September 5, 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 MOTION FOR LEAVE TO REPLY TO NRC STAFF BRIEF IN OPPOSITION TO TENNESSEE VALLEY AUTHORITY PETITION FOR REVIEW OF LBP-13-08

Pursuant to 10 C.F.R. § 2.323, Tennessee Valley Authority ("TVA") hereby moves the Commission for leave to reply to the NRC Staff's Brief in Opposition to Tennessee Valley Authority Petition for Review of LBP-13-08 (Aug. 26, 2013) ("Staff Brief"). While 10 C.F.R. § 2.311 does not provide for submittal of reply briefs, the Commission may grant a motion for leave to reply, provided that the reply brief genuinely replies to arguments raised in the other participants' briefs. *See, e.g.*, *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 439 (2006).

TVA respectfully submits that the unusual posture of this case and other compelling circumstances warrant granting this Motion and acceptance of TVA's Reply Brief, which is attached hereto. LBP-13-08 instructed the parties that "[t]his Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311" (LBP-13-08 at 43). The NRC Staff did not previously object to that instruction. In addition, as discussed in the attached Reply Brief,[1] there is considerable precedent providing that 10 C.F.R. § 2.311 allows an appeal as of right on the question of whether a hearing request should have been wholly denied. For these reasons, TVA did not anticipate that the NRC Staff would take the position that LBP-13-08 is not appealable under10 C.F.R. § 2.311. Further, the position that *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3),

[1] Tennessee Valley Authority's Reply Brief on Appeal of LBP-13-08 (Sept. 5, 2013) at 2-3.

CLI-12-16, 76 N.R.C. 63 (2012), requires the waste confidence contention in this proceeding to be held in abeyance was not raised until the NRC Staff filed its answer to the hearing request below, after TVA had filed its answer and to which TVA had no right to respond. Accordingly, TVA did not anticipate that the NRC Staff would take the position that TVA cannot now raise on appeal the inapplicability of *Calvert Cliffs*. A reply to these unexpected procedural objections is appropriate to allow the Commission to fully evaluate the Staff's objections, thus promoting sound decision making.

For these reasons, TVA respectfully requests that the Commission grant TVA's Motion.

Certification

Counsel for TVA hereby certifies that TVA has made a sincere effort to contact the other participants in this proceeding to resolve the issues raised in this motion, and that these efforts have been unsuccessful. The NRC Staff and BREDL do not support the motion.

Respectfully submitted,

/signed electronically by David R. Lewis/

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Dated: Sept. 5, 2013

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(Sequoyah Nuclear Plant, Units 1 and 2)	)	

TENNESSEE VALLEY AUTHORITY'S REPLY BRIEF ON APPEAL OF LBP-13-08

Tennessee Valley Authority ("TVA") hereby replies to the NRC Staff Brief in Opposition to Tennessee Valley Authority Petition for Review of LBP-13-08 (Aug. 26, 2013) ("Staff Brief"). In LBP-13-08, the Atomic Safety and Licensing Board ("Board"), ruling on the Blue Ridge Environmental Defense League's ("BREDL") hearing request, held in abeyance a contention raising waste confidence matters that are being addressed generically through rulemaking, and rejected all of BREDL's other contentions as inadmissible. TVA appealed this decision pursuant to the Board's instruction that "[t]his Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311." LBP-13-08 at 43.

In its appeal,[2] TVA argued that, because the Board erred in interpreting *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 N.R.C. 63 (2012) as requiring that the waste confidence contention be held in abeyance, BREDL's hearing request should have been wholly denied. In opposing this appeal, the NRC Staff asserts, *inter alia*, that (1) LBP-13-08 is not appealable under 10 C.F.R. § 2.311 because it neither grants nor denies a hearing (Staff Brief at 7-8); (2) TVA is precluded from arguing the inapplicability of *Calvert Cliffs* for the first time on appeal (*id.* at 14-15); and (3) TVA has identified no error in the Board's decision (*id.* at 9). TVA respectfully disagrees with each of these assertions.

