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October 13, 1993

James M. Taylor
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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

RE: **PHILADELPHIA ELECTRIC COMPANY, DOCKET NOS. 50-352 AND 50-353, LIMERICK GENERATING STATION, UNITS 1 AND 2, MONTGOMERY COUNTY, PENNSYLVANIA**

LONG ISLAND POWER AUTHORITY, DOCKET NO. 50-322, SHOREHAM NUCLEAR POWER STATION, SUFFOLK COUNTY, NEW YORK

Dear Executive Director and Secretary:

As a follow up to the October 8th request and petition submitted on behalf of the New Jersey Department of Environmental Protection and Energy ("NJDEPE"), enclosed please find Judge Garrett E. Brown's October 12th decision dismissing NJDEPE's request for injunctive relief.

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Given the fact that Judge Brown dismissed NJDEPE's requested relief to enjoin the ongoing shipments of irradiated fuel, it has become even more imperative that the Nuclear Regulatory Commission take immediate action on NJDEPE's request.

Respectfully submitted,

FRED DeVESA
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for NJDEPE

By: _____
Thomas A. Borden
Deputy Attorney General

cc: Attached Service List (w/o attach)
Office of the General Counsel (with attach)
Charles L. Miller, NRC (with attach)
Pacific Nuclear Systems, Inc. (with attach)

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STATE OF NEW JERSEY, et al.,

Plaintiffs,

v.

LONG ISLAND POWER AUTHORITY, et al.,

Defendants.

Civ. No. 93-4269 (GEB)

MEMORANDUM AND ORDER

BROWN, District Judge

This matter comes before the Court on plaintiffs' application for an Order preliminarily enjoining defendants from causing or allowing thirty-three shipments of irradiated nuclear fuel by barge through New Jersey's coastal waters until: (1) an independent environmental evaluation of the risks posed by, and the alternatives to, said shipments has been prepared as required under the National Environmental Policy Act (the "NEPA"), 42 U.S.C. § 4332(2)(c); and (2) defendant Long Island Power Authority ("LIPA") submits a consistency certification to the New Jersey Department of Environmental Protection and Energy (the "NJDEPE") and receives a consistency determination from the NJDEPE as required by the federal Coastal Zone Management Act (the "CZMA"), 16 U.S.C. § 1451 *et seq.* Also before the Court are defendants' cross-motions: (1) to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1); and (2) to dismiss for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6) or, in the alternative, for summary judgment pursuant to FED. R. CIV. P. 56.

For the following reasons, the Court will: (1) Order Count II of plaintiffs' Verified Complaint withdrawn by consent of the parties; (2) grant defendants' cross-motions to dismiss for lack of subject matter jurisdiction as to Count I of the Verified Complaint; (3) deny defendants' cross-motions to

dismiss for failure to state a claim; (4) grant defendants' cross-motions for summary judgment as to Count III of the Verified Complaint; and (5) dismiss as moot plaintiffs' application for preliminary injunctive relief.

I. BACKGROUND

On September 21, 1993, plaintiffs, the State of New Jersey (the "State"), the NJDEPE, and Jeanne M. Fox—Acting Commissioner of the NJDEPE, commenced the instant action against the LIPA, Thomas DeJesu—Executive Director of LIPA, the United States Nuclear Regulatory Commission (the "NRC"), the United States Coast Guard (the "Coast Guard"), and the Philadelphia Electric Company (the "PECo"), seeking temporary restraints and preliminary injunctive relief in an effort to enjoin the above-named defendants from causing or allowing thirty-three shipments of irradiated nuclear fuel by barge from the LIPA's Shoreham Nuclear Power Station located in New York (the "Shoreham Facility") to the PECo's Limerick Generating Station in located in Pennsylvania (the "Limerick Facility") by way of New Jersey's coastal waters until: (1) an independent environmental evaluation of the risks posed by, and the alternatives to, the shipments has been prepared as required under the NEPA; and (2) defendant LIPA submits a consistency certification to the NJDEPE and receives a consistency determination from the NJDEPE as required by the CZMA. On September 22, 1993, after reviewing the written submissions and hearing the arguments of counsel, this Court denied plaintiffs' application for the issuance of temporary restraints. The Third Circuit then summarily denied plaintiffs' application for a stay of this Court's Order pending appeal by Order dated September 24, 1993.[1]

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1. Plaintiff's appeal to Associate Justice Souter of the United States Supreme Court was similarly denied.

