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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket Nos. 50-322
	)	50-322-OLA
(Shoreham Nuclear Power Station, Unit 1)	)	50-322-OLA-2
	)	

NRC STAFF RESPONSE TO PETITIONERS' JOINT MOTION TO STAY

John T. Hull
Counsel for NRC Staff

March 25, 1991

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I. INTRODUCTION

On March 8, 1991, Scientists and Engineers for Secure Energy, Inc. and Shoreham-Wading River Central School District (referred to collectively as "Petitioners"), filed a joint motion to stay "or, if issued", vacate[1/] the issuance of a possession only license ("POL") for Shoreham; stay the above-captioned Licensing Board proceedings; and "stay further NRC Staff review of pending applications for license amendments, exemptions, and other forms of permission" regarding Shoreham. Stay Motion at 1-2.

1/ "Petitioners' Joint Motion To Stay Or Vacate License Issuance and Other Matters" ("Stay Motion"). Since the Staff has not issued a POL to Shoreham, only the Petitioners' stay request is addressed here.

Petitioners base this request on the Commission's inherent authority "to provide interim equitable relief"[2/] and the Commission's "duty to abstain from deciding crucial state law issues as a matter of comity." Stay Motion at 1. Petitioners contend that because the New York Court of Appeals, New York's highest court, recently granted the Petitioners and related parties leave to appeal in state cases challenging the validity of the agreement between the State of New York and the Long Island Lighting Company ("LILCO"), which prohibits operation of Shoreham as a nuclear power plant ("NY Agreement"), the Commission should stay all Shoreham licensing actions pending a decision on the merits by the New York Court of Appeals as to the NY Agreement's validity. *Id.* at 1-2, 10-11.

II. DISCUSSION

Petitioners seek a very broad stay which would bring to a halt all NRC actions affecting Shoreham's operating license. As the moving party, Petitioners have the burden of persuasion to establish that such a stay should be granted. *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795,

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[2/] In *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1 (1986), *rev'd and remanded on other grounds, San Luis Obispo Mothers For Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986), the Commission exercised its inherent supervisory authority over Staff actions by staying part of a license amendment which allowed a fivefold increase in spent fuel storage capacity at the Diablo Canyon Nuclear Power Plant. *Id.* at 4-5, 12-13. The Commission based this exercise of its inherent authority on special circumstances, which were Congress' expressed concerns about the Diablo Canyon spent fuel pool reracking amendments in general and a federal court of appeals' entry of a partial stay of those license amendments in particular. *Id.* at 4-5, nn. 1, 2. No such special circumstances are present here, since Shoreham is defueled, and the Stay Motion should be evaluated using the traditional stay factors of 10 C.F.R. § 2.788(e) notwithstanding the extraordinary nature of Petitioners' stay request.

797 (1981). Petitioners' Stay Motion fails to support the extraordinary relief requested, and should be denied for the reasons set forth below.

A. Stay Requests Are Governed By 10 C.F.R. § 2.788

Petitioners' Stay Motion fails to comply with the requirements of 10 C.F.R. § 2.788.[3/] The factors prescribed by 10 C.F.R. § 2.788(e) to be considered in connection with reviewing a request for stay are:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

A request to stay the effectiveness of a "decision or action" may be filed no later than 10 days after service of the decision or action of the presiding officer. 10 C.F.R. § 2.788(a). At the time the Stay Motion was filed, the only Shoreham licensing actions subject to challenge by a stay request pursuant to 10 C.F.R. § 2.788(a) were the recent decisions of the Licensing Board (LBP-91-07, 33 NRC ___ (Mar. 6, 1991)) and Commission (CLI-91-02, 33 NRC ___ (Feb. 22, 1991)).[4/] The Commission's regulations do not expressly authorize a stay of the

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[3/] For example, Petitioners' 29-page Stay Motion fails to comply with the ten-page limitation stated in 10 C.F.R. § 2.788(b). This limit is adhered to even in cases involving questions of first impression. *See Kerr-McGee Chemical Corp.* (West Chicago Rare Earth Facility), ALAB-928, 31 NRC 263, 269-70 (1990).

[4/] The right to seek stay relief under 10 C.F.R. § 2.788 is conferred only upon those who have filed or intend to file a timely appeal from the decision sought to be stayed. *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, (continued...)

