

RAS 11065

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

DOCKETED 01/17/06

SERVED 01/17/06

Before Administrative Judges:

Alex S. Karlin, Chairman
 Dr. Anthony J. Baratta
 Lester S. Rubenstein

In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE
 L.L.C.
 and
 ENTERGY NUCLEAR OPERATIONS, INC.
 (Vermont Yankee Nuclear Power Station)

Docket No. 50-271-OLA

ASLBP No. 04-832-02-OLA

January 17, 2006

MEMORANDUM AND ORDER

(Ruling on Deliberative Process Privilege Claims)

Before the Board is a motion by the Department of Public Service of the State of Vermont (State) to compel the NRC Staff (Staff) to produce fifteen documents that the Staff withheld from disclosure under 10 C.F.R. § 2.336(b).¹ This is the State's third motion to compel and, as with the previous two, the Staff claims that the documents are protected by the deliberative process privilege.² Both of the prior motions were denied. LBP-05-33, 62 NRC ___ (slip op.) (Dec. 21, 2005). With the exception of one portion of one document, State Motion to Compel III is likewise denied because we conclude that (a) the fifteen documents qualify for the deliberative process privilege, and (b) the State has failed to show that its immediate need for these documents outweighs the privilege.

¹ Vermont Department of Public Service Motion to Compel Production of Certain NRC Staff Documents (III) (Nov. 22, 2005) [State Motion to Compel III].

² NRC Staff's Answer to Vermont Department of Public Service's Third Motion to Compel (Dec. 2, 2005) [Staff Answer III].

I. BACKGROUND

A. Procedural Posture

Our December 21, 2005 ruling explains the relevant history and background of this case, thus our summary of the procedural context of State Motion to Compel III will be brief. Since the outset of this proceeding, the Staff has made documents available to the parties, as required by 10 C.F.R. § 2.336(b). Simultaneously, the Staff has withheld other documents, which it asserts are privileged or protected, and has listed these “otherwise discoverable documents” on privilege logs. See 10 C.F.R. § 2.336(b)(5). Recently, the State challenged the Staff’s assertion of the deliberative process privilege regarding certain of the withheld documents. In LBP-05-33, we denied the State’s first two motions challenging the Staff’s deliberative process privilege claims covering a total of twenty-eight documents that were listed on the Staff’s July 27 and September 6, 2005 deliberative process privilege logs. State Motion to Compel III seeks access to fifteen documents that were listed in the Staff’s September 29 and October 31, 2005 deliberative process privilege logs.³ State Motion to Compel III at 1. Based on the descriptions in the Staff’s privilege logs and brief, the fifteen documents in question can be grouped into three categories:

(1) RAI Documents: These six documents deal with Staff discussions relating to the need to request additional information (RAI) on various subjects, the adequacy of the applicant’s answers to previous RAIs, and the drafting of new RAIs. These documents are identified in the privilege logs as documents numbered 14-22, 14-24, 14-30, 15-05, 15-06, and 15-07.

³ These documents are referred to throughout this Memorandum and Order by the number assigned to each document in the Staff’s deliberative process privilege log. The fifteen documents that the State challenges are documents 14-22, 14-24, 14-30, 15-05, 15-06, 15-07, 15-30, 15-32, 15-33, 15-35, 15-36, 15-40, 15-41, 15-42, and 15-43. See State Motion III, Tab C, NRC Staff Deliberative Process Log of 9/29/05 and 10/31/05 [9/29/05 Deliberative Process Log and 10/31/05 Deliberative Process Log, respectively].

(2) Transient Testing Documents: These three documents are described as a part of a chain of e-mail messages regarding the wording and scope of a transient testing license condition. Staff Answer III at 10. These documents are numbered 15-40, 15-41, and 15-43.

