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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)	)	

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NRC STAFF RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK REQUEST FOR RECUSAL OF CHAIRMAN PALLADINO

Robert G. Perlis
Counsel for NRC Staff

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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I. INTRODUCTION

On June 5, 1984, Suffolk County and the State of New York filed a joint Request for Recusal of Chairman Palladino and, in the alternative, moved the Commission to disqualify the Chairman from participating further in this proceeding. The Staff herein files its response to the joint Request and Motion.

II. LEGAL STANDARDS FOR RECUSAL

Although 10 C.F.R. § 2.704(c) pertaining to the recusal of members of the Commission's adjudicatory boards does not explicitly encompass the

bringing of such motions against Commissioners, motions to recuse members of the Commission have been entertained.[1/] See Pacific Gas and Electric Company (Diablo Canyon Plant, Units 1 and 2), CLI-80-6, 11 NRC 411 (1980).[2/]

The Commission has determined that licensing board members are governed by the same disqualification standards that apply to federal judges. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982). Those standards are found

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1/ 10 C.F.R. § 2.704(c) requires a party seeking recusal to submit an affidavit supporting the request. The purpose of the affidavit requirement is to reduce the likelihood of irresponsible attacks upon the probity or objectivity of those involved in Commission decisions. Duquesne Light Company (Beaver Valley Station, Units 1 and 2), ALAB-172, 7 AEC 42, 43 (1974). The affidavit requirement must be observed even when the motion is founded upon matters in the public record. Id. The Joint Request for Recusal was not accompanied by an affidavit and does not comport with 10 C.F.R. § 2.704(c) in this regard. However, an affidavit was subsequently prepared and served on June 18, 1984, in connection with a motion to disqualify the Licensing Board. That motion largely had the same predicates as the subject motion.

2/ In the Diablo Canyon proceeding, Commissioners Kennedy and Hendrie both ruled on requests that they recuse themselves. Significantly, the party requesting recusal in Diablo Canyon moved that the full Commission disqualify the two Commissioners if they opted not to recuse themselves. The Commission refused this last request, noting:

> 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.

in 28 U.S.C. §§ 144 and 455. Of relevance here is Section 455(a), which provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

This standard, as the Commission has noted, is an objective one: "whether a reasonable person knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned." South Texas, supra, 15 NRC at 1366 (citation omitted). This standard is the one the federal courts have applied to members of administrative agencies in determining whether they have manifested bias or prejudgment of the facts in any particular matter before their agency. See Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970). Thus the issue is whether a reasonable person knowing all the circumstances would be led to the conclusion that Chairman Palladino's impartiality in this proceeding might reasonablly be questioned.[3/]

III. THE JOINT REQUEST FOR RECUSAL

The Joint Request for Recusal is based primarily on Chairman Palladino's meeting of March 16, 1984 with various members of the NRC

3/ It is noted that in the Intervenors' formulation of the rule for recusal they ignore the requirement that recusal is not just one where someone may question impartiality, but rather whether one knowing all the circumstances would reasonably question impartiality. See Request at 1 and 29.

staff. Intervenors conjecture that this meeting not only constituted an impermissible ex parte contact but also signalled the beginning of an "initiative" by the Chairman to drastically change the course of the proceeding. Thus it is alleged that one could conclude that, at the Chairman's behest, the Staff changed its views on applicable NRC regulatory requirements, changes were made in the Licensing Board hearing the case in order to assure a more favorable decision for LILCO, and essentially that the Staff and the Board (and the Chairman as well) agreed to trample the rights of the County and State in order to give LILCO an unauthorized license before that company went bankrupt. Chairman Palladino's involvement in these sinister activities was sufficient, we are told, to warrant the conclusion by a reasonable person that the Chairman might have prejudged the case.

Central to Intervenors' Recusal Request is their characterization of the events leading up to the meeting, the meeting itself, and the events that ensued thereafter. The description of these events in the Request is filled with misstatements and errors.[4/] The Staff submits that when the events are viewed properly, Chairman Palladino's impartiality is not called into question by the discussion which took place at that meeting.

