

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

_____)	
In the Matter of)	Docket Nos.
)	50-247-LR
Entergy Nuclear Operations, Inc.)	and 50-286-LR
(Indian Point Nuclear Generating)	
Units 2 and 3))	March 16, 2012
_____)	

**RIVERKEEPER, INC. AND HUDSON RIVER SLOOP CLEARWATER,
INC.’S REQUEST FOR LEAVE TO FILE MOTION FOR RECONSIDERATION
AND/OR CLARIFICATION OF THE ASLB’S RULING ON ENTERGY’S
MOTION IN LIMINE TO EXCLUDE PORTIONS OF PRE-FILED
TESTIMONY AND EXHIBITS FOR CONTENTION RK-EC-3/CW-EC-1**

Pursuant to 10 C.F.R. §2.323(e), Riverkeeper Inc. (“Riverkeeper”) and Hudson River Sloop Clearwater, Inc. (“Clearwater”) (collectively “Intervenors”) hereby seek leave of the Atomic Safety and Licensing Board (“ASLB”) to file a motion for reconsideration and/or clarification of its Order (Granting in Part and Denying in Part Applicant’s Motions in Limine), dated March 6, 2012, to the extent that the ASLB excluded certain testimony and exhibits proffered by Intervenors. As shown in the attached motion, there was a clear and material error in the ASLB’s determination to strike certain portions of Intervenors’ testimony and exhibits, which renders the ASLB’s decision invalid. The compelling circumstances described in the accompanying motion demonstrate that reconsideration is appropriate and necessary.

Accordingly, Intervenors respectfully submit that reconsideration and/or clarification is warranted to avoid manifest injustice, and that the entirety of Intervenors’ proffered testimony and exhibits pertaining to RK-EC-3/CW-EC-1 be admitted in this proceeding.

Respectfully submitted,

Signed (electronically) by Deborah Brancato

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RULING ON ENTERGY'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF PRE-
FILED TESTIMONY AND EXHIBITS FOR CONTENTION RK-EC-3/CW-EC-1**

In accordance with 10 C.F.R. §2.323(e), Riverkeeper Inc. (“Riverkeeper”) and Hudson River Sloop Clearwater, Inc. (“Clearwater”) (collectively “Intervenors”) hereby submit this Motion for Reconsideration and/or Clarification of the Atomic Safety and Licensing Board’s (“ASLB”) Ruling on Entergy’s Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention RK-EC-3/CW-EC-1.¹

I. INTRODUCTION

On January 30, 2012, Entergy, Nuclear Operations Inc. (“Entergy”) filed a Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks) (hereinafter “Entergy’s Motion in Limine”). On February 9, 2012, the Nuclear Regulatory Commission (“NRC”) Staff filed a Response in Support of Entergy’s Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks) (hereinafter “NRC Staff’s Response”). On February 17, 2012, Intervenors filed a combined response in opposition to Entergy’s Motion in Limine and NRC Staff’s Response.²

Thereafter, the ASLB denied in part and granted in part Entergy’s Motion in Limine.³ In particular, the ASLB granted Entergy’s Motion in Limine with respect to “specific statements made by Mr. Gundersen in RIV000060 that discuss leaks, spills, and releases from non-SFP [spent fuel pool] SSCs [systems, structures, and components], and challenge the adequacy of the AMPs for the aforementioned non-SFP SSCs at Indian Point,” and in relation to two proffered exhibits (RIV000079 and RIV000089) which discuss these topics.⁴

¹ In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Order (Granting in Part and Denying in Part Applicant’s Motions in Limine), March 6, 2012, at 31 (hereinafter “ASLB March 6, 2012 Order”).

² Riverkeeper Inc. and Hudson River Sloop Clearwater, Inc. Opposition to Entergy’s Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention RK-EC-3/CW-EC-1 (February 17, 2012).

³ ASLB March 6, 2012 Order at 31.

⁴ *Id.*

For the reasons that follow below, Riverkeeper respectfully requests that the ASLB reconsider its ruling excluding certain portions of Riverkeeper’s proffered testimony and exhibits, and in any event, respectfully seeks clarification regarding the implications of the ASLB’s ruling.

