UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

July 20, 1984
(ALAB-777)

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

Martin Bradley Ashare, Hauppauge, New York, and Herbert H. Brown and Lawrence Coe Lanpher, Washington, D.C., for the intervenor Suffolk County, New York.

Fabian G. Palomino, Albany, New York, for the intervenor State of New York.

W. Taylor Reveley, III, Donald P. Irwin, Robert M. Rolfe, Lee B. Zeugin and Jessine A. Monaghan, Richmond, Virginia, for the applicant Long Island Lighting Company.

Robert G. Perlis for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Opinion for the Board by Messrs. Rosenthal and Wilber:

On June 21, 1984, intervenors Suffolk County and State of New York filed a motion calling upon Administrative Judges Marshall E. Miller, Glenn O. Bright and Elizabeth B. Johnson to disqualify themselves from further service as members of one of three Licensing Boards now considering issues presented in this operating license proceeding

involving the Shoreham nuclear facility.[1] The gravamen of the motion was that, by reason of certain orders issued by that Licensing Board and the context within which those orders were entered, a disinterested observer might 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'" within the meaning of Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970), quoting with approval from Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (1959).

In a June 25 order, the three judges individually and collectively denied the motion on the dual grounds that it

---

[1] Suffolk County and State of New York Motion for Disqualification of Judges Miller, Bright, and Johnson (hereafter, June 21 disqualification motion). A previous motion seeking the same relief, filed on June 18, 1984, was denied on June 19 on the ground that it was not accompanied by a supporting affidavit as required by the Commission's regulation governing disqualification motions, 10 CFR 2.704(c). That denial was summarily affirmed by us in an unpublished order entered later on the same day. In rejecting the movants' claim that such an affidavit is unnecessary in circumstances where the factual underpinnings of the motion are "matters of public record contained in NRC and other documents," we called attention to our contrary holdings in Duquesne Light Co. (Beaver Valley Power Station, Units 1 and 2), ALAB-172, 7 AEC 42, 43 n.2 (1974), and Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-225, 8 AEC 379, 380 (1974). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1197 n.1 (1983).

The June 21 motion was accompanied by an affidavit.

w untimely and lacked merit. As mandated by 10 CFR 2.704(c), the order went on to refer the matter to us.

Upon receipt of the referral, we invited the parties to submit their views either in support of or in opposition to the order. The movants, the applicant and the NRC staff accepted the invitation. For their part, the movants maintain that the motion was timely and that, in determining that disqualification was not warranted, the Licensing Board improperly had failed to apply the Cinderella standard.[2] In contrast, both the applicant and the staff support the Board's order in full measure.[3]

For the reasons that follow, we conclude that the motion is of doubtful timeliness but, in any event, does not provide a sufficient basis for requiring the disqualification of the members of the Licensing Board. We accordingly affirm the denial of the motion.

---

[2] Suffolk County and State of New York Filing in Response to Appeal Board Order of June 26, 1984 (July 6, 1984) (hereafter, Suffolk and New York Response). For convenience, we shall employ the term "Licensing Board" or "Board" when referring to the three judges and their decisions and actions in this proceeding.

[3] LILCO's Brief in Support of the Order of Judges Miller, Bright and Johnson Denying the Suffolk County/New York State Motion to Disqualify Them (July 6, 1984) (hereafter, LILCO Brief); NRC Staff Response to Motion by Suffolk County and State of New York for Disqualification of Judges Miller, Bright, and Johnson (July 6, 1984) (hereafter, Staff Response). The applicant asserted grounds

(Footnote Continued)

I.
Background

A. As earlier noted, at present three separate Licensing Boards have the responsibility of adjudicating one or more issues pending in this extended and complex proceeding. The Board here involved, chaired by Judge Miller, came into existence most recently. It was established by the Chief Administrative Judge of the Licensing Board Panel, B. Paul Cotter, on March 30, 1984 for the purpose of hearing and deciding the applicant's March 20, 1984 "Supplemental Motion for Low Power Operating License."[4] That motion raised the question whether low-power operation of Shoreham (i.e., operation at levels up to 5 percent of rated power) might be permitted under 10 CFR 50.57(c)[5] in advance of the resolution of questions

---

(Footnote Continued)
for the denial of the disqualification motion beyond those relied upon by the Licensing Board. As will be seen, we do not reach those additional grounds.

[4] 49 Fed. Reg. 13,611 (1984).

[5] In relevant part, Section 50.57(c) provides:

> An applicant may, in a case where a hearing is held in connection with a pending proceeding under this section make a motion in writing, pursuant to this paragraph (c), for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation. Action on such a motion by the presiding officer shall be taken

(Footnote Continued)

pertaining to the reliability of onsite emergency power sources -- questions arising, in turn, as a result of failures during operational testing of the diesel generators installed to provide such emergency power. According to Judge Cotter, he took the step of creating a new Board to consider the motion because the Licensing Board then possessing "jurisdiction over non-emergency planning matters" had advised him that "two of its members are heavily committed to work on another operating license proceeding."[6]

For present purposes, we need focus only on the rulings of the Licensing Board here involved during the seven-day period between March 30 and April 6. Immediately upon its

---

(Footnote Continued)
with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. Prior to taking any action on such a motion which any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. * * *