Staff's review of pending applications for license amendments and similar such relief requested by Petitioners.[5/]

Perhaps in recognition of the questions concerning the timeliness of their request and the absence of any regulation expressly authorizing the very broad relief sought, Petitioners do not cite 10 C.F.R § 2.788 other than acknowledging that the four stay factors of 10 C.F.R § 2.788(e) are related to the traditional standards established by the federal judiciary for granting a stay. Stay Motion at 3. The Staff concurs that, absent special circumstances such as those discussed in n.2, *supra*, Petitioners' stay request, seeking in part to prevent the issuance of a Shoreham POL pending review of the NY Agreement by the New York Court of Appeals, is governed by the four stay factors of 10 C.F.R. § 2.788(e), which incorporate the general legal criteria for granting stay requests. *See generally Virginia Petroleum Jobbers Ass'n. v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Comm'n. v. Holiday Tours*, 559 F.2d 841, 843-44 (D.C. Cir. 1977); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 257 (1990).

4/(...continued)
68-69 (1979). Petitioners have not filed or indicated they will file the requisite timely appeals, and their extraordinary request for stay relief may therefore be denied on this ground alone.

5/ While the Commission has indicated that the scope of 10 C.F.R. § 2.788 is broad by declining to define or limit the phrase "decision or action" as used in the rule, 42 Fed. Reg. 22128, 22129 (May 2, 1977), the title of that regulation indicates that the provision pertains only to actions of NRC adjudicatory Boards.

1. Petitioners Fail To Show That They Will Suffer Irreparable Harm Absent A Stay

Of the four stay factors governing the granting of a stay request, the need to show irreparable harm is the most crucial one. *Seabrook, supra*, 31 NRC at 258. If no irreparable harm is established, "a strong showing would need to be made on the remaining stay factors in order for any stay to be granted." *Id.* at 260. *Cf. West Chicago, supra*, 31 NRC at 269 ("[a]bsent a finding of irreparable injury, one seeking a stay must show that a reversal of the decision under attack is not merely likely, but a virtual certainty") (footnote omitted). First, Petitioners argue they will suffer irreparable harm under the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* ("AEA"), if the NY Agreement "is ultimately declared void by the New York Court of Appeals." Stay Motion at 15-16. This argument is based on the assertion that should the New York Court of Appeals declare the NY Agreement void, Petitioners would be deprived of their AEA right to nuclear-generated electricity from Shoreham, because Shoreham's reconversion to an operational nuclear power plant would not then be practical or legally possible. *Id.* While the AEA does establish policies to "encourage widespread participation in the development and utilization of atomic energy" (42 U.S.C. § 2013(d), *see also* 42 U.S.C. § 2013(c)), it hardly gives a right to electricity generated from a particular nuclear plant.

Petitioners' argument fails for several other reasons as well. First, it is conjecture to suppose that the New York Court of Appeals will overrule the

intermediate appellate courts and declare the NY Agreement void.[6/] Second, it is conjecture to assume that the New York courts will find any defects that the parties to the NY Agreement would not be able or willing to correct. *See* CLI-91-02, *supra*, slip op. at 10. Third, it is conjecture to assume what LILCO's decision will be concerning plant operations if the NY Agreement is voided. Fourth, the asserted problems with the hypothetical Shoreham reconversion envisioned by Petitioners are conjecture based on no more than vague fears of what regulatory actions may or may not be taken in the future.

In short, Petitioners' argument that they will suffer irreparable harm under the AEA absent the requested stay is based on conjecture and provides no basis for granting the Stay Motion.

Petitioners also argue that they will suffer irreparable harm under the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), absent the requested stay. Stay Motion at 16-19.[7/] Contrary to Petitioners' arguments (Stay Motion at

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[6/] In addition to affirming the lower court decisions, the New York Court of Appeals may take any number of actions, including remanding some or all of the cases for further proceedings. Since there are separate cases being reviewed (albeit with many similar issues), each of which may be ruled on differently, the number of potential outcomes is quite large. Petitioners in the state cases generally allege that the NY Agreement violated New York constitutional and statutory laws, including the State Environmental Quality Review Act, and that it involved abuse of the state's rate-making powers. *See Citizens For An Orderly Energy Policy, Inc. v. Cuomo*, 559 N.Y.S. 2d 381 (A.D. 3 Dept. 1990); *J. Kenneth Dollard v. Long Island Power Authority*, 559 N.Y.S. 2d 381 (A.D. 3 Dept. 1990); and *Nassau Suffolk Contractor's Ass'n., Inc. v. Public Service Comm'n.*, 559 N.Y.S. 2d 393 (A.D. 3 Dept. 1990).

