UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

PDR

December 20, 1989

The Honorable Peter H. Kostmayer, Chairman
Subcommittee on Oversight and Investigations
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, D. C. 20515

Dear Chairman Kostmayer:

This letter responds to your letter dated December 12, 1989. That letter informed the Commission that the Oversight and Investigations Subcommittee is initiating an inquiry into NRC licensing proceedings and interpretations of law that govern those proceedings. Your letter suggests that we have permitted an erosion of safety standards enacted by Congress with respect to requirements for emergency planning at nuclear power plants. Most particularly you express concern about recent actions taken by the Commission and its Licensing Board concerning the application for a full power operating license for Seabrook Station in New Hampshire. In this connection, you sent eleven questions, some with multiple parts, for our response by December 20, 1989.

At the outset, let me state that the Commission is committed to the protection of the public health and safety through emergency planning. Protective responses must be planned and available in the unlikely event that, despite the redundancy of our safety requirements, there should be a serious radiological emergency at a nuclear power plant.

As you are aware, the Commission is currently and actively engaged in considering whether the emergency planning for Seabrook satisfies the Commission's standards for the grant of a full power license. That consideration is a part of the formal adjudicatory proceeding that is required by our regulations issued to implement Section 189 of the Atomic Energy Act. As your letter acknowledges, your inquiry is directed in significant part to the very question certified to the Commission by the Appeal Board in ALAB-922, issued October 11, 1989, as well as to other matters before it on motion of a party or parties or in the course of the regulatory process.

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Under the Administrative Procedure Act and the Commission's own regulations, it is clear that the Commission cannot consider comment received outside the record of the proceeding on matters before it for adjudication, nor may it discuss those matters off the record of the proceeding before decision. For those reasons the Commission is not able to directly respond to your questions. While it may be suggested that some questions are not Seabrook-specific but rather are generic in nature, even those questions are so intertwined with the Seabrook issues that it would be improper for us to respond, especially in the context of your letter which explicitly referred to your interest in the Seabrook proceeding.

When the Commission has concluded its deliberations on the Seabrook issues, it will publish its decisions. We will, of course, promptly provide you with a copy of any such decision. The Commission's forthcoming decisions on the issues in Seabrook obviously will encompass answers to many, if not all, of the questions you set forth. However, no Commission decision was issued before December 20, 1989.

In addition, your letter along with this response will be served on the participants of this proceeding and placed in our public document room for informational purposes.

In response to Question 11, Commissioners Curtiss and Remick have enclosed materials regarding their participation in certain Seabrook matters.

Sincerely,

Kenneth M. Carr

Kenneth M. Carr

Enclosures: As stated

cc: The Honorable Barbara Vucanovich

Submitted to the Congressional
Record, October 14, 1988

(S 16265)

STATEMENT OF JAMES R. CURTISS

If I am confirmed, it would be my intention, prior to participating in any agency action or decision involving a matter with respect to which I had a substantial involvement in my previous capacity as a staff member for the Committee on Environment and Public Works, to first consider whether I can approach any such decision or action with an open and impartial mind. In that regard, I would intend to consult with the Commission's Office of General Counsel on the relevant statutory and judicial standards, prior to reaching a judgment about whether it would be appropriate for me to participate in any such decision or action. Additionally, with respect to any adjudicatory proceeding, it would be my intention to first examine the contested issues before the Commission for decision and to recuse myself from participating in any such decision if there is a reasonable basis for questioning my ability to consider and resolve such issues in an impartial manner because of prior involvement on my part in such issues during my previous capacity as a staff member.

In addition, in any case where the action or decision of the agency is required to be made based upon a formal administrative record, it would be my intention first to review the record in any such proceeding in a thorough manner prior to participating in any agency decision or action involving a contested issue in such proceeding. In that regard, in view of the complexity of the Shoreham proceeding and the contested issues that have arisen in that proceeding, as well as the voluminous administrative record already compiled, I believe that for the near future, I will not be in a position to have reviewed this lengthy record with the thoroughness that would be necessary for me to participate in the upcoming Commission review process regarding the Licensing Board's Concluding Initial Decision on Emergency Planning, LBP-88-24, (September 23, 1988), including any subsequent Appeal Board decisions on review of that Licensing Board decision, or to participate in pending or upcoming Commission decisions on contested issues that might arise in future litigation regarding NRC's review of the June, 1988, emergency planning exercise at the Shoreham facility.

