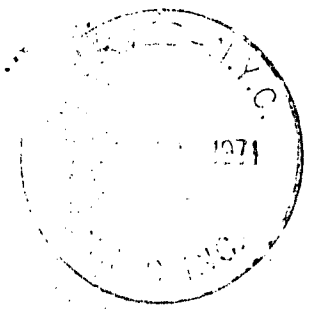

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AEC

December 9, 1971

Mr. L. Manning Muntzing
Director of Regulation
Atomic Energy Commission
Washington, D. C. 20545

Dear Director Muntzing:

As a follow-up to the meeting held on November 29, 1971 among representatives of the Commission and the Regulatory Staff, as well as various counsel for Intervenors in Atomic Safety and Licensing Board proceedings, we think it appropriate to set forth in some detail our view of the discussion at that meeting concerning the scheduled rulemaking proceeding dealing with "Acceptance Criteria For Emergency Core Cooling Systems For Light Water-Cooled Nuclear Powered Reactors," notice of which was published in the Federal Register on Tuesday, November 30, 1971.

As you will recall, we first received knowledge of that notice the morning of November 29 and in the afternoon quickly presented to you a formula for fairly resolving the current ECCS dispute in an adjudicative rather than a legislative type proceeding, on an expedited basis, thereby eliminating the ECCS issue from each of the current licensing hearings.

As you will also recall, we tendered certain suggestions in connection with the proposed rulemaking which are set forth below in Part II. In return for the adoption of these suggestions, we offered on behalf of our clients (with the added incentive that the Intervenor representatives at that meeting would attempt to accomplish a consolidation of all hearings even with respect to those hearings for which a representative was not present at the meeting) the following concessions:

I.

A. Intervenors would remove from licensing hearings all challenges to ECCS Criteria (except whether a particular system complied with the Criteria and the question of what residual risk from the totality of a particular proposed plant remains, notwithstanding compliance with the Criteria) and restrict their presentation on ECCS issues to participation in and appeals from an adjudicatory type rulemaking proceeding.

B. Intervenors would consolidate their discovery requests, so as not to burden the Commission and other parties with multiple requests.

C. Intervenors' lawyers would form a committee to participate in the rulemaking so as not to overburden the rulemaking with duplicative or excessive cross-examination.

D. Intervenors would make every effort to comply with and even expedite the schedule for the rulemaking proceeding as reflected in the notice of rulemaking published on November 30.

II.

In exchange for these concessions, Intervenors requested consideration of the following:

1. The rulemaking proceeding would be an adjudicatory type proceeding rather than a legislative type proceeding with any decision reached therein based upon the transcript of the proceeding.

2. All witnesses would testify under oath and would be subject to cross-examination normally afforded in adjudicatory or trial-type hearings.

3. All intervenors in current licensing hearings would become participants in the rulemaking proceeding without any formal filings other than notice of intent to participate.

4. An informal pre-hearing conference(s) would be held for the exchange of relevant documents in possession of the Commission (and vendors and utilities to the extent they participate). We had suggested that such a conference occur on December 6, 1971 at which time we would submit a list of requested documents and at the same time the Commission would turn over documents it acknowledged relevant, together with (to the extent all documents were not produced at that time) a list of documents in the Commission's possession or control which fairly relate to the ECCS issue. Thereafter, we offered to provide a further list of documents and to participate in a further pre-hearing conference during the week of December 21, at which time all questions concerning discovery would be resolved and all documents would have been produced. You will also recall that we stated that for us to comply with such a schedule we would require quick action by the Commission in resolution of our suggestions, action which has not yet taken place. Alternatively, we suggested that our list of requested documents be submitted to the Commission within five business days subsequent to a Commission decision on our suggestions, and that the Commission begin producing documents immediately, notwithstanding the absence of a list.

5. The actual hearing on ECCS issues would begin no earlier than 30 days after all documents had been produced. (If the original schedule of December 21 can be met, then there appears to be no difficulty with the hearing on January 27.) We also offered, to the extent possible, during this 30 day period to submit to the Commission our position on the ECCS issue, together with names of witnesses which we believe should be invited or subpoenaed to the hearing.

6. The Regulatory Staff would present its case first (followed by vendors and utilities if they participate). Two weeks after availability of the transcript of the case of the Regulatory Staff (and vendors and utilities), Intervenors would begin their consolidated cross-examination followed by their case in chief. We also offered to submit within the two week period between the Regulatory Staff testimony and the beginning of the cross-examination a final statement of our contentions agreeing, unless good cause were thereafter shown, to limit our cross-examination and direct case to the contentions so listed.

7. We requested that the documents produced be available in duplicate, one set on the East Coast and one set on the Midwest, and that the Commission arrange to provide Intervenors, at no cost, with two copies of the transcript of the proceedings.

8. We suggested that the panel hearing the ECCS issues be given the power of subpoena in order to assure that persons with specific expertise be available at the rulemaking.

9. We strongly urged that the vendors be parties to the rulemaking proceeding and suggested that if the vendors chose not to do so, then each one of their individual codes would be subject to direct attack in licensing hearings, since the only code which would be subject to the rulemaking proceeding would be the Commission's so-called Relap-3 Code. We made this suggestion in our continuing effort to attempt to resolve all ECCS issues in one proceeding.

