

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

Before Administrative Judges:

E. Roy Hawkens, Chairman  
 Michael M. Gibson  
 Dr. Sue H. Abreu

In the Matter of

THOMAS B. SAUNDERS

(Confirmatory Order)

Docket No. IA-19-027-EA

ASLBP No. 20-963-01-EA-BD01

January 29, 2020

MEMORANDUM AND ORDER

(Denying Intervention Request and Terminating Proceeding)

Pending before this Licensing Board is an intervention request from Leonard Sparks that seeks to challenge a Confirmatory Order (CO) issued by the NRC Staff to Thomas Saunders for wrongfully discriminating against Mr. Sparks.<sup>1</sup> For the reasons discussed below, we deny Mr. Sparks' intervention request, thereby terminating this proceeding at the licensing board level.

I. BACKGROUND

On October 21, 2019, the NRC Staff issued a CO to Mr. Saunders, the former Contracts and Procurement Director for Construction at Southern Nuclear Operating Company's (SNC's) Vogtle Electric Generating Plant, Units 3 and 4 (Vogtle), in Georgia.<sup>2</sup> The CO was the result of

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<sup>1</sup> See Motion to Intervene and Motion to Combine Opposition with Related Proceeding (Nov. 29, 2019) [hereinafter Sparks' Petition]. Pursuant to NRC regulations, pleadings requesting to intervene are characterized as "petitions to intervene." See 10 C.F.R. § 2.309(a). Accordingly, although Mr. Sparks labels his pleading as a motion to intervene, we will refer to it as a petition.

<sup>2</sup> See [CO to Thomas B. Saunders] Effective Upon Issuance (IA-19-027) (Oct. 21, 2019) (ADAMS Accession No. ML19269C005) [hereinafter Saunders CO], published at 84 Fed. Reg. 57,778 (Oct. 28, 2019).

an agreement reached by Mr. Saunders and the NRC Staff during an Alternative Dispute Resolution mediation session that Mr. Saunders requested after the NRC Staff notified him of his apparent willful violation of 10 C.F.R. § 52.5.<sup>3</sup> See Saunders CO at 2. According to a report prepared by the NRC Office of Investigations, the violation occurred in July 2017 when Mr. Saunders directed that Mr. Sparks (who was a contract employee at Vogtle) be removed from the site and discharged. See id. When Mr. Saunders took that action, he was aware that Mr. Sparks previously had raised numerous safety-related concerns, i.e., engaged in activity that is protected under section 52.5. See id. at 1–2.<sup>4</sup>

In the October 2019 CO, Mr. Saunders “acknowledge[d] that a violation of 10 [C.F.R. §] 52.5 (Employee Protection) occurred.” Saunders CO at 2. In consequence of that violation, Mr. Saunders agreed to take specified actions designed to enhance awareness of and compliance with section 52.5. In particular, Mr. Saunders agreed to make presentations at SNC meetings and training sessions addressing “lessons learned regarding the importance of employee protection (to include contractors), why it is necessary to ensure proper follow-up in response, and proper follow-up when evaluating any potentially adverse personnel decisions.” Id. Those presentations will be “based on Mr. Saunders’ personal case study and [he] will honestly answer questions about what he failed to do ([specifically, he failed to] follow STAR [i.e., the SNC stop, think, act, review protocol governing employee protection matters], seek advice from management, consult with [the SNC Human Resources office], and engage with the consolidated concerns department).” Id. at 3. Additionally, Mr. Saunders committed to (1) making presentations at five nuclear industry forums within one year of the CO’s issuance;

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<sup>3</sup> Section 52.5(a) provides that “[d]iscrimination . . . against an employee for engaging in certain protected activities is prohibited.” 10 C.F.R. § 52.5(a). “Protected activities” include the raising of safety-related concerns associated with the Atomic Energy Act of 1954 or the Energy Reorganization Act of 1974. See id. § 52.5(a)(1)(i).

<sup>4</sup> Although Mr. Sparks is not identified by name in the Saunders CO, he attests (and neither Mr. Saunders nor the NRC Staff disputes) that he is the adversely impacted employee described therein. See Sparks’ Petition at 3 n.1.

(2) submitting an article for publication to a nuclear industry forum; and (3) making a presentation at the NRC's annual Regulatory Information Conference (if asked by the NRC Staff) that would address his regulatory violation and honestly answer questions about his misconduct. See id. at 5–6.

