

May 17, 2006 (7:37am)

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

**OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF**

**Before Administrative Judges:**

**E. Roy Hawkens, Chair  
Dr. Paul B. Abramson  
Dr. Anthony J. Baratta**

In the Matter of:	)	May 16, 2006
AmerGen Energy Company, LLC	)	
(License Renewal for Oyster Creek Nuclear Generating Station)	)	Docket No. 50-219

**AMERGEN ANSWER OPPOSING  
CITIZENS' MOTION TO APPLY SUBPART G PROCEDURES**

On May 5, 2006, Citizens<sup>1</sup> in the above-captioned proceeding submitted to the Atomic Safety and Licensing Board ("Board") a "Motion to Apply Subpart G Procedures" ("Motion"). The Motion asks the Board to adopt the formal hearing process requirements in 10 CFR Part 2, Subpart G in this proceeding. AmerGen files this Answer opposing the Motion in accordance with 10 CFR §§ 2.306 and 2.323(c).

For the reasons discussed below, Citizens' Motion lacks legal merit. The Motion and its voluminous exhibits do nothing more than highlight Citizens' efforts to cast aspersions on AmerGen and its corporate parent, Exelon. Looking past the vitriol, Citizens have failed to satisfy either of the two criteria set forth in Section 2.310(d) which are prerequisites to approval of their request. While they have made broad and baseless challenges to the credibility of AmerGen and Exelon, in general, they have failed to show that the *admitted contention itself* is

<sup>1</sup> Citizens are comprised of: Nuclear Information and Resource Service ("NIRS"); Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation.

of the type that involves matters of credibility and warrants a Subpart G proceeding. Thus, their Motion should be denied in its entirety.

## I. BACKGROUND

In its February 27, 2006 “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),” the Board ruled that this “hearing shall be conducted in accordance with the informal adjudicatory procedures prescribed in Subpart L of 10 C.F.R. Part 2.” LBP-06-07, at 47 (“LBP-06-07”). This ruling is consistent with Nuclear Regulatory Commission (“NRC” or “Commission”) regulations which provide that license renewal proceedings may be conducted under the informal procedures of Subpart L, as opposed to the formal, trial-type procedures set forth in Subpart G of 10 CFR Part 2. 10 CFR § 2.310(a). However:

where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an *eyewitness* may reasonably be expected to be at issue, and/or issues of *motive or intent of the party or eyewitness material to the resolution of the contested matter*, the hearing for resolution of that contention or contested matter will be conducted under subpart G of this part.

10 CFR § 2.310(d) (emphasis added).

During the April 10, 2006 pre-hearing conference, Citizens indicated that they were “considering a motion for a Subpart G hearing on the basis of credibility.”<sup>2</sup> In response, the Board ordered that “[i]nsofar that counsel for NIRS intends to argue, pursuant to 10 C.F.R. §2.310(d), that all or part of the hearing in this case should be conducted pursuant to the procedures in Subpart G . . . , such motion must be filed by May 8, 2006.” “Memorandum and Order (Prehearing Conference Call Summary, Initial Scheduling Order, and Administrative

---

<sup>2</sup> Transcript, “AmerGen Energy Company, LLC, Oyster Creek Nuclear Generating Station, Pre-Hearing Conference,” Dkt. No. 50-0219-LR at 26 (Apr. 10, 2006).

Directives)” at 6 (Apr. 19, 2006). Citizens filed their Motion on May 5, 2006,<sup>3</sup> requesting that the Board “order this proceeding,” presumably in its entirety, be conducted pursuant to Subpart G. Motion at 1.

## II. LEGAL STANDARD

As a matter of policy, when the NRC amended its rules of practice on adjudicatory hearings in 2004, it did so “to make the NRC’s hearing process more effective and efficient.” 69 Fed. Reg. 2182 (Jan. 14, 2004). Among the decisions the Commission made to achieve this policy objective was “to move away from the trial-type, adversarial format to resolve technical disputes.” *Id.* Thus, the final amendments to Part 2 encourage, and in some situations require, the use of informal procedures in license renewal proceedings, as set forth in Subpart L. 10 CFR § 2.310.

