

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )  
 )  
AMERGEN ENERGY COMPANY, LLC ) Docket No. 50-219-LR  
 )  
(Oyster Creek Nuclear Generating Station) )

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NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL FROM LBP-06-07

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Ann P. Hodgdon  
Patrick A. Moulding  
Counsel for NRC Staff

April 10, 2006

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APPEAL FROM LBP-06-07

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), the staff of the Nuclear Regulatory Commission ("Staff") hereby files its brief in opposition to the New Jersey Department of Environmental Protection's ("Petitioner's" or "NJDEP's") appeal from the decision of the Atomic Safety and Licensing Board ("Board"), LBP-06-07, which, *inter alia*, denied Petitioner's hearing request and petition to intervene. As discussed below, the Board properly found that NJDEP had not proffered an admissible contention, and, accordingly, the Commission should uphold that portion of the Board's Order that denies NJDEP's request for hearing and petition to intervene.

STATEMENT OF THE CASE

This case arises from the July 22, 2005 application by AmerGen Energy Company, LLC ("AmerGen") to renew its operating license for Oyster Creek Nuclear Generating Station ("Oyster Creek"). See Letter from C.N. Swenson, Site Vice President, Oyster Creek Nuclear Generating Station [OCNGS], to U.S. NRC (July 22, 2005) (Agencywide Documents and Access Management System ("ADAMS") Accession No. ML052080172). On September 15, 2005, the NRC published a "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License DRP-16 for an

Additional 20-Year Period.” 70 Fed. Reg. 54,585 (2005). On November 14, 2005, NJDEP filed its “Request for Hearing and Petition for Leave to Intervene” (“NJDEP Petition”).

Subsequently, this Board was established to preside over the proceeding. See “Establishment of Atomic Safety and Licensing Board,” dated December 9, 2005. On December 12, 2005, AmerGen filed its answer to NJDEP’s Petition to Intervene, as did the Staff.<sup>1</sup> NJDEP did not file a reply to either the AmerGen or Staff answer. Subsequently, the parties filed simultaneous supplemental briefs in response to two Board orders.<sup>2</sup> Following these briefs, the Board, on February 27, 2006, issued an order that, among other things, denied NJDEP’s request for hearing and petition to intervene, finding that NJDEP had not proffered an admissible contention. See Memorandum and Order (Denying New Jersey’s Request for Hearing and Petition to Intervene, and Granting NIRS’s Request for Hearing and Petition to Intervene), LBP-06-07, 63 NRC \_\_ (February 27, 2006).

#### STATEMENT OF THE ISSUES

The Commission should sustain the Board’s decision denying admission of NJDEP’s proposed Contention 1, regarding the adequacy of AmerGen’s “severe accident mitigation alternatives” (“SAMA”) analysis; proposed Contention 2, concerning metal fatigue and AmerGen’s use of a cumulative usage factor (“CUF”); and proposed Contention 3, pertaining to AmerGen’s agreement with a third party to maintain combustion turbines.

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<sup>1</sup> See “AmerGen’s Answer Opposing NIRS et al. Request for Hearing and Petition to Intervene,” dated December 12, 2005 (“AmerGen Answer”); “NRC Staff Answer to [NJDEP] Request for Hearing and Petition to Intervene,” dated December 12, 2005 (“Staff Answer”).

<sup>2</sup> On January 17, 2006, NJDEP, AmerGen, and the NRC Staff each filed a supplemental brief concerning, *inter alia*, the issue of combustion turbines (“NJDEP Turbine Brief,” “AmerGen Turbine Brief,” and “Staff Turbine Brief,” respectively) in response to a January 10, 2006 Order (Directing Supplemental Briefing on Hearing Requests) (“Supplemental Briefing Order”). Subsequently, on January 30, 2006, NJDEP, AmerGen, and the NRC Staff each filed a supplemental brief on the issue of cumulative usage factor (“NJDEP CUF Brief,” “AmerGen CUF Brief,” and “Staff CUF Brief,” respectively) in response to a January 23, 2006 Order (Directing Supplemental Briefing on Hearing Requests) (“Supplemental Briefing Order”).