[6] 49 Fed. Reg. 13,612 (1984). The Board to which Judge Cotter alluded, chaired by Administrative Judge Lawrence Brenner, still has before it the issue of the reliability of on-site emergency power sources. The third Licensing Board assigned to this proceeding, chaired by Administrative Judge James A. Laurenson, is concerned exclusively with as yet unresolved emergency planning issues. The disqualification motion applies to neither of those Boards.

establishment on March 30, the Board advised the parties by telephone that it would hear oral argument on the applicant's March 20 supplemental low-power motion. This advice was confirmed in a written order (denominated a "notice"). In it, the Board observed that responses to the motion or statements of preliminary views had been filed by the other parties to the proceeding and that the "issues raised by the parties in their filings, as well as a schedule for their expedited consideration and determination," would be heard at the same time.[7]

The argument took place on April 4 in Bethesda, Maryland. Two days later, the Board issued a further order in which, "[b]ased upon a consideration of the [applicant's] motion and the facts alleged in its attached affidavits, the matters contained in the responsive filings of the other parties and the arguments of counsel in depth," several conclusions were reached.[8] As the Board saw it, the applicant had made a sufficient preliminary showing to justify the holding of a limited hearing on the question of its entitlement to a low-power license pursuant to 10 CFR

---

[7] Notice of Oral Arguments (March 30, 1984) (unpublished) at 1.

[8] Memorandum and Order Scheduling Hearings on LILCO's Supplemental Motion for Low-Power Operating License (April 6, 1984) (unpublished) at 5 (footnote omitted) (hereafter, April 6 order).

50.57(c).[9] The pivotal issue at the hearing would be whether reasonable assurance existed that the "activities associated with [the] request for a low-power license can be conducted without endangering the health and safety of the public, in the absence of resolution by another licensing board [i.e., the Board chaired by Judge Brenner (see note 6, supra)] of the emergency diesel generator contentions related to full-power operation."[10] In this connection, the Board stated that the provisions of Section 50.57 respecting low-power operations had to be read in conjunction with the requirements of General Design Criterion (GDC) 17 with respect to emergency power needs for full-power operations.[11] The Board added:

---

[9] Ibid.

[10] Id. at 6.

[11] Id. at 6-7. GDC 17, found in Appendix A to 10 CFR Part 50, provides in relevant part:

> An onsite electric power system and an offsite electric power system shall be provided to permit functioning of structures, systems and components important to safety. The safety function for each system (assuming the other system is not functioning) shall be to provide sufficient capacity and capability to assure that (1) specified acceptable fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded as a result of anticipated operational occurrences and (2) the core is cooled and containment integrity and other vital functions are maintained in the event of

(Footnote Continued)

> If the evidence shows that the protection afforded to the public at low power levels without the diesel generators required for full-power operations, is equivalent to (or greater than) the protection afforded to the public at full-power operations with approved generators, then [the applicant's] motion should be granted.[12]

Expressing the belief that an expedited hearing should be held on the issues that it had identified "to the extent that such matters are reasonably relevant to a low-power license," the Board then established, in the "exercise [of its] judgment," the following schedule:

Date	Event
April 6-16, 1984	Discovery
April 19, 1984	NRC Staff Supplemental [Safety Evaluation Report]
April 20, 1984	All direct written testimony filed
April 24-28, 30 through May 5, 1984	Hearing[13]

The Board opined that this schedule would not "prejudice any party to this proceeding."[14]

(Footnote Continued)
postulated accidents. * * *

As previously noted, the diesel generators installed as the back-up onsite electric power system for Shoreham failed during operational testing.

[12] April 6 order, supra, at 7.

[13] Id. at 7, 16.

[14] Id. at 16.

As it turned out, both the Board's ruling on GDC 17 and its hearing schedule were short-lived. At the instance of the Governor of the State of New York and Suffolk County, on April 25 the United States District Court for the District of Columbia issued a temporary restraining order precluding, inter alia, any hearings before the Licensing Board on the applicant's supplemental motion for a low-power operating license.[15] Thereafter, on April 30, the Commission entered an unpublished order in which it both vacated the Licensing Board's schedule and set down for oral argument (following briefing) the matter of the applicability of GDC 17 to the applicant's proposal to operate Shoreham at low power. Subsequent to the argument, the Commission ruled that 10 CFR 50.57(c) "should not be read to make General Design Criterion 17 inapplicable to low-power operation" and, accordingly, vacated the Licensing Board's April 6 order to the extent that it held otherwise.[16] Additionally, it

---

[15] Cuomo v. United States Nuclear Regulatory Commission, No. 84-124. The temporary restraining order was accompanied by a memorandum opinion in which the court expressed the view (at 8) that the plaintiffs had raised "a substantial legal question regarding the propriety of the hearing schedule."

[16] CLI-84-8, 19 NRC ___, ___ (May 16, 1984) (slip opinion at 1). The Commission went on to note that the applicant at oral argument had indicated an intent to seek an exemption from the GDC 17 requirements. Id. at __ (slip opinion at 2). In this regard, 10 CFR 50.12(a) provides in

(Footnote Continued)

provided a new schedule to the Licensing Board "as guidance in resuming the hearing."[17]

B. At the heart of the disqualification motion is the thesis that a disinterested observer might conclude that, apart from being unjustified, the Licensing Board's expedited schedule and GDC 17 ruling were not the product of reasoned and independent judgments on the Board's part. This is so, the movants insist, because the schedule and ruling "paralleled and furthered" objectives of NRC Chairman Palladino that had been "formulated outside the hearing process" and communicated "within the NRC."[18] We now canvass those events prior to the Licensing Board's April 6 order that are said to support this thesis.[19]

(Footnote Continued)
relevant part:

> The Commission may, upon application by any interested person or upon its own initiative grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest. * * *

[17] CLI-84-8, supra, 19 NRC at ___ (slip opinion at 3-4). That schedule called for the commencement of the hearing on the 55th day following the filing and service of the applicant's request for a Section 50.12(a) exemption from the GDC 17 requirements.