II. APPLICABLE LEGAL STANDARDS

10 C.F.R. §2.323(e) provides that to avoid manifest injustice, motions for reconsideration may be filed upon leave of the presiding officer “upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.”⁵ While the standard is a high one, reconsideration is appropriate where a party “demonstrates a fundamental [] misunderstanding of a key point.”⁶ The purpose of a motion for clarification is to explain or clarify something ambiguous or vague.⁷ In NRC adjudications, a party may seek clarification of a ruling on the scope of an admitted contention and related matters.⁸ The ASLB in the instant proceeding has previously granted motions for clarification.⁹

III. ARGUMENT

A. Intervenor Previously Demonstrated a Clear “Nexus” between the CEQ Definition for “Evaluating Significance” and the Discussion of Other Non-SFP Leaks

The ASLB found that Intervenor only offered a “general discussion regarding the CEQ [Council on Environmental Quality] definition for ‘evaluating significance’” and neglected “to

⁵ See 10 C.F.R. § 2.323(e); see also Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

⁶ See *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004).

⁷ See *United States v. Philip Morris USA, Inc.*, No. No. 99-2496, 2011 WL 2469733, at *2 (D.D.C. June 22, 2011) (quoting *Resolution Trust Corp. v. KPMG Peat Ma-wick*, No. 92-1373, 1993 WL 211555, at *2 (E.D.Pa. June 8, 1993)).

⁸ See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 374-384, 388 (2002) (addressing the applicant’s request that the Commission clarify its intent, as set forth in a prior Commission order (CLI-02-17), regarding the scope of an admitted contention).

⁹ See, e.g., Licensing Board Memorandum and Order (Granting Entergy’s Request for Clarification) (Aug. 10, 2011) (unpublished).

provide any nexus between the CEQ definition and the asserted justification for discussing other sources of leaks beyond those from SFPs.”¹⁰ The ASLB stated that “Riverkeeper and Clearwater have not established a meaningful foundation for the link between the CEQ definitions of significance and the need to present historic and potential future leaks from non-SFP sources.”¹¹ Intervenor respectfully disagree and believe that the ASLB has fundamentally misunderstood key aspects of Intervenor’s previous pleadings related to RK-EC-3/CW-EC-1.

To begin with, Riverkeeper’s initial filing of Environmental Contention EC-3 laid an adequate foundation related to Entergy’s obligation to assess *every* relevant aspect of the spent fuel pool leaks. Riverkeeper explained, and cited at length, the CEQ regulations, which provide that evaluating the “significance” of an impact involves assessing [b]oth short term and long term effects,” as well as the “severity of the impacts.”¹² Riverkeeper’s initial contention further explained that an assessment of the intensity and severity of the impacts involved the consideration of numerous factors, including the degree to which there are cumulative impacts.¹³ Riverkeeper’s initial contention also highlighted that “Entergy’s assessment of new and significant information must be accurate and complete enough to enable the Commission to make [the relevant] determination” relating to plant license renewal.¹⁴

Riverkeeper’s initial contention, thus, contained more than sufficient bases to support the later proffered testimony and evidence concerning non-SFP leaks, which the ASLB recognizes result in a cumulative/site-wide impact.¹⁵ Indeed, at the contention admissibility stage, intervenors are not obligated to put forth every fact that will support and prove its case, but

¹⁰ ASLB March 6, 2012 Order at 27.

¹¹ *Id.* at 28.

¹² Riverkeeper, Inc.’s Request for Hearing and Petition to Intervene in the License Renewal Proceedings for the Indian Point Nuclear Power Plant (November 30, 2007), ADAMS Accession No. ML073410093, at 77-78 (hereinafter “Riverkeeper Petition to Intervene”).

¹³ *Id.* at 78 (citing 40 C.F.R. §1508.27(b)).

¹⁴ *Id.* at 79.

¹⁵ *See* ASLB March 6, 2012 Order at 29.

rather, must only articulate the facts “of which it is aware at that point in time which provide the basis for its contention.”¹⁶ Riverkeeper amply did so.

Thereafter, Intervenor’s Statement of Position clearly identified a direct relationship between determining “significance” in accordance with CEQ regulations and the necessity of evaluating non-SFP leak sources. Intervenor did not simply rely upon a “general discussion” of the CEQ definition for “evaluating significance.” Rather, Intervenor plainly spelled out “how the impacts from the other non-SFP sources and the adequacy of relevant AMPs are needed to meet the CEQ definition of ‘significance.’”¹⁷ In particular, Intervenor explained that an assessment of how other component leaks (current, or likely future leaks), will impact the current groundwater contamination and the Hudson River

is necessary pursuant to NEPA’s requirement to evaluate cumulative impacts of a proposed action, that is, the “incremental impact of the action when added to other past, present, and reasonably foreseeable actions.” [See 40 C.F.R. §§ 1508.7]. As such, the FSEIS must include a meaningful assessment of other past, present, and reasonably foreseeable radiological leaks, and evaluate the expected impact in light of the *accumulation* of the individual impacts. [See *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345-46 (D.C. Cir. 2002)]. In other words, since other component leaks have affected and will continue to affect the contamination caused by the spent fuel pool leaks at Indian Point, and will also contribute to radioactive contamination entering the Hudson River, NRC Staff cannot view the impacts of the spent fuel pool leaks in a vacuum. [*Id.* at 346].¹⁸

