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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of TEXAS UTILITIES ELECTRIC COMPANY, (Comanche Peak Steam Electric Station, Unit 2)	Docket No. 50-446-CPA ASLBP No. 92-668-01-CPA

On December 15, 1992, an Atomic Safety and Licensing Board (ASLB) panel issued its Memorandum and Order (Ruling on Intervention Petitions and Terminating Proceedings) (hereinafter referred to as "M&O"). Petitioners, B Irene Orr and D.I. Orr, timely filed notice of appeal. On December 31, 1992, the Nuclear Regulatory Commission granted Petitioners leave until January 8, 1993 to file a brief in support of their notice of appeal. Petitioners hereby submit their brief in support of Petitioners' notice of appeal.

INTRODUCTION

By letter dated February 3, 1992, as supplemented on March 16, 1992, Texas Utilities requested an extension of the construction permit for Unit 2 of the Comanche Peak nuclear power plant from August 1, 1992 to August 1, 1995. It is undisputed that as good cause justification for this request Texas Utilities stated that although it originally anticipated only a one year delay in construction of Unit 2 beginning in April 1988 further delay until August 1995 was necessary because of the reinspection and corrective action program applied to Unit 1 at Comanche Peak. See, M&O at pp. 3-4. The NRC Staff found "good cause

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justification for the suspension of construction of Unit 2 based on allowing concentration of resources for the completion of Unit 1" and approved the extension of the construction permit for Unit 2 until August 1, 1992. Id. at p. 4.

The licensee and the NRC Staff both asserted that the construction permit for Unit 2 of Comanche Peak should be further extended for another three (3) years, even though the licensee originally proposed a one year delay in 1988, because they claim the licensee has demonstrated continued good cause based on the noted problems related to the construction and startup of Unit 1. See, 57 Fed. Reg. 28,885; M&O at pp. 2-5.

On July 27, 1992 petitioners filed a timely petition to intervene. On October 5, 1992 petitioners filed a supplement to the petition proposing a contention which alleged as follows:

> The delay of construction of Unit 2 was caused by Applicant's intentional conduct, which had no valid purpose and was the result of corporate policies which have not been discarded or repudiated by Applicant.

See, Petitioner's October 5, 1992 Supplement.

Here, petitioners contend that the Panel erred in dismissing their contention. Petitioners provided the Panel with detailed factual information in support of the contention which alleged:

(1) the licensee continues to employ corporate policies in violation of NRC requirements;

(2) as a result of these corporate policies significant and substantial construction delays occurred and continue to occur;

(3) that the applicant has not repudiated or disregarded the corporate policies which violate NRC requirements and are responsible for the delay.

The facts supporting these allegations fell into three categories.

First, the Petitioners alleged facts which showed that there existed a factual dispute whether the licensee had a corporate policy to violate NRC requirements with respect to the construction and startup of Unit 1. This allegation was supported by specific references to portions of the record in CPA-1, the 1988 proceeding in which the licensee sought to extend the construction date of Unit 1 to August 1988.

Second, Petitioners alleged facts which raised a factual dispute whether Texas Utilities misled the licensing board in CPA-1 about critical facts in an effort to conceal its ongoing corporate policy of construction in violation of NRC requirements. This allegation was based, in part, on specific reference to answers to interrogatories by one of the licensee's co-owners of Comanche Peak who alleged in sworn answers to the board that Texas Utilities and its agents and representatives had engaged in such material factual misrepresentations to the board. Additionally, petitioners based their allegations on the rampant practice by the licensee of restrictive settlements agreements and the payment of hush money designed to silence critics from reporting to the NRC the licensee's violation of NRC requirements. Moreover, the petitioners claimed the licensee

intentionally relied on incorrect construction standards and improper design certification methods and acted to conceal these acts of misconduct. Each of these facts viewed in the light most favorable to Petitioners raises an issue of fact whether the licensee has an ongoing corporate policy of violating NRC requirements which has resulted in the delay of construction of Unit 2.

