

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
TENNESSEE VALLEY AUTHORITY)	
)	Docket No. 50-259, 50-260, and
)	50-296
)	
(Browns Ferry Nuclear Plant)	
Units 1, 2, and 3))	

NRC STAFF'S BRIEF IN OPPOSITION
TO BEST/MATRR'S APPEAL OF LBP-16-11

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December 20, 2016

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NRC STAFF'S BRIEF IN OPPOSITION
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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") files this brief in opposition to the appeal of Bellefonte Efficiency & Sustainability Team/Mothers Against Tennessee River Radiation's ("BEST/MATRR") from the Atomic Safety and Licensing Board's ("Board") decision in LBP-16-11.¹ In LBP-16-11, the Board concluded that BEST/MATRR had not proffered an admissible contention concerning the Browns Ferry Nuclear Power Plant ("Browns Ferry") license amendment request ("LAR") for an extended power uprate for Units 1, 2, and 3,² which is the subject of this proceeding. Accordingly, the Board denied BEST/MATRR's Hearing Request and Petition to Intervene.³ BEST/MATRR now

¹ "Appeal of [BEST/MATRR] Regarding the Atomic Safety and Licensing Board's Denial of BEST/MATRR's Hearing Request and Petition to Intervene Regarding Tennessee Valley Authority's License Amendment Request for Extended Power Uprates For Browns Ferry Nuclear Plant Units 1, 2, And 3" (Nov. 25, 2016) ("Appeal") (available at Agencywide Documents Access & Management System (ADAMS) Accession No. ML16330A581).

² *Tennessee Valley Authority* (Browns Ferry Nuclear Plant Units 1, 2, and 3), LBP-16-11, 84 NRC __ (Nov. 2, 2016) (slip op. at 1).

³ LBP-16-11 (slip op. at 1).

seeks to reverse the Board's ruling or stay the NRC's consideration of the Browns Ferry license amendment request.⁴

As more fully discussed below, BEST/MATRR's Appeal should be denied, in that BEST/MATRR has not identified any error of law or abuse of discretion by the Board in LBP-16-11. Instead, BEST/MATRR simply reiterates arguments that were either made in its initial petition or its reply, without any showing that the Board erred in rejecting those claims. The Staff submits that the Board correctly applied the relevant law in ruling that BEST/MATRR's assertions did not identify a licensing action establishing a right to request a hearing under section 189a. of the Atomic Energy Act of 1954, as amended ("AEA"). Therefore, the Staff respectfully submits that the Commission should deny BEST/MATRR's appeal and affirm the Board's ruling denying BEST/MATRR's Petition.

BACKGROUND

Tennessee Valley Authority ("TVA") submitted a license amendment request on September 21, 2015, seeking NRC approval of an extended power uprate for Browns Ferry Units 1, 2 and 3.⁵ As part of the license amendment request, TVA submitted reports indicating that Browns Ferry would continue to meet peak cladding temperature limits using calculations that include the Baker-Just calculation.⁶ A notice of opportunity for hearing on the license

⁴ Appeal at 1 (claiming the Board "erred when it failed to find that the Staff has engaged in a *de facto* license proceeding to amend Diablo Canyon's licenses.").

⁵ Letter from J.W. Shea, TVA, to NRC, Proposed Technical Specifications Change TS-505 - Request for License Amendments - Extended Power Uprate, Browns Ferry Nuclear Plant, Units 1, 2, and 3, NRC Docket Nos. 50-259, 50-260, and 50-296, Operating License Nos. DPR-33, DPR-52, and DPR-68 (Sept. 21, 2015) (ADAMS Accession No. ML15282A152).

⁶ The Baker-Just equation is used to calculate the rate of energy release, hydrogen generation, and cladding oxidation from the metal/water reaction in emergency core cooling system ("ECCS") evaluation models. Licensees are required to use this equation in calculating the metal-water reaction rate in their ECCS evaluation models, pursuant to 10 C.F.R. Part 50, Appendix K, Section I.A.5 ("The rate of energy release, hydrogen generation, and cladding oxidation from the metal/water reaction shall be calculated using the Baker-Just equation").

amendment request (“LAR”) was published in the *Federal Register* on July 5, 2015.⁷