The following facts are derived from plaintiffs' Verified Complaint. Plaintiffs assert that although low power testing of nuclear energy was performed at the Shoreham Facility as early as 1987, said facility has never been placed into commercial operation due, at least in part, to the absence of an adequate evacuation plan. V.Compl. ¶ 10. Consequently, the LIPA is currently decommissioning the Shoreham Facility and arranging for the disposal of the irradiated nuclear fuel that was used during the above-referenced low power testing.[2] *Id.* As part of the intended decommission of the Shoreham Facility, the LIPA proposes to transfer the fuel used by the Shoreham Facility to the Limerick Facility. *Id.* The current proposed transfer of fuel involves approximately thirty-three shipments by barge from the Shoreham Facility to the Limerick Facility by way of New Jersey's coastal waters and will take several months.[3] *Id.* ¶ 11. Plaintiffs assert that when they became aware of the planned shipments, they expressed their objections and concerns to LIPA and PECo officials.[4] *Id.*

In February of 1993, defendant LIPA filed an "Updated Decommissioning Plan" (a "UDP") with the NRC. *Id.* ¶ 14. Plaintiff's assert that the UDP "contained only a brief and tentative discussion of 'fuel disposal alternatives,' and that [the] LIPA acknowledged that as those alternatives emerged it would have to send any requests 'to the NRC as separate licensing submissions.'" *Id.* (citations omitted). On March 8, 1993, defendant PECo applied to defendant the NRC for a variance to its operating license that would allow it to receive and use the Shoreham Facility's fuel.

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2. Plaintiffs assert that the nuclear fuel at issue consists of Uranium-235 and is radioactive—approximately 176,000 curies. *Id.*

3. According to the plaintiffs' Verified Complaint, "[t]he proposed barge route for the 33 shipments is a route from Long Island, south through the Atlantic Ocean 15 miles off-shore of the State's coast, around Cape May, through the State's waters in Delaware Bay and up the Delaware River, finally docking in Eddystone, Pennsylvania." *Id.* ¶ 13.

4. Plaintiffs objections and concerns centered around the potential damage to tourism and public confidence regarding the safety of the New Jersey shore should one of the barges be involved in an accident. *Id.* ¶ 12.

Id. ¶ 15. Thereafter, on June 23, 1993, defendant the NRC approved the variance sought by defendant PECo. *Id.* ¶ 17. Neither defendant PECo's application nor defendant the NRC's notice of approval published on July 7, 1993, discussed at length the proposed method or route by which the subject fuel would be transported. *Id.* ¶¶ 15, 17.

On or about July 7, 1993, defendant LIPA submitted a "Proposed Operations Plan" for the fuel's shipment by barge. *Id.* ¶ 18. Plaintiffs assert that although they were made aware of the possibility that the defendants *might* seek to transport the fuel by barge along New Jersey's coastline, this was "the first formal document in which [the] LIPA indicated its intention to move its fuel from [the] Shoreham [Facility] to [the] Limerick [Facility] by barge in part through the State's territorial waters and coastal zones." *See id.* Plaintiffs further contend that they did not receive this document until September 3, 1993. *Id.* ¶ 18. Plaintiffs assert that in the interim, on or about July 27, 1993, the defendant Coast Guard conditionally approved the LIPA's plan. *Id.* ¶ 19. Plaintiffs assert that the Coast Guard's conditional approval of the LIPA's proposed plan did not include (1) an assessment of the risks posed by the proposed method or route of transport, or (2) a discussion of reasonable alternatives. *Id.* Plaintiffs further aver that the Coast Guard's conditional approval "was issued without a certification by [the] LIPA that the proposed activity complies with the State's CZM program as required by the CZMA . . . ." *Id.*

