

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

|   |   |                                      |
|---|---|--------------------------------------|
| In the Matter of                          | ) |                                      |
|   | ) | Docket Nos. 50-390-CivP; 50-327-CivP |
| TENNESSEE VALLEY AUTHORITY                | ) | 50-328-CivP; 50-259-CivP             |
| (Watts Bar Nuclear Plant, Unit 1          | ) | 50-260-CivP; 50-296-CivP             |
| Sequoyah Nuclear Plant, Units 1 & 2       | ) |                                      |
| Browns Ferry Nuclear Plant, Units 1,2 &3) | ) |                                      |
|   | ) | ASLBP No. 01-791-01-CivP             |
|   | ) |                                      |
|   | ) | EA 99-234                            |

NRC STAFF OBJECTION TO TENNESSEE VALLEY AUTHORITY'S  
MOTION FOR LEAVE TO REPLY IN SUPPORT OF MOTION FOR SUMMARY DECISION

On March 1, 2002, the Tennessee Valley Authority (TVA) filed a motion for leave to reply to the Nuclear Regulatory Commission (NRC) Staff response to TVA's motion for summary decision. The Staff objects to TVA's motion and respectfully requests that the Atomic Safety and Licensing Board (Board) deny the motion and reject without consideration TVA's "Reply in Support of Tennessee Valley Authority's Motion for Summary Decision."

NRC regulations regarding motions for summary decision are clear -- once the motion and the supporting brief have been filed, and the opposing party has had the opportunity to respond, "[n]o further supporting statements or responses thereto may be entertained." 10 C.F.R. § 2.749(a). By filing this motion, TVA is attempting to circumvent the specific prohibition against filing additional statements in support of a motion for summary decision. Summary disposition is intended to expedite the hearing process, whereas TVA's motion for leave to reply to the Staff's response to its motion for summary decision will only cause further delays in this proceeding. Therefore, the Staff requests that the Board deny TVA's motion for leave to reply to the NRC Staff's response brief and refuse all consideration of the brief attached to TVA's motion.

Should the Board decide to grant TVA's motion, the Staff respectfully requests that the Board deny TVA's motion for summary judgment on procedural grounds. TVA has again failed to follow proper procedures as set forth in 10 C.F.R. § 2.749. The regulation specifically requires the moving party to "annex to the motion a *separate*, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be heard." 10 C.F.R. § 2.749(a) (emphasis added). The regulation does not permit a party to decide to include the statement of allegedly undisputed facts interwoven within its motion, but requires a separate pleading.

Where a movant for summary decision fails to include the required separate statement of disputed material facts, or where the statement of disputed material facts is inadequate, the Board may dismiss the motion as procedurally defective, or alternatively, can decline to give the statement full consideration. *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor, Full-Term Operating License and Show Cause), LBP-82-58, 16 NRC 512 (1982). Although the Board declined to dismiss as procedurally defective the Staff's motion for summary decision in that case, the Board noted that, upon filing an amended motion for summary decision, the Staff did attempt to comply with this requirement. Despite being notified by the NRC Staff Response that its motion for summary decision was procedurally defective, TVA has made no attempt to rectify this defect with its motion for leave to reply. Therefore, the Staff requests that the Board deny TVA's motion for summary decision for failure to follow proper procedures as set forth in 10 C.F.R. § 2.749.

To the extent that the Board grants TVA's motion for leave to file a reply in support of its motion for summary decision, this reply merely highlights that this proceeding is rife with issues of disputed material fact. TVA's introduction of evidence in its reply brief, evidence which it failed to cite in its original brief in support of its motion for summary decision, that it claims contradicts the statements of fact in the Staff's response brief, does not entitle TVA to summary decision in its favor. Instead, the late introduction of this evidence merely demonstrates that the parties have a

genuine conflict with regard to the material issues in dispute in this case. The fact that TVA disagrees with the Staff's statement of the facts does not make those facts undisputed -- it clearly indicates that TVA's motion for summary decision should be denied.

#### CONCLUSION

The Staff requests that the Board deny TVA's motion for leave to file a reply in support of its motion for summary decision and reject all consideration of the reply brief on the ground that the reply is procedurally barred by 10 C.F.R. § 2.749(a). The Staff also requests that the Board deny TVA's motion for summary decision for its continued failure to annex a separate statement of undisputed material facts to its motions for summary decision as required by 10 C.F.R. § 2.749(a). Finally, if the Board decides to consider TVA's reply brief, the Staff requests that the Board deny TVA's motion for summary judgment on the ground that its motion for summary decision and the reply brief, taken together, confirm that TVA has failed to demonstrate that there are no issues of material disputed fact in this case.

Respectfully submitted,

**/RA/**

Jennifer M. Euchner  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 4th day of March, 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OBJECTION TO TENNESSEE VALLEY AUTHORITY'S MOTION FOR LEAVE TO REPLY IN SUPPORT OF MOTION FOR SUMMARY DECISION" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (\*), or by electronic mail as indicated by a double asterisk (\*\*) on this 4th day of March, 2002.

Administrative Judge \*\*  
Charles Bechhoefer, Chairman  
U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
Washington, D.C. 20555

Administrative Judge \*\*  
Ann Marshall Young  
U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
Washington, D.C. 20555

Thomas F. Fine \*\*  
Brent R. Marquand \*\*  
John E. Slater \*\*  
Barbara S. Maxwell \*\*  
Tennessee Valley Authority  
400 West Summit Hill Drive  
Knoxville, Tennessee 37901-1401

Administrative Judge \*\*  
Richard F. Cole  
U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
Washington, D.C. 20555

Office of the Secretary \*  
ATTN: Rulemaking and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, D.C. 20555

Office of Commission Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, D.C. 20555

David Repka  
Winston & Strawn  
1400 L Street, N.W.  
Washington, D.C. 20005

**/RA/**

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Jennifer M. Euchner  
Counsel for NRC Staff