UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

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

CLI-14-03

MEMORANDUM AND ORDER

The Tennessee Valley Authority (TVA) and the Blue Ridge Environmental Defense League (BREDL) have appealed the Atomic Safety and Licensing Board's order, LBP-13-8.[1] The Board found that BREDL established standing.[2] In addition, the Board found seven of BREDL's proposed contentions inadmissible, but held in abeyance a contention raising waste confidence matters. As a result, the Board neither granted nor denied the hearing request.[3] As discussed in more detail below, because the intervention petition has not been fully ruled upon

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[1] LBP-13-8, 78 NRC 1 (2013).

[2] *Id.* at 5.

[3] *Id.*

by the Board, LBP-13-8 is not yet ripe for appeal. We dismiss the appeals as premature and provide further guidance with respect to the pending waste confidence contention.

I. BACKGROUND

This matter involves TVA's license renewal application for two units on the Sequoyah site, located in Soddy-Daisy, Tennessee. The renewed operating licenses, if issued, would authorize TVA to operate Sequoyah Units 1 and 2 for an additional twenty years beyond the period specified in the current licenses, which expire on September 17, 2020, and September 15, 2021, respectively.[4]

Following publication of a notice of opportunity to request a hearing and petition for leave to intervene on TVA's license renewal application, BREDL filed an intervention petition and hearing request, submitting eight proposed contentions.[5] The Board concluded that BREDL demonstrated standing.[6] The Board rejected seven of BREDL's contentions and held that a portion of one, related to waste confidence, should be held in abeyance.[7]

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[4] 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, 14,362-63 (Mar. 5, 2013).

[5] *See id.*; *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) (BREDL Intervention Petition).

[6] LBP-13-8, 78 NRC at 5. The Board also found that two subsets of BREDL, Bellefonte Efficiency and Sustainability Team and Mothers Against Tennessee River Radiation, had not made sufficient showings to demonstrate standing. *Id.* BREDL did not challenge these two standing determinations. *See 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), at 1 n.1 (BREDL Petition).

[7] LBP-13-8, 78 NRC at 5. Contention B asserts that "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." *Id.* at 15 (quoting BREDL (continued . . .)

Regarding waste confidence, last year the U.S. Court of Appeals for the District of Columbia Circuit found that the NRC failed to comply with the National Environmental Policy Act in issuing its 2010 update to the Waste Confidence Decision and accompanying Temporary Storage Rule.[8] The court vacated both the Decision and the Rule and remanded the case to the agency.[9] Shortly thereafter, in the *Calvert Cliffs* decision, we responded to a series of petitions to suspend final licensing decisions in twenty-two reactor licensing proceedings.[10] Because waste confidence undergirds certain agency licensing decisions, we held that the NRC should not issue licenses affected by the Waste Confidence Decision until the remanded issues are resolved.[11] At that time, we and the licensing boards also had received several new contentions and associated filings concerning waste confidence.[12] In view of the special circumstances presented by waste confidence, we directed that those contentions—and any related contentions filed in the near term—be held in abeyance pending our further order.[13]

In the instant case, the Board reasoned that the environmental portion of BREDL's waste confidence contention "is substantially similar to the petitions" that we responded to in the

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(. . . continued)
Intervention Petition at 12). The Board rejected the safety portion of Contention B: "To the extent that Contention B asserts that *New York v. NRC* undermines or invalidates the safety portion of the [License Renewal Application] for Sequoyah, we reject it." *Id.* at 16.

[8] *New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012).

[9] *Id.*

[10] *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 63-65 (2012).

[11] *Id.* at 66-67.

[12] *Id.* at 67 & n.10.

[13] *Id.* at 68-69.

Calvert Cliffs decision.[14] Accordingly, the Board held the contention in abeyance and, as a result, neither granted nor denied BREDL's request for a hearing.[15]

II. DISCUSSION

Both TVA and BREDL now appeal the Board order pursuant to 10 C.F.R. § 2.311.[16] TVA argues that the Board should have dismissed the waste confidence contention in its entirety, and therefore, BREDL's petition to intervene and request for hearing should have been wholly denied.[17] BREDL requests that we review LBP-13-8 and grant its request for a hearing and petition to intervene.[18] The Staff opposes both petitions for review; TVA opposes BREDL's petition for review.[19]

As an initial procedural matter, TVA seeks to reply to the Staff's answer, while the Staff opposes TVA's request.[20] As TVA acknowledges, section 2.311 does not provide for the filing

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[14] LBP-13-8, 78 NRC at 16 (citing *Calvert Cliffs*, CLI-12-16, 76 NRC at 63).

[15] *Id.* at 5, 16.

[16] *Tennessee Valley Authority's Notice of Appeal of LBP-13-08* (July 30, 2013); BREDL Petition.

