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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
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PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	Docket Nos. 50-443 OL 50-444 OL
	)	
(Seabrook Station, Units 1 and 2)	)	

ANSWER OF THE NRC STAFF IN OPPOSITION TO
SAPL'S PETITION FOR COMMISSION REVIEW OF ALAB-748

Roy P. Lessy
Deputy Assistant Chief
Hearing Counsel

December 16, 1983

DESIGNATED ORIGINAL

Certified By

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I. INTRODUCTION

On October 7, 1983, intervenor Seacoast Anti-Pollution League (hereafter "SAPL") filed a motion pursuant to 10 C.F.R. § 2.704(c) for the recusal of Chairperson Helen F. Hoyt from the Licensing Board presiding over this operating license proceeding. The only responses to SAPL's motion were filed by the Staff and Applicants; both answers opposed the recusal motion. On November 2, 1983, Judge Hoyt issued an Order denying SAPL's recusal motion. As required by 10 C.F.R. § 2.704(c), Judge Hoyt referred the matter to the Appeal Board for review. On November 16, 1983, the Appeal Board issued ALAB-748, 18 NRC ___ (hereafter "Slip Op.") which affirmed Judge Hoyt's Order denying SAPL's recusal motion. The Appeal Board stated that it acted promptly in reviewing the matter in accordance with its ". . . standard practice in matters of this kind." (Slip Op. at 3). In this regard, it should be noted that the recusal motion was filed in the midst of the operating license proceeding accompanied by a request that the Licensing Board stay further

proceedings pending resolution of the recusal motion.[1/] On December 1, 1983, SAPL petitioned for Commission review of ALAB-748 pursuant to 10 C.F.R. § 2.786(b)(1). For the reasons discussed, the Staff opposes the petition for Commission review.

II. DISCUSSION

The regulation governing petitions for discretionary Commission review of decisions of an Atomic Safety and Licensing Appeal Board is 10 C.F.R. § 2.786. That regulation provides, in pertinent part, that a party may file a petition for Commission review ". . . on the ground that the decision . . . is erroneous with respect to an important question of fact, law, or policy." No such important question has been raised in SAPL's petition.

SAPL alleges that the legal standard utilized by the Appeal Board (as well as Judge Hoyt) in ruling upon the recusal motion was erroneous. That standard was recently determined by the Commission in Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363 (1982). In that decision the Commission adopted the legal standard that "alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and result from an opinion on the merits on some basis other that what the Judge has learned from participation in the case." 15 NRC at 1365 citing U.S. v. Grinnel Corp., 384 U.S. 563, 583 (1966). In addition, in South Texas, the Commission re-affirmed its prior holding in Commonwealth Edison Company (La Salle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169, 170 (1973) that as a matter of law, preliminary assessments made on the record during the course of an

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1/ The stay request was denied by the Licensing Board by Order dated October 21, 1983.

adjudicatory proceeding based solely upon application of the decision-maker's judgment to matters properly before him in the proceeding do not compel disqualification. Id. The standard for recusal adopted by the Commission is the same standard that is applied to federal judges, and is based upon a decision, U.S. v. Grinnel Corp. supra, that has been consistently applied[2/] in cases examining recusal under 28 U.S.C. § 455, of federal judges, justices, or magistrates. In ALAB-748 the Appeal Board applied the general rule for disqualification in accordance with the Commission's South Texas decision. The Appeal Board concluded:

> All of the examples of alleged hostility to SAPL and other intervenors involve rulings, conduct or remarks by the Licensing Board Chairman in response to matters that arose during the administrative proceedings in this case. This being so, we must agree with Judge Hoyt and the opposing parties that no basis for disqualification has been established under the general rule applied in Commission proceedings. (footnote omitted) (Slip Op. pp. 5-6).