On or about August 9, 1993, defendant LIPA submitted an "Application for a Certificate of Handling" (a "COH") to plaintiff the NJDEPE as required by N.J.A.C. § 7:28-12 since New Jersey's Radiation Protection Act, N.J.S.A. § 26:2D-1 *et seq.*, prohibits the transport of certain radioactive materials into or through New Jersey without first obtaining a COH issued by the NJDEPE. *Id.* ¶ 20. Defendants' application is currently under review. *Id.* Plaintiffs maintain that this was the first application by anyone to the NJDEPE seeking approval for the proposed shipments at issue. *Id.*

On August 19, 1993, defendant the NRC issued a "Certificate of Compliance for Radioactive Materials Packages" to non-party Pacific Nuclear Systems for the use of certain containers manufactured to transport the Shoreham Facility's fuel. *Id.* ¶ 21. Plaintiffs assert that this certification was issued despite the fact that "[t]here was *no* analysis of the risks posed by barge transportation along any specific route, nor of a comparison of those risks versus those posed by other modes and routes of transportation, such as rail." *Id.* (emphasis in original).

Thereafter, on September 8, 1993, plaintiff the NJDEPE sent defendant Coast Guard a letter, with a copy to defendant LIPA, informing them that the LIPA was required under the CZMA to submit a "Consistency Certification" to both the Coast Guard and the NJDEPE certifying that the proposed transportation of radioactive material complied with the State's CZM program. *Id.* ¶ 22. It is also worth noting that on September 15, 1993, the NJDEPE wrote to the United States Department of Commerce—National Oceanic and Atmospheric Administration (the "NOAA") in an effort to have that federal administrative agency step in and require the defendants to submit to a consistency review under the CZMA. *Id.* ¶ 23. By letter dated October 1, 1993, the NOAA informed plaintiff that no such undertaking was required as "the proposed shipment by the LIPA does not involve the issuance of a required license or permit by the Coast Guard as defined [in the] CZMA." *See* Letter from Frank Maloney, Acting Director of the NOAA, to Jeanne M. Fox, plaintiff (Oct. 1, 1993) (attached to the Supplemental Letter Brief of the United States in support of its motion to dismiss) [hereinafter Maloney Letter.].

Plaintiffs maintain that "[t]o date [the] LIPA has refused [the] NJDEPE's demands that it withhold shipping the fuel until [the] LIPA has completed the CZMA process and until an adequate environmental assessment and alternatives analysis has been prepared." V.Compl. ¶ 23.

Consequently, plaintiff commenced the instant action on September 21, 1993, to enjoin the proposed shipments scheduled to begin on September 23, 1993.[5]

II. DISCUSSION

As an initial matter, in their Supplemental Briefs and at oral argument, plaintiffs formally withdrew Count II of their Verified Complaint alleging a violation of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* Accordingly, the Court will Order Count II of plaintiffs' Verified Complaint withdrawn by consent of the parties.

A. SUBJECT MATTER JURISDICTION

Before this Court can address the merits of plaintiffs' application for preliminary injunctive relief, I must ascertain whether this Court possesses subject matter jurisdiction over this cause of action. *See A.E. Finley & Assocs., Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990). For as the Sixth Circuit stated in *Gould, Inc. v. Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), *cert. dismissed*, 112 S. Ct. 1657 (1992): "[a] motion under FED. R. CIV. P. 12(b)(1) questioning subject matter jurisdiction must be considered before other challenges since the court must find jurisdiction before determining the validity of a claim." *Id.* at 450 (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

1. Standard for 12(b)(1) Motion to Dismiss

A district court may grant a motion to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1) based on the legal insufficiency of a claim. A dismissal pursuant to

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5. The Court has been advised by counsel that as of October 4, 1993—the date upon which this Court conducted oral argument on plaintiffs' application for preliminary injunctive relief—2 of the proposed 33 shipments had arrived in Eddystone, Pennsylvania without incident.

Rule 12(b)(1) is only proper, however, when the claim "'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-09 (3d Cir. 1991) (quoting *Bell v. Hood*, 327 U.S. 678, 683 (1946)). On a Rule 12(b)(1) motion, plaintiff bears the burden of persuading the Court that subject matter jurisdiction exists. *Id.* at 1409.