Consistent with this policy directive, the Commission has explained that Section 2.310(d) mandates use of Subpart G procedures if the presiding officer finds that resolution of the contention requires resolution of: (1) issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (2) issues of motive or intent of a party or eyewitness material to the resolution of the contested matter. 69 Fed. Reg. at 2222. Interpreting the express language of the regulation and citing the accompanying regulatory history quoted above, the Board has concluded that Section 2.310(d) “provides only two criteria entitling a petitioner to a Subpart G process. . . .” *Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 694 (2004) (“Vermont Yankee”).<sup>4</sup>

---

<sup>3</sup> Because the Motion was filed electronically and received after 5:00 p.m., this Answer is timely filed pursuant to 10 CFR § 2.306.

<sup>4</sup> In *Vermont Yankee*, the licensee had applied for an amendment authorizing a power uprate, and four contentions were admitted in the proceeding. The intervenors asserted that their contentions should be

### III. ARGUMENT

In the context of the single drywell contention admitted in this proceeding,<sup>5</sup> it is evident that Citizens have not demonstrated that its resolution necessitates trial-type adjudicatory procedures. This is because Citizens have failed to apply the two Section 2.310(d) criteria to the issue in this proceeding. Instead, they base their Motion on a single, broad, baseless, and offensive premise: “AmerGen’s credibility, and the credibility of its parent, Exelon, is in question.” Motion at 1. This theme and Citizens’ accompanying attacks on various AmerGen and Exelon personnel reflect Citizens’ desire to cast aspersions, but certainly do not satisfy the regulatory requirements of Section 2.310(d) for the reasons set forth below.

**A. The First Criterion for A Subpart G Proceeding Has Not Been Satisfied Because There is No Past Activity and No Eyewitness Thereto Whose Credibility Is At Issue In This Proceeding**

In examining the first Section 2.310(d) criterion (*i.e.*, resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue), the Board has ruled that it “combines two elements, requiring that a contention necessitate resolution of ‘a dispute of material fact concerning the occurrence of a past activity’ *and* that ‘the credibility of an eyewitness may reasonably be expected to be an issue’ in resolving that dispute.” *Vermont Yankee*, 60 NRC at 694. (Emphasis

---

adjudicated under Subpart G. The Board addressed two issues of first impression, one of which is relevant to this proceeding; *i.e.*, interpreting the then-new NRC regulation, 10 CFR § 2.310. It concluded that Section 2.310(d) provides only two criteria entitling a petitioner to a Subpart G process and ruled petitioners had not demonstrated that any of the admitted contentions met the criteria. 60 NRC 686, 703.

<sup>5</sup> As admitted by the Board, the contention is as follows: “AmerGen’s License Renewal Application fails to establish an adequate aging management plan for the sand bed region of the drywell liner, because its corrosion management program fails to include periodic UT [ultrasonic testing] measurements in that region throughout the period of extended operation and, thus, will not enable AmerGen to determine the amount of corrosion in that region and thereby maintain the safety margins during the term of the extended license. LBP-06-07, at 33.

in original). Citizens' Motion fails on both fronts, and it misstates the law with respect to the requirement that "eyewitness," versus "witness," credibility be at issue.<sup>6</sup>

*1. The First Element of Criterion One Is Not Satisfied Because Citizens Fail to Identify A Past Activity Within The Intent of Subpart G*

The first element of criterion one requires that the contention involve "a dispute of material fact concerning the occurrence of (including the nature or details of) a past activity." 69 Fed. Reg. at 2222. The sole contention at issue in this proceeding concerns AmerGen's aging management plan for the sand bed region of the drywell liner. LBP-06-07, at 33. The ultimate purpose of the aging management plan at issue is to provide reasonable assurance of safe plant operation during a renewed, twenty-year license term. See 10 CFR §§ 54.21(a)(3), 54.29(a)(1).<sup>7</sup> As such, the drywell issue is forward-looking and not an "issue[ ] of material fact relating to the occurrence of a past activity." 10 CFR § 2.310(d).

