

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

DOCKETED
USNRC

December 8, 2003 (8:00AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

IN THE MATTER OF)	Docket Nos. 50-390-CivP;
)	50-327-CivP; 50-328-CivP;
TENNESSEE VALLEY AUTHORITY)	50-259-CivP; 50-260-CivP;
)	50-296-CivP
)	
(Watts Bar Nuclear Plant, Unit 1;)	
Sequoyah Nuclear Plant, Units 1 &)	
2; Browns Ferry Nuclear Plant,)	EA 99-234
Units 1, 2 & 3))	

TENNESSEE VALLEY AUTHORITY'S
MOTION TO STRIKE

Pursuant to 10 C.F.R. § 2.730 (2003), the Tennessee Valley Authority (TVA) moves for the entry of an order striking Parts I and II of the Staff's November 21, 2003, Reply brief on the issue of mitigation. As grounds for its motion TVA would show that in the August 28, 2003, Memorandum and Order, CLI-03-09, the Commission authorized the Staff to file an initial brief followed by a reply brief on the mitigation issue which it had raised – "the standards by which a Licensing Board should mitigate a civil penalty in a discrimination case" (CLI-03-09 at 4). Because the Staff's arguments in Parts I and II as to the limitation of the Board's authority to exercise discretion in mitigating a civil penalty were not raised in the Staff's main brief, the Staff should be foreclosed from raising such arguments now.

In Part I of its Reply brief the Staff argues that Section III of the Commission's Enforcement Policy implicitly denies the Board the authority to exercise the discretion that it exercised pursuant to Sections IV, VI, and VII of the Enforcement Policy and 10 C.F.R. § 2.205(f) (2003). That argument which purports to limit the Board's authority to exercise discretion to mitigate the civil penalty is advanced by the Staff for the first time in its Reply brief. In Part II of its Reply brief the Staff argues that

Section VII.B.5. of the Enforcement Policy precludes the Board's exercise of discretion under Section VI.B.2 and VII.B.6. That argument is also advanced by the Staff for the first time in its Reply brief.

In TVA's view, the Staff's initial brief should have raised any arguments it wished to make regarding limitations on the Board's authority. Instead, the Staff has once again taken a new position in the home stretch of this proceeding. Since neither argument was raised in the Staff's main brief, it should be precluded from raising such arguments in its Reply brief. *Knighten v. Comm'r*, 702 F.2d 59, 60 n.1 (5th Cir.), *cert. denied*, 464 U.S. 897 (1983) ("It is impermissible to mention an issue for the first time in a reply brief, because the appellee then has no opportunity to respond."); *United States v. Perkins*, 994 F.2d 1184, 1191 (6th Cir. 1993), *cert denied*, 510 U.S. 903 (1993) ("Issues raised for the first time in a reply brief are not properly before this court."). The Commission has already noted that the Staff's practice of "not responding to [the] arguments raised" by TVA, but instead "waiting to present" a different issue, "effectively deprive[s] TVA of its right under our regulations to respond" (CL1-03-09 at 5-6). The Commission should not condone such practice by the Staff.

For the foregoing reasons the Commission should grant TVA's motion and strike Parts I and II of the Staff's Reply brief on the issue of mitigation.

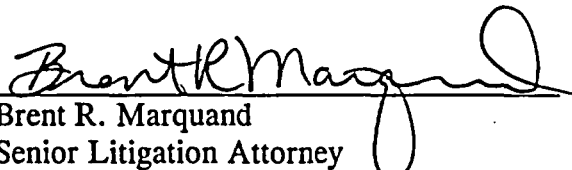
Respectfully submitted,

December 4, 2003

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I hereby certify that the foregoing document has been served by overnight messenger on the persons listed below. Copies of the document have also been sent by e-mail to those persons listed below with e-mail addresses.

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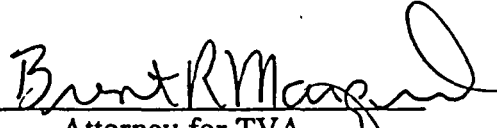
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This 4th day of December, 2003.



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