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FEDERAL REGISTER NOTICE

NUCLEAR REGULATORY COMMISSION

FINAL SUBAGREEMENT PERTAINING TO STATE RESIDENT ENGINEERS

BETWEEN NRC AND THE STATE OF ILLINOIS

AGENCY: Nuclear Regulatory Commission

ACTION: Publication of Subagreement No. 3 between NRC and the State of Illinois

SUMMARY: Section 274i of the Atomic Energy Act of 1954, as amended, allows the Nuclear Regulatory Commission (NRC or Commission) to enter into an agreement with a State "to perform inspections or other functions on a cooperative basis as the Commission deems appropriate." This Section 274i agreement, typically in the form of a Memorandum of Understanding (MOU), differs from an agreement between NRC and a State under the "Agreement State" program; the latter is accomplished only by entering into an agreement under Section 274b. of the Atomic Energy Act. A State can enter into a Section 274i MOU whether or not it has a Section 274b. agreement.

In April of 1984, NRC and the State of Illinois signed an "umbrella" MOU, providing principles of cooperation between the State and NRC in areas of concern to both.

In June of 1984, NRC and the State of Illinois signed Subagreement No. 1 which provided the basis for mutually agreeable procedures whereby the

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State may perform inspection functions for and on behalf of the Commission at certain reactor and materials licensees' facilities which generate low-level radioactive waste.

On June 7, 1990, following signature by NRC and the Illinois Department of Nuclear Safety, NRC published Subagreement No. 2 (55 FR 23317) regarding ASME Code inspections with the State of Illinois.

In Subagreement No. 3, NRC and the Illinois Department of Nuclear Safety (IDNS) seek to allow Illinois Resident Engineers to participate in NRC inspections at nuclear power plants in Illinois. This Subagreement is one of the first to be signed under the NRC's policy regarding "Cooperation With States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities" (54 FR 7530; 2/22/89). As stated in the policy, "The NRC will consider State proposals to enter into instruments of cooperation for State participation in NRC inspection activities when these programs have provisions to ensure close cooperation with NRC."

Analysis: On March 27, 1990, the proposed Subagreement Pertaining to State Resident Engineers Between NRC and the State of Illinois was published in the Federal Register for public comment, at 55 FR 11275. One set of comments was received from Commonwealth Edison Co. (CECo). The comments are addressed individually, as follows:

Comment: CECO should be allowed to express its views formally on whether a particular meeting or inspection will involve sensitive matters. Sections VI.C.8 and VI.D.3 establish the NRC's discretion to determine whether the Senior Resident Engineer may attend certain meetings with CECO or participate in certain inspections of its activities. One factor in the exercise of that discretion is the potentially sensitive nature of the subject, meeting or inspection. To ensure that the potential for sensitivity is fully appreciated, CECO should be given a formal opportunity to express its views on whether a particular meeting or inspection will involve sensitive matters.

Response: The Subagreement provides that the State recognize that there may be occasions when, because of the sensitive nature of certain inspections and meetings, it will be necessary for the NRC, at its discretion, to conduct such activities privately and separately. The Subagreement does not preclude the licensee from communicating its opinion on these matters to the NRC.

Correction to Section VI.C.13 - CECO states that the last sentence of Section VI. C. 13. should read, "NRC will forward the report to the licensee with a cover letter discussing the issues, if any, that the NRC believes warrant action by the licensee." The words "the report to the licensee with" were inadvertently omitted from the Federal Register Notice. The comment is accepted, and the text of the Subagreement has been changed.

Comment: NRC, IDNS and CECO should work together to agree on which IDNS issues warrant CECO action. Section VI.C.13 would require IDNS to submit all written communications concerning CECO inspection activity to the NRC. The NRC will review those communications and inform CECO as to which issues the NRC believes warrant action by CECO. CECO believes that a more efficient process would result if the NRC, IDNS and CECO would work together to agree on which IDNS issues warranted CECO action.