The NRC Office of Enforcement concluded that Mr. Saunders' commitments in the CO were "acceptable and necessary" and "that with these commitments the public health and safety are reasonably assured." Saunders CO at 4. The CO stipulated that it "settle[d] the matter between the parties," and that Mr. Saunders waived his right to a hearing. Id. The CO provided, however, that any other person adversely affected by the CO may request a hearing, see id. at 7, and, if a hearing were granted, "the issue to be considered . . . shall be whether this CO should be sustained." Id. at 10.

Mr. Sparks filed an intervention request in which he proffered two contentions. One contention challenged the facts in the CO, and the other challenged the sufficiency of the corrective actions. See Sparks' Petition at 7–8.<sup>5</sup> The NRC Staff and Mr. Saunders filed answers opposing Mr. Sparks' intervention request.<sup>6</sup> Mr. Sparks filed a reply to Mr. Saunders' answer,<sup>7</sup> but he did not reply to the NRC Staff's answer.

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<sup>5</sup> Mr. Sparks also moved to consolidate this intervention request with (1) a Notice of Violation issued to a different individual; and (2) an intervention request challenging a CO issued to SNC. See Sparks' Petition at 7; 8–9. We denied that motion in a January 8, 2020 Memorandum and Order. See LBP-20-01, 91 NRC \_\_, \_\_–\_\_ (slip op. at 7–12) (Jan. 8, 2020).

<sup>6</sup> See NRC Staff's Answer to Request for Hearing by Leonard Sparks (Dec. 19, 2019) [hereinafter NRC Staff's Answer]; Answer of Thomas B. Saunders in Opposition to Leonard Sparks' Motion to Intervene and Request for Hearing (Dec. 26, 2019) [hereinafter Saunders' Answer].

<sup>7</sup> See Sparks' Reply to Saunders' Answer to Sparks' Motion to Intervene (Jan. 3, 2020) [hereinafter Sparks' Reply]. Mr. Sparks accompanied his reply with an unopposed motion to extend the January 2, 2020 deadline for filing his reply. See Consent Motion for Extension of Time (Jan. 3, 2020). We granted that motion. See Licensing Board Order (Granting Consent Motion for Extension of Time) (Jan. 7, 2020) (unpublished).

## II. LEGAL STANDARDS

For Mr. Sparks' intervention request to be granted, he must (1) demonstrate standing; (2) proffer an admissible contention; and (3) satisfy the Bellotti doctrine, which derives its name from Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983) (affirming Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)). The Bellotti doctrine impacts standing and contention admissibility analyses in the context of enforcement proceedings. We summarize the legal standard associated with each of these requirements below.

### A. Standing

To intervene in an NRC adjudicatory proceeding, a petitioner must demonstrate standing. See 10 C.F.R. § 2.309(a).<sup>8</sup> In determining whether a petitioner has established standing, the Commission applies contemporaneous judicial concepts of standing that require a petitioner to show "(1) an injury in fact (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision." Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16 (2004) (internal quotation marks omitted).

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<sup>8</sup> Under section 189a of the Atomic Energy Act, the NRC is required to "grant a hearing upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A). Pursuant to the agency's regulation implementing general standing requirements, a petitioner's hearing request must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the [relevant statute] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1)(i)–(iv).

B. Contention Admissibility

In addition to demonstrating standing, a petitioner who seeks to intervene in an NRC adjudicatory proceeding must proffer a contention that satisfies the Commission's six-factor standard for contention admissibility. Specifically, a petitioner must (1) provide a statement of the issue of law or fact being challenged; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the proceeding; (5) provide a concise statement of the alleged facts or expert opinions that support the petitioner's position on the issue; and (6) provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)–(vi). The Commission has emphasized that the contention admissibility standard is “strict by design.” AmerGen Energy Co. (Oyster Creek Nuclear Generation Station), CLI-06-24, 64 NRC 111, 118 (2006) (quoting Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001)). Failure by a petitioner to comply with any admissibility requirement “renders a contention inadmissible.” Entergy Nuclear Operations, Inc. (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

C. The Bellotti Doctrine

Pursuant to the Bellotti doctrine,<sup>9</sup> the threshold question in an enforcement proceeding, “intertwined with both standing and contention admissibility issues, is whether the hearing

