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WASHINGTON, D. C. 20555

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The Honorable Edward Markey
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

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Dear Congressman Markey:

I am responding to your letter of January 13, 1987, regarding the Seabrook offsite emergency planning litigation now being conducted before the Atomic Safety and Licensing Board. Your letter raises several concerns relating to specific actions of the Licensing Board which may soon be before the Commission for adjudicatory review and decision. As you are aware, ex parte contacts such as those reflected in your letter are even more seriously viewed by the Courts when they appear to have injected the element of Congressional pressure into an agency's adjudication. Unless and until the Commission is presented with an issue by a party to the proceeding or by certification from a Licensing or Appeal Board, we cannot offer more than general comments regarding the matters you have raised.

As a hypothetical matter, there is no question that scheduling can be so onerous as to work a hardship on parties that can in extreme circumstances destroy the element of fairness in adjudicatory proceedings. With this concern in mind, the Commission's order of January 9, 1987 taking review of ALAB-853 on the onsite side of the Seabrook proceeding noted that the "Licensing Boards may, of course, make any necessary adjustments to their schedules that fairness dictates to accommodate the Commission's expedited briefing schedule."

We are also aware that matters of scheduling have become extremely contentious in the Seabrook proceedings. However, various motions were presented to the Licensing Board and the Appeal Board, and it has been our practice to allow these Boards to resolve such matters in the first instance. Nonetheless, the Office of the General Counsel monitors the progress of all ongoing adjudications and keeps the Commission informed of developments in this regard so that it may decide whether its inherent supervisory authority need be exercised.

Turning now to your concerns with respect to the agency's consideration of the applicant's request for a waiver of the rule requiring a 10-mile EPZ, we can make the following general comments.

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Judge Hoyt's decision not to entertain oral argument on the issue of whether a prima facie showing has been made by the applicant would not, in any circumstances, dispose finally of the hearing request in the event the waiver request is certified to the Commission. The decision on prima facie showing is a threshold decision required by 10 C.F.R. § 2.758 which must be made in favor of the application if it is to be given any further consideration. It would be improper at present to comment on the correctness of Judge Hoyt's interpretation of the term "prima facie showing." That matter is subject to litigation by the parties.)

In any number of circumstances where the Commission has been referred issues that have a significant factual component, the Commission has appointed special boards to hold hearings, and in some instances to assist in other respects such as making recommended decisions. It is premature for the Commission to decide how it would treat the waiver matter in advance of its having successfully passed the prima facie showing threshold. In the event that it passes that threshold, the issues will be fully explored before any final action is taken.

I hope that this letter alleviates, at least to some extent, the concerns that you have about the Seabrook proceeding.

Sincerely,

Original signed by
Lando W. Zech, Jr.

Lando W. Zech, Jr.

Congress of the United States
House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, D.C. 20515

January 13, 1987

The Honorable Lando W. Zech, Jr.
Chairman
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Dear Mr. Chairman:

I am writing to request that the Commission exercise its inherent supervisory authority and immediately assume responsibility for the Seabrook offsite emergency planning proceedings (Docket Nos. 50-443-OL; 50-444-OL; ASLBP 82-471-02-OL) now pending before the Atomic Safety and Licensing Board. Those proceedings are degenerating rapidly into a mockery of justice and an affront to every fundamental notion of due process of law. Failure by the Commission to act decisively to prevent the further unraveling of these proceedings likely will invite a harsh judicial rebuke and further diminish the Commission's credibility with the public.

Of greatest and most immediate concern are Judge Hoyt's orders of December 23, 1986 and January 7, 1987, Judge Cotter's order of December 31, 1986 and the Commission's order of December 24, 1986. The net effect of these orders is: (1) the Commonwealth of Massachusetts and the other intervenors will have approximately one month to respond to the mammoth and technically complex petition to reduce the Seabrook emergency planning zone (EPZ) from the regulatorily mandated ten miles to one mile, notwithstanding the fact that the utility has been planning and preparing the petition for years and received the active advice and assistance of NRC staff in that endeavor for the 16 months preceding its filing; (2) there will be no public hearing, much less an evidentiary hearing, on the petition at the ASLB level; (3) the "prima facie showing" standard which the utility must meet if the ASLB is to certify the petition for waiver to the Commission has been transformed in a footnote from a well understood and very stringent test into a vague, ambiguous and almost meaningless notion that virtually guarantees certification of the issue to the Commission; and (4) several different and in some respects conflicting proceedings concerning offsite emergency planning at Seabrook will be going on concurrently rather than in an orderly progression.

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While these rulings are unfair and seriously flawed on their face, the background and nature of the utility's petition to waive the 10-mile EPZ requirement make these results absolutely intolerable. As you know, the Subcommittee on Energy Conservation and Power held a hearing on November 18, 1986 which focused on the then possible petition for waiver and in particular the role of the NRC staff in advising the utility for the previous 15 months on how to make the strongest case for waiver if the utility in fact decided to proceed with a petition. At the November 18 hearing, in which NRC officials participated,* and again in a November 20, 1986 letter to you, I raised most serious questions concerning the propriety of this coaching by the NRC staff and the allocation of financial resources being committed to this effort by the NRC before a petition for waiver had ever been filed. By letters of November 25, 1986 and December 2, 1986 a majority of the Massachusetts Congressional Delegation and the entire New Hampshire Congressional Delegation advised the Commission of their opposition to any reduction in the size of the 10-mile EPZ.

