

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

Greta Joy Dicus, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

OFFICE OF THE
RULE
ADJUDICATOR

SERVED OCT 21 1999

In the Matters of)
)
NORTH ATLANTIC ENERGY SERVICE CORP.)
)
(Seabrook Station, Unit 1))
)
and)
)
NORTHEAST NUCLEAR ENERGY CO.)
)
(Millstone Station, Unit 3))

Docket Nos. 50-443-LT-2
and 50-423-LT (consolidated)

CLI-99-27

MEMORANDUM AND ORDER

This proceeding involves a March 15, 1999, application by the New England Power Company ("NEP" or "licensee") seeking authorization of an indirect transfer of its 9.9-percent ownership interest in the Seabrook Station, Unit 1, and its 12.2-percent ownership interest in the Millstone Station, Unit 3 ("Millstone-3").¹ More specifically, pursuant to Section 184 of the Atomic Energy Act of 1954 ("AEA")² and section 50.80 of our regulations,³ NEP seeks the

¹ A pending merger of the New England Electric System ("NEES," the parent company of NEP) with Eastern Utilities Associates, which owns Montaup Electric Company, would result in an increase in NEES' ownership interest in Millstone-3 to approximately 16.2 percent and its ownership interest in Seabrook to approximately 12.9 percent. The Commission has granted Montaup's request for approval of the sale of its share of Seabrook to Little Bay Power Corporation. However, the sale itself has not yet been finalized.

² 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission (continued...))

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Commission's approval of indirect license transfers to the extent that they are effected by a transaction under which NEES (of which NEP is a wholly-owned subsidiary) would itself become a wholly-owned subsidiary of The National Grid Group plc ("National Grid"), a company incorporated under the laws of England and Wales. NEP would remain a co-licensee of both plants with the company's rights and obligations unaltered, and with the only change being in its upstream ownership. Consequently, NEP does not seek to amend the Seabrook and Millstone-3 licenses. Three other co-owners have filed petitions to intervene and requests for hearing, seeking to oppose NEP's application. For the reasons set forth below, we find that petitioners have both demonstrated standing and proffered two admissible issues (regarding foreign ownership and financial qualifications). We also set the case for oral hearing, set the schedule for the proceeding, defer appointing a presiding officer, and make various other procedural rulings.

BACKGROUND

The Commission published the notice of NEP's application on June 30, 1999, in the Federal Register. 64 Fed. Reg. 35,190-92. In response, Connecticut Light and Power Company and Western Massachusetts Electric Company filed a joint petition to intervene and request for hearing of the Millstone-3 portion of the application. Motion of the Connecticut Light and Power Company and Western Massachusetts Electric Company for Leave to Intervene and Petition for a Hearing, dated July 20, 1999. Similarly, Connecticut Light and Power Company and North Atlantic Energy Corporation ("NAEC") filed a virtually identical petition and request

²(...continued)
both finds the transfer in accordance with the AEA and gives its consent in writing).

³ This regulation reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations and Commission orders.

for hearing concerning the Seabrook portion of the application.⁴ Motion of the Connecticut Light and Power Company and North Atlantic Energy Corporation for Leave to Intervene and Petition for a Hearing, dated July 20, 1999. The three petitioners are all among the subsidiaries of Northeast Utilities ("NU") which, either directly or through its various subsidiaries, holds approximately a 68-percent interest in Millstone-3 and a 40-percent interest in Seabrook. In addition, NU is the licensed operator of Millstone-3, and NAEC is the licensed operator of Seabrook.

Petitioners assert that the application provided neither sufficient assurances that NEP will remain financially qualified nor a sufficient mechanism (called a "negation action plan") to prevent foreign control of NEP's licenses. On July 27, 1999, NEP filed a response to both petitions. Response of New England Power Company to Requests for Hearing ("Response"). The three petitioners filed a Reply Brief on August 3rd, to which NEP filed a further Response Brief on August 10th. The staff, as is its usual practice in license transfer cases, has chosen not to participate as a party in the adjudicatory portion of the proceeding.

DISCUSSION

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," *i.e.*, it must demonstrate "standing." See AEA, § 189a, 42 U.S.C. § 2239(a). The Commission's rules also require that a petition to intervene raise at least one admissible contention or issue. The standards for meeting these two requirements in license transfer cases come both from our Subpart M procedural regulations and from judicial cases on standing (to which we look for guidance).

⁴ Because of the identical nature of the issues and the close similarity of the pleadings, we consolidate these two proceedings.