(3) Containment Overpressure Documents: These six documents deal with Entergy's proposed credit for containment overpressure and possible license conditions that might be imposed. Staff Answer at 10-11. These documents are numbered 15-30, 15-32, 15-33, 15-35, 15-36, and 15-42.⁴

B. Positions of Parties

In some respects, the arguments of the parties are the same as those articulated with regard to State Motions to Compel I and II. For example, State Motion to Compel III provides no new arguments regarding the applicability of the deliberative process privilege, but instead incorporates prior arguments that internal Staff communications relating to the need for additional RAIs are not "deliberative" because they are only tenuously related to the Staff's final decision on Entergy's application and do not involve a decision by a high-ranking NRC official. State Motion to Compel III at 3.

The bulk of State Motion to Compel III focuses on five of the Containment Overpressure Documents.⁵ The State argues that, even if they qualify for the deliberative process privilege,

⁴ Although the privilege log describes 15-30 as dealing with "input to draft SER regarding risk evaluation" and does not refer specifically to credit for containment overpressure, for purposes of this analysis, we treat it as a Containment Overpressure Document. Also, although the Staff's brief characterizes document 15-42 as dealing with transient testing, Staff Answer III at 10, the Staff's October 31, 2005 privilege log describes this document as dealing with containment overpressure credit, 10/31/05 Deliberative Process Log at 12. Finally, although document 15-32 is not discussed in the Staff brief, it appears that this is due to a typographical error, in that the Staff discusses document 15-31, a document which is not requested by the State and appears unrelated to credit for containment overpressure. See 10/31/05 Deliberative Process Log at 9.

⁵ Containment Overpressure Documents numbered 15-30, 15-32, 15-33, 15-35, and 15-36. The State does not argue that it needs the sixth document (15-42), perhaps because it is now available in redacted form.

these particular documents involve an “extremely important issue” relating to the Final Safety Evaluation Report (SER), and the State’s need for them outweighs any chilling effect that might be caused by compelling their production. State Motion to Compel III at 3-7. The State alleges that these documents, triggered by a September 2005 letter from the Advisory Committee on Reactor Safeguards (ACRS),⁶ apparently reflect a significant change in the Staff’s approach in evaluating Entergy’s request for credit for containment overpressure (which is central to State Contentions 1 and 2).⁷ State Motion to Compel III at 4. The State argues that unless the five documents are produced now, the information relating to the Staff’s new approach to containment overpressure will not be available until the Final SER is issued on February 24, 2006,⁸ which will be too late to allow the State to prepare its case.⁹ State Motion to Compel III at 6-7. The State alleges that it needs these Containment Overpressure Documents to minimize surprise, prepare for the hearing, and avoid delaying this proceeding. Id.

The Staff maintains that the documents listed in its deliberative process privilege logs

⁶ See State Motion to Compel III, Tab D, Letter from Graham B. Wallis, Chairman, ACRS, to Luis A. Reyes, Executive Director of Operations, NRC (Sept. 20, 2005), ADAMS Accession No. ML052630562.

⁷ The State Contention 1 is as follows: “Entergy has claimed credit for containment overpressure in demonstrating the adequacy of ECCS pumps for plant events including a loss of coolant accident in violation of draft General Design Criteria 44 and 52 and therefore Entergy has failed to demonstrate that the proposed uprate will provide adequate protection for public health and safety as required by 10 C.F.R. § 50.57(a)(3).” LBP-04-28, 60 NRC 548, 580.

State Contention 2 alleges: “Because of the current level of uncertainty of the calculation which the Applicant uses to demonstrate the adequacy of ECCS pumps, the Applicant has not demonstrated that the use of containment overpressure to provide the necessary net positive suction head for ECCS pumps will provide adequate protection for the public health and safety as required by 10 C.F.R. § 50.57(a)(3).” Id.

⁸ See NRC Staff’s Tenth Status Report on Review Schedule (Dec. 16, 2005) at 2.

