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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY
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Public Service Company of New
Hampshire, et al.

(Seabrook Station, Units 1 and 2)

)
)
) Docket Nos.
) 50-443, -444
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NEW ENGLAND COALITION ON NUCLEAR POLLUTION
MOTION FOR RECONSIDERATION

By order of December 6, 1983, the Appeal Board affirmed the denial of a motion by the New England Coalition on Nuclear Pollution (NECNP) for disqualification of Judge Helen F. Hoyt from the Seabrook operating license proceeding. ALAB-751. NECNP moves for reconsideration of the Appeal Board's decision.

The Appeal Board based its denial of NECNP's motion on two major grounds. First, the Appeal Board ruled that NECNP's claims are identical to claims raised by the two other intervenors who have moved for disqualification, and thus give the Appeal Board no reason to change its conclusion that Judge Hoyt's conduct was not extrajudicial and that it did not rise to the level of pervasive bias. Second, the Appeal Board found that NECNP's motion was not timely filed. The Appeal Board is incorrect on both grounds.

503

I. Substantive Basis For Disqualification

In denying NECNP's motion, the Appeal Board stated that "the substance of every example of asserted bias set forth by the Coalition was likewise advanced in one or both of the two recusal motions passed upon in ALAB-748 and ALAB-749." ALAB-751, slip op. at 2. This assertion is inaccurate. NECNP posited two extremely serious instances of biased behavior by Judge Hoyt that were not dealt with by either SAPL or the Commonwealth of Massachusetts. These instances, taken with the other examples raised in NECNP's motion, create an appearance of bias that pervades the entire licensing proceeding.

First, NECNP raised the fact that the Licensing Board held a meeting, ostensibly for the purpose of gathering information from the Massachusetts Civil Defense Director, at which Judge Hoyt announced her intention to reduce drastically the already constricted licensing proceeding schedule for Seabrook, and took suggestions from Applicants as to how it should be accomplished. See NECNP Motion for Disqualification at 19 - 22. NECNP did not attend this meeting on the express prior understanding that no discussion would be held of any matters substantively affecting NECNP's interest in the proceeding. The discussion of substantive matters affecting NECNP not only violated the ex parte rule, but demonstrated Judge Hoyt's predisposition to make a ruling favorable to the Applicants before she had heard NECNP's position on the issues. NECNP

considers this instance to have been severely prejudicial to its interest in obtaining full and fair litigation of licensing issues in the Seabrook proceeding.^{1/}

Second, NECNP was the only part to address the appearance of bias created by the way in which Judge Hoyt made an ex parte contact with the town of Rye, New Hampshire, and then mischaracterized her treatment of Rye representative Guy Chichester in the Licensing Board order of September 8.^{2/} As discussed at pages 17 - 19 of NECNP's Motion for Disqualification, Judge Hoyt conducted an ex parte conversation with J.P. Nadeau, Chairman of the Rye Board of Selectmen in which, according to the Rye Board of Selectmen, she attempted to persuade the town to remove Mr. Chichester as its official representative. The resulting offer of apology and withdrawal of Rye's recusal motion leaves the impression that Judge Hoyt's wholly improper contact with Rye had an intimidating effect on the town. Later, on September 8, Judge Hoyt issued a written order stating that she had dismissed Mr. Chichester from the

^{1/} NECNP formally objected to the Board's improper conduct and requested that all future scheduling decisions for offsite planning be assigned to an independent tribunal. NECNP Objection to Improper Board Conduct, Reponse to Applicants' Position as to Scheduling of Emergency Planning Issues, and Request for Hearing on Licensing Schedule, filed October 5, 1983.

^{2/} The motion for disqualification by the Commonwealth of Massachusetts described the ex parte contact with Rye in only one sentence, and did not discuss that event or the September 8 order in any detail.

proceeding during limited appearances on August 26, three days before she called Mr. Nadeau. The transcript of the limited appearances, however, shows only that Judge Hoyt expelled Mr. Chichester from the courtroom.

