UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-247-LA
	)	
(Indian Point Nuclear Generating, Unit 2)	)	

NRC STAFF'S ANSWER IN OPPOSITION TO STATE OF NEW YORK MOTION TO VACATE OR STAY ISSUANCE OF LICENSE AMENDMENT

Sherwin E. Turk
Anita Ghosh

Counsel for NRC Staff

March 7, 2016

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INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323(c) and 2.1213(c), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby files its answer in opposition to the motion filed by the State of New York ("New York"), seeking to vacate or stay the Staff's recent grant of a license amendment for Indian Point Nuclear Generating Unit 2 ("Indian Point Unit 2" or "IP2").[1] The amendment, issued by the Staff on February 23, 2016, modifies IP2 Technical Specification ("TS") 5.5.14 to allow extension of the ten-year frequency of the IP2 containment's "Type A" or Integrated Leak Rate Test ("ILRT") to 15 years on a permanent basis.[2] As more fully discussed below, New York's motion fails to satisfy the standards governing issuance of a stay, set forth in 10 C.F.R. § 2.1213(d), and constitutes an impermissible challenge to the Staff's final No Significant Hazards Consideration ("NSHC") determination in violation of 10 C.F.R § 2.1213(f). Accordingly, New York's Motion should be denied.

[1] "State of New York Motion to Vacate or for Stay of Staff Action Pending Appeal of Atomic Safety and Licensing Board Decision LBP-15-26 Regarding License Amendment for Entergy Indian Point Unit 2 to Delay the Containment Leak Rate Test for Five Years" (Feb. 26, 2016) ("Motion").

[2] *See* Letter from Douglas V. Pickett (NRC) to Vice President, Operations (Entergy), "Indian Point Nuclear Generating Unit No. 2 – Issuance of License Amendment Re: Extension of the Containment Integrated Leak Rate Test to 15 Years" (Feb. 23, 2016) (ADAMS Accession No. ML15349A794) ("ILRT Amendment").

BACKGROUND

This proceeding involves a license amendment request ("LAR") for Indian Point Unit 2, submitted by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") on December 9, 2014.[3] In accordance with the terms of its license, Indian Point Unit 2 was required to complete a containment ILRT ("Type A test") in 10-year intervals.[4] The last ILRT was completed at IP2 in April 2006;[5] the next ILRT was scheduled to be conducted during a refueling outage ("RFO") this month (March 2016). In its LAR, Entergy proposed to change TS 5.5.14 to extend the ten-year frequency of the Type A test to 15 years, on a permanent basis;[6] this would revise the due date for the next ILRT to March 2021 and would allow future ILRTs to be performed at 15-year intervals (assuming acceptable performance history).[7]

On March 17, 2015, the NRC published a notice of opportunity to request a hearing on the LAR,[8] along with a proposed NSHC determination.[9] On May 18, 2015, New York filed a petition to intervene and request for hearing,[10] in which it presented two contentions challenging the LAR and/or the Staff's proposed NSHC determination.[11] Entergy and the Staff opposed the

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[3] Letter from Lawrence Coyle (Entergy) to NRC Document Control Desk, NL-14-128, "Proposed License Amendment Regarding Extending the Containment Type A Leak Rate Testing Frequency to 15 years" (Dec. 9, 2014), at 1 (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML14353A015).

[4] *See* 10 C.F.R. Part 50, Appendix J, § III.D.

[5] The previous ILRT, prior to 2006, was conducted in 1991; IP2 was then granted a license amendment, on a one-time basis, extending the ILRT interval from 10 to 15 years.

[6] *See* LAR, Attachment 1, at page 2 of 19.

[7] LAR, Attachment 1, at 3.

[8] "Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations," 80 Fed. Reg. 13,902, 13,905 (Mar. 17, 2015).

[9] *Id.* at 13,903, 13,905-06.

[10] "State of New York Petition to Intervene and Request for Hearing" (May 18, 2015) ("Petition").

[11] New York's contentions asserted that (1) Entergy's LAR ignores plant-specific circumstances and events that have weakened and damaged key containment components as well as recent updates regarding elevated seismic hazards at the Indian Point site, and (2) Entergy failed to conduct an environmental review of its LAR as required by 10 C.F.R. § 51.22(c)(9)(i), in that the LAR presents a significant hazards consideration.

Petition, and the Board then held oral argument on July 30, 2015.[12] On September 25, 2015, the Board issued LBP-15-26, denying New York's Petition for failing to set forth an admissible contention.[13] New York filed an appeal from the Board's decision pursuant to 10 C.F.R. § 2.311,[14] to which Entergy and the Staff responded on November 16, 2015.[15] New York's appeal is presently pending before the Commission.

