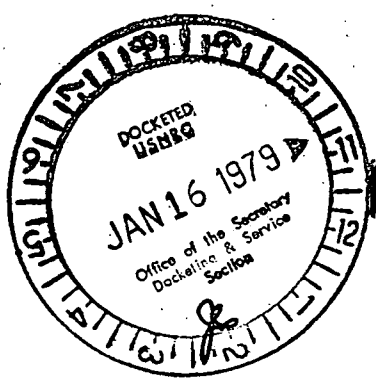
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION 1/12/79

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

1/12/79

In the Matter of	)	
	)	Docket Nos. 50-237
COMMONWEALTH EDISON COMPANY	)	50-249
	)	50-254
(Dresden Station, Units 2 & 3, and	)	50-265
Quad Cities Station, Units 1 & 2)	)	



NRC STAFF RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL AND CITIZENS FOR A BETTER ENVIRONMENT'S STATEMENT OF CONTENTIONS

On December 28, 1978, joint petitioners Natural Resources Defense Council and Citizens for a Better Environment (Joint Petitioners or NRDC/CBE) filed their statement of contentions in the captioned proceeding pursuant to the Atomic Safety and Licensing Board's (Board) Order of December 13, 1978. A number of the contentions appear to encompass broad legal and/or policy considerations more pertinent to the establishment of a national waste management program than to the particular details of this specific licensing action. Many of these concerns have been definitively addressed by the Commision or should more appropriately be pursued in another forum. The Nuclear Regulatory Commission (NRC or Commission) Staff (Staff) believes that this observation is borne out, in part, by the fact that seven of the nine contentions are essentailly verbatim recitals of contentions advanced by NRDC in another spent fuel transshipment proceeding involving the Oconee and McGuire facilities. The Atomic Safety and Licensing Appeal Board has warned that such "carry-over" contentions should receive particularly careful scrutiny. See Duquesne Light Company (Beaver Valley Power Station, Unit No. 1) ALAB-109,

6 AEC 243, 246 (1976). These and other factors have led the Staff to include the following discussion of certain legal and/or policy considerations which it believes should govern consideration of the contentions. Its formal statement of position with regard to the contentions then follows. The Staff reaffirms its earlier-expressed view that Joint Petitioners have failed to present an adequate showing of interest in the proceeding pursuant to the pertinent requirements of 10 CFR §2.714 so as to confer standing in this matter.[1/]

DISCUSSION

As a general precept, contentions must fall within the scope of the application described in the Federal Register Notice of Hearing (Notice of Hearing) (43 F.R. 37245)[2/] and be set forth with basis and specificity per the requirements of 10 CFR §2.714(b) and applicable Commission case law. See, e.g.,

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1/ See October 10, 1978 Staff response to NRDC/CBE intervention petition and later response to NRDC's reply thereto, dated November 3, 1978. It should be noted that the licensing board established to rule on intervention petitions in the Oconee-McGuire transshipment matter denied the petition filed therein by the NRDC, et al. on essentially the same grounds urged by the Staff in opposition to NRDC/CBE's showing of interest herein. See "Supplemental Order Ruling on Petitions for Leave to Intervene," dated January 9, 1979.

2/ The Notice of Hearing describes the amendments as follows:

> The proposed amendments would revise the licenses of the four units (Dresden Units Nos. 2 and 3 and Quad Cities Units Nos. 1 and 2) to permit storage of spent fuel from any of the units at the two stations, including Dresden Unit No. 1, in the spent fuel storage pools of any of the four specified units, in accordance with the licensees' application for amendment dated May 11, 1978.

Beaver Valley, supra, 6 AEC at 245; Northern States Power Company (Prairie Island, Unit Nos. 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), aff'd, BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (D.C. Cir. 1974).

Before granting a petition to intervene, the Board must determine that there is "at least one relevant contention set forth with reasonable basis and some specificity assigned for it." Northern States Power Company (Prairie Island, Units 1 and 2) ALAB-107, 6 AEC 188, 194 (1973), aff'd, CLI-73-12, 6 AEC 241 (1973), aff'd, BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (D.C. Cir. 1974). A major reason for requiring the articulation of specificity and basis is to help assure that other parties are put on sufficient notice of what they will have to defend against[3/] and to ensure that the hearing process is invoked solely for the resolution of concrete issues.[4/] This is especially true in a proceeding for which a hearing is not mandatory. Cf. Cincinnati Gas and Electric Company (Zimmer Nuclear Station), ALAB-305, 3 NRC 8, 12 (1976); Gulf States Utilities (River Bend Units 1 and 2) ALAB-183, 7 AEC 222, 226 n. 10 (1974).

