August 26, 2010

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**
**BEFORE THE COMMISSION**

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|---|---|
| In the matter of | |
| Pacific Gas and Electric Company | Docket Nos. 50-275-LR |
| Diablo Canyon Nuclear Power Plant | 50-323-LR |
| Units 1 and 2 | |

# SAN LUIS OBISPO MOTHERS FOR PEACE'S RESPONSE TO PACIFIC GAS AND ELECTRIC COMPANY'S APPEAL FROM LBP-10-15

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**MISCELLANEOUS**

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## I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), San Luis Obispo Mothers for Peace (SLOMFP) hereby responds to Pacific Gas and Electric Company's ("PG&E's") appeal of LBP-10-15, in which the Atomic Safety and Licensing Board ("ASLB") admitted four contentions challenging the adequacy of PG&E's application for renewal of the operating license for the Diablo Canyon Nuclear Power Plant (DCNPP). As demonstrated below, PG&E's arguments lack merit and therefore the appeal should be denied.

## II. PROCEDURAL BACKGROUND

On March 22, 2010, in accordance with the U.S. Nuclear Regulatory Commission's ("NRC's") hearing notice published at 75 Fed. Reg. 3,493 (January 21, 2010), SLOMFP filed a hearing request and intervention petition in the license renewal proceeding for the DCNPP. Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace ("Hearing Request"). SLOMFP submitted five contentions challenging the adequacy of PG&E's license renewal application and Environmental Report.

Two of SLOMFP's contentions (EC-2 and EC-3) sought consideration of spent fuel storage environmental impacts that currently are barred by NRC regulations. Therefore

SLOMFP also submitted a waiver petition, which was supported by a declaration by SLOMFP's counsel. San Luis Obispo Mothers for Peace's Petition for Waiver of 10 C.F.R. Part 51 Subpart A Appendix B and 10 C.F.R. § 51.53(c)(2) (March 22, 2010) ("Waiver Petition").

On August 4, 2010, the ASLB issued LBP-10-15, concluding that aspects of four contentions (TC-1, EC-1, EC-2, and EC-4) and re-casting three of them in more narrow language. *Id.,* slip op. at 2 and Appendix A. The ASLB also concluded that SLOMFP's Waiver Petition had made a *prima facie* case that the NRC's regulations should be waived for purposes of considering Contention EC-2, and therefore referred it to the Commission. *Id.,* slip op. at 40. The ASLB also referred Contention EC-4 to the Commission because it "involves novel issues of law." *Id.,* slip op. at 2, 69. In a separate opinion, Judge Abramson dissented from the ruling with respect to Contention TC-1.

PG&E appealed LBP-10-15 on August 16, 2010. Applicant's Notice of Appeal of LBP-10-15; Applicant's Brief in Support of Appeal From LBP-10-15 ("PG&E Brief"). PG&E's brief addresses only the issue of contention admissibility and does not address the question of whether the waiver petition should have been referred to the Commission. PG&E Brief at 20-21.

## III. ARGUMENT

### A. Contention TC-1 is Admissible.

As admitted by the ASLB, Contention TC-1 reads:

> The applicant, Pacific Gas & Electric Company (PG&E), has failed to satisfy 10 C.F.R. § 54.29's requirement to demonstrate a reasonable assurance that it can and will 'manage the effects of aging' in accordance with the current licensing basis. PG&E has failed to show how it will address and rectify an ongoing adverse trend with respect to recognition, understanding, and management of the Diablo Canyon Nuclear Power Plant's design/licensing basis which undermines PG&E's ability to demonstrate that it will adequately manage aging in accordance with this same licensing basis as required by 10 C.F.R. § 54.29.

*Id.,* slip op. at 92 and Appendix A.

