UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB,
Plaintiff,

v. No. 1:12-cv-1852-ABJ

TENNESSEE VALLEY AUTHORITY,
Defendant.

TENNESSEE VALLEY AUTHORITY'S MOTION FOR LEAVE TO FILE SURREPLY

Defendant Tennessee Valley Authority (TVA) respectfully moves the Court to enter an order allowing TVA to file the attached proposed Surreply.

In support of this motion, TVA would show:

1. This Court's rule on "Temporary Restraining Orders and Preliminary Injunctions" provides:

> An application for a preliminary injunction shall be made in a document separate from the complaint. The application shall be supported by all affidavits on which the plaintiff intends to rely. The opposition shall be served and filed within seven days after service of the application for preliminary injunction, and shall be accompanied by all affidavits on which the defendant intends to rely. Supplemental affidavits either to the application or the opposition may be filed only with permission of the court.

LCvR 65.1(c).

2. On November 15, 2012, Sierra Club filed its Complaint (Doc. 1) and Emergency Motion for Preliminary Injunction (Doc. 3) with a supporting memorandum and affidavits. (Docs. 3-1, 3-3.) On November 23, 2012, TVA filed its Response to Sierra Club's Motion (Doc. 9) and supporting affidavits. (Docs. 10, 11, 12.) Pursuant to Local Civil Rule 65.1, leave of the Court should have been sought before either party filed supplemental materials in support of or in opposition to the Emergency Motion for Preliminary Injunction.

3. On November 27, 2012, Sierra Club filed a Reply Memorandum in Support of its Motion for a Preliminary Injunction. (Doc. 14.) Sierra Club did not seek leave of Court before doing so.

4. TVA respectfully requests leave to file the attached proposed Surreply to respond, *very briefly*, to arguments made in Sierra Club's Reply Memorandum as to three legal issues central to its Motion and TVA's Response: (1) this Court's lack of personal jurisdiction over TVA; (2) appropriate venue for this action; and (3) the applicable time for TVA to respond to Sierra Club's requests for information under FOIA.

Respectfully submitted,

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s/Maria V. Gillen
Attorney for Tennessee Valley Authority

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TENNESSEE VALLEY AUTHORITY,
Defendant.

TENNESSEE VALLEY AUTHORITY'S SURREPLY IN OPPOSITION TO SIERRA CLUB'S MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR EXPEDITED HEARING

This Freedom of Information Act (FOIA) action is before the Court on Sierra Club's Emergency Motion for Preliminary Injunction and Request for Expedited Hearing. (Doc. 3.) Sierra Club's Motion should be denied for the reasons stated in TVA's Memorandum in Opposition. (Doc. 9.) The arguments that Sierra Club asserts in its Reply memorandum do not change this result. (Doc. 14.)

1. This Court Lacks Personal Jurisdiction Over TVA. Sierra Club is wrong that the reasoning of *East Tennessee Research Corp. v. TVA*, 416 F. Supp. 988 (D.D.C. 1976), *orders vacated and case dismissed*, 424 F. Supp. 1329 (D.D.C. 1976), and *Murphy v. TVA*, 559 F. Supp. 58 (D.D.C. 1983), is persuasive. Instead, the Court should decline to follow these cases because they conflate the independent requirements of subject-matter jurisdiction, personal jurisdiction, and venue. *See* 14D Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3801 (3d ed. 2007) (noting that venue and subject matter jurisdiction are "quite different," that personal jurisdiction is often confused with the separate concept of venue, and that the possibility for confusion is often exacerbated by federal venue statutes that use language that is more appropriate for subject matter jurisdiction).

East Tennessee improperly conflated these principles in stating:

> [5 U.S.C.] § 552(a)(4)(B) gives plaintiffs in FOIA suits against the TVA the right to sue in this District Court. This necessarily implies that the TVA is amenable to extraterritorial service of process by this Court.

416 F. Supp. at 990. *Murphy* again confused these principles in holding that "[i]t follows that where there is venue, there must be personal jurisdiction." 559 F. Supp. at 59.

The *Murphy* and *East Tennessee* holdings are contrary to Supreme Court precedent established by *Robertson v. Railroad Labor Board*, 268 U.S. 619 (1925).[1] There, the Court addressed the Transportation Act of 1920 which authorized the Railroad Labor Board to subpoena any witness "'from any place in the United States.'" *Id*. at 620 (quoting statute). The Act further provided that, "[i]n case of failure to comply with any subpoena . . . the Board may invoke the aid of any United States District Court." *Id*. When an Ohio citizen refused to comply with an Illinois subpoena, the Board sought aid from the United States District Court for the Northern District of Illinois, which granted the Board's request. *Id*. at 621. The Supreme Court reversed, holding that, although the Act clearly provided for venue, personal jurisdiction was lacking. *Id.* at 623-24. The Court found that it is "obvious that proper venue does not eliminate the requisite of personal jurisdiction over the defendant." *Id.* at 623.

