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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-443 OL
PUBLIC SERVICE COMPANY OF	)	50-444 OL
NEW HAMPSHIRE, et al.	)	Offsite Emergency Planning
	)	
(Seabrook Station, Units 1 and 2)	)	

NRC STAFF RESPONSE TO INTERVENORS' SECOND MOTION TO ADMIT CONTENTIONS ON THE SEPTEMBER 27, 1989 EMERGENCY PLAN EXERCISE

INTRODUCTION

By motion dated October 13, 1989, the Massachusetts Attorney General, Seacoast Anti-Pollution League and the New England Coalition on Nuclear Pollution ("Intervenors") petitioned the Board to admit for litigation in the above-captioned proceeding additional bases supporting their September 29, 1989 contention (JI-Onsite Ex-1) concerning the scope of the onsite exercise as well as an entirely new contention on the scope of the onsite exercise (JI-Onsite Ex-2). 1/

Intervenors maintain that the September 27, 1989 onsite exercise of the Seabrook Station Radiological Emergency Plan (SSREP) must be "broad enough in scope so that the major portions of the onsite emergency response capabilities can be evaluated." 2nd Motion at 2. Intervenors'

1/ Intervenors' Second Motion to Admit Contentions on the September 27, 1989 Plan Exercise, October 13, 1989 ("2nd Motion"). The NRC Staff filed a response opposing admission of the initial proffer of JI-Onsite Ex-1. NRC Response to Intervenors' Motion to Admit Contentions on September 27, 1989 Exercise, October 16, 1989 ("Staff Response").

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additional bases allege that (1) the NRC inspection report [2/] on the exercise "indicates that no PARs based upon dose assessment or other factors were actually prepared or implemented during the Exercise" and thus there is no assurance that Applicants have the capability to timely identify adequate and relevant information, formulate appropriate PARs, communicate those PARs offsite, or adjust the PARs based upon changed meteorological or plant conditions and (2) since the NRC inspection report indicates that sampling, but not monitoring procedures were demonstrated, there is no assurance that Applicants are capable of adequately implementing procedures for plume tracking or related monitoring activities. 2nd Motion, Attachment A at 2.

JI-Onsite Ex-2 alleges that the scope of the onsite exercise was too limited to validate the capability to implement the plan because it did not (1) include demonstrations or evaluations of primary procedures, persons, organizations, facilities, or equipment essential to implement the SSERP, (2) require or include a demonstration by onsite personnel to perform a shift change or to provide staffing for continuous 24-hour operations and (3) demonstrate the capability for early notification and instruction to the plume exposure EPZ population by testing the public notification system, and mobilization of the vehicular alert notification system (VANS), in alleged violation of the Commission's regulatory requirements. Id. at 2-5.

2/ NRC Inspection Report' No. 50-443/89-10 (Report) is appended as Exhibit 1 to Attachment A of Intervenors 2nd Motion.

For the reasons discussed below, the Staff opposes the 2nd Motion because it fails to provide an adequate basis for either JI-Onsite Ex-2 or JI-Onsite Ex-1, fails to make the requisite showing to warrant reopening the record, fails to allege a fundamental flaw, and fails to meet the five-factor balancing test for late-filed contentions.

DISCUSSION

A. The Contention Lacks Adequate Basis

1. No Basis Is Provided To Litigate The Issue Of Whether Or Not The On-site Exercise Was Comprehensive Enough To Be A Meaningful Test.

Intervenors offer no proof to show that the September 1989 off-site exercise was not "comprehensive enough to be a meaningful test." See ALAB-900, 28 NRC at 286. Intervenors attach no affidavits to their motion to make this showing. Under 10 C.F.R. § 2.734(b) affidavits must be annexed to motions to reopen a record or to admit new contentions to show a basis for facts averred. Commonwealth Edison Co. (Braidwood Nuclear Power Station Units 1 and 2), CLI-86-8, 23 NRC 241 (1986); Mississippi Power & Light, (Grand Gulf Nuclear Power Station, Unit 1), ALAB-704, 16 NRC 1725, 1730 (1982); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473, 483-84 (1989). Conclusory allegations cannot substitute for sworn affidavits based on personal knowledge.