PG&E argues that Contention TC-1 falls outside the scope of a license renewal proceeding because it raises a "current operating issue." PG&E Brief at 2. But PG&E mischaracterizes the contention. Contention TC-1 does not concern itself with PG&E's current operation, other than to rely on it as a factual basis for raising a concern about the adequacy of PG&E's future aging management program during the license renewal term. As the ASLB recognized in LBP-10-15, the legitimacy of such reliance is established in *Ga. Inst. Of Tech.* (Georgia Tech. Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995). *Id.,* slip op. at 82. The fact that *Georgia Tech* was not a license renewal case does not detract from its applicability to the question of whether past performance may support concerns about future performance.

PG&E contends that that issues regarding management of aging equipment are presumptively satisfied by the ongoing regulatory process. *See, e.g.,* PG&E Brief at 3, 5. But such a presumption is inconsistent with the plain language of the license renewal rule, which requires a demonstration of reasonable assurance with respect to "managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified to require review under § 54.21(a)(1)." 10 C.F.R. § 54.29(a)(1). Under well-established precedents, all terms of a regulation must be given effect. *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-14, 63 NRC 510, 516 (2006). Therefore PG&E may not read the phrase "managing the effects of aging" out of 10 C.F.R. § 54.29(a)(1). PG&E's argument is also inconsistent with the purpose of the license renewal rule, as described by the Commission in its 1995 amendments to the rule:

> *The objective of the license renewal rule is to determine whether the detrimental effects of aging, which could adversely affect the functionality of systems, structures, and components that the Commission determines require review for the period of extended operation, are adequately managed.* The license renewal review is intended to identify any additional actions that will be needed to maintain the functionality of the systems, structures, and components in the period of extended operation.

Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,464 (May 8, 1995) (emphasis added).

Finally, PG&E's position is inconsistent with the Commission's own pronouncements on this issue. As the Commission has observed:

> *Part 54 requires renewal applicants to demonstrate how their programs will be effective in managing the effects of aging during the proposed period of extended operation. See generally 10 C.F.R. § 54.21(a).* This is a detailed assessment, conducted at "a component and structure level," rather than a more generalized "system level." 60 Fed. Reg. at 22,462. License renewal applicants must demonstrate that all "important systems, structures, and components will continue to perform their intended function in the period of extended operation." *Id*. at 22,463. *Applicants must identify any additional actions, i.e., maintenance, replacement of parts, etc., that will need to be taken to manage adequately the detrimental effects of aging. Id.* Adverse aging effects generally are gradual and thus can be detected by programs that ensure sufficient inspection and testing. *Id.* at 22,475.

*Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001) (emphasis added).

PG&E also argues that Contention TC-1 lacks sufficient basis for linking the current adverse trend to aging management. PG&E Brief at 11. But SLOMFP specifically alleged that the personnel on which PG&E intends to rely for management of aging equipment (*see* license renewal application at B-4) are the very same personnel that have demonstrated a persistent inability to successfully manage safety equipment at DCNPP. Hearing Request at 3. PG&E's license renewal application does not contain any information showing that PG&E plans to improve the rigor of the program with respect to the management of the aging safety equipment that is subject to the license renewal rule.

Similarly, PG&E argues that SLOMFP should have showed "a link between the current adverse performance trend and an aging mechanism, an aging effect, or the adequacy of a specified [Aging Management Program] within the scope of the license renewal rule." PG&E

Brief at 11. But the type of problem identified in the inspection report does not appear to be related to the type of equipment that is being managed; rather it broadly applies to the entire program and personnel who are carrying out the management. In one inspection report, for example, NRC inspectors found eleven separate examples illustrating "a *common theme* related to poor license management of the plant design-licensing basis and inconsistent implementation of regulatory administrative processes." Hearing Request at 4 (quoting Integrated Inspection Report ("IIR") 08-05) (emphasis added). There is no reason to think that the adverse trend identified by the inspectors will vary according to the type of equipment that is being managed.