2. Third Circuit's Exclusive Jurisdiction

It is well settled that the courts of appeals are vested with exclusive subject matter jurisdiction to review all final orders issued by the NRC with respect to any proceeding granting, amending, revoking, or suspending of any license. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737, 739-41 (1985). Moreover, as stated in the Hobbs Act, 28 U.S.C. § 2342:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> . . .
>
> (4) all final orders of the [NRC] made reviewable by section 2239 of title 42 . . . .

Id. Section 2239(b), in turn, provides in pertinent part that "[a]ny final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in [the Hobbs Act, 28 U.S.C. § 2342]. . . ." *Id.* Subsection (a) of 42 U.S.C. § 2239 discusses, *inter alia*, the procedures by which the NRC must grant, suspend, revoke, or amend licenses. *See id.* Thus, a final order of the NRC which grants, suspends, revokes, or amends a license is subject to the judicial review provisions contained in the Hobbs Act set forth above.

After careful examination and review of the record presented to this Court and the well-documented written submissions of the parties and hearing the arguments of counsel, this Court finds

that Count I of plaintiffs' Verified Complaint is essentially challenging the validity of two final orders issued by the NRC—the first approving the variance sought by defendant PECO, and the second issuing a "Certificate of Compliance for Radioactive Materials Packages" to non-party Pacific Nuclear Systems for the use of certain containers manufactured to transport the irradiated nuclear fuel at issue. *See* V.Compl. at Count I. Plaintiffs are attempting to amend those orders to include: (1) an evaluation of the method and route of the intended transport of the nuclear fuel, and (2) an assessment of the risks posed by the current proposed transport by barge along the New Jersey coastline. *See id.* As such, this Court concludes that plaintiff has failed to meet its burden in establishing that this Court may exercise subject matter jurisdiction over this action.[6] Accordingly, the Court will grant defendants' cross-motions to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1) as to Count I of the Verified Complaint.

B. CROSS-MOTIONS TO DISMISS PURSUANT TO RULE 12(b)(6)

A motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986); *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). The Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Angelastro*, 764 F.2d at 944. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In setting forth a

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6. Because this Court find that plaintiffs are essentially challenging the validity of two final orders issued by the NRC, it necessary follows that plaintiffs' steadfast reliance on *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981), is misplaced. *See Lorion*, 470 U.S. at 737, 739-41 (discussed *supra*).

valid claim, a party is required only to plead "a short plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a).

Because defendants' cross-motions for summary judgment are based upon the entire factual record presented to this Court, I must conclude that it is the more appropriate context within which to decide whether plaintiffs' remaining claim has merit. *See* FED. R. CIV. P. 12(b). Accordingly, the Court will deny defendants' cross-motions to dismiss for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6).

C. CROSS-MOTIONS FOR SUMMARY JUDGMENT

1. Standard for Summary Judgment

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the non-moving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Rule 56(e) requires him to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

2. Applicability of the CZMA

The gravamen of Count III of plaintiffs' Verified Complaint is that "[the] LIPA applied for an obtained a Coast Guard approval for handling the fuel without submitting a CZM program

consistency certification to the Coast Guard in violation of the CZMA, 16 U.S.C. § 1456(c)(3)(A)."[7] *See* V.Compl. ¶ 40; see *generally id.* at Count III. Review of the CZMA reveals, however, that the application of 16 U.S.C. § 1456(c)(3)(A) is premised upon a finding that the LIPA is "[an] applicant for a required Federal license or permit." *See id.*

In the instant case, plaintiffs attempt to establish this predicate issue based upon a letter from Captain H. Bruce Dickey, United States Coast Guard, Captain of the Port-Long Island Sound, wherein Captain Dickey used the word "approval" to inform officials at the Shoreham Facility that pending a routine safety inspection, the Coast Guard would not interfere with the proposed shipments. *See* Letter from Captain H. Bruce Dickey, United States Coast Guard, Captain of the Port-Long Island Sound, to L.M. Hill, Resident Manager of the Shoreham Facility (Jul. 27, 1993) (annexed as Ex. D to Affidavit of Brant Aidikoff, Consultant to the General Electric Company, dated September 21, 1993 [hereinafter Aidikoff Aff.]). As alluded to in *supra* part I of this Memorandum and Order, however, the NOAA—the federal agency charged with administering this statute and making such findings—has already decided this issue, stating:

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7. 16 U.S.C. § 1456(c)(3)(A) provides in pertinent part:

> After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.