Nor have Citizens adequately explained in their Motion how the resolution of their contention necessitates the resolution of material issues of fact relating to the occurrence of a past activity. Rather, it seems that the parties are meant to infer, from the Motion's wide-ranging discussion of various unrelated past activities (*e.g.*, tritium leaks at Braidwood, a 2004 NRC Office of Investigations matter at Quad Cities, a National Academy of Sciences report on commercial spent nuclear fuel storage), that Citizens consider some or all of these to be material to resolution of the drywell contention. One can only surmise that various conclusory allegations in the Motion about 1996 ultrasonic testing ("UT") results—and purported deficiencies in the data—may be meant to suggest that there is a material factual dispute regarding a past activity,

---

<sup>6</sup> Citizens misstate the law as follows: "The [NRC] regulations require that a formal proceeding be conducted when the credibility of a witness may reasonably [sic] expected to be at issue." Motion at 7. The regulation, which expressly states that "*the credibility of an eyewitness may reasonably be expected to be at issue,*" is quoted, italicized, and then ignored by Citizens. *Id.* at n.1.

<sup>7</sup> The regulatory approval resulting from a license renewal review applies to future plant operation—not current or past operations, which are the subject of ongoing regulatory oversight under 10 CFR Part 50.

per Section 2.310(d). *See* Motion at 1-2, 4-5. But Citizens' allegations regarding supposed "systematic bias" in the 1996 UT results reflect the type of classic, technical disagreement which is both amenable to resolution via Subpart L procedures. As explained below, it is not the type of past event or action, calling into question the truthfulness or credibility of an eyewitness, for which the Commission designated the formal, trial-type procedures of Subpart G.<sup>8</sup>

2. *The Second Element of Criterion One Is Not Met Because Citizens Fail to Demonstrate How the Credibility of an Eyewitness May Reasonably Be Expected to Be At Issue In This Proceeding*

There is an even more compelling deficiency in the Motion with respect to the second element of the first criterion (*i.e.*, the credibility of an eyewitness may reasonably be expected to be an issue) because Citizens fail to identify an "eyewitness" to such past activity. Citizens must demonstrate that their credibility concerns attach to individuals who "will likely be eyewitnesses in this proceeding. . . ." *Vermont Yankee*, 60 NRC at 703. This they have failed to do, as it is not enough to amorphously complain that "Citizens will not be able to tell if witnesses are telling the whole truth. . . ." Motion at 2.

If this proceeding is not dismissed on the basis of AmerGen's pending Motion to Dismiss, then it is reasonable to assume that AmerGen may rely on the testimony of expert witnesses to support its position that the aging management plan for the sand bed region of the drywell liner is adequate because it includes periodic UT measurements in that region throughout the period of extended operation, contrary to Citizens' contention.<sup>2</sup> The Board has explained that even if parties submit written expert testimony "relating to the assumptions they used and the calculations they performed," this Section 2.310 criterion still is not satisfied because such

---

<sup>8</sup> *See* "AmerGen's Answer Opposing Citizens' Motion to Compel Further Mandatory Disclosures" at 6 (May 16, 2006).

<sup>2</sup> *See* "AmerGen's Motions to Dismiss Drywell Contention as Moot and To Suspend Mandatory Disclosures" (Apr. 25, 2006). The arguments set forth in this Answer do not waive, nor in any way modify or amend, AmerGen's April 25 Motions.

experts are not eyewitnesses. *Vermont Yankee*, 60 NRC at 700.<sup>10</sup> This ruling is consistent with the Commission's pronouncement that the first criterion "does not include the testimony of any expert witness who has no first hand knowledge of the activity, inasmuch as the expert is simply providing an opinion based upon the testimony of others. . . ." 69 Fed. Reg. at 2222.