BEST/MATRR then filed a hearing request and petition to intervene, in which it set out three contentions, essentially claiming that the usage of the Baker-Just calculation (which is required by NRC regulations for safety modeling of the extended power uprate) is “scientifically indefensible” because the calculation under-predicts the rate of heat generation and hydrogen generation.⁸ As such, BEST/MATRR argued that TVA has not scientifically demonstrated that the peak cladding temperature would not exceed regulatory limits and that the health and safety of their members and the public would be harmed due to the extended power uprate.⁹

The NRC Staff and TVA filed separate answers opposing BEST/MATRR’s petition, in which they each stated their reasons for concluding that BEST/MATRR had not proffered any admissible contentions.¹⁰ The Staff stated that BEST/MATRR had inadmissibly challenged a regulatory requirement without having filed a waiver petition, and that BEST/MATRR had not demonstrated that there were any special circumstances that would make use of the Baker-Just equation inappropriate for Browns Ferry.¹¹ Additionally the Staff pointed out that BEST/MATRR’s expert had already filed a petition for rulemaking on the exact same issues raised in the hearing request, and that contentions which are the subject of Commission

⁷ See Tennessee Valley Authority, Docket Nos. 50-259, 50-260, and 50-296. (Browns Ferry Nuclear Plant (BFNP), Units 1, 2, and 3, Limestone County, Alabama, 81 Fed. Reg. 43,666 (July 5, 2016).

⁸ “Hearing Request and Petition to Intervene Regarding Tennessee Valley Authority’s License Amendment Request for Extended Power Uprates for Browns Ferry Nuclear Plant Units 1, 2, and 3” (Sept. 9, 2016) (“Petition”) (ADAMS Accession No. ML16253A413).

⁹ Petition at 29-30.

¹⁰ “NRC Staff Answer to BEST/MATRR Petition to Intervene and Hearing” (Oct. 4, 2016) (“NRC Staff Answer”) (ADAMS Accession No. M16278A529); “Tennessee Valley Authority’s Answer Opposing Petition for Leave to Intervene and Request for Hearing” (Oct. 4, 2016) (ADAM Accession No. ML16278A536).

¹¹ NRC Staff Answer at 6-9.

rulemaking may not be considered by the Board.¹² Finally, the Staff noted that BEST/MATRR had not demonstrated any genuine dispute with the license amendment request itself, and BEST/MATRR did not allege that the application had not followed regulatory requirements.¹³

BEST/MATRR filed a combined reply to the Staff's and TVA's Answers on October 14, 2016.¹⁴ The reply, however, did not address the Staff's or TVA's assertions as to why the petition to intervene should be denied. Instead, BEST/MATRR presented entirely new arguments invoking the Administrative Procedures Act, 5 U.S.C. § 555, that were unrelated to the assertions presented in its initial petition to intervene or the answers filed by the Staff or TVA.¹⁵

On November 2, 2016, the Board issued its decision in LBP-16-11. Therein, the Board held that BEST/MATRR's contentions were inadmissible because (1) BEST/MATRR had impermissibly challenged a regulatory requirement without seeking a waiver; (2) BEST/MATRR's expert had filed a petition for rulemaking that is pending before the Commission, and the Board does not consider contentions that are subject of rulemaking before the Commission; and (3) BEST/MATRR had not demonstrated a genuine dispute with the license amendment application.¹⁶ Additionally, the Board responded to BEST/MATRR's request

¹² *Id.* at 9-10.

¹³ *Id.* at 10-11.

¹⁴ "Reply of [BEST/MATRR] to Answers of NRC Staff and Tennessee Valley Authority on the License Amendment Request for Extended Power Uprates for Browns Ferry, Units 1, 2 & 3" (Oct. 14, 2016) (ADAMS Accession No. ML16288A191). In addition to other deficiencies, BEST/MATRR's Reply was also untimely. Under 10 C.F.R. § 2.309(i)(2), a petitioner may file a reply to any "answers to hearing requests, intervention petitions, and motions for leave to file new or amended contention" within 7 days after service of the particular answer. The NRC and TVA separately filed answers to BEST/MATRR's Petition on October 4, 2016; accordingly, any response to the Staff and/or TVA was due by October 11, 2016. BEST/MATRR did not file its reply until October 14, 2016, several days beyond the time period permitted under the NRC's rules.

¹⁵ Reply of BEST/MATRR at 2-4.