Response: The Subagreement specifically indicates that State activities will be performed in accordance with Federal standards and requirements and NRC practices. Also consistent with NRC's Policy Statement on Cooperation With States at Commercial Nuclear Power Plants and Other Production or Utilization Facilities, the Subagreement specifically states that nothing in this agreement confers upon the State or the State Resident Engineer authority to: (1) interpret or modify NRC regulations and NRC requirements imposed on the licensee; (2) take enforcement actions; (3) issue confirmatory letters; (4) amend, modify, or revoke a license issued by NRC; and (5) direct or recommend nuclear power plant employees to take or not to take any action. Authority for all such actions is reserved exclusively to the NRC. Clearly there is no option for a collaborative process in interpreting or imposing NRC requirements on a licensee.

Comment: Differences in Freedom of Information Acts. Sections VI.D.5 and VI.D.6 imply that IDNS will apply the Illinois Freedom of Information Act (IFOIA) to the fullest extent possible to protect sensitive and

proprietary information just as the NRC applies the Federal Freedom of Information Act (FOIA). It is not clear that IFOIA provides the same level of protection as FOIA. There are far fewer judicial interpretations of IFOIA than of FOIA; Illinois judges may take a broader view of the public's right to know than have federal judges. Therefore, greater protection would be provided if IDNS had unlimited access to information covered by the Subagreement but did not physically retain any information which IFOIA could not clearly protect from unwarranted public disclosure.

Response: In practice, CECO must identify any proprietary or sensitive information submitted to the NRC which it wishes to have withheld from public disclosure(10 CFR 2.790(b)(1)). Any information so submitted and determined to be protected from public disclosure under the criteria in 10 CFR 2.790 is accorded protection from disclosure to the full extent of FOIA and NRC regulations. If such information is shared with the State under Illinois Subagreement No. 3, it should still be protected from disclosure to the same extent as it would be at the NRC. Therefore, if the IFOIA provided less protection than FOIA, the NRC would be concerned regarding a method of providing an equal level of protection for the documents provided to the State under this Subagreement.

However, CECO does not specifically contend that IFOIA provides less protection to sensitive or proprietary information than FOIA. Indeed, a facial comparison shows that IFOIA seems to provide a similar level of protection to that afforded by FOIA. Additionally, in paragraph VI.D.5. of proposed Illinois Subagreement No. 3, the State agrees to conform its

practices regarding information disclosure to those of the NRC. In paragraph VI.D.6., the State and NRC agree to consult with each other before releasing sensitive or proprietary information related to this Subagreement. IFOIA and these provisions would appear likely to provide protection. At this time it is impossible to predict with complete confidence how Illinois will interpret and implement this Subagreement and the relevant IFOIA provisions. However, the NRC-State consultations pursuant to Paragraph VI.D.6. should insure that the NRC is aware of Illinois practices and procedures in releasing information. If additional protective measures are required, they can be tailored to address the specific requirements of the situation.

Comment: Consultation. Section VI.D.6 also would require IDNS and the NRC to consult with each other before releasing sensitive or proprietary information related to this Subagreement. To ensure that the sensitivity of particular information is fully appreciated, CECO should have an opportunity to participate in the consultation before a final decision to release information is made. Moreover, any disagreements over release should be resolved in accordance with the dispute resolution provisions set forth in Section VIII.

Response: The release of sensitive or proprietary information in this situation is governed by the FOIA, NRC related regulations, and IFOIA. If CECO is concerned about the release of sensitive or proprietary information, CECO must first be certain that any such information is submitted pursuant to the regulations contained in 10 CFR 2.790. This

information, if it has been properly submitted to the NRC and determined to be properly withheld from disclosure, should be protected by operation of these statutes and regulations, and also by the consultation process between the State and NRC (pursuant to paragraph VI.D.6.). CECO's participation in the process would be unworkable and inconsistent with the NRC's and the State's conduct of their own procedures, which are governed by the applicable statutes and regulations.

Comment: Regulatory Confusion. CECO expressed concern that the addition of another regulatory observer may create confusion and administrative burdens for plant management.

Response: Both the Subagreement and the Commission's Policy Statement on Cooperation With States reflect that State activities must be conducted in accordance with Federal standards and requirements and NRC practices, with no undue burden on the NRC or its licensees.

Comment: Recommendation to Monitor Implementation. CECO strongly recommends that NRC monitor implementation of the Subagreement.

