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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARDS
Before Administrative Judges:
Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

In the Matter of
DAVID GEISEN

Docket No. IA-05-052
ASLBP No. 06-845-01-EA
March 27, 2006

In the Matter of
DALE L. MILLER

Docket No. IA-05-053
ASLBP No. 06-846-02-EA
March 27, 2006

In the Matter of
STEVEN P. MOFFITT

Docket No. IA-05-054
ASLBP No. 06-847-03-EA
March 27, 2006

MEMORANDUM AND ORDER SUMMARIZING CONFERENCE CALL
(Granting All Hearing Requests, Setting Oral Argument on Staff's Abeyance Motion,
and Addressing Related Matters)

As scheduled by our Notice of March 20, 2006, a conference call was held on March 22 to pursue certain preliminary matters in each of the three above-entitled proceedings, which are presided over by separate Licensing Boards (each appointed on March 16 and having the same membership). By this Order, we summarize the results of that conference, during which we, among other things, (1) granted all three pending hearing requests, and (2) set oral argument for Tuesday, April 11, on the NRC Staff's Motion to hold the Geisen matter in abeyance. We

also, in underlined material on page 7, below, cover a matter that was raised but not resolved during the call. Finally, we conclude (p. 9) by (1) referring all counsel to a brief “Standard Practice Manual” we have appended to this document (see pp. 10-14), and (2) establishing a process for counsel to seek amendment of this Memorandum if need be.

A. Results of Conference Call. During the call, the Board discussed with counsel each of the topics listed in our March 20 notice,¹ as well as other matters that arose. As is customary, the entire conference was transcribed; citations thereto are included herein where appropriate. Rather than recite the significant aspects of the call either in the order in which they occurred, or as suggested by the Notice, we present them in the following sequence:

1. *Granting Hearing Requests.*

With each of the three subjects of the Enforcement Orders having filed detailed requests for hearing within the allotted time (as duly extended), the NRC Staff filed timely papers indicating a lack of opposition to the requests. Accordingly, as we indicated during the conference call that we would do (Tr. at 15), each of the hearing requests (i.e., those of Messrs. Geisen, Miller, and Moffitt), is hereby GRANTED.²

¹ In that notice (p. 2), we indicated that we wished “to obtain indications from counsel as to certain procedural and/or logistical matters, such as: (1) whether any consideration should be given to consolidating one or more of the proceedings for some or all purposes (see 10 C.F.R. § 2.317); (2) whether the parties are aware of any potential intervention petitions that might be submitted in any of the proceedings; (3) whether there are any other related matters pending that arguably might have any impact on the scheduling of any of these proceedings; (4) what, if any, impact the government investigations that have already occurred might have on the discovery process and schedule; (5) what plans, if any, the parties may have for the filing of preliminary motions or other pleadings; (6) whether a schedule can be set for any prehearing aspects of the proceedings, including the timing of any filings and of the next conference call or in-person conference; (7) how the location of the parties, their counsel, and prospective witnesses might affect the eventual selection of a venue for the hearing(s); and (8) any other matters that counsel may wish to bring to the Boards’ attention at that time.”

² For purposes of calculating various time periods that begin to run with the grant of the hearing requests (see ¶ 2, below), the date of this Memorandum and Order will thus be deemed the triggering date.

2. *Stressing Milestones and Expedition.*

We observed during the conference that the Commission has published a set of “Model Milestones” that it expects will be used as a “starting point” in various types of Licensing Board proceedings. See 10 C.F.R. (2006 ed.) Part 2, Appendix B. One of those (Section I) covers this type of enforcement proceeding, and those milestones were referred to on several occasions during the conference call (see, e.g., Tr. at 13-15, 19, 20, 22, 36, 47).³

In addition, the Commission’s regulations state that the subject of an enforcement order that is immediately effective -- as each of the three orders before us was -- is entitled to have the requested hearing “conducted expeditiously, giving due consideration to the rights of the parties.” 10 C.F.R. § 2.202(c)(1) (emphasis added). Although “expeditiously” is not specifically defined (see Tr. at 24-25), during the call we discussed that, at the very least, it must mean that we should make every effort to move with more expedition than the model milestones would call for (Tr. at 14,⁴ 36).