Third, Petitioners alleged facts which created an issue of fact as to whether the continued imposition of Notices of Violation and civil fines by the NRC demonstrates that the licensee still employs the same corporate policies which originally violated NRC requirements and resulted in construction delays.

For the reasons stated below, petitioners satisfied the Commission's pleading requirements for the admission of contentions in construction permit application proceedings. As a matter of law, the ASLB Panel's Memorandum and Order must be reversed and petitioner's contention must be admitted.

ARGUMENT

I. THE PANEL MISCONSTRUED PETITIONERS' EVIDENCE OF NON-REPUDIATION

Construction permit amendment proceedings consist of two separate prongs (corporate policy resulting in past delay and non-repudiation of that corporate policy). One Appeal Board has specifically held:

> As the Commission's decision in CLI-86-15 establishes a two-pronged pleading standard and that the intervenors must provide a basis for both prongs. First, the

> intervenors must set forth a basis for the proposition that the applicants had a corporate policy to violate agency licensing requirements. Second, they must state a basis for the proposition that the applicants have not discarded and repudiated the policy.

Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 929 (1987).

The ASLB panel repeatedly attempted to construe entering into nondisclosure/"hush money" agreements as evidenced related to the delay in construction of CPSES and that this somehow constitutes a fatal flaw in the petition.[1/] TUEC's policy of intentionally concealing information about deficient and improper design practice did not directly cause delay. To the contrary it was the eventual unraveling of the deficient design and construction practices before the ASLB which resulted in the delay. Indeed, had TUEC successfully secreted all of the design deficiencies intentionally incorporated into the CPSES for the ASLB, there would not have been any need to amend the construction permit. Clearly, the secreting of this intentional wrong doing did not directly result in delays. Although the panel felt it necessary to draw a nexus between the past delay and evidence of non-repudiation, there was no requirement to do so.

1/ The panel repeatedly makes this assertion. For example, on page 22 of the M&O, the panel states that Petitioners did "not present any supporting material to show that on balance the restrictive agreements were the cause of the delay..." Likewise, on pages 26-27, the panel again asserts that even assuming "hush money" was paid, "it does not ipso fact show that delay at Unit 1 was caused by the entering into agreements or that the agreements, on balance, caused the delay at Unit 2 rather than the reason given by Texas Utilities." M&O at pp. 26-27

Often there may not be nexus simply because in the beginning the purpose behind the corporate policy which ultimately resulted in the delay was the hope that construction would be expedited. The delay only came about as a result of the uncovering of the very information TUEC attempted to keep from the ASLB (i.e., facts relating to the deficient design and construction practices).[2/]

Once Petitioners establish that the delay was due to a corporate policy to violate agency licensing requirements, the remaining factor which must be demonstrated is whether the applicant repudiated the corporate policies responsible for the delays. Here, the petitioners provided more than sufficient information to satisfy this standard. For example, the existance of the restrictive settlement agreements alone is sufficient to raise a factual dispute regarding the issue of repudiation. The various agreements each contain provisions which, on their face, violate NRC regulations by attempting to conceal information about the licensee's violation of NRC requirements. In addition, the agreements -- including their respective illegal and violative provisions -- have been in full force and effect since 1988. Indeed, there is no evidence to suggest that the licensee has ever even attempted to repudiate these restrictive agreements which suggest a sinister corporate policy of deliberately secreting information about the licensee's violation of NRC regulations.

[2/] Obviously, the purpose of employing deficient design and construction practices was to hasten the completion of the project.

Accordingly, contrary to the assertions of the licensee and the NRC Staff, the licensee has not repudiated its continuing corporate policies of violating NRC requirements.

II. THE ASLB PANEL ERRED WHEN IT FAILED TO CONSIDER THE CONTENT OF THE DOCUMENTS REFERENCED IN THE SUPPLEMENT TO THE PETITION.