⁹ The deadline for filing the final list of witnesses is ten days after the issuance of the Final SER and initial written statements of position and written testimony must be filed within sixty days of the issuance of the Final SER. See Licensing Board Initial Scheduling Order (Feb. 1, 2005) at 3-4 (unpublished).

were properly withheld from disclosure and that the State has failed to demonstrate an overriding need for the documents that outweighs its need for protection. Staff Answer III at 6-7. The Staff argues that documents that contain discussions among Staff members concerning the need for additional RAIs represent exactly the type of deliberations that the privilege was intended to cover. Id. at 8-9. The Staff asserts that the State's position regarding the need for the Containment Overpressure Documents is without merit because the documents the State seeks do not contain Entergy's confirmatory risk-informed evaluation of its proposed credit for containment overpressure or the Staff's analysis of Entergy's evaluation, but instead only include Staff opinions on the potential wording of a license condition requiring Entergy to perform such an evaluation. Id. at 13-14. With regard to document 15-30, the Staff argues that the State does not need it because the information is already publicly available in section 2.13 of the Draft SER. Id. at 13.

C. Applicable Law

In LBP-05-33, we discussed the legal requirements for the deliberative process privilege and thus we will only highlight some key points here. "The deliberative process privilege protects documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" LBP-05-33, 62 NRC at ___ (slip op. at 15) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)). The privilege "does not extend to factual material severable from the deliberative context." Id. (citing EPA v. Mink, 410 U.S. 73, 87-88 (1973)). Additionally, the privilege applies only if the information is both (1) predecisional and (2) deliberative. Id.

The deliberative process privilege is a qualified privilege, meaning a Board has the discretion to compel production of a document upon a finding that the need for the evidence outweighs the interests that support the privilege. LBP-05-33, 62 NRC at ___ (slip op. at 17). In balancing the need for the documents against the government's interest in non-disclosure,

courts have considered various factors, including the following:

- (i) the relevance of the evidence sought to be protected;
- (ii) the availability of other evidence;
- (iii) the seriousness of the litigation and the issues involved;
- (iv) the role of the government in the litigation; and
- (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

In re Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979).¹⁰ Commentators have observed that the importance of the evidence to the case is generally determinative in this balancing, and the first two Franklin factors – relevance and the availability of other evidence – focus on the importance of the evidence.¹¹ For example, if the documents at issue are not relevant, then, as a matter of law, a showing of sufficient need is not possible. United States v. Farley, 11 F.3d 1385, 1389-91 (7th Cir. 1993). Similarly, even if a draft document is relevant and important, once the final version of the document becomes available, the need for the draft (or comments suggesting changes to a draft) may become moot or minimal. See, e.g., Missouri v. Army Corps of Eng'rs, 147 F.3d 708, 711 (8th Cir. 1998); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1345 (1984).

¹⁰ The “Franklin factors” are a frequently applied test for qualifying the deliberative process privilege. See, e.g., In re Subpoena Duces Tecum, 145 F.3d 1422, 1423-24 (D.C. Cir. 1998); In re Subpoena, 967 F.2d 630, 634 (D.C. Cir. 1992); Paul F. Rothstein & Susan Crump, Federal Testimonial Privileges § 5:10 (2d ed. 2005).

¹¹ See 26A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5690 (1992 & Supp. 2005).

II. ANALYSIS

We apply the aforementioned principles to each of the three categories of documents that the Staff claims are privileged, first determining whether the deliberative process privilege applies to the disputed documents and, if so, then balancing the State's need for the documents against the Staff's showing of harm that would result from disclosing the documents. Because the only new argument raised in State Motion to Compel III deals with the State's showing of need for the five Containment Overpressure Documents, we find that our ruling in LBP-05-33 governs the outcome of most of the issues currently before us.¹²

A. RAI Documents

1. Applicability of the Deliberative Process Privilege

As the State has not proffered new arguments regarding whether the RAI Documents are protected by the deliberative process privilege, we hold, pursuant to our reasoning in LBP-05-33, that these documents, with one exception, qualify for the deliberative process privilege. In our prior ruling, we held that discussions between Staff members concerning the adequacy and completeness of the application, the potential need for RAIs, and the adequacy of RAI responses may be protected by the deliberative process privilege. See LBP-05-33, 62 NRC at