[18] June 21 disqualification motion at 2-3.

[19] Obviously, nothing transpiring after April 6 could have influenced the Licensing Board's action on that date.
(Footnote Continued)

1. The movants point first to a meeting attended by Chairman Palladino, Judge Cotter and several other NRC officials on March 16, 1984 -- four days prior to the filing of the applicant's supplemental low-power motion. According to the Chairman's testimony before a congressional committee, that meeting was initiated by him in the wake of indications of increased delay in the progress (and therefore conclusion) of operating license proceedings involving nuclear facilities that are near completion.[20] Its purpose was to discuss the status of a number of such facilities "at which there were problems or potential problems."[21] Judge Cotter had been requested to attend because of his knowledge of the status of the operating license proceedings before licensing boards, the possibility that he might have suggestions respecting how unnecessary

---

(Footnote Continued)
Nor do we understand the disqualification motion to rest to any extent upon post-April 6 Board rulings.

[20] Individual Statement of Nunzio J. Palladino, Chairman, U.S. Nuclear Regulatory Commission, Before the Subcommittee on Energy and the Environment, Committee on Interior and Insular Affairs, U.S. House of Representatives (May 17, 1984) at 3-8. This statement was appended to the Chairman's June 20, 1984 Memorandum to the Parties in connection with the request (filed by Suffolk County and the State of New York on June 6, 1984) that the Chairman recuse himself from further involvement in this operating license proceeding.

[21] Individual Statement of Chairman Palladino, supra, at 8-9.

delays in those proceedings could be avoided, and his ability to provide information respecting whether delays in their progress were attributable to the need for additional staff documents before hearings could begin.[22]

Although the briefing provided the Chairman at the meeting embraced the Shoreham proceeding among others, and included identification of the issues pending in that proceeding, the Chairman does not recall the discussion of the merits of any of those issues and is confident that the agency lawyers in attendance would have "raised a warning flag" had any such discussion been initiated.[23] For their part, two other attendees at the meeting, the Executive Director for Operations and the Executive Legal Director, have supplied by affidavit their own recollection of that portion of the meeting devoted to Shoreham:

> 4. When the question of Shoreham came up, the discussion turned to the impact of the diesel generator issue.
>
> 5. The Chairman raised the question, which we understood to be procedural, whether the diesel generator issue had to be resolved prior to low-power operation. He was informed that the applicant could, but had not yet done so, request low-power authorization pursuant to 10 C.F.R. § 50.57(c), and that the applicant would at least have an opportunity to try to make a showing that some resolution short of that which would be required for full-power operation, would justify

---

[22] Id. at 9.

[23] Id. at 10.

low-power operation. The Chairman then questioned whether such an application would have to be considered by a hearing board to which he was informed the answer was yes. He then inquired how long such a proceeding would take, whether it would be as long as a typical hearing? The General Counsel informed him that in the past the Commission has requested expedited hearings on narrow-issue proceedings. In fact, the Deputy General Counsel cited the example of a hearing that was held and completed in one day. The Chairman then asked questions as to whether an expedited hearing could be held on a request from LILCO for a low-power application (which the Staff had informed him was known to be forthcoming) and the discussion turned to a hypothetical reasonably expedited schedule. Most of the discussion was between the Chairman and the Office of the General Counsel, with occasional input from other participants. At the conclusion of the discussion, there was a consensus that it would be possible to conduct an expedited proceeding in something on the order of six to eight weeks. The Chairman requested the Office of the General Counsel to prepare a more detailed analysis of this subject.

6. The Executive Legal Director pointed out to the Chairman that if consideration were given to such an expedited proceeding, it should be kept in mind that the current Shoreham Licensing Board Chairman was also Chairman of another active case. No suggestion was made regarding what effect should be given to consideration of this factor. Specifically, the creation of a new board was not discussed, nor was the removal of Judge Brenner for tactical (or any other) reasons discussed.

7. In our judgment the discussion was entirely procedural and hypothetical, and dealt with the matter of the possible resolution of an issue in a time frame consistent with operation of the plant at or near the date requested by the applicant if the outcome of the proceeding were to favor such a result. At no time during the meeting was there any discussion of any substantive matter at issue in the Shoreham (or any other) proceeding. No one in the room expressed any prejudgment, nor evinced any indication of having a prejudgment, of what

the actual outcome would be. The focus was simply on how quickly the issue could be decided.[24]

2. The March 16 meeting left Chairman Palladino concerned that "the fate of the Shoreham facility might be determined not by the merits of the case, one way or the other, but instead by the NRC's inability to run its processes efficiently."[25] For this reason, he requested his personal staff to prepare "a one-page conceptual draft directive" from the Commission to Judge Cotter.[26] In addition, on March 20, the Chairman sent a memorandum entitled "Licensing Delays" to the other Commissioners. That memorandum alluded to the March 16 meeting and, with respect to Shoreham, specifically noted that he had asked the Office of the General Counsel to prepare a paper concerned with possible avenues for expediting the determination on low-power operation.