Following the issuance of LBP-15-26, the Staff completed its review. On February 10, 2016, the NRC Staff submitted a Notification of Significant Licensing Action ("NSLA") to the Commission, indicating that it had completed its review of the LAR, had made a final NHSC determination, and would issue the ILRT amendment on or about February 23, 2016, unless otherwise instructed by the Commission.[16] On February 23, 2016, the Staff issued the amendment, together with a safety evaluation ("SE") in which it provided its evaluation of the LAR, responded to New York's comments, and made a Final NSHC determination.[17] On February 26, 2016, New York filed the instant Motion, seeking to stay or vacate the Staff's action in issuing the ILRT Amendment.

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[12] *See* Official Transcript of Proceedings ("Tr.") at 19-145.

[13] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Station, Unit 2), "Memorandum and Order (Denying New York's Petition to Intervene)," LBP-15-26, 82 NRC __ (Sept. 25, 2015) (slip op.).

[14] *See* (1) "State of New York Notice of Appeal of LBP-15-26" (Oct. 20, 2015); and (2) "State of New York Brief Supporting Appeal Pursuant to 10 C.F.R. § 2.311 of Atomic Safety and Licensing Board Decision LBP-15-26 Denying New York's Petition to Intervene and Request for Hearing" (Oct. 20, 2015) ("NYS Brief").

[15] *See* (1) "NRC Staff's Answer to the State of New York's Appeal From the Atomic Safety and Licensing Board's Denial of its Petition to Intervene and Request for Hearing (LBP-15-26)" (Nov. 16, 2015) ("Staff Brief"); and (2) "Entergy's Answer Opposing State of New York's Appeal of LBP-15-26" (Nov. 16, 2015) ("Entergy's Brief").

[16] "Notification of Significant Licensing Action (Proposed Issuance of A Final [NSHC] Determination and License Amendment for Which A Hearing Has Been Requested)" (Feb. 10, 2016) (ADAMS Accession No. ML16011A177). On February 22, 2016, Staff Counsel learned that the NSLA had been sent to the Commission, and notified the parties of the anticipated issuance of the amendment. *See* "Commission Notification of Significant Licensing Action" (Feb. 22, 2016) (ADAMS Accession No. ML16053A214). On February 24, the Staff informed the Commission and parties that the amendment was issued on February 23, 2016. *See* "Notification of Issuance of License Amendment" (Feb. 24, 2016).

[17] *See* ILRT Amendment, SE at 23-25 and 25-27.

ARGUMENT

I. Applicable Legal Standards

The Commission's regulations in 10 C.F.R. § 2.1213(d) establish the factors used to analyze whether a stay of an NRC Staff action is appropriate. Those factors are: (1) whether the requestor has shown that it will be irreparably injured unless a stay is granted; (2) whether the requestor has made a strong showing that it is likely to prevail on the merits; (3) whether the granting of a stay would harm other participants; and (4) where the public interest lies.[18] As set forth in § 2.1213(f), stays are not available on the issue of whether a no significant hazards consideration determination was proper in a proceeding on a power reactor license amendment.

Commission case law is clear that the most important factor in determining whether a stay is appropriate is whether the petitioner has demonstrated immediate, irreparable injury.[19] A party seeking a stay must show that any irreparable harm is imminent, certain, and great.[20] The Commission has stated that "'raising the specter of a nuclear accident' does not demonstrate irreparable harm."[21] Moreover, absent any showing of irreparable harm, the moving party must make an overwhelming showing of the likelihood of success on the merits,[22] and must also demonstrate that the other two factors favor issuance of a stay. Further, "absent a strong showing of irreparable harm," a stay is not justified merely to preserve the status quo

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[18] *See also* 10 C.F.R. § 2.342(e) (applying similar factors for requests to stay the effectiveness of a presiding officer's decision or action during the pendency of an appeal).

[19] *See, e.g., Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-15-17, 82 NRC 33, 39 (2015); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994).

[20] *Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237-38 (2006) (*citing Cuomo v. NRC,* 772 F.2d 972, 976 (D.C. Cir. 1985), *quoting Wisconsin Gas Co. v. Federal Energy Regulatory Commission,* 758 F.2d 669, 674 (D.C. Cir. 1985)).

[21] *Id.* at 237-38 (*quoting Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 75 (1st Cir. 1981)).

