

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

CONSUMERS POWER COMPANY)

(Big Rock Point Nuclear Power)
 Station))

Docket No. 50-155

NRC STAFF RESPONSE TO MOTION OF
 JOHN A. LEITHAUSER TO FILE
 PLEADINGS OUT OF TIME, AND
 TO THE CONTENTIONS OF
 JOHN A. LEITHAUSER

The Staff of the Nuclear Regulatory Commission (Staff) hereby opposes the granting of John A. Leithauser's (Petitioner) Belated Motion For Leave To File Pleading Out Of Time on the ground that on balance, the factors set forth in 10 C.F.R. §2.714 weigh against allowing Petitioner to file his contentions out of time. In the alternative, should the Board allow filing of said contentions, the Staff hereby opposes their admission as contentions in this proceeding on the ground that none of them meets the requirements of 10 C.F.R. §2.714(b). Since Petitioner has failed to file even one contention which meets these requirements, he should be denied leave to intervene in this spent fuel pool expansion proceeding.

BACKGROUND

On August 22, 1979, Petitioner filed a document in which he requested leave to intervene in this spent fuel pool expansion proceeding on his own behalf and on behalf of the Northwest Coalition. Petitioner stated in that petition that the Northwest Coalition is an organization comprised of the Energy Resources Group of Petoskey, the Northern Michigan Alternative Development (Nomad), and the Charlevoix Citizens for Energy Awareness. This petition was found to be

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deficient by the Board in its Memorandum and Order of September 25, 1979. Petitioner was ordered to correct the deficiencies in the sections of the petition relating to both his individual intervention and that of the Northwest Coalition "...no later than 15 days prior to the convening of the special prehearing conference in order to cure the deficiencies." Board's Memorandum and Order at 3 (September 25, 1979). The prehearing conference was scheduled by Order dated October 12, 1979 for November 14, 1979. It was subsequently postponed until December 5, 1979. Board Order dated November 5, 1979. Petitioner failed either to correct the deficiencies in his petition, to file contentions, or to request an extension of time to perform these activities.

Petitioner appeared at the prehearing conference and gave his reasons for not complying with the September 25, 1979 Board Order orally. At that time he still had no contentions to submit to the Board in writing. The Board ruled from the bench that Petitioner would not be allowed to participate in this proceeding at this time. Tr. 66. In describing his position, the Board stated:

"You can, of course, submit in the future your contentions. And your request to be admitted to the proceeding, the Board will rule on as a matter of discretion as to whether or not we would permit your late intervention, and you will of course have to comply with the requirements of the regulation, including showing good cause for your late petition, or your late filings of contentions and noncompliance with the prior order of the Board requiring you to justify your standing in this case...." (Tr. 66).

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Petitioner has now filed a number of documents. The first is a letter in which he "clarifies his status". The second is his "Belated Motion For Leave To File Pleading Out Of Time", and the third is a document containing the contentions which he wishes to have litigated in this proceeding. Though it is somewhat unclear exactly what purpose Petitioner's letter was meant to serve, the Staff has chosen to treat it as a new petition to intervene, filed as a result of the Board's ruling at the December 5, 1979 prehearing conference as quoted above. The Staff will consider this letter, the motion, and the contentions filed by Mr. Leithauser as components of a late petition to intervene.

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DISCUSSION

I. APPLICABLE LEGAL STANDARDS

In determining whether or not to grant any petition to intervene, the Board must first find that a particular petitioner has an interest which may be affected by the proceeding in which he wishes to participate. 10 C.F.R. §2.714(a). Where a petition to intervene is late, or where a petitioner requests permission to file his contentions out of time, the Board must look to the factors set forth in 10 C.F.R. §2.714(a) of the Commission's regulations to determine whether the petition or petitioner's request should be granted.^{1/} These factors are:

- 1) Good cause, if any, for failure to file on time;
- 2) The availability of other means whereby the petitioner's interest will be protected;
- 3) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;
- 4) The extent to which the petitioner's interest will be represented by existing parties;
- 5) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Board's decision in both cases of late petitions for leave to intervene and concerning granting of requests to file contentions out of time is based on a