---

[24] Joint Affidavit of William J. Dircks and Guy H. Cunningham, III (July 3, 1984), at 2-4. This affidavit was submitted as an attachment to the NRC Staff Response to Suffolk County and State of New York Request for Recusal of Chairman Palladino (July 5, 1984). That response, with the affidavit, is appended to Staff Response, supra.

During the course of the March 16 meeting, Judge Cotter took a few rough notes. With respect to Shoreham, those notes were both brief and cryptic. We discuss their present significance later in this opinion.

[25] Individual Statement of Chairman Palladino, supra, at 11.

[26] Id. at 12.

On March 22, Chairman Palladino sent a "working paper" containing the substance of a possible Commission directive to Judge Cotter.[27] It conveyed the thought that a low-power decision should be rendered by May 9 and, to that end, set out a suggested hearing schedule.[28]

Within a day or so, Judge Cotter responded with a draft order prepared by him for possible Commission issuance.[29] That order would have had the Commission direct the conduct of an expedited hearing before a newly appointed Licensing Board.[30] Judge Cotter also included in the draft a specific "recommended" schedule that called for (1) the hearing on the applicant's March 20 supplemental motion seeking a low-power operating license to commence thirty days after the filing of responses to that motion; and (2) a Board decision in another thirty days -- i.e., on or about June 7.[31] In comments following the draft, Judge Cotter stated

---

[27] Ibid.

[28] A copy of this document was appended to an April 4 memorandum from the Chairman to his fellow Commissioners, discussed at pp. 16-17, infra.

[29] A copy of this document likewise was appended to the Chairman's April 4 memorandum.

[30] Cotter draft order at 1.

[31] Id. at 6-7. This schedule would have allowed sixteen days for discovery and seven days thereafter for the filing of prepared testimony. The hearing would start in another five days and consume ten days.

his opinion that the "[s]ixty day schedule is brutally tight. Definitely not recommended but possibly achievable."[32]

3. On April 2, the Office of the General Counsel (OGC) furnished the Commission with the memorandum that the Chairman asked it to prepare on the matter of expediting the determination on low-power operation.[33] One of the options discussed in the memorandum was a direction to the Licensing Board to conduct an expedited hearing on the applicant's March 20 supplemental motion.[34] In this regard, OGC set out a possible schedule, which called for a Board decision within eighty days following issuance of the Commission order. OGC noted that "[t]he demands placed on the parties by this schedule will likely be viewed by some parties as unreasonable because of the technical complexity of the issues."[35]

4. On April 4, Chairman Palladino sent a memorandum to the other Commissioners on the subject of Shoreham, with a

---

[32] Id. at 8.

[33] April 2, 1984 memorandum from Herzel H.E. Plaine to Commissioners entitled "Shoreham Low Power Proceeding."

[34] Id. at 2. The memorandum noted that a separate Licensing Board had been created to hear and decide the motion. Id. at 2 n.2.

[35] Id. at 3.

copy to, inter alia, the "ASLBP" (i.e., Licensing Board Panel). Attached to the memorandum were both the "working paper" sent to Judge Cotter and the draft order prepared by him in response. The Chairman indicated that further action "on this or any other draft order" wo ld await the comments of the Commissioners on the April 2 OGC memorandum.[36]

C. As earlier noted, the Licensing Board denied the disqualification motion on the dual grounds of untimeliness and insubstantiality. On the former score, the Board expressed the belief that the "alleged facts" were known tc the movants long before the motion was filed.[37] Moreover, given the current established hearing schedule, the Board thought the June 21 filing "to be productive of unnecessary delays."[38]

With regard to the merits of the motion, the Board explicitly denied that any of its orders had been "influenced in the least by any of the Commissioners, including Chairman Palladino, or by Chief Judge Cotter, or

---

[36] The Chairman requested that those comments be furnished no later than April 9.

[37] Order Denying Intervenors' Motion for Disqualification of Judges Miller, Bright and Johnson (June 25, 1984) (unpublished) at 4.

[38] Ibid. Under that schedule, arguments on discovery motions took place on June 22, discovery ended on June 29, the prepared testimony was to be filed on July 16 and the hearing is to begin on July 30.

by anyone else in or out of NRC."[39] In addition, the Board explicitly represented (1) that its members "were not acquainted with any of the actions of the Commissioners alleged in the motion;" and (2) that "the Individual Statement of Chairman Palladino before the Subcommittee on Energy and Environment dated May 17, 1984, is the only source of our information other than rumors, which we have disregarded."[40] Still further, the Board stated that the expedited schedule adopted in the April 6 issuance was "the product of [its] own judgment, and was not influenced or caused by anyone else."[41]

By way of summary, the Board had this to say:

> Each Board Member wishes to state, categorically, that there has been no outside influence or "pressure" exerted on them, individually or collectively. Every decision or action taken by the Board was by full agreement among the three members, and we expect it to continue to be thus. We further reject any notion of bias either for or against any party in this proceeding.
>
> The Board, neither individually nor collectively, was privy to the actions or exchanges cited at length in both the Motion and Affidavit. Since this information was not furnished to the Board, either in whole or in part, prior to the County's pleadings, it is simply not possible to have been influenced by it. The actions of this Board were dictated by no more than the simple, long-standing directive of the Commission to discharge duties in

---

[39] Id. at 5.

[40] Ibid.