The Panel further asserted that Petitioner's reference to two previously filed pleading in the CPA-1 proceeding could not be relied upon by Petitioners to satisfy the factual basis of their contention. M&O at p.19. It is settled that the factual basis of a contention may be established by a concise statement of the alleged facts supporting the contention together with references to specific documents the petitioner intends to rely upon. See 10 C.F.R. §2.714(b)(2)(ii), also see Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930 (1987) (factors underlying the contention can generally be satisfied under 2.714(b) by making reference to "documents and texts"). In the instant matter, Petitioners specifically referred to two specific documents contained in the public record as support for their contention.[3/] The documents specifically identified were

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[3/] There exists a "two-pronged" pleading requirement in construction amendment proceedings:

> As the Commission's decision in CLI-86-15 establishes a two-pronged pleading standard and that the intervenors must provide a basis for both prongs. First, the intervenors must set forth a basis for the proposition that the applicants had a corporate policy to violate agency licensing requirements. Second, they must state

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"CASE's Response to Applicants' Interrogatories to 'Consolidated intervenors' and Motion for a Protective Order," dated June 6, 1987, and "CASES's Supplementary response to Applicants' Interrogatories to 'Consolidated Intervenors' and Motion for a Protective Order," dated July 6, 1987. Petitioners advised the panel that these two document set out sufficient facts to establish that "the delay in construction of the CPSES was caused by TUEC's intentional conduct." Supplement at p. 3. The ASLB panel failed to review these two documents to determine whether they contained sufficient factual information to satisfy the requirements of 2.714(b)(2)(i)-(iii), and specifically erred by failing to consider whether this documentation established the minimal showing Petitioners were required to establish as to whether the delay in construction was caused by applicant's intentional misconduct.[4/]

[3/](...continued)
a basis for the proposition that the applicants have not discarded and repudiated the policy.

Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 929 (1987).

[4/] Although this documentation contains evidence of TUEC's non-repudiation, the predominate significance rests with the first (i.e., whether Petitioners set forth a basis for the proposition that the applicants had a corporate policy to violate agency licensing requirements which resulted in delays in construction).

III. PETITIONERS WERE ENTITLED TO AN ADVERSE INFERENCE THAT THE DOCUMENT SECRETED UNDER THE MINORITY OWNER AGREEMENTS CONTAINED SUFFICIENT EVIDENCE TO ESTABLISH A FACTUAL BASES FOR THE CONTENTION.

Petitioners established that under the terms of the "nondisclosure" agreements, all of the information in the control and possession of the CPSES former minority owners was concealed. Petitioners further established that this information was concealed from a presiding ASLB in violation of a standing order to advise the panel of the existence of such documentation. Under this set of circumstances, Petitioners were entitled to an inference that the documentation concealed sufficiently established the factual bases for the contention. Indeed, Petitioners identified this documentation in their supplement to the petition and, at a minimum, the panel should have reviewed this material before concluding that Petitioners were unable to satisfy the requirements imposed under 10 C.F.R. §2.714(b)(2). This is particularly true in light of Petitioners formal motion to compel disclosure of this documentation.

Moreover, the illegal nature of the agreements warranted adverse inferences and required the panel to order TUEC to release the secreted documentation. On there face, the minority owner agreements (in particular the TMPA and BEPC agreements) demonstrate that TUEC illegally sought to conceal all of the

information in the possession of its joint owners that could further delay the licensing of the CPSES.[5/]

This conduct of TUEC wholly undermined the regulatory process.[6/] The regulatory process requires that the information

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[5/] For example, Section 9.2 of the BEPC agreement and its counterparts in the TMPA (and Tex La) agreements seek to prevent the former minority owners (and their employees, agents, attorneys, consultants, etc.) from filing safety related complaints "in any manner involving, concerning, arising out of, or relating to, the design, construction, management and licensing of, or any other matter relating to, Comanche Peak . . . ." BEPC Agreement Section 9.2, p. 37, and further bars the filing of "any complaint" concerning safety related matters in "any forum whatsoever." BEPC Agreement, p. 37-38. Under this provision, BEPC and its "insures, agents, servants, employees, officers, directors, consultants, attorneys and representatives," are prohibited from filing complaints with the NRC, such as a petition under 10 C.F.R. 2.206, or a safety related complaint to the ASLB. BEPC Agreement Section 9.2.

