

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of :)	June 30, 2011
)	
U.S. Department of Energy (Docket No. 63-001))	
)	Docket No. 63-001-HLW
(High Level Waste Repository Construction)	
Authorization Application))	ASLBP No. 09-892-HLW-CAB04

**NYE COUNTY, NEVADA'S RESPONSE IN OPPOSITION TO NRC STAFF'S
JUNE 20, 2011 PETITION FOR REVIEW OF BOARD ORDERS**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND AND PROCEDURAL OVERVIEW 2

ARGUMENT 4

 I. CAB04'S ACTIONS TO PRESERVE THE FUNCTIONS OF THE LSN AND
 MAINTAIN ACCESSIBILITY TO ITS CONTENTS WERE PROPER AND NECESSARY
 4

 II. THE NRC ALSO HAS A MANDATORY OBLIGATION TO CONTINUE THE
 LICENSING PROCEEDING UNDER THE NWPA AND SHOULD PRESERVE THE LSN
 RECORD AND TAKE IMMEDIATE ACTION ON PENDING ISSUES 8

CONCLUSION..... 12

TABLE OF AUTHORITIES

Statutes

Nuclear Waste Policy Act, 42 U.S.C. § 10134 (d). 5, 13

Atomic Safety and Licensing Board Orders

Order (Concerning LSNA Memorandum), dated December 22, 2009 (unpublished) (December 2009 Order)..... 2

U.S. Dep’t of Energy (High-Level Waste Repository), LBP-10-11, 71 NRC __ (June 29, 2010) (slip op.) (LBP-10-11)..... 3, 11

NRC Staff Response to February 25, 2011, Board Order, filed March 3, 2011 at 3 11

Filings Before CAB04

Licensing Support Network Administrator's 2009 Memorandum from Daniel J. Graser, LSNA, to Administrative Judges, dated December 17, 2009 2, 5

Memorandum from Daniel J. Graser, LSNA, to Administrative Judges, dated February 18, 2011, at 1-2 (2011 Memorandum)..... 3

Nye County Answer to U.S. Department of Energy's Motion to Renew Temporary Suspension of the Proceeding at p. 7 and n.22. (March 11, 2011)..... 6

Congressional and Legislative Materials

DOE, *FY 2010 Congressional Budget Request, Vol. 5*, 504 505, 520, 540; P.L. 111-85, 123 Stat. 864, 2868..... 5

United States Government Accountability Office, *Commercial Nuclear Waste, Effects of a Termination of the Yucca Mountain Repository Program and Lessons Learned Report*, GAO-11-229 (April 2011) 6, 7

FY-2010 Appropriations Hearing Before the Subcomm. on Energy and Water Development, and Related Agencies of the S. Comm. on Appropriations, 111th Cong. (2009) 7

Joint Hearing of the Energy and Power Subcommittee and the Environment and Economy Subcommittee of the House Energy and Commerce Committee. *The Role of the Nuclear Regulatory Commission (NRC) in America's Energy Future* (May 5, 2011). 8

Regulations

10 C.F.R. Part 2, Subpart J 2, 4

10 C.F.R. § 2.1001 2

42 U.S.C. § 10134(d)..... 4, 12

10 CFR § 2.1007 (a)(2)..... 5

10 CFR § 2.1015 (a)..... 5

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I. INTRODUCTION

Nye County, Nevada ("Nye County" or "County"), the host County for the proposed Yucca Mountain repository, opposes the NRC Staff Petition for the Commission to Exercise its Inherent Supervisory Authority To Review April 11, 2011 and June 9, 2011 Board Orders. The Atomic Safety and Licensing Board ("CAB04") on those dates took appropriate action to safeguard, and maintain accessibility to, the contents of the Yucca Mountain Licensing Support Network ("LSN"), a scientific record which cost public taxpayers billions of dollars to generate. CAB04 was required to take action because this Commission has unjustifiably failed to timely determine if it should review, sustain, or overturn the CAB04's June 29, 2010, decision denying the Department of Energy's ("DOE") Motion to Withdraw its license application for Yucca Mountain, leaving the adjudication of DOE's license application in limbo. Issuance of the Commission's final decision on the review of the DOE Motion to Withdraw would necessarily resolve any issues regarding maintenance of the LSN. Because NRC Staff's Petition ignores this fundamental fact and relies upon erroneous conclusions of law, the Petition should be denied.