Finally, as an attorney and former Senate employee, I am extremely sensitive to the importance of avoiding the appearance of conflict of interest or impropriety for subsequent decisions I might make on matters previously within my responsibility. In particular, I am aware of concerns that have been expressed about my participation as a staff member of the Committee on Environment and Public Works in matters related to emergency planning for the Seabrook Nuclear Power Plant and, because of that, my ability to approach Commission decisions involving emergency preparedness for this facility with an open and impartial mind.

I should say that while I have been involved in the broad legislative policy issues related to emergency planning for nuclear power plants in my capacity as a staff member of the Committee on Environment and Public Works, representing the views and positions of the members for whom I have worked, I do not have a view—nor do I think it would be appropriate for me to have a view—on the contested issues in the Seabrook proceeding currently pending before the NRC.

Nonetheless, I do believe that the preception of objectivity and impartiality is critical to the integrity of the Commission's decisionmaking process.

For this reason, I intend to abstain from participating in Commission decisions on contested issues that have arisen or might arise in this proceeding involving the adequacy of the emergency preparedness plan for the Seabrook facility.

FORREST J. REMICK
305 EAST HAMILTON AVENUE
STATE COLLEGE, PA 16801

16 November 1989

The Honorable John F. Kerry
United States Senate
Washington, DC 20510-2102

Dear Senator Kerry:

This letter is in response to the concerns which you expressed in our meetings of October 24, 1989 and November 15, 1989 relating to my nomination to serve as a member of the Nuclear Regulatory Commission.

As Chairman of the Nuclear Regulatory Commission's Advisory Committee on Reactor Safeguards, I have signed on behalf of the Committee a letter to the Commissioners expressing the Committee's view on emergency planning at the Seabrook Station (Seabrook). That letter was developed on the basis of presentations made to the Committee by interested persons and representatives of cognizant agencies and expresses the collegial and advisory views of the Committee. I do not believe that my participation as a member of the Committee would necessarily disqualify me from acting impartially on Seabrook issues coming to me for action in an adjudicatory context as a Commissioner.

I have no doubt that I could and would act on Seabrook matters as an impartial adjudicator and would make my decision solely on the basis of the adjudicatory record. Nonetheless, I can understand why some members of the public might question whether I would be able to consider openmindedly the Seabrook issues now pending before the Commission. Consequently, I have reached the conclusion that I should disqualify myself from voting on contested issues in the matter of the initial authorization for full power operation of the Seabrook Station. In reaching my conclusion, I have been particularly sensitive to the possible perception of some members of the public of the need for my disqualification on Seabrook rather than any reality of bias or lack of objectivity on my part.

I have reached this conclusion after consultation with the Nuclear Regulatory Commission's General Counsel.

I appreciate the opportunity to set forth my views on this matter.

Sincerely yours,

Forrest J. Remick

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

December 12, 1989

The Honorable Kenneth M. Carr
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Chairman Carr:

The Oversight and Investigations Subcommittee is initiating a comprehensive inquiry into NRC licensing proceedings and interpretations of law that appear fundamentally at odds with the agency's safety mission. This inquiry has been prompted by the steady erosion of safety standards enacted by Congress following the major nuclear accident at Three Mile Island in Pennsylvania, and by the extraordinary series of apparently contradictory actions recently taken by the Commission and its Licensing Board concerning the application for a full power operating license at Seabrook Station in New Hampshire.

Erosion of Reasonable Assurance Standard

On March 28, 1979, the most serious accident in the history of the U.S. civilian nuclear power program occurred at Three Mile Island. Subsequently, this committee, pursuant to its jurisdiction over the regulation of the domestic nuclear power industry, conducted a thorough investigation of this accident and of the regulatory deficiencies made apparent by this accident. On the basis of this investigation, a series of reforms were recommended by this committee and enacted into law in the 1980 Authorization for the Nuclear Regulatory Commission.

