA must complete an environmental impact statement encompassing on-site and beyond-60 year high-level radioactive waste storage.”⁷

TVA opposed the petition on the grounds that none of the contentions were admissible.⁸ The Staff argued that Contention B should be held in abeyance consistent with the Commission’s instruction in the *Calvert Cliffs* proceeding and that all of the other contentions should be found inadmissible.⁹

In LBP-13-08, the Board reviewing the petition determined that BREDL had standing to intervene but denied the intervention requests of BEST and MATRR due to a lack of standing.¹⁰ The Board further found Contentions A, C, D, E, F-1, F-2, and F-3, and the “safety-related portion” of Contention B to be inadmissible.¹¹ The Board held that the “environmental-related portion” of Contention B regarding waste confidence should be held in abeyance pending further order of the Commission, consistent with the Commission’s instruction in the *Calvert Cliffs* proceeding.¹² The Board concluded that selection of hearing procedures was unnecessary

⁶ *Id.* at 12-14.

⁷ *Id.* at 14.

⁸ Tennessee Valley Authority’s Answer Opposing the Petition for Leave to Intervene and Request for Hearing by Blue Ridge Environmental Defense League, *et al.* (May 31, 2013) (ADAMS Accession No. ML13151A297).

⁹ NRC Staff Answer to Petition for Leave to Intervene and Request for Hearing by Blue Ridge Environmental Defense League, Bellefonte Efficiency and Sustainability Team, and Mothers Against Tennessee River Radiation at 1-2 (May 31, 2013) (ADAMS Accession No. ML13151A489), citing *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012).

¹⁰ *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), LBP-13-08, 78 N.R.C. ___ (July 5, 2013) (slip op. at 42) (Board Order or Order) (ADAMS Accession No. ML13186A103).

¹¹ *Id.*

¹² *Id.* at 16, 42.

pending “the potential admission of Contention B or another new contention”¹³ and indicated that LBP-13-08 “is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311.”¹⁴

On July 30, 2013, both TVA and BREDL appealed the Board’s decision. In its appeal, TVA argues that Contention B should have been dismissed, rather than held in abeyance, and that BREDL’s petition to intervene and request for hearing should have been wholly denied.¹⁵ BREDL’s appeal, which will be addressed by the Staff in a separate and concurrent filing, requests interlocutory review by the Commission to grant BREDL’s petition to intervene and request for hearing and admission of the contentions it submitted.¹⁶

LEGAL STANDARDS

Under 10 C.F.R. § 2.311, an order by a Licensing Board may be appealed in two circumstances: (1) an order *denying* a petition to intervene and/or request for hearing may be appealed by the requestor/petitioner on the question of whether the petition or request should have been granted,¹⁷ and (2) an order *granting* a petition to intervene and/or request for hearing may be appealed by a party other than the petitioner on the question of whether the petition or

¹³ *Id.* at 41-42.

¹⁴ *Id.* at 43. The reference to § 2.311 often appears in licensing board orders that rule on intervention petitions. See, e.g., *Virginia Elec. and Power Co. d/b/a Dominion Virginia Power and Old Dominion Elec. Coop.* (North Anna Nuclear Power Station, Unit 3), CLI-12-17, 76 NRC 207, 212 (2012). As discussed further below, the subject appeal is not “in accordance with the provisions of 10 C.F.R. § 2.311.”

¹⁵ 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 (TVA Appeal) (ADAMS Accession No. ML13211A473).

¹⁶ Petition for Interlocutory Review [of LBP-13-08] by the Blue Ridge Environmental Defense League and Chapter Bellefonte Efficiency and Sustainability Team, and Mothers Against Tennessee River Radiation (ADAMS Accession No. ML13212A392).

¹⁷ 10 C.F.R. § 2.311(c).

request should have been wholly denied.¹⁸ For a license applicant to appeal under § 2.311(d), the applicant must contend that, after considering all pending contentions, the Board erroneously granted a hearing to the petitioner.¹⁹ “[A] necessary prerequisite for an appeal taken pursuant to [§ 2.311] is that the Board rule on ‘all pending contentions’ first.”²⁰

Where no right of appeal lies under 10 C.F.R. § 2.311, a party may seek discretionary interlocutory review of decisions and actions of a presiding officer under 10 C.F.R. § 2.341.²¹ The Commission has stated that it “disfavors review of interlocutory Board orders, which would result in unnecessary ‘piecemeal interference with ongoing Licensing Board proceedings.’”²² Nonetheless, the Commission has clearly indicated that it will undertake interlocutory review pursuant to 10 C.F.R. § 2.341(f)(2) where a party demonstrates that it is threatened with “serious and irreparable impact” that could not, as a practical matter, be alleviated through

¹⁸ 10 C.F.R. § 2.311(d).

