UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 50-327-LR, 50-328-LR
	)	
(Sequoyah Nuclear Plant, Units 1 and 2)	)	
	)	

NRC STAFF BRIEF IN OPPOSITION TO BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, BELLEFONTE EFFICIENCY AND SUSTAINABILITY TEAM, AND MOTHERS AGAINST TENNESSEE RIVER RADIATION PETITION FOR INTERLOCUTORY REVIEW OF LBP-13-08

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INTRODUCTION

On July 30, 2013,[1] the Blue Ridge Environmental Defense League (BREDL), its chapter Bellefonte Efficiency and Sustainability Team (BEST) and its project Mothers Against Tennessee River Radiation (MATRR) (collectively BREDL) asked the Commission to take interlocutory review of the Atomic Safety and Licensing Board (ASLB or Board) Order[2] that partially ruled on their intervention petition.

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[1] Petition for Interlocutory Review By The Blue Ridge Environmental Defense League and Chapter Bellefonte Efficiency and Sustainability Team, and Mothers Against Tennessee River Radiation (July 30, 2013) (Agency Document Management System (ADAMS) Accession No. ML13212A392) (Petition). BREDL states that its petition is styled as including BEST and MATRR even though the ASLB found that BREDL established standing, but did not recognize that BEST and MATRR are "a legal and fiscal unit with BREDL." Petition at 1. Because the petition contains no clearly articulated arguments challenging the Board's conclusions as to the standing of these entities, the Commission should deem such arguments to be waived. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001) (citing *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001)); *Commonwealth Edison Co.* (Zion Nuclear Power Station Units 1 & 2), CLI-99-4, 49 NRC 185, 194 (1999); *Curators of the Univ. of Missouri,* CLI-95-1, 41 NRC 71, 132 n.81 (1995)).

[2] *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), LBP-13-08, 78 NRC __ (July 5, 2013) (LBP-13-08).

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this brief in opposition to the Petition. As discussed below, the Petition should be denied because (1) it is not an appeal permitted under 10 C.F.R. § 2.311; (2) the regulation governing interlocutory review (10 C.F.R. § 2.341) does not otherwise authorize BREDL to seek interlocutory review of a decision that neither grants nor denies its intervention petition; and (3) the Petition does not demonstrate any compelling reason or exceptional circumstances warranting Commission *sua sponte* review. If, however, the Commission decides to review the matter *sua sponte*, it should conclude that the Petition fails to identify any grounds that warrant Commission action to reverse or modify LBP-13-08 to grant BREDL intervention.

PROCEDURAL BACKGROUND

This proceeding concerns the January 13, 2013, application of the Tennessee Valley Authority (TVA) to renew the operating licenses for the Sequoyah Nuclear Plant, Units 1 and 2, (Sequoyah) for an additional 20 years past their current expiration dates of September 17, 2020, and September 15, 2021, respectively.[3]

In response to a March 5, 2013, notice of docketing and opportunity for hearing on the license renewal application (LRA),[4] BREDL, BEST, and MATRR jointly filed, on May 6, 2013, a petition for leave to intervene, proffering eight contentions (designated Contentions A through E and Contentions F-1, F-2, and F-3) for admission in the proceeding.[5] An Atomic Safety and

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[3] 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). The TVA License Renewal Application (LRA) for Sequoyah Nuclear Power Plant, Units 1 and 2, Facility Operating License Nos. DPR-77 and DPR-79, dated January 7, 2013, is available at ADAMS Package Accession No. ML130240007 (and includes Nos. ML13024A004 and ML13024A006 through ML13024A013).

[4] 78 Fed. Reg. 14,362.

[5] 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) (ML13126A403) (Intervention Petition) at 27.

Licensing Board (Board) was established to preside over the proceeding involving the application and the intervention petitions filed in response to the notice in the *Federal Register*.[6] TVA opposed the intervention petition on the grounds that BEST and MATRR failed to establish standing to intervene and that all of the proffered contentions were admissible.[7] The Staff also argued BEST and MATRR failed to show standing and opposed the admission of all but Contention B, which (1) alleges, "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,"[8] and (2) challenges the applicant's analysis of environmental impacts of reactor fuel storage and disposal due to the decision in *New York v. NRC*.[9] Unlike TVA, the Staff argued that the contention should be held in abeyance consistent with the Commission's instruction in the *Calvert Cliffs*[10] proceeding.[11] In in reply, BREDL argued that BREDL, including BEST and MATRR, had established standing and that its contentions should be admitted.[12]

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[6] *See* Tennessee Valley Authority; Establishment of Atomic Safety and Licensing Board, 78 Fed. Reg. 28,897 (May 16, 2013).

[7] [TVA]'s Answer Opposing the Petition for Leave to Intervene and Request for Hearing by [BREDL], et al. (May 31, 2013) (ADAMS Accession No. ML13151A297) (TVA Answer).

[8] Intervention Petition at 12. BREDL argued that vacated rules "provide part of the licensing basis for [Sequoyah] on issues regarding the safety and environmental impacts of irradiated reactor fuel storage and disposal" and that either the NRC "must suspend a final decision on [license renewal], or TVA must complete an environmental impact statement encompassing on-site and beyond-60 year high-level radioactive waste storage." *Id*. at 13-14.