In contrast to Intervenors' lack of affidavit support, the NRC Staff has addressed this issue and submitted affidavits of emergency planning experts that establish that the exercise was comprehensive enough to be a

meaningful test, [3/] and submits, attached to this filing, the Affidavits of Falk Kantor and Edwin Fox, Jr. [4/] Staff Response at 9-10; Kantor 2 at ¶ 7, 10; Fox Affidavit at ¶¶ 6, 8; Fox 2 at ¶ 2.

Thus, there is no basis for the averments that the on-site exercise was not broad enough to be a meaningful test.

2. The September 1989 On-Site Exercise Was Not Required To Be A Full Participation Exercise.

The Staff has previously briefed, in its October 16, 1989 response to Intervenors' original motion to add contentions relating to the September 1989 onsite exercise, the issue of why that exercise was not required to be a "full participation" exercise and incorporates those arguments herein. However, the Intervenors' proffered additional bases and new contention are again grounded on the false premise that the regulations require that the September 27, 1989 onsite exercise include a demonstration of all the onsite plan elements of a "full-participation" exercise as defined by 10 C.F.R. Part 50, Appendix E, § IV.F.1. 2nd Motion at 1-2.

Intervenors' argument fails on the very words of the provisions requiring the onsite exercise within a year before full-power licensing. That provision, 10 C.F.R. Part 50, Appendix E, § IV.F.1 provides in relevant part that:

> If the full participation exercise is conducted more than one year prior to the issuance of an operating license for full power, an exercise which tests the licensee's onsite emergency plans shall be conducted within one year before issuance of an

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3/ Since the Staff Response at 2-3 discussed the applicable regulatory requirements; that discussion is not repeated here.

4/ The Staff will refer to these affidavits as "Kantor 2" and "Fox 2" respectively.

> operating license for full power. This exercise need not have State or local government participation.

Thus, it is clear from the "plain meaning" of the quoted provision that the September 1989 onsite exercise is something other than the "full participation" exercise defined in footnote 4 to that section which requires "testing the major observable portions of the onsite and offsite emergency plans." As recognized in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290 (1988), regulatory guidance in interpreting or applying regulations is entitled to special weight where such guidance does not conflict with the regulations themselves. Here, there is no conflict with the wording of the regulation, and staff guidance and application of the regulation show that an onsite exercise conducted after the "full participation" exercise but before full power licensing need not test all major elements of an onsite plan. Regulations do not define the specific elements to be tested in a prelicensing onsite exercise, conducted after the "full participation" exercise.

However, NRC guidance provided in NUREG-0654 at 71 (Planning Standard N.1.b.) states:

> b. An exercise shall include mobilization of State and local personnel and resources adequate to verify the capability to respond to an accident scenario requiring response. . . . The scenario should be varied from year to year such that all major elements of the plans and preparedness organizations are tested within a five-year period. . . .

Further, NRC Inspection Manual, Inspection Procedure 82301, provides that licensee performance in the control room, the technical support center, the operational support center and the emergency operations facility

should be observed and evaluated. See also NRC Inspection Manual, Inspection Procedure 82302.

The affidavits submitted by Staff experts confirm the practice of following regulatory guidance in the conduct and evaluation of onsite exercises prior to issuance of a full power license conducted after the full participation exercise. Staff Response and Kantor Affidavit at ¶ 9; Kantor 2 at ¶ 3; Fox 2 at ¶¶ 2-4, 7, 8. Thus it can be seen that the onsite exercise, conducted after the "full participation" exercise did not conflict with any regulation and fully conformed to Staff guidance and practice.