¹⁹ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-11, 59 NRC 203, 207-08 (2004) (for a license applicant to appeal under 10 C.F.R. § 2.714a(c) [now redesignated as 10 C.F.R. 2.311(d)], “the applicant must contend that, after considering all pending contentions, the Board has erroneously granted a hearing to the petitioner”).

²⁰ *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), CLI-09-18, 70 NRC 859, 861-862 (2009) (citing *Catawba*, CLI-04-11, 59 NRC at 207-08).

²¹ As a general matter, the Commission may undertake review of a final or partial initial decision issued by a Board, pursuant to 10 C.F.R. § 2.341(b)(4)(i)-(v); in particular, pursuant to § 2.341(b)(4)(ii), (iii), and (v), such review may be undertaken “giving due weight to the existence of a substantial question” that “a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law,” that “[a] substantial and important question of law, policy, or discretion has been raised,” or that “[a]ny other consideration [exists] which the Commission may deem to be in the public interest.” 10 C.F.R. § 2.341(b)(4)(i)-(v); see, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 690 (2006) (accepting review of a partial initial decision under § 2.341(b)(4)(iii) and (v), and affirming and supplementing the Board’s resolution of a novel environmental issue); *accord*, *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001) (accepting review under former § 2.786(b)(4)(ii) [redesignated as § 2.341(b)(4)(ii)] where the interpretation of a regulation involved a question of law that was raised before and had the potential to be raised again in other proceedings).

²² *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station, CLI-08-2, 67 NRC 31, at 33-34, citing, *inter alia*, *Entergy Nuclear Operations Inc.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007).

reversal of the Board's action at the end of the proceeding.²³ Similarly, the Commission has indicated it will undertake interlocutory review of a Board action that may have a "pervasive or unusual" effect on the "basic structure of the proceeding."²⁴

Though the Commission has instructed that "parties should limit their requests for our review to those set forth in our rules,"²⁵ the Commission has stated that "we will occasionally take review of an issue on our own motion, or *sua sponte*, where that issue is not otherwise before us on appeal."²⁶ Thus, the Commission may, at its discretion, exercise its inherent supervisory authority over adjudications to take *sua sponte* review of a Board order when an appeal does not meet the requirements of 10 C.F.R. §§ 2.311 or 2.341.²⁷ In *Vermont Yankee*, the Commission provided several examples of its use of *sua sponte* review in past cases:

This "*sua sponte* review" provides an avenue for us to take various kinds of adjudicatory action. For instance, we have used *sua sponte* review as a vehicle to address unappealed issues or orders, to set a specific timetable or otherwise customize our procedures for individual adjudications, to suspend a proceeding, to vacate an unreviewed board order after withdrawal of the challenged application, to decide whether to disqualify a presiding officer, to address an issue of wide implication, and to provide guidance to a licensing board.²⁸

²³ 10 C.F.R. § 2.341(f)(2)(i). See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 71 (2004) (granting review of a Board decision based on its assessment that "disclosure of the safeguards information at issue here would be effectively irreversible later").

²⁴ 10 C.F.R. § 2.341(f)(2)(ii). See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-07, 55 NRC 205, 213-14 & n.15 (2002) (challenge to the basic structure of a proceeding involving a two-step hearing for construction and operating authority); *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85-86 (1992) (an order consolidating an informal subpart L proceeding with a formal subpart G proceeding affected the "basic structure" of the proceeding a "pervasive and unusual manner").

²⁵ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-11-14, 74 NRC 801, 813 n.67 (2011).

²⁶ *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-01, 65 NRC 1, 4 (2007).

²⁷ *Id.* at 4, 8-9 (although the Commission held that "Entergy's interlocutory appeal falls well outside [§ 2.341(f)(2)]," it took "*sua sponte* review of the Board's decision").