Id.

> [We have] determined that the proposed shipment by [the] LIPA does not involve the issuance of a required license or permit by the Coast Guard as defined in [the] CZMA . . . . Therefore, the activity is not subject to consistency review under the CZMA.
>
> . . . [Although we] give[] a broad meaning to the definition of "federal license or permit" . . . . In the instant case, [the] LIPA has not applied for a Federal [sic] license or permit, an moreover, the Coast Guard has not proposed any activities concerning the shipment. [The] LIPA was not legally required to present the Coast Guard with its operation plan for review, but elected to do so on a voluntary basis. Although the Coast Guard could have exercised its statutory authority to control the shipment, no such control was asserted in this case. Absent this control, [the] LIPA could proceed with the shipment without Coast Guard review or approval.

See Maloney Letter. Consequently, absent significant evidence to the contrary, this Court will defer to the findings of the NOAA. For as the Ninth Circuit stated while articulating the appropriate standard of review in such cases: "deference is due an agency's interpretation of its own regulations and the statute it is charged with administering . . . . [T]he agency's decision should not be disturbed unless error is so clear as to deprive its decision of a rational basis." *American Petroleum Inst. v. Knecht*, 609 F.2d 1306 (9th Cir. 1979) (cited with approval in *Norfolk S. Corp. v. Oberly*, 632 F. Supp 1225, 1251 n.46 (D. Del. 1986)); *see also Southern Pac. Transp. Co. v. California Coastal Comm'n*, 520 F. Supp. 800, 803 (N.D. Cal. 1981) ("N.O.A.A. should be afforded considerable deference by the courts with respect to its interpretation of its own regulations." (citing *Knecht*, 609 F.2d at 1310).

After careful review of the evidence presented and hearing the arguments of counsel, this Court finds that plaintiffs have failed to produce *any* credible evidence to support a contrary finding to that announced by the NOAA. In fact, in addition to the findings of the NOAA set forth above, the evidence presented to this Court supports a finding that the Coast Guard did not issue a federal license or permit to the defendants in this case to transport the irradiated nuclear fuel at issue. *See, e.g.*, Declaration of Commander Phillip J. Heyl, United States Coast Guard, Captain of the Port-Long Island Sound, dated September 22, 1993 (decision not to exercise power to stop shipment does not

create a federal license or permit to go forward with shipment); Aidikoff Aff. ¶¶ 6-7 (submission of proposed plans of transport to Coast Guard reflected a customary industry practice not an application for a federal license or permit). As such, this Court must find that the procedures enunciated in the CZMA have not been triggered by the series of events which lead to the filling of the instant action. Accordingly, the Court will grant defendants' motions for summary judgment with respect to this issue.

In light of the foregoing, the Court will dismiss as moot plaintiffs' application for preliminary injunctive relief.

III. CONCLUSION

For the foregoing reasons,

It is this 12th day of October, 1993,

ORDERED that Count II of plaintiffs' Verified Complaint be and is hereby WITHDRAWN by consent of the parties; and it is

FURTHER ORDERED that defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1) as to Count I of the Verified Complaint be and is hereby GRANTED; and it is

FURTHER ORDERED that defendants' motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) be and is hereby DENIED; and it is

FURTHER ORDERED that defendants' motion for summary judgment pursuant to FED. R. CIV. P. 56 as to Count III of the Verified Complaint be and is hereby GRANTED; and it is

FURTHER ORDERED that plaintiffs' application for preliminary injunctive relief be and is hereby DISMISSED as MOOT.

GARRETT E. BROWN, JR., U.S.D.J.

STATE OF NEW JERSEY

DIVISION OF LAW

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1. James Taylor
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4. Charles L. Miller

Thank you for your assistance