The NRC Staff is interpreting 10 C.F.R. §§ 2.311(c) and 2.311(d) as allowing immediate appeal as of right only for orders wholly granting or wholly denying a hearing request. The NRC Staff's argument

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[2] Tennessee Valley Authority's Brief in Support of Appeal of LBP-13-08 (July 30, 2013) ("TVA Brief").

does not address 10 C.F.R. § 2.311(a), which allows, without qualification, appeal of a licensing board order with respect to a hearing request. 10 C.F.R. §§ 2.311(c) and 2.311(d) only limit the questions that may be raised in certain types of appeal. With respect to an order denying a hearing request, 10 C.F.R. § 2.311(c) limits the appeal to the question of whether the hearing request should have been granted; and, with respect to an order granting a hearing request, 10 C.F.R. § 2.311(d) limits the appeal to the question of whether the hearing request should have been wholly denied. Sections 2.311(c) and 2.311(d) do not address the specific circumstance at issue here, and do not preclude appeals of other orders with respect to a hearing request where such appeal would determine whether the hearing should have wholly denied.

Indeed, the Commission has stated that "[S]ection 2.311 . . . permits an appeal as of right on the question of whether an initial intervention petition *should have been wholly denied, or alternatively, was granted improperly*." *Luminant Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 N.R.C. 379, 385 (2012) (emphasis added) (footnote omitted). Thus, an appeal on the question of whether an initial petition should have been wholly denied is a permissible *alternative* to an appeal challenging an order *improperly granting* a hearing.

Furthermore, the Commission has repeatedly stated that 10 C.F.R. § 2.311 allows 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. 377, 379 (2012). "Our rules of practice provide for an automatic right to appeal a licensing board decision deciding standing and contention admissibility, on the question whether a petition to intervene and request for hearing should have been granted, or denied in its entirety." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 N.R.C. 393, 396-97); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-22, 70 N.R.C. 932, 933 (2009). "Section 2.311 . . . allows a party to appeal a ruling on contention admissibility . . . if … a party other than the petitioner alleges that a petition for leave to intervene or request for hearing should have been wholly denied." *Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 N.R.C. 331, 365 (2009); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 N.R.C. 18, 23 (1998). "Under our rules,

where (as here) the NRC Staff or the license applicant argues that the Board ought to have rejected all contentions, an appeal lies." *AmerGen Energy Co.*, *LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 N.R.C. 111, 119 (2006).

The NRC Staff correctly points out that, in *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), CLI-09-18, 70 N.R.C. 859, 861-62 (2009), the Commission stated that "a necessary prerequisite for an appeal taken pursuant to [§ 2.311] is that the Board rule on 'all pending contentions' first." Staff Brief at 5. That case involved a licensing board decision that had ruled on nineteen of twenty-eight proposed contentions and had indicated that the remainder would be addressed in a subsequent decision. *South Texas*, CLI-09-18, 70 N.R.C. at 860. It is therefore readily distinguishable as involving appeal of a partial decision – an appeal not capable of determining whether the hearing request should have been wholly denied. Moreover, *South Texas* states "[t]o be appealable under section 2.714a(c) [now 2.311(d)], the disputed order must dispose of the entire petition *so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner*." *South Texas*, CLI-09-18, 70 N.R.C. at 861, quoting *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-11, 59 N.R.C. 203, 207 (2004) (additional emphasis added).[3] If successful, TVA's appeal will terminate the proceeding.

LBP-13-08 is in no way akin to the types of partial decisions that have been held unappealable. In LBP-13-08, the Board has ruled on every proposed contention. Further, there is no prospect that the waste confidence contention will be later admitted. *See* TVA Brief at 9 n.11 (observing that the Commission has made it clear that it will complete its generic rulemaking before issuing any renewed license, and that the Sequoyah licenses do not expire until 2021). Thus, holding the waste confidence contention in abeyance

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[3] The Staff's citation to *Catawba* (Staff Brief at 5 n.19) is inapposite for the same reason. That case involved the appeal of a licensing board decision ruling on only two of three sets of contentions proffered by a petitioner (*Catawba*, CLI-04-11, 59 N.R.C. at 208), thus having no potential to terminate the proceeding. TVA acknowledges that *Catawba* states that "to take an appeal under [what is now 2.311(d)] the applicant must contend that, after considering all pending contentions, the Board has erroneously granted a hearing to the petitioner." *Id.* However, as previously discussed, TVA submits that the Commission may accept an appeal under the broader authority in Section 2.311(a), where the appeal would determine whether a hearing request should have been wholly denied. *See Comanche Peak*, CLI-12-7, 75 N.R.C. at 385 (indicating that an appeal as of right on the question of whether an initial intervention petition should have been wholly denied is a permissible alternative to an appeal of whether the petition was granted improperly).

