September 16, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO TVA'S MOTION FOR LEAVE TO REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby responds to "Tennessee Valley Authority's Motion for Leave to Reply to the NRC Staff Brief in Opposition to Tennessee Valley Authority Petition for Review of LBP-13-08" ("TVA's Motion") dated September 5, 2013. The Staff submits that TVA's Motion should be denied, on the grounds that Tennessee Valley Authority ("TVA") has not demonstrated the compelling circumstances contemplated by 10 C.F.R. § 2.323(c) for the filing of a reply.

BACKGROUND

TVA requests leave to reply to "NRC Staff Brief in Opposition to Tennessee Valley Authority Petition for Review of LBP-13-08" ("Staff's Opposition") dated August 26, 2013. The Staff's Opposition was filed in response to "Tennessee Valley Authority's Notice of Appeal of LBP-13-08" ("TVA's Notice of Appeal") dated July 30, 2013, and "Tennessee Valley Authority's Brief in Support of Appeal of LBP-13-08" ("TVA's Brief in Support of the Appeal"), dated July 30, 2013 (collectively "TVA's Appeal"). TVA claims it could not have anticipated that the Staff would

(1) "take the position that LBP-13-08 is not appealable under[ ]10 C.F.R. § 2.311"[1] and (2) "take the position that TVA cannot now raise on appeal the inapplicability of *Calvert Cliffs.*"[2] TVA asserts it has demonstrated the compelling circumstances contemplated by 10 C.F.R. § 2.323(c) for the filing of replies.[3] However, TVA fails to show that compelling circumstances exist justifying a reply to the Staff's Opposition.

DISCUSSION

I. Legal Standard Governing Motions for Leave to Reply

Section 2.323(c) provides that there is no right to reply to answers to motions, but that permission to file a reply may be granted "only in compelling circumstances, such as where the moving party demonstrates that it could not have reasonably anticipated the arguments to which it seeks leave to reply" (emphasis added). In 2004, the Commission added the "compelling circumstances" standard to its rules governing motions for leave to file replies to answers to motions under 10 C.F.R. § 2.323(c).[4] In describing the compelling circumstances standard, the Commission explained that it was establishing a higher standard than previous precedent and intended to limit replies to those instances where "manifest injustice would occur" and the issue "could not have been raised earlier."[5] Thus, a demonstration of compelling circumstances in a motion for leave to reply must show that manifest injustice would occur in the absence of a reply and the arguments raised in the reply could not have been raised earlier.[6]

---

[1] TVA's Motion at 1.

[2] *Id.* at 2.

[3] *Id.*

[4] *See* Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

[5] *Id.* Previously, replies could be authorized for a number reasons including at the ASLB's discretion. *See*, e.g., *Florida Power & Light Co.,* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, -499-500 (1991).

[6] Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

II. TVA Should Have Anticipated a Challenge to the Ripeness of its Appeal

TVA's argument that it could not anticipate that the Staff would argue that TVA's Appeal was not ripe under 10 C.F.R. § 2.311 is simply not plausible. TVA asserts that the (1) "unusual posture" of the case, (2) the Atomic Safety and Licensing Board's ("ASLB") Order,[7] and (3) the Staff's failure to object to the Board's Order precluded TVA from anticipating the Staff's argument.[8] In its appeal, TVA addressed 10 C.F.R. § 2.311 in both its notice of appeal and brief in support of its appeal. Specifically, TVA states "[t]he Commission's rules of practice at 10 C.F.R. § 2.311 allow an appeal as of right on the question of whether a hearing request should have been wholly denied."[9] Because TVA argued that it could appeal the ASLB Order by right under § 2.311, it should have reasonably anticipated that a party opposing the appeal would argue to the contrary.

A. TVA Failed to Show How the Posture of the Case Precluded Anticipation of the Staff's Arguments

TVA's Motion asserts that the unusual posture of the case[10] warrants granting TVA an opportunity to reply. Assuming *arguendo* that this case has an unusual posture, it was incumbent on TVA to explain what was unusual about the posture of the case and how that prevented TVA from anticipating the Staff's arguments. In its brief supporting the appeal, TVA

---

[7] *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), LBP-13-08, ___ NRC ___, ___ (July 5, 2013) (sl. op. at 43).

[8] TVA's Motion at 1.

[9] TVA's Brief in Support of the Appeal at 6 (citing Exelon Generation Co., LLC (limerick Generating Stations, Units 1 and 2), CLI-12-19, 76 NRC ___, ___ (Oct. 23, 2012) (sl. op. at 3).