¹⁶ See Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33168, 33171 (Aug. 11, 1989) (“Under these new rules an intervenor will have to provide a concise statement of the alleged facts or expert opinion which support the contention and on which, at the time of filing, the intervenor intends to rely in proving the contention at hearing, together with references to the specific sources and documents of which the intervenor is aware and on which the intervenor intends to rely in establishing the validity of its contention. This requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.”); see also, e.g., *In re Va. Elec. & Power Co.*, 70 N.R.C. 992, 1010 (2009) (“the proponent of a contention is not required to prove its case on the merits at the contention admissibility stage”).

¹⁷ ASLB March 6, 2012 Order at 28.

¹⁸ See Riverkeeper and Hudson River Sloop Clearwater Initial Statement of Position Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks), December 22, 2011, at 40-41.

Intervenors' discussion of the necessity of assessing cumulative impacts derived directly from the legal requirements under the CEQ regulations pertaining to evaluating the significance of an impact.¹⁹ That is, as explained in Intervenors' Initial Statement of Position regarding RK-EC-3/CW-EC-1, a critical aspect of determining significance is the degree to which there will be a cumulative impact.²⁰ Intervenors' explication of what a cumulative impact assessment must involve, thus, was directly connected to the understanding that such a determination is necessary for assessing the significance of a given impact.

Riverkeeper, thus, respectfully disagrees with the ASLB's position that Intervenors failed to "provide any nexus between the CEQ definition" and Intervenors' discussion of non-SFP impacts.²¹ There is clearly a connection between the CEQ definition for evaluating "significance" and the impacts of non-SFP leaks: evaluating significance clearly includes a consideration of cumulative impacts, and any non-SFP impacts will undoubtedly cause such cumulative impacts, a fact that the ASLB acknowledges by taking "administrative notice that if releases from SFP leaks encounter groundwater, then the radionuclides would co-mingle and coalesce with any impacts that might be present from other sources."²² Further, the foundation for this connection was laid in Riverkeeper's initial filing of RK-EC-3, and later fully explained and established in Intervenors' Statement of Position relating to Consolidated Contention RK-EC-3/CW-EC-1.

The ASLB's position is premised upon a basic misunderstanding about a key aspect of Intervenors' contention, thus warranting reconsideration of the ruling at issue.

¹⁹ See *id.* at 10-11, 40-41.

²⁰ See *id.* at 10 (citing 40 C.F.R. § 1508.27(b)(7)).

²¹ ASLB March 6, 2012 Order at 27, 28.

²² *Id.* at 29.

B. Intervenor's Have Demonstrated a Clear Relationship Between Non-SFP Leaks and the Impacts from Spent Fuel Pool Leaks

The ASLB has further stated that Intervenor's' reference to the CEQ definition for "evaluating significance" "does not explain how a discussion of other radiological leaks and the AMPs for the non-SFP SSCs has any relationship to the stated Contention dealing with the impacts from the spent fuel pools."²³ To reiterate, the CEQ regulations pertaining to "evaluating significance" absolutely involve consideration of cumulative impacts. Thus, Intervenor's' reference to the CEQ definition does, in fact, justify the discussion of non-SFP leaks, since such releases cause a cumulative impact when assessed in combination with the SFP leaks.

In any event, Intervenor's respectfully refer the ASLB to Intervenor's' previously submitted clear references to the direct link between non-SFP leaks and other component leaks at Indian Point:

- "[I]t is clear that component leaks have been a problem at Indian Point and have *contributed to the contamination* in the groundwater and in the Hudson River."²⁴
- "[O]ther plant systems, structures, and components have *contributed to the groundwater contamination* at Indian Point. . . . The ongoing and reasonably foreseeable future radiological leaks will *undoubtedly contribute to cumulative impacts* that must be assessed in order to comply with NEPA."²⁵
- "[O]ther plant systems, structures, and components, including buried pipes and structures, have recently caused leakage issues, and will most likely leak in the future; such leaks will *add to and commingle with* the existing plumes of contamination."²⁶
- "Newly identified leaks will *add to and commingle with* the existing radionuclides in the groundwater."²⁷
- "[O]ngoing and future leaks will continue to *add to the existing plumes of* contamination."²⁸

²³ *Id.* at 27.