Judge Hoyt's issuance of a written order mischaracterizing her actions of August 26 as dismissal of Mr. Chichester from the proceeding has the appearance of an attempt to lend legitimacy to the ex parte contact with Mr. Nadeau of August 29. Had the Board already dismissed Mr. Chichester, Judge Hoyt's phone call to Mr. Nadeau might have been excusable as an attempt to ascertain how the town of Rye wished to proceed without Mr. Chichester. The record does not support Judge Hoyt's characterization of the events, however. The order of September 8 thus merely amplifies the appearance of bias and impropriety created by the illegal contact of August 29.

Another extremely important factual distinction between NECNP and the other intervenors who have moved for disqualification of Judge Hoyt is the fact that NECNP has raised many instances in which Judge Hoyt's biased conduct was either directed at counsel for NECNP or directly affected NECNP's ability to litigate its contentions. All of the contentions on which coaching of witnesses was alleged, for example, were NECNP contentions. The two instances described above also directly affected NECNP. Judge Hoyt's entertainment of ex parte arguments from Applicants on time allowances for filing contentions and conducting discovery on offsite

emergency planning may have a permanent, negative effect on NECNP's ability to participate effectively in the Seabrook licensing case. Judge Hoyt's treatment of Guy Chichester and the town of Rye relates directly to the litigation of NECNP's contentions, since one of Judge Hoyt's reasons for removing Mr. Chichester from the proceeding was his allegation of witness coaching by counsel for Applicants. See unpublished order of September 8, 1983, attached to NECNP Motion for Disqualification as Exhibit 4. In raising these instances, NECNP thus did not "simply rehearse" the assertions of parties in other disqualification motions. ALAB - 751, slip op. at 6. NECNP could not rely on the pleadings of the other intervenors, but had a distinct interest to protect in filing its own, quite different motion.

II. Timing

The Appeal Board faults NECNP for not having filed its motion in a timely fashion or attempting to justify that late filing. NECNP did not discuss the question of timeliness because in spite of the time consumed in reviewing the voluminous record of this proceeding and researching the legal standards for disqualification, the motion was within the bounds of timeliness as set forth in federal case law.

The Appeal Board apparently considers that NECNP should have filed a disqualification motion shortly after the August hearing that gave rise to the claims. As the Appeal Board

notes in ALAB-749, the courts and the NRC have soundly disapproved the holding back of disqualification motions until after an adverse decision has been rendered, Marcus v. Director, Office of Workers' Compensation Programs, 548 F.2d 1044, 1051 (D.C. Cir. 1976), or until a trial has commenced. Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32 n. 6 (1979). The crucial factor is not the date of discovery of the bias, however, but the effect of the disclosure on the future conduct of the proceeding. Smith v. Danyo, 585 F.2d 83, 86 (3rd Cir. 1978) As the Smith court explained,

[E]specially where the circumstances giving rise to the charge of bias occur or are discovered after the case has commenced, timeliness should be measured not in some absolute and arbitrary manner from the date of discovery, but with respect to the future stages of the case.

In Smith, the court found that plaintiffs who had waited three months to file a motion for recusal had not waived their right to make the motion because it was filed well before the trial date and before the plaintiffs had called upon the trial court for any new ruling

By the same token, NECNP has not jeopardized the conduct of the Seabrook licensing proceeding by filing its recusal motion less than three months after the August hearing. Because a number of offsite emergency plans have not yet been submitted to the NRC, the next phase of hearings, previously scheduled for December, has been indefinitely postponed. Thus, NECNP's

motion does not interfere with the scheduling of the Seabrook hearings.

Nor has NECNP thwarted the imminent issuance by the Licensing Board of a decision regarding the substantive issues litigated in the August hearing. The date for submission of the Applicants' response to the other parties' proposed findings did not fall until after NECNP had filed its recusal motion. Moreover, it is our experience that Licensing Boards take several months to issue a decision after receiving all of the parties' proposed findings. Thus, prompt removal of Judge Hoyt would not adversely affect or delay the Board's ability to reach a decision on the matters litigated in August.

Since the hearing, NECNP has filed contentions on local plans and evacuation time estimates for the State of New Hampshire. In these cases, NECNP did not affirmatively approach the Board seeking a favorable ruling, but filed contentions in conformance with strict and rigorous deadlines in order to maintain an interest in the Seabrook case as it continues. The Board has not yet ruled on any of these contentions, and a new chairman could do so as well as Judge Hoyt.