Further, there is no reason to think that management of aging passive safety equipment would be any less demanding than management of currently used active safety equipment. To the contrary, the history of the license renewal rulemaking shows that the Commission is concerned about the unusual demands of managing aging passive safety equipment. In 1995, the Commission removed aging active safety equipment from the scope of the license renewal rule, on the ground that it would be adequately covered by the newly-promulgated maintenance rule. 60 Fed. Reg. at 22,470. But the Commission specifically decided not to exempt aging passive safety equipment from the scope of the license renewal rule:

> Passive, long-lived structures and components that are the focus of the license renewal rule are also within the requirements of the maintenance rule, as discussed in the SOC Section III(d)(iv). Treatment of these structures and components, however, under the maintenance rule is likely to involve minimal preventive maintenance or monitoring to maintain functionality of such structures and components in the original operating period. Consequently, under the license renewal rule, the Commission did not allow for a generic exclusion of passive, long-lived structures and components based solely on maintenance activities associated with implementing the requirements of the maintenance rule.

60 Fed. Reg. at 22,470-71. Accordingly, Contention TC-1 raises a litigable issue regarding whether an organization that is demonstrably incapable of providing adequate management for

safety equipment under current circumstances can also respond to the additional demands of managing deteriorating and aging equipment.

**B. Contention EC-1 is Admissible.**

As admitted by the ASLB in LBP-10-15, Contention EC-1 reads:

> PG&E's Severe Accident Mitigation Alternatives ("SAMA") analysis fails to satisfy 40 C.F.R. § 1502.22 because it fails to consider information regarding the Shoreline fault that is necessary for an understanding of seismic risks to the Diablo Canyon nuclear power plant. Further, that omission is not justified by PG&E because it has failed to demonstrate that the information is too costly to obtain. As a result of the foregoing failures, PG&E's SAMA analysis does not satisfy the requirements of the National Environmental Policy Act ("NEPA") for consideration of alternatives or NRC implementing regulation 10 C.F.R. § 51.53(c)(3)(ii)(L).

*Id.,* slip op. at 25-26 and Appendix A.

PG&E argues that Contention EC-1 does not establish a genuine dispute with PG&E's SAMA analysis in several respects. First, PG&E claims that SLOMFP "failed to offer any support to show that PG&E's SAMA analysis does not bound the effects of the Shoreline Fault." *Id.* But SLOMFP was not required to provide a quantitative evaluation of the SAMA analysis at this stage of the proceeding. As recognized by the ASLB in LBP-10-15, it was sufficient for SLOMFP to identify a number of factors calling for consideration of the Shoreline Fault in the SAMA analysis, including the conceded significance of the fault, the preliminary nature of the information obtained so far, and the dominant role played by earthquakes in the SAMA analysis. Slip op. at 21-22. *See also Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 338-39 (2006) (holding that for purposes of admitting a contention, qualitative information is sufficient to support a SAMA contention).[1] PG&E also cites *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2;

[1] PG&E relies for some of its arguments on merits decisions by the Commission in the *Pilgrim* case. *See, e.g.,* PG&E Brief at 16, 17, 20 (citing *Entergy Nuclear Generation Co. and Entergy*

Catawba Nuclear Station, Units 1 and 2), CLI-01-17, 56 NRC 1, 11-12 (2007) for the proposition that SLOMFP was required to approximate the relative cost and benefit of a challenged SAMA or provide a "ballpark" consequence and implementation cost of implementing the SAMA. PG&E Brief at 16. But the *McGuire/Catawba* decision does not stand for the proposition that any challenge to a SAMA analysis must present a new SAMA and compare its costs and benefits to the existing analysis. In the portion of the decision cited by PG&E, the Commission found that the intervenors had not sufficiently supported a contention that sought consideration of a specific SAMA that had been omitted from the applicant's environmental analysis. 56 NRC at 11-12. Contention EC-1, in contrast, does not seek consideration of any particular SAMA. Contention EC-1 is more like the contention whose admission was *approved* by the Commission in the *McGuire/Catawba* case, in which the intervenors sought consideration of information that had been overlooked in the SAMA analysis. 56 NRC at 6-10. In affirming the admission of the contention, the Commission found that the petitioners had identified a discrepancy between containment probability figures in the SAMA analysis and the overlooked study. Of course, in this case, the probabilistic study of which SLOMFP seeks consideration is not yet available and therefore it is not possible for SLOMFP to perform such a quantitative comparison; nevertheless, SLOMFP has submitted sufficient qualitative evidence of its likely significance to warrant admission of the contention.