These reforms included a requirement that the NRC adopt, for the first time, mandatory rules with respect to emergency response to supersede the "voluntary guidelines" then in place. These rules were to specify that no operating license could issue until the NRC had approved emergency response plans which provide "reasonable assurance that public health and safety is not endangered by operation of the facility." Congress made clear in the conference report its intention

"that ultimately every nuclear powerplant will have applicable to it a state emergency response plan that provides reasonable assurance that the public health and safety will not be endangered in the event of an emergency at such plant requiring protective action."

In response, the NRC adopted regulations which now require, as a condition of receiving an operating license, an emergency response plan which provides "reasonable assurance that adequate protective measures can and will be taken" during an emergency.

Subsequent NRC decisions have, unfortunately, raised questions concerning the Commission's willingness to implement this requirement consistent with Congressional intent.

For example, in 1986 the NRC issued an emergency planning decision in the case of Shoreham (CLI-86-13) which declared that an emergency evacuation plan did not have to attain minimum radiation dose savings or evacuations times, but only achieve reasonable and feasible dose reductions "in the circumstances at that facility."

And in 1987, the Commission declared in a Statement of Considerations for rule amendments that "every emergency plan is to be evaluated for adequacy on its own merits, without reference to the specific dose reductions which might be accomplished under the plan or to capabilities of any other plan."

Based on these declarations one might reasonably be puzzled about whether the NRC is attempting to circumscribe the emergency evacuation requirements. This puzzlement grows to concern, however, following a recent decision by the NRC's own Appeal Board giving weight to the argument that the focus of a "reasonable assurance" finding "should be on the objective review of planning efforts and plan implementation...rather than on the more subjective judgments about whether a particular plan affords an 'adequate' level of protection or entails too great a degree of risk." (ALAB-922 at 23-24).

It is apparent that the Commission is dangerously close to twisting the intent of Congress to a point where it can no longer be said that the public health and safety protection afforded by one emergency plan is equivalent to another. Moreover, the Commission has drifted off course to such an extent that apparently plans might be approved as "reasonable" without judging the level of risk to which the population near the plant is exposed.

Fortunately, in ALAB-922 the Appeal Board was sufficiently confused about NRC interpretation of "reasonable assurance" that it has certified that question to the Commission, noting that the Commission's answer to this question "is of pivotal

importance to the emergency planning matters before us [the Seabrook case] ...and has important policy implications for emergency planning in general."

Unfortunately, in the same decision, the Appeal Board concluded that emergency planning is a "second-tier" safety measure, inferior to that of siting and design. That view clashes fundamentally with this Committee's intent as reflected in the 1980 Authorization Act and with the Commission's own statement in 1979 that it proposed "to view emergency planning as equivalent to, rather than secondary to siting and design in public protection." 44 Fed. Reg. 75169.

As you know, the significance of this distinction is the difference between whether or not a plant should be issued an operating license.

Fairness of Licensing Process in Question

Confusion over such pivotal issues ten years after Three Mile Island is a serious problem in its own right, but recent developments in the Seabrook case related to resolving this confusion now threaten to overrun rational decisionmaking and to compromise the integrity of the Commission.

I am referring to the extraordinary series of events which followed ALAB-922, including: 1) November 7, reversal by the Appeals Board of the Licensing Board decision to approve New Hampshire's Seabrook evacuation plan (ALAB-924); 2) November 9, a Licensing Board decision to authorize granting the full power operating license to Seabrook despite the reversal of its New Hampshire plan decision just 48 hours earlier and despite the fact that a question "pivotal" to the outcome of the licensing proceeding was pending before the full Commission; 3) November 16, a decision by the full Commission to short-circuit the Appeal Board by asserting jurisdiction over the interveners Motion to Revoke and initiating an "immediate effectiveness review" of the November 9 Licensing Board decision to authorize the license.

