

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
TENNESSEE VALLEY AUTHORITY)	Docket No. 50-391-OL
(Watts Bar Nuclear Plant Unit 2))	June 25, 2012

In the Matter of)	
TENNESSEE VALLEY AUTHORITY)	Docket Nos. 52-014-COL & 52-015-COL
(Bellefonte Nuclear Power Plant, Units 3 and 4))	June 25, 2012

**TENNESSEE VALLEY AUTHORITY’S ANSWER OPPOSING PETITION TO
SUSPEND FINAL LICENSING DECISIONS PENDING COMPLETION OF
REMANDED WASTE CONFIDENCE PROCEEDINGS**

I. INTRODUCTION

On June 18, 2012, Southern Alliance for Clean Energy, Inc. (“SACE”), Blue Ridge Environmental Defense League, Inc. (“BREDL”), and various other organizations (collectively, “Petitioners”) submitted a “Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings” (“Petition”) to the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”).¹ Based on the recent D.C. Circuit *New York v. NRC* decision vacating and remanding the NRC’s Waste Confidence

¹ TVA addresses only Petitioners’ request to suspend the above-captioned proceedings because Petitioners’ request to suspend other proceedings is not cognizable in these individual adjudicatory proceedings. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399 n.9 (2001). Furthermore, most of the organizations joining the Petition have never filed a hearing request or sought permission to participate in these proceedings on any other basis. Therefore, any request by the other organizations has “no legitimate place” in these proceedings and hereafter this Answer refers only to SACE and BREDL as Petitioners. *See, e.g., id.* at 398.

Decision (“WCD”) Update and Temporary Storage Rule (“TSR”),² Petitioners request that the Commission: (1) suspend all final reactor licensing decisions pending conclusion of the *New York* remand proceeding; (2) allow public comment on any Environmental Assessment (“EA”) or Environmental Impact Statement (“EIS”) prepared by NRC on remand; and (3) provide at least 60 days for raising site-specific contentions in individual licensing proceedings.³

Pursuant to 10 C.F.R. § 2.323(c) and the Commission’s June 19, 2012 Order, Tennessee Valley Authority (“TVA”) files this Answer opposing the Petitions filed in the Watts Bar Nuclear Plant Unit 2 (“WBN-2”) operating license (“OL”) and Bellefonte Nuclear Power Plant Units 3 and 4 (“Bellefonte 3 and 4”) combined license (“COL”) proceedings. As discussed below, the Petition is premature because *New York* is not yet final, and Petitioners fail to justify the drastic action of suspending final licensing decisions in ongoing licensing proceedings that are years from conclusion. Regardless of how the Commission proceeds to address *New York*—through either a rulemaking or case-by-case path—denial of the Petition will not hamper implementation of any potential rule or policy change regarding long-term spent fuel storage environmental impacts. Furthermore, whether long-term spent fuel storage issues are addressed generically or in individual licensing proceedings, NRC’s established processes allow for fair and efficient resolution of such issues without the need to suspend final licensing decisions. Moreover, no basis exists to conclude that final decisions in the WBN-2 and Bellefonte 3 and 4 proceedings would present any immediate threat to public health and safety. Finally, special procedures for public participation in the environmental review process or for filing contentions are unnecessary because existing NRC regulations sufficiently address such issues.

² *New York v. NRC*, No. 11-1045, 2012 WL 2053581 (D.C. Cir. June 8, 2012); *see also* Clerk’s Order, *New York v. NRC*, No. 11-1045 (D.C. Cir. June 8, 2012) (unpublished) (withholding mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc).

³ Petition at 12.

II. BACKGROUND

TVA filed an updated WBN-2 OL application in 2009.⁴ SACE is a party to that proceeding and one aquatic impacts contention remains subject to litigation.⁵ The NRC is not expected to make a final decision on the WBN-2 OL for several years.⁶

TVA submitted a COL application for Bellefonte 3 and 4 in 2007.⁷ SACE and BREDL are parties to that proceeding and two contentions remain, related to aquatic impacts and construction costs.⁸ NRC review of the COL application is on hold.⁹ Accordingly, any final decision on the Bellefonte 3 and 4 COLs is at least several years away.