Response: The NRC has provided a number of controls in the Subagreement so that it can be confident in the State Resident Inspector's ability to perform inspections, is aware of and has accounted for the inspections planned by the State, and communicates with the licensee on all follow-up actions and enforcement. It is intended that there will be communication between NRC and State staff members on day-to-day activities. Further,

the Subagreement requires a formal review, not less than six months after the effective date, to be performed by the NRC to evaluate implementation of the Subagreement and resolve any problems identified. In addition, periodic reviews are called for thereafter.

Conclusion: After careful consideration of the comments submitted, the Commission has determined to approve Subagreement No. 3 Pertaining to State Resident Engineers Between the U.S. Nuclear Regulatory Commission and the State of Illinois. Certain minor editorial changes to the text of the Subagreement have been made, including the change to section VI.C.13 discussed in the NRC response to comments.

FOR FURTHER INFORMATION CONTACT: Frederick C. Combs, Assistant Director of State, Local and Indian Relations, State Programs, Office of Governmental and Public Affairs, U.S. Nuclear Regulatory Commission, Washington D.C. 20555, telephone (301) 492-0325.

Dated at Rockville, MD this *10th* day of *December* 1990.

FOR THE NUCLEAR REGULATORY COMMISSION



Carlton Kammerer, Director
State Programs
Office of Governmental and
Public Affairs

SUBAGREEMENT NO. 3
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1. Authority

The U. S. Nuclear Regulatory Commission (NRC) and the State of Illinois (State) enter into this Subagreement under the authority of the Memorandum of Understanding (MOU) dated April 27, 1989, between NRC and the State, Section 274i of the Atomic Energy Act of 1954, as amended, and Section 4 of the Illinois Nuclear Facility Safety Act.

The State recognizes the Federal Government, primarily the NRC, as having the exclusive authority and responsibility to regulate the radiological and national security aspects of the construction and operation of nuclear production or utilization facilities, except for certain authority over air emissions granted to States by the Clean Air Act.

11. Background

- A. The Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, authorize the NRC to license and regulate, among other activities, the manufacture, construction, and operation of utilization facilities (nuclear power plants) in order to assure the common defense and security and to protect the public health and safety. Under these statutes, NRC is the responsible agency regulating nuclear power plant safety.
- B. NRC believes that its mission to protect the public health and safety can be served by a policy of cooperation with State governments and has formally adopted a policy statement on "Cooperation with States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities" (54 FR 7530, February 22, 1989). The policy statement provides that NRC will consider State proposals to enter into instruments of cooperation for State participation in NRC inspection activities when these programs have provisions to ensure close cooperation with NRC. NRC will only consider State proposals for instruments of cooperation to conduct inspection programs of NRC-regulated activities that provide for close cooperation with, and oversight by, the NRC.
- C. NRC fulfills its statutory mandate to regulate nuclear power plant safety by, among other things, conducting safety inspections of nuclear power plants to assure that the plants are designed, constructed, tested, maintained, operated, and decommissioned in accordance with NRC regulatory requirements.

The NRC operating reactor inspection program is conducted by Headquarters personnel, region-based inspectors, and Resident Inspectors. NRC Resident Inspectors are located at each nuclear power plant site. Resident Inspectors provide the major onsite NRC presence for direct observation and verification of licensee activities. The NRC Resident Inspector also acts as the primary onsite evaluator for the NRC inspection effort related to such items as Licensee Event Reports, events, and incidents. NRC Resident Inspectors also interact with local officials, the press, and the public.

- D. This Subagreement is intended to be consistent with and implement the provisions of the NRC's policy statement on "Cooperation with States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities" (54 FR 7530, February 22, 1989) which relates to State proposals to enter into instruments of cooperation with the NRC concerning State participation in NRC inspections at operating commercial nuclear power plants.

III Scope

- A. This Subagreement defines the way in which NRC and the State, with the assistance of State Resident Engineers, will cooperate in planning and conducting inspections of nuclear power plants in the State to ensure compliance with NRC regulations. This Subagreement does not apply to investigations or inquiries conducted by NRC.
- B. For the purpose of this Subagreement, inspection is defined as the examination, review, or evaluation of any program or activity of a licensee to determine the effectiveness of the program or activity in ensuring that the health and safety of the public and plant personnel are adequately protected and that the facility is operated safely; and to determine compliance with any applicable NRC rule, order, regulation, or license condition pursuant to the Atomic Energy Act of 1954, as amended, and commitments made to NRC.
- C. Nothing in this Subagreement is intended to restrict or expand the statutory authority of NRC or the State or to affect or otherwise alter the terms of any agreement in effect under the authority of Section 274b of the Atomic Energy Act of 1954, as amended; nor is anything in this Subagreement intended to restrict or expand the authority of the State on matters not within the scope of this Subagreement.
- D. Nothing in this Subagreement confers upon the State or State Resident Engineers authority to (1) interpret or modify NRC regulations and NRC requirements imposed on the licensee; (2) take enforcement actions; (3) issue confirmatory letters; (4) amend, modify, or revoke a license issued by NRC; and (5) direct

