August 13, 1982 SECY-82-338

ADJUDICATORY ISSUE

(Affirmation)

For: The Commissioners

From: Leonard Bickwit, Jr.
General Counsel

Subject: REVIEW OF ALAB-664 (IN THE MATTER OF TENNESSEE VALLEY AUTHORITY)

Facility: Browns Ferry Nuclear Plant (Units 1, 2 and 3)

Purpose:

EX. 5

Discussion: On April 16, 1982, the Commission took review of two issues regarding ALAB-664. 1/ In that decision, a majority of the Appeal Board decided to withhold consideration of certain contentions until the staff issued its environmental analysis on the Tennessee Valley Authority's (TVA) application to store low-level radioactive waste at the Browns Ferry site. Shortly after the parties submitted their briefs to the Commission, the Appeal Board learned that an amendment to TVA's application, submitted by TVA to the NRC staff by letter of November 3, 1982, had not been served to the Appeal Board. Based on this information, the Appeal Board requested counsel for TVA and the NRC staff to explain why the amended application had not been brought to its

1/ Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3) ALAB-664, 15 NRC 1 (1982).

CONTACT:
Juan L. Rodriguez, OGC
634-1465

Information in this record was deleted in accordance with the Freedom of Information Act, exemptions 5
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PDR FOIA
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attention while the case was pending consideration before it. Counsel for TVA and the NRC staff responded with written submissions. 2/

In reviewing these submittals, the Appeal Board (in ALAB-677) found that the amended application constituted a "material alteration of TVA's earlier presentation" because that amendment "significantly modified, if not entirely superseded" the "principal evidentiary support for TVA's initial application." Slip op. at 7. 3/ For these reasons, the Appeal Board opined that its decision might have been different if the board had timely considered TVA's amended application. The Appeal Board stated:

> "Clearly the new document, which superseded Enclosure 2 was material to the resolution of the issues before us. Indeed, timely presentation of the new information, with appropriate opportunity for comment or rebuttal, might well have changed the outcome of the Appeal."

EX. 5

2/ Staff counsel explained that he did not become aware of the amended application until after ALAB-664 was issued. Counsel for TVA, however, alleged that he did not believe that service of the amendment to the Appeal Board was required. See Slip op. at 6.

3/ The Appeal Board took no action because the pendency review removed the Appeal Board's jurisdiction over the matter.

EX. 5

Recommendation:

Leonard Bickwit, Jr.
General Counsel

Attachments:

1. ALAB-677
2. Draft Order

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Monday, August 30, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Monday, August 23, 1982, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of September 6, 1982. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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ATTACHMENT 1

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Stephen F. Eilperin, Chairman
Dr. John H. Buck
Gary J. Edles

SERVED JUN 11 1982

In the Matter of	)	
	)	Docket Nos. 50-259 OL
TENNESSEE VALLEY AUTHORITY	)	50-260 OL
	)	50-296 OL
(Browns Ferry Nuclear Plant, Units 1, 2 and 3)	)	

Mr. Robert B. Pyle, Chattanooga, Tennessee, for the petitioners, David R. Curott, et al.

Messrs. Herbert S. Sanger, Jr., Lewis E. Wallace, James F. Burger and W. Walter LaRoche, Knoxville, Tennessee, for the applicant, Tennessee Valley Authority.

Mr. Richard J. Rawson for the Nuclear Regulatory Commission staff.

MEMORANDUM

June 10, 1982

(ALAB-677)

This proceeding, which involves an application by the Tennessee Valley Authority for the storage of low level radioactive waste at the Browns Ferry Nuclear Plant, is now before the Commission on review of our decision in ALAB-664, 15 NRC ____ (issued January 6, 1982). It has recently come to our attention, however, that on November 3, 1981, while the case was pending before us, TVA submitted to the NRC staff a modification of its application. TVA never served

that modification on the parties or brought it to our attention. It was first made available through staff counsel on March 29, 1982, long after we had rendered our decision. Although recognizing that we no longer have jurisdiction over the case, we issued an order (unpublished) asking TVA and the staff to explain why the modification was not served or brought to our attention in a timely fashion.

Upon review of those explanations, we are convinced that TVA's failure to serve its modification on other parties and us violated a long-standing requirement imposed by this Board. See generally, Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 406 note 26 (1976); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 NRC 404, 411 (1975); and Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625 (1973). We are also concerned that the staff's internal procedures were inadequate to keep staff counsel apprised of material developments regarding the application. We are issuing this opinion to re-emphasize our need to be advised of all significant developments that may bear on decisions in pending proceedings.

