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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

OFFICE OF SECRETARY
BOARDING & SERVICE
BRANCH

Public Service Electric and)
Gas Company)
(Hope Creek Generating) Docket No. 50-354-OL
Station))

APPLICANTS' RESPONSE TO ORDER DATED
DECEMBER 28, 1983 REGARDING RECUSAL
MOTION BY THE PUBLIC ADVOCATE

Preliminary Statement

By an Order dated December 28, 1983, the Chairman of the Atomic Safety and Licensing Appeal Panel requested Public Service Electric and Gas Company, et al. ("Applicants") to furnish the Appeal Board with their views regarding a motion filed by intervenor Public Advocate of the State of New Jersey ("Public Advocate") on November 18, 1983, requesting that Administrative Judge James H. Carpenter disqualify or recuse himself from further service as a member of the presiding Licensing Board in this proceeding. The instant memorandum is filed in compliance with the Chairman's directive.

Discussion

The prevailing rule regarding the disqualification of a licensing board member was stated in Midland as follows:

[A]n administrative trier of fact is
subject to disqualification if he has a

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direct, personal, substantial pecuniary interest in a result; if he has a "personal bias" against a participant; if he has served in a prosecutive or investigative role with regard to the same facts as are an issue; if he has prejudged factual - as distinguished from legal or policy - issues; or if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.^{1/}

Our review of the NRC case law on disqualification indicates that, for the most part, disqualification cases have involved a party's dissatisfaction with a licensing board member's personal comportment or his conduct of the proceeding. In South Texas, the Commission held that such conduct rarely, if any, provides a basis for disqualification.^{2/} Rather, the Commission adopted the standard utilized by the federal courts to the effect that "disqualifying bias or prejudice of a trial judge must generally be extra-judicial."^{3/}

Unfortunately, neither South Texas nor the other cases provide helpful guidance with regard to a claim of prior involvement by a licensing board member performing

1/ Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973). The Midland standard was cited with approval in Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 (1978).

2/ Houston Lighting and Power Company (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1365 (1982).

3/ Id.

consulting services for a license applicant. Accordingly, we have reviewed the relevant documents as regards Dr. Carpenter on the basis of the general standards outlined in Midland. Based upon that review, including an examination of the documents which the undersigned counsel furnished to Dr. Carpenter and the parties at his request by letter dated December 1, 1983, Applicants believe that there is nothing which requires Dr. Carpenter's disqualification. In our view, the matters as to which Dr. Carpenter provided consultant services do not, under Midland, give rise to any "direct, personal, substantial pecuniary interest" in the operating license proceeding, demonstrate any personal bias or factual prejudgment, or give the appearance of bias or prejudgment.

Specifically, we find no reason to question Dr. Carpenter's statement that his prior work on behalf of Public Service Electric and Gas Company regarding the Hope Creek Generating Station "was limited to evaluating the potential thermal effects of discharges of heated waters," which are not at issue in this proceeding.^{4/} Nor do Applicants have any basis upon which to disagree with Dr. Carpenter's factual and legal conclusions:

I have not prejudged any issues in dispute in this case, nor do have any

^{4/} Public Service Electric and Gas Company (Hope Creek Generating Station, Unit 1), Docket No. 50-354-OL, "Memorandum" (December 8, 1983) (slip op. at 3).

bias with respect to the proper determination of those issues. My work performed over a decade ago for PSE&G presents no objective basis for assuming the existence of any appearance of bias or prejudgment.^{5/}

Nonetheless, Applicants have no way of predicting what conclusion an appellate tribunal ultimately reviewing decisions in this proceeding might reach, at least regarding the possible appearance of a conflict of interest on the part of Dr. Carpenter. If, for example, a reviewing tribunal were to vacate the Licensing Board's initial decision authorizing the issuance of an operating license for Hope Creek on the ground that Dr. Carpenter should have been disqualified, and to remand the case for further proceedings, the consequences to Applicants caused by the delay would be critical.

Because it is in Applicants' best interest that any possible reason for delay in the issuance of a license be avoided, a cautious approach to the situation at hand

^{5/} Id.

dictates the replacement of Dr. Carpenter with another Board member as to whom no question exists.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

Troy B. Conner, Jr. JPC/R

Troy B. Conner, Jr.
Counsel for the Applicant

January 9, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Gas Company)	
)	Docket No. 50-354-OL
(Hope Creek Generating)	
Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to Order Dated December 28, 1983 Regarding Recusal Motion by the Public Advocate," dated January 9, 1984 in the captioned matter have been served upon the following by deposit in the United States mail on the 9th day of January, 1984:

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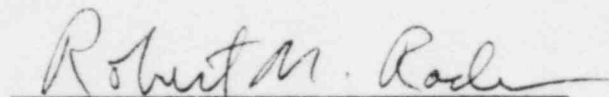
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