LEGAL STANDARDS

A. Legal Standard for Interlocutory Appeal of Licensing Board Order Granting a Petition to Intervene or Request for a Hearing

Pursuant to 10 C.F.R. § 2.311(c), an order granting a petition to intervene and/or request for hearing may be appealed by a party other than the requestor/petitioner on the question as to whether the request/petition should have been wholly denied. In considering an appeal raised pursuant to section 2.311(c) (formerly, 2.714a(c)), the Commission may consider all the points of error raised on appeal, rather than simply whether the petition should have been wholly denied. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 19 (2001); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25-27 (1987).

B. Legal Standards for the Admission of Contentions

To gain admission to a proceeding as a party, a petitioner for intervention, in addition to establishing standing, must proffer at least one contention that satisfies the admissibility requirements of 10 C.F.R. § 2.309(f). See 10 C.F.R. § 2.309(a). See also *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 333 (1999). For a contention to be admissible, the petitioner must satisfy the following six requirements:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the . . . petitioner's position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents on which the . . . petitioner intends to rely to support its position on the issue; and

- (vi) Provide sufficient information to show that a genuine dispute exists with the . . . licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). These contention requirements are "strict by design." *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). A contention that fails to comply with any of these requirements will not be admitted for litigation. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Changes to Adjudicatory Process [Final Rule], 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004). The petitioner must do more than submit bald or conclusory allegations of a dispute with the applicant. *Millstone*, CLI-01-24, 54 NRC at 358. There must be a specific factual and legal basis supporting the contention. *Id.* at 359. A contention will not be admitted if it is based only on unsupported assertions and speculation. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner fails to provide the requisite support for its contentions, then a Licensing Board may neither make factual assumptions that favor the petitioner, nor supply information that is lacking. *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004) (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)).

#### C. License Renewal

The scope of technical issues that may be considered in a license renewal proceeding is limited by 10 C.F.R. Part 54. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 6-10 (2001); *Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC \_\_\_, slip op. at 25-28 (March 7, 2006); [Final

Rule], Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461 (May 8, 1995).

The focus of Part 54 safety review is on “the detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operation.” 60 Fed.

Reg. at 22,464. As the Commission has explained, license renewal review focuses on “plant systems, structures, and components for which current [regulatory] activities and requirements *may not* be sufficient to manage the effects of aging in the period of extended operation.”

*Turkey Point*, CLI-01-17, 54 NRC at 10 (citing 60 Fed. Reg. at 22,469) (alteration in CLI-01-17).

In contrast, issues relating to a plant’s “current licensing basis” are ordinarily beyond the scope of a license renewal review, because “those issues already [are] monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight.” *Id.* at 8. The current licensing basis is defined in § 54.3(a) and includes the various Commission requirements and the licensee’s written commitments applicable to a particular plant that are docketed and in effect. See 10 C.F.R. § 54.3. Therefore, a contention that does not raise a genuine dispute of fact or law with respect to the “detrimental effects of aging” during the period of extended operation has not demonstrated that it is within the scope of license renewal and therefore, necessarily, has not raised an issue material to license renewal.

## DISCUSSION

### A. The Licensing Board was Correct in Finding Contention 1 Inadmissible

As the Licensing Board correctly found, Petitioner’s proposed contention concerning the adequacy of AmerGen’s SAMA analysis (“Contention 1”) was inadmissible. The Board concluded that the contention failed to satisfy several of the Commission’s 10 C.F.R.

