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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SUFFOLK COUNTY AND STATE OF NEW YORK
MOTION FOR DISQUALIFICATION
OF JUDGES MILLER, BRIGHT, AND JOHNSON

Suffolk County and the State of New York hereby move that Judges Marshall E. Miller, Glenn O. Bright, and Elizabeth B. Johnson disqualify themselves from participating in any matters concerning the Long Island Lighting Company's ("LILCO") Shoreham Nuclear Power Station ("Shoreham"). The bases for this Motion are stated hereinbelow, in the County's and State's request for recusal of Chairman Palladino, dated June 5, 1984, a copy of which is attached and hereto incorporated by reference, and in the attached Affidavit.1/

The legal standard which applies to the issue of whether Judges Miller, Bright, and Johnson should be disqualified is

1/ Section 2.704(c) of the NRC's regulations calls for submittal of an affidavit accompanying a motion to disqualify an ASLB judge. In the view of the County and State, such an affidavit is unnecessary here, because all material facts set forth herein and in the attachment are matters of public record contained in NRC and other publicly available documents. However, in view of the Board's telegraphic order of June 19, 1984, an Affidavit is submitted herewith.

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whether "a disinterested observer may conclude that [each of the named Judges] has in some measure adjudged the facts as well as the law of [the] case in advance of hearing it." Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) quoting with approval from Gilligan, Mill & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (1959) (emphasis added). The documents referred to hereinbelow and incorporated by reference show that the actions of these Judges, individually and jointly, are within the proscription of this legal standard. As further noted hereinbelow, two NRC Commissioners have stated their conclusion that these Judges should be replaced. The actions of these Judges, the documents of public record, and the statements of the two Commissioners provide solid grounds for other disinterested observers to join the conclusion of the Commissioners that these Judges should be replaced. The standard of the Cinderella case, therefore, is clearly met here.

Commencing March 30, 1984, Judges Miller, Bright, and Johnson made decisions which paralleled and furthered the objectives of Chairman Palladino. These objectives were formulated outside the hearing process and beyond the reach or knowledge of the parties and the public. In essence, the Chairman let it be known within the NRC that he wanted to "expedite" the issuance of a low power decision for Shoreham and "to get around" the issue of Shoreham's defective emergency diesel generators. The Chairman, personally and through his legal assist-

ant, through memoranda, and through a March 16 ex parte meeting with the NRC Staff, the Chief Administrative Judge, and other NRC personnel, communicated those objectives. The Chief Administrative Judge and NRC Staff then took actions which set the stage for tne achievement of the objectives, and the Licensing Board -- composed of Judges Miller, Bright, and Johnson -- issued the Orders which secured them. The actions of these Judges clearly, in the words of the Cinderella case, permit a disinterested observer to conclude that Judges Miller, Bright, and Johnson have "in some measure adjudged the facts as well as the law of [this case] in advance of hearing it." For that reason, they should disqualify themselves.

The Cinderella standard is not prosecutorial, and it does not bring into controversy the question of "guilt." The standard, rather, raises the issue of the objectivity, and the appearance of objectivity, of the Shoreham proceeding. The events of record which began at the Chairman's initiative on March 16 and climaxed with the Orders of Judges Miller, Bright, and Johnson have undermined public confidence in the impartiality of these Judges. There is, in short, justification for a disinterested observer of the Shoreham proceeding to conclude that the actions of Judges Miller, Bright, and Johnson were the product of their having "in some measure" prejudged the facts and law of the issues pending before them.

I. Factual Background

The data set forth in the attached request for recusal of Chairman Palladino (particularly pages 11-29) and in the attached Affidavit contain the basic information in support of the instant Motion. Set forth below is a brief summary of some of these facts.

1. On March 30, the day of being appointed by Chief Judge Cotter to preside over the low power proceeding in place of the Brenner Board, Judges Miller, Bright, and Johnson (hereinafter the "Miller Board") issued by telephone an Order to the parties. This Order stated that the Miller Board would on April 4 hear "oral arguments" on LILCO's Low Power Motion, and that the Board would consider a schedule for their "expedited decision." Affidavit, ¶¶ 32, 34. This Order was confirmed by the Miller Board's Notice of Oral Arguments (March 30, 1984), which stated that at the oral argument the Board would hear the issues raised by the parties "in their filings, as well as a schedule for their expedited consideration and determination." Affidavit ¶ 34. (Emphasis added).

In light of the known facts, it would not be reasonable to conclude that the Miller Board's March 30 decision to expedite the proceeding was independent of the chain of events that began with the Chairman's March 16 intervention. (See pages 7-24 of the attached request of the County and State for recusal of Chairman Palladino and paragraphs 11-31, 33 of the attached Affidavit for a description of such chain of events.) It must be

borne in mind that the Miller Board was appointed on March 30. To make a reasoned and independent judgment to expedite the proceeding and to deal with the unprecedented GDC 17 issue, the Board would have had to review and consider LILCO's inch-thick March 20 Motion and the responsive pleadings of the County, State and the Staff, become familiar with the extensive record compiled by the Brenner Board, particularly the February 22 conference, and hear from the parties regarding the many issues raised by LILCO's Motion. That Motion included, for example, an unprecedented proposal to operate a nuclear plant without a nuclear-qualified onsite emergency power system, a proposal which clearly called into question LILCO's compliance with GDC 17 and other requlations. Nevertheless, the Miller Board decided to expedite the proceeding the very same day it was appointed -- March 30.