^{1/} Mr. Leithauser's claim of complete ignorance of the rules and regulations of the Commission is somewhat overstated. On August 24, 1979, a copy of 10 C.F.R. Parts 2 and 50 was sent to Mr. Leithauser.

balancing of these five factors. For example, intervention could be granted if a petitioner had no good excuse for his late filing, but he could meet the substantial burden of showing that his petition should be granted based on the other factors in the rule. In the Matter of Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975). Conversely, a showing of good cause for late filing may, nevertheless, result in a denial of intervention where assessment of the other factors weighs against the petitioner. Id. at 275.

In this particular case, the Board should also take note that Petitioner failed to make any request of the Board for additional time to meet its September 25, 1979 Order and to file his contentions. The orderly functioning of the administrative process is scarcely served by allowing parties to ignore prescribed time limits because such time limits are inconvenient for them. See, in the Matter of Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit 2), ALAB-474, 7 NRC 746, 748 (1978). This is true even if the party in question happens to be a non-lawyer. In some respects the rules of the Commission are relaxed to accommodate the fact that a party may not have the benefit of counsel, but no good reason exists why a double standard should obtain insofar as observance of deadlines is concerned. Id. There is no indication in Petitioner's late filings that he would have been unable to file a short request for an extension of time with the Board 15 days prior to the December 5, 1979 prehearing conference.

II. STANDING

A. Petitioner Has Clarified His Individual Standing In A Way Which Would Satisfy The Requirements of 10 C.F.R §2.714.

Petitioner now states that he is a permanent resident within 30 miles of the Big Rock plant. Since residence within 50 miles of a nuclear power plant has been held to give rise to an interest which may be affected by the proceeding, See, e.g., Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421, n. 4 (1977), Petitioner has met the interest requirement. His letter also states that the aspect of the proceeding in which he is interested is the possibility that a spent fuel accident could affect his home and surroundings. This would seem to satisfy the aspects requirement of §2.714(a). Therefore, the new petition has established Petitioner's standing to intervene as an individual in this proceeding.

B. Petitioner Has Not Clarified The Standing Of The Organization Known As The Northwest Coalition To Intervene In This Proceeding In Its Representative Capacity Sufficiently To Meet The Requirements of 10 C.F.R. §2.714 And Commission Caselaw.

Petitioner states in his letter that the Northwest Coalition is now made up of two organizations-- the Energy Resources Group of Petoskey and Nomad. Petitioner also states that he represents a Mr. Ronald Beyer, a member of Nomad, and that this is somehow exemplified by the letter received along with a letter from Congressman Albosta to Chairman Hendrie dated September 14, 1979. Mr. Beyer's letter, however, has no relevance to the spent fuel pool expansion proceeding. It mentions nothing about an interest of Mr. Beyer which may be affected by the proceeding and, in fact, mentions nothing about the spent fuel pool expansion at all. It makes no mention of authorizing anyone to represent

him as a member of Nomad, in the spent fuel pool expansion proceeding. Therefore, this new petition still does not satisfy the requirements of Commission case law that at least one member of an organization with an interest which may be affected by a particular proceeding must authorize that organization to represent his interest, thus clothing that organization with his personal standing. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 396 (1979).

It should be noted that in the original petition to intervene of the Northwest Coalition filed on August 22, 1979, the Coalition was said to be made up of three organizations. Since there seems to be some confusion concerning exactly how many organizations comprise the Northwest Coalition, authorization should be required from at least one member of each of the Coalition's constituent organizations allowing the Northwest Coalition to represent that member's interest. Petitioner now states that he is a member of the Northwest Coalition, though he does not state whether he is a member of any of its constituent organizations.^{2/} If the Northwest Coalition is found to have standing as an organization to intervene in its representative capacity in this proceeding, Petitioner could represent that organization as a member of it under 10 C.F.R. §2.713. In its present form, however, this new petition should be deemed deficient unless and until Petitioner provides authorization from members of the two organizations comprising the Northwest Coalition with affected interests giving authority to the Northwest Coalition to represent their interests in this proceeding.