¹⁶ LBP-16-11, slip op. at 5-7.

for denial or stay of the extended power uprate license amendment. The Board noted that BEST/MATRR's claim of unreasonable delay by the Commission would not be considered by the Board because (1) it was raised for the first time in a reply and not the initial petition and (2) the Board does not have authority to review claims of unreasonable delay for rulemaking petitions before the Commission.¹⁷ As a result, the Board denied BEST/MATRR's petition. For the reasons discussed below, the Board's decision in LBP-16-11 should be affirmed.

DISCUSSION

A. Standard of Review

An order denying a petition to intervene and/or request for hearing is appealable pursuant to 10 C.F.R. § 2.311. Pursuant to § 2.311(c), a ruling on a request for hearing or a petition to intervene is only appealable on the question as to whether the request/petition should have been granted. The Commission gives substantial deference to a Board's determinations on threshold issues and will regularly affirm Board decisions on issues of admissibility of contentions where the appeal fails to point to an error of law or abuse of discretion.¹⁸

A petitioner appealing a Board's denial of intervention "bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims."¹⁹ A mere recitation of an appellant's earlier arguments in a proceeding or a statement of his or her general disagreement with a decision's result is in conflict with the Commission's adjudicatory practice and procedure, as it does not

¹⁷ *Id.*, slip op. at 7-8.

¹⁸ See *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-16-09, 83 NRC 472, 482 (2016) (citing *AmerGen Energy Co., LLC*, (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111,121 (2006)).

¹⁹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

identify alleged errors in the Board's decision.²⁰ Finally, when considering an appeal under 10 C.F.R. § 2.311, the Commission may affirm a Board decision on any ground finding support in the record, whether or not relied on by the Board.²¹

B. Legal Standards Governing the Admission of Contentions

For a contention to be admitted, the contention must meet all of the requirements of 10 C.F.R. § 2.309(f)²² and must be timely.²³ The requirements for an admissible contention are set out in 10 C.F.R. § 2.309(f)(1), which provides that, to be admissible, a contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
- (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application. . . . that the petitioner disputes and the supporting reasons for each dispute

²⁰ See *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), 72 NRC 197, 200-01 (2010).

²¹ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005) (redacted public version of decision) (citing federal court precedent).

²² 10 C.F.R. § 2.309(a).

²³ 10 C.F.R. § 2.309(b).

The Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) contention admissibility requirements are “strict by design.”²⁴ Failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for dismissing the proposed contention.²⁵

Subsection (iii) of 10 C.F.R. § 2.309(f)(1) explicitly provides that a contention must raise an issue that is within the scope of the proceeding. Challenges to the Commission’s regulations and generic determinations are beyond the scope of NRC adjudications unless they are accompanied by a waiver petition.²⁶ A proposed contention that is otherwise inadmissible as an out-of-scope collateral attack on a Commission rule may, however, be entertained, pursuant to 10 C.F.R. § 2.335, if (1) the proponent of the contention petitions for the waiver of the rule in the particular proceeding, (2) the presiding officer determines that the waiver petition has made a *prima facie* showing that the application of the specific rule would not serve the purposes for which the rule was adopted and then certifies the matter directly to the Commission, and (3) the Commission makes a determination on the matter.²⁷ If the presiding officer determines that the petitioner has not made the required *prima facie* showing, “no evidence may be received on [the] matter and no discovery, cross examination, or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.”²⁸ Instead, the participant may challenge the rule by filing a petition for rulemaking under 10 C.F.R. § 2.802.²⁹

²⁴ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Station, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

²⁵ *Id.*

²⁶ *See Exelon Generation Co., L.L.C.* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 206-07 (2013).

²⁷ 10 C.F.R. §§ 2.335(b) and (d).

²⁸ 10 C.F.R. § 2.335(c).

²⁹ 10 C.F.R. § 2.335(e).

The Commission has established that the Board, in individual license proceedings, does not accept contentions that are also the subject of rulemaking before the Commission.³⁰ As such, a contention that is or is about to become the subject of rulemaking, is inadmissible before the Board.³¹

Contentions must also raise a genuine material issue of law or fact with the specific application at bar.³² In other words, the proponent on the contention must show how resolution of the dispute would make a difference in the outcome of the licensing proceeding.³³ A contention that raises only a generic issue and fails to link that issue to any specific aspect of the pertinent application is inadmissible for failure to raise a genuine material issue.³⁴ While a disagreement as to the interpretation of the language of a rule may raise a genuine issue of law, a challenge to the rule itself does not.³⁵ Such a challenge fails because it does not raise a material issue of law as contemplated by the regulation.