II. BACKGROUND AND PROCEDURAL OVERVIEW

The Licensing Support Network (LSN) was established pursuant to 10 C.F.R. Part 2, Subpart J, to assist the Commission and the assigned licensing Board (CAB04) in reaching a decision in the Yucca Mountain repository licensing proceeding consistent with timeframes in the Nuclear Waste Policy Act. The LSN is a web-based system that makes documents electronically available to NRC and the parties.

Pursuant to 10 C.F.R. § 2.1001, the LSN Administrator (LSNA) is the NRC official responsible for coordinating access to and maintaining the integrity of data available on the LSN. On December 17, 2009, the LSNA filed a memorandum regarding potential LSN impacts if DOE were to withdraw its license application.¹ Pursuant to a December 22, 2009, CAB04 Order, the parties filed comments regarding the LSNA's 2009 Memorandum.² During a January 27, 2010, case management conference, CAB04 asked each LSN participant present, other than DOE and the Staff, to commit to preserve their LSN document collections and provide compact disc (CD) copies to the LSNA, if circumstances warranted. On February 4, and 19, 2010, respectively, DOE answered Board questions posed during the January conference, and filed a status report on its LSN archiving plan. On March 3, 2010, DOE filed a motion to withdraw its license application.

This Commission directed CAB04 to expeditiously decide the Motion to Withdraw, and after briefing by the parties, CAB04 held oral arguments on DOE's Motion on June 3, 2010. At the conclusion of a case management conference held the next day, June 4, 2010, CAB04 instructed all the parties to confer and agree upon proposed conditions regarding DOE's LSN document collection should the Motion for Withdrawal be granted. Tr. at 443 (June 4, 2010).

¹ Memorandum from Daniel J. Graser, LSNA, to Administrative Judges, dated December 17, 2009 (2009 Memorandum).

² See Order (Concerning LSNA Memorandum), dated December 22, 2009 (unpublished) (December 2009 Order); NRC Staff Comments Concerning LSNA Memorandum, dated January 21, 2010; State of Nevada's Comments on LSNA Queries, dated January 21, 2010; Nye County, Nevada Response to LSNA Questions, dated January 25, 2010.

Consistent with CAB04's direction, the parties filed a joint report addressing proposed conditions on June 18, 2010. *See* CAB04 Order, dated June 7, 2010 and Order (Questions for Several Parties and LSNA), dated April 21, 2010, at Appendix A (unpublished) (April 2010 Order) which noted that all parties, except the Staff and DOE, committed to store their LSN collections on a CD and provide a copy to the LSNA if circumstances warranted such action. On June 29, CAB04 denied DOE's Motion to Withdraw, and parties subsequently filed requests for review of that decision with this Commission. The Commission was briefed by the parties on CAB04's decision denying DOE's Motion to Withdraw on July 9, 2010, with reply briefs filed ten days later. The matter is still pending before the Commission nearly a year later.

In a memorandum to CAB04 dated February 18, 2011, the LSNA indicated that (1) the LSN would need to be shut down by October 1, 2011, if the Administration's budget proposal for FY 2012 is approved, (2) the Board could no longer presume that the LSN website would be operational or that the LSNA could take custody of documents, and (3) that parties' LSN document collections will no longer be electronically accessible when the LSN website is shut down.³

When CAB04 denied DOE's motion to withdraw and identified proposed conditions for preservation of the DOE LSN,⁴ the Board could not have anticipated that the Commission would ignore its own internal policies for expeditiously resolving the parties' requests for review of CAB04's decision on DOE's Motion to Withdraw. Nor could CAB04 have anticipated that the Chairman of the Commission would unilaterally direct the NRC staff to closeout work on the Yucca Mountain licensing proceeding and the safety evaluation reports (SERs) before NRC had finally ruled on the Motion to

³ Memorandum from Daniel J. Graser, LSNA, to Administrative Judges, dated February 18, 2011, at 1-2 (2011 Memorandum).