During the call, the regulation’s cautionary “due consideration” language quoted above was at least implicitly invoked by counsel for two of the subjects, who raised a legitimate concern that Board suggestions as to potential time-saving measures should not be invoked until she was able to evaluate their impact on her preparation of her clients’ defenses (see Tr. at 20-21). Having recognized the validity of that point at the time (Tr. at 20), we now explain further that we will indeed be mindful of the cautionary language as we move forward.

³ Under those milestones, the Board’s ruling granting a hearing is to be issued within 100 days of the Enforcement Order. With the subjects having obtained 30-day extensions of their initial 20-day period to answer, and the Staff having taken the entire permitted 25 days thereafter to respond (on March 20) that it did not contest the hearing requests, today’s grant of those uncontested requests comes 82 days after the Enforcement Order.

⁴ To reflect correctly what was said, line 14 of Tr. 14 should read “beat”, not “meet” -- as was accurately reported at a later point (Tr. at 36, line 19).

It seems quite plain that the expedition directive is intended to benefit the subject of an immediately effective order by avoiding procedural delay in his opportunity to have the order overturned; it thus should not be used to reduce the likelihood of that opportunity by imposing procedures that deprive him of needed time to prepare his presentation. Accordingly, although any delays requested by the subjects of the orders must have some underlying legitimacy, any strategic decisions by them to trade expedition for thoroughness (see, e.g., Tr. at 37) will essentially be respected, as the “due consideration” language indicates should be done. There may thus be circumstances in which the subjects of the orders would want to seek in effect to “waive” their rights to expedition (compare Tr. at 20-21). In contrast, the other party (the Staff) may not invoke such a “waiver,” but the Staff’s right to sufficient preparation time must also be given “due consideration.”

3. Setting Oral Argument on Staff’s Abeyance Motion.

Later on the same day that we issued our Notice of the conference call, the NRC Staff filed a motion to hold the Geisen enforcement proceeding in abeyance pending the conclusion of the related criminal proceeding pending against him. Upon receiving from Mr. Geisen’s counsel sufficient indication (Tr. at 26-27) that he would not need an extension of time for filing his response (due Thursday, March 30) to the Staff motion, we SET THE MATTER FOR ORAL ARGUMENT at 10:00 A.M. on Tuesday, April 11, 2006 (Tr. at 28, 33-35).

That argument will be held in the Licensing Board Panel’s Courtroom on the 3rd Floor of the Two White Flint North Building (the shorter of the two buildings making up the NRC headquarters complex in Rockville, Maryland, on the East side of Rockville Pike (# 11545) just South of the White Flint Metro Station). Each side will have at least 30 minutes for argument (Tr. at 34), with the NRC Staff, as the moving party, proceeding first.

At the request of the Staff made during the conference (Tr. at 17), all steps that would otherwise be triggered by our grant of the Geisen hearing request will themselves be HELD IN ABEYANCE pending oral argument and a ruling on the overall abeyance motion (Tr. at 18). In

particular, this includes the mandatory document and other disclosures mentioned in ¶ 6, below (see Tr. at 47-48).

4. *Requiring Specificity on Abeyance Factors.*

In connection with the upcoming oral argument, we mentioned (Tr. at 28, 41-42) our concern -- triggered by the material the Staff has put before us here ⁵ -- that both parties be prepared to provide some detail about the various factors that are to be considered in reaching a determination on the abeyance issue (see, e.g., Oncology Services Corp., CLI-93-17, 38 NRC 44, 59 (1993)). In that regard, we emphasized that the Staff should consider having present at the argument the Department of Justice representative upon whom they have been relying (Tr. at 29-30).⁶ While not going so far as to direct his presence, as the Memorandum of Understanding between the two agencies seems to contemplate we might do (Tr. at 50-51; MOU, 53 Fed. Reg. 50317, 50319 (Dec. 14, 1988)), the Board strongly urged that he be present. We indicated that an inability by the Staff to provide detailed and case-specific reasons underlying a government claim that a particular factor weighs in favor of abeyance could well -- under principles such as those set out in the Oncology decision cited above -- result in a ruling that the government not receive credit for that factor (Tr. at 28-30)⁷. The same principle applies, of course, to Mr. Geisen's presentation.

