

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )

CONSOLIDATED EDISON COMPANY )  
OF NEW YORK (Indian Point, Unit 2 )

POWER AUTHORITY OF THE STATE OF )  
NEW YORK (Indian Point, Unit 3) )

Docket Nos. 50-247-SP  
50-286-SP



NRC STAFF RESPONSE TO LICENSEE'S MOTION FOR  
DIRECTED CERTIFICATION

Janice E. Moore  
Counsel for NRC Staff

May 10, 1982

DESIGNATED ORIGINAL

Certified By [Signature]

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NRC STAFF RESPONSE TO LICENSEE'S MOTION FOR  
DIRECTED CERTIFICATION

I. INTRODUCTION

On April 20, 1982, the Power Authority of the State of New York (The Authority) filed a document entitled, "Licensee's Motion for Directed Certification of Motion For a Stay of Commission's Orders of January 8, 1981 and September 18, 1981 or for Dismissal of this Proceeding or, in the Alternative, for Certification to the Commission" (hereinafter Motion for Directed Certification). The Authority is the Licensee of Indian Point Unit 3. In its motion the Authority has requested certification of the issues raised in the motion for a stay or dismissal of this proceeding, which the Authority filed on November 25, 1981 before the Atomic Safety and Licensing Board (Licensing Board) established to preside over this proceeding.<sup>1/</sup>

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<sup>1/</sup> That original motion was also joined by Consolidated Edison Co. of New York, Inc. (Con Edison), Licensee of Indian Point Unit 2. However, Con Edison has not joined in the motion for directed certification filed by the Authority on April 20, 1982.

The Staff opposes the Authority's motion for directed certification on the ground that the questions raised in the Authority's original motion do not satisfy the standards for directed certification. The Staff's reasons for this conclusion are set forth below.

## II. STATEMENT OF THE CASE

On November 25, 1981, the Authority and Con Edison filed "Licensees' Motion for a Stay of Commission's Orders of January 8, 1981 and September 18, 1981 or for Dismissal of this Proceeding or, in the Alternative, for Certification to the Commission" (hereinafter Motion for Stay) with the Licensing Board. The Licensees requested that the special investigatory proceeding ordered by the Commission in Orders dated January 8 and September 18, 1981, be either stayed pending completion of certain presently scheduled or proposed generic proceedings or that this proceeding be dismissed. Motion for Stay at 1. In the alternative, they requested that the issues raised in their motion be certified to the Commission pursuant to 10 C.F.R. § 2.718(i) of the Commission's regulations. Id. at 1-2. As grounds for these requests Licensees put forward a number of arguments based on various Amendments to the United States Constitution.<sup>2/</sup>

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<sup>2/</sup> The specified grounds for these requests are as follows:

- (1) commencement of an adjudicatory proceeding prior to completion of ongoing proceedings to establish generic standards constitutes a denial to licensees of procedural due process;
- (2) principles of res judicata and collateral estoppel bar reconsideration of the physical and population characteristics of the Indian Point sites;

At a Special Prehearing Conference held on December 2, 1981, the Licensing Board requested briefs from the parties and petitioners on the question of whether the Licensing Board had the authority to stay this proceeding. Tr. 86-93, 153. Briefs were filed on the Board's question by the Staff, the Attorney General of the State of New York and UCS/NYPIRG. The Staff in its response argued that the Licensing Board lacked the authority to stay or dismiss this proceeding, and also argued that the questions raised by Licensees need not be certified to the Commission.<sup>3/</sup>

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2/ FOOTNOTE CONTINUED FROM PRECEDING PAGE

- (3) the Commission's failure to adhere to its existing siting criteria constitutes action which is arbitrary, capricious, an abuse of discretion, and a deprivation of property without due process of law; (a) the siting criteria are violated by the Commission's January Order; (b) the application of existing siting criteria to existing plants has been ratified by Congress; and (c) the retroactive application of new siting standards would violate the due process clause;
- (4) the Constitution requires that the Commission establish compelling reasons to justify a shutdown of Indian Point;
- (5) an adverse ruling from a readjudication of the Indian Point site would result in an impairment of contract and a taking of property without just compensation guaranteed by the fifth amendment; and
- (6) the Commission lacks jurisdiction to conduct the hybrid investigatory-adjudicatory proceeding which constitutes an unconstitutional singling out of the Indian Point licensees.

