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September 24, 2007

The Honorable Dale E. Klein
Chairman
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

I write concerning media reports that the Nuclear Regulatory Commission (NRC) has awarded a contract to Information Systems Laboratories, Inc., to review applications for nuclear reactor construction.

The September 17, 2007 edition of *Washington Business Journal* reported that "Information Systems Laboratories won a five-year \$34 million contract from the Nuclear Regulatory Commission to review applications submitted by utility companies to build nuclear power plants." The article went on to state that, "the contract was awarded to handle the workload from an increasing number of companies applying for site and construction approval to build power plants."

I am gravely concerned that the clear public interest in the thorough, critical, and fair analysis of reactor construction applications will be undermined by contracting and subcontracting such analyses to private companies. Farming out a vital aspect of the NRC's regulatory responsibilities to private companies could result in conflicts of interest which prevent this critical work from proceeding appropriately.

If Congress had intended to allow private companies to regulate private companies in the extraordinarily sensitive nuclear sector, we would not have established the NRC.

Moreover, it is not clear to me that this decision is legal. Certain activities of government are defined as "inherently governmental," and as such are not eligible for execution by contract. The Federal Activities Inventory Reform (FAIR) Act of 1998 (PL 105-270) defines "inherently governmental function" in statute as "a function that is so intimately related to the public interest as to require performance by Federal Government employees." The FAIR Act includes in its statutory definition "activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government." The White House Office of Management and Budget, in Circular No. A-76 (Revised) of May 29, 2003,


defines an "inherently governmental activity" as "an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government."

It would seem to me that assuring the safety of nuclear power plants would fall well within the definition of an 'inherently governmental' function. I am alarmed that the contract awarded to Information Systems Laboratories, Inc., to review applications for nuclear reactor construction, or any similar contract, may violate both the statutory and regulatory restrictions upon outsourcing inherently governmental functions and could, as a consequence, result in a danger to public health and safety.

Please provide all documents, including any memoranda, analyses and email correspondence, relating to the decision to issue any contract for the review or processing of applications to the NRC, including applications for design certifications, early site permits, construction permits, operating licenses, and combined licenses for commercial nuclear power facilities. Please provide a copy of any such contract, as well as any Request For Proposal for any such contract. Please provide all documents, including any memoranda, analyses and email correspondence, relating to the compliance or noncompliance of any such contract with the restrictions upon contracting "inherently governmental functions" contained in PL 105-270 and OMB Circular No. A-76.

Thank you very much for your attention to this important matter. Please provide your response no later than Friday, October 5. If you have any questions or concerns, please have your staff contact Dr. Michal Freedhoff or Mr. Will Huntington of my staff at 202-225-2836.

Sincerely,

A handwritten signature in cursive script that reads "Edward J. Markey". The signature is written in black ink and is positioned above the printed name and title.

Edward J. Markey
Chairman