²⁸ *Id.* at 4-5 (internal citations omitted). See *id.* at n.11-n.19 (citing multiple examples for the listed instances of its *sua sponte* review).

However, the Commission has cautioned parties against seeking interlocutory review by invoking the grounds under which the Commission might exercise its “supervisory authority.”²⁹

Whether the appeal lies under 10 C.F.R. § 2.311 or § 2.341, or whether it is taken up by the Commission *sua sponte*, if an argument could have been raised below and was not, that argument will not be entertained on appeal.³⁰

ARGUMENT

A. TVA Cannot Appeal Under 10 C.F.R. § 2.311 Because No Hearing Has Been Granted and the Board Has Not Ruled on All Pending Contentions

Though TVA relied upon 10 C.F.R. § 2.311 in submitting its appeal, TVA does not meet the requirements for appeal under that regulation. As a party other than the petitioner/requestor, TVA would be permitted to appeal an order *granting* a petition to intervene or a request for hearing, on the question of whether the petition or request should have been wholly denied.³¹ However, in this case, no contentions have been admitted, one remains in abeyance, and the petition to intervene and the request for hearing have not been granted.³² The Board stated, “we neither grant nor deny BREDL’s request for a hearing and petition to intervene.”³³ The environmental portion of Contention B was held in abeyance, neither granted

²⁹ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-09-06, 69 NRC 128, 138 (2009).

³⁰ *Detroit Edison Co.* (Fermi Power Plant Independent Spent Fuel Storage Installation), CLI-10-03, 71 NRC 49, 51 n.7 (2010) (“We do not consider arguments or new facts raised for the first time on appeal unless their proponent can demonstrate that the information was previously unavailable.”). See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124, 132-33 & n.38 (2007), *aff’d*, *New Jersey Dep’t of Env’tl. Prot. v. NRC*, 561 F.3d 132, 137 n.5 (3d Cir. 2009).

³¹ 10 C.F.R. § 2.311(d).

³² *Sequoyah*, LBP-13-08, 78 NRC at ___ (slip op. at 2, 16, 42).

³³ *Id.* at 42.

nor denied, pending an order from the Commission.³⁴ Accordingly, TVA's appeal is not "in accordance with the provisions of 10 C.F.R. § 2.311"³⁵ because TVA cannot meet the requirement under 10 C.F.R. § 2.311(d) that the appeal be lodged against the grant of a hearing.

Moreover, TVA's appeal is premature because the Board has deferred its ruling on Contention B such that it has not ruled on all pending contentions.³⁶ As discussed further in Section B, *infra*, the procedural matters contemplated in the Board's prehearing conference order appear to be simply clarifying possible administrative contingencies and do not render the ruling in LBP-13-08 analogous to a grant of a hearing for the purposes of Section 2.311. TVA's appeal should, therefore, be rejected and the Board's decision in LBP-13-08 should be upheld.

B. TVA Cannot Appeal Under 10 C.F.R. § 2.341

TVA has not sought Commission review under 10 C.F.R. § 2.341,³⁷ the regulation that authorizes interlocutory appeals in circumstances other than those identified in 10 C.F.R. § 2.311. The Commission has noted that in "exceptional instances" the Commission may exercise its discretion to grant a party's petition for interlocutory review where the appeal demonstrates that the criteria in § 2.341(f)(2) are satisfied.³⁸ However, TVA did not provide information that would satisfy either of the § 2.341(f)(2) criteria in its appeal; it has not shown that holding Contention B in abeyance threatens TVA with immediate and serious irreparable

³⁴ *Id.*

³⁵ Board Order at 43.

³⁶ See *Catawba Nuclear Station*, CLI-04-11, 59 NRC at 207-08) (holding that a license applicant's appeal of a Board order granting a hearing request is premature when filed prior to the Board ruling on all pending contentions). See also *South Texas*, CLI-09-18, 70 NRC at 861-862.

³⁷ TVA did not cite 10 C.F.R. § 2.341 for purposes of its appeal.

³⁸ *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-01, 65 NRC 1, 4-5 (2007) (intervenor (not petitioner) request for discretionary review declined, Commission instead used its *sua sponte* review authority to address an issue of wide implication and provide guidance to a licensing board).

impact or affects the basic structure of the proceeding.