"Licensees' Memorandum of Law in Support of Motion for a Stay of Commission's Orders of January 8, 1981 and September 18, 1981 or for Dismissal of this Proceeding or, in the Alternative, for Certification to the Commission" (hereinafter Stay Memorandum of Law).

- 3/ "NRC Staff Response Concerning the Board's Authority to Stay or Dismiss this Proceeding and Opposition to Certification of Licensees' Stay Request," dated December 18, 1981.

In an Order dated March 29, 1982, the Licensing Board held that it lacked the authority to stay this proceeding. The Licensing Board also found that there was no compelling reason to certify a question to the Commission.<sup>4/</sup> Therefore, the Licensing Board denied Licensees' Motion for a Stay. The Authority now requests that the Commission direct certification of the issues raised in its Motion for a Stay filed before the Licensing Board. Motion for Directed Certification at 1-2.

### III. QUESTIONS FOR DIRECTED CERTIFICATION

It is difficult to ascertain from the Authority's filing exactly what questions it wishes the Commission to consider through directed certification. Since the Authority has failed to set forth specifically the questions to be certified, the Staff is forced to speculate as to their exact nature.<sup>5/</sup> It is the Staff's conclusion that there are two main questions which the Authority wishes to have considered. They are as follows:

1. Whether the above-captioned proceeding should be stayed pending completion of certain presently scheduled and proposed

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<sup>4/</sup> "Memorandum and Order (Ruling on Licensees' Motion for Stay of Commission's Orders of January 8, 1981 and September 18, 1981)," dated March 29, 1982 (hereinafter Stay Order) at 5-6.

<sup>5/</sup> If the Commission determines that there is some question in the Authority's motion which warrants directed certification, the Staff requests the Commission to identify the specific question and establish a suitable briefing schedule.



generic proceedings or should be dismissed in its entirety;<sup>6/</sup> and

2. Whether the Licensing Board erred in finding that it lacked the authority to stay the above-captioned proceeding.

#### IV. ARGUMENT

A. The Standards for Directed Certification Advocated by the Authority are Inappropriate.

Directed certification is sought by the Authority pursuant to 10 C.F.R. § 2.718(i) of the Commission's regulations. That section states:

A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. He has all power necessary to those ends, including the powers to:

\* \* \* \* \*

(i) certify questions to the Commission for its determination, either in his discretion or on direction of the Commission.

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<sup>6/</sup> In its motion for directed certification the Authority lists a number of issues which, it claims, are raised by its original motion before the Licensing Board. An examination of that original motion indicates that they were not exactly the issues raised by that motion, but rather were the grounds for the broader requests contained in that motion. These grounds are set forth in n.2, supra.

Section 2.718(i) of the Commission's regulations does not contain any standards to be used in determining whether or not directed certification requests should be granted, or for a Licensing Board to use in judging whether to certify a question to the Commission. However, guidance is provided by Section V(f)(4) of Appendix A to 10 C.F.R. Part 2.

Section V(f)(4) states:

A question may be certified to the Commission or the Appeal Board, as appropriate, for determination when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when the prompt and final decision of the question is important for the protection of the public interest, or to avoid undue delay or serious prejudice to the interests of a party.

Appendix A to 10 C.F.R. Part 2, Section V(f)(4). This standard was applied by the Licensing Board in this proceeding when it determined that certification of the question of whether this proceeding should be stayed to the Commission was unnecessary. Stay Order at 5-6. Indeed, the Licensing Board, using the words of the Appeal Board in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-211, 7 AEC 982, 984 (1974), found that there was "no compelling reason" for the certification of any question to the Commission.

The Authority argues that a less stringent standard for directed certification is appropriate. The Authority relies on the Appeal Board's decision in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975) to argue that the standard to be used for directed certification is "... failing a certification, the public interest will suffer or unusual delay or

expense will be encountered." Licensee's Memorandum of Law in Support of Motion for Directed Certification of Motion for a Stay of Commission's Orders of January 8, 1981 and September 18, 1981 or, in the Alternative, for Certification to the Commission dated April 20, 1982 at 2 (hereinafter Directed Certification Memorandum of Law).<sup>7/</sup> The Authority also argues that the Staff's previous position before the Licensing Board setting forth the more stringent standard of Section V(f)(4) of Appendix A to 10 C.F.R. Part 2 has not been adopted by the Appeal Board. Id. at 2 n.1. Both of these arguments are without merit.