Intervenors more particularly allege that (1) no PARs were prepared or implemented, (2) no field monitoring or assessment was performed, (3) no shift change or 24-hour staffing was demonstrated and the (4) public notification system was not activated. 2nd Motion Attachment A at 1-5. Intervenors conclude that the non-performance of these activities somehow, standing alone, proves their case. 2nd Motion at 6. Contrary to Intervenors' assertions, 10 C.F.R. § 50.47(b)(10) and NUREG-0654 II.J. do not require the preparation or implementation of PARs during an onsite exercise. Section 50.47(b)(10) simply sets forth standards that the onsite plan shall contain "[a] range of protective actions" and "[g]uidelines for the choice of protective actions during an emergency, consistent with Federal guidance, are developed and in place, and protective actions appropriate to the locale are developed." NUREG-0654, J.II., provides additional guidance that "Each licensee shall establish a mechanism for recommending protective actions to the appropriate State and

local authorities." Neither of these sections of the regulation nor those sections of the Staff document set any onsite exercise requirements.

On the issue of whether field monitoring teams are required to carry out monitoring procedures or activities during an onsite exercise, neither the cited regulation, 10 C.F.R. § 50.47(b)(9), nor NUREG-0654, II.I, provide requirements or guidance for testing during an onsite exercise. Staff guidance in IP 82302 provides that field monitoring be exercised once in a five year period. Fox 2 at ¶ 7.

The scenario for the onsite exercise did not call for any offsite release, Fox 2 at ¶ 6, and, therefore, no PARs or field monitoring was needed. However, during the review of the objectives and scenario consistent with the guidance in IP 82302, PARs for the states and the potential for PARs were discussed with representatives of the State of New Hampshire and the ORO, offsite authorities. Fox 2 at ¶¶ 3-4.

Intervenors' bases for JI-Onsite Ex-2 contend that a shift change, 24-hour staffing, early notification and VANS mobilization capability were not demonstrated. Regulations and Staff guidance cited by Intervenors do not support their contention that the staffing and VANs aspects of the plan must be demonstrated in an onsite exercise. To the contrary, staffing and VANs aspects of the emergency plan are separately evaluated by the NRC Staff in accordance with the NRC Inspection Manual, IP 82701 during its routine inspection program or in an Emergency Preparedness Implementation Appraisal and need not be verified through an onsite exercise. Fox 2 at ¶¶ 6-7, 9-11.

Intervenors assert that the public notification system was not tested during the September 27, 1989 onsite exercise in violation of 10 C.F.R.

§ 50.47(b)(5) and NUREG-0654. II.E. On the contrary, the demonstration of both the notification of onsite and offsite emergency responders and communications were included as an onsite exercise objective and furthermore, the NRC Staff observed and evaluated these activities. Fox 2 at ¶ 9. Activation of the Seabrook alert and notification system is the responsibility of the state and local governments and since the September 1989 exercise was not a "full participation" exercise, this aspect did not have to be tested. Fox 2 at ¶ 11. Other tests of this system are performed throughout the year including a silent test, a growl or equipment test and a complete cycle test. Id.

To demonstrate an adequate basis for their contentions, Intervenors must do more than point out that the Staff Report and the exercise scenario did not include the activities they believe should be exercised. It is incumbent of the movants to cite the regulatory requirement on which they rely and indicate why (1) the inclusion of those aspects in the onsite exercise would reveal a fundamental flaw or (2) the omission would not result in a meaningful test of the plan.

Thus, there was no basis for the averments that the scope of onsite exercise did not meet 10 C.F.R. § 2.714(b), 10 C.F.R. Part 50, Appendix E, or any other requirement. 5/

5/ The Statement of Consideration on recent amendments to the Commission Rules of Practice, 10 C.F.R. Part 2, states: "The amendments will apply only to contentions in proceedings initiated after [September 11, 1989]." 54 Fed. Reg. 33168, 3317 (August 11, 1989). Thus proceeding was initiated long before and these amendments would not seem to apply to contentions in this proceeding.