SAPL contends in its petition that it is the position of the Applicants and Staff "that no matter how pervasive the appearance of bias and hostility [is] on the part of the Judge, [if] the actions giving rise to that appearance stem from participation in the hearings, [it] is not 'extra-judicial', and therefore cannot serve as a basis for recusal." (Petition, p. 4). Contrary to SAPL's assertion, the Staff noted in its response to SAPL's motion that some courts have recognized a narrow exception to the Grinnel rule, under which even "judicial conduct," if

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2/ See, e.g.: Phillips v. Joint Legislative Committee, 637 F.2d 1014, 1020 (5th Cir. 1981); Johnson v. Trueblood, 629 F.2d 287, 291-92 (3d Cir. 1980); United States v. Sibla, 624 F.2d 864, 869 (9th Cir. 1980); In re International Business Machines, 618 F.2d 923, 927-32 (2d Cir. 1980); Hepperle v. Johnson, 590 F.2d 609, 614 (5th Cir. 1979); Davis v. Board of School Commissioners, 517 F.2d 1044, 1051-52 (5th Cir. 1975).

extremely prejudiced, can result in disqualification.[3/] The Commission in South Texas, supra, noted that the exception for extreme prejudice has been invoked by the courts in only the most extreme cases. 15 NRC at 1366. Significantly, however, the Appeal Board concluded in ALAB-748 that even if such a standard were to be used here, based upon a "carefu[l] canvass[ing] [of] the materials submitted by SAPL in connection with its motion," and its familiarity "with the context of the litigation by virtue of . . . [its] earlier rulings on requests by SAPL and other intervenors for directed certification . . . ." (Slip Op. pp. 6-7), none of the events and allegations raised by SAPL, taken ". . . independently or collectively, rise to the level of demonstrating a preconceived opinion on the merits or a showing of pervasive bias or prejudice by the Licensing Board Chairman" (Slip Op. p. 7).

Almost all of the factual allegations raised by SAPL against Judge Hoyt do not even relate to the merits of the proceeding. Rather, these allegations relate to procedural matters; i.e., the way in which Judge Hoyt presided over a complex, multi-party, heavily contested proceeding, and a prehearing conference. As noted by the Appeal Board in ALAB-748, supra, friction between a judge and counsel during even a brief trial does not constitute "pervasive bias." Slip Op. p. 4 citing Hamm v. Members of the Board of Regents of State of Florida, 708 F.2d 647, 651 (1983). Accord, Plaquemines Parish School Board v. U.S., 415 F.2d 817, 824-25 (5th Cir. 1969). SAPL's allegations of bias essentially stem from its interpretation of factual incidents involving Judge Hoyt's ruling on procedural matters and her attempts to control

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3/ "Response Of The NRC Staff In Opposition To SAPL's Motion To Recuse Judge Hoyt" (October 31, 1983) p. 3 (hereafter "Staff Response").

the proceeding.[4/] Judge Hoyt ruled upon SAPL's allegations as a whole and considered therein charges or arguments made by SAPL on behalf of other intervening parties. The Appeal Board likewise reviewed the various events and likewise concluded that such events, whether considered independently or collectively, do not show a basis for action on the merits or pervasive bias. ALAB-748, Sl[illegible].R. § 2.786(b)(4)(ii) provides that a petition for review of factual matters ". . . will not be granted unless it appears that the . . . Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to resolution of that same issue by the . . . Licensing Board." That necessary predicate to further factual review of SAPL's allegations has not been satisfied here, as the Appeal Board in ALAB-748 did not express any disagreement with Judge Hoyt's Order as to any factual issues.

SAPL contends in the alternative (Petition, p. 4), that "Commission review of ALAB-748 should be granted because the Commission's interpretation in Houston Lighting [CLI-82-9] that disqualifying bias must generally be extrajudicial is erroneous and contrary to the intent of Congress . . ." in enacting the 1974 amendment to 28 U.S.C. § 455. (Petition, p. 4).