The case relied upon by the Authority for its suggested standard does not reflect either agency practice or the situation existing in the case at bar. In Seabrook the Appeal Board was deciding whether to direct certification of a question raised before and ruled upon by a Licensing Board in the context of an ongoing proceeding. Seabrook, ALAB-271, supra at 480-81. The Appeal Board in Seabrook stated "We believe, then, that, at the very minimum, a party asking that we invoke our Section 2.718(i) authority must establish that a referral would have

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<sup>7/</sup> This standard is the same as that found in 10 C.F.R. § 2.730(f) of the Commission's regulations for referral to the Commission of Licensing Board rulings. Section 2.730(f) states, in pertinent part:

. . . When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission . . .

been proper. . . " Id. at 483.<sup>8/</sup> Since Seabrook the Appeal Board has expanded somewhat on the standards for granting interlocutory review by the use of its certification authority. The Appeal Board has noted that it has only engaged in interlocutory review either by directed certification or acceptance of referrals "where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive and unusual manner." Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station), ALAB-405, 5 NRC 1190, 1192 (1977). In view of the above-cited decisions, the Authority's suggestion that the standard set forth in 10 C.F.R. § 2.730(f) is the appropriate standard for directed certification ignores the present practices of this agency's adjudicatory tribunals.

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<sup>8/</sup> In addition the Authority argues that in Seabrook, ALAB-271, supra, the Appeal Board refused to adopt the Staff's argument that a stringent standard for directed certification should be applied. Directed Certification Memorandum of Law at 2 n.1. This case is inapposite. In Seabrook the Appeal Board stated that the Applicant had failed to make the threshold showing that a referral pursuant to 10 C.F.R. § 2.730(f) would have been proper. For that reason, the Appeal Board indicated that it need not reach the question of whether a more stringent standard for directed certification should be applied. The Appeal Board stated:

Since, as will be seen, these applicants have not made this showing, we need not decide here whether, as the staff suggests, a more stringent standard must be satisfied in order to justify a Section 2.718(i) certification.

Seabrook, ALAB-271, supra at 483 n.12. There is a vast difference between an Appeal Board's statement that it need not reach an issue, and an affirmative statement by an Appeal Board that it would not accept an argument offered to it. The Authority has chosen to ignore that difference.

In addition, the proceeding in question here is not before the Appeal Board. The Authority is asking the Commission itself to disrupt a proceeding ordered by the Commission by directing certification of the Authority's complaints. The Commission in its regulations has recognized that a particular standard must be met before certification of questions to it is warranted. See 10 C.F.R. § 2.785(d). As the Appeal Board has recognized, such a mechanism for bringing questions before the Commission should be used sparingly. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978). The Appeal Board has, in the past, refused to certify questions unless there is a compelling reason to do so. Vermont Yankee, ALAB-211, supra at 984. The Commission itself has encouraged certification only in rare instances. One instance involved a situation where the Commission stated "certifications are encouraged where Boards are in doubt as to the Commission's intentions in approving NUREG-0737." Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses, CLI-80-42, 12 NRC 654, 660 (1980). That is not the case here. There is no doubt in the case at bar of the Commission's intentions regarding the conduct of this special investigatory proceeding. The Commission has made it abundantly clear that it wishes a proceeding to be conducted in an expeditious manner concerning the risk of the Indian Point facilities. See, Consolidated Edison Co. of New York, Inc. (Indian Point, Unit 2) and the Power Authority of the State of New York (Indian Point, Unit 3), CLI-81-1, 13 NRC 1 (1981), revised, CLI-81-23, 14 NRC 610 (1981); Consolidated Edison Co. of New York Inc. (Indian Point, Unit 2), and the Power Authority of the State of New York (Indian Point, Unit 3), Unpublished Order dated May 30, 1980 (hereinafter May 30, 1980 Order).

For the foregoing reasons, the standard to be applied in judging the merits of the Authority's motion for directed certification should be whether the motion presents a major or novel question of policy, law or procedure which cannot be resolved except by the Commission and whether the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interests of a party. The Authority's motion does not meet this standard, and, therefore, should not be granted by the Commission.

B. The Question of Whether this Proceeding Should be Stayed or Dismissed is Not a Major or Novel Question of Policy, Law or Procedure Warranting Directed Certification

On February 11, 1980, the Director of the Office of Nuclear Reactor Regulation (NRR) issued a decision granting in part and denying in part a petition filed by the Union of Concerned Scientists that called for the decommissioning of Indian Point Unit 1 and the shutdown of Units 2 and 3. Consolidated Edison Co. of New York, Inc. (Indian Point Units 1 and 2) and the Power Authority of the State of New York (Indian Point, Unit No. 3), DD-80-5, 11 NRC 351 (1980). On February 22, 1980, a Commission notice was published in the Federal Register soliciting public comments, both on the merits of the Director's Decision and on the procedural form which any further Commission action on the petition should take. 45 Fed. Reg. 11969 (February 22, 1980). The Authority provided its comments in response to this notice on March 10, 1980.<sup>9/</sup> The Authority indicated that Commission review of the Director's Decision was unwarranted. Id. at 2.