I. Background

An understanding of our concern over the failure to provide us (and the parties) with important new information requires an appreciation of the exact chronology of events.

To facilitate this understanding, we have listed the key dates below:

July 31, 1980	Original application filed seeking (i) temporary storage; (ii) installation of volume reduction and incineration equipment, and (iii) life of the plant storage.
November 17, 1980	Amended application filed limiting request to onsite five year storage.
December 11, 1980	Federal Register notice. (45 Fed. Reg. 81697)
January 14-16,1981	Petitions to intervene filed.
August 10, 1981	Staff letter sent to TVA requesting additional information and advising of the need to revise or amend the application.
August 19, 1981	TVA acknowledges receipt of staff request.
October 2, 1981	Licensing Board issues decision (LBP-81-40) denying intervention and requests for hearing.
October 19, 1981	Notice of appeal of Licensing Board decision filed.
October 22, 1981	TVA submits answers to staff questions.
November 3, 1981	TVA submits updated amended application to the staff. (transmittal letter included as an appendix)
November 23, 1981	Appeal Board orally requests information from staff counsel.
November 23, 1981	TVA files brief in opposition to appeal.
November 24, 1981	Staff counsel responds to Appeal Board request. (included as an appendix)

November 25, 1981	Staff files brief in opposition to appeal.
January 6, 1982	Appeal Board issues decision (ALAB-664) reversing the Licensing Board.
January 21, 1982	NRC staff files petition for Commission review of ALAB-664.
January 27, 1982	TVA files petition for Commission review of ALAB-664
March 29, 1982	Staff counsel serves November 3, 1981 documents on all parties and both adjudicatory boards.
April 16, 1982	Commission grants discretionary review of ALAB-664

As the chronology makes clear, between the time of TVA's original July 31, 1980 application and the November 3, 1981 revision, TVA's application had metamorphosized from an application to reduce, incinerate and store low-level radioactive waste during the full operational life of the plant to one which only sought approval to store the waste onsite for five years. The substantial change in the nature of the project had prompted a series of staff questions. Those questions were answered in a document submitted to the staff on October 22, 1981. Over a week later, on November 3, 1981, TVA separately submitted what it described as "an updated amendment" to its July 31, 1980 application intended to provide "an update of all new information that has been submitted since the original July 31, 1980 submittal."

The November 3, 1981 revision is a 60 page document describing the waste storage facility and the proposed method of operation which essentially replaces Enclosure 2 of the July 31, 1980 application. —/ Neither we nor the parties to the case (including counsel for the staff) were served with a copy of the November 3, 1981 submission.

Unaware of TVA's November 3 submission, and in order to facilitate our review of the case, the Secretary to the Appeal Board orally asked staff counsel, on November 23, 1981, for copies of TVA's original application, the November 17, 1980 amendment, and the environmental assessment. He forwarded these materials to us with a transmittal letter on the following day. Copies of the letter were served on all parties. That letter, however, contained no indication that any of the requested documents had been superseded in whole or in part and staff counsel now advises us that, at the time, he was unaware of the November 3, 1981 changes. He first became aware of the November 3 document during his preparation for an April 1, 1982 prehearing conference when the technical members of the NRC staff provided him with a

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1/ Enclosure 2 provided the basic description of the waste storage facility and the proposed method of its operation. The original application also contained a construction schedule (Enclosure 3) and an environmental assessment.

copy. Staff counsel states that he brought the matter promptly to the attention of TVA's counsel and was informed that service had not been made on other parties (or us) because TVA did not believe it was obliged to do so. Staff counsel disagreed with TVA's understanding of its obligations and, on March 29, 1982, promptly served the November 3 revision on all parties.

TVA's counsel confirms staff counsel's representation that TVA did not believe that the change was required to have been served:

> . . . TVA does not believe that the November 3 submittal was material to the issues before the Appeal Board, and whether or not the Appeal Board had the document, its decision should not have been affected. The document referred to did not amend TVA's July 31, 1980 application for storage of low-level radioactive waste (LLRW), as amended on November 17, 1980 which the Appeal Board had requested and received. It merely updated the application to reflect questions and responses exchanged between the NRC staff and TVA. It is a normal practice for an applicant from time to time during the course of an application to update licensing documents by incorporating in them all of the then current information and commitments generated during the course of the NRC staff's review. 2/

TVA and the staff submitted their appellate briefs to us on November 23 and 25, 1981, respectively. Neither brief noted the November 3, 1981 revision. We issued our decision on January 6, 1982.

2/ Tennessee Valley Authority's Response to Appeal Board Order (May 27, 1982), p. 2.

