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UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

FILE NUMBER 50-322-01-5
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DOCKETED
USNRC

October 31, 1986

'86 NOV -3 A9:44

The Honorable Edward J. Markey
U.S. House of Representatives
Washington, D.C. 20515

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Dear Congressman Markey:

Your October 28, 1986 letter concerning the Shoreham proceeding concerns me deeply. I know you, as a lawyer, are well aware of the long standing rule of law that the deliberative processes of adjudicators are protected from any inquiry absent some external evidence of impropriety, particularly in connection with a specific case under active judicial consideration. As the Supreme Court held in the fourth Morgan opinion, "... examination of a judge would be destructive of judicial responsibility Just as a judge cannot be subjected to such scrutiny, so the integrity of the administrative process must be equally protected."

Your letter inquires into two protected areas: (1) the exercise of my responsibility as Chief Administrative Judge in assigning judges to a particular case and (2) the mental processes and deliberations of the judges on the Shoreham Board itself. Both of these areas are fully protected from inquiry to preserve the integrity of the adjudicatory process. It would be improper for me to compromise that process at this Commission by responding to inquiries into such areas.

Nevertheless, in sympathy with your expression of deep concern, I do want to go so far as to inform you that my reconstitution of the Shoreham Board on the narrow issue of the emergency exercise was wholly an internal Panel decision made solely in carrying out my responsibility under the Administrative Procedure Act. My decision was not influenced by any other consideration. There were absolutely no communications, direct or indirect, with anyone outside this office concerning that decision or the issuance of the October 17, 1986 clarification. As I noted in my letter to Senator D'Amato (copy enclosed), the reconstitution was a purely administrative decision made in this case (as well as many others) solely for the purpose of eliminating workload conflicts in order to avoid delay. All parties to the Shoreham proceeding are entitled to a reasonably prompt decision on their concerns at minimal expense. I note also the well-established principle that judges are fungible (at the NRC within their own expertise), a truism particularly apt at this starting point in the emergency planning exercise proceeding.

Moreover, as the public record in this case makes patently clear, it is simply not true that the reconstituted board will be dealing with a subject as to which the prior board had "extensive knowledge of the

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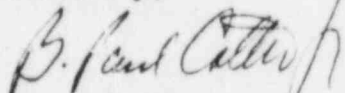
issues". The proceeding concerning the emergency planning exercise at Shoreham was initiated pursuant to a Commission order dated June 6, 1986. Contentions were only recently admitted by order dated October 3, 1986. No hearings have been held, and discovery has just begun. The admitted contentions will, and by law must be decided solely on the basis of evidence and testimony that has yet to be presented.

No party to an NRC proceeding should have to wait for a hearing and decision because the judge is tied up in another case if such a delay can be avoided. Since, as you know, the Shoreham proceeding has become the equivalent of four major cases, I deemed it appropriate to expand the judicial manpower hearing those issues so that when each of them is ready it can be heard and decided. In my judgment, not proceeding to hear and decide a case when it is ready constitutes undue delay.

As I'm sure you are aware, the Licensing Panel and each of its boards has a responsibility to avoid delay in the hearing process. In its Statement of General Policy and Procedure concerning the conduct of proceedings (10 CFR Part 2, Appendix A), the Commission expressed its intent "that such proceedings be conducted expeditiously" and its position that "fairness to all the parties and the obligation of administrative agencies to conduct their functions with efficiency and economy, require that Commission adjudications be conducted without unnecessary delays." See also Statement of Policy on Conduct of Licensing Proceedings, 13 NRC 452 (C.I. 81-8, 1981). Finally, the Commission order initiating the exercise proceeding specified that it be expedited. The Panel is bound to implement the Commission's policy. Reconstituting the Shoreham emergency planning exercise board will contribute to that objective by providing a total of five judges to share the workload previously handled by three. The purpose of all such reconstitutions is to insure that the parties' disputes are fairly, promptly, and fully adjudicated.

In closing, let me assure you that your being "deeply troubled" over the reconstitution of the Board hearing one set of issues in the Shoreham proceeding is at least matched by my own absolute astonishment over the strident reaction from some quarters to what was simply a routine administrative action. I hope the foregoing satisfies your concerns.