A. Standing

To show standing in a license transfer proceeding, a petitioner must

(1) identify an interest in the proceeding by

- (a) alleging a concrete and particularized injury (actual or threatened) that
- (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
- (c) is likely to be redressed by a favorable decision, and
- (d) lies arguably within the "zone of interests" protected by the governing statute(s).

(2) specify the facts pertaining to that interest.

See 10 C.F.R. § 2.1308; North Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 214-15 (1999). See generally Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 194-96 (1998).

Petitioners are all co-owners of one or both of the facilities at issue and claim that they may suffer financial harm and harm to their property if NEP no longer provides sufficient financial resources to support safe and efficient operation of the plants, or if NEP's foreign owner takes action not in the best interest of the plants. See Petitions to Intervene at 3-4. NEP does not contest petitioners' standing, other than to suggest, briefly, that their two arguments "present ... a strained interpretation of NEP's Application and do not appear to serve any interests of petitioners." Response at 3.

Petitioners advance an injury claim similar to that which we accepted when admitting NEP itself as an intervenor in another license transfer proceeding involving Seabrook, *i.e.*, "the potential that NRC approval of the license transfer would put in place a financially incapable co-licensee, thereby increasing ... [their] risk of being forced to assume a greater-than-expected share of Seabrook's [and Millstone-3's] operating and decommissioning costs." Seabrook, CLI-99-6, 49 NRC at 215. Indeed, as we stated in Seabrook, "it is hard to conceive of an entity more entitled to claim standing in a license transfer case than a co-licensee whose costs may

rise ... as a result of an ill-funded license transfer. This kind of situation justifies standing based on 'real-world consequences that conceivably could harm petitioners and entitle them to a hearing.'" CLI-99-6, 49 NRC at 215, quoting Yankee Atomic, CLI-98-21, 48 NRC at 205.

Petitioners' allegations regarding increased risk, although not supported by affidavits or other documents (as in the earlier Seabrook proceeding), are nonetheless sufficiently concrete and particularized to pass muster for standing. The threatened injury is fairly traceable to the challenged action (here, the grant of the license transfer application) because the alleged increase in risk associated with National Grid indirectly taking over NEP's interest in the two plants could not occur without Commission approval of the application. Similarly, the threatened injury can be redressed by a favorable decision because the Commission's denial of the application would prevent the indirect transfer of interest. Cf. Seabrook, CLI-99-6, 49 NRC at 215.

Likewise, as in the earlier Seabrook proceeding, the risk to petitioners' interest in the Seabrook and Millstone-3 plants lies within the "zone of interests" protected by the AEA. "The AEA protects not only human health and safety from radiologically-caused injury, but also the owners' property interests in their facility." Seabrook, CLI-99-6, 49 NRC at 216 (and cited authority). "Persons or entities who own (or co-own) an NRC-licensed facility plainly have an AEA-protected interest in licensing proceedings involving their facility."⁵

⁵ Id. As an independent matter, we would observe that grievances on foreign ownership are general in nature -- the foreign ownership restriction protects national, not individual, interests -- and therefore do not provide a separate basis for standing. See generally Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 333 (1983) (generalized grievances to the public provide no basis for individual standing). However, because we are granting standing based on the petitioners' obvious economic interests, we need not reach the question whether petitioners' foreign ownership grievances provide any basis for standing.

B. Admissibility of Issues

To show admissible issues, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; Seabrook, CLI-99-6, 49 NRC at 215. See generally Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-49 (1998).

1. Financial Qualifications

Section 50.80(b) of 10 C.F.R. requires a license transfer application to include information necessary to establish such financial qualifications as are required under 10 C.F.R. § 50.33. Under these regulations, an applicant may either establish that it is an "electric utility" (as defined in 10 C.F.R. § 50.2) that is not subject to a case-specific financial qualifications review under section 50.33(f) or it must submit information demonstrating that it either possesses or has reasonable assurance of obtaining the funds necessary to cover the estimated operating costs for the license period. Petitioners criticize the application for failing to provide information sufficient to show either that it will remain an "electric utility" within the meaning of 10 C.F.R. §§ 50.2 and 50.33(f) or that it satisfies the criteria for non-utilities.

NEP responds by assuring the Commission that NEP will continue to be an "electric utility" under either of what it considers to be the two definitions of that term found in 10 C.F.R.