10. We finally suggested that consideration be given to changing the presiding officer of the panel from Mr. Goodrich to an administrative law professor or a recognized judge schooled in administrative and/or judicial proceedings so as to avoid any possible question of prejudice, bias or error. Alternatively, we suggested that the panel be expanded to five members including Samuel Jensch and one other technical member such as Mr. Warren Nyer.

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As of the writing of this letter, we have not received any formal communication from the Commission as to the status of its acceptance to our proposal but understand that the Commission is considering our proposal and is having discussions with Applicants and vendors to determine their willingness to participate in the type of rulemaking proceeding suggested by us. However, we must point out that we have already lost more than a week of our proposed schedule and have yet to see any of the ECCS documents in the possession of the Commission.

Moreover, in light of other matters outlined below which have complicated the adherence to a tight schedule, we begin to have concern as to the sincerity and willingness of the Commission to adopt the proposal as discussed at our November 29th meeting in such a way as to afford Intervenors and their representatives a fair opportunity for preparation.

III

You will also recall that Mr. Arnold and I suggested that the Commission ought to consider enjoining ECCS issues (or even hearings) at various licensing hearings which were imminent. We made this suggestion because it seemed appropriate in light of the effort toward consolidation. Indeed, as the Commission knows, since there are relatively few technical personnel assisting Intervenors, to continue to hold ECCS hearings or to require Intervenors to jockey for legal and scientific positions at the licensing level, while expecting Intervenors to prepare for the rulemaking proceeding is an exercise in fantasy inasmuch as it would require a small group of persons to divide their efforts on several fronts. At this very time Mr. David Comey, members of the Union of Concerned Scientists and others whom we had hoped would be available to direct their efforts toward preparation for the rulemaking proceeding, including preparation of document and witness lists, are busy in preparation for or are engaged in ECCS hearings in Point Beach, Pilgrim, Shoreham and Indian Point.

Additionally, notwithstanding the fact that a motion was made in the Point Beach proceeding to abate ECCS hearings subject to the rulemaking proceedings (a course of action which was approved by the Director of Regulation at the meeting, if not encouraged), the Regulatory Staff did not support the request in that or any other proceeding leaving us to wonder whether the Director gave contrary instructions to the Staff or whether one or more members of the Director's legal staff is not pleased by the position the Director took at the November 29 meeting and is trying to scuttle his efforts.

Thus the failure (for whatever reason) of the Regulatory Staff to take a position consistent with what we believed to be the Director's position at the November 29 meeting has resulted in opinions in Point Beach and Pilgrim dealing with the procedural aspects of ECCS, the scheduling of an ECCS hearing in Shoreham to begin on January 4, 1972 approximately three weeks before the proposed rulemaking and a certification request in Indian Point by Chairman Jensch regarding the legal and scientific basis for the Interim Criteria. Whether one agrees or disagrees with these Board rulings, one thing is certain: they all detract from the kind of consolidated effort we discussed at our November 29 meeting.

The Commission cannot, in all fairness, expect Intervenors to continue ECCS hearings in various licensing hearings and at the same time prepare for an adjudicatory rulemaking proceeding. Such a result makes absolutely no sense and moreover is a waste of time, money and the administrative process.

Intervenors cannot seriously entertain participation in a rulemaking proceeding without adequate time for preparation. Indeed, any counsel for Intervenors who acquiesced in such a procedure would be doing a disservice to his client, as well as to the public interest.

We would urge the Commission to come to a quick decision regarding our proposal of November 29 and in any event in an effort to demonstrate the Commission's good faith to Intervenors, it should begin to collate and distribute ECCS documents now while it is considering our proposal, and also abate ECCS hearings without impinging upon rights of the various Intervenors.

Moreover, we would urge the Director of Regulation to consider having his staff take a position before all current hearings to the effect that no hearings on any matter be convened until subsequent to the rulemaking proceeding, so as to avoid Intervenors and their representatives from having to divide their efforts in such a manner so as not, perhaps, to be prepared for the ECCS rulemaking proceeding. Indeed, the very fact that the Commission scheduled two major rulemaking proceedings (ECCS and as low as practicable) within three days of each other raises the question as to whether the Commission is seriously inviting public participation.

We are still disposed to believe that the Director of Regulation and General Counsel of the Commission is interested in resolving this matter fairly. If, however, the Commission is not so disposed, we should appreciate quick confirmation. We are strongly convinced that the suggestions made by Intervenors are suggestions which are required to be implemented under law; and, accordingly, in the absence of the adoption of such suggestions we, on behalf of our clients, are very seriously considering a court action to enjoin the rulemaking proceedings upon the grounds that it deprives Intervenors in various licensing hearings of substantial due process.

Such a lawsuit is in our judgment a wasted effort; but such a lawsuit, also in our judgment, may be a necessary wasted effort, if adequate provision for an adjudicatory rulemaking proceeding, with all the trappings of a fair hearing, is not ordered with dispatch.

I am authorized to submit the views contained in this letter on behalf of myself and my clients, as well as on behalf of the following lawyers and their clients:

Thomas R. Arnold	Irving Like
Lewis D. Drain	Angus MacBeth
Harold P. Green	Gregor I. McGregor
Oliver A. Houck	Anthony Z. Roisman

Sincerely yours,

Myron M. Cherry

MMC/lm

cc: Martin R. Hoffmann, Esq.
Lawyers listed above