[17] *Tennessee Valley Authority's Brief in Support of Appeal of LBP-13-08* (July 30, 2013), at 1 (TVA Brief).

[18] BREDL Petition at 1.

[19] *NRC Staff Brief in Opposition to Tennessee Valley Authority Petition for Review of LBP-13-08* (Aug. 26, 2013) (Staff Answer to TVA Appeal); *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* (Aug. 26, 2013); *Tennessee Valley Authority's Brief in Opposition to BREDL's Appeal of LBP-13-08* (Aug. 26, 2013).

[20] *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* (Sept. 5, 2013) (TVA Motion to Reply); *Tennessee Valley Authority's Reply Brief on Appeal of LBP-13-08* (Sept. 5, 2013); *NRC Staff's Answer to TVA's Motion for Leave to Reply* (Sept. 16, 2013) (Staff Answer to TVA Motion to Reply).

of replies.[21] The Staff contends that TVA should have anticipated its arguments that (1) LBP-13-8 is not appealable under 10 C.F.R. § 2.311 and (2) because TVA did not raise the issue before the Board, TVA is foreclosed on appeal from arguing that *Calvert Cliffs* does not apply here because that decision only applies to contentions then pending or filed soon after its issuance one year ago.[22] For its part, TVA argues that it should be allowed to file a reply due to compelling circumstances, including the unusual posture of this case and the unforeseeability of the Staff's arguments.[23]

"We permit filings not otherwise authorized by our rules only where 'necessity or fairness dictates.'"[24] We are not persuaded that TVA could not reasonably have anticipated the arguments contained in the Staff's brief opposing TVA's appeal. TVA filed its appeal under section 2.311. As an experienced litigant in our proceedings, TVA should reasonably have anticipated that the Staff might challenge its interpretation of section 2.311 in the first instance, particularly given recent Commission case law (discussed *infra*) clarifying the appealability of Board decisions that only partially disposition a hearing request. More critically, however, the

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[21] TVA Motion to Reply at 1; *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents*, CLI-13-2, 77 NRC 39, 44 n.20 (2013); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 360 n.36 (2012).

[22] Staff Answer to TVA Appeal at 14-15.

[23] TVA Motion to Reply at 1-2.

[24] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 807 (2011) (citing *U.S. Department of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677 (2008)).

record reflects that TVA was aware of the potential applicability of *Calvert Cliffs* to this matter.[25] Because this very issue was raised earlier in this proceeding, TVA cannot claim surprise at the Staff's argument that it is precluded from raising the inapplicability of *Calvert Cliffs* for the first time on appeal.[26] TVA has not shown that it could not have addressed these issues in its appeal, nor has it presented genuinely new information in its reply; therefore, neither necessity nor fairness dictates that its reply should be permitted.[27] Moreover, we find that the arguments raised in TVA's reply are not necessary for our decision in this case. We therefore deny TVA's Motion to Reply.[28]

With respect to the appeals of the Board order, Section 2.311 of our rules of practice permits an appeal as of right from a board's ruling on an intervention petition in two limited circumstances: (1) upon the denial of a petition to intervene and/or request for hearing, on the question as to whether it should have been granted; or (2) upon the granting of a petition to

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[25] *See* Transcript (Scheduling Teleconference) (Aug. 8, 2013), at 46-47 (Judge Karlin's exchange with TVA counsel on the potential applicability of *Calvert Cliffs*).
[26] *See* Staff Answer to TVA Motion to Reply at 7 (citing Tr. at 46-47).

[27] *See Pilgrim*, CLI-12-6, 75 NRC at 374 n.138. For the same reasons, even if TVA's reply were considered under our motions rule that it cites, 10 C.F.R. § 2.323(c), it would not satisfy the "compelling circumstances" standard.

[28] BREDL replied to TVA's answer. *Reply of the Blue Ridge Environmental Defense League* (Sept. 5, 2013). TVA does not oppose BREDL's reply, but that reply likewise is not contemplated by our rules. BREDL does not address why its reply is proper, but even had BREDL done so, it would not have satisfied our standard. BREDL's reply does not raise new information or arguments that it could not have made when it filed its petition for review, and, as the reply relates to the merits of its appeal, which we do not reach today, it does not provide information necessary for our decision. As such, we likewise reject BREDL's reply.