§ 50.2. That regulation states that the term "electric utility means any entity that generates or distributes electricity and that recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority." The regulation goes onto say that the term "electric utility" encompasses investor-owned utilities, including generation or distribution utilities, as well as a number of other types of enterprises, including cooperatives and government-owned utilities. NEP states in its application that its "primary role has been to generate and transmit electricity" for sale to its affiliates, which are electric distribution companies. Application at 8. NEP further states that, in the future, its "principal focus" will be the wholesale transmission of electricity (id.), in which its rates will be regulated by the Federal Energy Regulatory Commission ("FERC"). NEP asserts, therefore, that it falls within what it describes as the first of the two regulatory definitions of "electric utility." Response at 5. It also claims to be an investor-owned utility, and therefore to fall as well within what it considers the second definition. In either case, according to NEP, its financial qualifications requirements are deemed under 10 C.F.R. § 50.33(f) to have been met.⁶ Id. at 5-6.

We reject at the outset NEP's claim that its status as an investor-owned utility brings it within a so-called "second definition" of the term "electric utility." This portion of the regulatory definition is not a separate definition at all but is intended merely to indicate that investor-owned utilities (like other types of utilities listed in the rule, such as a cooperative) may fall within the category of "electric utility" -- not that they always fall within that category. Any other result would allow an investor-owned utility to qualify for the "electric utility" exception specified in section 50.33, even if it were to lack the rate-based financial assurance on which the Commission relied in creating that exception. Such a result would contravene the

⁶ NEP has not attempted in its application to satisfy the financial qualifications requirements for a non-electric utility.

Commission's intent in creating the exception. The Commission has always understood the definition to call for some form of rate-based reimbursement.

NEP's other argument is that NEP fits within the "first definition" -- the portion providing that an "electric utility" is an entity that generates or distributes electricity and that recovers the cost of this electricity, either directly or indirectly, through rates established by a separate regulatory authority (here, according to the licensee, the FERC). Response at 4-5. Although NEP may well be correct in this respect, all it has offered us thus far are conclusions, not facts. We thus find the financial qualifications issue to meet the regulatory standards of admissibility in a Subpart M proceeding, and we set this issue for hearing.

We find particularly confusing NEP's claim that its "principal role will be the transmission of electricity (e.g., wholesale 'distribution') and those of its affiliate retail distribution, with NEP's rates regulated by the FERC." Response at 5. NEP's application and July 27th Response Brief provide insufficient information regarding what portion of NEP's business would lie within this "principal" focus, or what portion of its costs would be recovered -- "either directly or indirectly" (10 C.F.R. § 50.2) -- through FERC-approved rates, through rates approved by state public utilities commissions ("PUCs"), and through spot market sales (the rates for which are, strictly speaking, set by neither the FERC nor the PUCs).⁷ Nor does NEP explain why interstate sales pursuant to the FERC's rate caps (which differ from the more typical cost-of-service based rates allowed by state PUCs) would provide any guarantee of cost recovery. We need to know the answers to these questions before determining whether NEP satisfies our "financial qualifications" requirements, unless of course NEP chooses instead to attempt a demonstration that it satisfies the financial qualifications requirements which 10 C.F.R. § 50.33(f) imposes on entities other than electric utilities.

⁷ See NUREG-1577, "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," at 9 n.8 (March 1999, Rev. 1).

2. Foreign Ownership

Petitioners offer three lines of argument challenging the proposed transaction's compliance with the foreign ownership standards set forth in both the AEA and the Commission's own regulations and guidance. First, petitioners assert that the small percentage of NEP's ownership interest in the two facilities does not exempt it from the provisions of Section 103d of AEA, 42 U.S.C. § 2133(d), prohibiting the Commission from issuing a license to any corporation owned, controlled or dominated by a foreign entity.⁸ Petitioners stress that Section 103d prohibits foreign control over "licensees," not plants, and point out that here National Grid, indirectly, will own 100 percent of NEP. See Reply of the Connecticut Light and Power Company, Western Massachusetts Electric Company, and North Atlantic Energy Corporation to Response of New England Power Company to Requests for Hearing, dated Aug. 3, 1999, at 9-10.

Second, petitioners assert that NEP's negotiation action plan for the two facilities fails to satisfy the requirements of 10 C.F.R. § 50.38⁹ and the provisions of the Commission's Interim "Standard Review Plan on Foreign Ownership, Control or Domination," 64 Fed. Reg. 10,166, 10,169 (March 2, 1999) ("Interim SRP"). According to petitioners, the SRP requires all negotiation action plans to provide positive measures to assure that the foreign ownership interest is denied control or domination over licensee decisions. See Petitions for Review at 8.

⁸This statutory section also prohibits the Commission from issuing a license to any foreign individual or entity if such issuance would "be inimical to the common defense and security or the health and safety of the public."