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*Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, __ NRC __ (slip op. March 26, 2010); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), 69 NRC 529, 533 (2006). SLOMFP respectfully submits that the standard for disposition of a SAMA contention on the merits is distinct from the standard for admission of such a contention for a hearing. Under 10 C.F.R. § 2.309, SLOMFP is required to demonstrate the existence of a genuine and material dispute with PG&E, not to satisfy a standard for surviving summary disposition or prevailing in an evidentiary hearing.

PG&E next argues that the contention is inadmissible because it is based on Council on Environmental Quality ("CEQ") regulations, which are not binding on the NRC. PG&E Brief at 18. Nevertheless, the Supreme Court has held that the CEQ regulations are entitled to "substantial deference." *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016, 1032-33 (2006), *cert. denied,* 549 U.S. 1166 (2007). The regulation in question, 40 C.F.R. § 1502.22, is also completely consistent with the "rule of reason" generally applied to interpretations of the National Environmental Policy Act ("NEPA"). *Id.* SLOMFP has raised a litigable dispute with PG&E regarding the reasonableness of PG&E's proposal that the NRC should complete its environmental analysis of alternatives for mitigation of a severe earthquake at DCNPP years before any such decision is needed, and without the benefit of a pending probabilistic study of a newly discovered and potentially significant earthquake fault that lies within the DCNPP site.

Finally, PG&E argues that even if 40 C.F.R. § 1502.22 applies, SLOMFP has not demonstrated that consideration of the Shoreline Fault is "essential" to a choice among alternatives. PG&E Brief at 18. But SLOMFP has cited extensively from government documents showing that (a) the Shoreline Fault is a potentially significant contributor to earthquake risk at DCNPP, (b) the information presented to date is only "preliminary," and (c) earthquake risks dominate the severe accident risks at DCNPP. As the ASLB correctly concluded in LBP-10-15, this is sufficient information to support the admission of a contention. *See also Pilgrim,* LBP-06-23, 64 NRC at 338-39.

Therefore, PG&E has failed to demonstrate that Contention EC-1 is inadmissible.

**C. Contention EC-2 is Admissible.**

As admitted by the ASLB, the contention states:

> PG&E's Environmental Report is inadequate to satisfy NEPA because it does not address the airborne environmental impacts of a spent fuel pool accident caused by an earthquake

adversely affecting DCNPP.

LBP-10-15, slip op. at 26 and Appendix A. Admission of the contention depends upon the granting of a waiver by the Commission. *Id.* at 26-27.

Setting aside the issue of the validity of SLOMFP's waiver petition, PG&E argues that Contention EC-2 is inadmissible because SLOMFP failed to demonstrate a genuine dispute with the spent fuel pool impacts analysis in the 1996 License Renewal Generic Environmental Impact Statement ("GEIS"), which PG&E incorporated by reference into its environmental report. PG&E Brief at 21. But PG&E overlooks the fact that, as stated in SLOMFP's Hearing Request, the analysis in the 1996 GEIS has been updated and superseded by the 2009 Draft Revised License Renewal GEIS. Hearing Request at 16. In the Draft Revised License Renewal GEIS, the NRC relies on NUREG-1738, *Technical Study of Spent Fuel Accident Risk at Decommissioning Nuclear Power Plants* (October 2000), for its conclusion that although impacts of a spent fuel accident would generally be comparable to or lower than the impacts of a reactor accident and therefore are bounded by the 1996 GEIS, that general conclusion does not apply to western reactor sites such as DCNPP. Hearing Request at 16-17. The 1996 License Renewal GEIS is not a regulation that is binding until the NRC decides, as a matter of its regulatory discretion, to change it. To the contrary, the GEIS is an analysis of environmental impacts that must be revised if the NRC obtains new information demonstrating that the impacts of the proposed action are significantly greater or different than the NRC had previously considered. 10 C.F.R. § 51.92(a)(1). *See also Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 371-72 (1989).