Without getting into the merits of this ongoing proceeding, it seems preposterous for the Licensing Board to authorize a license while the NRC has pending before it the question of the standard for judging whether the evacuation plans for that plant are adequate. Until the standard is known, it is impossible to judge whether the standard has been met.

It seems equally preposterous for the Licensing Board to take final action in a case 48 hours after it has been reversed on an earlier decision which is the necessary predicate for final action. When the Licensing Board can ignore the decisions of the Appeal Board, all semblance of fairness is lost and the due process protections afforded affected parties become a sham.

Questions

Given these concerns, I would appreciate your prompt cooperation in answering the following questions:

1. Does the NRC agree that it is legally required to deny an operating license to a new plant for which a state, local or utility plan meeting the "reasonable assurance" standard legislated in the 1980 NRC Authorization bill has not been approved?

2. Is it relevant to judging the adequacy of a proposed emergency evacuation plan that:

a. the site of a plant makes it unusually difficult to evacuate? If not, why not?

b. a significant number of the people the plan is intended to protect are not likely to avoid lethal radiation doses within the first 8 hours after a major accident? If not, why not?

c. the radiation dose savings are lower and the evacuation times are higher than for similar plants in other locations? If not, why not?

3. Please provide the Subcommittee with a legislative and regulatory history of the "reasonable assurance" standard. Please include:

a. any opinion of the General Counsel of the NRC which deals with the interpretation of this standard.

b. any reference in the statute or the legislative history which supports the view that this standard could be lower for a plant with a site which is relatively difficult to evacuate than for a plant which is relatively easy to evacuate?

c. a list of all decisions made by the Commission or its lower boards in which the "reasonable assurance" standard was applied.

4. When the Commission adopted the emergency response rules in response to the Three Mile Island accident, it declared that it "recognizes that this proposal, to view emergency planning as equivalent to, rather than secondary to siting and design in public protection, departs from its prior regulatory approach to emergency planning." 44 Fed. Reg. 75169. Has the Commission departed from this view as expressed when the rule was adopted? If yes, why?

5. Does the Commission agree that it is not sufficient to meet the "reasonable assurance" standard for an applicant to show that it has done its best to plan for as efficient an evacuation as possible?

6. On what basis did the Commission decide to take the unusual step of interfering with the normal appeal rights of the the Seabrook interveners by removing the Appeal Board from the appellate process after it reversed the Licensing Board and by initiating an "immediate effectiveness" review? Please provide the Subcommittee with the opinion of the Office of General Counsel or any other similar opinion used by the Commission to guide its decision to review the consistency of LBP-89-32 with ALAB-924 as a matter of "immediate effectiveness" rather than on the merits.

7. Since 1989, has the NRC ever issued a full power operating license to an applicant who did not have an approved emergency response plan at the time the license was issued? If yes, please provide a detailed explanation for each decision and an explanation of how each decision is consistent with the 1980 NRC Authorization Act.

8. Have decisions of the Atomic Safety and Licensing Appeal Board ever before been overruled by the Atomic Safety and Licensing Board? If yes, please provide a detailed explanation of the circumstances and a justification that addresses how this is consistent with the Administrative Procedures Act, relevant statutes, and fundamental fairness to the parties.

9. Has the Licensing Board ever before granted authority to issue an operating license while an appeal is pending before the Appeal Board? If yes, please provide a detailed explanation and justification consistent with the Administrative Procedures Act, relevant statutes and fundamental fairness to the parties.

10. Has the Licensing Board ever before granted authority to issue an operating license while an issue described as "pivotal" to approving the application has been certified to the full Commission and is still pending there? If yes, please explain.

11. Are any of the current Commissioners precluded from deliberating matters concerning the licensing of Seabrook? If yes, please list the person affected and the nature of the problem.

I would appreciate receiving these responses at your earliest

convenience, but in any case no later than December 20, 1989. Please call me or my staff director, Mr. David Weiss, should you have any question concerning this letter.

Sincerely,

Peter H. Kostmayer
Chairman