With respect to the impact of holding Contention B in abeyance, TVA states that “[h]olding Contention B in abeyance affords the Petitioners no greater rights or remedies than they already will be afforded through the waste confidence rulemaking process, and thus accomplishes nothing other than to delay and potentially complicate what should now be a closed proceeding.”³⁹ To support its assertion of delay and potential complication, TVA included a footnote discussing a scheduling conference held by the Board for consideration of what TVA asserts are “matters typically indicative of a granted hearing request.”⁴⁰ However, TVA presents no indication that the possibility of “delay” will cause “immediate” harm nor that any potential complications anticipated by TVA in the Board’s scheduling order will result in “irreparable harm” that cannot be remedied by the Commission once the Board has made a final decision on Contention B. In fact, TVA notes that “[t]he Commission has made it clear that no renewed license will be issued until the remanded issues have been addressed” and that the proposed rule on waste confidence “will be subject to typical rulemaking procedures, including notice in the *Federal Register* and an opportunity for public review and comment.”⁴¹ Thus, TVA fails to demonstrate that it is threatened by “immediate and serious irreparable impact” that could not be alleviated upon appeal at a later time once the Board has acted on Contention B in accordance with Commission direction.⁴²

C. TVA Has Not Identified Any Error or Abuse of Discretion in the Board’s Ruling on Contention B

As noted earlier, when the rules of practice do not permit an appeal, and in the absence

³⁹ TVA Appeal at 10-11.

⁴⁰ *Id.* at 11 n.13.

⁴¹ *Id.* at 8.

⁴² 10 C.F.R. § 2.341(f)(2)(i).

of a compelling reason to consider an appeal *sua sponte*, the Commission need not consider the matter further.⁴³ However, should the Commission decide to consider TVA's appeal under its *sua sponte* authority, TVA's appeal identifies no error of law or abuse of discretion that would justify reversal of LBP-13-08. The Board's decision to hold Contention B in abeyance pending further Commission order is consistent with the treatment of similar contentions filed in several ongoing proceedings and the Commission's guidance in the *Calvert Cliffs* proceeding and should be upheld.

TVA argues that the Board "erred in construing *Calvert Cliffs* as applying to any new waste confidence contention until further Commission order" and asserts that the Board should have denied the waste confidence contention in light of long-standing case law that holds that contentions involving issues that are, or will be, the subject of rulemaking should not be accepted in license renewal adjudications.⁴⁴ Specifically, TVA argues that:

[I]n 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.⁴⁵

In support of its argument, TVA cites *Douglas Point*, where the Atomic Safety and Licensing Appeal Board held that "licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission."⁴⁶

While *Douglas Point* has been invoked on numerous occasions to deny contentions,

⁴³ *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-10-10, 71 NRC 281, 283 (2010).

⁴⁴ TVA Appeal at 9-10.

⁴⁵ *Id.* at 7.

⁴⁶ *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 NRC 79, 85 (1974).

including contentions raising waste confidence issues,⁴⁷ it does not preclude holding BREDL's contention in abeyance; neither does it compel denial of that contention. The Commission, in *Calvert Cliffs*, determined that the special circumstances associated with waste confidence supported holding waste confidence contentions in abeyance even though waste confidence was, at that time, only potentially subject to a rulemaking.⁴⁸ The Commission acknowledged that *Douglas Point* stood for a contrary position.⁴⁹ Citing the circumstances presented in *Calvert Cliffs* and exercising its "inherent supervisory authority over adjudications," the Commission directed that the waste confidence contentions at bar "and any related contentions that may be filed in the near term – be held in abeyance pending our further order."⁵⁰

TVA also asserts that actions by the Commission since the *Calvert Cliffs* decision in September 2012 constitute the "Commission's further direction regarding how it decided to proceed" and that it is unnecessary to hold waste confidence contentions in abeyance any longer.⁵¹ TVA notes several different documents that it claims constitute the "further order" contemplated in *Calvert Cliffs* that would support denial of Contention B, including the Staff

⁴⁷ See, e.g., *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 & 4), CLI-11-08, 74 NRC 214, 228-30 (2011) (affirming denial of contention challenging containment design on the grounds that design certification challenge properly lies in design certification rulemaking, not in adjudication); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-19, 72 NRC 98, 99-100 (2010) (directing board to deny admission of waste confidence contentions as the waste confidence rulemaking was then in process); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-09, 71 NRC 245, 272-73 (2010) (construing a contention as a challenge to the Waste Confidence Rule and finding it inadmissible and noting that the rule was the subject of an ongoing rulemaking).