PG&E also disputes the lawfulness of the ASLB's conclusion that:

> While PG&E and the Staff assert that the environmental impacts of a SFP accident are no worse than those of the severe (reactor) core accidents already considered in the NEPA

> analysis, and therefore their "environmental impacts" have been considered, this does not eliminate the necessity for assessment of the likelihood of such incidents and their concomitant effect upon the overall likelihood of a radiation release of that magnitude.

LBP-10-15, slip op. at 29. According to PG&E, the Board erred by finding that a "bounding" analysis is unacceptable under NEPA. PG&E Brief at 24.

Neither the ASLB nor SLOMFP disputes the acceptability of a bounding analysis where it is appropriate. In this case, however, a number of factors undermine that approach. First, the Draft Revised License Renewal GEIS explicitly excludes Diablo Canyon from the analysis of airborne pathway impacts. *Id.* at E-33 n.(a). Second, the comparison between impacts of spent fuel pool accidents and reactor accidents in the Draft Revised GEIS is expressed in terms of early and latent fatalities. Such a comparison does not take into account the significant differences between the source terms for a reactor accident and a spent fuel pool accident. A spent fuel pool accident is more likely to cause widespread land contamination, with concomitant population relocation, cleanup costs and adverse economic impacts. *See* Hearing Request at 17, SLOMFP's Waiver Petition (Curran Declaration, par. 8) and San Luis Obispo Mothers for Peace's Reply to Oppositions to Request for Hearing, Etc. at 13 (April 23, 2010).[2] These differences between reactor accident impacts and spent fuel pool fire impacts are not discussed in the Draft Revised License Renewal GEIS. The Draft Revised License Renewal GEIS also fails to explain how its conclusion that the impacts of a reactor accident bound the impacts of a spent fuel pool accident is affected by the assumption in NUREG-1738 that the population surrounding a nuclear power plant would be re-located after a spent fuel pool fire.

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[2] SLOMFP also raised the issue in its comments on the Draft Revised License Renewal GEIS. Memorandum from San Luis Obispo Mothers for Peace to Secretary, U.S. Nuclear Regulatory Commission, re: Draft revision to the Generic Environmental Impact Statement for License Renewal of Nuclear plants, NUREG-1437, revision 1 (GEIS) (January 12, 2010) (ADAMS Accession No. ML100150092).

Finally, PG&E argues that the ASLB incorrectly concluded that Contention EC-2 is not a SAMA contention. PG&E Brief at 26. But as the ASLB correctly pointed out, the contention's two reference to PG&E's SAMA analysis are "minor and incidental." LBP-10-15, slip op. at 47. In any event, the regulatory bar to consideration of SAMAs with respect to spent fuel pools stems from the NRC regulations from which SLOMFP seeks a waiver. *See Turkey Point,* CLI-01-17, 54 NRC at 23. If SLOMFP's Waiver Petition is granted, then any analysis of the environmental impacts of earthquakes on the DCNPP spent fuel pools would necessarily include an analysis of alternatives for mitigating or avoiding those impacts. Thus, while "SAMA" is a term of art that is generally applied by the NRC to the analyses of severe accident mitigation alternatives for reactor accidents, it would also be applicable to accidents involving the effects of severe earthquakes on spent fuel pools.

**D. Contention EC-4 is Admissible.**

As presented by SLOMFP and admitted by the ASLB, Contention EC-4 states:

> The Environmental Report fails to satisfy the National Environmental Policy Act (NEPA) because it does not discuss the cost-effectiveness of measures to mitigate the environmental impacts of an attack on the Diablo Canyon reactor during the license renewal term.