2. On April 2, the NRC's General Counsel circulated a Memorandum to all the Commissioners. The purpose of this Memorandum was to respond "to the Chairman's March 20 request that OGC develop proposals for expedited hearings on the Shoreham diesel problem." The OGC noted that the "issues [raised by LILCO's Motion] are extremely complex . . . ." OGC suggested a number of alternatives, including an expedited hearing schedule, which allowed a total of 80 days between a Commission Order starting the proceeding and a Licensing Board decision on the LILCO Motion. Under this OGC "expedited" schedule, there would have been 15 days for discovery, 10 days between close of dis-

covery and the start of hearings, and 15 days for hearings. Affidavit ¶ 35.

3. On April 3, the County filed Comments on the Miller Board's March 30 Notice of Oral Arguments, pointing out that "there is no basis for any expedited process," and that this issue should be addressed by the parties at the oral argument. The County repeated its view that LILCO's Low Power Motion should not be argued on the merits until the County had an opportunity to retain experts and conduct adequate discovery, as discussed in the County's March 26 Preliminary Views. Affidavit ¶ 36. Also, on April 3, the State of New York filed a motion in opposition to the Miller Board's ruling that LILCO's Low Power Motion would be given expedited consideration. The State argued that expediting LILCO's Low Power Motion was arbitrary and would deny the State due process of law. Affidavit ¶ 37.

4. On April 4, Chairman Palladino distributed a Memorandum to the other Commissioners, attached to which was Chairman Palladino's March 22 "working paper" and Judge Cotter's March 23 draft order. The Chairman's April 4 Memorandum was also distributed to the Atomic Safety and Licensing Board Panel, of which Chief Judge Cotter and Judges Miller, Bright and Johnson are members. Affidavit ¶ 38. In his draft order, Judge Cotter suggested a schedule which he described as "brutally tight" to reach an expedited decision on LILCO's Motion. That schedule called for 16 days for discovery, 5 days between the close of discovery

and filing testimony, 5 days until the start of hearings, and 10 days for the hearing. Affidavit ¶ 25.

5. On April 4, the newly appointed Miller Board heard oral argument on the LILCO Motion, including whether GDC 17 was being impermissibly challenged by LILCO and whether there was any basis to expedite the proceeding. Affidavit ¶ 39.

6. On April 6, the Miller Board issued its Memorandum and Order Scheduling Hearing on LILCO's Supplemental Motion for Low-Power Operating License (the "Low Power Order"). First, the Low Power Order stated that LILCO could operate Shoreham at low power with no onsite electric power system, provided that public health and safety findings similar to those suggested by the NRC Staff were made. Affidavit ¶ 40. The Board thus essentially adopted the position urged by the Staff in its March 30 filing (Affidavit ¶ 30) and by Judge Cotter in his March 23 draft order (Affidavit ¶ 25). It provided the final link in the chain which began at the Chairman's March 16 meeting with the formulation of an "alternative solution for low power." Affidavit ¶ 16. This was, as Judge Cotter's notes reflected, the means for LILCO "to get around [the] diesel issue." Affidavit ¶ 16.

Second, despite the "extremely complex" issues presented (Affidavit ¶ 35), the Miller Board decided to expedite consideration of LILCO's Motion. Affidavit ¶ 40. Again, this decision was consistent with the Chairman's "working paper" (Affidavit ¶ 24), with the position of the Staff (Affidavit ¶ 30), and with Judge Cotter's draft order. Affidavit ¶ 25. The Board's Order

defined the issues and established expedited procedures. Judge Cotter's notes of the Chairman's March 16 meeting reveal a discussion to "define 'contention' and set time frames for expedited procedures." Affidavit ¶ 16. The time frames established by the Miller Board have a striking similarity to those proposed by Judge Cotter in his March 23 draft order for the Chairman.

	Judge Cotter	Miller Board
Time for discovery	16 days	10 days
Time between close of discovery and filing of testimony	5 days	4 days
Time between filing of testimony and start of hearing	5 days	4 days
Elapsed time set aside for hearing	10 days	11 days

Affidavit ¶¶ 25, 40.

7. Suffolk County and the State of New York protested the Miller Board's April 6 Order as denying them due process of law and as being contrary to GDC 17 and other NRC regulations. Affidavit ¶ 41. The County even submitted affidavits of expert consultants documenting that the April 6 Order denied the County a chance to prepare for and participate meaningfully in the hearing. Affidavit ¶ 41. The Miller Board and, subsequently, the Commission refused to alter the April 6 Order, forcing the County and the State to seek a temporary restraining order in

federal court. Affidavit ¶ 41. The TRO was granted on April 25. Affidavit ¶ 41.