[22] *Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC at 7, *citing Kerr-McKee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990) (absent a showing of irreparable harm, movant must demonstrate that the reversal of the licensing board is a "virtual certainty").

while an appeal is pending on a complex question.[23]

As discussed below, New York's request to stay the Staff's issuance of the amendment fails to meet the standards set forth in 10 C.F.R. § 2.1213(d). More specifically New York's Motion does not demonstrate: (1) that New York will be irreparably injured unless a stay is granted; (2) that New York is likely to prevail on the merits; (3) that the granting of a stay would not harm other participants; and (4) that the public interest warrants a stay.

II. New York Has Not Demonstrated that A Stay Should Be Issued

A. New York Has Not Shown that It Will Be Irreparably Injured in the Absence of A Stay

New York asserts that its due process rights are directly and irreparably violated by the Staff's issuance of the ILRT amendment during the pendency of New York's appeal to the Commission.[24] Further New York argues that, absent a stay, Entergy will essentially circumvent Commission review to obtain the relief it requested in its LAR and that this prejudices the State by truncating the Commission's consideration of the State's concerns.[25]

New York's assertions are without merit. Significantly, its Motion fails to demonstrate that the Staff's action (taken in accordance with Section 189a of the Atomic Energy Act[26] and 10 C.F.R. § 50.92(c))[27] will result in any irreparable injury to the State that cannot be remedied by the Commission's subsequent review of its appeal, or that resolution of its claims following issuance of the amendment deprives New York of a due process right.[28]

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[23] *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 719 (2005) (where there is no irreparable harm, "the Commission is reluctant to rush to judgment on the merits of an appeal before it has the opportunity to examine the Board's ruling and the parties' arguments in detail.").

[24] Motion at 2.

[25] *Id*. at 8.

[26] Atomic Energy Act of 1954, as amended ("AEA" or the "Act"), 42 U.S.C. § 2239a.

[27] *See* discussion *infra* at 6.

[28] *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), CLI -86-4, 23 NRC 113, 122 (1986) (*citing Barry v. Barchi*, 443 U.S. 55 (1979), and *Mathews v. Eldridge*, 424 U.S. 319 (1976)) (noting "the Supreme Court has consistently held that unless 'fundamental rights' are involved, a prompt post-hearing on an administrative action complies with requirements of 'due process'").

In issuing the ILRT Amendment prior to completion of the Commission's review of New York's appeal, the Staff acted in full accordance with Section 189a of the AEA and the Commission's regulations in 10 C.F.R. § 50.92(c). In accordance with Section 189a of the Act and 10 C.F.R. § 50.92(c), the Staff made a final determination that the license amendment involves no significant hazards consideration.[29] The AEA expressly authorizes the NRC to grant license amendments, and to make them immediately effective "upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person."[30] Similarly, 10 C.F.R. §§50.91(a)(4) and 50.92(c) authorize the Staff to issue an amendment, effective immediately, notwithstanding the pendency of a hearing request, if the Staff makes a final NSHC determination.

To the extent New York argues that it will be prejudiced because Entergy will be able to delay the next ILRT from March 2016 to March 2021, New York fails to demonstrate how this harm is imminent, certain, and great.[31] As the Commission observed in *Vermont Yankee*, upon reviewing the movant's appeal, the Commission may revoke or modify the amendment notwithstanding the Staff's having issued the amendment.[32] Thus, the Commission could revoke the amendment or modify it to require Entergy to conduct its next ILRT well before the five-year extension date of March 2021 has been reached. Thus, New York would not be prejudiced by the Staff's action, in the absence of a stay. New York's claim that it will be irreparably harmed because the State's citizens and environment will be subjected to an

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[29] ILRT Amendment, SE at 25-27.

[30] AEA, § 189a(2)(A), 42 U.S.C. § 2239a(2)(A) (emphasis added). *See also* 10 C.F.R. § 2.1202(a) (noting that "[d]uring the pendency of any hearing under this subpart, . . . the NRC staff is expected to promptly issue its approval or denial of the application, or take other appropriate action on the underlying regulatory matter for which a hearing was provided").

[31] *Vermont Yankee*, CLI-06-8, 63 NRC at 237-38.

[32] *See id.* at 238 (finding that the Staff's decision to grant an amendment did not leave intervenors without effective redress because the amendment can be revoked or conditioned after a hearing upon the Board's determination that it should not have been granted).

increased risk of exposure to the accidental release of radiation,[33] is also unavailing because "'raising the specter of a nuclear accident' does not demonstrate irreparable harm."[34] In sum, New York has not demonstrated it will be irreparably harmed in the absence of a stay.