3. Intervenors Fail To Identify A Fundamental Flaw

The Appeal Board in ALAB-900 ruled that intervenors may properly challenge whether a full participation exercise was sufficient in scope to "permit a meaningful test and evaluation of the emergency plan to ascertain that the plan is fundamentally flawed." 6/ Assuming arguendo that the onsite exercise should have been broader in scope, Intervenors fail to disclose as a basis for their contentions how these presumed omissions, if included, would have revealed any fundamental flaws or what those fundamental flaws would be. For the reasons discussed above, Intervenors' contentions have failed to successfully challenge the sufficiency of the scope of the September 27, 1989 exercise.

B. Intervenors Have Not Met The Standards For Reopening

Intervenors have failed for a second time to substantively address the standards for reopening the record to admit their proffered contentions. As the Staff argued in its earlier filing, contentions on the onsite exercise may not be admitted unless Intervenors prevail on a motion to reopen the proceeding under 10 C.F.R. § 2.734 and meet the late-filing criteria of § 2.714(a)(1). See Staff Response at 8-9. The

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6/ Fundamental flaws are those exercise "deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken," Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986), and reflect "a failure of an essential element of the plan, and . . . can be remedied only through significant revision of the plan," Shoreham, ALAB-903, 28 NRC 499, 505 (1988). For example, errors arising from insufficient training do not ordinarily establish a fundamental flaw. Seabrook, ALAB-918, 29 NRC at 485-86.

discussion below evaluates the additional bases proffered by Intervenors and the second contention, JI-Onsite Ex-2, against those standards. 7/

To justify reopening, the motion must be timely, address a significant safety or environmental issue, demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially, and be accompanied by affidavits. 10 C.F.R. § 2.734. In addition, there must be evidence that there is a fundamental flaw in the emergency plan requiring a significant plan revision. 8/

While the Staff does not dispute that the motion is timely, the 2nd Motion does not allege a significant safety or environmental issue, is not supported by affidavit, and does not establish that a different result would be obtained if the information were considered. As shown by the affidavits of Falk Kantor and Edwin Fox attached to the Staff Response and the affidavits appended to this filing, the onsite exercise held at Seabrook was sufficient in scope to test the Applicants' emergency response capability. Kantor Affidavit at ¶¶ 10, 13; Fox Affidavit ¶¶ 6, 13. Inspection Report No. 50-443/89-10 which contains the Staff's evaluation of the onsite exercise, concluded that the major aspects of the

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7/ On October 26, 1989, the Staff filed an opposition to Intervenors' motion of October 16, 1989, to amend their pleadings to admit contentions on the onsite emergency exercise to discuss the standards for reopening a record. As set out in that Staff opposition, the Intervenors should not be permitted to amend their pleadings to address matters they deliberately chose not to address in those pleadings. Moreover, as set out herein, the Intervenors could not here prevail on a motion to reopen the record on matters germane to the scope of the September 1989 onsite exercise.

8/ See footnote 4.

SSRERP were tested and no weaknesses in the Applicants' emergency preparedness were identified. Report at 3, 9.

The additional bases and contention profferred by Intervenors do not constitute deficiencies in the scope of the onsite exercise. As stated previously, exercises can be held on a site area emergency in order for major portions of the response plan to be tested. Fox at ¶¶ 7-8. Protective action recommendations can be evaluated at this level of emergency. Id. at ¶ 8; Fox 2 at ¶¶ 3, 6. The Recovery Manager and state representatives discussed PARs on several occasions during the site area emergency declared for the exercise. Fox at ¶¶ 4-6. Field monitoring teams were dispatched and engaged in assessment activities. Id. at ¶ 10. Even if Intervenors were to prevail in a showing that more PAR activity should be demonstrated, or that a shift change should be demonstrated or that the VANS should have been demonstrated, 9/ any performance or equipment deficiencies that could be revealed during the exercise could be easily corrected without significant revision to the plan and thus would not constitute a fundamental flaw. See ALAB-903. The adequacy of the onsite plan was established by the 1988 full participation exercise. Kantor Affidavit at ¶ 7.