With regard to environmental contentions, the now familiar "rule of reason" must be applied. See NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972); See

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3/ Philadelphia Electric Company (Peach Bottom, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

4/ Philadelphia Electric Company (Peach Bottom, Units 2 and 3), CLI-73-10, 6 AEC 173, 174 (1973); Beaver Valley, supra.

most recently Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 48-49 (1978). As the D.C. Circuit stated in NRDC v. Morton:

> There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies -- making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed. 458 F.2d at 837-38.

The United States Supreme Court recently made the following observation in connection with the assertion of contentions arising under the National Environmental Policy Act (NEPA) in NRC proceedings:

> ". . . while it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions.

Vermont Yankee Nuclear Power Corporation v. NRDC, et al., ____ U.S. ____, 55 L. Ed. 2d 460, 485 (1978).

In this regard, the Supreme Court further stated that a petitioner's comments "must be significant enough to step over a threshold requirement of materiality* * *

The comment cannot merely state that a particular mistake was made, it must show why the mistake was of possible significance in the results." Id., quoting from Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

The Appeal Board has had the occasion to discuss the scope of the issues cognizable by a licensing board presiding over another form of licensing action intended to ameliorate a perceived shortage of spent fuel storage capacity. Northern States Power Company (Prairie Island Units 1 and 2), ALAB-455, 7 NRC 41 (1978)(spent fuel pool expansion). The Appeal Board therein took note of the fact that there was no need to duplicate the review afforded the plant at the operating license stage. The Appeal Board stated:

> "Nothing in NEPA or in those judicial decisions to which our attention has been directed dictates that the same ground be wholly explored in connection with a proposed amendment to those 40-year operating licenses. Rather, it seems manifest to us that all that need be undertaken is a consideration of whether the amendment itself would bring about significant environmental consequences beyond those previously assessed and, if so, whether those consequences (to the extent unavoidable) would be sufficient on balance to require a denial of the amendment application." 7 NRC at 6 n. 4.

In a Federal Register Notice published on September 16, 1975,[5/] the Commission announced its intent to prepare a generic environmental impact statement on the handling and storage of spent light water power reactor fuel (Spent Fuel GEIS). The Commission determined that licensing actions designed to ameliorate a possible shortage of spent fuel storage capacity should not be deferred pending completion of the GEIS given its consideration of certain specified factors.[6/]

Reviewing Joint Petitioners' statement of contentions in light of the above considerations, the Staff is satisfied that it contains at least one acceptable contention (contention 9) so as to meet the contention requirement of 10 CFR §2.714. The Staff's position on the contentions follows.

5/ Notice of "Intent to Prepare Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel." 40 F.R. 42801. The Staff issued a Draft Spent Fuel GEIS (NUREG-0404) on March, 1978.

6/ Broadly stated, these factors are: (1) the utility of this type of action might be dependent on a separate licensing action; (2) other available alternatives might be foreclosed; (3) impacts could not be adequately assessed in the context of an individual proceeding without overlooking cumulative impacts; (4) technical issues might arise which could not be resolved in the context of the individual proceeding; and (5) a deferral or severe restriction on this type of action would substantially harm the public interest.

STATEMENT OF POSITION

Contention 1

This contention seeks the introduction of a policy issue expressly decided to the contrary by the Commission. The contention asserts that the proposed action violates NEPA because it is a commitment to a program which precedes the completion of separate programmatic impact statements to be prepared by NRC and, apparently, the Department of Energy (DOE). Parts (a) and (b) of the contention are mere factual representations.

As noted above, the Commission has explicitly determined that licensing actions of the type proposed need not await completion of the Commission's spent fuel GEIS. GEIS Notice; accord, Prairie Island, supra; Portland General Electric Company, et al. (Trojan Nuclear Plant), LBP-78- , slip op. at 58 (October 6, 1978). It should be noted that such a deferral was earlier requested by the NRDC and others in a letter to the Commission, dated May 20, 1975, and specifically rejected by the Commission in its GEIS Notice. With regard to the further assertion that the instant application must additionally await some document to be prepared by DOE, the Staff observes that Joint Petitioners cite no legal authority to support such a proposition and the Staff knows of none.