ARGUMENT

The NRC Staff submits that BEST/MATRR's Appeal should be denied, in that BEST/MATRR has not shown that the Board committed any error of law or abused its discretion in denying BEST/MATRR's Petition. Instead, BEST/MATRR's Appeal simply repeats

³⁰ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 345 (1999)

³¹ *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 228-29 (2011).

³² 10 C.F.R. § 2.309(f)(1)(vi).

³³ *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 354 (2006), *citing* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (Final Rule).

³⁴ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-21, 82 NRC 295, 301 (2015).

³⁵ *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-12-8, 75 NRC 539, 566 (2012), *rev'd in part on other grounds*, CLI-12-19, 76 NRC 377, 383-87 (2012), *on remand*, LBP-13-1, 77 NRC 57 (2013), *aff'd on other grounds*, CLI-13-7, 78 NRC 199 (2013).

arguments made in BEST/MATRR's initial Petition and Reply, without addressing the reasons enunciated by the Board for denying its Petition.

A. The Board was Correct in Finding Best/MATRR's Contentions Inadmissible

1. The Contentions are Inadmissible because they Impermissibly Attack Commission Regulations

In its Petition, BEST/MATRR presented three contentions, challenging the adequacy of the Baker-Just equation – whose use is explicitly required for ECCS evaluation models, pursuant to 10 C.F.R. Part 50, Appendix K, § I.A.5.³⁶ As the Board correctly found, BEST/MATRR's proposed contentions concerning the adequacy of the Baker-Just equation were inadmissible in the absence of a petition seeking to waive the regulations, and the contentions failed to satisfy several of the Commission's requirements for waiver as set forth in 10 C.F.R. § 2.335.³⁷ In sum, the Board found that BEST/MATRR had impermissibly challenged a Commission rule or regulation by directly challenging the adequacy of the Baker-Just equation and Appendix K requirements, without requesting a waiver of the regulations under § 2.335 through a showing of "special circumstances" unique to this proceeding.³⁸

Significantly, BEST/MATRR's Appeal does not cite or address the Commission's contention admissibility standards, and does not respond to the Board's conclusions concerning BEST/MATRR's failure to demonstrate that the adequacy of the Baker-Just equation would present a special circumstance unique to Browns Ferry. Instead, the Appeal appears to reiterate the claims made in a rulemaking petition that is currently pending before the Commission, rather than address the Board's determination on the admissibility of its contentions in this license amendment proceeding. Further, the Appeal does not explain how the Board committed any

³⁶ See n. 6, *supra*.

³⁷ LBP-16-11, slip op. at 5-6.

³⁸ LBP-16-11, slip op. at 5-6.

error in determining the admissibility of these contentions. In the absence of any showing of error or abuse of discretion by the Board in determining that BEST/MATRR's contentions constituted an impermissible challenge to NRC regulations, its decision in LBP-16-11 should be affirmed.

2. The Contentions are Inadmissible because the Issues are
Subject to a Pending Rulemaking Petition

Upon reviewing BEST/MATRR's contentions, the Board found that the Petition raised the same issues that BEST/MATRR expert, Mr. Mark Leyse, had raised in a pending rulemaking petition.³⁹ The Board correctly concluded that contentions that are the subject of a rulemaking petition before the Commission may not be accepted for litigation in a specific license amendment proceeding.⁴⁰ As such, the Board did not accept BEST/MATRR's contentions as they are presently the subject of rulemaking before the Commission.⁴¹

BEST/MATRR's Appeal recites many of the same issues and arguments that its expert, Mr. Leyse, had raised in the rulemaking petition that is currently pending before the Commission.⁴² In fact, the Appeal explicitly acknowledges that "PRM-50-93 addresses issues similar to those raised by BEST/MATRR in their hearing request".⁴³ The Appeal does not respond to the Board's findings on this point, nor does BEST/MATRR assert or demonstrate that there is any difference between the issues presented in the rulemaking petition and the

³⁹ LBP-16-11, slip op. at 6.

⁴⁰ LBP-16-11, slip op. at 6 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 345 (1999) ("It has long been agency policy that Licensing Boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission").