¹² Although the Staff has repudiated its earlier agreement with the State regarding the procedures for requesting and filing challenges to privileged documents, the Staff has not raised the issue of timeliness here. See Staff Answer III at 4 n.8. Therefore, given that the Staff has not objected to the timeliness of State Motion to Compel III, we find the motion to be timely for reasons stated in our prior decision. See LBP-05-33, 62 NRC at ___ (slip op. at 7-11). However, there will be no further forbearance on this point. We remind the parties that if they "believe that additional time for consultation may be productive, either on a specific dispute or more generally, they are encouraged to advise the Board and move for the enlargement of the 10-day time frame of 10 C.F.R. § 2.323(a)." Id. at ___ (slip op. at 9).

Our previous decision also addressed whether a senior NRC official was required to assert the deliberative process privilege. Id. at ___ (slip op. at 20-26) (holding that the NRC division director was sufficient). We find that the affidavit of Catherine Haney, Director of the Division of Operating Reactor Licensing, in the NRC's Office of Nuclear Reactor Regulation, satisfied these requirements. See Staff Answer III, Enclosure 1, Affidavit of Catherine Haney (Dec. 1, 2005).

___ (slip op. at 18-19). Documents 14-22, 14-24, 15-05, 15-06, and 15-07 all contain the analysis, opinions, and recommendations of Staff members regarding Entergy responses to prior RAIs or the formulation of new RAIs. Therefore, we conclude that the Staff has demonstrated that these documents qualify for the deliberative process privilege.

However, the Staff description of one of the RAI Documents, document number 14-30, indicates that it contains (in addition to deliberations concerning new RAIs) statements concerning the “procedural aspects of completing the Draft SER” and “the overall status of the EPU review.” Staff Answer III at 8. Staff communications that summarize the applicable procedures or report on the status of a matter are factual in nature and are not protected by the privilege. See Mink, 410 U.S. at 87-88. Therefore, we find that these specific portions of document 14-30 do not qualify for the deliberative process privilege and thus this portion of State Motion to Compel III is granted.

2. Qualified Privilege Balancing

Having concluded that the six RAI Documents, with one exception, are covered by the deliberative process privilege, we must assess whether the State has shown a need for the documents that outweighs the Staff’s need to protect the documents. In LBP-05-33, we held that the State failed to carry its burden of demonstrating need for the documents because “[r]elevance alone is not sufficient.” LBP-05-33, 62 NRC at ___ (slip op. at 27). See also Farley, 11 F.3d at 1389-91. The State has proffered no additional arguments explaining or justifying its supposed need for the RAI Documents. Therefore, this portion of State Motion to Compel III is denied.

B. Transient Testing Documents

1. Applicability of the Deliberative Process Privilege

The three Transient Testing Documents (15-40, 15-41, and 15-43) are part of a chain of e-mail messages between Staff members discussing the wording and scope of a transient testing license condition that has since been finalized.¹³ See Staff Answer III at 10. Such communications concerning the appropriate wording and scope of a license condition are deliberative because they contain the opinions of individual Staff members and do not necessarily represent part of the NRC's final policy decision concerning the sufficiency of Entergy's application, i.e., whether the license amendment should be granted, denied, or appropriately conditioned. The State has not offered any arguments, other than those proffered in State Motions to Compel I and II, to the contrary. Therefore, consistent with our ruling in LBP-05-33, 62 NRC ___, we uphold the Staff's assertion of the deliberative process privilege with regard to these documents.