⁵ We note that similar concerns were expressed by the Board presiding over In Re Siemaszko (NRC Docket # 1A-05-021) related to the written filings and oral presentations on the abeyance issue therein. See, e.g., that Board's March 2 Memorandum and Order granting the Staff's abeyance motion, and Tr. at 117-29 therein.

⁶ Counsel for Mr. Geisen interposed (Tr. at 30-31) that, were the Staff thereby to present at argument factual information beyond that which is contained in the pending motion papers, he would want the opportunity to challenge that proffer. The Staff concurred in the thrust of counsel's point (Tr. at 32), and the Board agreed that point would be preserved (Tr. at 32-33).

⁷ In that regard, we take the opportunity to re-emphasize here the concern we expressed (Tr. at 40-42) implicating the level of candor and/or thoroughness thus far evident in the government's presentation insofar as it touches on the workings and impact of the Speedy Trial Act, 18 USC § 3161. With respect to the projected length of the stay the Staff is seeking to obtain, we expect at the oral argument to be given accurate and complete descriptions both of that Act's provisions and of their application in the Geisen criminal proceeding.

5. *Deferring Consideration of Consolidation.*

Upon inquiry, counsel representing both Messrs. Miller and Moffitt indicated (and the Staff agreed) that there were likely sufficient differences between those two proceedings to militate against consolidating them (Tr. at 8-10). And the pendency of a criminal proceeding against Mr. Geisen raises questions about whether it will be held in abeyance (see ¶¶ 3-4, above) and thus be on a significantly different track from the other two (Tr. at 9-10). In light of those facts, and with counsel stating a current inability even to begin to estimate the number of witnesses involved in each proceeding and the possible overlap between them (Tr. at 10-11), any question of consolidation will be deferred until a later time (Tr. at 9, 11).

In that regard, the Boards have since determined to keep entirely separate for now the Geisen matter on the one hand, and the Miller and Moffitt ones on the other. Accordingly, until the question of possible consolidation for some or all purposes (see 10 C.F.R. § 2.317) becomes more timely to consider, any documents the Board issues hereafter in the Geisen matter will bear only that caption; for now, with the two other cases on parallel tracks, Board-issued documents affecting both will bear both captions.

6. *Triggering Discovery.*

The granting of the hearing requests triggers a milestone of 145 days for the parties to “complete discovery.” The Boards asked whether, in light of the significant government investigations that have already been completed, there were ways to reduce that time period (Tr. at 16-17). As we were advised by the Staff’s filings (Responses to hearing requests, fn. 3), and as was confirmed during the call, Counsel for Messrs. Moffitt and Miller and Counsel for the NRC Staff had already entered in to discussions as to how discovery should be conducted and as to the structuring of appropriate protective orders (Tr. at 17-18, 25). The Boards encouraged those discussions and indicated that it would await the parties’ efforts on that score (Tr. at 19, 35-36).