Moreover, the BEPC and TMPA Agreements specifically seek to restrain all of BEPC and TMPA's employees from contacting the NRC as well. See TMPA Agreement at p. 37-38; BEPC Agreement at p. 36-37. Pursuant to NRC Staff's letter of April 27, 1989, it was incumbent upon TUEC to insure that the minority owners, their attorneys and employees did not interpret the agreements in a manner which would restrict the free flow of safety related information to the NRC. TUEC never took this step and never advised the NRC of the restrictive terms contained in these agreements pursuant to the requirement to do so set out in NRC's April 27, 1989 letter. TUEC's failure to comply with NRC Staff's April 27, 1989 memorandum is further indicia that TUEC continues to maintain a corporate policy of prohibiting the release of relevant information to the NRC which resulted in the delay of construction of the CPSES.

[6/] TUEC's nondisclosure agreements with its joint owners are utterly repulsive inasmuch as they intentionally concealed information from a standing ASLB in violation of an order issued by that ASLB requiring TUEC to timely appraise the ASLB (and thereby appraise the public) of the very information it had secretly arranged to conceal with its joint owners. In this respect the TMPA and BEPC settlements were both executed prior to the dissolution of the ASLB which had been adjudicating the CPA-1 contention. Consequently, the TMPA and BEPC settlements were executed in violation of TUEC's fiduciary and legal obligations

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obtained by TMPA and BEPC which relates, in any manner, to the licensing of CPSES (or the issues related to this proceeding) be fully disclosed to Petitioners. The fact that TUEC required that this information be suppressed as a condition of settlement constitutes overwhelming evidence that TUEC did not repudiate its past corporate policies.[7/]

Thus, the provisions contained in the BEPC and TMPA Agreements (and the Tex-La agreement) which artfully attempt to prohibit employees, attorneys, consultants and others from "assisting" citizen intervenors are patently illegal.

Beyond the statutory and regulatory precedent outlined above, restrictive settlements such as the Tex-La agreement have

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[6/](...continued)
to the NRC. See Exhibits 8 and 9 to Supplemental Petition. The provisions of the TMPA and BEPC outlined above violated the fiduciary and legal obligations of TUEC to the Board, the public, the former intervenors and Petitioners. The language of these agreements demonstrates that TUEC knowingly and deliberately entered into restrictive settlement agreements with its joint owners and therein secured a guarantee that this information would never reach the, NRC, the CPSES intervenors, the CPA-1 ASLB, the CPA-2 ASLB or Petitioners. See Exhibit 3 to Petitioners' Supplement to the Petition to Intervene.

[7/] It should be noted that the minority agreements violate 10 C.F.R. § 50.7(f). Section 50.7(f) explicitly prohibits employers, such as TUEC, BEPC and TMPA (and Tex-La) from prohibiting or inhibiting "employees," including attorneys and paid consultants, from engaging in protected activity. 10 C.F.R. § 50.7 incorporates by reference all of the substantive protections afforded the public by Section 210 and, in addition thereto, specifically prohibits utilities from entering into the restrictive settlements TUEC entered into with its minority owners. Similarly, the agreements violated Section 210 of the Energy Reorganization Act. "Under this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act. S. Rep. 95-848, reprinted in 1978 U.S. Code Cong. & Admin. News 7303-04 (emphasis added).

been voided on public policy grounds for years. See, e.g. EEOC v. Cosmair, 821 F.2d 1085, 1090 (5th Cir. 1987); Town of Newton v. Rumery, 480 U.S. 386, 392 (1987)("[a] promise is unenforceable if the interest in its enforcement is outweighed by a public policy harmed by enforcement of the agreement").