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<sup>9</sup> In the Bellotti case, the Attorney General of Massachusetts, Francis Bellotti, challenged an enforcement order the NRC Staff had issued to the licensee of the Pilgrim Nuclear Power Station. The enforcement order limited the scope of any challenge brought by a third party to the issue of whether “this Order should be sustained.” Bellotti, 725 F.2d at 1382 n.2. Bellotti challenged the adequacy of the order (not its issuance), arguing that the order should be strengthened by adding corrective actions. See id. at 1382 & n.2. The Commission denied Bellotti's intervention request because (1) his challenge to the adequacy of the order was outside the scope of the proceeding; and (2) he failed to assert injuries that were traceable to the order and thus failed to establish standing. See Pilgrim, CLI-82-16, 16 NRC at 45–46 & n.\*. The United States Court of Appeals for the District of Columbia Circuit affirmed. See Bellotti, 725 F.2d at 1381–82.

request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the [CO] should be sustained.” FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004). Regarding standing, an “injury alleged as a result of failure to grant more extensive relief is not cognizable in a proceeding on a [CO],” because such an assertion fails to establish harm that is traceable to the CO. Id. at 158. Regarding contention admissibility, a contention challenging a CO will be rejected as outside the scope of the proceeding unless it “oppose[s] the issuance of the order as unwarranted, so as to require relaxation, or [as] affirmatively detrimental to the public health and safety, so as to require rescission (as opposed to supplementation).” Id. (quoting Davis-Besse, LBP-04-11, 59 NRC 379, 385 (2004)).

The Commission has held that the dispositive inquiry under Bellotti for a third-party challenge to a CO “is whether the [CO] improves the licensee’s health and safety conditions. If it does, no hearing is appropriate.” Alaska Dept. of Transp. and Pub. Facilities (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 408 (2004) [hereinafter Alaska DOT].

### III. ANALYSIS

In his intervention request, Mr. Sparks seeks to challenge the facts and the proposed sanction in the CO (Contention 1), as well as the sufficiency of the corrective actions (Contention 2). Sparks’ Petition at 7. His proffered contentions state in full:

1. Whether the facts, as stated in the [CO], are true; and whether the proposed sanction is supported by these facts;
2. Whether the actions agreed upon in the [CO] are sufficient to ensure that [] Mr. Saunders; and the Licensee (SNC), and its supervisors, managers, executives and support infrastructure, i.e., [Human Resources], Compliance and Concerns Departments, and [Employee Concerns Program], as well as contractors, are sufficient to ensure that the workforce (employees and contractors), are free to raise safety concerns without fear of reprisal, in compliance with the NRC’s requirements for Employee Protections[,] 10 [C.F.R. §] 52.5 “Employee Protection.”

Id. at 7–8.

The NRC Staff and Mr. Saunders argue that Mr. Sparks' intervention request should be denied because, pursuant to the Bellotti doctrine, Mr. Sparks lacks standing and fails to proffer an admissible contention. See NRC Staff's Answer at 4–13; Saunders' Answer at 9–20. We agree.<sup>10</sup>

A. The Commission's Application of *Bellotti* in the *Alaska DOT* Decision

We begin our analysis by reviewing the Commission's 2004 decision in Alaska DOT, which, in our view, is identical in all material respects to this case. In that case, the NRC Staff issued a Notice of Violation (NOV) in which it concluded that Alaska DOT had discriminated against Robert Farmer, a Statewide Radiation Safety Officer, in retaliation for his having raised safety concerns. See CLI-04-26, 60 NRC at 402. Rather than contest the NOV, Alaska DOT agreed to comply with a CO that required it to take planning and training actions designed to ensure future compliance with the NRC's employee protection regulation. See id.

Farmer filed an intervention request with two contentions arguing that the CO should be rescinded and its corrective actions "replace[d] or supplement[ed] . . . with civil penalties and enforcement actions against individual managers." 60 NRC at 402. Contention 1 included an attack on the adequacy of the CO because it allegedly failed to address the "illegal retaliatory actions and behaviors of Licensee managers, [and] the failure of the managers to address employee concerns about safety and compliance." Id. Contention 2 asserted that the CO should be rescinded because "it is not based upon an accurate assessment and analysis of all

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<sup>10</sup> Mr. Saunders also argues that the intervention request should be denied because it was not timely filed through the NRC's Electronic Information Exchange system, and it was filed beyond the deadline without a demonstration of good cause. See Saunders' Answer at 2, 7. Because we deny the intervention request for lack of standing and failure to proffer an admissible contention, we do not address these alternative procedural arguments for denial advanced by Mr. Saunders.

the facts available to the Commission, or on a correct interpretation and application of [regulation and policy].” Id.<sup>11</sup>