[7/] Petitioners cite *Illinois Commerce Comm'n. v. I.C.C.*, 848 F.2d 1246 (D.C. Cir. 1988), as a basis for questioning the need to show irreparable harm when a stay request is based on an alleged NEPA violation. Stay Motion at 16. The cited opinion merely (continued...)

17), the Commission's decision not to require NEPA consideration of the environmental impacts of Shoreham replacement plants at this time was not only based on the NY Agreement's validity, but was also based on federal case law that private, non-federal actions, even though they may later lead to federal actions subject to NEPA, do not of themselves trigger NEPA requirements. *See* CLI-91-02, *supra*, slip op. at 7-9 and *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 127-131 (D.C. Cir. 1987) and *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976), *cited in* CLI-91-02, *supra*, slip op. at 9. Even if the New York Court of Appeals voids the NY Agreement, such a decision would not change the private, non-federal nature of LILCO's determination not to operate Shoreham.

The conclusion Petitioners reach, "that they would suffer irreparable harm to their interests under the AEA and NEPA, each independently, if the requested stays are not granted," Stay Motion at 19, is not supported by their arguments or by the

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2/(...continued)
refers to statements made by I.C.C. counsel as to what the I.C.C.'s practice is regarding the issuance of stays pending I.C.C. resolution of environmental concerns raised by intervenors. *I.C.C.*, *supra*, 848 F.2d at 1260. The opinion provides no support for Petitioners' argument that irreparable harm need not be shown here.

Petitioners also argue that the Commission should presume irreparable harm "and proceed to a balancing of the equities under the judicial test." Stay Motion at 16-17. *Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983), is cited in support of this argument. The cited opinion reflects that both the appellate court and the federal district court whose decision was affirmed specifically found that irreparable harm would occur absent issuance of a preliminary injunction and that other criteria comparable to the stay factors of 10 C.F.R. § 2.788(e) also supported issuance of a preliminary injunction. *Watt*, *supra*, 716 F.2d at 951-53. Petitioners provide no additional argument supporting their position, and the Commission should accordingly adhere to 10 C.F.R. § 2.788 and its decisions applying the rule.

facts of this case. Accordingly, the Commission should find that this stay factor is not met.

2. Petitioners Fail To Show They Are Likely To Prevail On The Merits

The only argument Petitioners make to show they are likely to prevail on the merits, which is not addressed above, is a discussion of mathematical probabilities associated with appeals in New York. Stay Motion at 22-25. There is no substantive discussion of the merits of the New York appeals, and it is admitted that an evaluation of the substantive likelihood of the New York Court of Appeals reversing the lower appellate court decisions, which uphold the NY Agreement to close Shoreham, is "beyond the ken" of Petitioners' counsel. *Id.* at 24. Instead, Petitioners rely on probability calculations based on general case statistics contained in the 1989 report of the New York Court of Appeals' Clerk, but fail to explain what relevance these statistics have to the substantive merit of the cases in New York,[8/] let alone what relevance these statistics have to this proceeding. It can safely be said that the New York Court of Appeals considers each case on its own merits without any regard to how many reversals it has handed down in any given year. Plainly, without having some knowledge of the merits of the state appeals, Petitioners' statistics are meaningless. The strained argument, based not on the merits of the state appeals, but on questionable statistical extrapolations (Stay

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[8/] These interconnected cases share many of the same questions of law. It is thus not surprising that the New York Court of Appeals, once it decided to review one of the cases, would decide to review all of them. *See* n.6, *supra*.

Motion at 22-25), does not demonstrate any likelihood of success on the merits of the cases before the New York Court of Appeals.

The Commission has determined that pending court proceedings do not present a ground to stay Commission action even where the court's decision might affect the Commission's actions or proposed actions. Thus, in *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-76-19, 4 NRC 474, 475 n.1 (1976), the Commission refused to instruct the Licensing Board to stay its consideration of issues pending Supreme Court consideration of petitions for certiorari (which could affect the proposed licensing action). In *Uranium Mill Licensing Requirements*, CLI-81-9, 13 NRC 460, 461 n.4 (1981), a party's stay request was denied even though petitions to review the NRC's licensing requirements under the Uranium Mill Tailings Radiation Control Act of 1978 were pending before a federal court of appeals. In *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 780-81 (1977), the Appeal Board emphasized that the grant of certiorari petitions by the Supreme Court provides no basis in itself to stay agency action, as it would not alone provide a sufficient basis to stay a lower court ruling.