^{2/} It could be inferred that Petitioner in fact is a member of the Energy Resources Group of Petoskey, since his address and the address of that organization seem to be identical.

III. ANALYSIS OF THE FIVE FACTORS

A. Petitioner Has Marginally Established Good Cause For His Late Filings In This Proceeding.

Petitioner states in his motion that he was unable to meet the requirements set forth in the September 25, 1979 Board Order, and to file his contentions 15 days prior to the December 5, 1979 prehearing conference, because he was in the process of moving his home and office. He further states that due to his financial circumstances he was required to expend a great deal of his time and effort in this move. He lists as illustrations certain tasks he was obliged to perform in connection with the move. The Staff is in some doubt as to whether these tasks were of such a nature as to preclude Petitioner from at least setting his predicament before the Board and requesting some interim relief. Therefore, although there may be some justification for Petitioner's tardiness, the Staff does not believe that this justification should weigh very heavily in favor of allowing Petitioner to file his documents out of time, or in favor of allowing him to intervene at all in this proceeding.

B. Other Means Are Available Whereby Petitioner's Interest Will Be Protected.

The interest of the Petitioner in this proceeding is that of a resident within approximately 30 miles of the plant whose home might be affected by a spent fuel accident. This interest has been the subject of a number of contentions submitted by other petitioners in this proceeding. See contentions of John P. O'Neill, II, filed November 20, 1979; contentions of Christa-Maria filed November 20, 1979. Questions relating to the effect of accidents on the expanded spent fuel pool have also been posed

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by the Board. See Tr. 162. Therefore, Petitioner's interest will be focused upon during this hearing. Since there are other means by which Petitioner's interest will be protected if he is not granted leave to intervene in this proceeding, this factor should not weigh heavily in Petitioner's favor.

C. Petitioner Has Not Shown That His Participation Could Reasonably Be Expected To Assist In The Development Of A Sound Record In This Proceeding.

Petitioner's contentions as will be elaborated upon infra, are merely broad assertions without basis or specificity. Petitioner does not indicate how, in support of these contentions, he will be able to contribute to the development of a sound record in this proceeding. Unless and until he can do so by showing, for example, the basis of his contentions and the list of witnesses whose testimony he would be able to provide relating to any of these contentions, this factor should weigh heavily against allowing Petitioner to file his contentions out of time, and against allowing his participation as a party in this proceeding.

D. Assuming That The Other Petitions For Leave To Intervene In This Proceeding Are Granted, Petitioner's Interests Will Be Adequately Represented By The Existing Parties.

Petitioner has stated his interest as that of a resident in the area of the plant whose home and surroundings would be affected by a spent fuel accident. Accidents in and near the spent fuel pool, and their effect on that pool and the general environment, have been the subject of a number of contentions timely filed by two other petitioners for leave to intervene in this

proceeding. ^{3/} In addition, as mentioned above, the Board has already posed a question regarding the effect of an accident near the spent fuel pool on that spent fuel pool. See Tr. 162. Therefore, if the Board admits the contentions of the other parties and petitioners concerning either specific spent fuel pool accidents, or the general safety of the spent fuel pool, then the litigation of those issues will adequately represent Petitioner's interests in this proceeding. Assuming such contentions are admitted, this factor should weigh against allowing Petitioner's late filing of contentions and participation as a party in this proceeding.

E. Petitioner's Participation Would Broaden The Issues
In This Proceeding Only Slightly, If At All, And Would
Not Delay The Proceeding.

Petitioner raises only one possible issue not mentioned by the other parties to this proceeding, and that is the presence of some mixed oxide fuel in the Big Rock spent fuel pool. However, since there is already such fuel in the pool, it must be taken account of by the Staff and Licensee in their evaluation of the effects of expansion on the existing pool. Therefore, this is not an issue which would not otherwise have been dealt with without Petitioner's participation. Thus the issues would not be broadened by Petitioner's participation in this proceeding. Petitioner's participation would not delay this proceeding, since it is now in the discovery phase which will not end until after the issuance of the Staff's Safety Evaluation Report sometime in February. See Tr. 220. If Petitioner's

3/ By the Board's approval of the stipulation which was entered into by Counsel for Christa-Maria, the NRC Staff, and Consumers Power Company on November 26, 1979, Christa-Maria is already a party to this proceeding.

contentions were to be ruled upon before February, the schedule as approved by the Board would remain intact. Therefore, this factor weighs in favor of admission of the Petitioner as a party in this proceeding and the granting of permission for him to file his contentions out of time.