4/ In its Petition, SAPL acknowledges Judge Hoyt's denial of its recusal motion based upon her efforts to control the course of the proceeding and the conduct of the participants. (Petition, pp. 5-6). SAPL complains that nowhere is there a finding that a party refused to comply with the board's directions or was guilty of "disorderly, disruptive, or contemptuous conduct." In response, the Staff disagrees with the assertion that a presiding officer must first make a finding of disorderly conduct before it can act to control the proceeding. Moreover, Judge Hoyt distributed to the parties and actively followed the Commission's "Statement Of Policy On Conduct Of Licensing Proceedings," CLI-81-8, 13 NRC 452 (1981). As required by that Policy Statement, the Board set and adhered to schedules, granted extensions of time only for good cause, managed discovery, utilized summary disposition where there was no genuine issue of material fact or law, required the filing of cross-examination plans, and imposed sanctions in one or two instances.

When originally enacted, 28 U.S.C. § 455 (1970) had required a judge to disqualify himself only if it would be improper "in his opinion" to continue to sit. This subjective standard was replaced in 1974 by the objective standard now found in 28 U.S.C. § 455(a).[5/] Contrary to SAPL's assertion, at no place in the present statute or its legislative history is there language to demonstrate a Congressional intent to apply § 455 to judicial acts as opposed to acts stemming from an extra-judicial source.[6/]

The federal courts have, indeed, reaffirmed their previous statements of the law of disqualification in decisions rendered after the 1974 amendment to § 455. One of the first cases to raise the issue of the amendment's effect was Davis v. Board of School Commissioners, supra note 1. In that decision, the Court of Appeals for the Fifth Circuit observed that the amended language of § 455 was new to the federal law of disqualification, and stated that its task was to determine "whether Congress intended to overrule the gloss placed on [28 U.S.C.] § 144 [related disqualification provision], and impliedly on § 455, by court decisions that it applies only to conduct which runs against a party and not the lawyer . . . and that disqualification results from extra-judicial

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5/ 28 U.S.C. § 455 (Supp. V 1981) provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

6/ See generally: H.Rep. No. 93-1453, 93rd Cong., 2nd Sess. (1974); reprinted in 1974 U.S. Code Cong. and Ad. News p. 6351; S.Rep. No. 93-419, 93rd Cong., 1st Sess. (1973).

conduct rather than from matters arising in a judicial context." 517 F.2d at 1052. The Court found "no suggestion in the legislative history that these decisions were being overruled or in anywise eroded . . . ." Id. The court concluded that disqualification should be determined "on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than counsel . . . and on the basis of conduct extra-judicial in nature as distinguished from conduct within a judicial context." Id. And in Johnson v. Trueblood, supra note 1, the Court of Appeals concluded:

> [i]n general, it seems that § 455(a) was intended only to change the standard the district judge is to apply to his or her conduct; it does not alter the type of bias required for recusal. Thus the rule . . . continues that only extrajudicial bias requires disqualification. (citations omitted) 629 F.2d at 290-91.7/

It is thus clear, contrary to SAPL's assertion, that the amendment of 28 U.S.C. § 455 in 1974 has not diminished the force of the general principle applied by the Commission in South Texas, supra that disqualifying bias must stem from an extrajudicial source. Without citation to any authority, SAPL proffers the new argument that Judge Hoyt's actions were not "judicial" in any event ". . . since the incidents described, although they occurred in the hearing room, were usually directed not to matters of law or evidence, but towards the roles of the parties and the [sic] counsel."8/ (Petition, p. 4, n.2). This argument is likewise

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7/ See also Phillips v. Joint Legislative Committee, supra, 637 F.2d at 1020; In re International Business Machines, supra, 618 F.2d at 927-32; United States v. Sibla, supra, 624 F.2d at 869; and Hepperle v. Johnson, supra, 590 F.2d at 614.