Part (c) of the contention asserts that approval of the proposed action would forestall development of preferable alternative plans to meet the spent fuel storage program, particularly expansion of spent fuel storage

at each plant site. First, Commission authorization has already been given to expand the capacities of the spent fuel pools for the subject facilities. See letter from D. K. Davis, NRC, to C. Reed, Commonwealth Edison Company, dated January 30, 1978. Additionally, there is no basis to support the claim that approval of the instant application would "forestall" development of generally available alternatives in other unrelated licensing actions aimed at alleviating a possible shortage of spent fuel storage capacity.

Indeed, the Commission came to a contrary general conclusion with respect to its consideration of much the same factor in its GEIS Notice[7/] which the Staff endorsed in its first opportunity to consider this factor in connection with an analogous individual transshipment application. See Environmental Impact Appraisal related to Spent Fuel Storage of Oconee Spent Fuel at McGuire Nuclear Station Unit 1 Spent Fuel Pool, Duke Power Company, Docket No. 70-2623, December 1978 (Oconee - McGuire EIA). Similarly, there is no specification of what alternative plans are deemed "preferable" to meet the perceived spent fuel storage problem at issue in this matter save for an increase in on-site storage capacity, an action already authorized with regard to the facilities involved in this matter. Accordingly, this contention is inadmissible in this proceeding.

7/ See discussion supra at 6 and n.6.

Contention 2

This contention asserts that the proposed action is a major federal action significantly affecting the environment, as the result of certain enumerated perceived impacts, which requires the preparation of an environmental impact statement under NEPA. The Staff believes that it is premature to ascertain whether an environmental impact statement is necessary herein under NEPA until the completion of its environmental evaluation of the applicaction. Notwithstanding this, however, Joint Petitioners present no basis to support the inference that the proposed action will result in the impacts alleged or that taken either individually, or in the aggregate, they are "significant." Additionally, many of the perceived impacts are remote and speculative and not susceptible to a reasonable degree of proof. Joint Petitioners' assertion about the alleged "long-term implications of another spent fuel storage half-measure which allows increasing nuclear waste without a solution and without progress toward a solution for the permanent and safe storage of such waste" seeks to introduce an issue of long-term waste management policy that is beyond the scope of the proceeding. Cf. Commission's "Denial of [NRDC] Petition for Rulemaking" 42 F.R. 34391, 34393 (July 5, 1977) [8/] (Commission explicitly declined to place a moratorium on licensing actions pending development of an operable repository for high level waste), aff'd, NRDC v. NRC, 582 F.2d 166 (2d Cir. 1978).

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8 / Cited approvingly in Prairie Island, supra, 7 NRC at 51.

Finally, the Commission's GEIS Notice does not automatically require preparation of an environmental impact statement in actions such as the instant one. Rather, it contemplates that such a licensing action would be accomplished by either an environmental impact statement or appraisal as appropriate. On the basis of the foregoing, the Staff recommends that consideration of the admissibility of this contention be deferred subject to the objections noted herein.

Contention 3

This contention alleges that there has been no adequate analysis of certain proferred alternatives to the proposed action. Like the question of whether an environmental impact statement is necessary, the Staff believes that it is premature to determine what, if any, alternatives should be considered in this proceeding. Should the Staff determine that it need not prepare an environmental impact statement, it will prepare an environmental impact appraisal which, at a minimum, will address the matters required of such documents by 10 CFR §51.7(b). It should be noted that there is a growing indication from the Appeal Board and some licensing boards that no consideration of alternatives is required under NEPA in connection with applications for the modification of spent fuel pools, another form of action designed to ameliorate the shortage of spent fuel storage capacity.[9/] Even assuming there is some obligation to

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9 / Prairie Island, supra, 7 NRC at 46 n. 4; Duquense Light Company, et al. (Beaver Valley Power Station, Unit 1 - SFPM), LBP-78-16, 7 NRC 811, 817 (1978), aff'd (without opinion but with agreement on legal determinations) ALAB-484, 7 NRC 984 (1978); Trojan, supra, slip op. at 58.

consider alternatives to the proposed action from an environmental standpoint, such alternatives must, nonetheless, pass some threshold test of reasonableness. See, e.g., NRDC v. Morton, supra, 458 F.2d at 837. Joint Petitioners present no basis to believe that suggested alternative (a) is a reasonable, let alone preferable, alternative to the instant action. It is also lacking in specificity. Suggested alternative (b), expanded spent fuel pool capacity at each plant, has already been authorized and will presumptively be undertaken. Suggested alternative (c) constitutes an assertion that the licensee has not fully utilized existing storage capacity of its spent fuel pools and thus presumably the proposed action is not needed. Essentially the same allegation is made in contention 9 and the two should be consolidated.

Accordingly, with the possible exception of Part (c) thereof, contention 3 is inadmissible in this proceeding.