2. Qualified Privilege Balancing

Other than incorporating by reference the arguments made in its first two motions, the State has made no showing of need for the Transient Testing Documents. As discussed in LBP-05-33 and in Section II.A.2 above, a showing of relevance alone is not sufficient to demonstrate need. The State's incorporated arguments do little more than argue relevance.¹⁴ Additionally, because the final version of the transient testing license condition is now publicly

¹³ Document 15-42, which the privilege log describes as involving "containment overpressure credit," is, it appears incorrectly, included in the Staff's discussion of Transient Testing Documents. Staff Answer III at 10.

¹⁴ Even if relevance were sufficient, the relevance of these documents to the State's contentions is unclear because the State has not sought to adopt the New England Coalition's admitted contention dealing with transient testing. See LBP-04-28, 60 NRC 548, 571-72, 580.

available,¹⁵ the State has little need for predecisional e-mail messages discussing the wording and scope of the license condition. See Missouri v. Army Corps of Eng'rs, 147 F.3d at 711. Therefore, we find that there is no showing that the State's need for the Transient Testing Documents outweighs the Staff's need to protect these predecisional and deliberative documents.

C. Containment Overpressure Documents

1. Applicability of the Deliberative Process Privilege

Five of the Containment Overpressure Documents (15-32, 15-33, 15-35, 15-36, and 15-42) are described in the privilege logs as relating to the Staff's risk-informed evaluation of Entergy's request for credit for containment for overpressure.¹⁶ The sixth document, 15-30, described in the privilege log as involving "input to draft SER regarding risk evaluation," also appears to concern credit for containment overpressure. In general, the Containment Overpressure Documents are characterized by the Staff as containing recommendations and opinions as to whether a license condition should be imposed requiring Entergy to submit a confirmatory risk-informed evaluation of its proposed credit for containment overpressure. See Staff Answer III at 10-11. As with the Transient Testing Documents, the Containment Overpressure Documents contain information that reflects the opinions and non-binding recommendations of individual Staff members and are intended to assist the NRC in reaching a final decision on the appropriateness of a license condition. Thus, we hold that they are

¹⁵ See Letter from J.E. Dyer, Director of NRC Office of Nuclear Reactor Regulation, to Michael Kansler, President, Entergy Nuclear Operations, Inc. (Oct. 12, 2005) at 3, ADAMS Accession No. ML052630053.

¹⁶ Document 15-32 is a Containment Overpressure Document requested by the State, but the Staff's discussion of Containment Overpressure Documents appears to have inadvertently referred to 15-31 (a document concerning the Staff review and scheduling practices that was not requested) instead of 15-32. Compare 10/31/05 Deliberative Process Log at 9, with Staff Answer III at 10-11.

protected by the deliberative process privilege.

2. Qualified Privilege Balancing

Having concluded that the Containment Overpressure Documents qualify for the deliberative process privilege, we now turn to the State's argument that it needs these documents immediately (rather than waiting until the Final SER is issued) because they are central to both of its contentions, and failure to produce them now will delay this proceeding. Here, for the first time, the State presents a "need" argument that raises a close case as to whether production of the documents should be compelled.

Focusing on the first two Franklin factors – relevance and availability of other evidence – it appears to us that the Containment Overpressure Documents are relevant and important to State Contentions 1 and 2, both of which challenge Entergy's request for credit for containment overpressure. See LBP-04-28, 60 NRC at 558-64, 580. The State claims that the requested documents reveal a significant departure from the Staff's methodology used in the Draft SER for calculating containment overpressure and stem from the September 2005 ACRS recommendation. State Motion to Compel III at 4. We agree that Staff documents concerning any new confirmatory probabilistic risk analysis on credit for containment overpressure would be vital to the State's preparation for the evidentiary hearing on its contentions. Thus, the relevance and importance of these deliberative process documents weigh in favor of their disclosure.

There is a temporal dimension, however, to the second Franklin factor – availability of other evidence – as it applies to the Containment Overpressure Documents. At this moment, there appears to be no "other evidence available" concerning any risk-informed evaluation of containment overpressure credit and whether such a license condition should be imposed. But when the Final SER is issued, in approximately five weeks, this situation will be cured and such evidence will be available. The Final SER will be the Staff's authoritative position regarding

credit for containment overpressure and, as such, will be more useful to the State than the Staff's preliminary ruminations on the same subject.