[41] Id. at 6.

an efficient and expeditious manner. CLI-91-8, 13 NRC 452 (1981).[42]

II.
Timeliness

Within the past year, we had occasion to stress anew that motions for disqualification or recusal must be submitted "'as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist.'" [43] This is because "any delay in filing a motion for disqualification or recusal necessarily casts a cloud over the proceedings and increases the likelihood of delay in the ultimate completion of the case in the event recusal or disqualification is warranted and a new decisional officer must be appointed."[44]

As earlier noted, the Licensing Board concluded that the movants failed to adhere to this admonition in the present case. Although not resting our disposition of the referral on that ground alone, we agree with the conclusion.

---

[42] Id. at 7.

[43] Seabrook, supra, 18 NRC at 1198, quoting from Marcus v. Director, Office of Workers' Compensation Programs, 548 F.2d 1044, 1051 (D.C. Cir. 1976).

[44] Ibid.

The movants point out that their acquisition under the Freedom of Information Act of the notes taken by Judge Cotter at the March 16 meeting[45] did not take place until "late May."[46] But it scarcely follows, as they would have it,[47] that the movants were not in a position to seek the Licensing Board's recusal at an earlier point. By their own admission, the "bases" of the motion "did begin to become known in early 1984."[48] And it would appear that, by April 27, the movants thought that enough of those "bases" had surfaced to support an assertion that the Licensing Board should step aside. For, on that date, Suffolk County's counsel wrote a letter to the counsel for the other parties in Cuomo v. United States Nuclear Regulatory Commission, the suit brought to enjoin the Licensing Board's hearing schedule.[49] In that letter (at p. 2), counsel stated, inter alia:

> The County will file additional requests with the Commission for disestablishment of the Licensing Board consisting of Judges Miller, Bright and Johnson (beyond the April 11 written request of the Suffolk County Executive) and also for recusal

---

[45] See note 24, supra.

[46] Suffolk and New York Response, supra, at 2.

[47] Ibid.

[48] Ibid.

[49] See note 15, supra, and accompanying text. The letter is found at Attachment 5 to the LILCO Brief, supra.

of such Judges and Chairman Palladino and Judge Cotter.

Assuming, however, that the movants nonetheless were justified in resting on their oars until they received the Cotter notes, the question remains why they then waited until June 18 before filing their first -- albeit incomplete -- motion to disqualify the Board.[50] On May 31, the Licensing Board issued its new hearing schedule to replace the one vacated by the Commission on April 30.[51] That schedule called for the discovery process to continue until June 29 and the hearing to commence on July 30. As such, it should have removed all possible doubt that any endeavor to disqualify the Board should be undertaken immediately. Instead, on June 6 the movants filed their request that Chairman Palladino recuse himself[52] and then waited almost another two weeks before filing the motion at bar. In this connection, it is noteworthy that (1) precisely the same events undergird both the recusal request directed to the Chairman and the disqualification motion addressed to the Licensing Board; and (2) as the movants might well have

---

[50] See note 1, supra.

[51] Order Establishing Schedule for Resumed Hearing (unpublished).

[52] See note 20, supra. On June 22, these movants filed a motion seeking the disqualification of Judge Cotter from any further participation in this proceeding.

anticipated, the Licensing Board has been required to hear and act upon certain matters while the disqualification motion still awaits ultimate resolution -- precisely the situation that the prompt filing requirement is intended to obviate.[53]

III.
Merits

It is well-settled that

> "[A]n 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 as 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."[54]

---

[53] For example, on June 21 (the day the motion was refiled with the necessary affidavit) the Licensing Board issued an unpublished order scheduling oral argument for June 22 on various pending discovery matters. On June 27, two days after the motion was denied by it and referred to us, the Board entered an unpublished order confirming oral rulings made on June 22.

[54] Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984), quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973). As observed in Hope Creek, these are basically the same standards that govern the disqualification of federal judges. In its decision in Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982), the Commission emphasized the applicability of federal judicial disqualification standards in this agency's adjudicatory proceedings.

In this instance, there is no claim that any of the Licensing Board members is biased against either of the movants, or that the actions of the Board created the appearance of such bias. Rather, it is plain from the content of the disqualification motion, and most particularly its reliance exclusively upon the disqualification standard set forth in the District of Columbia Circuit's decision in Cinderella, that the Board is charged solely with impermissible prejudgment (or at least the appearance thereof).

A.1. We have just seen that, in order to provide a basis for disqualification, the asserted prejudgment (or appearance of prejudgment) must relate to "factual -- as distinguished from legal or policy -- issues." Indeed, that distinction was at the root of our rejection many years ago of the attempt to disqualify a Licensing Board member in the Midland construction permit proceeding on the ground that a law review article he had written reflected prejudgment of issues in that proceeding. We there observed:

> Reviewing the entire law review article, including each of the passages to which the [movants] have referred, we find no evidence of prejudgment of any facts in issue. Nor do we find any appearance of prejudgment. All that we find is an individual who may have certain crystallized views -- indeed, who may possess an "underlying philosophy" -- on the application of NEPA to the Commission's licensing process. Previous decisions of this Board and the Commission have explicitly recognized this situation as nondisqualifying. Thus, in the Bailly case, we referred to Professor Davis' view, based on his analysis of the

> jurisprudence in this area, that "the fact that a member of an adjudicatory tribunal may have a crystallized point of view on questions of law or policy is not a basis for his disqualification."[55]

Interestingly, and appropriately, Cinderella was one of the cases cited in Midland in support of the dichotomy between factual issues on the one hand and legal and policy issues on the other. In that case, the Federal Trade Commission had charged the Cinderella Career and Finishing Schools with false and deceptive advertising. While the matter was pending before the full Commission on an appeal by the agency staff from a hearing examiner's decision in Cinderella's favor, the FTC Chairman delivered a speech in which he alluded to the facts of that administrative proceeding as an example of deceptive advertising. Thereafter, the FTC, with the participation of the Chairman in its decision, reversed the hearing examiner on a finding that Cinderella had engaged in unfair and deceptive advertising practices.