⁹ This section provides, in relevant part, that "any corporation ... owned, controlled or dominated by a ... foreign corporation ... shall be ineligible to apply for and obtain a license." Petitioners also cite 10 C.F.R. § 50.40(c) which provides that the Commission will be guided by the following considerations (among others) when determining whether to grant a license under Part 50 of the Commission's regulations: whether "the issuance of a license to the applicant will ...be inimical to the common defense and security or to the health and safety of the public." However, petitioners do not offer "common defense and security" arguments to support their challenge to NEP's application.

Third, petitioners challenge the provisions of the Application in which NEP reserves to its full Board of Directors the authority to cast NEP's vote on the following three decisions: (1) whether to close or seek relicensing of either facility, (2) whether to sell, lease or otherwise dispose of the facilities, and (3) how to comply with lawful court or agency orders. Petitioners believe that, because of the potential for foreign domination of NEP's Board, the authority to make the above-mentioned three decisions should instead rest with NEP's Nuclear Committee -- an entity created by the negation action plan and given broad authority over nuclear matters. See Petitions to Intervene at 10-11.

We believe that petitioners' foreign ownership arguments meet the regulatory standards for raising an admissible issue in a Subpart M proceeding. We also note that, subsequent to petitioners' most recent filing in this proceeding, the Commission on August 31, 1999, approved a Final SRP. See 64 Fed. Reg. 52,355 (September 28, 1999); Staff Requirements Memorandum regarding SECY-99-165 (Aug. 31, 1999). In the final SRP, we indicated that (albeit in a different permutation), where a parent of an applicant is being acquired by a foreign entity and the applicant owns less than a 100-percent interest in a facility, we would consider the following factors in determining whether such an indirect license transfer is consistent with the statutory and regulatory requirements:

- (1) the extent of the proposed partial ownership of the reactor;
- (2) whether the applicant is seeking authority to operate the reactor;
- (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies;
- (4) whether the applicant would have any access to restricted data;
- and (5) details concerning ownership of the foreign parent company.

Mem. at 5. As the parties have had no opportunity to address the extent to which the Application addresses these newly-stated factors, we direct them to provide us their views on the matter in their submissions during the Subpart M proceeding.

C. Procedural Matters

1. NEP's Response

We strike, as unauthorized by either Commission regulation or order, the "Response of New England Power Company," dated August 10, 1999.

2. Designation of Issues

As noted above, the hearing will be limited to the following two issues: financial qualifications and foreign ownership. The parties should be prepared to offer pre-filed testimony and exhibits containing specific facts and/or expert opinions in support of their positions on these issues. Because the three petitioners are taking identical positions on the two admitted issues, we require them to file consolidated pleadings, testimony and exhibits. All parties should keep their pleadings as short, and as focused on the admitted issues, as possible. Redundant, duplicative, unreliable or irrelevant submissions are not acceptable and will be stricken from the record. See 10 C.F.R. § 2.1320(a)(9). We also direct petitioners to state explicitly what remedial measures (if any) they believe the Commission should take in addition to those specified in their intervention petitions.

3. Designation of Presiding Officer

The Commission will issue a notice designating a presiding officer after the Commission ascertains whether the parties will request a written hearing or, in any event, before any oral hearing is scheduled to begin. Until the appointment of a presiding officer, the parties should file any written submissions with the Secretary.

4. Notices of Appearance

To the extent that they have not already done so, each counsel or representative for each party shall, not later than 4:30 p.m. on November 1, 1999 (i.e., the first workday following the tenth day after the issuance date of this order), file a notice of appearance complying with

the requirements of 10 C.F.R. § 2.713(b). In each such notice of appearance, the counsel or representative should specify his or her business address, telephone number, facsimile number, and Internet e-mail address. Any counsel or representative who has already entered an appearance but who has not provided one or more of these pieces of information should do so not later than the date and time specified above.

5. Filing Schedule

If the parties unanimously agree to a non-oral hearing, they must file their joint motion for a "hearing consisting of written comments" no later than 4:30 p.m. on November 5, 1999, (i.e., 15 days of the date of this order). 10 C.F.R. § 2.1308(d)(2). No later than that same date, the parties should complete any necessary negotiations on a protective order regarding any proprietary data and should submit a joint protective order to the presiding officer. If the parties are unsuccessful in negotiating such an order, they should inform the Office of the Secretary by that date and indicate any areas in which they were able to agree. We also direct the parties to confer promptly on whether this proceeding might be settled amicably without conducting a hearing.