Sincerely,



B. Paul Cotter, Jr.
Chief Administrative Judge

Enclosure:

Ltr. to Senator D'Amato

cc: Shoreham Service Lists



UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

October 17, 1986

The Honorable Alfonse M. D'Amato
United States Senator
Washington, D.C. 20510

Dear Senator D'Amato:

This is in response to your letter of October 14, 1986 concerning the reconstitution of the Atomic Safety and Licensing Board presiding in the emergency planning exercise segment of the Shoreham proceeding.

First, let me say that there seems to have been some confusion as to the scope of the proceedings affected by the reconstitution. This is understandable given the number of issues pending in the Shoreham case. Consequently, I have submitted a clarification of the Notice of Reconstitution for publication in the Federal Register. A copy is enclosed.

As you will note, Judges Margulies, Kline and Shon will continue to preside over the bulk of the emergency planning issues in Shoreham, including all matters that have been the subject of extensive prior litigation. The reconstituted Board of Judges Frye, Paris and Shon will preside only in the proceedings related to the emergency planning exercise. Hearings on this issue were instituted pursuant to a June 6, 1986 Commission order and do not involve "tens of thousands of pages . . . compiled in the nearly five-year history of the Shoreham case."

Last week, Judge Margulies advised me that it was his Board's opinion upon completing the admission of issues in the exercise case, that all pending proceedings in Shoreham could not be heard in anything like a reasonably timely fashion by a single Board. For that reason, I established the reconstituted Board to handle the newer, less developed emergency planning exercise hearing.

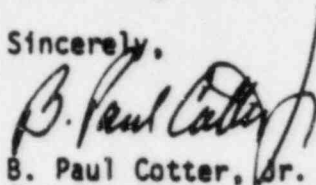
In complex NRC proceedings, segregation of specific hearing issues for consideration by separate licensing boards has been a normal case management procedure for many years. In Shoreham itself, emergency planning was assigned to a separate board long before the original board had completed consideration of other safety and environmental issues. Similarly, the Seabrook proceeding in New Hampshire is being handled by two licensing boards.

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October 17, 1986

My sole concern in responding to the excessive workload created by the expanding Shoreham emergency planning proceeding was to assure that all issues are heard fully without unnecessary delay. I believe it is that commitment to which the residents of Long Island are entitled.

Sincerely,



B. Paul Cotter, Jr.
Chief Administrative Judge

Enclosure

cc: Service List - Shoreham/Emergency Planning, Docket No. 50-322-OL-3
Shoreham/EP Exercise, Docket No. 50-322-OL-5

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LONG ISLAND LIGHTING COMPANY

Shoreham Nuclear Power Station, Unit 1

(EP Exercise)

(Docket No. 50-322-OL-5)

[ASLEP No. 86-534-01-OL]

NOTICE OF RECONSTITUTION OF BOARD: CLARIFICATION

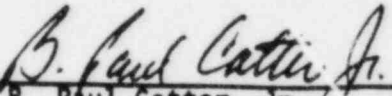
By notice dated October 7, 1986, the Atomic Safety and Licensing Board presiding in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322-OL-5 was reconstituted. Because of the multiple issues pending in this proceeding, there has been some confusion as to the intended scope of the reconstitution.

This is to clarify that the reconstituted Board comprised of John H. Frye, III, Chairman; Oscar H. Paris; and Frederick J. Shon will preside only in the proceedings related to the emergency planning exercise, which are being heard under Docket No. 50-322-OL-5 (Emergency Planning Exercise). These proceedings were initiated pursuant to Commission order, CLI-86-11, 23 NRC 577 (1986).

The Board comprised of Morton B. Margulies, Chairman; Jerry R. Kline; and Frederick J. Shon will continue to preside in all other proceedings pertaining to emergency planning for the Shoreham Nuclear Power Station, which are being heard under Docket No. 50-322-OL-3

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(Emergency Planning). These include issues remanded by the Commission in CLI-86-13, 23 NRC ____ (July 24, 1986) and by the Atomic Safety and Licensing Appeal Board in ALAB-832, 23 NRC 135 (1986) and ALAB-847, 23 NRC ____ (September 19, 1986).



B. Paul Cotter, Jr.
Chief Administrative Judge
Atomic Safety and Licensing
Board Panel

Issued at Bethesda, Maryland,
this 17th day of October, 1986.