It was in this context that, in the course of remanding the case to the agency for reasons unrelated to the Chairman's public statements, the court ruled that he was disqualified from further participation. And that the

---

[55] ALAB-101, supra, 6 AEC at 66 (footnotes omitted). The cited Bailly case is Northern Indiana Public Service Co. (Bailly Generating Station, No. 1), ALAB-76, 5 AEC 312, 313 (1972).

District of Columbia Circuit adheres today to the principle that only the prejudgment of factual issues is disqualifying is manifest from its very recent decision in the Southern Pacific Communications antitrust proceeding. As the court there stated:

> It is well established that the mere fact that a judge holds views on law or policy relevant to the decision of a case does not disqualify him from hearing the case. See, e.g., Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151, 1174 (D.C. Cir. 1979) ("Administrators, and even judges, may hold views on questions of law prior to participating in a proceeding."), cert. denied, 447 U.S. 921 (1980); id. at 1177 (Leventhal, J., concurring) ("even judges are not disqualified merely because they have previously announced their positions on legal issues"); United States v. Haldeman, 559 F.2d 31, 136 n.332 (D.C. Cir. 1976) (en banc) (per curiam) ("although fixed, an opinion on the law is not disqualifying"), cert. denied, 431 U.S. 933 (1977). Indeed, we can barely conceive of a judge coming to a case without holding at least certain preconceptions that may affect his approach to the case. "The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices." In re J. P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943). If a judge approached every case completely free of preconceived views concerning the relevant law and policy, we would be inclined not to applaud his impartiality, but to question his qualification to serve as a judge.[56]

---

[56] Southern Pacific Communications Co. v. American Telephone and Telegraph Co., No. 83-1102, slip op. at 17-19 (D.C. Cir. June 26, 1984) (footnotes omitted).

2. In light of the foregoing, it is immediately apparent that the prejudgment claim advanced by these movants must fail. For, despite the invocation of the Cinderella standard, in sharp contrast to the situation in that case the movants here have not identified any specific factual issue that a disinterested observer might conclude had been prejudged by the Licensing Board members. This is scarcely surprising. The Board did not consider, let alone decide, any factual issues in its March 30 and April 6 orders -- i.e., those Board orders to which the movants point as evidence of the appearance of prejudgment. As we have seen, the March 30 order did no more than call for oral argument on the applicant's supplemental low-power motion and the establishment of a schedule for the "expedited consideration and determination" of the issues raised by the parties in connection with that motion. For its part, and insofar as objected to by movants, the April 6 order provided the expedited schedule and also ruled on the purely legal issue of the application of GDC 17 to low-power Shoreham operation.[57]

---

[57] See pp. 6-8, supra. We do not understand the movants to claim that the March 30 and April 6 orders created the impression that the Licensing Board had prejudged the ultimate question of the applicant's entitlement to a low-power license. Be that as it may, neither order is susceptible of that interpretation. The

(Footnote Continued)

We need add on this score only that it makes no difference whether the Licensing Board might have been influenced in reaching its judgment on the scheduling and legal issues by what it perceived to be the thinking of Chairman Palladino on those issues.[58] There is a wide variety of possible sources to which an adjudicator might look in formulating an opinion on a particular scheduling or legal question. We know of no authority, and the movants point to none, for the proposition that an adjudicatory body's entitlement to continue to participate in a proceeding hinges upon how its legal or scheduling conclusions happened to be shaped.[59]

(Footnote Continued)
Board's GDC 17 ruling did not, of itself, determine the low-power matter. Rather, as the Board noted, that ruling left for resolution certain factual issues. See pp. 7-8, supra. And, whether or not unduly tight in the totality of circumstances, the Board's schedule for the hearing of those issues was not so patently unreasonable as to permit an inference that the Board had already made up its mind that low-power operation should be authorized.

[58] As shall shortly be seen, however, there is no record basis for assuming that the Board was even aware of the Chairman's thoughts respecting Shoreham.

[59] Manifestly, a Licensing Board member would not be justified in taking a cue on the ultimate merits of a controversy from the Commission's Chairman -- or from any other NRC official for that matter. Indeed, such a forfeiture of the Board member's independence -- and disregard of the solemn obligation not to abdicate his or her adjudicatory responsibilities -- would be extremely serious misconduct. In this instance, there is neither an explicit allegation that such misconduct took place nor any
(Footnote Continued)

B. Were prejudgment of a legal or policy issue (or the appearance thereof) a basis for disqualification, the movants' claim here would rest on no better footing. According to the movants, a disinterested observer could justifiably conclude (whether such was the fact or not) that the Licensing Board was aware of the "chain of events" commencing with the March 16 meeting and that these events led to a prejudgment on the scheduling and GDC 17 questions.[60] The Licensing Board, however, has expressly disclaimed that it was aware of any of the events prior to the issuance of its March 30 and April 6 orders.[61] Needless to say, if that disclaimer is truthful the Board could not have been influenced by what the movants choose to characterize as the "Chairman's March 16 intervention"[62] or by the developments in the wake of the meeting on that date.