[9] *New York v. NRC*, 681 F. 3d. 471 (D.C. Cir. 2012), vacated the Waste Confidence Decision and Temporary Storage Rule in 10 C.F.R. § 51.23.

[10] *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012).

[11] NRC Staff Answer to Petition for Leave to Intervene and Request for Hearing By the [BREDL], [BEST], and [MATRR] (May 31, 2013) (ML131151A489) (Staff Answer) at 1-2 (citing *Calvert Cliffs*, CLI-12-16, 76 NRC at 68-69)).

[12] See Reply of the [BREDL] re: Petition for Leave to Intervene and Request for Hearing (June 7, 2013) (Reply).

In LBP-13-08, the Board neither granted nor denied BREDL's hearing request, ruling that BREDL established standing to intervene and proffered a portion of one contention -- Contention B[13] -- that "must be held in abeyance (without being admitted or denied)."[14] The Board denied the intervention requests of BEST and MATRR due to their failure to demonstrate standing[15] and found Contentions A, C, D, E, F-1, F-2, and F-3, and the "safety-related portion of Contention B," inadmissible.[16] The Board ruled that the "environmental-related portion of Contention B" regarding the storage and disposal of spent fuel should be held in abeyance pending further order of the Commission.[17] The Board also found selection of hearing procedures unnecessary pending "the potential admission of Contention B or another new contention"[18] and indicated LBP-13-08 "is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311."[19]

On July 30, 2013, BREDL sought "interlocutory review" pursuant to 10 C.F.R. § 2.311, asking the Commission to grant BREDL's petition to intervene and request for a hearing.[20]

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[13] Contention B alleged, in part, that renewal and TVA's environmental report could not rely on the environmental impacts of storage and disposal in the Waste Confidence Decision and Temporary Storage Rule regulation vacated by *New York v. NRC*, 681 F. 3d. 471 (D.C. Cir. 2012).

[14] LBP-13-08 at 2.

[15] LBP-13-08 at 42. The Board found that member declarations used to support organizational standing did not mention either BEST or MATRR and, despite both TVA and Staff identification of the omission, there was no attempt to cure this deficiency in the reply and there was no showing of an injury to BEST's or MATRR's organizational interest. *Id.* at 5-6. The Board further concluded that although the intervention petition failed to demonstrate the standing of BEST or MATRR to intervene, there is no discernible injury caused by the failure to grant them standing because "their interests are represented through BREDL as subset members thereof." *Id.* at 6 n.12.

[16] *Id.*

[17] *Id.* at 16, 42.

[18] *Id*. at 41-42.

[19] *Id*. at 43. The reference to § 2.311 often appears in licensing board orders that rule on intervention. *See, e.g., South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), CLI-09-18, 70 NRC 859, 863 (2009). As discussed further below, the subject appeal is *not* in accordance with the provisions of 10 C.F.R. § 2.311.

[20] Petition at 1-2.

BREDL argues that the Board "abdicated its responsibility to rule on BREDL's intervention petition" and that unless LBP-13-08 is reversed or modified by the Commission, BREDL will not know how to proceed and its due process rights will be denied.[21] BREDL claims that (1) the Board incorrectly concluded that Contention F-1 (Aging Management Plans Lacking) and Contention F-2 (Severe Accident Mitigation Analysis Lacking) were inadmissible and (2) that Contention B should be admitted and held in abeyance "to afford the Petitioner a clear, unambiguous procedure" for resolution and to provide openness or transparency.[22]

The Staff's opposition is set forth below.

LEGAL STANDARDS

I. Interlocutory Appeals Under 10 C.F.R. §§ 2.311 and 2.341

An intervention petitioner may file an appeal from a licensing board ruling on intervention petitions only in specified circumstances.[23] Under 10 C.F.R. § 2.311(c), an intervention petitioner may only file an appeal from *an order denying* a petition for leave to intervene on the question of whether the petition should have been granted.[24] Further, 10 C.F.R. § 2.311(b) explicitly states, "No other appeals from rulings on requests for hearings are allowed."

The limited opportunity for Commission review of an intervention ruling dates back to 1972. Prior to the reorganization of Part 2 in 2004, the predecessor regulation, 10 C.F.R. § 2.714a, similarly limited the opportunity for intervention petitioner appeals of rulings on

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[21] *Id*. at 2.

[22] *See id.* at 3-6.

[23] 10 C.F.R. § 2.311; Title 10—Atomic Energy: Chapter I—Atomic Energy Commission: Part 2 Rules of Practice: Authority of Atomic Safety and Licensing Board to Rule on Certain Petitions, 37 Fed. Reg. 27,810, 27,811 (Dec. 29, 1972).