The Commission held that “Bellotti means that Farmer lacks ‘standing’ to seek a hearing and also lacks admissible contentions.” 60 NRC at 404. Regarding standing, the Commission observed that the CO “mandates numerous actions for [Alaska DOT] to take to ensure a Safety Conscious Work Environment. These actions, including independent policy review, training, and a plan for assuring compliance with [NRC regulatory policy], cannot conceivably cause Farmer to suffer any injury.” Id. at 406. Absent injury attributable to the CO, held the Commission, “Farmer does not have standing.” Id. Regarding contention admissibility, the Commission concluded that both of Farmers’ contentions were outside the scope of the proceeding “because he speculates that other remedies would be more effective. This is really a request to impose either different or additional enforcement measures—in contravention of . . . Bellotti.” Id. at 405.

B. The Bellotti Doctrine, As Applied in Alaska DOT, Mandates Denial of Mr. Sparks’ Intervention Request for Lack of Standing and Lack of an Admissible Contention

Mr. Sparks claims that he has standing because the “vague” language in the CO harms his “professional reputation and credibility,” Sparks’ Petition at 6, and “do[es] nothing to ‘improve safety’ at the Vogtle facility.” Sparks’ Reply at 4 n.5; see also Sparks’ Petition at 6 (safety concerns at the Vogtle site are “ill served by this [CO]”). In other words, Mr. Sparks attacks the CO because, in his view, it is not adequately descriptive and it fails to impose adequate

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<sup>11</sup> The Alaska DOT licensing board rejected Contention 1, concluding that it impermissibly sought to strengthen the relief in the CO, contrary to the Bellotti doctrine. See Alaska DOT, LBP-04-16, 60 NRC 99, 117 (2004). However, a majority of the board found that Contention 2 supported standing and raised a legitimate factual question that warranted a hearing. See id. at 117–18. Judge Bollwerk dissented from this ruling, concluding that the Bellotti doctrine precluded the admission of Contention 2. See id. at 120–23 (Separate Views of Bollwerk, J., Dissenting in Part). On appeal, the Commission “agree[d] with Judge Bollwerk’s dissent.” Alaska DOT, CLI-04-26, 60 NRC at 401.



corrective actions. Here, as in Alaska DOT, “[t]his is really a request to impose different or additional enforcement measures—in contravention of . . . Bellotti.” 60 NRC at 405.

Significantly, here, as in Alaska DOT, the challenged CO mandates numerous corrective actions designed to enhance awareness of, and compliance with, the NRC regulation barring discrimination against employees for engaging in protected activities. Compare Saunders CO at 2–6 (describing corrective actions to be taken by Mr. Saunders), with Alaska DOT, 60 NRC at 406 (describing corrective actions to be taken by Alaska DOT). The corrective actions in the Saunders CO—including presentations by Mr. Saunders at SNC meetings and training sessions that are “based on [his] personal case study” and that require him to “honestly answer questions about what he failed to do,” Saunders CO at 3—“cannot conceivably cause [Mr. Sparks] to suffer any injury.” 60 NRC at 406; see also id. (“[A] petitioner . . . is not adversely affected by a [CO] that improves the safety situation over what it was in the absence of the order.”). Absent injury traceable to the CO, Mr. Sparks (like the petitioner in Alaska DOT) “does not have standing.” Id.

Mr. Sparks also fails to proffer an admissible contention under the Bellotti doctrine. Both of his contentions challenge the adequacy of the corrective actions in the CO,<sup>12</sup> and that is precisely what Bellotti forbids. See Alaska DOT, CLI-04-26, 60 NRC at 405. Pursuant to Bellotti, a contention challenging a CO must be rejected as outside the scope of the proceeding unless it claims that (1) the CO is unwarranted and, accordingly, its terms should be relaxed; or (2) the CO should be rescinded (as opposed to supplemented) because it is affirmatively detrimental to the public health and safety. See Davis Besse, CLI-04-23, 60 NRC at 158; accord Alaska DOT, CLI-04-26, 60 NRC at 406. Mr. Sparks’ contentions do not assert that the corrective measures in the Saunders CO should be relaxed or that the CO itself should be

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<sup>12</sup> Contention 1 questions the facts and whether the “proposed sanction is supported by the[] facts,” i.e., whether the proposed sanction is adequate. Sparks’ Petition at 7. Contention 2 questions whether the corrective “actions agreed upon in the [CO] are sufficient” to ensure future compliance with the NRC’s employee protection regulation. Id.

rescinded (as opposed to supplemented) for being detrimental to the public health and safety. His contentions thus fail to satisfy the Bellotti standard and, therefore, are inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(iii) as outside the scope of this proceeding.