In case after case, the courts and the Department of Labor have found settlement provisions far less restrictive than the BEPC and TMPA agreements void against public policy. These provisions were voided even when, unlike the BEPC and TMPA agreements, the settlements contained explicit provisions which allowed avenues of disclosure to the NRC of safety related information.

For example, in Polizzi v. Gibbs and Hill, 87-ERA-38, D&O of SOL (July 18, 1989) ("Enclosure 7" hereto), the SOL reviewed the legality of an agreement which restricted certain rights of Mr. Polizzi to participate in NRC ASLB proceedings, but explicitly allowed Mr. Polizzi to inform the "Nuclear Regulatory Commission of any and all safety concerns he may have relating to the Comanche Peak Steam Electric Station." Polizzi, p 3-4 (citing from the settlement agreement). Despite this provision, the SOL struck down the legality of the restrictive provisions of the Polizzi agreement as violative of the Energy Reorganization Act. According to the SOL:

> . . . the Settlement Agreement significantly restricts access . . . to information [Polizzi] may be able to provide relevant to the administration and enforcement of the ERA [i.e. Energy Reorganization Act] and many other laws. Its effect, to a large degree, would be to 'dry up' channels of communication which are essential

> for government agencies to carry out their responsibilities. NLRB v. Scrivener, 405 U.S. 117, 122 (1972). As such, I find it against public policy.

Polizzi, p. 5-6.

The public policy behind aggressively promoting the filing of safety complaints or concerns with the NRC is monumental. As the U.S. Supreme Court recently recognized, the public policy behind Section 210 of the Energy Reorganization Act is not only to protect persons from discrimination, but to "encourage" the filing of safety complaints. English v. General Electric, 496 U.S. 72, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). The BEPC, TMPA (and Tex-La agreement) thwart the very Congressional policies behind the enactment of Section 210 and thwart the very NRC policies behind the enactment of 10 C.F.R. 50.7.

Moreover, the NRC has adopted public policy considerations with respect to a licensee's conduct. All licensees are required to possess the requisite character and integrity necessary to safeguard the public. In this respect, the NRC has determined that:

> The generally applicable standard to determine licensee character and integrity is whether there is reasonable assurance that the licensee has the character to operate the facility in a manner consistent with the public health and safety, and with the NRC requirements. To deice that issue, the Commission may consider evidence of licensee behavior having a rational connection to safe operation and some reasonable relationship to licensee's candor, truthfulness, and willingness to abide by regulatory requirements and accept responsibility to protect pubic health and safety.

In re Piping Specialists, Inc, LBP 92-25 (September 8, 1992)(citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985).

The secreting of safety-related information by a licensee through the use of restrictive settlement agreements as well as a licensee's intentional withholding of information from an ASLB knowing that to do so constituted a violation of an on-going duty to disclose such information to a sitting ASLB, is wholly inconsistent with the NRC's stated policy with respect to a licensee's integrity and character.

Additionally, the Chairman of the NRC in a prepared statement to a U.S. Senate Subcommittee stated:

> ...let me state emphatically, that an agreement whereby any person--not just an employee or former employee with pending claims under Section 210 of the Energy Reorganization Act, but any person--contracts to withhold safety-significant information from the Nuclear Regulatory Commission is not acceptable... [A] paid-for confidential commitment by an individual not to raise safety concerns with the NRC in any fashion is intolerable... The objective of this effort is to leave no uncertainty that parties to settlement agreement understand that they have the opportunity to provide information directly to the Commission."

May 4, 1989 Statement submitted by the NRC to Senate Subcommittee on Nuclear Regulation, at pp. 4-7 (emphasis added)("Enclosure 8" hereto).[8/]

[8/] Also see NRC Staff's April 27, 1989 letter ("Attachment 6"), which states:

> Examples of restrictive clauses include but are not limited to prohibiting or in any way limiting an employee, or an attorney for such employee, from coming to and providing safety information to an NRC staff

(continued...)