III. LEGAL STANDARDS

As an initial matter, the Petition does not comport with any pleading form contemplated or authorized by the NRC Rules of Practice.¹⁰ Commission precedent, however, makes clear that suspension of decisions is not warranted absent compelling circumstances.¹¹ In considering requests to, among other things, suspend licensing decisions following the Fukushima accident, the Commission considered whether denying such requests would prevent

⁴ See *Tenn. Valley Auth.* (Watts Bar Unit 2), LBP-09-26, 70 NRC 939, 945 n.1 (2009).

⁵ See *id.* at 946, 988 (admitting aquatic impacts contention); *Tenn. Valley Auth.* (Watts Bar Unit 2), Licensing Board Memorandum and Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1) at 2 (June 2, 2010) (unpublished) (holding contention regarding federal and state permits to be moot).

⁶ See NRC Staff's May 2012 Bimonthly Report Regarding the Schedule for Review of the Watts Bar Number 2 License Application at 2 (May 1, 2012), available at ADAMS Accession No. ML12122A962 (indicating that the NRC Staff expects to issue the Final Safety Evaluation Report in December 2013).

⁷ *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 & 4), LBP-08-16, 68 NRC 361, 374 (2008).

⁸ See *id.* at 373-75, *rev'd in part*, CLI-09-3, 69 NRC 68, 78 (2009).

⁹ See *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), Licensing Board Memorandum and Order (Request for Joint Report Regarding Mandatory Disclosure/Hearing File Updates) at 1-2 (Apr. 11, 2012) (unpublished).

¹⁰ The Petition in fact states that it is *not* a request for a stay pursuant to 10 C.F.R. § 2.342 or a request for any other form of equitable relief recognized by the Commission. See Petition at 4.

¹¹ *Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC ___, slip op. at 19 (Sept. 9, 2011).

appropriate implementation of any pertinent rule or policy changes, prove an obstacle to fair and efficient decisionmaking, or jeopardize public health and safety.¹²

IV. ARGUMENT

A. The Petition Should Be Denied as Premature

Based on the D.C. Circuit's recent *New York* decision, Petitioners argue that NRC no longer has a "valid basis for any NRC reactor licensing decision."¹³ The D.C. Circuit, however, has not yet issued its "mandate" formally returning the proceeding to the Commission. In fact, in accordance with Federal Rule of Appellate Procedure 41(b), the mandate will not issue until the later of seven days after the time to file a petition for rehearing expires or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate.¹⁴ As such, the mandate will not issue, at the earliest, until late July 2012.¹⁵ Because the mandate is the certified copy of the final judgment and the order that makes the decision effective, the *New York* decision establishes no binding legal "requirements" at this time, contrary to Petitioners' assertion.¹⁶ As such, the Petition is premature and should be denied.

Recognizing that their request is premature, Petitioners ask the Commission to hold the Petition in abeyance pending the mandate's issuance.¹⁷ Such a request, however, is inconsistent with Commission precedent. Specifically, in *Diablo Canyon*, the Commission denied a similarly

¹² *Id.* at 19-21.

¹³ Petition at 3. As discussed below, TVA also disagrees with Petitioners' conclusion that there is no "valid basis for any NRC reactor licensing decision."

¹⁴ In addition, upon motion, the court's mandate also may be stayed pending an application to the U.S. Supreme Court for a writ of certiorari. *See* Fed. R. App. P. 41(d)(2).

¹⁵ *See* Fed. R. App. P. 40(a)(1) (indicating that in cases where a federal agency is a party, the time seeking rehearing is 45 days after entry of judgment, unless an order shortens or extends the time).

¹⁶ *See* Petition at 4.

¹⁷ *Id.* at 4 n.1.

premature motion seeking relief in advance of an appellate court's mandate.¹⁸ As the Commission recognized, a premature relief request should be denied because the facts relevant to the request may change before the mandate issues.¹⁹ So too here, where further judicial review, administrative action, or both, may well obviate the need for Petitioners' requested relief.²⁰

B. The Petition Fails to Demonstrate Compelling Circumstances to Suspend Final Licensing Decisions

Even had the mandate already issued, the Commission should deny the Petition for failing to demonstrate compelling circumstances justifying suspending final licensing decisions. Petitioners ignore the leading and most recent Commission precedent that establishes the framework within which requests for suspension of licensing decisions must be evaluated. In *Callaway*, the Commission considered petitions that requested, among other things, suspending licensing decisions pending a Commission National Environmental Policy Act ("NEPA") review following the Fukushima accident.²¹ As discussed below, none of the three criteria in *Callaway* justifies suspending final licensing decisions.