II. Discussion

We have no doubt that the November 3, 1981 submittal constituted a material change in TVA's application that was required to have been served on all parties and brought to our immediate attention. While we believe that staff counsel acted properly in alerting all parties to the document as soon as he became aware of it, we are nevertheless concerned that the staff's internal procedures were inadequate to alert staff counsel to the document even as he was preparing his brief to us on the pending appeal.

We reject TVA's argument that the new information did not constitute a material alteration of its earlier presentation. The original Enclosure 2 of TVA's July 31, 1980 application, which was a principal evidentiary support for that application, has been significantly modified if not entirely superseded. Three specific changes are illustrative. First, the title of the document has been changed from "Long-Term, Low-Level Radioactive Waste" to simply "Low-Level Radioactive Waste," reflecting the change in TVA's overall approach. The original July 31, 1980 application contemplated long-term life-of-the-plant low level radioactive waste storage coupled with volume reduction and incineration. While the November 17, 1980 amendment narrowed the request to store low level radioactive waste onsite for five years, the amendment was not accompanied by any revised evidentiary appendices analyzing

the more limited objectives. Rather, the analysis of the more limited objectives was provided for the first time in TVA's November 3, 1981 submittal.

Second, the justification for the facility -- the section on "Need" (section 1.3) -- has been completely revised to reflect TVA's more limited objectives of five year storage. The "Need" section in the original document indicated that the proposal was to "make TVA's operations at Browns Ferry essentially immune from outside restrictions on disposal of LLRW for the foreseeable future." The new "Need" section indicates, in contrast, that

> TVA's future use of the volume allocation at Barnwell is under continuing review. Because of uncertainty in TVA being able to obtain sufficient disposal allocations at Barnwell, our present plans are to store radioactive material onsite when our storage facility is licensed. We will evaluate continued offsite disposal during the five-year storage period, if commercial burial space remains available. . . [3/]

Third, the section on "Decommissioning" has been revised to take into account the applicant's shift from long-term to five year storage. The original section on "decommissioning" (section 7) contemplated life-of-the-plant storage with three options ultimately available:

1. Placing the storage facility in an inactive state and providing a security and monitoring force for an indefinite time.

3/ Compare Enclosure 2 to TVA's July 31, 1980 application with the Enclosure to the November 3, 1981 submittal.

2. Sealing all radioactive material inside the storage facility (utilizing a material such as concrete) in a technique known as entombment.

3. Retrieving all radioactive waste containers and transporting all of this material to another facility. The storage site can then be decontaminated as necessary, leaving the area in as close to its original state as possible. This method may also involve dismantling and removing the storage facility.

TVA expressly indicated that "[n]o specific method will be selected at this time since actual decommissioning for the storage facility will not be necessary for approximately 30 years . . . Although the exact decommissioning method will not be determined until needed, the third method above is preferred by TVA at this time." New section 7 reads, in part:

> At the end of the five-year license period for the proposed facility, TVA will have two options.
>
> 1. Seek an extension of the license from the NRC.
>
> 2. Retrieve all radioactive waste containers and ship them offsite to a disposal facility. The modules could then be decontaminated.
>
> If adequate offsite disposal space is available at the end of the five-year license period, TVA intends to pursue option 2. If offsite disposal space is not available, TVA will pursue option 1. . . . 4/

The majority's decision in ALAB-664 turned on TVA's failure to explain on the record how five year storage was to be separated from the original integrated proposal

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4/ Ibid.

including long-term storage and incineration. 15 NRC at ____ (slip opinion at pp. 12-15). It noted:

> While we do not suggest that TVA may not have altered its plans, or could not do so in the future, we believe that, before we dismiss the petitioners' contentions, TVA has some obligation to come forward with an explanation on the record of what options -- other than incineration -- it would, or could, pursue at the end of the five year period. . . .

Id. at ___ (slip opinion at pp. 13-14). Similarly, the dissenting opinion specifically relied on Enclosure 2 as part of its analysis. Id. at ____ (slip opinion at p. 31). Clearly the new document, which superseded Enclosure 2, was material to the resolution of the issues before us. Indeed, timely presentation of the new information, with appropriate opportunity for comment or rebuttal, might well have changed the outcome of the appeal.