Notwithstanding my concerns, which I do not believe you have taken sufficiently seriously based upon your December 8, 1986 letter, NRC staff continued to work with the utility almost right up to the time the petition was filed. To absolutely nobody's surprise, the petition adhered faithfully to the principal teaching that NRC staff had imparted: emphasize the uniqueness of Seabrook, especially its containment.

Having had the benefit of almost a year and one half of NRC staff input, including personal and substantial participation by Mr. Victor Stello, Executive Director for Operations, and the preliminary results of a $245,000 consulting contract with Brookhaven funded by the NRC, Public Service of New Hampshire filed its petition for waiver of the 10-mile EPZ requirement. The ASLB has now given the Commonwealth of Massachusetts and the intervenors approximately one month to respond with no discovery and no public hearing. Such blatant unfairness would shock the conscience of any federal court reviewing NRC's actions in this matter. The procedural nightmare created by these recent orders is even more egregious than that which prompted the federal court in New York to intercede into the Shoreham ASLB proceeding to grant the state and local governments and intervenors more time to prepare their case.

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* As you recall, I specifically telephoned you to insist upon Mr. Stello's appearance at the hearing and only excused him because of your representation to me that he had a serious family medical problem which precluded his travel.

Two aspects of Judge Hoyt's January 7, 1987 order merit particular criticism. The order states that the ASLB's decision on whether the petition makes a prima facie case for waiver of the 10-mile EPZ regulation will be based on "written pleadings. No oral hearings to supplement written responses are anticipated." At the Subcommittee's November 18, 1986 hearing, the President of New Hampshire Yankee pledged to the Subcommittee that the utility would request a public hearing on the petition for waiver if such a petition were filed. The applicant's memorandum in support of the petition does make that request. The intervenors had requested full adjudicatory hearings on the petition. For the ASLB to deny even oral argument in light of the enormous importance of this issue to the ultimate question of whether or not Seabrook will receive a full power license is unfathomable. In other contexts such as the Commission's proposed revisions to its Sunshine Act regulations, the Subcommittee Members have repeatedly warned the Commission about the perils of doing its business in secret. Having no public hearing of any kind at the ASLB level on an issue of this magnitude only reinforces the ever growing public distrust of the entire nuclear licensing process.

No less startlingly disturbing was Judge Hoyt's redefinition of the term "prima facie showing" in a footnote on page 3 of her January 7, 1987 order. Citing absolutely no authority and rejecting another ASLB decision interpreting "prima facie," Judge Hoyt redefines prima facie "to mean evidence of a sufficient nature that would cause reasonable minds to inquire further." That is no standard at all, much less a burden of proof which must be met as a prerequisite to certification of the issue to the Commission. Almost any evidence of anything would "cause reasonable minds to inquire further." Indeed, most anthropologists consider the capacity for imaginative rational inquiry to be what distinguishes homo sapiens from other species of life. If the ASLB believes that to be the standard for judging the utility's petition, the ASLB should simply dispense with requiring any further response from anybody and immediately certify the issue to the Commission.

The phrase "prima facie showing" or "prima facie case" is a commonly understood jurisprudential standard carrying with it a heavy burden which the moving party (here, the utility) must meet. Black's Law Dictionary defines "prima facie case" as: "such as will suffice until contradicted and overcome by other evidence." Normally, "prima facie" is used in a legal context in which there has been no response yet to the position advocated by one party. Here, however, the ASLB judgment of whether a prima facie showing has been made comes after all parties have made known their views. Therefore, in this anomalous situation the phrase could be

reasonably construed to require an ASLB determination that there exists a substantial likelihood that the Commission will grant the waiver. Absent such a finding, the ASLB would be prohibited from certifying the petition to the Commission.

Permitting the ASLB to continue to make farcical rulings which deny due process in the Seabrook proceedings, however, is not in the best interest of any of the parties or that of the Nuclear Regulatory Commission. The time is ripe for the Commission, in the exercise of its inherent supervisory authority, to undertake a management initiative which will restore some measure of fairness and credibility to these proceedings.

Accordingly, I request the Commission constitute a special Board to conduct all proceedings associated with the utility's petition to waive the 10-mile EPZ requirement for Seabrook. I also request that the Commission establish a fair and reasonable schedule for the orderly and fair conduct of these proceedings, including but not limited to providing for public hearings. In setting such a schedule, the Commission should consider: (1) the burden on the parties of participating in concurrent, conflicting proceedings; (2) the need for discovery; and (3) the enormous importance of the petition to reduce the 10-mile emergency planning zone to the ultimate outcome of the Seabrook case and as a potential precedent with implications for emergency planning around every nuclear power facility in the United States.

The issues raised here transcend Seabrook. Were the commission to reduce the emergency planning zone on a site-specific basis, it would represent perhaps the most significant weakening of the NRC's regulatory regime since the accident at Three Mile Island. It would be especially ironic in light of the Chernobyl accident only eight short months ago where even today a zone of 18 miles around the plant remains evacuated. It would open the door for every licensee in the country to demonstrate to the NRC why it too shouldn't be allowed a reduced emergency planning zone because of its unique qualities.

If the Commission is to consider the petition at all, it must assure itself that it will do so only on the basis of the fullest, most fairly developed record compiled by the ASLB. While it is too late to cure what I believe to be improper NRC staff activity prior to the utility's filing of the waiver petition, it is not too late to rectify the deteriorating situation at the ASLB. For the sake of the Commission's own credibility, I urge you to take the management actions described above.

Please provide me with a response to this letter no later than close of business on January 20, 1987.

Sincerely,

Ed Markey

Edward J. Markey
Member of Congress