[24] 10 C.F.R. § 2.311(c) ("An order denying a petition to intervene, and/or request for hearing…is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.").

requests for hearing and petitions to intervene to circumstances where there had been a grant or denial of intervention.[25]

For example, in *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 11 (2007), the Commission denied a 10 C.F.R. § 2.311 appeal by an intervenor (i.e., a petitioner whose intervention petition was granted) who sought reversal of a licensing board's ruling that one of the intervenor's contentions proffered in the hearing petition was inadmissible. The Commission noted that the "rule permits appeals as of right" of licensing board (or presiding officer) rulings on hearing requests and intervention petitions in "three circumstances only:

> (1) where a petitioner challenges an order 'denying' a petition to intervene and/or request for hearing;
>
> (2) where a party other than a petitioner challenges an order granting a petition to intervene, claiming that the petition should have been 'wholly denied'; and
>
> (3) where a party claims that an order selecting an hearing procedure 'was in clear contravention' of applicable Commission hearing selection criteria."[26]

The Commission has previously concluded that a licensing board's ruling on only part of an initial intervention petition does not provide an appeal of right under 10 C.F.R. § 2.311. While the rule expressly provides "an exception to the general policy limiting interlocutory review,"[27] the rule only allows a petitioner to appeal an order that "'denies the petitioner's

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[25] *See* 10 C.F.R. § 2.714a (2003); Changes to Adjudicatory Process [Final Rule], 69 Fed. Reg. 2182, 2223 (Jan. 14, 2004) ("Section 2.311 continues unchanged the provision in former § 2.714a that limits interlocutory appeal of rulings on requests for hearing and petitions to intervene to those that grant or deny a petition to intervene."). The Commission recently considered revising this regulation, but decided not to modify its standards for interlocutory appeals, stating that "[t]he NRC finds no compelling justification to change the current process." Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562 (Aug. 3, 2012).

[26] *Pilgrim*, CLI-07-2, 65 NRC at 11 (citing 10 C.F.R. § 2.311(b) – (d)).

[27] *South Texas*, CLI-09-18, 70 NRC at 861.

standing or the admission of all of a petitioner's contentions.'"[28] "In short, our rules permit appeals of rejected contentions only where a petitioner 'claims that the Board wrongly rejected all contentions.'"[29] Thus, as relevant here, § 2.311 does not permit an intervention petitioner to appeal to the Commission where there is no order "wholly denying" its intervention petition. [30]

Where no right of appeal lies under 10 C.F.R. § 2.311, a *party* may seek interlocutory review of decisions and actions of a presiding officer under 10 C.F.R. § 2.341. *See* 10 C.F.R. § 2.341(f). "The Commission may, in the exercise of its discretion, grant interlocutory review at the request of a *party* despite the absence of a referral or certification by the presiding officer [under § 2.341]" if the petition is "filed within the times and in the form prescribed in [§ 2.341(b) (formerly § 2.786(b))." 10 C.F.R. § 2.341(f)(2). [31] The petition for interlocutory review must be

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[28] *Id.* at 862 n.6 (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998)). Generally, contentions filed after the initial petition (often called late-filed contentions) are not subject to appeal under § 2.311, but instead under rules for interlocutory review in 10 C.F.R. § 2.341(f). *South Texas*, CLI-09-18, 70 NRC at 862 & n.12 (citations omitted).

[29] *Pilgrim*, CLI-07-02, 65 NRC at 11 (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006); *Clinton*, CLI-04-31, 60 NRC 461, 468 (2004); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 208 (2004)).

[30] *Compare* 10 C.F.R. § 2.311(c) *with* 10 C.F.R. § 2.311(b).

[31] For example, 10 C.F.R. § 2.341(b)(1) provides that *a party* may file a petition for review within 25 days after service of "any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part . . . on the grounds specified in paragraph (b)(4)." Under 10 C.F.R. § 2.341(b)(4) (formerly § 2.786(b)(4)), the Commission may, in its discretion, grant a petition for review, "giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly in erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest."

In certain circumstances, an intervenor (an admitted party in a proceeding) could ask the Commission to exercise its discretion and grant interlocutory review under 10 C.F.R. § 2.341(f)(2). A petition for interlocutory review, however, must be filed within the times and form prescribed by 2.341(b) and "must be treated in accordance with the general provisions of that section."

treated in accordance with the general provisions of § 2.341 and "will be granted only if the party demonstrates that the issue for which the party seeks review:

(i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's decision; or

(ii) Affects the basic structure of the proceeding in a pervasive and unusual manner."[32]

Thus, § 2.341(f) authorizes a party's petition for interlocutory review only "(1) where the Board decision works 'immediate and serious irreparable impact'; (2) where it 'affects the basic structure of the proceeding in a pervasive or unusual manner'; or (3) where the Board refers a ruling, or certifies a question, that 'raises significant and novel legal or policy issues.'"[33] The mere potential for legal error does not justify interlocutory review.[34]

The general requirements for an intervention petitioner to become a party (i.e., an intervenor) in an NRC proceeding are set forth in 10 C.F.R. § 2.309. That regulation specifies that a petitioner must both establish its standing to intervene in a proceeding and propose at least one admissible contention. 10 C.F.R. § 2.309(a).

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[32] 10 C.F.R. § 2.341(f)(2).

[33] *Clinton*, CLI-04-31, 60 NRC at 466. *See also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 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 in a "pervasive and unusual manner").