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<sup>9/</sup> "Comments of Power Authority of the State of New York," dated March 10, 1980.

On May 30, 1980, the Commission issued an unpublished order in which it stated, among other things, that an adjudicatory proceeding regarding the Indian Point units was to be conducted before an Atomic Safety and Licensing Board.<sup>10/</sup> May 30, 1980 Order at 3-4. The Commission in reaching its decision weighed carefully the original UCS petition, the Director's Decision and the public comments received. See May 30, 1980 Order at 2. As part of the informal proceeding mentioned in that order, the Commission once again solicited public comments. This time the comments were for the purpose of aiding in shaping the discretionary adjudicatory proceeding. Id. at 2. A number of such public comments were filed by various persons, including comments by both Con Edison and the Authority.<sup>11/</sup> In its memorandum Licensees' alluded to the generic nature of many of the questions posed by the Commission in its May 30, 1980 Order and asserted a need for reconsideration of the provisions of that order. Id. at 9.

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<sup>10/</sup> The Commission also ordered:

. . . (B) an informal proceeding, to begin at once, for the purpose of determining, on an expedited basis, the issues which the adjudicatory proceeding is to address, and the criteria to be used for the ultimate decision in that proceeding; (C) generic consideration of the question of operation of reactors in areas of high population density; and (D) the establishment of an intra-agency task force to review available data, including the comments already received, and present the Commission with all relevant information so that the Commission itself can decide the status of the Indian Point 2 and 3 reactors during the pendency of the adjudication . . .

May 30, 1980 Order at 2.

<sup>11/</sup> "Licensees' Informal Proceeding Memorandum in Response to the Commission's Order of May 30, 1980," dated June 20, 1980.



In addition, on July 25, 1980, Con Edison and the Authority filed a joint motion for reconsideration of that portion of the May 30, 1980 Order which established the adjudicatory proceeding.<sup>12/</sup> In their motion the Licensees argued that there is no "rational policy basis" for singling out Indian Point for adjudicatory hearings. Id. at 10. They also argued that imminent hearings relating solely to Indian Point are unnecessary since these facilities have already been the subject of extensive agency proceedings. Id. at 11. In its Order of January 8, 1981, the Commission denied Licensees' motion for reconsideration on the ground that the Task Force report<sup>13/</sup> relied upon by Licensees for their motion was not meant to be a definitive assessment of the risks posed by the Indian Point Units. The Commission stated:

. . . we will not turn a decision on interim operation into a final decision on the long-term acceptability on the indian Point site.

Indian Point, CLI-81-1, supra at 5. The Commission noted that the Task Force report would be tested in the adjudicatory proceeding and that parties would have an opportunity to present additional evidence. Id.

The Authority now argues that the question of stay or dismissal of this proceeding is a novel question which has not been considered before, since the Constitutional arguments they now raise in support of

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<sup>12/</sup> "Licensees' Motion for Reconsideration of that Portion of the Commission's Order of May 30, 1980 Which Directs Adjudicatory Hearings," dated July 25, 1980.

<sup>13/</sup> In the May 30, 1980 Order the Commission created an intra-agency Task Force to evaluate information and present the Commission with data which would allow it to decide the status of the Indian Point units during the pendency of the adjudicatory proceeding. The Task Force made its report to the Commission by written report SECY-80-283 on June 12, 1980. This Task Force report was later published as NUREG-0715 in August 1980.



this question were not raised before. Directed Certification Memorandum of Law at 8. This argument is without merit.

What the Authority is actually requesting in this motion for directed certification is that the Commission reconsider the actions it took in January and September of 1981. However, the actions taken in those two orders do not differ from the action outlined in the Order of May 30, 1980. As the Commission noted in its January 8, 1981 Order, "In making this decision, we considered the positions taken by the many commentors." Indian Point, CLI-81-1, supra at 3. Those orders merely provide more detail as to how the adjudicatory proceeding established in the May 30, 1980 Order is to be conducted. For example, the questions to be considered in this proceeding do not vary significantly among the three orders. Therefore, the question of staying this proceeding or dismissing it entirely has already been weighed by the Commission, and dealt with both explicitly and implicitly. The Authority's attempt now to try once again to persuade the Commission to reconsider its previous actions does not raise a novel question of policy, law or procedure warranting directed certification.