[10] TVA asserts without explanation that the posture of the case is unusual. TVA's Motion at 1. However, this case is not unusual. The license renewal proceedings for Davis-Besse Nuclear Power Station, South Texas Project, and Grand Gulf Nuclear Station present similar situations where there are no admitted contentions and one being held in abeyance that is related to the D.C. Circuit's decision to vacate the Waste Confidence Decision and Temporary Storage Rule. *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CL-12-16, 76 NRC 63 (2012); *see also New York v. NRC*, 681 F.3d 471 (2012).

argues that its appeal is allowed under 10 C.F.R. § 2.311.[11] Because TVA argued that it could appeal an order with respect to a petition to intervene in accordance with 10 C.F.R. § 2.311, it cannot now be surprised that Staff opposed its appeal as not being permitted under 10 C.F.R. § 2.311. In its argument opposing TVA's appeal, the Staff explained that parties other than petitioner must proceed under 10 C.F.R. § 2.311(d), which requires the petition to intervene be granted prior to the appeal.[12] The ASLB's Order has not granted the petition to intervene.[13] As such, the Staff argued that TVA did not meet the requirements of 10 C.F.R. § 2.311(d) because the petition to intervene had not been granted, an argument that TVA should have anticipated. Since it should have reasonably anticipated the Staff's argument, TVA has not shown that compelling circumstances exist justifying a reply.

Finally, TVA's Motion does not explain why the unusual posture of the case precluded it from anticipating the Staff's argument. TVA's proposed reply remains completely silent on this issue. Because TVA is completely silent as to why the posture of the case resulted in TVA being unable to anticipate the Staff's argument, TVA has not shown the compelling circumstances contemplated by 10 C.F.R. § 2.323(c) for the filing of replies exist. Thus, TVA's Motion should be denied.

B. The ASLB's Order Did Not Excuse TVA from Satisfying the Regulatory Requirements for Filing an Appeal Under 10 C.F.R. § 2.311

TVA argues that it could not have anticipated that the Staff would oppose its appeal under 10 C.F.R. § 2.311. TVA's alleged basis for failing to anticipate the Staff's arguments is a single sentence from the ASLB's Order. In that order, the ASLB states that

> This Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311. An appeal meeting the

---

[11] *Id.*

[12] Staff's Opposition at 7-8.

[13] LBP-13-08 at 42; *see also* Staff's Opposition at 7.

> applicable requirements set forth in that section must be filed within twenty-five (25) days of service of this order.[14]

TVA argues, based on the first sentence from the Order, that the ASLB instructed the parties that an appeal of the Order would lie under 10 C.F.R. § 2.311. However, the order provided the parties no such assurance. A careful reading of the ASLB's Order shows that the parties still needed to demonstrate that their appeals satisfied the applicable requirements of 10 C.F.R. § 2.311. Contrary to TVA's view, the ASLB did not make any findings regarding whether an appeal filed by the parties would satisfy the applicable regulatory requirements.

The proposed reply[15] discussing the scope of 10 C.F.R § 2.311(a) merely rehashes the bare argument contained in TVA's Appeal.[16] TVA's assertion regarding the scope of 10 C.F.R. § 2.311(a) would render sections 2.311(c) and (d) superfluous. Section 2.311 states:

> (a) An order of the presiding officer, or if a presiding officer has not been designated, of the Chief Administrative Judge, or if he or she is unavailable, of another administrative judge, or of an administrative law judge with jurisdiction under § 2.318(a), may be appealed to the Commission with respect to:
> (1) A request for hearing;
> (2) A petition to intervene; or
> (3) A request for access to sensitive unclassified non-safeguards information (SUNSI), including, but not limited to, proprietary, confidential commercial, and security-related information, and Safeguards Information (SGI). An appeal to the Commission may also be taken from an order of an officer designated to rule on information access issues.
>
> …
>
> (c) An order denying a petition to intervene, and/or request for hearing, or a request for access to the information described in paragraph (a) of this section, is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.

---

[14] LBP-13-08, at 43 (emphasis added).

[15] Tennessee Valley Authority's Reply Brief on Appeal of LBP-13-08 ("TVA's Proposed Reply").

[16] TVA's Brief in Support of the Appeal at 1, 6 (arguing that "10 C.F.R. § 2.311 allow an appeal as of right on the question of whether a hearing request should have been wholly denied"); *compare* TVA's Proposed Reply at 2 (arguing that 10 C.F.R. § 2.311(a) allows, "without qualification, [an] appeal of a licensing board order with respect to a hearing request.").