For the reasons set forth above, a balancing of the five factors shows that they weigh more heavily in favor of denying Petitioner's participation in this proceeding as a party and in favor of denying him permission to file his contentions out of time. Perhaps the most important factor to be considered here is that Petitioner has not demonstrated that he could contribute anything to the development of a sound record in the proceeding. Since that is so, and since his interests will be adequately protected by the Board and existing parties, Petitioner's request to file his pleadings out of time should be denied.

IV. CONTENTIONS

It is the Staff's position that Petitioner's request to be allowed to file contentions out of time should be denied. Even if, however, the Board were to grant Petitioner's request to file pleadings out of time, it is the Staff's position that Petitioner should not be granted leave to intervene in this proceeding on the ground that he has failed to set forth at least one contention which meets the requirements of 10 C.F.R. §2.714. The reasons for this position are set forth below.

A. Contention I Fails to Meet The Requirements of §2.714 and Should Not Be Admitted as a Contention in This Proceeding.

Contention I states as follows:

- I) That granting of licensee's request is a defacto permit to indefinitely store spent-fuel on site.

Contention I is merely a statement that granting this amendment would be a defacto permit to store waste indefinitely on site. The statement gives no indication of what site-specific issue the Petitioner wishes to litigate in this proceeding. It also gives no basis for Petitioner's belief that in fact this amendment would constitute such a defacto permit. Therefore, this contention should not be admitted as a contention in this proceeding.

B. Contention II Fails To Meet The Basis Requirement Of
10 C.F.R. §2.714(b), And Should Not Be Admitted As A
Contention In This Proceeding.

Contention II states as follows:

- IIa) That the Interagency Review Group Report on Nuclear Waste Management (1978), states that it may take until 1995 before a final underground storage site can be opened; and
- b) That licensee has in hearings before the Michigan Public Service Commission, stated that Big Rock will be taken out of service in 2000; and
- c) That licensee's proposal does not include plans for the five years from 1990 to 1995; and
- d) Therefore licensee's proposal is clearly deficient and should not be granted.

Petitioner contends that since the spent fuel pool at Big Rock will be full in 1990, and there is no indication that a final underground storage site will be available before 1995, the licensee is somehow required to state what it will do with spent fuel generated between 1990 and 1995. Petitioner has failed to show why any such discussion must be part of an application for an amendment to a license allowing the capacity of the spent fuel pool to be expanded. Therefore this contention lacks the basis necessary under §2.714(b) for its admission as a contention in this proceeding.

C. Contention III Has No Relevance To This Proceeding
And So Should Not Be Admitted As A Contention.

Contention III states as follows:

- IIIa) That on June 27, 1979 Consumers Power Co. shipped twelve drums (of what was supposed to be solidified low-level radioactive waste) "in doubtful condition," to the NECO dump in Beatty, Nevada; and
- b) That three of the drums were leaking liquid waste; and
- c) That at least one of these had been shipped with a cloth-like patch over what proved to be a source of leakage; and
- d) That the Beatty site was closed due to this incident; and
- e) That this accident is typical of Consumers Power Co.; and represents numerous flaws in licensee's equipment, practices, and administrative policies in regards to nuclear waste; and
- f) That due to these inadequacies on the part of the licensee, the request should be denied.

Petitioner contends that this request to expand the capacity of the Big Rock spent fuel pool should be denied because of an incident which occurred regarding some solid low-level waste which was shipped off site. Petitioner fails to show how this incident, involving a different system from the spent fuel pool, is in any way related to the subject of this proceeding. Petitioner also fails to explain what safety or environmental hazards caused by the increase in the capacity of the spent fuel pool would be affected by licensee's practices regarding its low-level waste disposal. This contention is irrelevant to the main issue involved in this proceeding and should therefore not be admitted as a contention.