In that regard, the model milestones call for Boards to set an initial schedule for the proceeding within 25 days of the grant of the hearing (see Tr. at 15). Accordingly, although that subject was not pursued to conclusion during the call, counsel listed above should complete their discovery planning discussions in time to participate in a scheduling conference call on the morning of Thursday, April 13, so as to permit the Boards to step into those discussions if necessary and thereby to issue an initial scheduling order no later than Friday, April 21. Alternatively, counsel for the subjects may wish by then to request that we defer such an order pending her assimilation of the enormous amount of documentation the Staff is preparing to disclose to her no later than April 26 (see text immediately below).⁸

On the matter of discovery, the NRC Staff pointed out that the hearing grant also would trigger its 30-day period under 10 C.F.R. § 2.336(b) for providing documents to counsel for Messrs. Moffitt and Miller (Tr. at 38). The Staff also indicated that some 19,000 documents were involved in that exercise (Tr. at 44). The Boards deferred judgment on whether and to what extent they would want to be furnished copies of discovered documents during the discovery process so as to expand the time frame for Board members' hearing preparation (Tr. at 43-45).

7. Discussing Scheduling.

Throughout the conference call, the Boards and the parties discussed various matters that might have an impact on the scheduling of various phases of the prehearing and hearing process. In general, and understandably, all counsel were of the view that they lacked sufficient knowledge to make any representations at that time (see, e.g., Tr. at 11, 38-40). Accordingly, the only future scheduling progress made was with respect to the matter of discovery, covered in ¶ 6, above.

⁸ That assimilation factor would certainly seem to be "relevant information" related to "the complexity of the issues" justifying "appropriate modifications" to the milestones, as suggested in the preamble to the milestones themselves.

8. *Addressing Other Matters.*

Noting the large block of time reserved in the model milestones for filing and resolving summary disposition motions (90 days, after completion of discovery), and speculating that there might well exist significant factual disputes (as to the recounting of the past events that underlie this proceeding) that would tend to preclude the granting of summary disposition, the Boards inquired as to whether it might prove to be in order to dispense with the summary disposition process (Tr. at 19-20), as the Commission's regulations and policy statements have indicated should be done when resources and time can be conserved thereby. See 10 C.F.R. § 2.710(d)(1); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 20-21 (July 28, 1998) (also published in 63 Fed. Reg. 41872, 41873-74 (Aug. 5, 1998)). Counsel for the subjects was unwilling to endorse that approach at this juncture (Tr. at 20), and further consideration of it will be deferred to a more appropriate time (Tr. at 20-21).

Noting also that the model milestones envision the employment of the standard practice of pre-filed written testimony, the Boards suggested (Tr. at 21) the possibility that in proceedings focusing on accounts of past events, rather than on technical analyses attempting to project future performance, it might make sense, and save time, to dispense with that step (as the Subpart G rules which will govern these proceedings⁹ contemplate as an option (see 10 C.F.R. § 2.711(b)). Again, counsel believed themselves unable to comment knowledgeably on that topic at this early date, so that consideration of it too will be deferred (Tr. at 22).

When the Boards asked about potential intervention petitions, the parties stated that they were aware of none (Tr. at 12). Although the Staff opined that any filed hereafter would be too late (Tr. at 12), the Boards noted that the regulations leave it open to any late filers to attempt to show good cause therefor (Tr. at 12-13).

⁹ During the call, no counsel suggested that the parties try to reach agreement that Subpart G would not govern (see 10 C.F.R. §§ 2.310(b), 2.700), and we are proceeding on the assumption that these will be Subpart G proceedings.

B. **“Practice Manual”**. In convening the March 22 conference call, we indicated that we would append to this follow-up document “a standard set of instructions for counsel regarding administrative matters, including such topics as notices of appearance, various types of service, motions and replies, page limits, extensions of time, and the like.” March 20 Notice at 3. To that end, we have included as an Addendum hereto a “Standard Practice Manual” for the guidance of counsel.

Any party (1) objecting to the manner in which we have recounted herein the results of the conference call, (2) wishing to bring to our attention any significant matter omitted herefrom, or (3) otherwise seeking a change herein, should do so within three days of electronic receipt of this document.

It is SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/
Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

/RA/
E. Roy Hawken
ADMINISTRATIVE JUDGE

/RA/
Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 27, 2006

ADDENDUM: Standard Practice Manual (pp. 10-14)

Copies of this Memorandum and Order were sent this date by e-mail transmission to counsel for: (1) Mr. Geisen; (2) Messrs. Miller and Moffitt; and (3) the NRC Staff.