1. Continuing Final Licensing Decisions Will Not Prevent Appropriate Rule or Policy Change Implementation

Petitioners argue that, absent final action by the NRC on remand, the NRC no longer has a valid NEPA basis to issue any reactor licenses.²² If and when the mandate issues, however, the

¹⁸ *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-06-23, 64 NRC 107, 109 (2006).

¹⁹ *See id.* at 108-09.

²⁰ Moreover, as discussed above, the NRC will not make any licensing decisions concerning WBN-2 and Bellefonte 3 and 4 for several years. Given this length of time and the numerous potential intervening events that may take place before any licensing decision, the requested relief is premature for this additional reason.

²¹ *See Callaway*, CLI-11-05, slip op. at 19-21.

²² Petition at 3.

Commission has broad discretion as to how it responds to the remand, whether through rulemaking or case-by-case.²³ Suspending licensing is not necessary in either case.

If the Commission continues its long-standing practice of addressing NEPA-based waste issues generically through rulemaking, then, consistent with federal case law, licensing suspension is unnecessary to implement any rule changes.²⁴ In *Minnesota v. NRC*, based upon an apparent NEPA violation, the D.C. Circuit ordered the NRC to consider long-term spent fuel storage issues.²⁵ On remand, the Commission instituted the first WCD rulemaking and issued a Notice of Proposed Rulemaking establishing that “licensing practices need not be altered” during the rulemaking because all licensing proceedings then underway would be subject to the final rulemaking determination.²⁶ Thus, the Commission allowed licensing to continue, because once the rulemaking eventually concluded, the WCD could be applied retroactively.²⁷ Between the Notice of Proposed Rulemaking and conclusion of the WCD proceeding, the NRC issued 17 reactor OLs.²⁸

Moreover, this practice passed the test of judicial scrutiny. Following the direction in the Notice of Proposed Rulemaking, the Atomic Safety and Licensing Appeal Board rejected a request to delay a spent fuel-related OL amendment pending the completion of the WCD proceeding.²⁹ The D.C. Circuit upheld the decision to proceed with licensing absent a final

²³ See, e.g., *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 100-01 (1983) (finding that rulemaking is an appropriate method for complying with NEPA); *Minnesota v. NRC*, 602 F.2d 412, 416-17 (D.C. Cir. 1979).

²⁴ See *Potomac Alliance v. NRC*, 682 F.2d 1030, 1031 (D.C. Cir. 1982) (affirming *Va. Elec. & Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451 (1980)); Notice of Proposed Rulemaking, Storage and Disposal of Nuclear Waste, 44 Fed. Reg. 61,372, 61,373 (Oct. 25, 1979).

²⁵ See *Minnesota*, 602 F.2d at 418-19.

²⁶ Notice of Proposed Rulemaking, Storage and Disposal of Nuclear Waste, 44 Fed. Reg. at 61,373.

²⁷ See *North Anna*, ALAB-584, 11 NRC at 464-66; Notice of Proposed Rulemaking, Storage and Disposal of Nuclear Waste, 44 Fed. Reg. at 61,373.

²⁸ See NUREG-1350, Vol. 23, Information Digest, 2011-2012, App. A at 102-13 (Aug. 2011).

²⁹ See *North Anna*, ALAB-584, 11 NRC at 464-66.

WCD in *Potomac Alliance v. NRC*, declining to stay challenged licensing actions.³⁰

Accordingly, this precedent demonstrates that licensing suspension is not required pending completion of rule changes.³¹

Furthermore, should the Commission elect to address the *New York* decision on a case-by-case basis, the issues raised by *New York* will be resolved prior to any licensing action in the above proceedings. NRC regulations and case law establish procedures allowing participation in such proceedings.³² Therefore, granting of the Petition is unnecessary even if the Commission elects to proceed on a case-by-case basis.