²⁴ See Riverkeeper and Hudson River Sloop Clearwater Initial Statement of Position Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks), December 22, 2011, at 43 (emphasis added).

²⁵ *Id.* at 49 (emphasis added).

²⁶ *Id.* at 76 (emphasis added).

²⁷ See Exhibit RIV000060 (Gundersen Testimony at 15:28-29) (emphasis added).

- Intervenor’s Initial Statement of Position and testimony relating to RK-EC-3/CW-EC-1 discussed various specific accidental leaks and spills that have occurred at Indian Point since the filing of Riverkeeper and Clearwater’s initial contention; these incidents unequivocally demonstrate that new spills *add to and cause increases in radionuclide levels* present in the contamination plumes that Entergy primarily attributes to “historic” spent fuel pool leaks.²⁹

Indeed, Intervenor’s Initial Statement of Position, testimony, and exhibits relating to RK-EC-3/CW-EC-1 thoroughly establish that because current leaks from non-SFP components persist and future additional radiological leaks from onsite components are also likely, “[l]evels of radionuclides in the groundwater are likely not decreasing,” “levels of radionuclides in the groundwater will likely remain high in the future,” and “the present groundwater contamination will not be abated.”³⁰ Thus, evidence of non-SFP leaks and the likelihood of future leaks is directly linked to an assessment of the SFP leaks, which necessarily involves an evaluation about the status, persistence, size, etc, of the contamination plumes. Accordingly, the relationship between non-SFP leaks and the stated Contention is well-documented, and has clearly been established in Intervenor’s previous filings.

Intervenor’s do not understand the ASLB’s conclusion that Intervenor’s have failed to establish a connection between the impact of the SFP leaks and other non-SFP leaks, when the

²⁸ *Id.* at 21:10-11 (emphasis added).

²⁹ See Riverkeeper and Hudson River Sloop Clearwater Initial Statement of Position Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks), December 22, 2011, at 42-43 (citing Exhibit RIV000060 (Gundersen Testimony at 15:28-29)).

³⁰ See Exhibit RIV000060 (Gundersen Testimony at 20-21). The evidence of specific non-SFP leaks is the kind of information that directly informs an assessment of the cumulative impact of the SFP leaks. This is information that is clearly “necessary for a NEPA assessment.” See ASLB March 6, 2012 Order at 29. Notably, the ASLB rightfully admitted testimony related to mitigation alternatives for this very reason, *see id.*, when such testimony was supported by the same NEPA-based arguments Intervenor’s proffered in relation to evidence of non-SFP leaks – i.e., that such information is necessary for determining significance of the impact pursuant to the CEQ definition. It appears inconsistent that the ASLB would admit some but exclude other testimony and exhibits, when both issues are premised upon and supported by the same regulatory requirements. Both categories of information (i.e., non-SFP leaks, and mitigation alternatives) are critical in order for the agency to make an informed decision. See *id.* at 30. Indeed, whether contamination initially caused by SFP leaks, yet prolonged due to other ongoing leaks, will persist throughout the proposed license renewal period, is squarely relevant for the decision maker when determining the appropriateness of relicensing Indian Point.

ASLB itself has echoed and apparently accepted Intervenor's position that any leaks from non-SFP sources will mix and coalesce with radionuclides from SFP leaks, and further recognized how "the distribution and concentration of specific radionuclides in the groundwater . . . are a *major foundation* of RK-EC-3/CW-EC-1."³¹

In sum, Intervenor's proffered testimony and exhibits related to non-SFP leaks and AMPs at Indian Point are directly related to RK-EC-3/CW-EC-1. The ASLB's apparent misapprehension warrants reconsideration of the ASLB's ruling to grant in part Entergy's Motion in Limine.

C. Intervenor's Have Not Raised Untimely Arguments

In its ruling, the ASLB states that Intervenor "never" identified a relationship between the CEQ definition for evaluating significance and non-SFP leak sources until responding to Entergy's Motion in Limine.³² Intervenor respectfully disagrees with this characterization of Intervenor's previously submitted pleadings, because it is incorrect. As described at length above, Intervenor laid an appropriately broad foundation at the contention admissibility stage of this proceeding, and, in Intervenor's Initial Statement of Position and prefiled testimony, thoroughly explained the relevance of non-SFP leaks for purposes of satisfying the CEQ definition of "evaluating significance."³³ This is a clear and material error, for which the ASLB should reconsider its ruling.

D. The ASLB's Apparently Inconsistent Statements Warrant Reconsideration of the ASLB's Ruling, or, in the Alternative, Clarification

The ASLB's ruling on Entergy's Motion in Limine excludes testimony and exhibits related to RK-EC-3/CW-EC-1 that discuss or list "specific, non-SFP sources of radiological

³¹ ASLB March 6, 2012 Order at 29.