4/ To provide an accurate description of the meeting, the Staff has attached the Affidavit of William J. Dircks, Executive Director for Operations and Guy H. Cunningham, III, Executive Legal Director, who were present at the meeting.

Prior to the meeting, the Intervenors assert that the Licensing Board chaired by Judge Brenner had ruled that no low power license could be granted prior to complete litigation of the TDI diesel issue, that the Staff had taken the "unequivocal" position that no low power license could issue prior to resolution of the TDI diesel issue, and that nothing in the public record suggested that LILCO would file a proposal "to get around the diesel issue." Request at 8-9, 14. The Intervenors thus give the impression that prior to March 16th, the issue of whether LILCO could receive a low power license in advance of resolution of the TDI contentions was closed.

The actual record of this proceeding, however, reveals that the issue of a low power license was far from closed. Contrary to Intervenors' assertions, neither the Staff nor the Board had precluded issuance of a low power license before litigation of the TDI contentions. Both the Staff and Board agreed that a low power license based upon confidence in the TDI's could not be authorized prior to litigation of the TDI's. However, both the Staff and Board recognized that a proposal not relying upon TDI's could be entertained. Thus counsel for the Staff explained:

> What we have said is what they [LILCO] have proposed is not sufficient, but we are not ruling out that they [can meet] the requirements of 50.57(c). It might even be possible that they do not need diesels at all. That is quite possible but we don't know and it is very difficult to answer your questions until we get that submission from LILCO.

Tr. 21,513. Similarly, Judge Brenner, after reiterating his opinion that the TDI's could not warrant low power operation, announced:

> What we have said so far would not preclude LILCO from proposing other methods by which LILCO believes the standards of 50.57(c) could be met, short of litigation of Contentions 1, 2, and 3 on the merits. Or possibly seeking some sort of waiver under 2.758 or other procedures.
>
> But, that is up to LILCO. After giving it thought on our own and listening to the other parties, we agree it is difficult to deal with an abstract proposition. And while someone could imagine different things in combination, we do not know what is feasible or what LILCO would seek to propose.
>
> But whatever LILCO would propose, it would have to meet our present finding. That unless we consider Contentions 1, 2, and 3 on the merits, we do not presently have reasonable assurance that the TDI diesel generators can reliably be depended upon to start and generate electricity.

Tr. 21,616-17. See also Tr. 21,631-33 (Brenner). Thus neither the Staff nor Board had taken the unequivocal position prior to March 16th that no low power license could issue before resolution of the TDI contentions. Indeed the quote cited by the Intervenors in their Request (at p. 8) reveals the true nature of the Board's position (as well as the Staff's); Intervenor's quote Judge Brenner as saying: Based on what we have before us now," no low power license could issue before litigation of the TDI issues. Clearly neither Judge Brenner nor the Staff had ruled out the possibility of a submittal for low power not relying on the operability of the TDI diesels.

As to the March 16th meeting itself, the Intervenors allege that this meeting involved improper ex parte discussions and complain that neither the State and County nor the other Commissioners were notified of the meeting in advance. Request at 12, 30. As to the fact that neither the other parties (Intervenors neglect to point out that no one from LILCO was present at the meeting) nor the other Commissioners were

present, both the purpose of the meeting, and the role of Chairman must be kept in mind. Pursuant to the Reorganization Plan No. 1 of 1980 (see 45 Fed. Reg. 40561 (June 16, 1980)), the Chairman is the Commission's principal executive officer and is ultimately responsible for overseeing the performance of the Staff. Surely the mere fact of the principal executive officer of the NRC meeting with his regulatory staff cannot be taken as evidence of an appearance of impropriety on the part of the Chairman.

Intervenors give the impression that the meeting was called in order to explore ways to provide a low power license for Shoreham. This is simply not the case. The meeting was arranged to provide assistance to Chairman Palladino in his preparation for hearings before Congressman Bevill, Chairman of the House Appropriations Committee. This Committee has been very interested in perceived "licensing delays;" the meeting was designed to provide Chairman Palladino with information on a number of near-term operating license proceedings including, but certainly not limited to, Shoreham. Dircks and Cunningham Affidavit, ¶¶ 2, 3.