8/ This argument was not raised by SAPL below, but could have been. Even though this itself is grounds for denial of the petition in this regard (see 10 C.F.R. § 2.786(b)(4)(iii)), the Staff will briefly respond.

without merit, for as the Appeal Board recently observed in ALAB-749, 18 NRC ___ (November 28, 1983) in this proceeding, that "[m]atters are extra-judicial when they do not relate to the judge's official duties in the case" (ALAB-749, Slip Op. at 8 citing In re International Business Machines Corp., 618 F.2d 923, 928 (2d Cir. 1980)).[9/] As noted by the Appeal Board in ALAB-748, "the allegations of bias stem entirely from the Judge's conduct during the course of the proceedings rather than from an extra-judicial source" (Slip Op. p. 2, 8). In IBM, supra, the court gave an example of disqualifying extra-judicial bias, in the instance where a Judge's first cousin would be a party to a case being litigated before that Judge. Although this is not within the "third degree of kinship that requires disqualification pursuant to 28 U.S.C. § 455(b)," the court stated that "reasonable men might well question his impartiality where a close personal relationship exists between the two." Other examples of bias emanating from extrajudicial sources may occur, for example, where the Judge has personal knowledge of disputed facts; where the Judge previously represented a party "in the matter in controversy"; or where the judge has a financial interest in the subject matter in controversy. See 28 U.S.C. § 455(b). Contrary to SAPL's assertion, there is no support for the novel proposition that matters relating to a judge's actions in presiding over the participants in a proceeding constitute extrajudicial rather than judicial actions.

Similarly, SAPL argues that the Appeal Board failed to address the fact that there have been some negative newspaper articles in New Hampshire

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9/ Accord, Johnson v. Trueblood supra note 1, 629 F.2d at 291 ("extra-judicial bias refers to bias that is not derived from the evidence or conduct of the parties' that the judge observes in the course of the proceedings").

regarding the Seabrook OL hearings, and Judge Hoyt in particular. (Petition, p. 10). To buttress its position, SAPL has referred to a number of newspaper articles attached to its recusal motion previously filed. In response, it should be initially noted that the Appeal Board made it clear that it ". . . carefully canvassed the materials submitted by SAPL in connection with its motion." (ALAB-748, p. 6). Contrary to SAPL's assertion, such articles do not present "a significant evidentiary basis" for SAPL's recusal motion. Rather, the evidentiary record (which would fall within the Appeal Board's review) is the proper and appropriate evidentiary basis for the proceeding. In addition, many if not most of the submitted articles, as well as other contemporaneously issued articles, appear based to a significant extent on interviews given by counsel or representatives for certain intervening groups and participants in this proceeding. In administrative proceedings, as in courts of law, attorneys are expected to make their record and present evidence in the administrative proceeding itself, not in the media. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 744, 750 (April 11, 1980). Reliance on such media reports simply provides no proper or appropriate basis for disqualification of a presiding officer.[10/]

10/ There is a procedural claim made by SAPL that should be briefly noted. By pleading dated November 15, SAPL filed a reply with the Licensing Board to the Applicants' and Staff's answers in opposition to SAPL's recusal motion. This document was filed almost two weeks after Judge Hoyt had ruled. Contrary to SAPL's assertion, this procedural matter provides no basis for Commission review of ALAB-748. First, a moving party has no right to reply to answers filed by others. 10 C.F.R. § 2.730(c); Detroit Edison Company (Enrico Fermi Atomic Plant, Unit 2), ALAB-479, 7 NRC 470, 471 (1978). Moreover, if a separate motion for leave to reply is filed, it has been held that the reply itself should not be attached. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-76-38, 4 NRC 435, 441 (1976). At most, SAPL's argument involves a minor procedural issue, which is not within the "important question of law, fact, or policy" as required for Commission review by 10 C.F.R. § 2.786(b)(1).

III. CONCLUSION

For the reasons stated, SAPL's petition for Commission review of ALAB-748 should be denied.

Respectfully submitted,

Roy P. Lessy

Roy P. Lessy
Deputy Assistant Chief
Hearing Counsel

Dated at Bethesda, Maryland
this 16th day of December, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "ANSWER OF THE NRC STAFF IN OPPOSITION TO SAPL'S PETITION FOR COMMISSION REVIEW OF ALAB-748" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 16th day of December, 1983:

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

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

Helen Hoyt, Esq., Chairman*
Administrative Judge
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jo Ann Shotwell, Asst. Attorney
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 19th Floor
Boston, MA 02108