or recommend nuclear power plant employees to take or not to take any action. Authority for all such actions is reserved exclusively to the NRC.

- E. Under this Subagreement, one State Resident Engineer may be assigned to each nuclear power plant site in the State.

IV. NRC's General Responsibilities

NRC is responsible for conducting safety inspections of nuclear power plants to ensure that the plants are designed, constructed, tested, operated, maintained, and decommissioned in accordance with NRC regulatory requirements. These inspections are conducted in accordance with the NRC Inspection Manual using personnel appropriately qualified and trained to perform the necessary tasks. Only the NRC may take appropriate enforcement actions for all inspections conducted under this Subagreement.

V. The State's General Responsibilities

- A. The State, through its State Resident Engineer, will cooperate with NRC in performing safety inspections. Such inspections shall be conducted in accordance with NRC regulatory requirements and procedures governing operating nuclear power plants in the State and under the oversight of an authorized NRC representative.
- B. The State will cooperate with the NRC in such inspections as necessary for the NRC to ensure that power reactors in the State continue to be operated without undue risk to the public health and safety and the environment.
- C. State activities will be performed in accordance with Federal standards and requirements and NRC practices, with no undue burden on the NRC or its licensees.

VI. Implementation

The State and NRC agree to work in concert to assure that the following staffing, training, inspection and enforcement, communications and information exchange, and conflict resolution protocol regarding the State Resident Engineer Program are followed.

A. Staffing

1. The State will select its State Resident Engineers in accordance with its own procedures and qualifications, patterned after those for NRC Resident Inspectors.
2. State Resident Engineers will have education and experience equivalent to that required for an NRC Resident Inspector.

3. The State is responsible for obtaining security clearances for State Resident Engineers that are acceptable to the nuclear power plant licensee.
4. The State is responsible for ensuring that State Resident Engineers comply with all requirements established by the nuclear power plant licensee, including fitness for duty, site access, and onsite space and support. NRC is not responsible for ensuring access or space for State personnel.
5. The State will certify to NRC that each State Resident Engineer has no financial or other interests that may call into question his or her objectivity or that create a conflict of interest or the appearance of a conflict of interest.

B. Training

1. State Resident Engineers performing inspection functions will be qualified and certified by the State in accordance with the NRC Inspection Manual or its equivalent. Such qualification and certification will be made for each inspection activity in which a State Resident Engineer will participate, such as:
 - Reactor operations (boiling-water reactor (BWR))
 - Reactor operations (pressurized-water reactor (PWR))
 - Reactor engineering - electrical
 - Reactor engineering - instrumentation
2. NRC will use its best efforts to make space available in its inspector training courses and special orientation programs to accommodate the training needs of State Resident Engineers.
3. The State will pay the travel and per diem expenses of State Resident Engineers attending training courses. Where NRC establishes special training classes, the State agrees to reimburse NRC for its costs of training State Resident Engineers, if requested.
4. NRC will provide one week of on-the-job training and orientation for the State Resident Engineer at each site.
5. Information acquired by NRC relating to the ability of a State Resident Engineer to perform inspections satisfactorily in accordance with NRC regulations, requirements, standards, and procedures will be provided to the State for appropriate action.

