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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-4
	)	(Low Power)
(Shoreham Nuclear Power Station, Unit 1)	)	
	)	

LILCO'S RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK'S REQUEST FOR RECUSAL AND, ALTERNATIVELY, MOTION FOR DISQUALIFICATION OF CHAIRMAN PALLADINO

I. INTRODUCTION

Nearly two months after first improperly demanding the recusal of Chairman Palladino, Suffolk County and Governor Cuomo have now formally moved for the Chairman's recusal and, alternatively, for his disqualification by the entire Commission. The facts upon which Chairman Palladino must decide the motion are uniquely known to him; LILCO will not comment upon them. LILCO is concerned, however, that this motion not be used as a further delaying tactic by the County and Governor Cuomo in an effort to avoid reaching the merits of various licensing matters pertinent to Shoreham. Indeed, LILCO

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is troubled by the intervenors' implicit suggestion that improper bias is indicated merely by administering the process to ensure that the substantive merits, rather than procedural delays, determine the ultimate result. Accordingly, LILCO sets forth below the applicable law which ought to be taken into account by Chairman Palladino.

II. THE DECISION ON RECUSAL RESTS SOLELY WITH THE CHAIRMAN

The decision with respect to recusal must be made solely by Chairman Palladino and is not to be second-guessed by the Commission. Commission precedent establishes that the motion for consideration and disqualification by the whole Commission must be denied:1/

> Consistent with the Commission's past practice, and the generally accepted practice of the federal courts and administrative agencies, the Commission has determined that disqualification decisions should reside exclusively with the challenged Commissioner and are not reviewable by the Commission.

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power

1/ Research has not disclosed any difference between the substantive standards for recusal, which is simply self-disqualification by a person acting in the capacity of a judge, and for disqualification of such a person by others.

Plant, Units 1 and 2), CLI-80-6, 11 NRC 411, 412 (1980).[2/]

III. TIMELINESS OF THE MOTION MUST BE CONSIDERED

Both federal courts and administrative agencies require that a motion for recusal be filed as soon as the party asking for recusal becomes aware of the information leading to the request. Marcus v. Director, Office of Worker's Compensation Programs, 548 F.2d 1044, 1051 (D.C. Cir. 1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983). This requirement for prompt action increases administrative efficiency by avoiding unnecessary delay in the proceeding should recusal be warranted, id., and prevents conversion of "the serious and laudatory business of insuring judicial fairness into a mere litigation strategy." Delesdernier v. Porterie, 666 F.2d 116, 121 (5th Cir.), cert. denied, 103 S. Ct. 86 (1982).

2/ The County/Cuomo motion's failure to cite any of the abundant Commission precedent on recusal and disqualification and specifically its failure to mention this case -- directly on point and contrary to their position -- is disturbing and potentially unethical. It is all the more surprising in view of the fact that Suffolk County's counsel were counsel of record for Governor Jerry Brown in the Diablo Canyon proceeding at the time this decision was rendered.

The actions by Chairman Palladino of which the County and Governor Cuomo complain occurred between March 16, 1984 and, at the latest, April 4, 1984. The County and Governor Cuomo were clearly aware of them by April 11, when the County Executive wrote a letter to the Commission alleging that Chairman Palladino was biased. The instant motion was not filed until almost two months later, a period of delay which has not been tolerated in other comparable proceedings. See Seabrook, 18 NRC at 1199 (motion for disqualification late when party waited almost two months to raise its concerns); Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32 n.6 (1979) (motion filed more than six weeks after the order on which it was predicated is untimely).

Timeliness should not be considered solely for the sake of adjudicatory efficency, but also to the extent that it reflects on the credibility of the County's and Governor Cuomo's asserted belief that recusal is necessary. At least three times beginning April 11, the County, with or without Governo Cuomo, has called for the Chairman's recusal without any factual predicate and without any properly filed motion.3/

3/ These include the letter of County Executive Peter Cohalan on April 11, the Amended Complaint in Cuomo v. NRC, Civ. Action

(Footnote cont'd)

Each request appears to have been prompted solely by progress toward adjudicating the merits of LILCO's low power license request. A request for recusal should not be used to delay the adjudicatory process. The two-month delay in properly raising this issue, particularly give the multiplicity of attempts to raise it improperly in the interim, suggests that litigation tactics, rather than any concern with fairness, may have prompted the motion.