§ 2.309(f)(1) contention criteria. Although failure to meet any of the § 2.309(f)(1) criteria would render the contention inadmissible, the Board determined that NJDEP’s SAMA contention was deficient on several separate grounds as well. The Board found that the contention was outside the scope of the proceeding; lacked materiality; lacked proper basis, support, and specificity;

and failed to establish a genuine dispute on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(i)-(vi); LBP-06-07, at 15.

Petitioner's appeal does not cite the Commission's detailed contention standards. Indeed, nothing in the appeal appears to respond to, much less overcome, the Board's conclusions concerning Contention 1's failure to demonstrate materiality; basis, support, and specificity; or a genuine dispute on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(i),(ii), (iv)-(vi). For that reason alone, Petitioner has failed to identify a basis for reversing the Board's decision on Contention 1.

Instead, NJDEP's argument concerning Contention 1 appears to contest only the Board's conclusion that the contention was not within the scope of the proceeding. NJDEP argues that the AmerGen's SAMA analysis is deficient (1) because it does not address the consequences of terrorist air attacks; (2) because it does not address the consequences of the vulnerability of the spent fuel pool; and (3) because it is not based on long-term compensatory security measures. Petitioner's Appeal, at 8-24. LBP-06-07, at 10-15. However, as the Board succinctly explained, these NJDEP arguments have already been thoroughly examined and rejected by the Commission's regulations and prior adjudicatory decisions.

First, to the extent Petitioner is demanding consideration of terrorist attacks (whether in the context of aircraft attacks or spent fuel pool vulnerability) as part of the license renewal review, "[t]he Commission repeatedly and unequivocally has ruled that the effects of terrorist attacks need not be considered under NEPA." LBP-06-07, at 10; see *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002). See also, *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *Duke Cogema Stone & Webster* (Savannah River

Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002). See also Staff Answer, at 8-10.

Second, to the extent that Petitioner is challenging AmerGen's SAMA analysis for failing to look at "design basis accidents" for spent fuel pools (see Petition at 4-5), the Board correctly stated that this challenge is precluded by regulation. LBP-06-07, at 12. On-site spent fuel is a "Category 1 issue" (see 10 C.F.R. Part 51, Subpt. A, App. B) that the Commission has resolved generically for all plants. See *Turkey Point*, CLI-01-17, 54 NRC at 15, 20-24; *Oconee*, CLI-99-11, 49 NRC at 343-44; LBP-06-07, at 12.

Finally, to the extent NJDEP is seeking to require AmerGen to implement long-term compensatory security measures, the Board acknowledged the Commission's ongoing rulemaking proceedings concerning this precise issue. See LBP-06-07, at 14-15; Design Basis Threat, 70 Fed. Reg. 67,380 (Nov. 7, 2005). Because the Commission has instructed its licensing boards to refrain from admitting contentions that are the subject of general rulemaking, the Board properly found NJDEP's contention to be beyond the scope of this proceeding. See LBP-06-07, at 14-15; *Oconee*, CLI-99-11, 49 NRC at 345.

Inasmuch as NJDEP has failed to establish that its Contention 1 is admissible in this proceeding in light of Commission regulations and precedent, and because the Board properly concluded that the contention failed to meet several admissibility requirements (including some not addressed by Petitioner's appeal), the Commission should uphold the Board's dismissal of Contention 1.

B. The Licensing Board was Correct in Finding Contention 2 Inadmissible

As the Licensing Board correctly found, Petitioner's contention concerning the licensee's use of a cumulative usage factor ("CUF") of 1.0 rather than 0.8 ("Contention 2") was inadmissible. The Board properly concluded that the contention failed to satisfy two elements of the Commission's 10 C.F.R. § 2.309(f)(1) contention standards: (1) because the contention

was unsupported as a matter of law or fact and (2) because the contention failed to show the existence of a genuine dispute regarding a material issue. LBP-06-07, at 19; see 10 C.F.R. § 2.309(f)(1)(v), (vi).<sup>3</sup> In its proposed contention, NJDEP alleged that 10 C.F.R. § 50.55a(c)(4) requires the licensee to apply the more restrictive CUF of 0.8 “specified by the [standards in the American Society of Mechanical Engineers Boiler and Pressure Vessel Code (“ASME Code”)] that were required” at the time the plant’s construction permit was issued. NJDEP Petition, at 6. Petitioner also contended that AmerGen’s use of a CUF of 1.0 exceeds the current licensing basis (“CLB”) in violation of 10 C.F.R. § 54.21(a)(3). *Id.* at 7.