Given the temporal dimension to the "availability of other evidence" Franklin factor, the issue here is whether the State's need for the Containment Overpressure Documents during the next five weeks (i.e., until the Final SER is issued) outweighs any harm that might be caused by the disclosure of these deliberative process documents. As noted, the State's "need" argument is that these documents are crucial if this proceeding is to stay on schedule. In contrast, the Staff is silent as to the harm or chilling effect that might be caused by the disclosure of these five documents a few weeks before the Final SER.¹⁷ In short, we have no information as to the fifth Franklin factor – how the release of these particular documents will, or will not, cause any realistic "future timidity by government employees who will be forced to recognize that their secrets are violable." Franklin, 478 F. Supp. at 583.

Although the State has shown a significant need for the Containment Overpressure Documents, and this is a relatively close call,¹⁸ we conclude that, under the Franklin factors test, the imminent availability of the Final SER constitutes sufficient "other evidence" such that the immediate need for the documents does not outweigh temporarily honoring their protected status under the deliberative process privilege.¹⁹ The Staff currently estimates that its Final

¹⁷ The Staff argues only that (a) the Containment Overpressure Documents meet the criteria for the deliberative process privilege and (b) the State has not shown a sufficient need for the documents. Staff Answer III at 10-14.

¹⁸ No extended discussion of the remaining two Franklin factors is needed here. Given that this proceeding involves assuring the safety of a proposed twenty percent increase in the power of a nuclear power reactor, the third Franklin factor – the seriousness of the litigation and the issues involved – is clearly met. And since the NRC Staff is a central player and party in this matter and proceeding (not merely an indifferent bystander to private party litigation), the fourth Franklin factor – the role of the government in the litigation – also weighs in favor of disclosure.

¹⁹ Document 15-30 is in a different status and the denial of the motion to compel its production is not a close case. This document deals with comments on the Draft SER, and

SER will be available very shortly – in late February. If this important document contains new information that is material to any of the admitted contentions or triggers the filing of new or amended contentions, and warrants a change to the schedule set in our Initial Scheduling Order of February 1, 2005, the Board has full authority and discretion to take appropriate action. Accordingly, the State’s motion to compel the production of the Containment Overpressure Documents is denied.

III. RELIEF

State Motion to Compel III is granted with respect to those portions of document 14-30 that describe the procedural aspects of completing the Draft SER and the overall status of the EPU. The Staff shall produce these portions of 14-30 within fifteen (15) days of this order. The remainder of the motion is denied because the documents qualify for the deliberative process privilege and because there is no overriding need for the documents immediately, given the fact that the Final SER, which will be issued within five weeks, will be better and more authoritative evidence. Once the Final SER is issued and delivered to the parties, they shall have ten (10) days within which to move for any adjustment to the schedule herein and thirty (30) days within

since that draft is already publicly available, we fail to see that the State has any overriding need for comments on the draft. See Staff Answer III at 11.

which to move for leave to file any new or amended contentions.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD²⁰

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA by G.P. Bollwerk for/

Dr. Anthony J. Baratta
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Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 17, 2006

²⁰ Copies of this order were sent this date by Internet e-mail transmission to counsel for (1) licensees Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.; (2) intervenors Vermont Department of Public Service and New England Coalition of Brattleboro, Vermont; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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ENTERGY NUCLEAR VERMONT YANKEE L.L.C.) Docket No. 50-271-OLA
and ENTERGY NUCLEAR OPERATIONS, INC.)
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)
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(Vermont Yankee Nuclear Power Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON DELIBERATIVE PROCESS PRIVILEGE CLAIMS) (LBP-06-03) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-271-OLA
LB MEMORANDUM AND ORDER (RULING ON
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(LBP-06-03)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of January 2006