[34] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc*. (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC at 35 (2008) (citing 10 C.F.R. § 2.341(f)(2); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373 (2001) (mere legal error is not enough to warrant interlocutory review because errors are correctable on appeal from final decisions); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-8, 47 NRC 307, 320 & n.4 (1998)).

An issue raised for the first time on appeal will not be entertained.[35] An appeal board's "disinclination to do so will be 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."[36] In addition, a petition for review must adequately identify any claimed errors in a licensing board's approach.[37] If a licensing board rules that a contention is inadmissible for failing to satisfy more than one of the requirements specified in 10 C.F.R. § 2.309(f)(1)(i) – (vi), a petitioner's failure to address each grounds provides sufficient justification for the Commission to reject the petitioner's appeal.[38] Thus, the Commission "deem[s] waived any arguments not raised before the Board or not clearly articulated in the petition for review."[39]

In addition, appellants seeking intervention must structure their participation so that it is meaningful.[40] Even *pro se* litigants (although not held to the same standards of clarity and precision as an attorney) have an obligation to familiarize themselves with proper briefing format and with the Commission's rules of practice.[41] An appeal brief must clearly identify errors of fact

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[35] *Detroit Edison Co.* (Fermi Power Plant Independent Spent Fuel Storage Installation), CLI-10-3, 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, which does not appear to be the case here") (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 132-33 & n.38 (2007), *aff'd*, *New Jersey Dep't of Env't Prot. v. NRC*, 561 F.3d 132, 137 n.5 (3d Cir. 2009)).

[36] *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34 (1981).

[37] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001).

[38] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 638 (2004).

[39] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001) (citing *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001); *Commonwealth Edison Co.* (Zion Nuclear Power Station Units 1 & 2), CLI-99-4, 49 NRC 185, 194 (1999); *Curators of the Univ. of Missouri,* CLI-95-1, 41 NRC 71, 132 n. 81 (1995)).

[40] *See Public Service Elec. & Gas Co.* (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978).

[41] *Salem*, ALAB-650, 14 NRC at 50 n.7 (citations omitted).

or law that are the subject of the appeal.[42] Briefs that rely on previous filings without providing meaningful arguments or that contain statements that are difficult to discern are of little value.[43]

II. Commission Consideration of Matters *Sua Sponte*

Even though an appeal may not be authorized under the regulations, the Commission, as part of its *sua sponte* authority, has the discretion to entertain interlocutory appeals. The Commission does not usually entertain discretionary interlocutory appeals, primarily due to a "general unwillingness to engage in 'piecemeal interference in ongoing Licensing Board proceedings.'"[44]

Although the Commission disfavors interlocutory review, it sometimes takes interlocutory review as an exercise of its inherent supervisory authority over agency adjudicatory proceeding.[45] The Commission generally limits the exercise of its inherent supervisory authority to "significant" or "novel" issues affecting multiple proceedings.[46] The Commission may grant interlocutory review at the request of a party despite the absence of a referral or certification by the presiding officer.[47] A petition for interlocutory review, however, will only be

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[42] *Salem*, ALAB-650, 14 NRC at 49-51: *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297-98 (1994) (citations omitted), *aff'd*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (Table).

[43] *See Salem*, ALAB-650, 14 NRC at 50-51.

[44] *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004) (quoting *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002)).

[45] *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 26-27 (2004) (citing *Catawba*, CLI-04-6, 59 NRC 62, 70-71 (2004); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7 55 NRC 2005, 214 n.15 (2002)).

[46] *Pilgrim* , CLI-08-2, 67 NRC 31, 33-34 (2008) (citing *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 4-5, nn.11-19 (2007) (*sua sponte* review may be undertaken, *inter alia*, to consider a "significant issue" that "may affect multiple pending or imminent licensing proceedings," to provide guidance to the Board, or in other cited circumstances); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-06-20, 64 NRC 15, 20-21 (2006) (*sua sponte* review may be undertaken to address "novel questions of potentially broad application")).

[47] 10 C.F.R. § 2.341(f)(2).

granted if the party who seeks review demonstrates that the two standards in 10 C.F.R. § 2.341(f)(2) are met (i.e., the issue raised threatens the party with "immediate and serious irreparable impact" or "affects the basic structure of the proceeding in a pervasive or unusual manner."

Even though, in "exceptional instances," the Commission could exercise its discretion to grant a *party's* petition for interlocutory review where the party demonstrates that the criteria in 10 C.F.R. § 2.341(f)(2) are satisfied, mere claims that a board wrongly rejected a contention do not suffice.[48] Rather, the Commission's *sua sponte* review authority is appropriate to address an issue of wide implication and provide guidance to a licensing board.[49]

If the Commission takes *sua sponte* review, it yields the same result as instructing a board to certify "novel license renewal issues" to the Commission.[50] The Commission has instructed that "parties should limit their requests for our review to those set forth in our rules."[51] The Commission has also discouraged requests for Commission review, stating that "parties should not seek interlocutory review by invoking the grounds under which the Commission might exercise its supervisory authority."[52] Moreover, when the rules of practice do not permit a

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[48] *Pilgrim*, CLI-07-02, 65 NRC at 11-12 (citations omitted).