Contention 4

Part (a) of the contention claims that the proposed action would increase radiation exposure to workers and the public beyond what is ALARA, otherwise acheivable by on-site expansion of spent fuel pool storage capacity. Significantly, there is no claim that the proposed action would result in either personnel or general population exposure in excess of the permissible regulatory limits prescribed in 10 CFR Part 20 and 10 CFR §50.34(a) (specifically, Appendix I thereof). Similarly, there is no basis for the claim in part (b) of the contention that the proposed action will result in "residual health risks" to workers or for the more sweeping allegation that such "health

hazards" include "increased genetic mutations" and "increased somatic effects". On the contrary, for example, in its evaluation of a similar transshipment proposal, the Staff concluded that, at both the maximum individual doses and the upper bound population doses expected from that proposed action, the postulated health effects would be "less in quantity and no different in kind from the postulated health effects resulting from natural background radiation." Oconee-McGuire EIA, supra, at 43.

The added claim in part (b) of this contention that NRC regulations set levels for workers 10 times higher than acceptable is an unequivocal challenge to the applicable provisions of 10 CFR Part 20. This conclusion is underscored by the supporting reference to an NRDC rule-making petition involving portions of 10 CFR Part 20. Such challenge may only be pursued within the procedural framework outlined in 10 CFR §2.758. Accordingly, this contention is inadmissible in this proceeding.

Contention 5

This contention appears to question the licensee's desire to maintain a full core discharge reserve capacity as one reason underlying the proposed action. Part (a) of the contention is unduly vague, lacks adequate specificity and appears to seek the introduction of an issue under NEPA which presupposes that a cost-benefit analysis must be performed and otherwise runs afoul of the threshold test of reasonableness (materiality).

Moreover, the issue does not appear to be one susceptible to a reasonable degree of proof. Part (b) of the contention constitutes a representation about the alleged practices of other utilities that is totally irrelevant to, and beyond the scope of, the instant proceeding. Accordingly, this contention is inadmissible in this matter.

Contention 6

This contention evinces a concern over the adequacy of safeguard measures to protect the shipment of spent fuel against sabotage, hijacking or other malevolent acts.

Spent fuel in transit is specifically exempt from the Commission's physical protection requirements in 10 CFR Part 73 dealing with the transportation of special nuclear material. 10 CFR §73.6(b). The high radiation level of the irradiated spent fuel to be shipped and the heavy shielded cask required for safe transport (per licensing requirements of 10 CFR Part 71) are regarded as adequate protection against malevolent acts. See Draft Spent Fuel GEIS, NUREG-0404 at 5-3; NRC Final Environmental Statement on the Transportation of Radioactive Material by Air and Other Modes (FES on Transportation of Radioactive Material), NUREG-0170, §7.2.2 (December 1977); See also Oconee-McGuire EIA, §3.4.1. Thus, the contention constitutes an improper challenge to 10 CFR §73.6(b). 10 CFR §2.758.

As a further matter, shipping casks used in the transportation of spent fuel must be certified by the NRC to meet the applicable requirements of 10 CFR Part 71 for type B quantities of radioactive material under both normal conditions of transport and transportation accident test conditions. Additionally, all shipments must comply with the relevant transportation safety requirements of the Department of Transportation (DOT) in 49 CFR Parts 170-189, 14 CFR Part 103, and 46 CFR Part 146 as appropriate to the selected mode of transport. 10 CFR §71.5(a).

The contention is deficient aside from its challenge to the prescribed regulatory scheme. Specifically, the contention rests on the underlying supposition that the proposed action could pose a threat of "sabotage, hijacking or other malevolent" acts without a basis in support thereof. Nor is there any showing that the hypothetical attack postulated in part (a) is a "credible" event as alleged therein. While not necessarily dispositive of this matter, protection against such a hypothetical attack goes beyond the Commission's physical protection requirements for licensed activities on site against industrial sabotage. 10 CFR §73.55.

Part (b) appears to be an integral part of the concerns raised in part (a) and suffers from many of the same deficiencies. Part (c) is unduly speculative and lacks adequate specificity. Part (d) lacks basis and is unduly speculative and remote. There is no specification of what constitutes a

"successful malevolent act" within the context of this portion of the contention and no basis for the spectrum of impacts alleged to result therefrom. Accordingly, this contention is inadmissible in this proceeding.