⁴ *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC __ (June 29, 2010) (slip op.) (LBP-10-11),

Withdraw⁵ and before Congress had acted upon NRC's appropriations for the Yucca Mountain licensing proceeding.

ARGUMENT

I. CAB04'S ACTIONS TO PRESERVE THE FUNCTIONS OF THE LSN AND MAINTAIN ACCESSIBILITY TO ITS CONTENTS WERE PROPER AND NECESSARY

In denying DOE's attempt to unilaterally withdraw its license application without providing a safety justification for the withdrawal, CAB04 recognized NRC's duty to complete consideration of the Yucca Mountain license application on the merits, pursuant to the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10134(d). The Commission has refused to conclude its review of CAB04's decision, which is the law of the case, even though the matter has been pending for nearly a year, and even though final votes have been cast by the individual NRC Commissioners in the fall of 2010.

Since filing its Motion for Withdrawal, DOE has rapidly dismantled the Yucca Mountain program, acting as if CAB04 had decided the withdrawal motion in its favor. Granting the NRC staff's petition would simply serve to further DOE's apparent goal of making it as difficult as possible to restart the discovery process, should a Court order, Congressional, or NRC action make that necessary in the future. DOE began its unilateral "termination" of the program without obtaining Congressional approval, and in the teeth of the CAB04 decision that the withdrawal was contrary to the requirements of the NWPA.

Until Congress amends the NWPA to eliminate Yucca Mountain as the sole designated repository site, this Commission fulfills its obligation to issue a final decision on any review of the CAB04 June 29, 2010, decision, and/or a federal court rules otherwise, NRC regulations require that the LSN record be preserved in a manner that insures accessibility by the parties. See 10 C.F.R. Part 2, Subpart J.

⁵ See text accompanying notes 9-12 *infra*.

For example, 10 CFR § 2.1007 (a)(2) unequivocally states:

A system to **provide electronic access** to the Licensing Support Network **shall be provided** at the NRC Web site, *http://www.nrc.gov*, and/or at the NRC Public Document Room beginning in the pre-license application phase (emphasis added)

In addition, **nothing** in Subpart J authorizes NRC or the LSNA to terminate the LSN while the license proceeding is still pending. Indeed, the Commission's own rules regarding the Yucca Mountain licensing proceeding preclude appeals or petitions for review of Board decisions regarding the LSN. 10 CFR § 2.1015 (a) ("No appeals from a... presiding Officer's order or decision under this subpart are permitted, except as prescribed [later in the section].") The NRC staff admits that no such grounds related to LSN operation exist in this case, but rather invoke the Commission's inherent supervisory authority to overturn the CAB04 order. However, as will be demonstrated, there is no basis in law or fact for granting NRC staff's petition.

Contrary to assertions in the LSNA 2009 Memorandum and NRC staff filings, appropriated funds are available for execution of the CAB04 Order. Moreover, nothing in the appropriations passed by Congress preclude such use. Finally, funds used for such purposes serve the national interest, and are not wasteful.

Funds are available to either continue the LSN operation, or execute the CAB04 orders designed to provide a functional equivalent **until the license proceeding is concluded, and any appeals are exhausted**. The Administration requested, and Congress approved, funding for the 2010 fiscal year that continued the Yucca Mountain license application process. DOE, *FY 2010 Congressional Budget Request, Vol. 5*, 504 (FY-2010 budget request "is dedicated solely to supporting ... the NRC LA process."), 505, 520, 540; P.L. 111-85, 123 Stat. 2864, 2868. Because the licensing process was in essence stayed during much of FY-2010, those funds were not exhausted. In addition, FY-2011 Continuing Resolutions ("CR") signed into law prior to the

final FY-2011 CR passed in April of 2011 continued to fund DOE's and NRC's Yucca Mountain activities. As Nye County stated in a previous filing: "The NWPA is law and Congress has already appropriated sufficient funds for DOE to complete this phase of discovery and for NRC to continue its adjudication of the license application through the end of FY-2011, regardless of future Congressional actions that could impact additional funding for the rest of the fiscal year."⁶ Such funding necessarily includes full maintenance of a functional LSN. If this Commission simply orders the LSNA to continue operation of the LSN network at least until a final unappealable decision is reached on DOE's motion to withdraw, or until Congress amends the NWPA to eliminate Yucca as the sole designated nuclear repository site, the challenged CAB04 Orders would be unnecessary.