Accordingly, the Commission should find that Petitioners have failed to establish any likelihood of success under 10 C.F.R. § 2.788(e)(1), and that this stay factor has not been satisfied.

3. Harm To Other Parties

Petitioners argue that the requested stay, if granted, would not result in cognizable harm to the other parties.[9/] However, the stay, if granted, would bring to a halt all Shoreham licensing actions currently before the Commission and its Staff, pending a decision on the merits in the New York courts of the NY Agreement's validity -- a matter not even subject to the Commission's jurisdiction. A stay of indeterminate length such as requested by Petitioners would further add an undesirable degree of uncertainty to NRC decisionmaking. To that extent, such a stay harms the NRC regulatory process.

4. The Public Interest

Regarding the public interest stay factor, 10 C.F.R. § 2.788(e)(4), Petitioners' arguments (Stay Motion at 27-28)[10/] recognize the delay inherent in granting their

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[9/] Petitioners argue the harm-to-other-parties issue at pp. 4-5, 25-27 of their Stay Motion. The cases there cited, other than *Virginia Petroleum Jobbers*, *supra*, and *Washington Metropolitan Area Transit Commission v. Holiday Tours*, *supra*, do not even involve stay requests. *Power Reactor Development Co. v. International Union*, 367 U.S. 396, 414-15 (1961), discusses the well-established rule that the amount of licensee investment in a nuclear plant is not a proper consideration in deciding whether to issue an operating license. *Calvert Cliffs' Coordinating Committee v. A.E.C.*, 449 F.2d 1109, 1111-112 (D.C. Cir. 1971), involved the remand of a rulemaking implementing NEPA. *Union of Concerned Scientists v. N.R.C.*, 880 F.2d 552, 554 (D.C. Cir. 1989), deals with the application of the "backfit rule", 10 C.F.R. § 50.109.

[10/] The cases there cited do not support Petitioners' arguments in this regard. For example, in the case that is quoted from (Stay Motion at 28), *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2nd Cir. 1953) ("*Benrus*"), affidavits and hearing testimony supported the movant's contention that it would be irreparably harmed absent issuance of a preliminary injunction, and the balancing of hardships there was limited to consideration of the harm the other party would sustain under the requested preliminary injunction. *Id.* at 739, 743. The public interest issue is not discussed there.

(continued...)

broad stay request, but urge the Commission to "have confidence" that the New York Court of Appeals will soon reach a decision on the merits. *Id.* at 28. Any number of delays, including remands and decisions not reaching the question of the NY Agreement's validity, could occur before New York's highest court settles the question of the NY Agreement's validity. Moreover, this question of validity is not relevant to the Commission's duty under the AEA to ensure that Shoreham, in whatever mode it is in, remains radiologically safe for its workers and the surrounding public.

Accordingly, because none of the four 10 C.F.R. § 2.788(e) factors discussed above favors granting the stay requested, the Commission should deny Petitioners' Stay Motion.

B. Comity Concerns Do Not Justify Granting Petitioners' Stay Request

Petitioners argue that, as a matter of comity, the Commission should stay further administrative proceedings pending state court review of the NY Agreement's validity. Stay Motion at 12-13. But the Shoreham licensing actions and Commission decisions in these proceedings are not predicated on a question of state law; they are predicated on LILCO's decision not to operate Shoreham. *See* CLI-90-8, 32 NRC 201, 207-08 (1990) and CLI-91-02, *supra*, slip op. at 7-9. While the NY Agreement may have provided a motivation for LILCO not to operate Shoreham,

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10/(...continued)

Moreover, *Benrus* is cited by *Holiday Tours, supra*, in the context of the court's explanation regarding its move away from the use of a stay standard "incorporating a wooden 'probability' [of success on the merits] requirement" (559 F.2d at 844), the type of stay standard Petitioners rely so heavily on. Stay Motion at 22-25.