IV. STANDARD FOR RECUSAL

Disqualification of a judge or an agency official acting in an adjudicative capacity is unusual. There is a presumption of the decisionmaker's honesty and integrity. See Withrow v. Larkin, 421 U.S. 35, 47 (1975). This presumption is overcome only if the decisionmaker harbors an attitude that a

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No. 84-1264 (D.D.C. filed April 23, 1984), and Suffolk County's memorandum of April 27, 1984 to counsel for parties in Cuomo v. NRC (quoted in the Licensing Board's Status Report to Commissioners dated April 30, 1984). Further, Mr. Cohalan, and counsel for Governor Cuomo, delivered lengthy accusations of misconduct by Chairman Palladino in prepared and live testimony at May 17, 1984 oversight hearings on the regulatory process at Shoreham called by the Subcommittee on Energy and the Environment of the House Interior Committee. (Prepared Testimony of Peter Cohalan at 2-4; Prepared Testimony of Fabian G. Palamino, at 4-5).

fair-minded person would be unable to set aside so that he could evaluate objectively the arguments presented by all parties. See United States v. Conforte, 624 F.2d 869, 881 (9th Cir.), cert. denied, 449 U.S. 1012 (1980). Thus, for example, a general bias in favor of nuclear power does not disqualify an adjudicator from participating in a nuclear licensing decision if the adjudicator can base his decision on the evidence before him. See Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975).

The standards for determining whether recusal is warranted are as follows:[4/]

> [An] administrative trier of fact is subject to disqualification if he has a 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 that 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.

4/ The County/Cuomo motion cites as its standard for recusal the formulation first addressed in Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (motion at 1-2). However, the motion never mentions any of the numerous cases before the Commission which have applied and construed that very general verbal formula under circumstances applicable to Commission practice.

Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), No. 50-354-OL, ALAB-759, slip op. at 12 (Jan. 25, 1984) (quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973)); cf. 28 U.S.C. § 455 (providing standards for disqualification of a federal judge). The Commission has held in applying these standards that only bias or prejudgment attributable to extra-judicial sources requires disqualification. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363 (1982), citing United States v. Grinnel Corp., 384 U.S. 563, 583 (1966).[5/]

The County/Cuomo motion does not meet this standard. Even if accepted at face value, the facts averred in it would not lead a disinterested observer to conclude that the Chairman has prejudged the facts concerning Shoreham in advance of hearing the issues. The primary basis for the recusal motion is the Chairman's alleged role in expediting the schedule for reaching a decision on whether a low power license should issue for Shoreham. Such an attempt to ensure that the process

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5/ The Commission left open the possibility that in the most extreme cases judicial conduct demonstrating pervasive bias and prejudice against a party might be grounds for disqualification. South Texas, 15 NRC at 1366. Obviously, no such facts exist here.

itself (specifically, its length) does not artifically dictate the result indicates no predisposition on the merits. Interestingly, the motion contains no particularized averment that Chairman Palladino has reached any substantive view concerning LILCO's low power license request or that he has attempted to influence the substantive views of others involved in the process. Indeed, in the one low power license matter that has thus far reached the Commission, the Chairman voted against LILCO's position. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC ____ (May 16, 1984).

In contrast, scheduling questions are procedural. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-757, 18 NRC 1356, 1359 n.17 (1983). The public interest in setting a schedule for licensing hearings is usually best served by proceeding as rapidly as is possible, consistent with the opportunity for all parties to be heard. See Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 684-85 (1975); Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975). The Commission has recognized the public interest in concluding licensing proceedings expeditiously and certainly prior to

completion of construction of a nuclear plant. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); Statement of General Policy and Procedure: Conduct of Proceedings for the Issuance of Construction Permits and Operating Licenses for Production and Utilization Facilities for Which a Hearing is Required under Section 189A of the Atomic Energy Act of 1954, as amended, 10 CFR Part 2, Appendix A. As a result, the Commission's policy is to encourage expedited hearings as a means of avoiding licensing delays and to maintain its commitment to a fair and thorough hearing process.