LBP-10-15, slip op. at 69. The ASLB referred its ruling on Contention EC-4 to the Commission because it raises the "novel legal or policy issues" of:

> (a) whether because of the quantitative nature of the cost-benefit analyses which are the end product of SAMA analyses, a quantitative, as opposed to qualitative, analysis of terrorist attacks and the alternatives for mitigation and prevention is necessary; (b) how staff should approach such an analysis when the data is, at best, sparse; and ( c) the extent to which, and manner by which, SAMA analyses should consider matters and mechanisms already addressed by the NRC's Design Basis Threat programs.

*Id.* PG&E argues that the Commission should simply reject the contention because it is "contrary to established NRC precedent." PG&E Brief at 27. In support of its argument, PG&E

cites the Commission's decision in *Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128 (2007), in which the Commission declined to apply the Ninth Circuit's ruling in *San Luis Obispo Mothers for Peace* to a reactor in the Third Circuit. Thus, in *Oyster Creek,* the Commission held – contrary to the Ninth Circuit's ruling in *San Luis Obispo Mothers for Peace* -- that the effects of terrorist attacks on nuclear facilities constitute safety issues only and are not litigable under NEPA. 65 NRC at 129. Because the DCNPP is located in the Ninth Circuit, however, the Commission must adhere to that court's decisions in the Diablo Canyon license renewal proceeding.

PG&E also argues that Contention EC-4 should be dismissed because the Commission has concluded that the environmental impacts of a severe reactor accident bound the impacts of a terrorist attack. As the ASLB explained in LBP-10-15, however:

> While it seems plausible to us that consequences of terrorist-act-originated core damaging events may well be no worse than those for severe accidents traditionally considered in SAMA analysis (because there are events considered in SAMA analysis which assume release from the containment into the environment of a substantial portion of the core fission product inventory), *that fact has no bearing upon the potential cost-benefit analysis of various mechanisms to prevent such a release by a terrorist attack, and possibly none upon mechanisms which might ameliorate its consequences.* The referenced findings of the 1996 GEIS (insofar as they address terrorist-act-initiators) regard only the consequences aspects of a SAMA analysis, and address neither the impact of additional initiating events (terrorist attacks) upon the Core Damage Frequency, nor the cost-benefit analyses regarding mitigative (preventive as well as palliative) alternatives. Thus we do not find this contention to challenge a generic finding of the NRC.

LBP-10-15, slip op. at 66 (emphasis added) (footnotes omitted).

Finally, PG&E contends the contention should be dismissed because SLOMFP has failed to provide any expert opinion or factual information to show that the environmental impacts of an attack would be different or call for different mitigation measures than a severe accident. PG&E Brief at 30. But SLOMFP has satisfied its burden by showing that neither the NRC nor

PG&E has even attempted to address the question of what would be the difference between a SAMA analysis for severe accidents and a SAMA analysis for terrorist attacks. Both parties simply appear to have assumed that it was not necessary to address the question. That is extremely unreasonable, given that a significant portion of mitigative measures for an attack would consist of steps for preventing attackers from accessing or intentionally harming a facility. Such measures that would probably be unnecessary to mitigate or avoid an accident caused by natural phenomena or equipment failures, and thus would require additional independent consideration. Accordingly, PG&E has failed to demonstrate that Contention EC-4 is inadmissible.

## IV. CONCLUSION

For the foregoing reasons, the Commission should deny PG&E's appeal and affirm LBP-10-15.

Respectfully submitted,

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August 26, 2010

## CERTIFICATE OF SERVICE

I certify that on August 26, 2010, I posted San Luis Obispo Mothers for Peace's Response to Pacific Gas and Electric Company's Appeal from LBP-10-15 on the NRC's Electronic Information Exchange. It is my understanding that as a result, the following persons were served:

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| Office of the Secretary<br>And NRC Commissioners<br>Rules and Adjudications Branch<br>U.S. Nuclear Regulatory Commission<br>11555 Rockville Pike<br>Rockville, MD 20852<br>hearingdocket@nrc.gov | David A. Repka, Esq.<br>Tyson R. Smith, Esq.<br>Winston & Strawn, LLP<br>1700 K Street N.W.<br>Washington, D.C. 20006-3817<br>drepka@winston.com,<br>trsmith@winston.com |
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