We find TVA's assertions that the November 3, 1981, submission did not constitute an amendment and was immaterial to our consideration of the appeal disingenuous. TVA itself, in the accompanying cover letter, describes its November 3 submittal as "an updated amendment to TVA's July 31, 1980 application for the storage of low-level

radioactive waste at the Browns Ferry Nuclear Plant." 5/ Irrespective of nomenclature, however, TVA had an absolute obligation to advise us that the supporting evidentiary documentation upon which we were relying had been superseded. Staff counsel's November 24, 1981 letter to us, in response to the request of the Appeal Board's Secretary, expressly indicated that he was sending us TVA's July 31, 1980 application as amended November 17, 1980. TVA received a copy of tnat letter. It is plain that the new Enclosure is a direct replacement for that part of the July 31 application (Enclosure 2) that described the facility and its method of operation. Even if TVA considered the information immaterial (and we find it difficult to comprehend how it could be), it knew that we had expressly requested and planned to review it. In this circumstance,

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5/ As noted above, an August 10, 1981, letter to TVA from the staff had specifically requested an item-by-item response to a list of questions concerning the July 30, 1980 application, as amended November 17, 1980. The letter also alerted TVA to the separate need "to revise or amend" its application to reflect its responses. TVA's August 19, 1981 letter expressly stated that it would revise the July 31 application to reflect the new information. TVA's responses to the questions were sent to the staff under a transmittal letter dated October 22, 1981, so there can be no doubt that its separate November 3 follow-up submission was intended to revise or amend its application to bring it into conformity with its October 22 responses.

counsel for TVA had an obligation to advise us that we were about to rely on outdated, i.e., incorrect, information. 6/

III. Conclusions

Scientific technology is ever-changing. The plans of applicants and other litigants, as reflected in their submissions to the Commission, are also frequently in a state of flux. Yet the hearing process is necessarily tied to a point in time, i.e. the date on which evidence is presented for consideration. To bridge this gap, we have always insisted that significant changes be brought to the immediate attention of all decisional bodies.

The obligation to provide information to adjudicatory bodies requires that information be submitted to them directly. Parties should not assume that information made available to a component of the Commission's staff will necessarily find its way into the record and come to the

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6/ Cf. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 533 (1973). Among the issues in that case was whether a loss of coolant accident would compromise the emergency core cooling system criterion that the calculated peak cladding temperature in the event of an accident not exceed 2300°F. Our decision incorrectly observed that the peak cladding temperature in the event of an accident at the Vermont Yankee plant would be 2280°F. Applicant's counsel promptly advised us that the actual temperature in the event of an accident, as reflected in the record, would be 2298°F. Although the precise temperature level turned out to be immaterial because both met the 2300°F criterion, counsel properly alerted us to our earlier reliance on incorrect information.

attention of the decisional body. Similarly, internal staff procedures must insure that staff counsel -- who is, after all, the chief line of communication with the adjudicatory bodies -- be fully apprised of new developments. 7/

We recognize that not every change in factual circumstances is important. We nonetheless remind parties to Commission proceedings of their absolute obligation to alert adjudicatory bodies directly regarding (i) new information that is relevant and material to the matters being adjudicated; (ii) modifications and rescissions of important evidentiary submissions; and (iii) errors of the type discussed in the Vermont Yankee case, supra, note ____.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

7/ In this connection, we recently had occasion to note that both a Licensing Board and an Appeal Board were asked to rule on the admission of a contention concerning the efficacy of recombiners for hydrogen mitigation, even though the applicants had apparently decided to rely principally on a distributed igniter system. The applicants had only advised the Commission's Division of Licensing of that change. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-675, 15 NRC ___, ____ (May 17, 1982) (slip opinion at p. 20).

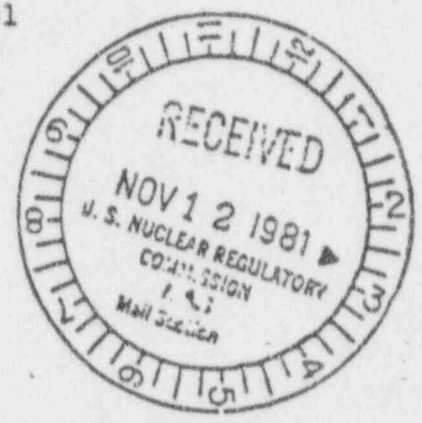
30-19102

TENNESSEE VALLEY AUTHORITY

CHATTANOOGA, TENNESSEE 37401

400 Chestnut Street Tower II

November 3, 1981



Director, Office of Nuclear Material Safety
and Safeguards
Attention: Mr. L. C. Rouse, Chief
Advanced Fuel and Spent Fuel
Licensing Branch
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Rouse:

In the Matter of the) Docket No. 30-19102
Tennessee Valley Authority)

In response to your letter to H. G. Parris dated August 10, 1981, we are submitting an updated amendment to TVA's July 31, 1980 application for the storage of low-level radioactive waste at the Browns Ferry Nuclear Plant. The amendment requests authorization for TVA to store the low-level radioactive waste generated from the operation of Browns Ferry for a period of five years. The amendment is enclosed and provides an update of all new information that has been submitted since the original July 31, 1980 submittal. We believe that this submittal includes all information requested by your August 10, 1981 letter.