Intervenors' 2nd Motion does not allege or discuss the existence of any significant safety issue arising from not covering the specified items either in the Staff Report or within the scope of the onsite exercise scenario. In contrast, the NRC Staff has established, by uncontroverted

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9/ Mobilization and deployment of VANs are performed by the Applicant as part of the offsite plan. Applicant Ex. 42, Appendix G and Implementing Procedure 2.16.

affidavit, that there are no safety significant issues raised by Intervenors in either the additional bases or in the new contention. Kantor 2 at ¶ 6; Fox 2 at ¶ 12.

The instant motion to reopen also fails for the independent reason that it is not accompanied by affidavits as required by 10 C.F.R. § 2.734(b). Seabrook, ALAB-918, 29 NRC at 432.

In sum, Intervenors have not raised a significant safety issue which would affect the outcome of the Seabrook emergency planning proceeding and the motion to reopen should be denied on both procedural and substantive grounds.

C. Intervenors Do Not Prevail On The Standards For Late-Filing

Intervenors' failure to satisfy all of the criteria for reopening the record compels denial of the Motion. Contrary to Intervenors' novel assertion (2nd Motion at 3), that if good cause is shown for a delay in filing contentions, the other factors must be considered much more lightly, Commission regulations clearly require a balancing of the five factors of 10 C.F.R. § 2.714(a)(1). 10/ Intervenors also claim, without support, that giving weight to the other four factors, would impermissibly burden intervenors' hearing rights.

The requisite balancing of the five factors does not favor admission of the late-filed contentions and bases. Since the Staff has briefed the standards applicable to late-filed contentions (Staff Response at 11-15),

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10/ The Commission has emphasized that Boards are to demand compliance with the lateness requirements of 10 C.F.R. § 2.714. Pacific Gas & Electric Co. (Diablo Canyon Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981).

the following discussion analyzes whether the additional information meets five-factor test. That test, is:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which petitioner's interest will be represented by other parties.

(v) The extent to which petitioner's participation will broaden the issues or delay the proceeding.

The Intervenors argue that if good cause is shown the other factors in 10 C.F.R. § 2.714(a), governing the submission of late-filed contentions, "should be considered much more lightly" so as not to burden their hearing rights. 2nd Motion at 3. The Commission in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-46, 1050 (1983) held that even where good cause exists, other factors must be fully considered and fully weighed in determining whether to allow the consideration of late-filed contentions and that the application of the five factor test does not unduly burden petitioners' hearing rights. This Board earlier found a balancing of all the factors in 10 C.F.R. § 2.714(a) led to a rejection of the contention proffered even though factors i, ii and iv weighted in the Petitioner's favor. It was held that where one seeks to reopen a record more weight is given to the third and fifth factors in 10 C.F.R. § 2.714(a) governing the consideration of late-filed contentions and that the contentions should be rejected. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 51, 59, aff'd, ALAB-915, 29 NRC 427 (1989).

1. Good cause, other means and parties to protect Intervenors' interest

The first factor (good cause for the failure to file on time), the second factor (the availability of other means to protect petitioner's interest) and fourth factor (the extent to which a petitioner's interest will be represented by other parties) may weigh in favor of admission of the contention. The Commission, however, has repeatedly observed that the second and fourth factors are "accorded less weight, under established Commission precedent, than factors one, three, and five." Braidwood, supra, 23 NRC at 245; South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

2. Contribution to the development of a sound record

This factor -- the extent to which a petitioner can contribute to the development of a sound record -- is very important. When a petitioner addresses this criterion "'it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.'" Braidwood, 23 NRC at 246; Grand Gulf, ALAB-704, 16 NRC at 1730; Seabrook, ALAB-918, 29 NRC at 483-84. The movant must therefore demonstrate that it possesses "special expertise on the subjects which it seeks to raise." Braidwood, 23 NRC at 246.