All initial written statements of position and written direct testimony (with any supporting affidavits) must be filed no later than 4:30 p.m. on November 22, 1999 (the first working day following the thirtieth day after the issuance date of this order). 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(a), 2.1322(a)(1). All written responses to direct testimony, all rebuttal testimony (with any supporting affidavits) and all proposed questions directed to written direct testimony must be filed no later than 4:30 p.m. on December 13, 1999 (the first working day following the twentieth day after the submission of written statements of position and written testimony). 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(2)-(3). All proposed

questions directed to written rebuttal testimony must be submitted to the Presiding Officer no later than 4:30 p.m. on December 22, 1999.¹⁰

Assuming that the parties do not unanimously seek a hearing consisting of written comments, the Presiding Officer will hold an oral hearing beginning at 9:30 a.m on January 12, 2000, at the Commission's headquarters in Rockville, MD. The subject of the hearing will be the issue designated above. Any party submitting pre-filed direct testimony should make the sponsor of that testimony available for questioning at the hearing. Each party will be allotted 30 minutes for its oral argument on the issues specified above and 15 minutes for any rebuttal argument it wishes to offer. See 10 C.F.R. §§ 2.1309, 2.1310(a), 2.1322(b). The hearing will not include opportunities for cross-examination, although the Presiding Officer may question any witness proffered by any party.

Finally, all written post-hearing statements of position must be filed no later than 4:30 p.m. on February 1, 2000 (20 days after the oral hearing). See 10 C.F.R. § 2.1322(c). The Commission expects to issue a final memorandum and order on the merits of this proceeding by April 3, 2000 (62 days after the record closes).

The Commission is confident that the proceeding can be resolved fairly and efficiently within the prescribed time schedule.

6. Participants in the Hearing and the Proceeding; Service List

The four participants at the hearing will be the New England Power Company, Connecticut Light and Power Company, Western Massachusetts Electric Company, and North Atlantic Energy Corporation. The recipients on the service list will be:

¹⁰ See 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(4). The seven-day filing period specified in the last two of these regulations is, pursuant to 10 C.F.R. § 2.1314(b), extended by two days, because the period includes a Saturday and Sunday.

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Pursuant to 10 C.F.R. § 2.1316(b)-(c), the NRC staff has indicated that it will not be a party to this proceeding. Notwithstanding this fact, the staff is still expected both to offer into

evidence its Safety Evaluation Report ("SER") and to proffer one or more sponsoring witnesses for that document. See 10 C.F.R. § 2.1316(b).

7. Service Requirements

Although the parties have a number of options under 10 C.F.R. § 2.1313(c) by which to serve their filings, the preferred method of filing in this proceeding is electronic (i.e., by e-mail). Electronic copies should be in WordPerfect format (in a version at least as recent as 6.0). Service will be considered timely if sent not later than 4:30 p.m. of the due date under our Subpart M rules. However, the Commission's electronic filing system is not yet operational and will probably not be until January 1, 2000. Therefore, until the system is operational, we will also require the parties to submit a single signed hard copy of any such filings¹¹ to the Rulemakings and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, MD 20852. As noted above, the fax number for this office is (301) 415-1101 and the e-mail address is secy@nrc.gov.

CONCLUSION

- (1) The two above-captioned proceedings are consolidated.
- (2) Petitioners are granted standing.
- (3) Petitioners' two issues are admitted.
- (4) Those issues are set for hearing.
- (5) NEP's August 10, 1999, Response brief is stricken from the record.

¹¹ We draw the attention to the difference between this requirement and that of Subpart G, which provides that any service whether by fax or e-mail on the Secretary should be followed with an original and two conforming copies of the service by regular mail in accordance with 10 C.F.R. § 2.708(d).

IT IS SO ORDERED.



For the Commission¹²

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook".

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of October, 1999.



¹² Commissioner Diaz was not available for affirmation of this Memorandum and Order. Had he been present, he would have affirmed the Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
NORTH ATLANTIC ENERGY SERVICE CORP.) Docket Nos. 50-443-LT-2 and
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(Seabrook Station, Unit 1))
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and)
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NORTHEAST NUCLEAR ENERGY CO.)
)
(Millstone Station, Unit 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-99-27) have been served upon the following persons by U.S. mail, first class, as indicated by an asterisk (*) or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by double asterisks (**), with copies by electronic mail as indicated.

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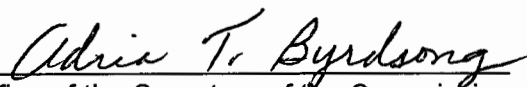
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COMMISSION MEMORANDUM AND
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of October 1999