In addition, the Authority's argument at this time that certain of its constitutional rights are being violated by the Commission is premature. The Licensing Board is empowered to make recommendations to the Commission. Indian Point, CLI-81-1, supra at 5 n.4, revised, CLI-81-23, supra at 611. It is for the Commission to decide whether any further action must be taken with regard to the Indian Point facilities. It is when that action is taken by the Commission that the Authority should raise its complaints concerning the propriety of the Commission's actions

if that action adversely affects the Authority. Right now the Commission has merely established a vehicle for the gathering of reliable information concerning the Indian Point facilities consistent with its authority under Section 161 of the Atomic Energy Act of 1954, as amended. 42 U.S.C. § 2201.<sup>14/</sup> Moreover, the Atomic Energy Act, as an Act of Congress, is entitled to a presumption of constitutionality. Mathew v. DeCastro, 429 U.S. 181, 185 (1976).

For the reasons stated above, consideration of the Authority's complaints about the Commission's action in ordering this proceeding is premature. If the Commission takes further action with regard to Indian Point Unit 3, it is then that the Authority should challenge the Commission's action. Therefore, the Authority's motion for directed certification of whether this proceeding should be stayed or dismissed should not be granted by the Commission.

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14/ Section 161 states, in pertinent part:

Sec. 161. General Provisions. - In the performance of its functions the Commission is authorized to -

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c. make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder.

C. The Question of Whether the Licensing Board Erred in Determining that it Lacked the Authority to Stay this Proceeding is Not a Major or Novel Question of Policy, Law or Procedure Warranting Directed Certification

The Authority argues that the Licensing Board erred in determining that it lacks the authority to stay this proceeding. Directed Certification Memorandum of Law at 8-10. This issue does not meet the standard for directed certification. It is not a major question of policy, law or procedure. See discussion supra at 7-10.

In any event, the Licensing Board was correct in its determination that it lacked the authority to grant the requested relief. In its Order of March 29, 1982, the Licensing Board found that it lacked the authority to stay the proceeding since the Commission had ordered the Board to conduct the proceeding. Stay Order at 5. The Licensing Board found that the Commission had not delegated to it the power to grant the requested stay. Id. at 4.

A Licensing Board possesses only that authority delegated to it by the Commission. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976); see Exxon Nuclear Company, Inc. (Nuclear Fuel Recovery and Recycling Center), ALAB-425, 6 NRC 199, 204 (1977). Licensing Boards must adhere to Commission precedent. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 465 (1980). As indicated in the NRC Manual, Licensing Boards have been delegated the authority to ". . . conduct such hearings as the Commission may authorize or direct, make such intermediate or final decisions as the Commission may authorize in proceedings to grant, suspend, revoke, or amend licenses or authorizations, and perform such other regulatory

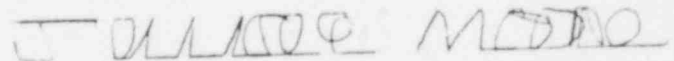
functions as the Commission deems appropriate." NRC Manual Chapter 0106-022. In this case the Commission decided that this Licensing Board should conduct a hearing to gather facts and make recommendations to the Commission on the question of whether the Indian Point units should be shut down or other action taken. Indian Point, CLI-81-1, supra at 5-6.

It is clear from the Commission's Orders of January 8 and September 18, 1981, that the Commission delegated to this Licensing Board the authority to conduct a proceeding and to present recommendations to the Commission.<sup>15/</sup> There is no doubt as to the Commission's intent on this matter. Therefore, the Licensing Board is obligated to follow the Commission's Orders, and there is no major question of policy, law or procedure warranting directed certification to the Commission. For the above reasons, the motion for directed certification of this question should be denied.

V. CONCLUSION

For the reasons set forth above the Staff concludes that the Authority's motion for directed certification should be denied in its entirety.

Respectfully submitted,



Janice E. Moore  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 10th day of May, 1982

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<sup>15/</sup> The Commission indicated it "would like to receive the Board's recommendations no later than one year from the date of this Order." Indian Point, CLI-81-23, supra at 613. That date would be September 18, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LICENSEE'S MOTION FOR DIRECTED CERTIFICATION" 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 10th day of May, 1982.

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