Rather than wait for a final decision by the NRC on the Motion to Withdraw, DOE, in an uncommon display of rapid administrative action, immediately began dismantling the Yucca Mountain program, dispersing experienced technical staff, and disposing of property and support systems without fully assessing the risks of such precipitous action, addressing the requirements of the NWPA, or even complying with federal rules governing the disposition of property. *See generally* United States Government Accountability Office, *Commercial Nuclear Waste, Effects of a Termination of the Yucca Mountain Repository Program and Lessons Learned* Report, GAO-11-229 (April 2011)[hereinafter GAO Report]. While DOE continued to dismantle the program, it took only the minimal steps mandated by the CAB04 in the licensing proceeding for over a year, while initiating no discovery whatsoever. DOE's rapid dismantling of the Yucca Mountain program required the improper "abandonment" of millions of dollars worth of property paid for by taxpayers without fully accounting for the property or following procedures that

⁶ NYE COUNTY ANSWER TO U.S. DEPARTMENT OF ENERGY'S MOTION TO RENEW TEMPORARY SUSPENSION OF THE PROCEEDING at p. 7 and n.22. (March 11, 2011).

would have minimized fiscal losses. This action drew criticism from the GAO. All total, DOE has placed fifteen billion dollars of taxpayer money at risk by prematurely abandoning Yucca Mountain without so much as awaiting a final decision by the NRC or the results of its own Blue Ribbon Panel Recommendations on the future of nuclear waste management. *See generally* GAO Report.

Should this Commission entertain the Staff's Petition and refuse to maintain the LSN, or at least a functional equivalent, the Commission will be responsible for similar waste. Contrary to NRC Staff assertions, CAB04 efforts to insure the integrity of the electronic record, and accessibility to it, are both within its authority and fiscally prudent. A functioning LSN is not only required by NRC regulations, but has value far beyond the costs required to comply with the Orders.

Uncertainty surrounding the current proceeding, and the budget, is cited in both the Staff Petition for Review and its Request for Stay as support for its position that the CAB04 orders should be overturned. In fact, such uncertainty is exactly why the LSN documents, particularly those of DOE, should be preserved in a central location, and ready in the event the proceeding is restarted by NRC, the Courts, or Congress. Even the President and DOE Secretary Chu recognized, at least initially, that the Yucca Mountain licensing proceeding should continue because the record would produce valuable scientific information for future nuclear waste management efforts, regardless of the ultimate fate of the Yucca Mountain project.⁷

CAB04's orders properly recognized the federal government's duty to preserve the record and to move forward with the licensing adjudication proceeding under the Nuclear Waste Policy Act. The

⁷ In May 2009, the Secretary of DOE testified before Congress that DOE would “continue participation in the Nuclear Regulatory Commission (NRC) license application process, consistent with the provisions of the Nuclear Waste Policy Act.” FY-2010 Appropriations Hearing Before the Subcomm. on Energy and Water Development, and Related Agencies of the S. Comm. on Appropriations, 111th Cong. (2009).

CAB04's orders, far from being an *undue* burden and *waste* as alleged by the NRC staff, are precisely what the law requires.

II. THE NRC ALSO HAS A MANDATORY OBLIGATION TO CONTINUE THE LICENSING PROCEEDING UNDER THE NWPA AND SHOULD PRESERVE THE LSN RECORD AND TAKE IMMEDIATE ACTION ON PENDING ISSUES

Any further delay of this licensing proceeding would appear to be an official NRC collective sanctioning of DOE's desire to abandon its Nuclear Waste Policy Act duties relative to the repository. NRC funding for this licensing proceeding continued through April of 2011 at or near the previous years' levels, and Congress added an additional ten million to that funding. Compliance with CAB04 order and preservation of the accessibility to the LSN contents can be accomplished with that funding.