However, Petitioner’s understanding of the Commission’s regulations is mistaken. First, as the Board recognized, “50.55a(c)(4) does *not* impose an inexorable requirement that AmerGen forever use the standards embodied in the ASME Code in effect at the time its construction permit was issued[.]” LBP-06-07, at 17. In fact, the regulation gives the licensee the option to voluntarily update to a later permissible version of the ASME Code, if that version has been endorsed in 10 C.F.R. § 50.55a. *Id.*; see also Industry Codes and Standards; Amended Requirements, 64 Fed. Reg. 51,370, 51,381 (Sept. 22, 1999). The portion of the ASME Code referenced by the licensee in the LRA relevant to the CUF has been so endorsed. LBP-06-07, at 17; see also 10 C.F.R. § 50.55a(g)(4); 64 Fed. Reg. at 51,386.

The Board also properly rejected the Petitioner’s construction of 10 C.F.R. § 54.21(a)(3) concerning the CLB. NJDEP argues that because the licensee’s current CLB is a CUF of 0.8, § 54.21(a)(3) requires the licensee to maintain that CUF through the period of extended operation. NJDEP Petition, at 7. However, as the Board explained, § 54.21(a)(3) “simply requires the licensee to ‘demonstrate’ that the intended functions of the relevant components

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<sup>3</sup> As with Petitioner’s discussion of Contention 1, Petitioner’s Contention 2 argument again does not even mention the Commission’s 10 C.F.R. § 2.309(f)(1) contention standards; Petitioner therefore does not make clear precisely which element of the Board’s analysis it disputes.

will be maintained consistent with the ‘CLB for the period of extended operation’.” LBP-06-07, at 18-19 (quoting 10 C.F.R. § 54.21(a)(3)).<sup>4</sup> Because AmerGen had already formally committed to update its CLB to reflect the CUF of 1.0 *prior* to the period of extended operation, the Board was correct in finding that AmerGen had demonstrated that a CUF of 1.0 would be the CLB at the time of extended operation; therefore, the licensee’s commitment comports with the regulation. *Id.* at 19; *see also* AmerGen Exh. 1, at 3.

In its appeal, Petitioner further claims that AmerGen’s commitment to update its CLB is flawed because 10 C.F.R. § 50.55a(a)(3) requires Commission approval of such a Code update before it can become effective. Petitioner’s Appeal, at 24-26. However, no such approval is required where the updated version of the Code has already been endorsed by Commission regulation; such updating is a matter of the licensee’s option and, therefore, as the Board concluded, a docketed commitment is sufficient “demonstration” for the purposes of 10 C.F.R. § 54.21(a)(3). LBP-06-07, at 19.<sup>5</sup>

Inasmuch as NJDEP failed to establish that its Contention 2 is admissible in this proceeding, and because the Board correctly determined that NJDEP’s Contention 2 was unsupported as a matter of law or fact and failed to raise a genuine dispute regarding a material issue, the Commission should uphold the Board’s dismissal of Contention 2.

C. The Licensing Board was Correct in Finding Contention 3 Inadmissible

As the Licensing Board correctly determined, Petitioner’s contention concerning AmerGen’s “Interconnection Agreement” with a third party (First Energy) to operate the Forked River combustion turbines (“FRCTs”) (“Contention 3”), was inadmissible. AmerGen relies on

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<sup>4</sup> The Commission’s regulations explicitly contemplate changes to the CLB during the license renewal review process. *See* 10 C.F.R. § 54.21(b); *see also* Staff CUF Brief, at 3-4.