The deficiencies in Citizens' Motion on the credibility element of the first criterion also defeat the Motion for several additional reasons. First, Citizens' so-called "credibility" issues are general in nature and attempt to disparage AmerGen and Exelon's corporate character.<sup>11</sup> For instance, Citizens state that "AmerGen/Exelon has put its credibility and the credibility of its employees and agents at issue," and that "the Board should recognize that Citizens have done more than raise a reasonable concern as to AmerGen's credibility. . . ." Motion at 2, 8. The Board should note that AmerGen and Exelon are separate corporate entities,<sup>12</sup> recognize that Citizens' "concerns" relate to these corporate entities rather than individual eyewitnesses,<sup>13</sup> and reiterate its previous ruling that such "generalized aspersions" do not satisfy the "credibility" or "motive" elements of either Section 2.310 criterion. *Vermont Yankee*, 60 NRC at 700.

---

<sup>10</sup> In order to be eyewitnesses, such experts also must testify as "fact eyewitnesses with first-hand knowledge of a material and disputed past activity. . . ." *Vermont Yankee*, 60 NRC at 700. As the Board aptly points out, to hold otherwise "would allow the exception to swallow the rule." *Id.*

<sup>11</sup> AmerGen takes strong exception to all of Citizens' allegations and disparaging characterizations. Due to the ten-page limitation on the length of this Answer, however, and the need to address the serious legal deficiencies in the Motion, AmerGen notes the following, particularly with respect to the serious claim that it and Exelon have "submitted false data to the NRC" (Motion at 1): (1) the Quad Cities matter was treated by the NRC as a non-cited violation in part because it was identified and immediately investigated by Exelon; see Motion, Exh. E at 1-2; (2) the characterization of "proprietary" information is a discovery-related matter addressed in Section III.C of this Answer; (3) the Braidwood tritium and spent fuel matters are wholly unrelated to this proceeding; and (4) the claim that AmerGen has been "untruthful" (Motion at 4) in its pleadings is unfounded. In response to this final point, AmerGen incorporates by reference its "Answer in Opposition to Citizens' Motion for Reconsideration" at 7-8 (Apr. 17, 2006), as confirmed by the Board's "Memorandum and Order (Denying NIRS's Motion for Reconsideration)" at 7-8 (Apr. 27, 2006).

<sup>12</sup> The credibility of employees of different corporate entities will not be assumed across organizations. See *Vermont Yankee*, at 703.

<sup>13</sup> "[T]he fact that a witness may be a paid employee or dedicated member of a party, does not, per se, create any presumption that his or her credibility or motives are in such doubt that a Subpart G proceeding is required pursuant to 10 C.F.R. § 2.310(d)." *Id.* at 700.

Second, there must be a nexus between Citizens' credibility claims and *this proceeding*; *i.e.*, a demonstration of how "the credibility of . . . eyewitness testimony reasonably may be expected to be an issue in this proceeding." *Id.*, at 702. In this regard, the information proffered by Citizens must be "probative of whether a witnesses' credibility 'reasonably may be expected to be at issue' in the current proceeding." *Id.*, quoting 10 CFR 2.310(d). Surely, Citizens cannot assert or reasonably imply that some or all of the individuals targeted in their Motion—such as Messrs. Crane (President and Chief Nuclear Officer, Exelon Nuclear) and Resler (Manager, Nuclear Communications, Exelon Generation), or the two former Quad Cities instrument maintenance technicians—are or will be eyewitnesses in this proceeding, as defined by Section 2.310(d). *See* Motion at 3, and Exhibits D, E, and K. Moreover, most of the information appended to or addressed in the Motion falls far afield of the Oyster Creek license renewal proceeding; *e.g.*, State Of Illinois Complaint;<sup>14</sup> NRC Office of Investigations findings at Quad Cities circa 2004; National Academy of Science, Alvarez, and NEI-EPRI studies on commercial spent fuel pools. Such information bears no nexus to the instant proceeding.