C. Inspections and Enforcement

1. The State Resident Engineer's activities are intended to assist NRC in the conduct of its regulatory activities.
2. The State Resident Engineers are responsible for meeting all requirements imposed by a licensee related to personal safety, radiological protection, and access at the plant site.
3. To the extent practicable, it is intended that the State Resident Engineers will arrange their schedules of inspection activities in coordination with NRC personnel in order to provide the widest possible coverage of the plant and its operations.
4. If the State intends to participate in the inspection process, the State will provide recommendations for the NRC inspection plan, consistent with NRC Inspection Manual Chapter 2515, generally describing proposed inspection activities for the upcoming month. These recommendations will include a schedule of the inspections and a listing of NRC procedures to be used by the State Resident Engineer. In accordance with Section VI.C.1 above, such recommendations shall be designed to assist NRC site inspection activities. NRC shall take such recommendations into account in formulating its Master Inspection Plans.
5. The State will submit the monthly inspection recommendations to the NRC Resident Inspector in sufficient time to allow NRC review before preparation of the inspection plan. NRC will review the State's inspection recommendations and will inform the State of any activities that appear inappropriate, untimely, or impose an undue burden on NRC or the licensee, such as schedular conflicts with NRC special inspections, management meetings, or Institute for Nuclear Power Operations (INPO) visits. The State will make adjustments to the State inspection recommendations, as necessary, to address NRC comments. Taking into account recommendations made by the State, NRC will be responsible for developing a single site inspection plan. NRC staff inspection activity will not be reduced for a facility below minimum program requirements on the basis of the availability of State's inspection resources.
6. NRC will coordinate with the State Resident Engineers, to the extent practicable, unscheduled inspections conducted in response to events, issues, and allegations.
7. An NRC Resident Inspector will initially accompany each State Resident Engineer on at least two inspections to review the performance of the State Resident Engineer. On the basis of

these reviews, the NRC Resident Inspector will make recommendations to the State Resident Engineer regarding the preparation, conduct, and technical adequacy of the inspections. On a monthly basis, the NRC Senior Resident Inspector shall determine and authorize which, if any, inspections may be conducted by the State Resident Engineer on an unaccompanied basis. Such inspections shall be conducted in accordance with Sections VI.C.4 and VI.C.5. State Resident Engineers may perform as members of NRC inspection teams, provided State Resident Engineers are qualified in the activity to be examined by the NRC inspection team and the NRC inspection team leader authorizes the State Resident Engineer's participation. All inspections performed by State Resident Engineers shall be in accordance with the NRC site inspection plans and NRC inspection practices.

8. The NRC Resident Inspectors may accompany the State Resident Engineers on any inspection. The State Resident Engineers may, at the NRC's discretion, accompany the NRC Resident Inspectors on inspections, at inspection entrance and exit interviews, and at enforcement meetings. The State recognizes that there may be occasions when, because of the sensitive nature of certain inspections and meetings, it will be necessary for NRC, at its discretion, to conduct such activities privately and separately.
9. NRC will provide the State with a copy and current updates of the NRC Inspection Manual and Master Inspection Plan (MIP) for each reactor site in the State at which a State Resident Engineer is stationed. The State will hold the MIP in confidence and will not release it to the public or licensees except in accordance with Section VI.D.6 of this Subagreement.
10. Allegations received by the State Resident Engineers will be provided to the NRC Resident Inspectors and processed in accordance with NRC procedures. Upon request by NRC, the State Resident Engineers will be made available to assist the NRC in addressing allegations.
11. The results of all State Resident Engineers' inspections will be discussed in a timely manner with the NRC Resident Inspectors. Matters that may require action by the licensee will be discussed with licensee management by the NRC Resident Inspectors, or by the State Resident Engineers in the presence of the NRC Resident Inspectors, except as may be necessary under Section VI.C.12.
12. If a State Resident Engineer identifies situations with immediate safety significance, he or she will immediately communicate this information to the licensee and the NRC

Resident Inspectors. It is essential that this information be discussed with an NRC representative immediately upon discovery so that NRC may take prompt action as dictated by the situation. If the NRC Resident Inspectors are unavailable, a State Resident Engineer will transmit this information immediately to NRC, Region III (the Regional Duty Officer during non-business hours).

13. All written communications with the licensee will be made through NRC. If a State Resident Engineer prepares a written report of the results of an inspection activity covered by this Subagreement, the report will not be sent directly to the licensee, but will be sent to the NRC Region III office and to the NRC Resident Inspectors. The State is responsible for the technical adequacy of State Resident Engineers' inspection reports. NRC will forward the report to the licensee with a cover letter discussing the issues, if any, that the NRC believes warrant action by the licensee.
14. If NRC identifies potential violations of NRC regulatory requirements as a result of the State's inspection activities, NRC may take appropriate enforcement action as set forth in Appendix C of 10 CFR Part 2. The State Resident Engineers will assist NRC in the preparation of enforcement actions and during any enforcement conferences or hearings for those matters that were identified as a result of the State's inspection activities. Enforcement action, if any, will be taken only by NRC.