(Footnote Continued)
concrete evidence from which it might be inferred.

One other equally obvious point likewise requires no more than passing mention. That an adjudicator is not subject to disqualification for prejudgment on a legal or scheduling issue does not mean that, if erroneous, the conclusion reached on the issue cannot be successfully attacked. As previously noted, in this instance both the expedited schedule and the GDC 17 ruling contained in the April 6 order were subsequently overturned. See pp. 9-10, supra.

60 June 21 disqualification motion, supra, at 2-4.

61 See p. 18, supra.

62 June 21 disqualification motion, supra, at 4.

Hence, in order to reach the movants' suggested conclusion, the disinterested observer would have to infer first that the Licensing Board's disclaimer was not truthful.

We find no possible foundation for a reasonable inference to that effect. The movants point to the fact that, upon being constituted, the Board immediately issued its March 30 order in which it referred to the "expedited consideration and determination" of the matters before it. The movants would have it that, in such a short time period, the Board could not conceivably have reached on its own the conclusion that expedition was warranted.[63] We disagree. For one thing, the Board members might well have been informed of their new assignment in advance of the issuance of the formal Federal Register notice[64] and promptly embarked upon a study of the papers then in the record. For another, it may confidently be assumed that the Board members were generally familiar with the fully-constructed status of the Shoreham facility[65] and the generic interest

---

[63] Id. at 5.

[64] Such advance notice would not have been improper. There is no reason why a Licensing Board Panel member should invariably be kept in the dark respecting a new assignment until such time as the announcement of the assignment is sent to the Federal Register.

[65] Indeed, given the extensive media attention that Shoreham has attracted over a considerable period of time,

(Footnote Continued)

of the Commission in avoiding unnecessary delays in the adjudication of license applications for such facilities.[66] Armed with that general knowledge, and the inference arising from its assignment to the low-power phase of the proceeding,[67] the Board quite understandably would have wished the oral argument to focus upon the possibility of an expedited schedule.

The March 30 order did not, of course, contain a proposed schedule. And it was only after hearing from the parties on April 4 that the Board established the schedule of which the movants complain.[68] The movants would attach significance to the "striking" similarity they perceive[69] between that schedule and the one set forth by Judge Cotter in his March 23 draft order.[70] In our view, however, the

---

(Footnote Continued)
it would have been virtually impossible for the Board members not to have been aware of Shoreham's situation.

[66] See, e.g., Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), cited by the Board at p. 14 of its April 6 order, supra.

[67] We agree with our concurring colleague that there was good reason for the Board to have concluded that it was created to enable a more expeditious decision on the applicant's supplemental low-power motion than would likely have been forthcoming from the Board chaired by Judge Brenner. See p. 35, infra.

[68] See p. 6, supra.

[69] June 21 disqualification motion, supra, at 8.

[70] See p. 8 & note 31, supra.

two schedules are not sufficiently alike that a fair-minded disinterested person would likely jump to the conclusion that the Licensing Board misrepresented the facts when it stated in effect that it had not seen Judge Cotter's draft order. (Among other things, the latter provided sixteen days for discovery; for its part, the Licensing Board was prepared to allow only ten days for that purpose.)[71] Moreover, had the schedules been closer, an objective observer might still have been hesitant to indulge in the conjecture that the Board members were untruthful.

Insofar as the Licensing Board's GDC 17 ruling is concerned, the movants endeavor to tie it to (1) the notes that Judge Cotter took at the March 16 meeting;[72] and (2) the Cotter draft order.[73] The former referred to a discussed "alternative solution for low power" in these words: "LILCO file proposal to get around diesel issue [and] hold hearing on operation at low power."[74] The latter suggested that the Commission direct the Licensing Board to hold a hearing on that proposal.[75] Even assuming that one

---

[71] Ibid.

[72] See note 24, supra.

[73] June 21 disqualification motion, supra, at 9-10.

[74] Cotter notes at 1 (emphasis in original).

[75] Cotter draft order, supra, at 4, 5-6.

or both of these documents could be taken as communicating a judgment on Chairman Palladino's part respecting precisely how the GDC 17 issue should be decided (a dubious assumption at best),[76] it simply does not follow that the Board must have been both aware of that judgment and influenced by it. The short of the matter is there is absolutely nothing before us that lends any support to a reasoned challenge to the Board's explicit representation that the GDC 17 ruling in the April 6 order reflected its independent thinking on the issue.

What remains for consideration is the movants' attempted reliance[77] upon the separate opinion of Commissioner Asselstine in connection with the Commission's May 16 order reversing the Licensing Board's GDC 17 ruling and providing a suggested hearing schedule.[78] In that opinion, joined on the point by Commissioner Gilinsky in his

---

[76] To us, the cryptic Cotter note quoted in the text does not suggest that the Chairman had already decided that the applicant should prevail on the GDC 17 issue. And, significantly, when the issue ultimately came before the Commission, the Chairman joined his colleagues in reversing the Licensing Board's ruling in the applicant's favor. CLI-84-8, supra.

[77] June 21 disqualification motion, supra, at 11 & n.2.