<sup>5</sup> For a licensee to use a different version of the Code, it needs to perform an evaluation pursuant to 10 C.F.R. § 50.59. Such evaluations are subject to Staff review and Staff action, if appropriate.

the FRCTs to satisfy 10 C.F.R. § 50.63, which requires an alternate source of alternating current (“AC”) power for Oyster Creek in the event of a station blackout (“SBO”). LBP-06-07, at 20. In its proposed contention, NJDEP alleged that the Interconnection Agreement improperly fails to assure that:

- 1) First Energy will continue to operate the FRCTs during the extended period of operation;
- 2) the FRCTs will be maintained in compliance with the licensee’s aging management plan; and
- 3) any problems First Energy encounters with the FRCTs will be entered into a corrective action program that satisfies 10 C.F.R. Part 50, Appendix B’s quality assurance requirements. NJDEP Petition, at 9.

The Board concluded that Contention 3 failed to satisfy several elements of the Commission’s 10 C.F.R. § 2.309(f)(1) contention standards: the contention lacked adequate basis, was unsupported by facts or expert opinion, and failed to show the existence of a genuine dispute regarding a material issue. LBP-06-07, at 21-24; *see* 10 C.F.R. § 2.309(f)(1)(ii), (v)-(vi). Petitioner appears to appeal the Board’s dismissal of the contention solely with respect to the issue of whether AmerGen had provided for First Energy’s compliance with the FRCT aging management plan.<sup>6</sup> Petitioner’s Appeal, at 26-27.

As the Board explained, NJDEP articulated no grounds to believe either that the aging management plan for the FRCTs is inadequate or that First Energy will not comply with it. LBP-06-07, at 22-23.

Further, although Petitioner’s appeal devotes much attention to its supposed lack of access to the Interconnection Agreement, *see* Petitioner’s Appeal at 28-30, the commitments involved in the aging management plan were discussed in the LRA as well as in AmerGen’s

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<sup>6</sup> Petitioner does not appear to challenge the Board’s conclusion that Petitioner failed to demonstrate the admissibility of its contention on the issues of 1) continued operation of the FRCTs (*see* LBP-06-07, at 20-22) or 2) the applicability of a corrective action program (*see id.* at 24-25). .

Response to a Staff Request for Additional Information (“RAI Response”).<sup>7</sup> See Staff Answer, at 21; Staff Turbine Brief, at 9. Although the RAI Response was publicly available when NJDEP framed its contention, NJDEP did not take issue with any of the factual assertions in the RAI Response or, in fact, even mention the RAI Response. *Id.* In effect, Contention 3 relies on unsupported speculation that, despite AmerGen’s confirmation that the Interconnection Agreement requires First Energy to implement the aging management plan,<sup>8</sup> First Energy might nevertheless fail to do so. NJDEP does not explain why AmerGen’s confirmation that the Interconnection Agreement commits First Energy to implement the aging management plan is insufficient to demonstrate that the aging management plan will in fact be performed as proposed.

In short, Petitioner’s contention fails to reference any factual grounds for disagreement with the aging management plan or AmerGen’s assertions about its implementation. Therefore, the Board correctly found Contention 3 inadmissible because it lacked an adequate basis, was unsupported by facts or expert opinion, and failed to show the existence of a genuine dispute regarding a material issue. Consequently, the Commission should uphold the Board’s dismissal of Contention 3.

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<sup>7</sup> See “Response to NRC Request for Additional Information (RAI 2.5.1.19-1), dated September 28, 2005, Related to Oyster Creek Generating Station License Renewal Application,” dated October 12, 2005 (ADAMS Accession No. ML052910091); see *also* Oyster Creek LRA at section 2.5.1.19.