Thus, these procedures demonstrate that, regardless of how the Commission elects to proceed, no compelling reason warrants suspending final licensing decisions.³³

2. Continuing Final Licensing Decisions Will Not Prevent Fair and Efficient Decisionmaking Concerning the *New York* Remand Issues

Regardless of how the Commission proceeds, the NRC's established processes provide proven, fair, and efficient means to resolve long-term spent fuel storage environmental impact issues in response to the *New York* remand without the need to suspend final licensing decisions.

³⁰ See *Potomac Alliance*, 682 F.2d at 1031.

³¹ Contrary to Petitioners' claim, the Commission's *Indian Point* decision does not support the conclusion that the NRC committed to suspend licensing in that (or any other) proceeding until the WCD Update rulemaking was completed. See Petition at 10 (citing *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC ___, slip op. (July 8, 2010)). Instead, after directing the Board to deny two proposed contentions concerning potential impacts of long-term spent fuel storage, the Commission simply observed that the *Indian Point* license renewal proceeding would not be completed before the then-pending WCD Update. See *Indian Point*, CLI-10-19, slip op. at 3. This prediction proved accurate, as the WCD Update was issued in December 2010 and the *Indian Point* proceeding continues. See Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010); Atomic Safety and Licensing Board; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3); Notice of Hearing (Application for License Renewal), 77 Fed. Reg. 36,015, 36,016 (June 15, 2012). Further, this Commission observation did not establish a "precedent" that all licenses must be withheld until the WCD Update was completed. In fact, the NRC issued two renewed licenses (Cooper and Duane Arnold) after the *Indian Point* decision and before the final WCD Update. See NUREG-1350, Vol. 23, App. A at 103-04.

³² See, e.g., 10 C.F.R. § 2.309(f)(2).

³³ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399-400 (2008) (finding no reason to stay licensing decision where issuance of the license is not imminent and proposed contention pending before Board).

For example, NRC's Rules of Practice provide for public comment on any generic rulemaking proceedings.³⁴ Should the Commission decide on a case-by-case approach, NRC regulations, case law, and case-specific scheduling orders provide for ample public participation.³⁵ In addition, whether a rulemaking or case-specific approach is taken, NRC's NEPA regulations provide public comment opportunities.³⁶ Just as the NRC continued to issue licenses during the first WCD proceeding and during the recent WCD Update, the Commission can continue to issue licenses during any *New York* remand proceeding. The Commission's policy of providing prompt, efficient, and fair resolution of adjudications demands as much.³⁷

3. Continuing Final Licensing Decisions Poses No Immediate Public Health and Safety Threat

The Petition provides no basis upon which to conclude that final decisions in the WBN-2 and Bellefonte 3 and 4 licensing proceedings would present any public health and safety threat, much less an immediate threat. Nor could the Petition so provide, because, as a general matter, the WCD does not address "immediate" risks but instead concerns the long-term storage of spent nuclear fuel. Moreover, to the extent that any rule changes are implemented following any generic proceedings, as discussed above, those rules can then be applied retroactively. Accordingly, there simply is no risk of any immediate threat to public health and safety.

³⁴ See 10 C.F.R. § 2.805(a).

³⁵ See *id.* § 2.309(f)(2); *Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC ___, slip op. at 10 n.43 (Mar. 10, 2011) (indicating that the Commission and its Boards generally consider approximately 30 to 60 days as the limit for timely filings based on new information); *Tenn. Valley Auth.* (Watts Bar Unit 2), Licensing Board Scheduling Order at 5 (May 26, 2010) (unpublished); *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), Licensing Board Memorandum and Order (Prehearing Conference and Status of General Schedule) at 3 (Nov. 10, 2008) (unpublished).

³⁶ See, e.g., 10 C.F.R. §§ 51.33(a)-(e), 51.73.

³⁷ See *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381 (2001) (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998)).

C. Petitioners Fail to Establish the Need for Special Procedures

Aside from suspending final licensing decisions, Petitioners also ask the Commission for an opportunity to comment on any EA or EIS issued by the NRC, and establish deadlines for contentions raising site-specific concerns that are not sufficiently addressed in any generic rulemaking.³⁸ This request is unnecessary and should be denied. As discussed above, NRC regulations already establish ample and appropriate public participation opportunities.