II. Judges Miller, Bright and Johnson Must Recuse Themselves or Otherwise be Disqualified by the Commission

The actions of the Miller Board are within the disqualification standard of the Cinderella case. The immediacy of the Board's March 30 Order to expedite the low power proceeding in advance of hearing from the County and State, the refusal of the Board to provide persuasive reasons for expediting the proceeding over the objections of the County and State, the adoption of a schedule strikingly similar to that proposed by Judge Cotter after the Chairman's personal intervention, and the decision of the Board to frame issues for trial that eliminated GDC 17 over the objections of the County and State clearly indicate that a disinterested observer "may conclude" that the Miller Board "in some measure" prejudged the matters before it.

What is of particular significance is that these actions of the Miller Board furthered the wishes and objectives expressed by the Chairman -- outside the hearing process and thus properly outside the reach of the Miller Board. The Chairman's March 16 ex parte meeting with the Staff, Chief Administrative Judge Cotter, and other NRC personnel, his undated "working paper" discussed by his legal assistant with Judge Cotter, his March 20 Memorandum to the other Commissioners, and his April 4 Memorandum to the other Commissioners with Judge Cotter's draft Order at-

tached (of which copies were sent to the ASLB Panel), all were designed to achieve two objectives in the Shoreham low power proceeding:

1. "Expediting" a decision in order to aid LILCO's financial position; and

2. "Getting around" the issue of Shoreham's defective diesels and the obstacle posed by the Brenner Board's February 22 ruling on the applicability of GDC 17.

The achievement of these objectives required the accommodation and parallel action of the NRC Staff and the Licensing Board Judges. The Chairman's March 16 meeting provided the catalyst: First, shortly thereafter, on March 30, the NRC Staff abruptly reversed itself and supported the operation of Shoreham with no onsite emergency power. Affidavit ¶¶ 5, 6, 30, 31. Second, Judge Cotter set out the framework for an expedited hearing and the elimination of GDC 17 in his March 23 draft order which the Chairman circulated to the ASLB Panel. Affidavit ¶¶ 25, 38. Third, the Miller Board on March 30 ordered the "expedited" hearing -- and later confirmed that order over the repeated objections of the County and State -- and on April 6 essentially adopted the Staff's position which eliminated GDC 17 and found onsite emergency power unnecessary for low power operation. Affidavit ¶¶ 34, 36, 37, 40, 41. Thus, these actions achieved the Chairman's objectives and prejudiced the rights and interests of the County and State.

In the face of these actions, we submit that it would be clearly reasonable for a disinterested observer to conclude that the Miller Board had "in some measure" prejudged matters within the prohibition of the Cinderella standard. Indeed, such an observer certainly "may conclude" that the actions of the Chairman, the Chief Administrative Judge, the NRC Staff, and the Miller Board were consciously in pursuit of aiding LILCO with an "expedited" low power decision that "got around" the diesel issue.

Moreover, the instant situation is a case where two disinterested observers -- Commissioners Gilinsky and Asselstine -- have considered the facts of record and have concluded that Judges Miller, Bright and Johnson should be replaced.2/ By

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2/ See separate Statements of Commissioner Gilinsky and Commissioner Asselstine appended to the Commission's May 16, 1984 Order in this docket.

Commissioner Asselstine stated in part:

> I believe the Commission's Order is deficient because it fails to address a series of procedural questions associated with the conduct of this proceeding. These questions involve procedural irregularities associated with certain actions by the Chairman of the Commission which are related to this case, and the conduct of the Licensing Board Chairman, including his decision to institute disciplinary action against an attorney for one of the parties to the proceeding. Taken together, these procedural questions create the appearance of impropriety in the conduct of this proceeding, and call for prompt and effective corrective action by the Commission.
>
> The Commission should have directed the

(footnote continued)

definition, therefore, the standard of the Cinderella case has been met: Not only "may disinterested observers" conclude that the Miller Board should be replaced, but two have already done so. Accordingly, Suffolk County and New York State move that Judges Miller, Bright and Johnson disqualify themselves from participating in any matter related to the Shoreham plant. If they do not so act, the Commission or Appeal Board, as appropriate, should disqualify these Judges. See 10 C.F.R. § 2.704(c).

Respectfully submitted,

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

(footnote continued from previous page)

> establishment of a new Licensing Board to consider any modified motion submitted by the Applicant under 10 CFR section 50.12. The establishment of a new Licensing Board would have done much to restore the appearance of objectivity and fairness to this proceeding. Moreover, it would have eliminated many of the procedural deficiencies that could call into question the validity of any subsequent decision of the Licensing Board and the Commission on the issuance of an exemption under 10 CFR section 50.12.

Id. Commissioner Gilinsky stated in part:

> I also agree emphatically with Commissioner Asselstine that the case should be heard by a new hearing Board for the reasons he cites.

Id.

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
Special Counsel to the Governor
New York State
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

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

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