[78] CLI-84-8, supra, 19 NRC at ___ (Additional Views of Commissioner Asselstine).

own separate opinion,[79] Commissioner Asselstine expressed his belief that this Licensing Board should be replaced.[80] This was not, however, because the Commissioner thought that the Board had been guilty of prejudgment or, for some other reason, was subject to disqualification based upon its March 30 and April 6 orders. Indeed, the Commissioner did not mention either of those orders but instead referred specifically only to a subsequent Board order concerned with a quite different matter.[81] In these circumstances, there is no substance to the movants' suggestion that Commissioners Asselstine and Gilinsky have demonstrated that the Cinderella disqualification standard has been satisfied.[82]

For the foregoing reasons, we hold that the disqualification motion is both legally and factually

---

[79] Id. at ___ (Separate Views of Commissioner Gilinsky at 1).

[80] Id. at ___ (Additional Views of Commissioner Asselstine at 1).

[81] Ibid. The disqualification motion at hand does not allude to that order.

[82] June 21 disqualification motion, supra, at 11-12.

insubstantial.[83] Accordingly, the Licensing Board's denial of the motion in its June 25, 1984 order is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

The concurring opinion of Mr. Edles follows, pp. 35-38, infra.

---

[83] Because Mr. Edles concurs in this result, there is no need to dwell at length upon our differences in approach. Suffice it to say that, as indicated earlier in this opinion, we do not share his belief that the disqualification motion should be read as impliedly asserting that the Licensing Board has created the appearance of prejudgment of "the ultimate question of the applicant's entitlement to a low-power license." See p. 36, infra. For one thing, had movants' counsel intended to advance such a claim, it is reasonable to assume that they would have done so explicitly and not left it a matter of implication. (In this regard, given their sensitivity, it is especially important that all disqualification motions set forth their bases with particularity.) Secondly, the movants have pointed to nothing that might support a claim of apparent prejudgment of the ultimate issue by the Licensing Board. Thus, to imply such a claim would be to do the movants the disservice of suggesting that they seek to have the Licensing Board removed on wholly frivolous grounds.

Opinion of Mr. Edles, concurring in the result:

I join the Board's result but wish to outline my slightly different path to decision. Because I do not believe that there is ample information to lead a disinterested observer to conclude that the Board has prejudged matters of substance before it, I would affirm its decision. Given my view on the merits, I do not reach the issue of timeliness.

I do not believe that the County and the State have made out an adequate case for disqualification. In so concluding, I accept the Miller Board's unchallenged representation that its members were in no way importuned by Chairman Palladino, Judge Cotter, or others. I also accept their assertion that the expedited schedule was of their own making.

That is not to say, however, that the Miller Board did not understand, or assume, that it was to move quickly on the low-power request. The Brenner Board originally handling the case, after all, had set a schedule looking toward a decision on the issue of a low-power license by the end of 1984. Thereafter, it was decided that another board should handle the pending application. At a minimum, the Miller Board must have reasoned that it was created in order to decide the low-power application on a faster schedule than the Brenner Board.

I share the majority's view, however, that neither the Board's belief that expedition of the case was in accord with the wishes of someone in the hierarchy (if that was its belief) nor its decision to expedite, standing alone, constitutes a valid basis for disqualification. Court decisions indicate that only where outside agents attempt by procedural means to influence the substantive outcome of a case through external pressure on a presiding officer might disqualification be in order.[1]

Suffolk County and the State allege more than impermissible expedition, however. As my colleagues note, the Licensing Board is charged with the appearance of prejudgment. The majority believes that the movants allege only prejudgment of discrete legal or policy issues. I disagree. As I see it, the movants also claim that there is an appearance that the Licensing Board has in some measure prejudged the ultimate question of the applicant's entitlement to a low-power license. The clear import of the motion is that a disinterested observer would infer that the Miller Board's actions were part of its involvement with the

---

[1] See PATCO v. FLRA, 685 F.2d 547, 569 n.46 (D.C. 1982); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Gulf Oil Corp. v. FPC, 563 F.2d 588, 610 (3d Cir. 1977); Federal Broadcasting System v. FCC, 225 F.2d 560, 566 (D.C. Cir. 1955) (dictum), cert. denied sub nom. WHEC v. Federal Broadcasting System, 359 U.S. 923 (1955).

Chairman, Judge Cotter, and the NRC staff "in pursuit of aiding LILCO with an 'expedited' low power decision that 'got around' the diesel issue."[2] The March 30 decision to expedite the application, the ruling on GDC 17, and the schedule outlined in the April 6 order are not the exclusive subjects of the motion. They are, the movants believe, also indicia of the Board's ultimate predisposition. The ultimate question on which the appearance of prejudgment is alleged -- i.e., whether a license should issue -- is a mixed question of fact, law and, perhaps, policy and discretion, that could justify disqualification.

Applying the Cinderella standard, however, I think a disinterested observer, familiar with the facts as now known, would conclude that no substantive judgment on the eventual outcome of the application, or any subsidiary factual determinations, has as yet been made. I do not suggest that the movant's theory underlying disqualification -- i.e., that the Miller Board has been in some measure coopted -- might not be inferred by some cynical or skeptical observers despite the Board's assertions to the contrary. Such allegation may well also demand a more searching appellate examination of any decision the Board may eventually reach on the merits. But, on the basis of

---

[2] June 21 Disqualification Motion at 11.

present information, I think it is more reasonable to conclude simply that the Miller Board saw its role as getting the show on the road.