Finally, Mr. Sparks' attempt to circumvent the Bellotti doctrine by characterizing Contention 1 as a factual challenge to the CO is foreclosed by the rationale in Alaska DOT, where the Commission concluded that when a respondent in an enforcement action (here, Mr. Saunders) has agreed to the terms of a CO, "a challenge to the facts themselves by a [third party] is not cognizable." 60 NRC at 408. As the Commission explained, allowing a third party "to attack a [CO] under the guise of a factual dispute would effectively permit an end run around Bellotti," and would also "undercut our salutary policy favoring enforcement settlements." Id. at 408, 409.<sup>13</sup>

Admittedly, Alaska DOT is distinguished from this case in the following respect: there, the respondent who agreed to the CO was a licensee (Alaska DOT), whereas here, the respondent who agreed to the CO is a company official (Mr. Saunders). In our judgment, this is a distinction without a difference. In either circumstance, allowing a third party like Mr. Sparks to challenge a CO under the guise of a factual dispute would eviscerate the Bellotti doctrine and create a disincentive for respondents to settle enforcement matters. See Alaska DOT, CLI-04-26, 60 NRC at 408–09.<sup>14</sup>

We are not insensitive to the fact that Mr. Sparks, like the petitioner in Alaska DOT, "appears to have been a victim of retaliatory misbehavior," or that, also like the petitioner in

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<sup>13</sup> The Commission recognized in Alaska DOT that the NRC Staff has broad discretion in enforcement matters, and the NRC's "adjudicatory process is not an appropriate forum for petitioners . . . to second-guess enforcement decisions on resource allocations, policy priorities, or the likelihood of success at hearings." 60 NRC at 407.

<sup>14</sup> Even putting the Bellotti doctrine aside, we conclude that the two contentions proffered by Mr. Sparks are inadmissible because his pleadings fail to show that (1) the issues raised are material to the proceeding; (2) adequate facts support his position; and (3) a genuine dispute exists on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(iv), (v), (vi); see also Saunders' Answer at 18.

Alaska DOT, “the corrective measures outlined in the [challenged CO] do not improve [Mr. Sparks’] personal situation.” 60 NRC at 406, 407. But for purposes of considering Mr. Sparks’ intervention request, those facts are beside the point. The NRC’s “charter does not include providing [Mr. Sparks] a personal remedy.” Id. at 407. Rather, the NRC’s role “is to procure corrective action for the Licensee’s program, and by example, other licensee’s programs,” id., and the enforcement measures in the Saunders CO serve that purpose.

Mr. Sparks’ avenue for seeking a personal remedy for alleged wrongful termination is through the U.S. Department of Labor, see Alaska DOT, CLI-04-26, 60 NRC at 407 & n.35,<sup>15</sup> and he declares that he is pursuing relief through that channel. See Sparks’ Petition at 3; Sparks’ Reply at 4. And insofar as Mr. Sparks maintains that additional NRC enforcement action is necessary to remedy employee discrimination at Vogtle, he can seek relief under 10 C.F.R. § 2.206, which provides that “[a]ny person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper.” 10 C.F.R. § 2.206(a); see also Alaska DOT, CLI-04-26, 60 NRC at 407 n.35.

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<sup>15</sup> See 10 C.F.R. § 52.5(b) (describing the process for seeking a remedy from the Department of Labor for any employee who believes he or she was discharged or otherwise discriminated against for engaging in protected activities).

IV. CONCLUSION

For the foregoing reasons, we deny Mr. Sparks' request to intervene, thereby terminating this proceeding at the licensing board level. This Memorandum and Order is subject to appeal in accordance with the provisions in 10 C.F.R. § 2.311(b) and (c).

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

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E. Roy Hawkens, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Michael M. Gibson  
ADMINISTRATIVE JUDGE

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Dr. Sue H. Abreu  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )

Mr. Thomas B. Saunders )  
(Confirmatory Order) )

IA-19-027 EA  
)  
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Intervention Request and Terminating Proceeding) (LBP-20-03)** have been served upon the following persons by Electronic Information Exchange.

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Thomas Saunders IA-19-027 EA

**MEMORANDUM AND ORDER (Denying Intervention Request and Terminating Proceeding)  
(LBP-20-03)**

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[Original signed by Clara Sola \_\_\_\_\_]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 29<sup>th</sup> day of January 2020.