⁴⁸ *Calvert Cliffs*, CLI-12-16, 76 NRC at 68-69.

⁴⁹ *Id.* at 67 n.9

⁵⁰ *Id.* at 68-69.

⁵¹ TVA Appeal at 10.

Requirements Memorandum (SRM) dated September 6, 2012;⁵² a proposed rule on waste confidence submitted to the Commission for review on June 7, 2013;⁵³ and a final rule published in the *Federal Register* on June 20, 2013, entitled “Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” which included a discussion of waste confidence issues related to the revisions.⁵⁴ However, while these actions reflect the Commission’s ongoing consideration of waste confidence issues, none of them constitutes the “further order” contemplated by CLI-12-16. While the Commission could have stated its intention for any of these actions to constitute that direction to the Staff, or provided unequivocal guidance to the Staff and boards on how it wished to proceed regarding new waste confidence contentions or those already held in abeyance, it declined to do so. Accordingly, these actions do not demonstrate error in the Board’s decision in LBP-13-08.

With respect to the SRM dated September 6, 2012, the NRC staff disagrees that it constitutes a basis for holding Contention B inadmissible as the subject of a general rulemaking. Although the SRM was released after the *Calvert Cliffs* decision to hold waste confidence decisions in abeyance, it was released before the Commission’s decision in *North Anna* on September 25, 2012. In *North Anna*, BREDL also proffered a waste confidence contention.⁵⁵ In responding to BREDL’s petition for review, the Commission in *North Anna* noted that “[s]imilar requests were filed on a number of dockets. We have held these requests in abeyance,

⁵² SRM, COMSECY-12-0016, Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule (Sept. 6, 2012) (ADAMS Accession No. ML12250A032).

⁵³ SECY-13-0061, Proposed Rule: Waste Confidence - Continued Storage of Spent Nuclear Fuel (June 7, 2013) (ADAMS Accession No. ML13143A371).

⁵⁴ Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282 (June 20, 2013) (This final rule is not to be confused with the waste confidence rulemaking that is currently in process).

⁵⁵ *Virginia Elec. & Power Co. d/b/a Dominion Virginia Power and Old Dominion Elec. Coop.* (North Anna Nuclear Power Station, Unit 3), CLI-12-17, 76 NRC 207, 212 (2012).

pending our further direction.”⁵⁶ The Commission clearly did not intend that its SRM on September 6, 2012, be read to constitute the “further direction” alleged by TVA. If that had been the Commission’s intention, the Commission could have indicated that in its *North Anna* decision on September 25, 2012. Instead, the Commission restated its determination to hold the waste confidence contentions in abeyance.

The Commission had another opportunity to provide direction to boards and litigants when it commented on the proposed rule on waste confidence submitted to it for review on June 7, 2013. Notably, in its comments on the proposed rule, the Commission did not order any action on contentions being held in abeyance.⁵⁷

Finally, with respect to the final rule entitled “Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” published in the *Federal Register* on June 20, 2013, that included a discussion of waste confidence issues related to the revisions,⁵⁸ the Board correctly concluded that the final rule lends support to the rationale for holding Contention B in abeyance pending Commission direction.⁵⁹ TVA argues that “such support is not apparent” because there is “no mention of holding newly raised or pending contentions in abeyance” in the final rule.⁶⁰ However, the Board correctly noted that the statement in the final rule that “[i]n 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” was a “reiteration of the NRC’s policy of holding off on granting any reactor license renewal

⁵⁶ *Id.*

⁵⁷ SRM, SECY-13-0061, Proposed Rule: Waste Confidence - Continued Storage of Spent Nuclear Fuel (Aug. 5, 2013) (ADAMS Accession No. ML13217A358).

⁵⁸ Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282 (June 20, 2013).

⁵⁹ Order at 16-17, n.24.