³² *Id.* at 28.

³³ *See supra* pp. 3-6.

leaks,” however acknowledges the general relevance of such information in terms of “the distribution and concentration of specific radionuclides in the groundwater,” since such issues are “a major foundation of RK-EC-3/CW-EC-1.”³⁴ In fact, the ASLB takes “administrative notice that if releases from SFP leaks encounter groundwater, then the radionuclides would co-mingle and coalesce with any impacts that might be present from other sources” and that “the impacts to groundwater from SFP leaks and the subsequent discharges into the Hudson River could only be assessed on a site-wide basis.”³⁵ Intervenor do not believe these positions are consistent, and, thus, clarification is required.

Notably, Entergy attributes the groundwater contamination at Indian Point primarily to SFP leaks.³⁶ Further, it appears undisputed that the cumulative amount of radiological contamination in the groundwater is squarely relevant and within the scope of RK-EC-3/CW-EC-1. As such, it would be highly prejudicial to Intervenor’s case to prohibit the presentation of specific evidence about additional sources of contamination that affect the contamination plumes, i.e. the distribution, and concentration of the plumes. It would be impossible to completely assess the extent of groundwater contamination pursuant to NEPA without evaluating specific incidences of other releases, and their affect on the contamination. Such an assessment is predicated on providing specific evidence that allows the designated experts to draw conclusions about the behavior of contamination plumes. Indeed, Entergy’s own consultant, GZA, GeoEnvironmental, Inc., reviews and assesses the status of the contamination plumes specifically in view of any new spills and leaks, as opposed to in a vacuum.³⁷

³⁴ ASLB March 6, 2012 Order at 29.

³⁵ *Id.*

³⁶ See Entergy, Groundwater Investigation Executive Summary, Indian Point Energy Center, Buchanan, NY (January 2008), at 1-2 (Exhibit RIV000068) (“investigations traced the contamination back to two separate structures, the Unit 2 and Unit 1 Spent Fuel Pools”).

³⁷ See, e.g., GZA, GeoEnvironmental, Inc. Final IPEC Quarterly Long-Term Groundwater Monitoring Report, Quarter Two 2010 (Report No. 10) (February 15, 2011), IPEC00227561, at p.1-2 (Exhibit RIV000076); See also

The ASLB's determination to disallow the submission of specific evidence of non-SFP leaks, despite the explicit acknowledgement that any such leaks co-mingle and add to existing contamination and that an assessment of the impact of the *total* groundwater contamination is relevant, denies Intervenors the opportunity to fully and fairly adjudicate the admitted contention. This determination is a clear and material error, and warrants reconsideration of the ASLB's ruling.

In the alternative, Intervenors seek clarification of the ASLB's ruling. In particular, Intervenors request that the ASLB provide further explanation pertaining to how Intervenors may present evidence to specifically prove the status of the contamination plumes at Indian Point, and related matters, without reference to specific non-SFP leaks and the likelihood of such future leaks.

IV. CONCLUSION

Based on the foregoing, the ASLB should reconsider its decision to exclude certain portions of Intervenors' testimony and exhibits related to RK-EC-3/CW-EC-1, or in the alternative clarify the implications of its ruling to do so.

Respectfully submitted,

Signed (electronically) by Deborah Brancato

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Certification Pursuant to 10 C.F.R. § 2.323(b)

In accordance with 10 C.F.R. §2.323(b) and the ASLB’s Scheduling Order dated July 1, 2010,¹ I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

In particular, while counsel for the State of New York, John Sipos, indicated that the State of New York does not oppose Intervenors’ motion, counsel for Entergy, Paul Bessette indicated that Entergy opposed the motion as not meeting the standards for a motion for reconsideration, while counsel for NRC Staff, Sherwin Turk, indicated that “NRC Staff opposes the motion as it is unwarranted and fails to satisfy the standards for reconsideration.”

Signed (electronically) by Deborah Brancato

Deborah Brancato, Esq.

¹ In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Scheduling Order, July 1, 2012, at ¶ G.6.

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CERTIFICATE OF SERVICE

I certify that on March 16, 2012, copies of Riverkeeper, Inc. and Hudson River Sloop Clearwater, Inc.'s Request for Leave to File and Motion for Reconsideration and/or Clarification of the ASLB's Ruling on Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention RK-EC-3/CW-EC-1, were served on the following through NRC's Electronic Information Exchange:

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Signed (electronically) by Deborah Brancato

Deborah Brancato

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