**B. The Second Criterion For A Subpart G Proceeding Is Not Relevant Because There Are No Issues of Motive or Intent Material To Resolution of the Drywell Contention**

Having failed to satisfy the first Section 2.310(d) criterion, Citizens' Motion hinges on satisfaction of the second criterion; *i.e.*, demonstrating that resolution of the drywell contention requires resolution of "issues of motive or intent of the party or eyewitness material to the resolution of the contested matter. . . ." 10 CFR § 2.310(d). Again, the Motion fails to make the requisite demonstration, as Citizens do not identify "issues of motive or intent" that are material to resolution of the drywell contention. This is not a surprising outcome, because there are no

---

<sup>14</sup> "[T]he fact that . . . lawyers are ethically bound to zealously represent their respective clients, does not trigger Subpart G procedures." *Vermont Yankee*, 60 NRC at 700.

such issues of motive or intent germane to the contention at bar.<sup>15</sup> Thus, this criterion is not relevant to determination of Citizens' Motion.

**C. Citizens' Remaining Challenges Are Amenable To Alternative Means of Resolution Outside of Subpart G**

To the extent Citizens' seek to challenge the proprietary designation of, and resultant protections afforded to, materials sought under the Subpart L mandatory disclosure process,<sup>16</sup> AmerGen has proposed the form of a Protective Order and NonDisclosure Affidavit that, once executed by Citizens' representatives, will afford them access to proprietary information. This is simply a procedural, discovery-related matter, the resolution of which does not require the extraordinary action of ordering a Subpart G proceeding.

Finally, Citizens' dire predictions about their inability to "properly build [a] case by relying solely on paper discovery from an untrustworthy source," (Motion at 9) are unfounded "[g]iven that the Board has the primary responsibility to examine witnesses in Subpart L proceedings, [and] its three judges must be active inquisitors of the factual, technical, and scientific evidence relevant to resolving contested issues." *Vermont Yankee*, 60 NRC at 697, citing 69 Fed. Reg. at 2188. "[I]f there is an unexcused failure to make a full disclosure, the Board will not hesitate to impose sanctions, including the use of depositions and interrogatories, against the offending party." *Id.*, citing 10 CFR § 2.336(e). Thus, Citizens are afforded

---

<sup>15</sup> The Commission describes the following issue, by way of example, as being subject to analysis under this second criterion: "a contention alleging deliberate and knowing actions to violate NRC requirements by an applicant's representative necessarily requires resolution of the motive or intent of the applicant and its representative." 69 Fed. Reg. at 2222. By contrast, the Commission explains that "disputes over the motive or intent of an expert witness who was not an eyewitness are not relevant in determining whether to apply Subpart G procedures, inasmuch as such issues are not relevant to the decision criteria of the presiding officer (e.g., whether the contested application meets NRC requirements), and may easily be addressed in written filings and oral argument." *Id.*

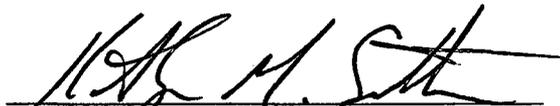
<sup>16</sup> See Motion at 4-5 (AmerGen characterization of "proprietary business information").

meaningful protection from their generalized, unfounded misgivings under Subpart L, despite their protestations to the contrary.<sup>17</sup>

#### IV. CONCLUSION

For the reasons set forth above, Citizens' Motion should be denied in its entirety.