[49] *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 4-5 (2007). The Commission found that the divergent views of the licensing board on the regulatory requirements for environmental assessment of once-through cooling system discharge raised "a significant issue of potentially broad impact" that could "recur in the likely renewal proceedings." *Id.* at 5.

[50] *Vermont Yankee*, CLI-07-01, 65 NRC at 5 (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 23 (1998)).

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

[52] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009).

request and in the absence of a compelling reason to consider an appeal *sua sponte*, the Commission need not consider the matter further.[53]

ARGUMENT

Although the Staff is of the view that BREDL's request for interlocutory Commission review pursuant to 10 C.F.R. § 2.311 can be rejected on procedural grounds alone and should not be entertained on the merits, the Staff, ever mindful of the Commission's ability to entertain matters *sua sponte*, explains in the section below why the Petition is not authorized by Commission regulations, and, why, even if entertained the request for relief should be rejected.

I. BREDL's Appeal Is Not Authorized Under 10 C.F.R. § 2.311 or 2.341

BREDL, pursuant to 10 C.F.R. § 2.311, asks the Commission to grant its intervention petition and request for hearing, arguing that Contentions F-1, F-2 and B should be admitted.[54] The Petition, however, is not authorized under § 2.311 and is premature because the Board has not rejected all of its proffered contentions. Inasmuch as the Board has deferred its ruling on Contention B pending further order of the Commission and has not wholly denied the BREDL intervention petition,[55] BREDL cannot appeal the Board's decision under 10 C.F.R. § 2.311. Therefore, the Commission should deny the Petition.

Furthermore, BREDL cannot seek review under 10 C.F.R. § 2.341(f) because that provision does not authorize BREDL's filing at this juncture. As noted previously, that provision permits a "party" to seek interlocutory review by the Commission.[56] BREDL, however, is a participant in this proceeding, not a "party". Although BREDL has established its standing to

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

[54] *See, e.g.,* Petition at 1, 3-6.

[55] LBP-13-08 at 42.

[56] 10 C.F.R. § 2.341 ("The Commission may, in its discretion, grant interlocutory review at the request of a *party . . . .*") (emphasis added).

intervene,[57] BREDL cannot become a party in the proceeding until its intervention petition is granted (i.e., the Board rules that BREDL has proffered at least one contention that satisfies the requirements of 10 C.F.R. § 2.309(f)). Therefore, its petition for interlocutory review would not be authorized by § 2.341.

Moreover, because BREDL does not cite or otherwise address the 10 C.F.R. § 2.341(f)(2) standards for interlocutory review, such arguments should be deemed waived. [58] Thus, the Commission should deny the Petition.

II. BREDL Has Not Shown Compelling Circumstances Warranting *Sua Sponte* Review or Any Grounds to Grant Intervention

As discussed above, BREDL's request for interlocutory review is not authorized by either 10 C.F.R. § 2.311 or § 2.341 because BREDL's intervention petition has not been wholly denied and BREDL is not a party. Furthermore, although the Commission sometimes exercises its authority to review matters *sua sponte* in compelling circumstances or when there is a showing that the criteria in 10 C.F.R. § 2.341(f)(2)(i) and (ii) are met, BREDL's petition would fail to justify Commission consideration under those criteria as well.

As a threshold matter, BREDL neither cites nor otherwise claims that the 10 C.F.R. § 2.341(f)(2) for discretionary interlocutory review are met. BREDL merely argues that (1) BREDL will not "kno[w] how to proceed in its intervention" and will be denied due process unless LBP-13-08 is modified or reversed;[59] (2) Contentions F-1 and F-2 were improperly rejected,[60] and (3) admission of Contention B (spent fuel storage and disposal) and "holding it in abeyance would afford a clear, unambiguous procedure for ultimate resolution of this matter."[61]

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[57] LBP-13-08 at 5.

[58] *Shearon Harris*, CLI-01-11, 53 NRC at 383.

[59] Petition at 2.

[60] Petition at 3-4.

[61] Petition at 5.

These arguments fail to raise any novel or significant issue or any other compelling circumstances that show Commission review is warranted. BREDL has not shown that either the rejection of all but one of its contentions or the holding of Contention B in abeyance threatens BREDL with immediate and serious irreparable impact or affects the basic structure of the proceeding.[62] BREDL's mere claims that its contentions were wrongly rejected are not sufficient to show serious irreparable impact or that the basic structure of the proceeding has been affected.[63] A "routine ruling on contention admissibility . . . provides no occasion for the Commission to invoke its 'inherent supervisory authority.'"[64] If interlocutory review could be successfully invoked "based merely on an assertion that the licensing board erred in admitting (or excluding) a contention [in instances other than an appeal of right under § 2.311, the Commission] would be opening the floodgates to a potential deluge of interlocutory appeals from . . . participants who lose admissibility rulings."[65] As discussed further below, because the Board's ruling on Contentions F-1 and F-2 rested on whether those contentions met the standards for admissibility, the Commission should conclude that BREDL provides no basis for the Commission to exercise its *sua sponte* authority to review LBP-13-08.