D. Contentions IV, V and VI All Lack Basis and
Therefore Do Not Meet the Requirements of 10
C.F.R. §2.714(b).

Contentions IV, V and VI state as follows:

- IV) That Consumers Power Big Rock plant does not have adequate technical capabilities to possess a sub-critical spent-fuel pool of plutonium enriched uranium oxide; and
- V) That Consumers Power Co. Big Rock plant does not have the administrative capabilities to possess a sub-critical spent-fuel pool of plutonium enriched uranium oxide; and
- VI) That Consumers Power Co. does not have the economic stability to possess a sub-critical spent-fuel pool of plutonium enriched uranium oxide.

In these three contentions Petitioner contends that Licensee is not technically or financially qualified to maintain a spent fuel pool containing plutonium enriched uranium oxide. In addition, Petitioner contends that licensee does not have the administrative capability to maintain such a spent fuel pool. These contentions are inadmissible for several reasons. The main reason is that Petitioner fails to give a basis for any of the assertions made in these three contentions. They are just broad general statements without any foundation. Therefore none of the contentions meets the requirements of 10 C.F.R. §2.714(b). In addition these contentions make no mention of the expansion which is the subject of this proceeding. They seem rather to be dealing with the pool as it exists today. If Petitioner is concerned about the existing spent fuel pool then he should be expressing this concern in another forum. As they stand these contentions are not related in any way to the spent fuel pool expansion or its environmental, health, and safety effects. For the above-mentioned reasons, contentions IV, V and VI are inadmissible as contentions in this proceeding.

E. Contention VII is Not a Contention and
Therefore Does Not Meet the Admissibility
Requirements of 10 C.F.R. §2.714.

Contention VII states as follows:

- VII) That because of the considerations raised in Nos. IV, V, & VI, licensee request should be denied.

Petitioner seems to be making a statement that for the reasons set forth in Contentions IV, V and VI, licensee's request should not be granted. This in itself is no contention. It states nothing more than what is already articulated in the three prior contentions. Therefore, this statement should not be admitted as a contention in this proceeding.

F. Contention VIII is Inadmissible in its Present
Form as a Contention in This Proceeding Since
it is Related Neither to the Spent Fuel Pool
Capacity Expansion in Question Nor to the Effects
of That Expansion.

Contention VIII states as follows:

- VIIIa) That Consumers Power Big Rock plant is a G.E. boiling water reactor (the fifth built in the country), and as such could experience a loss-of-water accident due to a reactor explosion (because the spent-fuel pool is located above the reactor). This explosion could result from difficulties with the diffuser plate, or from other difficulties with the reactor; and
- b) That because a loss-of-water accident is credible for B.W. reactors (i.e. in the spent-fuel pool), licensee's request ought to be denied.

Petitioner contends that a loss-of-water accident in a BWR spent fuel pool is credible because the pool is located above the reactor. Such an accident, contends Petitioner, could be caused by difficulties with the diffuser plate in the reactor

or other difficulties. Petitioner has made no attempt to state this contention in terms which were related to the question involved in this proceeding - whether licensee should be allowed to expand the capacity of the spent fuel pool at the Big Rock facility. His concerns seem rather to relate to a possible problem with the spent fuel pool as it exists today. This concern is more appropriately expressed in another forum. Therefore this contention in its present form is not admissible as a contention in this proceeding.

G. Contention IX is Beyond the Scope of the Present Proceeding and Therefore an Inadmissible Contention.

Contention IX states as follows:

- IXa) That there does not presently exist safe, workable, and effective emergency plans for the areas within ten miles of the plant and within fifty miles of the plant; and
- b) That absent such plans, licensee's request for a de facto ten year operating extension should not be granted, particularly in light of the increased hazards associated with the proposed fuel-compaction.