To the extent Chairman Palladino sought to encourage an expedited hearing on LILCO's application for a low power license, his actions appear simply to have been consistent with implementation of this policy.6/ The Chairman has many duties in addition to his adjudicatory role, including responsibility for ensuring that the Commission staff is responsive to

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6/ The meeting on March 16, 1984 did not, as alleged by the County and State, involve ex parte contacts. Ex parte communications involve substantive matters at issue in the proceeding. 10 C.F.R. § 2.780(a)(2); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-313, 3 NRC 94, 96 (1976). Scheduling questions are purely procedural. See Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-757, 18 NRC 1356, 1359 n.17 (1983).

Commission policy. See Reorganization Plan No. 1, 45 Fed. Reg. 40561 (1980). The mere fact that he performs these other duties does not necessitate his recusal. If it did, it would be impossible for any agency chairman to carry out both his adjudicatory and his other legal duties. Cf. Kennecott Copper Corp. v. FTC, 467 F.2d 67, 79-80 (10th Cir. 1972) (Commission not disqualified when Act requires it to perform other duties involving the very subject matter of the case), cert. denied, 416 U.S. 909 (1974).

Further guidance may be gleaned by comparing the present situation to two other instances in which recusal or disqualification was an issue. In the Diablo Canyon proceeding, Commissioner Hendrie declined to recuse himself after discussing scheduling matters with the applicant in an off-the-record meeting. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant), Nos. 50-275-OL and 50-323-OL (Commissioner Hendrie's Memorandum to Counsel for Parties, March 13, 1980). In contrast, in the only instance disclosed by research in which an adjudicative officer at NRC has been removed from a case, the Hope Creek Appeal Board found that an appearance of impropriety existed because the disqualified judge had actually worked for the applicant on the particular plant at issue and that work had been cited in the

decision approving a construction permit. See Hope Creek, slip op. at 17. Chairman Palladino's alleged actions far more closely resemble the first example than the latter.7/

7/ Additional perspective on whether the previous conduct or statements of Chairman Palladino, or any other Commissioner, may be of such a nature as to lead a disinterested observer to conclude that prejudgment of facts or law has occurred is gained by comparing them with actions or statements which were not considered by the only competent judge -- the Commissioner himself -- to warrant recusal. In that regard, it is helpful to remember Commissioner Gilinsky's May, 1983 dissent from the Commission's refusal of Suffolk County's demand that it preemptively terminate emergency planning proceedings at Shoreham before ever allowing any evidence to be taken. There, Commissioner Gilinsky clearly indicated his views on the outcome:

> [T]he Commission has failed to deal with the actual issue in this case. That is: can there be adequate emergency preparedness (as distinct from planning) if neither the State nor the County Governments will participate?
>
> The answer is, clearly, No. There cannot be adequate emergency preparedness for the surrounding population without the participation of a responsible government entity.

Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-83-13, 17 NRC 741, 744 (1983). Such views, if logically pursued by Commissioner Gilinsky, would utterly preclude his voting in favor of an operating license for Shoreham, despite statutory and regulatory provisions which not only empower but obligate the Commission to hear fairly the merits of a plan sponsored only by a utility. Chairman Palladino's actions and statements, unlike those of Commissioner Gilinsky, go only to scheduling, not to substance; yet Commissioner Gilinsky has not recused himself from Commission decisions and deliberations on Shoreham.

V. CONCLUSION

In deciding the motion for his recusal, Chairman Palladino should consider the matters discussed above. Based on the facts as alleged, recusal does not appear to be warranted in these circumstances.

Respectfully submitted,

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LILCO, June 18, 1984

CERTIFICATE OF SERVICE

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LONG ISLAND LIGHTING COMPANY
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I hereby certify that copies of LILCO'S RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK'S REQUEST FOR RECUSAL AND, ALTERNATIVELY, MOTION FOR DISQUALIFICATION OF CHAIRMAN PALLADINO were served this date upon the following by U.S. mail, first-class, postage prepaid, and in addition by hand (as indicated by one asterisk), by Federal Express (as indicated by two asterisks).

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