serves no purpose. *Id.* at 10-11. Moreover, the decision to hold the waste confidence contention in abeyance has resulted in further procedural burdens and requirements resembling to a considerable extent a granted hearing request, such as the issuance by the Board of an Initial Scheduling Order establishing reporting obligations and procedures for motions and new or amended contentions, imposed on the "parties." Initial Scheduling Order (Aug. 26, 2013). Indeed, the Initial Scheduling Order observes that "the adjudication has commenced" (*id.* at 3), and provides for the possibility of summary disposition of the waste confidence contention (*id.* at 9).

Finally, the Licensing Board decision itself determined that "[t]his Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311." LBP-13-08 at 43. While the NRC Staff attempts to dismiss this language as often appearing in licensing board orders that rule on intervention petitions (Staff Brief at 4 n.14[4]), presumably licensing boards only provide such instructions when a decision is capable of being appealed under the cited provision. The NRC Staff did not object to these instructions when issued, and TVA proceeded in accordance with those instructions. Even if the NRC Staff is correct in its interpretation of 10 C.F.R. § 2.311, simple notions of fairness as well as the unusual posture of this case justify the Commission's exercise of discretion under the circumstances present here.

The NRC Staff's argument that TVA cannot address the *Calvert Cliffs* decision for the first time on appeal is misplaced. In opposing the admission of the waste confidence contention, TVA's Answer clearly argued that Board should reject the waste confidence contention because it raised issues being addressed by rulemaking.[5] Thus, TVA can certainly assert on appeal that the waste confidence contention should have been dismissed. TVA's Answer did not address *Calvert Cliffs* because BREDL's intervention petition did not raise it, BREDL did not argue that the waste confidence contention should be held in abeyance, and TVA viewed the *Calvert Cliffs* decision as inapplicable (for the reasons discussed in the TVA Brief). The

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[4] The NRC Staff cites *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Unit 3), CLI-12-17, 76 N.R.C. 207, 212 (2012) – *see* Staff Brief at 4 n.14 – but that case does not discuss the references to Section 2.311 that appear in licensing board orders ruling on intervention petitions.

[5] *See* 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) at 20 ("TVA's Answer"), citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85 (1974).

position that *Calvert Cliffs* requires the waste confidence contention to be held in abeyance was not raised until the NRC Staff filed its answer to BREDL's petition,[6] which was after TVA's Answer had already been filed. Under 10 § C.F.R. § 2.309(i)(3), TVA had no right to reply to the NRC Staff's Answer. Further, while TVA anticipated being able to respond to the NRC Staff's position on *Calvert Cliffs* at a prehearing conference that the Board had informed the participants it was considering holding,[7] that opportunity disappeared when the Board informed the participants on June 10 that a prehearing conference was unnecessary.[8] Thus, the Board issued its decision in LBP-13-08 without affording TVA any opportunity to respond to the NRC Staff's position.

Finally, the NRC Staff's assertion that TVA has identified no error in the Board's ruling on the waste confidence contention (Staff Brief at 9) is incorrect. TVA's Brief asserts that the Board erred as a matter of law in interpreting *Calvert Cliffs* as requiring the waste confidence contention to be held in abeyance because, on its face and in context, 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. TVA's Brief at 1, 6-7. The NRC Staff does not respond to or dispute this assertion.

For these reasons, the Commission should accept and grant TVA's appeal, dismiss the waste confidence contention, and terminate the proceeding.

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[6] 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, 24-26 (May 31, 2013) ("NRC Staff's Answer").

[7] E-Mail Message from M. Flyntz, Law Clerk, ASLB, Re Sequoyah LR Oral Argument Update (May 24, 2013).

[8] E-Mail Message from M. Flyntz, Law Clerk, ASLB, Re Sequoyah LR Oral Argument Update (June 10, 2013).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Tennessee Valley Authority's Motion for Leave to Reply to NRC Staff Brief in Opposition to Tennessee Valley Authority Petition for Review of LBP-13-08, and accompanying Tennessee Valley Authority's Reply Brief On Appeal of LBP-13-08, have been served through the E-Filing system on the participants in the above-captioned proceeding, this 5th day of September, 2013.

/signed electronically by David R. Lewis/

David R. Lewis