

7/06/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

24 JUL -9 11:16

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,
Unit 1))

Docket No. 50-322-OL-4
(Low Power)

SUFFOLK COUNTY AND STATE OF NEW YORK FILING
IN RESPONSE TO APPEAL BOARD ORDER OF JUNE 26, 1984

On June 21, 1984, Suffolk County and the State of New York moved for disqualification of the three members of the Low Power Licensing Board. See Suffolk County and State of New York Motion for Disqualification of Judges Miller, Bright, and Johnson, June 21, 1984 (hereafter, the "Motion"). On June 25, 1984, the Low Power Board denied the Motion. See Order Denying Intervenors' Motion for Disqualification of Judges Miller, Bright and Johnson, June 25, 1984. By Order dated June 26, 1984, this Appeal Board stated that any party wishing to present views either in support of or in opposition to the Licensing Board's June 25 Order should file papers by July 6, 1984. The instant filing by Suffolk County and the State of New York responds to the Appeal Board's June 26 Order.

The Licensing Board denied the Motion on two grounds: that the Motion was untimely; and that the Motion and the supporting

DS03

affidavit were "wholly insufficient to justify disqualification." Order Denying Intervenor's Motion for Disqualification of Judges Miller, Bright and Johnson, at 5. Suffolk County and the State of New York urge the Appeal Board to reverse the Licensing Board's Order and to direct disqualification of Judges Miller, Bright and Johnson. The basic reasons for such disqualification are set forth in the Motion and supporting affidavit and need not be repeated here. However, there are two comments which must be made respecting the stated bases for the Licensing Board's action.

First, contrary to the Licensing Board's assertion, the Motion was not untimely. Part of the bases for this Motion did begin to become known in early April 1984; however, the full bases, as set forth in the Motion and the affidavit, did not become available to the County until late May 1984. Namely, key information pertinent to the need for disqualification (particularly, Judge Cotter's notes of the March 16, 1984 meeting) did not become available to the County until late May 1984 when they were obtained by the County in response to Freedom of Information Act Request 84-267. Thus, it was not until late May that the County and State were in a position to file a motion for recusal or disqualification.^{1/} Once all those data were compiled, the

^{1/} The County did raise disqualification in an amended complaint to the Civil Action filed in late April 1984. That complaint was dismissed after the Commission vacated most provisions of the Licensing Board's April 6 Order. In subsequent briefs to the Commission, the need for a new Licensing Board was raised, and the matter was also addressed by several Commissioners in the May 16, 1984 NRC Order. It was shortly thereafter,
(footnote continued)

County and State moved promptly. First, the County and State filed a motion for recusal or disqualification of Chairman Palladino. That motion was filed on June 6, 1984. Subsequently, the County and State filed the instant motion regarding the Low Power Board. Under all the circumstances, we submit that filing the Motion within a month of receiving the Freedom of Information Act materials and just over a month after the NRC's issuance of the May 16 Order was prompt and timely.

Second, the Licensing Board's denial of the disqualification motion argues at some length that the Low Power Licensing Board was not influenced by whatever activities were going on elsewhere at the NRC, such as Chairman Palladino's March 16 meeting. Since the Licensing Board stated that it was not influenced by these activities, it concluded that it would not be in the public interest for it to disqualify itself. However, the Low Power Board failed to apply the necessary legal standard of the Cinderella case, namely whether a disinterested observer would have reason to believe that the Board may have been affected in some manner by the chain of events set forth in the Motion and in the attached affidavit. When that correct legal standard is applied, Suffolk County and the State of New York submit that no conclusion is possible other than that the Low Power Board must be disqualified.

(footnote continued from previous page)

when the present Licensing Board was left in charge of this proceeding, that the FOIA data became available and the County and State commenced work on motions to disqualify Chairman Palladino, the Low Power Board, and Judge Cotter.

Respectfully submitted,

Martin Bradley Ashare
Suffolk County Department of Law
Veterans Memorial Highway
Hauppauge, New York 11788

Lawrence Coe Lanpher

Herbert H. Brown
Lawrence Coe Lanpher
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Attorneys for Suffolk County

Fabian G. Palomino (by JCY)

Fabian G. Palomino
Special Counsel to the Governor
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

Attorney for MARIO M. CUOMO,
Governor of the State of New York

July 6, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)
)
)

LONG ISLAND LIGHTING COMPANY)
)
)

(Shoreham Nuclear Power Station,)
Unit 1))
_____)

DOCKET NUMBER 50-322-OL-4
FILED JULY 1984
Docket No. 50-322-OL

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY RESPONSE TO APPEAL BOARD ORDER OF JUNE 7, 1984 and SUFFOLK COUNTY AND STATE OF NEW YORK FILING IN RESPONSE TO APPEAL BOARD ORDER OF JUNE 26, 1984, dated July 6, 1984, have been served on the following this 6th day of July 1984 by U.S. mail, first class, except as otherwise indicated.

Alan S. Rosenthal, Chairman*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Howard A. Wilber*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Gary J. Edles*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Mr. Marc W. Goldsmith
Energy Research Group, Inc.
400-1 Totten Pond Road
Waltham, Massachusetts 02154

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

W. Taylor Reveley, III, Esq.
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

James B. Dougherty, Esq.
3045 Porter Street, N.W.
Washington, D.C. 20008

Mr. Brian R. McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, New York 11792

Joel Blau, Esq.
New York Public Service Commission
The Governor Nelson A. Rockefeller
Building
Empire State Plaza
Albany, New York 12223

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Bernard M. Bordenick, Esq.
Edwin J. Reis, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Stuart Diamond
Business/Financial
NEW YORK TIMES
229 W. 43rd Street
New York, New York 10036

Stewart M. Glass, Esq.
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza
New York, New York 10278

Anthony F. Earley, Jr., Esq.
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Stephen B. Latham, Esq.
Twomey, Latham & Shea
P.O. Box 398
33 West Second Street
Riverhead, New York 11901

Hon. Peter F. Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Fabian Palomino, Esq.
Special Counsel to the
Governor
Executive Chamber, Room 229
State Capitol
Albany, New York 12224

Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Jonathan D. Feinberg, Esq.
Staff Counsel
New York State Public Service
Commission
3 Rockefeller Plaza
Albany, New York 12223

Mr. Bruce L. Harshe
Consumers Power Company
1945 W. Parnall Road
Jackson, Michigan 49201

Dr. Peter F. Riehm
KMC, Inc.
801 18th Street, N.W.
Washington, D.C. 20006

Lawrence J. Brenner, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

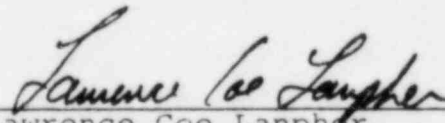
Dr. George A. Ferguson
School of Engineering
Howard University
2300 6th Street, N.W.
Washington, D.C. 20559

Dr. Peter A. Morris
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Marshall E. Miller
Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Judge Glenn O. Bright
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Judge Elizabeth B. Johnson
Oak Ridge National Laboratory
P.O. Box X
Building 3500
Oak Ridge, Tennessee 37830



Lawrence Coe Lanpher
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

DATE: July 6, 1984

* By Hand