⁶⁰ TVA Appeal at 9.

requests until [waste confidence decision] and [temporary storage rule] related issues are settled.”⁶¹ Contrary to TVA’s claim, the Board’s interpretation of the statement demonstrates that the final rule does not contravene or supersede *Calvert Cliffs*.

As the Board in the *Prairie Island* independent spent fuel storage installation proceeding observed, when it rejected an argument that the Commission’s Staff Requirements Memorandum (SRM) directing the Staff to proceed with rulemaking justified denial of a contention, “CLI-12-16 provided specific instructions to licensing boards and a memorandum to the NRC Staff is not the type of ‘further order’ to which the Commission referred.”⁶² In the absence of any specific order, the Board’s interpretation of *Calvert Cliffs* as Commission instruction to hold the waste confidence contention in abeyance in the proceeding was reasonable and should be upheld..

D. TVA Cannot Raise Arguments for the First Time on Appeal

TVA also raises several arguments for the first time on appeal that accordingly should not be considered should the Commission decide to take up TVA’s appeal. In its appellate brief, TVA argues that “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.”⁶³ TVA asserts that when the Commission referred to contentions “filed in the near term,” it meant “contentions that were filed while the Commission was determining whether to address the remanded waste confidence issues generically or in individual cases.”⁶⁴

TVA did not raise these arguments before the Licensing Board and did not discuss the

⁶¹ Order at 17 n.24 (quoting 78 Fed. Reg. at 37,293).

⁶² *Northern States Power Co.* (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP-12-24, 76 NRC ___, ___ (Dec. 20, 2012) (slip op. at 7).

⁶³ TVA Appeal at 6.

⁶⁴ *Id.* at 7.

Calvert Cliffs decision in its answer opposing BREDL's petition.⁶⁵ Ordinarily an issue raised for the first time on appeal will not be entertained.⁶⁶ An appeal board observed its "disinclination to do so is particularly strong in circumstances where the issue and the factual averments underlying it could have been—but were not—timely put before the Licensing Board."⁶⁷

In its filings before the Board, TVA could have raised its argument that *Calvert Cliffs* is inapplicable; as TVA itself pointed out, "the Commission issued that decision a year ago."⁶⁸ Nevertheless, it did not. In accordance with long-standing and well-established precedent, it may not do so now.

CONCLUSION

As discussed above, TVA's appeal should be denied. TVA cannot appeal under 10 C.F.R. § 2.311 because no hearing has been granted in this case and the Board has not ruled on all pending contentions. TVA has not sought, and does not meet the standard for, discretionary interlocutory appeal under 10 C.F.R. § 2.341(f)(2); and should the Commission exercise its inherent supervisory authority to take up this matter *sua sponte*, TVA has not shown that the Board's ruling was erroneous or an abuse of discretion. Thus, TVA's appeal should be rejected, and the Board's decision in LBP-13-08 should be upheld.

Respectfully submitted,

/Signed (electronically) by/

Christina L. England
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21

⁶⁵ The absence of any reference by TVA to *Calvert Cliffs* in its answer was noted by the Board in its July 5, 2013 Order ("TVA never mentions the *Calvert Cliffs* order cited by the NRC Staff."). Board Order at 15.

⁶⁶ *Fermi*, CLI-10-3, 71 NRC at 51 n.7.

⁶⁷ *Puerto Rico Elec. Power Auth.* (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 37 (1981).

⁶⁸ TVA Appeal at 6.

Washington, DC 20555-0001
Telephone: (301) 415-3138
E-mail: Christina.England@nrc.gov

Executed in Accord with 10 CFR 2.304(d)

Beth N. Mizuno
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-3122
E-mail: Beth.Mizuno@nrc.gov

Executed in Accord with 10 CFR 2.304(d)

Mitzi A. Young
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-3830
E-mail: Mitzi.Young@nrc.gov

Dated at Rockville, Maryland
this 26th day of August, 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)	
)	
(Sequoyah Nuclear Plant, Units 1 and 2))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF BRIEF IN OPPOSITION TO TENNESSEE VALLEY AUTHORITY PETITION FOR REVIEW OF LBP-13-08," dated August 26, 2013, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 26th day of August, 2013.

/Signed (electronically) by/

Christina L. England
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-3138
E-mail: Christina.England@nrc.gov