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

Dr. Jerry Harbour*
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Emmeth A. Luebke*
Administrative Judge
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Brentwood Board of
Selectmen
RFD Dalton Road
Brentwood, NH 03833

Beverly Hollingworth
7 A Street
Hampton Beach, NH 03842

Edward L. Cross, Jr., Esq.
George Dana Bisbee, Esq.
Environmental Protection Division
Office of the Attorney General
State House Annex
Concord, NH 03301

Patrick J. McKeon
Chairman of Selectmen, Rye,
New Hampshire
10 Central Road
Rye, New Hampshire 03870

Mr. Robert J. Harrison
President and Chief Executive Officer
Public Service Co. of New Hampshire
P.O. Box 330
Manchester, NH 03105

Robert A. Backus, Esq.
116 Lowell Street
P.O. Box 516
Manchester, NH 03105

Brian P. Cassidy
Regional Counsel
FEMA, Region I
John W. McCormack Post Office &
Courthouse
Boston, MA 02109

Senator Gordon J. Humphrey
U.S. Senate
Washington, D.C. 20510
(Attn: Tom Burack)

Thomas G. Dignan, Jr., Esq.
Ropes & Gray
225 Franklin Street
Boston, MA 02110

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

Nicholas J. Costello
1st Essex District
Whitehall Road
Amesbury, MA 01913

Sandra Gavutis
Town of Kensington, New Hampshire
RFD 1
East Kingston, NH 03827

Calvin A. Canney, City Manager
City Hall
126 Daniel Street
Portsmouth, NH 03801

Roberta C. Pevear
Town of Hampton Falls, New Hampshire
Drinkwater Road
Hampton Falls, NH 03844

William S. Jordan, III, Esq.
Ellyn R. Weiss, Esq.
Harmon & Weiss
1725 I Street, N.W.
Suite 506
Washington, D.C. 20006

Phillip Ahrens, Esq.
Assistant Attorney General
State House Station #6
Augusta, ME 04333

Donald L. Herzberger, MD
Hitchcock Hospital
Hanover, NH 03755

Sen. Robert L. Preston
State of New Hampshire Senate
Concord, NH 03301

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

Jane Doughty
Field Director
Seacoast Anti-Pollution League
5 Market Street
Portsmouth, NH 03801

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gary W. Holmes, Esq.
Holmes & Ells
47 Winnacunnet Road
Hampton, New Hampshire 03842

Dr. Mauray Tye
209 Summer Street
Haverhill, MA 01830

Town of North Hampton
North Hampton, New Hampshire 03862

Edward F. Meany
Town of Rye, New Hampshire
155 Washington Road
Rye, NH 03870

Carol S. Sneider, Esq.
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 19th Floor
Boston, MA 02108

Owen B. Durgin, Chairman
Board of Selectmen
Durham, NH 03824

Donald E. Chick, Town Manager
10 Front Street
Exeter, NH 03833

Division of Consumer Counsel
c/o Barry S. Zitser, Consumer Counsel
One Central Park Plaza, Room 105
New Britain, Connecticut 06051

John F. Doherty
318 Summit Ave., #3
Brighton, MA 02135

R. K. Gad III, Esq.
Ropes & Gray
225 Franklin Street
Boston, MA 02110

Senator Gordon J. Humphrey
1 Pillsbury St.
Concord, NH 03301
(Attn: Herb Boynton)

Anne Verge, Chairperson
Board of Selectmen
Town Hall
South Hampton, NH 03842

Town Manager's Office
Town Hall - Friend Street
Amesbury, MA 01913

Charles Cross, Esq.
Shaines, Madrigan & McEachern
25 Maplewood Ave.
P.O. Box 366
Portsmouth, NH 03801

Diana P. Randall
70 Collins Street
Seabrook, NH 03874

Mr. Angie Machiros
Board of Selectmen
Newbury, MA 09150

Alfred Sargent, Chairman
Board of Selectmen
Salisbury, MA 01950

Samuel J. Chilk, Secretary*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Roy P. Lessy

Roy P. Lessy
Deputy Assistant Chief
Hearing Counsel