<sup>8</sup> (and allows AmerGen to oversee the implementation)

CONCLUSION

As stated above, the Board was correct in finding all three of NJDEP's contentions inadmissible. Therefore, the Commission should deny Petitioner's appeal of LBP-06-07.

Respectfully submitted,

***/RA/***

Ann P. Hodgdon  
Patrick A. Moulding  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 10th day of April, 2006

April 10, 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name: Patrick A. Moulding  
Address: U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Washington, D.C. 20555  
Telephone Number: 301-415-2549  
Fax: 301-415-3725  
E-mail Address: PAM3@nrc.gov  
Admissions: State of Maryland  
Name of Party: NRC Staff

Respectfully submitted,

**/RA/**

\_\_\_\_\_  
Patrick A. Moulding  
Counsel for NRC Staff

Dated at Rockville, Maryland

this 10th day of April 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL FROM LBP-06-07" and "NOTICE OF APPEARANCE" of Patrick A. Moulding in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system as indicated by an asterisk, or by electronic mail, with copies by U.S. mail, first class, as indicated by double asterisk, this 10th day of April, 2006.

E. Roy Hawken, Chair\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
ERH@nrc.gov

Anthony J. Baratta\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
AJB5@nrc.gov

Paul B. Abramson\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
PBA@nrc.gov

Office of the Secretary\*  
ATTN: Docketing and Service  
Mail Stop: O-16C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
HEARINGDOCKET@nrc.gov

Office of Commission Appellate  
Adjudication\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
OCAAMail@nrc.gov

Debra Wolf\*  
Law Clerk  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
DAW1@nrc.gov

Lisa P. Jackson, Acting Commissioner\*\*  
New Jersey Department of  
Environmental Protection  
P.O. Box 402  
Trenton, NJ 08625-0402  
Lisa.Jackson@dep.state.nj.us

Jill Lipoti, Director\*\*  
New Jersey Department of  
Environmental Protection  
Division of Environmental Safety and Health  
P.O. Box 424  
Trenton, NJ 08625-0424  
Jill.Lipoti@dep.state.nj.us

Kathryn M. Sutton, Esq.\*\*  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Ave., NW  
Washington, DC 20004  
ksutton@morganlewis.com

Ron Zak\*\*  
New Jersey Department of  
Environmental Protection  
Nuclear Engineering  
P.O. Box 415  
Trenton, NJ 08625-0415  
Ron.Zak@dep.state.nj.us

Suzanne Leta\*\*  
New Jersey Public Interest Research Group  
11 N. Willow St.  
Trenton, NJ 08608  
sleta@njpirg.org

Donald Silverman, Esq.\*\*  
Morgan, Lewis, & Bockius LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
dsilverman@morganlewis.com

Alex S. Polonsky, Esq.\*\*  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Ave., N.W.  
Washington, DC 20004  
apolonsky@morganlewis.com

Paul Gunter, Director\*\*  
Reactor Watchdog Project  
Nuclear Information  
And Resource Service  
1424 16<sup>th</sup> Street, NW, Suite 404  
Washington, DC 20036  
pgunter@nirs.org

J. Bradley Fewell, Esq.\*\*  
Exelon Corporation  
200 Exelon Way, Suite 200  
Kennett Square, PA 19348  
bradley.fewell@exeloncorp.com

John A. Covino, Esq.\*\*  
Valerie Anne Gray, Esq.  
Deputy Attorneys General  
Division of Law  
Environmental Permitting and Counseling  
Section  
Hughes Justice Complex  
Trenton, NJ 08625  
john.covino@dol.lps.state.nj.us  
Valerie.Gray@dol.lps.state.nj.us

Richard Webster, Esq.\*\*  
Rutgers Environmental Law Clinic  
123 Washington Street  
Newark, NJ 07102-5695  
rwebster@kinoy.rutgers.edu

**/RA/**

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Ann P. Hodgdon  
Counsel for NRC Staff