ADDENDUM
to Conference Call Summary:
STANDARD PRACTICE MANUAL

In accordance with 10 C.F.R. §§ 2.318(a), 2.319, the following standard administrative directives shall apply to the conduct of this proceeding:

A. Notice of Appearance

If they have not already done so, within seven days after receipt of this document, each counsel or representative for each participant shall file a notice of appearance complying with the requirements of 10 C.F.R. § 2.314(b). In each notice of appearance, besides providing a business address and telephone number, if an attorney or representative has a facsimile number and/or an Internet e-mail address, the attorney or representative should provide that information as well. Counsel or representatives who have already submitted a notice of appearance that does not provide facsimile or e-mail information should file a supplemental statement with that information within the same seven days.

B. Good Faith Consultation.

In order to maximize the early resolution of issues without Board intervention, motions will be summarily rejected if they are not preceded by a sincere attempt to resolve the issues and include the certification specified in 10 C.F.R. § 2.323(b). Each party shall make itself available for consultation and shall cooperate in attempting to resolve the issues. Without revealing the substance of any settlement discussions, the required certification shall state if the other potential party was not available or refused to discuss the matter.

C. Service on the Licensing Board and on Other Participants

1. Licensing Board Transmittal Information.

For each pleading or other submission filed before the Board or the Commission in this proceeding, subject to the requirement of subsection 4 below, in addition to submitting an original and two conforming copies to the Office of the Secretary as required by 10 C.F.R. § 2.304(f) and serving a copy on every other participant in this proceeding in accordance with section 2.305(b), a participant should serve conforming copies on the Licensing Board as follows:

a. Regular Mail. To complete service on the Licensing Board via regular mail, a participant should send conforming copies to each of the Board members at the following address:

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

For regular mail service, the NRC staff may use the NRC internal mail system (Mail Stop T-3F23) in lieu of first-class mail.

b. Overnight or Hand Delivery. To complete service on the Licensing Board via overnight (e.g., express mail) or hand delivery, a participant should send conforming copies to the Board members at the following address:

Atomic Safety and Licensing Board Panel
Third Floor, Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738

It should be noted that use of the Board's regular mail address (see subsection a, above) on an overnight/hand delivery (such as Federal Express) may delay receipt of the filing.

c. Facsimile Transmission. To complete service on the Licensing Board by facsimile transmission, a participant should (i) send one copy by rapifax to the attention of the Licensing Board Chairman at (301) 415-5599 (verification (301) 415-7399); and (ii) that same date, send conforming copies to the Board members by regular mail at the address given in ¶ a, above.

d. E-Mail. To complete service on the Licensing Board by e-mail transmission, a participant should (i) send the filing (which should include the certificate of service) as a file attached to an e-mail message directed to the Board members and law clerk (mcf@nrc.gov, erh@nrc.gov, ngt@nrc.gov, and jmr3@nrc.gov); and (ii) send paper conforming copies that same date to the Board members by regular mail at the address given in ¶ a, above.

If a participant has a pleading it wishes to send by e-mail that includes attachments it is unable to convert to electronic form, it should do one of the following:

- i. If the attachments the participant is unable to convert to electronic form are fifteen pages or less, contemporaneous with the transmission of the pleading by e-mail the attachments should be sent by a separate facsimile transmission. The e-mail and facsimile transmissions should note that separate transmission modes are being used. The paper conforming copies of the pleading and attachments should be sent to the presiding officer by regular mail at the address given in subsection a, above.
- ii. If the attachments the participant is unable to convert to electronic form are more than fifteen pages, the pleading should be sent by e-mail and the paper conforming copy of the pleading with the attachments should be sent to the presiding officer by express mail or other means that will ensure delivery on the next business day. The e-mail should note that there will be next-day service of the pleading with the attachments.