D. Communications and Information Exchange

1. The State and NRC agree in good faith to make available to each other information within the intent and scope of this Subagreement.
2. NRC and the State agree to meet periodically, at least annually, at mutually agreeable times to exchange information on matters of common concern pertinent to this Subagreement. Unless otherwise agreed, such meetings will be held in the NRC Region III Office or at the NRC Resident Inspector's Office.
3. NRC will inform the State of formal meetings with licensee management involving a site to which a State Resident Engineer is assigned and provide the State the opportunity to attend, with the exception of those meetings that NRC determines should be closed as provided in Section VI.C.8 of this Subagreement.
4. The State and NRC agree to consider each other's identified information needs and concerns when developing inspection plans.

5. The State will conform to NRC practices regarding information disclosure. For instance, the State must abide by NRC protocol not to publicly disclose inspection findings prior to the release of the NRC inspection report.
6. To preclude the premature public release of sensitive information, the State and NRC shall protect sensitive information to the extent permitted by the Federal Freedom of Information Act, the Illinois Freedom of Information Act and other applicable authority. The State and NRC shall consult with each other before releasing sensitive or proprietary information related to this Subagreement.
7. Press releases regarding State's activities or NRC inspections in which the State has been involved under this Subagreement which are prepared by one party will be provided to the other party before issuance. Press releases are to conform to information disclosure restraints of Sections VI.D.5 and VI.D.6.
8. The State will provide NRC with written notice at least 60 days before the stationing of a State Resident Engineer at a site.

VII. Contacts

- A. The principal senior management contacts for this Subagreement will be the Director, Division of Reactor Projects, Region III, NRC, and the Manager, Office of Nuclear Facility Safety, Illinois Department of Nuclear Safety. These individuals may designate appropriate staff representatives for the purpose of administering this Subagreement.
- B. Identification of these contacts is not intended to restrict communication between NRC and State staff members on technical and other day-to-day activities.

VIII. Resolution of Conflicts

- A. If disagreements or conflicts arise about matters within the scope of this Subagreement, NRC and the State will work together to resolve these differences.
- B. Resolution of differences between the State and NRC staff over the significance of findings will be the initial responsibility of the Director, Division of Reactor Projects, Region III, NRC.
- C. Differences that cannot be resolved in accordance with Sections VIII.A and VIII.B will be reviewed and resolved by the Regional Administrator, Region III, NRC and the Director, Illinois Department of Nuclear Safety. The decision of the Regional Administrator will be final.

D. The NRC's General Counsel has the final authority to interpret the NRC's regulations.

IX. Effective Date

This Subagreement shall become effective upon signing by the Director, Illinois Department of Nuclear Safety, and the Executive Director for Operations, NRC, and shall remain in effect permanently unless terminated by either party on 30 days written notice.

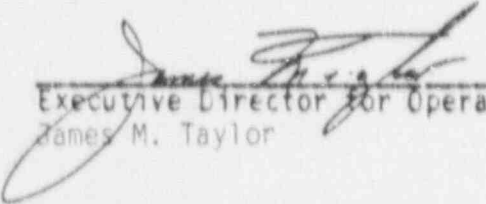
X. Duration, Termination, and Modification

A formal review, not less than six months after the effective date, will be performed by the NRC to evaluate implementation of the Subagreement and resolve any problems identified. This Subagreement will be subject to periodic reviews and may be amended or modified upon written agreement by both parties, and may be terminated upon 30 days written notice by either party.

XI. Separability

If any provision(s) of this Subagreement, or the application of any provision(s) to any person or circumstances is held invalid, the remainder of this Subagreement and the application of such provisions to other persons or circumstances shall not be affected.


FOR THE U. S. NUCLEAR REGULATORY COMMISSION,



Executive Director for Operations
James M. Taylor

Date: 11/14/90

FOR THE STATE OF ILLINOIS



Director
Illinois Department of Nuclear Safety
Thomas W. Ortziger

Date: 11/20/90