> (d) An order granting a petition to intervene, and/or request for hearing, or granting a request for access to the information described in paragraph (a) of this section, is appealable by a party other than the requestor/petitioner on the question as to:
> (1) Whether the request for hearing or petition to intervene should have been wholly denied; …

As the regulatory language demonstrates, 10 C.F.R. § 2.311(a) establishes that orders regarding a request for hearing, a petition to intervene, and a request for access to sensitive unclassified non-safeguards information may be appealed. In 10 C.F.R. § 2.311(c) and (d), the regulation provides the precise requirement for appealing orders regarding a petition to intervene.[17] An applicant is limited under 10 C.F.R. § 2.311 to appealing only an order granting a petition to intervene.[18] TVA's argument that 10 C.F.R. § 2.311(a) serves essentially as a catch-all for any appeal of a petition to intervene not meeting the requirements of either 10 C.F.R. § 2.311(c) or (d) would upset the delicate regulatory balance established by the Commission. TVA's misreading of the regulations and the ASLB's Order does not demonstrate that compelling circumstances exist justifying the filing of a reply under 10 C.F.R. § 2.323(c).

C. The Staff's Alleged Failure to Object to the ASLB's Order Is Not Material to TVA's Right to Reply

The Staff was under no duty to object to the ASLB's Order regarding the method for filing appeals in accordance with all of the requirements of 10 C.F.R. § 2.311. As discussed above, the ASLB's Order was not objectionable because it did not alter the regulatory requirements for an appeal or make any determination requiring the ripeness of TVA's appeal. Neither TVA's Motion nor its proposed reply provide any argument or analysis demonstrating that the Staff was under any obligation to object to the ASLB's order. As such, TVA cannot now claim that it was unfairly surprised by the Staff's opposition to its appeal because the Staff

---

[17] 10 C.F.R. § 2.311(c) and (d).

[18] 10 C.F.R. § 2.311(d).

somehow failed to object to the ASLB's Order. Because TVA has not shown that compelling circumstances contemplated under 10 C.F.R. § 2.323(c) exist, its motion should be denied.

III. TVA's Asserted Right to Raise *Calvert Cliffs* on Appeal Is Immaterial

TVA's complaint regarding the Staff's position rings hollow in light of TVA's admission regarding its analysis of the applicability of *Calvert Cliffs* during the initial scheduling conference. During that conference, the Board Chairman, Judge Karlin, discussed TVA's failure to discuss or cite *Calvert Cliffs* in its opposition to petitioner's proposed Contention B. In questioning the lack of discussion, Judge Karlin stated that

> I was very surprised that your brief, with regard to Contention B, did not ever once mention that Commission's decision in *Calvert Cliffs*, CLI-12-16. I have to believe, with the experienced litigator you are, and your colleagues, that you are aware of that decision. And I found that a very difficult – we had [to] confront that decision. In fact that was the basis of our decision on Contention B.[19]

In response, counsel for TVA stated:

> I apologize for that. I was aware of the case. I had thought about including [a] discussion. I had reached the conclusion that the case was inapplicable, and I actually thought at that point, because I think you had indicated that there would be a pre-hearing conference, that there would be a further opportunity for – to have that discussion, and made the judgment to leave that for the prehearing conference, and the prehearing conference went away. So that was a bad call on my part.[20]

As TVA's counsel explained to the ASLB, it chose to forgo raising *Calvert Cliffs* to the ASLB in its initial opposition to petitioners proposed contention. As such, TVA could not claim that it was unfairly surprised by the Staff's argument that TVA could not raise the issue for first time on appeal.

Even if TVA was correct that it could not have anticipated the Staff's argument, it still needed to demonstrate that compelling circumstances exist; that is, TVA must show how some

---

[19] Transcript at 46-47.

[20] *Id.* at 47.

manifest injustice would result from being precluded from filing its reply.[21] TVA's Motion points to no harm that would result if it was not allowed to file a reply. TVA merely states that "[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."[22] This desire for additional briefing on the issue does not show that the compelling circumstances requirement of 10 C.F.R. § 2.323(c) exist. Thus, TVA's Motion should be denied.

IV. Conclusion

For the reasons set forth above, TVA's motion for leave to reply should be denied.

Respectfully submitted,

Signed (electronically) by

Brian G. Harris
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
Telephone: (301) 415-1392
E-mail: brian.harris@nrc.gov
Date of signature: September 16, 2013

---

[21] *See* Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004) (explaining that the compelling circumstances added to the regulation requires a showing of manifest injustice).

[22] TVA's Motion at 2.

CERTIFICATION

I certify that Counsel for the Staff has made a sincere effort to make itself available to consider and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and its efforts to resolve the issues have been unsuccessful.

/Signed (electronically) by/

Brian G. Harris
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-1392
E-mail: brian.harris@nrc.gov

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'S ANSWER TO TVA'S MOTION FOR LEAVE TO REPLY," dated September 16, 2013, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 16th day of September, 2013.

/Signed (electronically) by/

Brian G. Harris
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-1392
E-mail: brian.harris@nrc.gov