This is not to say that the Chairman is immune from the ex parte prohibitions of 10 C.F.R. § 2.780(a). That Section prohibits an adjudicatory official, including a Commissioner, from entertaining, and a party from submitting to such an adjudicatory official, "any evidence, explanation, analysis, or advice, whether written or oral, regarding any substantive matter at issue in a proceeding on the record then pending before the NRC." (Emphasis supplied). Intervenors charge that two substantive matters for Shoreham were discussed at the March 16th meeting: scheduling and the need for an onsite emergency power source.

Request at 4. Scheduling was certainly discussed during the meeting, but scheduling is a procedural matter, not a substantive one. See, e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-757, 18 NRC 1356, 1359 n.17 (1983); Puerto Rico Water Resources Authority (North Coast Plant, Unit 1), ALAB-313, 3 NRC 94, 96 (1976). The question of the need for an onsite emergency power source was also discussed, but only in a procedural sense. The discussion addressed the scheduling of consideration of a motion expected to be submitted by LILCO dealing with the question of onsite emergency power and low power operation; the discussion was limited to the time needed to consider such a motion. No discussion of the merits of such a motion was involved. Dircks and Cunningham Affidavit, ¶¶ 5, 7. Thus contrary to Intervenors' allegations, no matters subject to the ex parte (or separation of functions) rule were discussed.[5/]

Finally, Intervenors point to the events that occurred after the March 16th meeting in order to demonstrate that something untoward took place at the meeting. Here, Intervenors assert that the Staff dramatically changed its position, a new licensing board was appointed to hear LILCO's Supplemental Low Power License Application, and expedited procedures were adopted to hear the Application. Request at 5-6. All of the above are presumed to have occurred because of the Chairman's allegedly improper conduct at the March 16th meeting.

5/ Intervenors' suggestion that Chairman Palladino prejudged the substantive issue of whether an onsite power system is required at low power seems particularly baseless in light of the position taken by the Chairman and the other Commissioners in CLI-84-8 (issued two months after the March 16th meeting) that either strict compliance with GDC 17 or an appropriate exemption was required before a low power license could be granted.

Again, Intervenors have not presented the full picture in their Request. As the Staff has noted, no improper conduct took place at the March 16th meeting. Moreover, as also noted above, the Staff did not change its position; it had consistently taken the position that if LILCO applied for a low power license without relying on the TDI diesels, the Staff would respond to the merits of such an application. See "NRC Staff's Response to Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions," February 14, 1984, at 12, n.7; Conference of Parties, February 22, 1984, Tr. 21,513.

Similarly, Intervenors' allegations about the appointment of a new licensing board ring hollow. The gist of this allegation is that the Brenner Board had closed the possibility of a low power license before full litigation of the TDI issues and that therefore the Brenner Board had to be replaced. Here, Intervenors point to handwritten notes of Judge Cotter (Chairman of the Licensing Board Panel) taken at the March 16th meeting stating "NOTE: Concern re Same Board Chairman." Request at 5, 19. The assertion that the licensing board was reconstituted in order to pave the way for issuance of a low power license is both baseless and insulting. As noted previously (see pp. 5-6, supra), the Brenner Board had not foreclosed the possibility of LILCO seeking a low power license without relying upon the TDI's.[6/] The

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6/ To further place the Request in its proper context, it should be pointed out that the Brenner Board issued a mammoth Partial Initial Decision on September 21, 1983; it resolved all issues other than TDI diesels in favor of authorizing operation. The record hardly supports the assertion that Judge Brenner was so hostile to the Applicant that he had to be replaced.

concern associated with Judge Brenner dealt not with his attitude towards low power but rather with his availability; Judge Brenner was then (and is still) involved in another heavily-contested and time-consuming hearing involving the Limerick facility. As noted, the March 16th meeting included a discussion of scheduling of consideration of a low power submittal expected from LILCO. It was clear at that meeting that Judge Brenner's involvement with the Limerick proceeding called his availability into question.[7/] There was simply no discussion at the meeting, either explicit or implicit, of replacing Judge Brenner in order to appoint a board chairman who would view LILCO's Supplemental Action more favorably. Dircks and Cunningham Affidavit, ¶ 6.[8/]