Unfortunately, the Chairman of the NRC must share with DOE blame for unjustifiably delaying the orderly completion of the Yucca licensing proceeding. Congress is now investigating a series of actions by the Chairman, foremost of which is the possible mischaracterization of other Commissioners' votes on the DOE's Motion to Withdraw as preliminary rather than final,⁸ and the unjustifiable delay in the release of the Commission's decision on DOE's Motion to Withdraw because the Commission refuses to reach what the Chairman refers to as a "majority" position on the wording of a final order.⁹

Simply because two of the four Commissioner's voting on the decision can block the issuance of **any** final order, no matter how neutrally worded, is not a justification for NRC to fail to discharge its responsibilities in this case. NRC's internal rules provide for tie votes and **timely**

⁸ Joint Hearing of the Energy and Power Subcommittee and the Environment and Economy Subcommittee of the House Energy and Commerce Committee. The Role of the Nuclear Regulatory Commission (NRC) in America's Energy Future (May 5, 2011). Commissioners Syinicki, Magwood, and Ostendorff testified that their votes were indeed final votes on the Motion to Withdraw.

⁹ Testimony of NRC Chairman Gregory Jaczko on May 4, 2011 (un-paginated preliminary transcript)

issued final orders in such cases. Of course, one option for a final NRC order would be to simply release the final votes and the individual Commissioner's reasoning for their disparate positions.

Paralleling DOE's actions, the Chairman has also unilaterally ordered NRC staff to begin an orderly closeout of Yucca Mountain, over the objection of senior staff and other Commissioners, because he had determined, for budgetary purposes, that the DOE license application had already been withdrawn.¹⁰ For example, staff consideration and finalization of critical safety evaluation reports (SERs) have been delayed by the Chairman's "budgetary" actions, in spite of assurances the staff gave to CAB04 in 2010 regarding the scheduling and release of the SERs in the licensing proceeding. Just as DOE has done in dismantling its Yucca program, the Chairman has assumed his positions will be determined to be legally correct and has initiated termination of the Yucca licensing process. He testified that, "We had had an application for the Yucca Mountain project that had been withdrawn." No, it has not been withdrawn. DOE maintains it has unilateral authority to withdraw its application, and has *moved* to withdraw its application, but that motion was denied by CAB04 on June 29, 2010. Motions are simply requests to an adjudicatory body to take action. The Commission in this case should be acting as an independent adjudicatory body, not as a policy arm of the Administration, working in lock-step with DOE. Whether DOE can unilaterally withdraw its license application on grounds other than safety under the NWPA, without express Congressional approval, is the very question still pending before the NRC.

¹⁰ Chairman Jaczko testified as follows: "And on a separate track, we are--because of the budget situation- we are working to close down our review of the application. And that was based on a decision that I made in early October..." *Id.* He later testified that in March of 2010 there was "a memo indicating that, based on the fact that the application was being withdrawn, that the staff was moving into closeout." Of course, this was before CAB04 had even ruled on the legality of the withdrawal.

The Chairman also maintains that the budget matters are his domain, that he acted legally, and that the decision on the merits of the Motion to Withdraw is separate.¹¹ Nonsense, they are clearly related, and he has single-handedly turned the adjudicatory and budget processes on their heads. First, NRC must decide whether DOE may properly withdraw its application, and then order the appropriate staff actions in either continuing or terminating the licensing proceeding, including operation of the LSN. If the DOE withdrawal is contrary to law, as Nye County and other parties maintain-- and most importantly, as CAB04 has determined-- there are no legal grounds for making budgetary decisions which dismantle the LSN and further undermine the licensing process, especially when appropriated monies are available for that purpose.¹²

Whatever the outcome of the Congressional process, NRC's reputation for independence and scientific and technical neutrality has been damaged. That damage, however, need not be permanent. Immediate release of a final appealable order by the NRC, together with the unredacted staff SER, would go a long way to restoring reason and order to the licensing process. On the other hand, the damage to NRC could be exacerbated should the NRC refuse to ever issue the long delayed "majority" order, as the Chairman suggested might happen, or if NRC waits to issue the order when a Commissioner's term of office expires. Similarly, failing to provide funding for CAB04, an independent adjudicatory body, or to maintain the LSN or its equivalent, would seriously undermine NRC's position as an independent and neutral licensing agency.