Furthermore, to the extent Petitioners seek an additional opportunity to raise contentions in individual licensing proceedings even if the NRC proceeds with a generic rulemaking, Commission precedent bars such contentions. As the Commission explained in *Indian Point*, when the Commission elects to proceed with WCD issues through rulemaking, it does so for the specific purpose of avoiding inefficiencies of case-by-case adjudication of generic issues.³⁹ Thus, a contention that raises a matter that is, or is about to become, the subject of a rulemaking cannot be litigated in an individual licensing proceeding.⁴⁰

V. CONCLUSION

Suspending final licensing decisions is an extraordinary remedy that is not warranted and should not be granted. Not only is the Petition premature, it fails to demonstrate compelling circumstances justifying the requested action. Furthermore, NRC rules already provide appropriate public participation opportunities. Accordingly, for all of these reasons, the Petition should be denied in its entirety.

³⁸ Petition at 11-12.

³⁹ See *Indian Point*, CLI-10-19, slip op. at 2.

⁴⁰ See *id.* at 2-3.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

Edward J. Vigluicci, Esq.
Christopher C. Chandler, Esq.
Scott A. Vance, Esq.
Office of the General Counsel
Tennessee Valley Authority
400 W. Summit Hill Drive, WT 6A-K
Knoxville, TN 37902
Phone: 865-632-7317
Fax: 865-632-6147
E-mail: ejvigluicci@tva.gov
E-mail: ccchandler0@tva.gov
E-mail: savance@tva.gov

Counsel for TVA

Dated in Washington, DC
this 25th day of June 2012

Paul M. Bessette, Esq.
Steven P. Frantz, Esq.
Kathryn M. Sutton, Esq.
Stephen J. Burdick, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: pbessette@morganlewis.com
E-mail: sfrantz@morganlewis.com
E-mail: ksutton@morganlewis.com
E-mail: sburdick@morganlewis.com

Co-Counsel for TVA

CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the Petition, and that my efforts to resolve the issues have been unsuccessful.

Executed in Accord with 10 C.F.R. § 2.304(d)

Paul M. Bessette, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: pbessette@morganlewis.com

Co-Counsel for TVA

Executed in Accord with 10 C.F.R. § 2.304(d)

Steven P. Frantz, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com

Co-Counsel for TVA

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CERTIFICATE OF SERVICE

I hereby certify that, on June 25, 2012, a copy of “Tennessee Valley Authority’s Answer Opposing Petition to Suspend Final Licensing Decisions Pending Completion of Remanded Waste Confidence Proceedings” was served by the Electronic Information Exchange on the following recipients:

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gpb@nrc.gov

Administrative Judge
Dr. William W. Sager
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wws1@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Administrative Judge
Dr. Anthony J. Baratta
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ajb5@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Jody C. Martin
E-mail: Jody.Martin@nrc.gov

Sara Barczak
Southern Alliance for Clean Energy
428 Bull Street, Suite 201
Savannah, GA 31401
E-mail: sara@cleanenergy.org

Louis A. Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
E-mail: bredl@skybest.com

Signed (electronically) by Stephen J. Burdick

Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sburdick@morganlewis.com

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U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

Lawrence G. McDade, Chair
Administrative Judge
E-mail: lgm1@nrc.gov

Paul B. Abramson
Administrative Judge
E-mail: pba@nrc.gov

Gary S. Arnold
Administrative Judge
E-mail: gxa1@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001

Edward Williamson, Esq.
E-mail: elw2@nrc.gov
David Roth, Esq.
E-mail: david.roth@nrc.gov
Catherine Kanatas, Esq.
E-mail: catherine.kanatas@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001

OCAA Mail Center
E-mail: ocaamail@nrc.gov

Diane Curran, Esq.
Representative of Southern Alliance for Clean
Energy (SACE)
Harmon, Curran, Spielberg & Eisenberg,
L.L.P.
1726 M Street N.W., Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16C1
Washington, DC 20555-0001

Hearing Docket
E-mail: hearingdocket@nrc.gov

Signed (electronically) by Stephen J. Burdick
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sburdick@morganlewis.com

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