The plain meaning of the NRC's May 4, 1989 statement demonstrates that restrictive clauses executed with any person which restricts the flow of information to the NRC is unacceptable. The TMPA Agreement specifically requires TMPA to "take all such action as may be appropriate in order to prevent its consultants and attorneys... from participating or assisting in any manner adverse to TMPA's duty of cooperation" and must not assist or cooperate in any manner with "any current or future proceedings or matter before...the NRC involving or relating to Comanche Peak." TMPA Agreement at p. 39, §9.2 (Emphasis added). Accord BEPC Agreement at p. 39, §9.2 (BEPC must "encourage and solicit" its attorneys and consultants and "take all such action as may be necessary or appropriate in order to prevent the consultants and attorneys...from participating or assisting in any manner adverse to Brazos' duty of cooperation," and specifically with respect to any proceeding before the "NRC"). These provisions are per se restrictive and violative of NRC policy.

IV. PETITIONERS SATISFIED THE REQUIREMENTS SET OUT IN 10 C.F.R. §2.714(b)(2)(iii).

The ASLB panel asserts that Petitioners have not satisfied the requirements set out in 10 C.F.R. §2.714(b)(2)(iii). Section 2.714(b)(2)(iii) requires petitioners to reference the specific portions of the application that the petitioner disputes and the

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[8/](...continued)
member.

supporting reasons for the dispute. While the Commission has ruled these requirements must be enforced, the threshold for stating a valid and litigable contention does not require that the petitioners marshal evidence which proves its case at the initial pleading stage. However, the Panel's strict interpretation of these regulations would reqire just that.

Unlike other intervention proceedings, intervention in a construction permit amendment proceeding is limited to whether an applicant has established "good cause" for delay in construction.[2/] It is axiomatic that a petitioner may intervene in a construction permit amendment proceeding on one ground only, that being whether the applicant's failed to established "good cause" for the delay in construction. Petitioners' Supplement to their intervention petition specifically states that they were intervening to challenge TUEC's asserted "good cause" for the delay of construction. Supplement to Petition at p. 2. As such, Petitioners did identify the specific portions of the application they dispute (i.e., TUEC's asserted grounds that "good cause" exists).

2/ Section 185 of the Atomic Energy Act and 10 C.F.R. §50.55(b' provide only one ground for intervention, that being whether the applicant states good cause. Moreover, the panel's September 11, 1992 Memorandum and Order (Setting Pleading Schedule) at page 6 states that "the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show good cause justification for the extension, only those contentions that address issue are admissible (citing Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 932 (1987)).

Moreover, the petitioners presented sufficient information in their pleadings to demonstrate a factual dispute exists as to whether: (1) the licensee continues to employ corporate policies in violation of NRC requirements; (2) as a result of these corporate policies significant and substantial construction delays occurred and continue to occur; and (3) that the applicant has not repudiated or disregarded the corporate policies which violate NRC requirements and are responsible for the delay. These facts were sufficient to support a litigable contention on the issue of good cause for delay.

As a matter of law, the Panel must be reversed because there was sufficient factual information presented by the Petitioners to support their contention.

CONCLUSION

For the forgoing reasons, the ASLB panel erred by not admitting Petitioners' contention and, as such, must be reversed.

Respectfully submitted,

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Dated: January 8, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of	)	
	)	Docket No. 50-446-CPA
TEXAS UTILITIES ELECTRIC COMPANY,	)	ASLBP NO. 92-668-01-CPA
	)	(Construction Permit
(Comanche Peak Steam Electric Station, Unit 2)	)	Amendment)
	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of: BRIEF IN SUPPORT OF PETITIONERS' APPEAL OF ATOMIC SAFETY AND LICENSING BOARD MEMORANDUM AND ORDER was served VIA FACSIMILE and FIRST CLASS MAIL, postage pre-paid, on January 8, 1993, upon:

Secretary,
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

(Original and two copies)

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