that agreement was not subject to Commission review, just as the administrative proceedings Petitioners seek to stay are not subject to review by the New York Court of Appeals. Even in situations involving review by federal appellate courts of Commission or NRC Staff decisions, requests to stay the administrative actions pending appellate review have been denied. *Midland*, ALAB-395, 5 NRC at 781, sets out the United States Supreme Court doctrine that the mere grant of a petition for certiorari does not act to stay the effect of lower court decisions, and on that basis denies a request to suspend licensing board proceedings pending Supreme Court review of related fuel cycle matters. *Uranium Mill Licensing Requirements*, CLI-81-9, 13 NRC 460, 461 n.4 (1981), denied a stay request predicated on the ground that review of the NRC's licensing requirements under the Uranium Mill Tailings Radiation Control Act of 1978 was pending before a federal court of appeals. Here, even though the Commission was aware of the New York state court's having granted leave to appeal from the lower state court decisions at the time it issued its most recent Shoreham licensing decision, the Commission saw no need to discuss any comity concerns. CLI-91-02, *supra*, slip op. at 10 n.2.

The decisions Petitioners cite do not support their comity argument, and were based on circumstances inapposite to those here. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 593-94 (1968), was a case involving water rights filed in federal court under diversity of citizenship jurisdiction, and its resolution required the interpretation of provisions in New Mexico's state constitution. The Court reversed the federal appellate court's refusal to stay the federal case pending resolution by the New Mexico courts of the state law issues, as those issues formed the crux of

the entire case. *Id.* Similarly, *Railroad Comm'n. of Texas v. Pullman Co.*, 312 U.S. 496, 497-99 (1941), involved an interpretation of a Texas statute upon which the state railroad commission based its discriminatory order affecting passenger trains in Texas. To avoid prematurely deciding federal constitutional questions, the Court ruled that the Texas state courts must first be given the opportunity of interpreting the state statute before federal interpretation of that statute would be proper. *Id.* A statement in *Hagans v. Lavine*, 415 U.S. 528, 548 (1974),[11/] explaining the rationale of the above-illustrated rule governing pendent state law claims, is cited by Petitioners in support of their comity argument, Stay Motion at 13, but Petitioners fail to explain how the NY Agreement's validity can fairly be viewed as a "pendent state law claim" in this proceeding.

Petitioners fail to establish that comity concerns justify granting their requested stay, and the Stay Motion should accordingly be denied.

III. CONCLUSION

Having failed to establish (a) that any of the four stay factors of 10 C.F.R. § 2.788(e) weigh in favor of granting the requested stay and (b) that comity concerns

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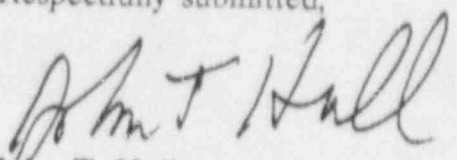
[11/] The case involved a New York State regulation affecting the distribution of federal funds under the Aid To Families With Dependent Children welfare program. *Hagans, supra*, 415 U.S. at 530-31.

justify granting the requested stay, the Commission should deny Petitioners' Stay Motion.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated in Rockville, Maryland
this 25th day of March, 1991

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITIONERS' JOINT MOTION TO STAY" 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, by deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by double asterisks, by express mail, this 25th day of March, 1991:

Morton B. Margulies, Chairman*
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

George A. Ferguson
Administrative Judge
5307 Al Jones Drive
Columbia Beach, MD 20764

James P. McGranery, Jr., Esq.**
Dow, Lohnes & Albertson
1255 23rd Street, NW, Suite 500
Washington, DC 20037

Stephen A. Wakefield, Esq.
General Counsel
U.S. Department of Energy
1000 Independence Ave., SW
Room 6A245
Washington, DC 20585

W. Taylor Reveley, III, Esq.**
Donald P. Irwin, Esq.
Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, VA 23212

Nicholas S. Reynolds
David A. Repka
Winston & Strawn
1400 L Street, NW
Washington, DC 20005

Stanley B. Klimberg, Esq.
Executive Director and General Counsel
Long Island Power Authority
200 Garden City Plaza, Suite 201
Garden City, NY 11530

Samuel A. Cherniak, Esq.
NYS Department of Law
Bureau of Consumer Frauds and
Protection
120 Broadway
New York, NY 10271

Carl R. Schenker, Jr., Esq.
O'Melveny & Meyers
555 13th Street, NW
Washington, DC 20004

Gerald C. Goldstein, Esq.
Office of the General Counsel
New York Power Authority
1633 Broadway
New York, NY 10019

Office of the Secretary* (16)
Attn: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Board
Panel* (1)
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adjudicatory File* (2)
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Appeal
Panel* (6)
U.S. Nuclear Regulatory Commission
Washington, DC 20555

John T. Hull
Counsel for NRC Staff