Intervenors argue that no witnesses need be presented to develop a record on their contention that major portions of the onsite plan were not exercised since they present only a legal issue and the facts can be demonstrated by the inspection report and exercise scenario appended as Exhibits 1 and 2 to their pleading. 2nd Motion at 6-8. In essence, Intervenors argue that no facts are in dispute, no experts need testify

regarding the proper scope of a prelicensing onsite exercise and no record need be developed in order for the Board to rule on their contentions.

Intervenors are wrong on all counts. There is a dispute as to whether certain activities took place during the exercise and reference to the cited documents alone is not sufficient to establish all the pertinent facts. See Fox 2 at ¶¶ 4-9. Intervenors still contest whether field monitoring teams were dispatched and engaged in monitoring activities and also assert that exercise did not include preparation or implementation of protective action recommendations. 2nd Motion at Attachment A 1-2. At minimum, each of the parties would have to present evidence on these issues in order to enable to Board to resolve the factual disputes. Further, expert opinion on the adequacy of the scope of the exercise will assist in the development of a sound record in the proceeding. The failure to identify any witness to testify on whether a failure to exercise certain plan aspects during the onsite exercise would prevent a meaningful test of the plan and preclude the revelation of fundamental flaw(s) results in an incomplete record on the adequacy of the scope of the onsite exercise.

Intervenors assertion that ALAB-900 only requires that a contention state a challenge concerning whether the scope of an exercise complied with NRC regulatory requirements does not excuse their failure to make an evidentiary showing as to why the alleged omission of the plan areas they identify would conceal fundamental flaws in the SSERP. Such failure ignores the Appeal Board's subsequent ruling in ALAB-903, 28 NRC at 505, which refined the definition of a fundamental flaw. The two decisions should be read together. Thus, any record developed on exercise scope

contentions should address why the inclusion of certain elements of the plan during a prelicensing onsite exercise could reveal a fundamental flaw, i.e. the failure of a essential plan element or pervasive performance breakdown. Neither Intervenors' contentions nor the documents they rely on provide such a showing. Even if the Board were to agree that the exercise events proceeded as Intervenors allege, their failure to proffer witnesses which would explain why the alleged exercise deficiencies would preclude revelation of performance or equipment inadequacies (other than those that are readily correctable without significant plan revision) constitutes a failure to provide an adequate basis for their contentions.

In short, Intervenors miscontrue the regulatory requirements for an onsite exercise, there are disputed facts which would require presentation of witnesses, and the matters raised by Intervenors fail to constitute a sufficient basis for their contention or show they will make a meaningful contribution to the development of a sound evidentiary record. Consequently, this factor weighs heavily against admission of Intervenors' contentions. See Seabrook, ALAB-918, 29 NRC at 485-86.

3. Broadening of issues and delay to the proceeding

Admission of the contentions will both broaden the issues and delay this operating license proceeding where all that remains is for the Board to issue an initial decision resolving the matters placed in controversy by the remaining emergency planning contentions. Staff Response at 14-15. Intervenors themselves recognize such delay. See 2nd Motion at 8. Contrary to Intervenors' assertion, witnesses will be needed to fully develop a record on their contentions, particularly with respect to

disputed facts and whether the exercise was a meaningful test of the plan. Thus, hearings on new matters will likely delay the projected issuance date for the initial decision on the 1988 exercise and divert the Board's attention from resolving those issues. Thus, this factor weighs heavily against the Motion.

In sum, the third and most important factor in the context of reopening, the development of a sound record, and the fifth factor, delay and broadening of the proceeding, weigh heavily against the admission of the Contention. Consequently, a balancing of the five factors weighs on the whole against admission of the Contention.

IV. CONCLUSION

For the reasons stated above, Intervenors' motion to admit additional bases and a new contention on the onsite exercise should be denied.

Respectfully submitted,

Elaine I. Chan

Elaine I. Chan
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of October 1989.