Finally, we come to the heart of Intervenors' complaint: the expedited scheduling of consideration of LILCO's Application. As noted by the Intervenors (see Request at 12, n.2), the March 16th meeting was convened to discuss potential licensing delays. Intervenors charge that a delay of nine months was seen for Shoreham and that Chairman Palladino was improperly concerned with the questionable financial health of the utility and the possibility that the utility would go bankrupt if it had to wait until the end of the year for a licensing decision. Request at 10-11, 15, 20, 32. As evidence of Chairman Palladino's concern for

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7/ Intervenors fail to mention that scheduling conflicts had already caused another licensing board chaired by Judge Laurenson to be constituted to hear the emergency planning issues in Shoreham.

8/ In this connection, it is also well to note that the Licensing Board appointed to hear the low power license application categorically rejected the County's and State's suggestion that it had been improperly influenced in any way in establishing a schedule for hearing the low power license application. Order Denying Intervenors' Motion for Disqualification, June 25, 1984.

LILCO's financial condition, the Intervenors cite the Chairman's testimony before Congress that he was concerned with "the possibility that if NRC didn't do something Shoreham would go under because of NRC's inability to make timely licensing decisions, and I felt that, whatever happened to Shoreham, I did not want inaction by NRC to be the cause." Request at 15, citing Chairman Palladino's Testimony before the House of Representatives Subcommittee on Energy and the Environment, May 21, 1984, at Tr. 20.

As we have seen, the great majority of Intervenors' Request for Recusal is based on factual misstatements and events taken out of context. Intervenors are correct, however, that Chairman Palladino was concerned with LILCO's financial health and that he sought to expedite the low power proceeding to the extent consistent with sound decision-making. There is no evidence that, in doing so, he prejudged either the facts or the law of the case. The sole question for recusal is whether a reasonable person, knowing all the circumstances, would be led to the conclusion that Chairman Palladino's impartiality was called into question because he attempted to assure that delays in the licensing process did not needlessly result in a public utility's bankruptcy. We believe that there was no indication at the March 16, 1984 meeting that Chairman Palladino had prejudged the issue of whether a license should issue, or that he would not fairly base his decisions in this proceeding on the evidence of record. The Intervenors would have us believe that it is nonetheless improper to expedite a ruling (not a license) in order to prevent a possibly needless waste of public resources. This flies in the face of

common sense. All that can be said of Chairman Palladino's actions with regard to the March 16 meeting is that, as the chief executive officer of the Commission, he attempted to carry out Commission policy (see Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981)) and assure that delays attributable to the Commission's licensing process were kept to a minimum. The responsibilities of his office require no less; such actions can hardly be said to give rise to a "reasonable questioning of his impartiality."

CONCLUSION

The ultimate decision as to whether the Chairman should recuse himself must rest with the Chairman himself. As a matter of law, however, for the reasons presented above, the events which transpired at the March 16th meeting do not require that the Joint Request for Recusal be granted. This meeting is the only aspect of the allegations (other than the factual misstatements pointed out above) as to which the Staff has firsthand knowledge. Only the Chairman and those with whom he consulted can speak directly to the events that occurred subsequent to the March 16th meeting; from what the County and State have provided, those events do not appear to provide a basis for the Chairman to recuse himself. In sum, the County and State have not demonstrated that recusal is either required or warranted here. Nonetheless, the Chairman himself must

consider all the factors in the case, including the public perception of NRC proceedings, in reaching his decision.9/

Respectfully submitted,

Robert G. Perlis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 5th day of July, 1984

9/ Cf. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275OL, 50-323OL, Memorandum to Counsel to the Parties (unreported), May 29, 1980, wherein Commissioner Richard T. Kennedy found no legal ground to recuse himself from the proceeding, but decided not to participate in any matter in the proceeding in the one month remaining in his term as (1) no substantive issues would likely arise during that period and (2) he desired to "avoid a fruitless expenditure of litigative resources" on the collateral issue of his disqualification.