B. New York Has Not Made a Strong Showing That It Is Likely to Prevail on the Merits

New York argues that the Board's decision in LBP-15-26 suffers from a number of alleged legal deficiencies and factual inaccuracies and that New York is therefore likely to prevail on the merits of its appeal.[35] New York also alleges specific legal errors in the Board's analysis, alleging that the Board applied an unduly strict standard for contention admissibility.[36]

New York's arguments do not demonstrate that it is likely to prevail on the merits. Each of New York's assertions were refuted by Entergy and the Staff in their briefs on appeal. As the Staff and Entergy explained in their Answers to New York's brief on appeal, New York's arguments lack merit, and the Board correctly denied New York's Petition for failing to meet the contention admissibility standards in 10 C.F.R. § 2.309(f)(1). For example, the Staff showed that New York failed to recognize that its concerns over past degradation and corrosion had already been addressed;[37] New York's concern over an apparent "trend" in Type A test results ignored the fact that those results include Type B and Type C leakage, and failed to raise a

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[33] Motion at 8.

[34] *Vermont Yankee*, *supra,* 63 NRC at 237-38.

[35] Specifically, New York contends that its evidence showed that (1) the IP2 containment liner has been subjected to a number of degradation events that have directly impacted the integrity of the containment liner; (2) recent inspections discovered signs of liner degradation, some of which was attributable to the historic degradation events; (3) the Atomic Energy Commission Staff had recommended that the IP2 containment liner be subject to more frequent inspections; (4) previous ILRT results showed that the IP2 containment's leak rate was increasing, and was on pace to exceed a leakage rate which, if discovered, would prevent IP2 from operating; (5) Entergy failed to consider the increased seismic risk hazards that were recently discovered for IP2; and (6) Entergy relied on a probabilistic risk assessment that allegedly suffered from a variety of shortcomings. *See* Motion at 7-8.

[36] *Id.* at 8.

[37] The Staff noted that New York's citation of issues regarding liner degradation and corrosion and previous ILRT results were addressed in Entergy's LAR – and New York showed no reason to believe that Entergy failed to adequately consider those matters. Further, the Staff observed that New York failed to address the corrective actions that have occurred over time or Entergy's discussion of these matters, and New York's reliance on events that had preceded those corrective actions was therefore misplaced and lacking in factual basis. *See* Staff Brief at 17-18.

material issue;[38] New York's claims regarding new seismic information lacked any expert support and failed to show a material issue;[39] and New York's claims that Entergy relied on an allegedly defective 2009 SAMA analysis lacked legal basis, and contravened the provisions of 10 C.F.R. § 2.309(f)(1)(v) and (vi) and Commission case law.[40] Finally, the Staff explained that, contrary to New York's assertions, the Board did not commit an error of law or abuse its discretion in finding Contention NYS-2 inadmissible, because New York had impermissibly challenged the Commission's regulation in 10 C.F.R. § 51.22(c)(9) without seeking a waiver;[41] and New York's late-filed claims of "special circumstances" were untimely.[42]

For these reasons, as described more fully in the Staff's brief on appeal, the Staff respectfully submits that New York is not likely to prevail on the merits of its appeal. As the Commission stated in *Sequoyah Fuels Corp.,* absent a showing of irreparable harm, "a movant. . . must make an overwhelming showing that it is likely to succeed on the merits." [43] New York has not done so, and its request for a stay should therefore be denied.

C. Granting A Stay May Prejudice or Harm Other Parties

New York asserts that granting the stay, "would have little if any actual prejudice to the

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[38] With respect to New York's claims regarding a purported trend in ILRT results, the Staff noted that that New York ignored the fact that Type A test results include leaks through Type B and C valves and penetrations in addition to containment liner leaks. Further, the Staff noted that the Board had correctly concluded that New York's argument that future ILRT results may show a leakage rate greater than the 75% allowable leakage (L_a) criterion in 10 C.F.R. Part 50 Appendix J, "reflects a fundamental misunderstanding of the acceptance criteria" and "is inadmissible for failing to raise a material issue." *See* Staff Brief at 19-20.

[39] Regarding New York's claims pertaining to Entergy's seismic analyses, the Staff explained that New York provided no expert opinion or affidavit in support of these claims, made no attempt to calculate whether its perceived flaws have any adverse effect on the risk assessment's conclusions, and nowhere alleged or attempted to show that Entergy's risk assessment underestimates the risk posed by the LAR. *See id.* at 20-23.

[40] *Id.* at 20 and 22-23.