If there is any additional information necessary to complete the review of TVA's low-level storage application, please let us know.

Very truly yours,

TENNESSEE VALLEY AUTHORITY

L. M. Mills, Manager
Nuclear Regulation and Safety

Subscribed and sworn to before
me this 3rd day of Nov. 1981
Paulette N. White
Notary Public

My Commission Expires 9-5-84

11/12/81
OK B. Moore

Enclosure
cc: See page 2

Director, Office of Nuclear Material
Safety and Safeguards

November 3, 1981

cc (Enclosure):
Mr. Charles R. Christopher
Chairman, Limestone County Commission
P.O. Box 188
Athens, Alabama 35611

Office of Nuclear Reactor Regulation
Attention: Mr. Darrell G. Eisenhut, Director
Division of Licensing
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. K. D. Fagan, Supervisor - Nuclear
General Electric Company
832 Georgia Avenue
Chattanooga, Tennessee 37402

Dr. Ira L. Myers
State Health Officer
State Department of Public Health
State Office Building
Montgomery, Alabama 36104

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of TENNESSEE VALLEY AUTHORITY (Browns Ferry Nuclear Plant, Unit Nos. 1, 2 and 3)	Docket Nos. 50-259, 50-260 and 50-296 (License amendment to permit onsite storage of low level radioactive waste)

CERTIFICATE OF SERVICE

*John H. Frye III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mrs. Elizabeth B. Johnson,
Administrative Judge
Oak Ridge National Laboratory
P. O. Box X, Building 3500
Oak Ridge, Tennessee 37830

Dr. Quentin J. Stober,
Administrative Judge
Fisheries Research Institute
University of Washington
Seattle, Washington 98195

Mr. Ron Rogers
Tennessee Valley Authority
400 Chestnut Street, Tower II
Chattanooga, Tennessee 37401

H. S. Sanger, Jr., Esq.
General Counsel
Tennessee Valley Authority
400 Commerce Avenue
3 11B 33C
Knoxville, Tennessee 37902

Mr. H. N. Culver
249 HBD
400 Commerce Avenue
Tennessee Valley Authority
Knoxville, Tennessee 37902

Mr. Herbert Abercrombie
Tennessee Valley Authority
P. O. Box 2000
Decatur, Alabama 35602

Mr. Charles R. Christopher
Chairman, Limestone County Commission
P. O. Box 188
Athens, Alabama 35611

. Robert F. Sullivan
5. Nuclear Regulatory Commission
O. Box 1863
catur, Alabama 35602

eroy J. Ellis, III, Esq.
ttorney for Intervenors
21 Charlotte Avenue
ashville, Tennessee 37219

Robert B. Pyle
Suite 9, Oakwood Center
4783 Highway 58 North
P. O. Box 16160
Chattanooga, TN 37416

Ira L. Myers, M.D.
State Health Officer
State Department of Public Health
State Office Building
Montgomery, Alabama 36104

Mr. John F. Cox
Tennessee Valley Authority
W9-D 207C
400 Commerce Avenue
Knoxville, Tennessee 37902

Director, Office of Urban & Federal
Affairs
108 Parkway Towers
404 James Robertson Way
Nashville, Tennessee 37219

*Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Atomic Safety and Licensing Appeal
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Secretary
U.S. Nuclear Regulatory Commission
ATTN: Chief, Docketing and Service
Branch
Washington, D.C. 20555

NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

November 24, 1981

Stephen F. Eilperin, Esq.
Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
TENNESSEE VALLEY AUTHORITY
(Browns Ferry Nuclear Plant, Unit Nos. 1, 2 and 3)
Docket Nos. 50-259, 50-260 and 50-296

NOV 25 1981

Dear Mr. Chairman:

As your secretary requested, I enclose for the Appeal Board records copies of the following documents:

1. TVA's application, dated July 31, 1980, for an amendment to the operating licenses for Browns Ferry Nuclear Plant;

2. TVA's amended application, dated November 17,1980; and

3. TVA's Environmental Assessment, dated February 28,1980, of low-level radioactive waste management for the Browns Ferry Nuclear Plant.

These documents were previously supplied to the Atomic Safety and Licensing Board by letter dated April 15, 1981 at the request of its then-chairman, Herbert Grossman.

Sincerely,

Richard J. Dawson
Counsel for NRC Staff

Enclosures as stated
cc (w/o encl.):
Service list

ATTACHMENT 2