⁴¹ LBP-16-11, slip op. at 6.

⁴² Petition for Rulemaking of Mark Edward Leyse (Nov. 17, 2009) (ADAMS Accession No. ML093290250); Mark Edward Leyse; Receipt of Petition for Rulemaking, Docket No. PRM-50-93; NRC-2009-0554, 75 Fed. Reg. 3876 (Jan. 25, 2010).

⁴³ BEST/MATRR Appeal at 2.

issues raised in its petition to intervene in this proceeding. The Board's rulings in this regard were entirely correct, and BEST/MATRR has failed to demonstrate any error in those determinations.

3. The Contentions are Inadmissible because they Fail to Raise a Genuine Dispute of Fact or Law with the License Amendment Application

In its decision, the Board also noted that BEST/MATRR's Petition fails to demonstrate any argument or dispute with the license amendment application, and that it instead presented a challenge to NRC regulations.⁴⁴ BEST/MATRR, in its Appeal from the Board's decision, had the burden of explaining how the license amendment application failed to meet Commission requirements. BEST/MATRR's Appeal, however, articulates no basis for finding fault with the license amendment application and instead merely reiterates the arguments made in Mr. Leyse's pending rulemaking petition. BEST/MATRR's Appeal continues to argue that an NRC regulatory requirement is purportedly inadequate, while making no mention of the contents of TVA's license amendment application.

Inasmuch as BEST/MATRR has failed to establish a genuine dispute with the instant license amendment request, as required for its contentions to be admissible in this proceeding, the Board's dismissal of BEST/MATRR's petition to intervene and hearing request should be affirmed.

B. The Board was Correct in Denying BEST/MATRR's Stay Request

BEST/MATRR's Appeal claims that the Commission should stay its consideration of TVA's request for an extended power uprate at Browns Ferry, due to an alleged violation of the Administrative Procedures Act.⁴⁵ BEST/MATRR alleges in its appeal that the Staff has "unreasonably delayed" resolution of Mr. Leyse's rulemaking petition and such resolution may

⁴⁴ LBP-16-11, slip op. at 7.

⁴⁵ BEST/MATRR Appeal at 2-4.

be compelled by a reviewing court.⁴⁶ As the Board explained, however, BEST/MATRR raised this issue for the first time in its Reply and never raised the issue in its initial Petition.⁴⁷ The Board correctly rejected this argument: As the Commission has stated, it is “well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request.”⁴⁸ Moreover, the Commission has stated that replies must focus on the arguments presented in either the original petition or in answers to the petition.⁴⁹ Here, BEST/MATRR’s Reply (and its Appeal) presented new arguments invoking the Administrative Procedures Act that were never raised in the original petition and do not address arguments presented in either the initial petition or the answers filed by the Staff Answer or TVA.⁵⁰ The Board’s determination to reject BEST/MATRR’s arguments raised for the first time in its reply was entirely correct and should be affirmed.

Finally, in rejecting BEST/MATRR’s request for a stay, the Board found that it cannot provide a remedy as requested, because a petition for rulemaking that raises the same issues is currently pending before the Commission.⁵¹ Indeed, the crux of BEST/MATRR’s Appeal concerns the duration and timeliness of the NRC’s consideration of Mr. Leyse’s rulemaking petition, and has nothing to say about TVA’s license amendment request that is the subject of this proceeding. As such, BEST/MATRR’s stay request was beyond the scope of this license amendment proceeding, and the Board correctly found that it could provide no remedy on the separate topic raised by BEST/MATRR.

⁴⁶ *Id.* at 2-3.

⁴⁷ LBP-16-11, slip op. at 7.

⁴⁸ *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-17, 63 NRC 727, 732 (2006).

⁴⁹ *Id.*

⁵⁰ BEST/MATRR Reply at 2-4, 12.

⁵¹ LBP-16-11, slip op. at 7.

CONCLUSION

For the reasons stated above, the Commission should deny BEST/MATRR's Appeal and affirm the Board's ruling in LBP-16-11 denying BEST/MATRR's Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S BRIEF IN OPPOSITION TO BEST/MATRR's APPEAL OF LBP-16-11," dated December 20, 2016, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 20th day of December, 2016.

/Signed (electronically) by/

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Date of Signature: December 20, 2016

Dated at Rockville, Maryland
this 20th day of December, 2016