The only other motion that NECNP has filed before the Licensing Board since the August hearing is an objection to the Board's conduct of the ex parte discussion of August 31, 1983. That motion was filed on October 5, 1983. In it, NECNP asked

the Licensing Board to assign all future decisions regarding the timing of filings in the offsite emergency planning proceeding to an independent tribunal. NECNP also requested a hearing on the timing of completion of construction of Seabrook, so that licensing proceeding scheduling decisions can be made reasonably in light of the projected completion date. (Applicants' and staff's projections now differ by over a year.) Thus, the only action NECNP has independently requested of the Licensing Board was that it open for investigation and debate the issue of the plant completion date, which appears to be a factor governing Judge Hoyt's August 31 proposal to severely constrict the schedule for filing pleadings on offsite planning; and that it examine the propriety of continuing to preside over scheduling issues in light of its prejudicial behavior of August 31. NECNP's disqualification motion does not interfere with the Board's disposition of this motion, but rather is consistent with it. The Board has not ruled upon the motion.

In judging the timeliness of NECNP's motion, the Appeal Board compares NECNP unfavorably to SAPL and the Commonwealth of Massachusetts. The timing of NECNP's submission should be judged not by comparison with other parties, but on the basis of the effect of NECNP's filing on the proceeding. It is simply unfair to judge NECNP's pleading as late because it followed the pleading of other intervenors. Intervenors are independent parties with independent interests. As the Appeal Board has ruled, "a disqualification motion must . . . be based

on an invasion of the movant's own rights.^{3/} ALAB-748, slip op. at 5. Just as the other intervenors could not speak for NECNP, so NECNP was not bound by the schedule by which they asserted their own interests. Hence, the Appeal Board's "inference" that NECNP "assumed that it was free to await Judge Hoyt's disposition of the previous recusal motions before putting in its own oar" is not sufficient legal grounds for denying NECNP's motion. In any event, the record demonstrates the incorrectness of the Appeal Board's conclusion. Judge Hoyt's denial of the Massachusetts disqualification motion was served on November 25, 1983, and was not received by NECNP until November 28, five days after NECNP had filed its own motion.

Conclusion

NECNP does not make a recusal motion lightly. It hoped to file its motion soon after SAPL's appeared, but it refused to do so until it had been able to undertake a thorough review and analysis of the transcript and records of this proceeding and of the applicable law. In light of prior Commission decisions, this review was necessary in order to determine that the motion was legally supportable. It was also necessary to understand the detail and full implications of Judge Hoyt's improper actions with respect to the dismissal of Guy Chichester as

^{3/} For this reason, the Appeal Board is inconsistent in suggesting that NECNP should have filed a response to the disqualification motions by SAPL and the Commonwealth of Massachusetts. To the contrary, NECNP would have no more standing or right to support those motions than those intervenors would have to raise issues related to bias against other intervenors.

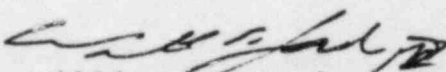
representative of the Town of Rye and the ex parte contact with the town. It would have been irresponsible of NECNP to file its motion before completing that work.

The fact that other intervenors have filed recusal motions is legally irrelevant to the timing or substance of NECNP's motion. The timeliness of NECNP's motion must be judged independently under the standards discussed above. It meets those standards. The substance of NECNP's motion, including unique factual issues raised by NECNP alone, and the prejudice caused specifically to NECNP by Judge Hoyt's conduct, must also be independently examined by the Appeal Board. Those factual issues meet the Commission's standards for disqualification of administrative law judges.

For these reasons, NECNP moves that the Appeal Board reconsider and reverse its decision of December 6, 1983.

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December 13, 1983

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I certify that on December 13, 1983, copies of NEW ENGLAND COALITION ON NUCLEAR POLLUTION MOTION FOR RECONSIDERATION were served on the following by first-class mail:

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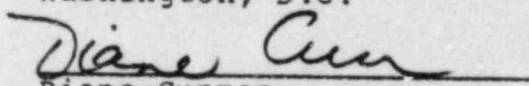
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