We also note that BREDL did not submit its reply via the agency's E-filing system, as required by 10 C.F.R. § 2.302, nor did it seek an exemption from that rule. We remind adjudicatory participants that electronic filing is required unless we grant an exemption permitting an alternative filing method for good cause shown, or unless the filing falls within the scope of the exception identified in 10 C.F.R. § 2.302(g)(1).

intervene and/or request for hearing, on the question as to whether it should have been wholly denied.[29] This limited interlocutory appeal right attaches only when the Board has fully ruled on the initial intervention petition—that is, when it has admitted or rejected all proposed contentions. In *South Texas* and *Catawba*, we addressed circumstances similar to those here—where a Board has ruled only partially on an initial intervention petition.[30] These cases demonstrate that a Board must rule on all pending contentions before an appeal may be lodged pursuant to section 2.311(c) or (d)(1).[31] Consistent with these cases, because the Board explicitly neither granted nor denied BREDL's hearing request and neither admitted nor denied BREDL's waste confidence contention, neither TVA's nor BREDL's appeal is yet ripe.[32] We

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[29] *See* 10 C.F.R. § 2.311(c), (d)(1). An appeal of an order selecting a hearing procedure also is governed by section 2.311, "on the question as to whether the selection of the particular hearing procedures was in clear contravention of the criteria set forth in § 2.310." 10 C.F.R. § 2.311(e). That provision is not at issue here.

[30] *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-09-18, 70 NRC 859 (2009); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203 (2004)). In these cases, the Boards found that the petitioners had standing and had submitted at least one admissible contention but did not rule on all of the outstanding contentions. *South Texas Project*, CLI-09-18, 70 NRC at 860; *Catawba*, CLI-04-11, 59 NRC at 205-207.

[31] *South Texas Project*, CLI-09-18, 70 NRC at 862; *Catawba*, CLI-04-11, 59 NRC at 208 ("[F]or a hearing petitioner to take an appeal pursuant to section 2.714a(b) [now section 2.311(c)], the petitioner must claim that, after considering all pending contentions, the Board has erroneously denied a hearing. And for a license applicant . . . to take an appeal under the counterpart regulation, section 2.714a(c) [now section 2.311(d)(1)], the applicant must contend that, after considering all pending contentions, the Board has erroneously granted a hearing to the petitioner."); *see* Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2218 (Jan. 14, 2004) (Table 2 - Cross-References Between Old Provisions of Subpart G and New Subpart C); *see also Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 11 (2007) (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-04-31, 60 NRC 461, 468 (2004); *Catawba*, CLI-04-11, 59 NRC at 208).

[32] *See* LBP-13-8, 78 NRC at 5.

therefore dismiss those appeals without prejudice. Once the Board has finally dispositioned BREDL's intervention petition, TVA and BREDL may re-submit their appeals, as appropriate, consistent with the applicable rules.[33]

We do, however, take this opportunity to provide additional guidance on the question of the pending waste confidence contention—after all, it was our direction in *Calvert Cliffs* that led the Board to rule only partially on BREDL's intervention petition. We issued *Calvert Cliffs* shortly after the court vacated our 2010 Waste Confidence Decision and Temporary Storage Rule.[34] TVA correctly observes that, at that time, we had not set a course of action in response to the remand. Consistent with our direction in *Calvert Cliffs* to hold contentions related to waste confidence in abeyance, the Board correctly held the environmental portion of Contention B in abeyance.

Since the issuance of that decision, we have directed the Staff to proceed with development of a generic environmental impact statement and complete a final rule and environmental impact statement by Fall 2014.[35] We will provide further direction regarding

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[33] We observe that, in its decision, the Board did note that its order was "subject to appeal in accordance with the provisions of 10 C.F.R. § 2.311." *Id.* at 35. The Board's reference serves as a useful convenience to the participants, in that it advises them of the potentially applicable appeal provision. But the Board's reference does not guarantee an immediate automatic appeal; the rule's requirements still must be satisfied.

[34] *See Calvert Cliffs*, CLI-12-16, 76 NRC at 66.

[35] *See* Staff Requirements—COMSECY-12-0016—Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule (Sept. 6, 2012) (ADAMS accession number ML12250A032). We have since approved publication of a proposed rule and a draft Generic Environmental Impact Statement. *See* Staff Requirements—SECY-13-0061—Proposed Rule: Waste Confidence—Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20) (Aug. 5, 2013) (ML13217A358); Waste Confidence—Continued Storage of Spent Nuclear Fuel, 78 Fed. Reg. 56,776 (Sept. 13, 2013); Draft Waste Confidence Generic Environmental Impact Statement, 78 Fed. Reg. 56,621 (Sept. 13, 2013).

pending waste confidence contentions concurrent with issuance of the final rule. Thereafter, following the issuance of the Board's final dispositive decision in this matter, and consistent with our procedural rules, TVA and BREDL will have the opportunity to appeal the Board's decisions.[36] In the meantime, the direction we provided in *Calvert Cliffs* remains in place.

III. CONCLUSION

For the reasons set forth above, we *dismiss* both TVA's appeal and BREDL's petition for interlocutory review, without prejudice to their ability to appeal the Board's rulings following the issuance of the Board's final dispositive decision in this matter.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of February, 2014.

[36] *See South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-10-16, 71 NRC 486, 491 (2010) (citing 10 C.F.R. § 2.341(a), (b); *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 365 & n.180 (2009)).