Contention 7

Part (a) of this contention asserts that the licensee has failed to submit an Environmental Report (ER). Joint Petitioners cite no legal authority for the allegation that an ER must accompany applications such as the instant one. The Staff will obtain the submission of whatever information its deems necessary to perform its environmental evaluation of the proposed action. Its documented evaluation will be offered into evidence should a hearing be ordered in this proceeding. Part (b) of the contention asserts that the application should contain an analysis of additional emergency planning required by the transshipment. This portion of the contention is unduly vague and lacks adequate specificity. For instance, there is no particularization of what "additional" planning is deemed required or what type of shipping incident(s) would necessitate the initiation of an emergency response.

The Commission has determined, as a general matter, that the environmental risk of radiological effects stemming from transportation accidents involving nuclear fuel is small. See Table S-4 of 10 CFR Part 51[10/]; see also FES on Transportation of Radioactive Material, supra, chapter 5. It should also be recognized that the spent fuel will be packaged and transported in accordance with the licensing provisions of 10 CFR Part 71 and subject to

10/ Supporting data is given in the Commission's "Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants", WASH-1238, December 1972, and Supp. I, NUREG-75/038, April 1975,

the applicable transportation safety requirements of the DOT cited above. In addition, the State of Illinois appears to possess certain authority and responsibility over the planned transshipment under its state statutes governing the transportation of hazardous materials. Ill. Rev. Stat. ch 127, §1251, et seq.[11/] Thus, this contention is inadmissible in this proceeding.

Contention 8

Part (a) of this contention is unduly speculative and remote and lacks the requisite basis and specificity. Accordingly, it is inadmissible in this proceeding. Part (b) of the contention essentially constitutes a restatement of contention 1(c) and prompts the same Staff response as given in connection with that earlier contention.

Contention 9

This contention questions the immediate need for the proposed action based on the projected spent fuel pool capabilities at the subject facilities provided in the environmental impact appraisal which accompanied the January 30, 1978 license amendments authorizing expansion of the spent fuel pool capacities

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11/ See contention 12 in the State of Illinois' statement of contentions filed in this proceeding on December 29, 1978.

for these plants. Joint Petitioners contend that on site storage capability is adequate through the middle-1980s. The question of need for the action is broadly related to consideration of one of the factors (viz., harm to public interest should deferral of action result in plant shutdown) which the Commission indicated should be assessed within any environmental impact statement or appraisal that might be prepared in connection with licensing actions such as the one involved here. Accordingly, this contention raises a permissible issue in this proceeding for which an adequate basis has been assigned.

CONCLUSION

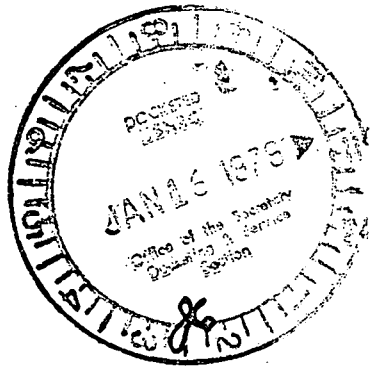
Based on the foregoing, the Staff believes that NRDC/CBE has met the contention requirement of 10 CFR §2.714 with its assertion of at least one acceptable contention, contention 9. The Staff's position on the balance of the contentions is as stated herein. The Staff had earlier expressed the opinion that NRDC/CBE had failed to satisfy the interest requirement of 10 CFR §2.714. Accordingly, the Staff recommends that their intervention petition be denied unless an adequate showing of interest in the proceeding is presented on or before the scheduled special prehearing conference date.

Respectfully submitted,

Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of January, 1979.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



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Quad Cities Station, Units 1 & 2)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 CFR §2.713(a), the following information is provided:

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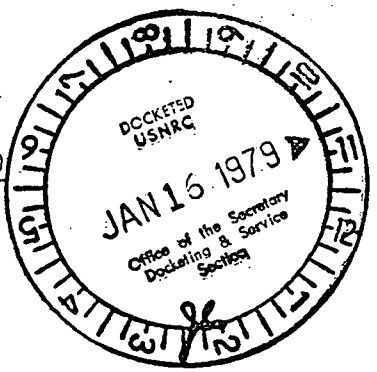
Admissions	- Supreme Court of the United States of America Supreme Court of the State of New Jersey District of Columbia Court of Appeals
Name of Party	- NRC Staff U.S. Nuclear Regulatory Commission Washington, D.C. 20555

Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of January, 1979.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO NATURAL RESOURCES DEFENSE COUNCIL AND CITIZENS FOR A BETTER ENVIRONMENT'S STATEMENT OF CONTENTIONS" and "NOTICE OF APPEARANCE" for Steven C. Goldberg, in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of January, 1979:

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