Petitioner contends that there are no "safe workable and effective" emergency plans for the areas within 10 and 50 miles of the plant. He also contends that absent such plans licensee's request should be denied, since it is a de facto 10 year operating extension for the facility. The license for the Big Rock facility expires in the year 2000. Practical considerations aside, Consumers Power Co. is licensed to operate the facility until that time. Therefore, the issue here is not whether Big Rock should be allowed to operate for another ten years but rather, whether the Consumers Power Co. should be permitted to expand the spent fuel pool capacity at the facility. A general emergency planning issue is beyond

the scope of such a proceeding. In addition, Petitioner has established no basis for his assertion that absent these plans Consumers Power should not be allowed to expand its spent fuel pool. Therefore, this contention is beyond the scope of the proceeding, does not meet the requirement of 10 C.F.R. §2.714 and thus should not be admitted as a contention in this proceeding.

H. Contention X Does Not Meet The Requirements Of
10 C.F.R. §2.714(b) And Should Not Be Admitted
As A Contention In This Proceeding.

Contention X states as follows:

- Xa) That at present there is no use for, nor means of disposing of spent uranium oxide fuel; and
- b) That Consumers Power Co. Big Rock plant is a non-commercial reactor of only sixty-three megawatts (M.W.) total capacity; and
- c) That due to "grandfathering" it is exempt from numerous fundamental safety features; and
- d) That it is known experientially, that shutdown of Consumers Power Co. Big Rock plant would in no way hinder the reliable delivery of electricity to Consumers Power Co. customers; and
- e) That because of these (Xa-Xd), licensee should not be allowed to store additional spent-fuel on-site.

Contention X lacks basis for the assertions made therein and, indeed, is beyond the scope of this limited issue proceeding. Contention Xa is merely a statement of Petitioner's opinion and presents no issue which could be litigated in a hearing. Contention Xb and Xc are statements which refer to the reactor in general, and bear no relation to the expansion of the spent fuel capacity which is the subject of this proceeding. There is no basis given for the statement in Contention Xd that the power from this reactor is not needed. In any event, the need for power from the Big Rock facility is not an issue within the scope of this spent fuel pool expansion proceeding.

Since this contention does not meet the basis requirements of 10 C.F.R. §2.714(b), it should not be admitted as a contention in this proceeding.

I. Contention XI Is Not A Contention And Therefore Should Not Be Admitted As A Contention In This Proceeding.

Contention XI states as follows:

XI. For all of the above, the proposed amendment should be denied. Contention XI is merely a statement of Petitioner's belief that for the reasons he feels he has listed, the requested amendment should be denied. This presents no separate issue which could be litigated at a hearing and so fails to meet the requirements of 10 C.F.R. §2.714(b). Therefore, it should not be admitted as a contention in this proceeding.

CONCLUSION

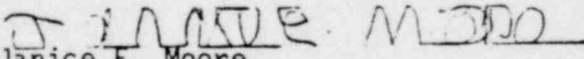
For the reasons set forth above, the Staff believes:

1. The Petitioner has established his individual standing to intervene, even in an untimely fashion, in this proceeding;
2. The new petition filed on behalf of the Northwest Coalition is still deficient regarding the standing of that organization to intervene;
3. A balancing of the factors set forth in 10 C.F.R. §2.714 militates against allowing Petitioner to file his contentions out of time. If the documents filed by Petitioner are treated by the Board as a late petition to intervene, the petition should be denied based on a balancing of the factors set forth in 10 C.F.R. §2.714.

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4. Even were Petitioner to be allowed the late filing of his contentions, he has not formulated one contention which would meet the requirements of 10 C.F.R. §2.714(b), and therefore should be denied leave to intervene in this proceeding.

Respectfully submitted,


Janice E. Moore
Counsel for NRC Staff

Dated at Bethesda, MD
this 7th day of January, 1980.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
CONSUMERS POWER COMPANY
(Big Rock Point Nuclear Power
Station)

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Docket No. 50-155

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO MOTION OF JOHN A. LEITHAUSER TO FILE PLEADINGS OUT OF TIME, AND TO THE CONTENTIONS OF JOHN A. LEITHAUSER, 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 7th day of January, 1980.

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