In addition, BREDL has not shown how the Board's decision to defer ruling on Contention B and to hold the contention in abeyance presents any compelling or special circumstances warranting review. Although BREDL claims denial of due process and implies that the Board's decision is inconsistent with the benefits of openness and public participation in

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[62] *See Clinton*, CLI-04-06, 60 NRC at 467 ("Our 'basic structure' standard comprehends disputes over the very nature of the hearing in a particular proceeding — for example, whether a licensing hearing should proceed in one step or two — not to routine arguments over admitting particular contentions.") (footnote omitted).

[63] *Pilgrim*, CLI-07-02, 65 NRC at 12.

[64] *Catawba*, CLI-04-31, 60 NRC at 466.

[65] *Entergy Nuclear Operations Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-09-6, 69 NRC 128, 137 & n.37 (2009) (citation omitted).

NRC proceedings,[66] the Petition fails to explain how those benefits are denied by the Board's postponement of its determination of whether BREDL has proffered an admissible contention pursuant to 10 C.F.R. § 2.309 and is a party to a contested licensing proceeding. Nor has BREDL shown that the treatment of the contention is contrary to law or an abuse of discretion. The Board's deferral is consistent with the treatment of similar contentions filed in 22 proceedings per the Commission's instruction in the *Calvert Cliffs* proceeding[67] and BREDL offers no basis for its waste confidence-related contention to be treated differently. Thus, the Petition provides no compelling or extraordinary circumstances that warrant Commission action to disturb LBP-13-08.[68]

In short, because the NRC's rules of practice do not permit BREDL's request and BREDL's petition identifies no compelling reason to consider the appeal *sua sponte*, the Commission need not consider the matter further.[69] However, if the Commission decides to consider the Petition under its *sua sponte* authority, the Petition identifies no error of law or abuse of discretion that might serve as a basis to modify or reverse LBP-13-08.[70] Therefore, as discussed further below, the Petition should be denied.

A. BREDL Fails to Identify Any Error in the in the Board's Denial of Contention F-1

In Contention F-1, BREDL alleges that Aging Management Plans (AMPs) are inadequate to address ice condenser containment aging issues and that a "Sequoyah-specific"

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[66] *See* Petition at 5-6.

[67] *Calvert Cliffs* holds in abeyance similar contentions in 22 proceedings, including the proceeding regarding the combined operating license for the North Anna Power Station, Unit 3, where BREDL is a party. *See Virginia Elec. & Power Co. d/b/a Dominion Virginia Power & Old Dominion Elec. Cooperative* (North Anna Power Station, Unit 3), CLI-12-17, 76 NRC 207, 212.

[68] *See* Petition at 2.

[69] *U.S. Dep't of Energy*, CLI-10-10, 71 NRC at 283.

[70] *See id.*

AMP is needed.[71] BREDL also quoted a Sandia report to support its assertion that industry has known that AMP on ice condenser containments are inadequate and that there is a potential for corrosion. [72]

In its Petition, BREDL states:

> The [Board] rejected Petitioners argument because, it said, Sandia "merely discusses theoretical potential for localized corrosion in the inaccessible region behind the ice condensers." To summarily dismiss as theoretical a material issue of fact developed by a national laboratory, supported by an expert affidavit and presented by a petitioner seeking to have it litigated in a hearing is antithetical to the law . . . .[73]

Contrary to BREDL's statements in its Petition, however, the Board rejected BREDL's proposed Contention F-1 for multiple reasons that BREDL failed to challenge in its petition for interlocutory review. BREDL's failure to challenge each of these independent reasons for rejecting Contention F-1 is fatal to its Petition.[74] Furthermore, even the one issue BREDL mentions fails to demonstrate any error in the Board's reasoning.

The Board rejected Contention F-1 because it did not address Sequoyah's license renewal application (LRA) or the Aging Management Plans (AMPs) designed to manage aging effects that may impact the ice condenser containment.[75] BREDL's proposed contention failed to acknowledge the AMPs in the LRA and failed to demonstrate any inadequacy with respect to them.[76] Accordingly, the Board rejected the contention because it failed "to comply with the

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[71] *See* Intervention Petition at 21-23.

[72] *See* LBP-13-08 at 28 (citing Intervention Petition at 22).

[73] Petition at 4.

[74] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 638 (2004) (denying a petition for review because it failed to challenge each independent reason for the Board's inadmissibility ruling).

[75] LBP-13-08 at 31.

[76] *Id*.

regulation that requires that contentions 'provide sufficient information to show that a genuine dispute exists … on a material issue of law or fact'".[77]

In addition, the Board noted that the contention did not "include references to specific portions of the application … that the petition disputes and the supporting reasons for each dispute."[78] The Board noted that Sequoyah's LRA "contains many provisions that purport to address and resolve the aging management issues raised by BREDL and … BREDL fails to confront these provisions."[79] The Board found no legal support for BREDL's claim that Sequoyah could not make use of AMPs contained in the Generic Aging Lessons Learned Report (GALL Report) or BREDL's demand for a site-specific AMP.[80] BREDL's appeal addresses none of these bases for the denial of its contention.