2. Timely Service by Hand Delivery, Facsimile Transmission, or E-Mail.

For service on the Licensing Board to be timely, any pleading or other submission served (i) by hand delivery must be received by 4:30 p.m. Eastern Time on the due date; and (ii) by facsimile transmission or e-mail must be received by the Board no later than 11:59 p.m. Eastern Time on the due date.

3. Service on Other Participants.

Whichever of the methods outlined above is used for service on the Licensing Board, the participant serving the pleading should employ the same or a comparable method to make service on other participants and the Office of the Secretary (e-mail: hearingdocket@nrc.gov; facsimile number: (301) 415-1101 (facsimile verification number: (301) 415-1966)).

4. Receipt of All Filings.

Absent some other directive from the Licensing Board, all filings directed to the Board shall be served on the Board and the other participants so as to ensure receipt on the day of filing. Absent some other directive from the Board, the participants may use any of the methods outlined above so long as the filing is timely received by the Board and the other participants.

D. Limitations on Pleading Length and Reply Pleadings

1. Page Limitation

Any motion filed after the date of the Board issuance to which this Manual is appended, and any related responsive pleadings to such a motion, shall not exceed ten pages in length (including signature page) absent preapproval of the Licensing Board. A request for Board preapproval to exceed this page limitation shall be sought in writing no less than three business days prior to the time the motion or responsive pleading is filed or due to be filed. A request to exceed this page limitation must (1) indicate whether the request is opposed or supported by the other participants to the proceeding; (2) provide a good faith estimate of the number of additional pages that will be filed; and (3) demonstrate good cause for being permitted to exceed the page limitation.

2. Reply Pleadings

In accordance with the agency's rules of practice, leave must be sought to file a reply to a response to a motion. See 10 C.F.R. § 2.323(c). A request for Licensing Board preapproval to file a reply shall be sought in writing no less than three business days prior to the time the reply will be filed.¹⁰ A request to file a reply must (1) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (2) demonstrate good cause for permitting the reply to be filed.

¹⁰ Although the agency's rules of practice do not provide for reply pleadings, the Board will presume that for a reply to be timely, it would have to be filed within ten days of the date of service of the response it is intended to address.

E. Motions for Extension of Time

A motion for extension of time filed with the Licensing Board shall ordinarily be submitted in writing at least three business days before the due date for the pleading or other submission for which an extension is sought. A motion for extension of time must (1) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (2) demonstrate appropriate cause that supports permitting the extension.

F. Opposing a Request to Exceed the Page Limitation, to File a Reply, or to Extend the Time for Filing a Pleading

Any written opposition to a request to exceed the page limit, to file a reply, or to extend the time for filing a pleading shall be served on the Licensing Board, the Office of the Secretary, and counsel for the other participants in the particular proceeding by facsimile transmission, e-mail, or other means that will ensure receipt on the next business day after the filing of the request.

G. Exhibits/Attachments to Filings.

If a participant files a pleading or other submission with the Licensing Board that has additional documents appended to it as exhibits or attachments, a separate alpha or numeric designation (e.g., Exhibit 1; Attachment A) should be given to each appended document, either on the first page of the appended document or on a cover/divider sheet in front of the appended document.

Exhibits and attachments to a motion and any related responsive pleadings are not subject to the page limitation set forth in Section D.1, above.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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DAVID GEISEN) Docket No. IA-05-052
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(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER SUMMARIZING CONFERENCE CALL (GRANTING ALL HEARING REQUESTS, SETTING ORAL ARGUMENT ON STAFF'S ABEYANCE MOTION, AND ADDRESSING RELATED MATTERS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Michael C. Farrar, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
E. Roy Hawken
Atomic Safety and Licensing Board Panel
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Administrative Judge
Nicholas G. Trikouros
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of March 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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DALE L. MILLER) Docket No. IA-05-053
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of March 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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STEVEN P. MOFFITT) Docket No. IA-05-054
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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of March 2006