Respectfully submitted,



Donald J. Silverman, Esq.  
Kathryn M. Sutton, Esq.  
Alex S. Polonsky, Esq.  
MORGAN, LEWIS & BOCKIUS, LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Phone: (202) 739-5502  
E-mail: [dsilverman@morganlewis.com](mailto:dsilverman@morganlewis.com)  
E-mail: [ksutton@morganlewis.com](mailto:ksutton@morganlewis.com)  
E-mail: [apolonsky@morganlewis.com](mailto:apolonsky@morganlewis.com)

J. Bradley Fewell  
Assistant General Counsel  
Exelon Business Services Company  
200 Exelon Way  
Kennett Square, Pennsylvania 19348  
Phone: (610) 765-5580  
E-mail: [Bradley.Fewell@exeloncorp.com](mailto:Bradley.Fewell@exeloncorp.com)

COUNSEL FOR  
AMERGEN ENERGY COMPANY, LLC

Dated in Washington, D.C.  
this 16th day of May 2006

---

<sup>17</sup> To the extent Citizens challenge the Board's compliance with the Administrative Procedure Act ("APA") in applying Subpart L to the instant proceeding, AmerGen counters that no such showing has been made by Citizens aside from the vague, unsubstantiated claim that "a Subpart G hearing is required for the proceedings to meet the requirements of the APA." Motion at 9.

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

In the Matter of:	)	
	)	May 16, 2006
	)	
AmerGen Energy Company, LLC	)	
	)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear	)	
Generating Station)	)	
	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "Amergen Answer Opposing Citizens' Motion To Apply Subpart G Procedures" were served this day upon the persons listed below, by E-mail and first class mail, unless otherwise noted.

Secretary of the Commission\*  
U.S. Nuclear Regulatory Commission  
Attn: Rulemakings and Adjudications Staff  
One White Flint North  
11555 Rockville Pike  
Rockville, Maryland 20852-2738  
(E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov))

Administrative Judge  
E. Roy Hawkens, Chair  
Atomic Safety and Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail: [erh@nrc.gov](mailto:erh@nrc.gov))

Administrative Judge  
Paul B. Abramson  
Atomic Safety and Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail [pba@nrc.gov](mailto:pba@nrc.gov) )

Administrative Judge  
Anthony J. Baratta  
Atomic Safety and Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail: [ajb5@nrc.gov](mailto:ajb5@nrc.gov))

John A. Covino  
Ellen Barney Balint  
Valerie Anne Gray  
Caroline Stahl  
Division of Law  
Environmental Permitting and Counseling Section  
P.O. Box 093  
Hughes Justice Complex  
Trenton, NJ 08625  
(E-mail: [john.covino@dol.lps.state.nj.us](mailto:john.covino@dol.lps.state.nj.us))  
(E-mail: [Ellen.Balint@lps.state.nj.us](mailto:Ellen.Balint@lps.state.nj.us))  
(E-mail: [Valerie.Gray@dol.lps.state.nj.us](mailto:Valerie.Gray@dol.lps.state.nj.us))  
(E-mail: [Caroline.Stahl@lps.state.nj.us](mailto:Caroline.Stahl@lps.state.nj.us))

Suzanne Leta  
NJPIRG  
11 N. Willow Street  
Trenton, NJ 08608  
(E-mail: [sleta@njpirg.org](mailto:sleta@njpirg.org))

Mitzi A. Young  
Steven C. Hamrick  
Office of the General Counsel, 0-15D21  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
(E-mail: [may@nrc.gov](mailto:may@nrc.gov))  
(E-mail: [schl@nrc.gov](mailto:schl@nrc.gov))

\* Original and 2 copies  
\*\* First Class Mail only

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

Richard Webster  
Rutgers Environmental Law Clinic  
123 Washington Street  
Newark, NJ 07102-5695  
(E-mail: [rwebster@kinoy.rutgers.edu](mailto:rwebster@kinoy.rutgers.edu))

Paul Gunter  
Nuclear Information and Resource Service  
1424 16th Street, NW  
Suite 404  
Washington, DC 20036  
(E-mail: [pgunter@nirs.org](mailto:pgunter@nirs.org))

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

  
Kathryn M. Sutton