Even BREDL's single assertion of an erroneous Board's analysis of the Sandia Report[81] does not reflect the Board's full analysis and order. The Board did *not* reject Contention F-1 on the basis that BREDL mischaracterized the Sandia Report. Instead, the Board found that BREDL did not show how the Sandia Report[82] was relevant to aging in Sequoyah's ice condenser containment.[83] The Board observed that the Sandia Report "neither states nor provides data or experimental evidence supporting the proposition that such corrosion has been

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[77] *Id*. at 32 (quoting 10 C.F.R. § 2.309(f)(1)(vi)).

[78] *Id.*

[79] *Id.*

[80] *Id*.

[81] J. Cherry, "Analyses of Containment Structures with Corrosion Damage," SAND96-004C ("Sandia Report") (1996).

[82] The Sandia Report "merely discusses the theoretical potential for localized corrosion in the inaccessible region behind the ice condensers." LBP-13-08 at 32.

[83] *Id.*

observed or will occur."[84] The Board found that BREDL did not specifically challenge or address why the AMPs discussed in the LRA, and developed after the issuance of the Sandia Report, were inadequate to manage aging effects in the ice condenser containment.[85] Accordingly, the Board found that BREDL provided no support for its claim that the TVA AMPs were deficient.[86]

Because the Petition fails to identify any error or abuse of discretion in this determination, and because BREDL fails to challenge the Board's other independent reasons for ruling contention F-1 inadmissible (which alone would be sufficient reason to deny the Petition), the Petition does not provide grounds warranting interlocutory review or reversal of LBP-13-08.

B. BREDL Fails To Identify Any Error in the Board's Denial of Contention F-2

BREDL's Petition similarly fails to identify any error in the Board's determination that Contention F-2 is inadmissible. In its intervention petition, BREDL challenged the LRA, asserting that it claimed, without support, that Sequoyah's containment would "retain all fission products" even under severe accident conditions.[87] BREDL's Intervention Petition stated:

> TVA's application for license extension at [Sequoyah] claims that for even "severe accidents," like the ones that occurred at Fukushima Daiichi, the Sequoyah containment would *retain all its radioactive fission products*.[88]

BREDL also asserted:

> TVA has … claimed in its Sequoyah License Renewal Application that the [Ice Condenser] containment has the ability to withstand not simply design-basis events, but also **severe accidents**. According to [Mr.]

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[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] Intervention Petition at 24.

[88] *Id.* (emphasis added).

> Gundersen's expert witness report, submitted in support of this contention, there is no analysis within the LRA to support this claim.[89]

The Board's careful analysis of BREDL's assertions in Contention F-2 demonstrated that BREDL either misapprehended the meaning of TVA's statement or mischaracterized it.[90] The Board explained that there are no regulatory provisions requiring a demonstration that containments will be leak-tight during severe accident conditions.[91] The Board explained that BREDL's interpretation of TVA's statement was not supportable.[92] The Board traced the context of TVA's statement to the Updated Final Safety Analysis Report (UFSAR) § 1.2.2.2, which explained that the severe accident conditions are as analyzed in Chapter 15.[93] Contrary to BREDL's assertions, the Chapter 15 analysis examined the consequences of design-basis events, not severe accidents.[94] BREDL failed to identify any portion of Sequoyah's LRA, the regulations, or supporting documentation that would support a claim that TVA was required to provide an analysis showing that Sequoyah's containment would retain all fission products during a severe accident.[95] The Board's Order demonstrated that BREDL's misunderstanding of the plain meaning of TVA's Environmental Report cannot "serve to bootstrap its claim into a genuine dispute with the application."[96]

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[89] *Id.* (emphasis in the original).

[90] LBP-13-08 at 35.

[91] *Id.* at 36

[92] *Id.* at 34-35.

[93] *Id.* at 34.

[94] *Id.*

[95] *Id.* As the Board noted, BREDL's claims are in direct contradiction to other portions of the UFSAR, which allows for some nominal amount of leakage from containment even during normal operations. *Id.*

[96] *Id*. at 35.

As the Board correctly concluded, BREDL's claim is not material to the findings that the NRC must make during the review of the license renewal application.[97] Because BREDL merely iterates claims in its original contention, and does not identify any regulation or document that shows error in the Board's reasoning, the Petition provides no grounds for Commission review . Thus, BREDL has not provided a basis for the Commission to reverse the Board's rejection of Contention F-2.

C. BREDL Fails to Identify Any Error or Abuse of Discretion in the Board's Ruling on Contention B

Finally, BREDL asserts on appeal that the Board should have admitted Contention B (long term storage and disposal of spent fuel) and then held it in abeyance.[98] BREDL claims that "[a]dmitting Contention B and holding it in abeyance would afford the Petitioner a clear, unambiguous procedure for ultimate resolution of this matter."[99] BREDL's appeal on this issue is flawed in several ways.

While it is incumbent on the appellant to identify, with specificity, an error in the decision below, BREDL identifies no error in the Board's determination denying admission of the safety-related portion of the contention.[100] Thus, BREDL has waived its opportunity to challenge that portion of the decision.[101]

As to the environmental portion of the contention that the Board held in abeyance, BREDL does not explain why admitting the contention would result in greater clarity or why

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[97] LBP-13-08 at 36.