[41] Pursuant to 10 C.F.R. § 51.22(c)(9), license amendments that do not involve a significant hazards consideration are categorically exempt from requiring an environmental impact statement.

[42] Staff Brief at 23-29.

[43] CLI-94-9, 40 NRC at 7.

other parties in the proceeding."[44] However, as New York itself acknowledges, staying the Staff's issuance of the amendment would require Entergy to conduct an ILRT during IP2's refueling outage, this month.[45] A stay could well result in harm to Entergy, because Entergy would have to prepare for, staff, and perform the ILRT this month – rather than in March 2021. While New York argues that a stay would simply require Entergy to conduct the ILRT in accordance with its current license, New York ignores the disruptive effect such a stay could have at this late date, and the fact that expanding the work to be performed during the RFO, to include the ILRT, could cause delays in restarting the plant. In contrast, if the Commission later overturns LBP-15-26, it could require Entergy to complete the ILRT by some other date, well before the March 2021 date authorized by the amendment. In sum, New York has not shown that a stay would not harm other parties, and its stay request should therefore be denied.

D. The Public Interest Does Not Favor Issuance of a Stay

New York argues that a stay would be in the public interest because the State's appeal raises safety and regulatory oversight issues that are of concern to its citizens.[46] However, as explained above, the Board correctly denied New York's Petition for failing to meet the contention admissibility standards in 10 C.F.R. § 2.309(f)(1). While New York argues that a stay is also in the public interest because the Staff's action is allegedly contrary to the NRC's goals and values of transparency, fairness, and the integrity of its regulatory process,[47] New York fails to observe that both the AEA and the Commission's regulations in 10 C.F.R. § 50.92(c) explicitly permit the Staff to issue a license amendment upon making a final NSHC determination, notwithstanding the pendency of a hearing request.[48] Accordingly, New York's assertion that

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[44] Motion at 8.

[45] *Id.* at 9.

[46] *Id.* at 8.

[47] *Id.* at 9-10.

[48] In adopting the final rule, the Commission noted its belief that requiring prior hearings on license amendments could result in unnecessary disruption or delay in the operations of nuclear power plants by imposing regulatory burdens unrelated to significant safety matters. *See* Final Rule, "Final

the Staff's action is somehow contrary to the Commission's goals, values and processes, and is somehow not in the public interest, should be rejected.[49]

III. New York's Motion Impermissibly Challenges the Staff's NSHC Determination.

Finally, in arguing that the Staff's issuance of the ILRT Amendment should be vacated or stayed, New York essentially challenges the Staff's underlying Final NSHC determination – since it was that determination which allowed issuance of the amendment prior to the Commission's resolution of New York's appeal. In this regard, New York's Motion contravenes the express terms of 10 C.F.R. § 2.1213(f), which states, "[s]tays are not available on matters limited to whether a [NSHC] determination was proper in proceedings on power reactor license amendments."[50] New York's Motion should be denied for this reason, as well.

CONCLUSION

New York's Motion fails to meet the standards governing issuance of a stay, as set forth in 10 C.F.R. § 2.1213(d), and contravenes the requirements of 10 C.F.R. § 2.1213(f). For these reasons, as more fully set forth above, the Staff respectfully submits that New York's Motion should be denied.

Respectfully submitted,

Executed in Accord with 10 CFR 2.304(d)
Anita Ghosh
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-4113
E-mail: Anita.Ghosh@nrc.gov

/Signed (electronically) by/
Sherwin E. Turk
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-1533
E-mail: Sherwin.Turk@nrc.gov

Dated at Rockville, Maryland
this 7th day of March, 2016

Procedures and Standards on No Significant Hazards Considerations," 51 Fed. Reg. 7744, 7746 (March 6, 1986).

[49] Although it concedes that the Staff's NSHC determination is not reviewable, New York nevertheless appears to attempt to challenge the Staff's determination. *See* Motion at 8 n.4.

[50] *See also*, 10 C.F.R. § 50.58(b)(6); 10 C.F.R. § 50.91(a)(4); 10 C.F.R. § 50.92(c).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER IN OPPOSITION TO STATE OF NEW YORK MOTION TO VACATE OR STAY ISSUANCE OF LICENSE AMENDMENT," dated March 7, 2016, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 7th day of March, 2016.

/Signed (electronically) by/

Sherwin E. Turk
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O15-D21
Washington, DC 20555
Telephone: (301) 415-1533
E-mail: Sherwin.Turk@nrc.gov

Dated at Rockville, Maryland
this 7th day of March, 2016