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[1] The procedural histories of *Murphy* and *East Tennessee* also cast doubt upon their persuasive value because TVA lacked the opportunity to seek appellate review in each case. In *East Tennessee*, TVA sought permission for an immediate appeal of the Court's jurisdictional ruling under 28 U.S.C. § 1292(b). Plaintiff moved for a voluntary dismissal without responding to the section 1292(b) motion. TVA opposed dismissal on the grounds that this dismissal would deny TVA its right to appeal the earlier order. The Court then vacated the earlier order and dismissed the case. *East Tennessee*, 424 F. Supp. 1326. In *Murphy*, TVA's petition for interlocutory appeal under 28 U.S.C. § 1292(b) was denied; however, the Court granted TVA's motion for summary judgment on the merits of the case. The jurisdictional issue was mooted when the *Murphy* Plaintiff did not appeal.

Jones v. NRC, 654 F. Supp. 130 (D.D.C. 1987), recognized this controlling principle, and held that Congress's creation of *subject matter jurisdiction* in this Court over FOIA cases and designation of this District as an appropriate *venue* for FOIA cases does not automatically create *personal jurisdiction* over a defendant. *Id.* at 132. The Court stated:

> Subject matter jurisdiction, venue, personal jurisdiction and service of process are related but independent concepts, and all four requirements must be satisfied in every case. It is well-settled both that a federal court may not enter a valid judgment without jurisdiction over the defendant's person and that the presence of venue does not dispense with the necessity for service in order to acquire personal jurisdiction. It follows, therefore, that [the FOIA statute], which establishes venue for FOIA actions in this district, does not by itself give this court personal jurisdiction over TVA.

Id. (citations omitted) (internal quotation marks omitted). The Court went on to hold that this general principle applies with greater force as to TVA, because the federal venue statute conferring nationwide service of process on federal agencies, 28 U.S.C. § 1391(e), is inapplicable to TVA. *Id.* at 131 (citing *Envtl. Def. Fund v. TVA*, No. 71-1615 (D.D.C. Oct. 13, 1971) and various Congressional statements that venue and service of process are restricted as to TVA). *See also Natural Res. Def. Council, Inc. v. TVA*, 459 F. 2d 255, 259 (2d Cir. 1972) (Friendly, C.J.) (holding that 28 U.S.C. § 1391(e) does not apply to TVA). *Jones* was well-reasoned and correctly decided. This Court should follow it and find that it lacks personal jurisdiction over TVA.

2. Venue is Proper in the Northern District of Alabama or the Eastern District of Tennessee. Sierra Club suggests that the Court "send this case to the Middle District of Tennessee, where Gallatin is located." (Doc. 14, Pl.'s Reply Br. at 24.) Under 28 U.S.C. § 1404(a) (2006), this Court may, "[f]or the convenience of parties and witnesses, in the interest of justice . . . transfer any civil action to any other district or division *where it might have been brought* or to any district or division to which all parties have consented." (Emphasis added.)

The venue provision pertaining to actions against agencies of the United States does not apply to TVA. *See Natural Res. Def. Council, Inc. v. TVA*, 459 F.2d at 259 (28 U.S.C. § 1391(e) inapplicable because "TVA operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington"); *accord Oxair, Ltd. v. TVA*, No. 98-cv-0478E(H), 1999 WL 66692, at *2 (W.D.N.Y. Jan. 25, 1999), *adhered to on reconsideration*, No. 98-cv-0478E(H), 1999 WL 409491 (W.D.N.Y. June 8, 1999); *Jones v. NRC*, 654 F. Supp. at 131 (citing *Natural Res. Def. Council, Inc., v. TVA* and *Envtl. Def. Fund v. TVA*, No. 71-1615 (D.D.C. Oct. 13, 1971)). Thus, the general venue provision of § 1391(b) applies to this case against TVA. Subsection (b) provides that an action can be brought where: (1) any defendant resides, (2) a substantial part of the events giving rise to the claims in the complaint occurred, or (3) if neither of the above subsections applies, where any defendant is subject to the court's personal jurisdiction with respect to the action. 28 U.S.C. § 1391(b) (2006).

The TVA Act makes explicit that, for purposes of federal venue statutes, TVA is a resident of the Northern District of Alabama. 16 U.S.C. § 831g(a) (2006) ("[TVA] shall be held to be an inhabitant and resident of the northern judicial district of Alabama within the meaning of the laws of the United States relating to the venue of civil suits."). Thus, under 28 U.S.C. § 1391(b)(1), this case might have been brought in the Northern District of Alabama. This case also might have originally been brought in the Eastern District of Tennessee pursuant to 28 U.S.C. § 1391(b)(2). Sierra Club has made clear in its Complaint and in its Reply that the events giving rise to its claims concern the request for documents pursuant to FOIA that pertain to a proposed action under the National Environmental Policy Act (NEPA). TVA's FOIA

officer works in Knoxville, Tennessee, and the documents that Sierra Club requests under FOIA – those related to the Environmental Assessment of installing pollution controls at the Gallatin Fossil Plant – are located in either Knoxville, Tennessee, where TVA's NEPA staff works, or in Chattanooga, Tennessee, where TVA's environmental compliance staff works. (See Doc. 12, Black Decl.)[2] Both Knoxville and Chattanooga are in the Eastern District of Tennessee. Although the Gallatin Plant is located outside of Nashville in the Middle District of Tennessee, none of the FOIA (or implied NEPA) claims in Sierra Club's Complaint concerns documents that are generated or reside at Gallatin. And, because the installation of pollution controls of which Sierra Club complains is only a proposed action, there can be no argument that any "events" such as the installation of pollution controls at the plant have occurred.