[98] BREDL Appeal at 5.

[99] *Id*.

[100] *See Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001) (a party appealing a decision must identify the error in the decision below).

[101] *See Shearon Harris*, CLI-01-11, 53 NRC at 383 (arguments not clearly articulated should be rejected or deemed waived) (citations omitted).

holding it is abeyance is erroneous or an abuse of discretion.[102] Significantly, BREDL does not address the Board's rationale for holding Contention B in abeyance; the Petition is devoid of any reference to the *Calvert Cliffs* decision,[103] upon which the Board reasonably relied.[104] BREDL's cursory complaints about the Board's decision to hold the contention in abeyance are not sufficient to meet its responsibility to present information and cogent arguments to support its claims.[105] Thus, BREDL fails to provide the Commission any basis to conclude that this aspect of the ruling in LBP-13-08 should be modified or reversed.

III. BREDL Cannot Raise New Arguments on Appeal

In addition to failing to identify any error in the Board's order, the Petition contains new comments and arguments that were not previously raised before the Board and that were not material to the Board's rejection of Contention F-2.[106] Similarly, BREDL also raises new arguments regarding Contention B. As the Appeal Board explained in *Catawba*, a party must explicitly raise its arguments to the Board in order to preserve those issues for appeal.[107]

Like the appellant intervenors in *Catawba*, BREDL newly raises an issue for the first time on appeal regarding Contention F-2 (i.e., the meaning of "adequately retained"). Previously, BREDL asserted that TVA was required to show that its containment would not leak under any

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[102] *See Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978) (party seeking review of a decision must give some reason for its claim that the decision was wrong).

[103] *Calvert Cliffs*, CLI-12-16, *supra.*

[104] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638 (2004) (petition must address each of the bases for the ruling below or the petition will be rejected).

[105] *See Advanced Medical Systems, Inc*. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994) (appellant's failure to illuminate certain bases for appeal is sufficient ground to reject those arguments) (citation omitted), *aff'd, Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (Table).

[106] *See* Intervention Petition at 23-25; Reply at 8-9.

[107] *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 82-83 (1985).

condition.[108] Now, in its appeal before the Commission, BREDL appears to have come, belatedly, to the realization that there are no regulatory provisions requiring a demonstration that containments will be leak-tight during severe accident conditions. BREDL argues that the Board's decision acknowledging containment leakage during severe accidents would result in unacceptable levels of leakage.[109] To the extent that BREDL now asserts that containment leakage is excessive, BREDL raises a new issue that it did not raise below. Because BREDL did not raise the issue before the Board, it cannot raise it on appeal.[110]

With respect to Contention B, it is apparent that BREDL claims for the first time on appeal that its due process rights are violated (by holding the contention in abeyance) and that "admitting Contention B and holding it in abeyance would afford . . . a clear, unambiguous procedure for ultimate resolution and would be consistent with openness and transparency."[111] These arguments do not appear in either BREDL's initial intervention petition or its Reply.[112] Instead, BREDL merely noted that the Staff argued Contention B "should be held in abeyance."[113] BREDL cannot raise on appeal any arguments that the Board had no fair opportunity to consider.[114]

Therefore the Commission should also reject new arguments made on Contention F-2 and Contention B, and deny the Petition.

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[108] Intervention Petition at 24.

[109] Petition at 4.

[110] *Catawba*, ALAB-813, 22 NRC at 82-83 (denying, among other things, an appeal of a contention dismissal because the party had not raised the issue before the Board).

[111] *See* Petition at 2, 5-6. Although BREDL's arguments in this regard are not a model of clarity, the Staff believes this is a fair reading of the Petition.

[112] *See* Intervention Petition at 12-14; Reply at 4-5.

[113] Reply at 5.

[114] *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 46 NRC 185, 194 (1999) (citing *Sequoyah Fuels Corp.* (Gore, Oklahoma), CLI-97-13, 46 NRC 195, 221 (1997).

CONCLUSION

For the reasons stated above, the Petition should be denied. Under 10 C.F.R. § 2.311, BREDL has no right to appeal the Board's decision in LBP-13-08 because its intervention petition was not wholly denied. In addition, review of the Petition pursuant to 10 C.F.R. § 2.341 is not authorized because the Commission's regulations do not allow a nonparty to seek interlocutory Commission review. Further, BREDL has not made a showing of compelling or exceptional circumstances that warrant the exercise of the Commission's discretion to review this matter *sua sponte.* Finally, even if the Commission were to review this matter *sua sponte,* the Petition fails to show that the rulings in LBP-13-08 are erroneous or an abuse of discretion. Therefore, the Petition should either be rejected or the Board's decision in LBP-13-08 should be upheld.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 26th day of August 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 50-327-LR, 50-328 LR
	)	
(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 BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, BELLEFONTE EFFICIENCY AND SUSTAINABILITY TEAM, AND MOTHERS AGAINST TENNESSEE RIVER RADIATION PETITION FOR INTERLOCUTORY 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/

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