NRC directed CAB04 to expeditiously resolve the DOE Motion to Withdraw on April 23, 2010, when the Commission vacated the April 6, 2010, CAB04 Order suspending the licensing case and noted that the CAB04 should render a decision on DOE's Motion to Withdraw

¹¹ Id.

¹² Judicial appeals and stays of the NRC final order are potentially available to aggrieved parties in the United States Court of Appeals for the DC Circuit.

no later than June, 2010.¹³ Even though CAB04 rendered its decision denying the Motion to Withdraw on June 29, 2010, and the parties re-briefed the issue before the Commission in July of 2010,¹⁴ no final NRC decision has been issued.

Had NRC done so, the first phase of discovery on party contentions might be completed, with the possible exception of deposing NRC staff and experts regarding the unredacted version of Volume 3 of the Safety Evaluation Report ("SER"). NRC staff informed the CAB04 that it cannot release the unredacted SER because it is a "preliminary draft" and not a "circulating draft."¹⁵ The NRC staff's belabored response to the CAB04's "show cause order" repeated numerous irrelevant details from a previous explanation found wanting by the CAB04. At the time of its response, staff curiously failed to provide any concrete reasons why a schedule for the SER's release is "indeterminate due to circumstances beyond the Staff's control."¹⁶ It is now clear from the recent Congressional testimony that the issuance of an unredacted SER was blocked by the NRC Chairman, and further staff work on the application impeded, over the strong objection of senior staff and two other Commissioners.¹⁷ Nevertheless, the full Commission has the authority to reverse the previous February 17, 2011, decision to release only a redacted version of the SER, and to direct the staff to expeditiously finalize the SER.¹⁸ That action should be taken immediately.

¹³ *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-10-13, 71 NRC ____ (slip op. at 5.) (Apr.23, 2010).

¹⁴ On June 30, 2010, the Secretary to the Commission issued an Order establishing the briefing schedule for participants to support or oppose CAB04s decision.

¹⁵ NRC Staff Response to February 25, 2011, Board Order, filed March 3, 2011 at 6.

¹⁶ See NRC Staff Response to February 25, 2011, Board Order, filed March 3, 2011 at ¶ 6 of Catherine Haney affidavit.

¹⁷ Commissioners Ostendorff and Synicki voted to have the staff continue with its processing the license application. The Chairman and Commissioner Magwood testified that they abstained. The Chairman further noted that a third Commissioner also abstained, even though that Commissioner had previously recused himself from consideration of any Yucca issue due to his work at Sandia. It remains unclear why the Chairman's view, after abstaining, prevailed under the circumstances.

¹⁸ NRC Staff Response to February 25, 2011, Board Order, filed March 3, 2011 at 3.

Granting a further delay in this proceeding is inimical to the mandates of the Nuclear Waste Policy Act governing this proceeding. That Act includes a statutory requirement that the licensing proceeding be completed, on the merits, in three years (four with extension) from the date of DOE's filing of the license application. *See* 42 U.S.C. § 10134(d). Had it not been for the Commission's failure to act and DOE's delaying tactics following the decision of the CAB04 on the Motion to Withdraw, considerable discovery would already have been completed.

CONCLUSION

Congress has not amended the NWPA to eliminate Yucca Mountain as the sole site for the nuclear repository, nor has it altered NRC's statutory duty to reach a decision on the merits of the license application within a prescribed period of time, or seek an extension from Congress. Just as importantly, the CAB04 ruling that the license application may not be unilaterally withdrawn by DOE is the law of the case. NRC staff does not assert that the licensing proceeding has been lawfully terminated or that sufficient funds are unavailable to continue the LSN's operation. Therefore, CAB04 should reject NRC staff's petition for review. In the alternative, it should commit to continuing the LSN's operational until a final unappealable order terminating the licensing proceeding is issued by a Court or until Congress has amended the NWPA to eliminate Yucca Mountain as the sole site for the Nation's nuclear repository.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **NYE COUNTY, NEVADA'S RESPONSE IN OPPOSITION TO NRC STAFF'S JUNE 20, 2011 PETITION FOR REVIEW OF BOARD ORDERS** in the above-captioned proceeding have been served on the following persons and all others added to the electronic service docket this 30th day of June, by Electronic Information Exchange.

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