Accordingly, under 28 U.S.C. §§ 1404(a) and 1391(b), this Court may transfer venue of this action to only two district courts: the Northern District of Alabama or the Eastern District of Tennessee.[3]

3. The Appropriate Response Time for Sierra Club's FOIA Requests. With respect to its FOIA claims, Sierra Club skews the facts. Sierra Club is correct that it requested twenty-one broad categories of documents concerning Gallatin in April 2012. (Doc. 10-2, Smith Decl. Attach. 2, the Gallatin FOIA request.) Due to the sheer volume of this request, TVA put it on "Track Three" and Sierra Club did not object to TVA's determination. (Doc. 10, Smith Decl. at ¶ 7.c.) This slower track is allowed by the FOIA statute itself, and is embodied in TVA's FOIA regulations. 5 U.S.C. § 552(a)(6)(D) (2006); 18 C.F.R. § 1301.5(b) (3). TVA's

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[2] The cover of the EA itself directs the public to send their comments to TVA's NEPA Interface Specialist in Chattanooga. *See* Gallatin Fossil Plant — Installation of Air Pollution Control Equipment, *available at* www.tva.gov/environment/reports/gallatin_APCE/index.htm.

[3] 28 U.S.C. § 1391(b)(3) does not apply because either subsection (b)(1) or (b)(2) apply.

regulations further plainly provide for 20-day processing only for requests placed on Track 1, and state that requests on Track 3 "will take the longest to process." 18 C.F.R. §§ 1301.5(b)(1), 1301.5(b)(3) (2012). Because the multi-tracking system explicitly allows for a slower response time on voluminous FOIA requests, it cannot, as Sierra Club claims, logically require TVA to produce the documents within 20 days.

More importantly, TVA gave priority to certain of Sierra Club requests other than the Gallatin request, at Sierra Club's own insistence. (Doc. 10, Smith Decl. at ¶ 7.f.) Sierra Club did not ask TVA to expedite the Gallatin request until October 23, 2012. (*Id.* at ¶ 7.h.) Even when Sierra Club requested expedited processing for the first time on October 23, it asked TVA to expedite *both* the IRP and the Gallatin Requests, in no particular order. Honoring the Sierra Club's requests, TVA produced the IRP documents first, on November 5, 2012. (*Id.* at ¶ 7.j.) TVA is now working to respond to Sierra Club's Gallatin request as soon as practicable. In short, the record demonstrates that TVA has exercised due diligence in responding to Sierra Club's ever-changing FOIA requests.

Indeed, Sierra Club's alleged predicament is self-made, and directly results from its frequent changes of position on its multiple pending FOIA requests, both at the agency level and before this Court. For example:

- On June 12, 2012, Sierra Club requested that TVA give priority to its request for IRP documents above all other pending FOIA requests, including the Gallatin request. Sierra Club further indicated its willingness to "defer[]" or "delay[]" its other requests, including the Gallatin request, if TVA would respond to the IRP request. (Doc. 10, Smith Decl. ¶ 7.f, and Doc. 10-10, Smith Decl. Attach. 10.)

- On October 23, 2012, Sierra Club asked TVA to expedite both the IRP and Gallatin requests, in no particular order. (Doc. 10, Smith Decl. ¶ 7.h and Doc. 10-12, Smith Decl. Attach. 12.)
- On November 15, 2012, Sierra Club filed this action, seeking an order "compelling TVA to provide documents in response to Sierra Club's outstanding FOIA requests." (Doc. 1, Compl. at ¶ 13.)
- On November 27, 2012, Sierra Club represented to this Court that "it is seeking injunctive relief to compel a full response only to those portions of its FOIA requests bearing on Gallatin." (Doc. 14, Pl.'s Reply Br. at 16.)

Sierra Club should not be allowed to use its frequently-changing requests for priority to impede TVA's timely consideration of emission controls and associated projects at the Gallatin plant, which are in the public interest and comply with the Consent Decree to which Sierra Club is a party. The Court should deny Sierra Club's Motion.

CONCLUSION

For the reasons stated above and in TVA's initial Memorandum in Response to Sierra Club's Emergency Motion for Preliminary Injunction and Request for Expedited Hearing, this Court should deny Sierra Club's motion for a preliminary injunction for lack of personal jurisdiction and because Sierra Club has not shown entitlement to such relief.

Respectfully submitted,

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