UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
COMMISSIONER

May 14, 1984

MEMORANDUM FOR: Chairman Palladino
Commissioner Gilinsky
Commissioner Roberts
Commissioner Bernthal

FROM: James K. Asselstine

SUBJECT: MAY 4, 1984 MARKEY LETTER

In his May 4, 1984 letter to the Commission, Congressman Markey requested an accounting of any communications with the Executive Branch relating to emergency planning or the Shoreham proceeding.

I have the following to report:

On March 7, 1984, while in Florida to observe the full-scale federal field exercise at the St. Lucie plant, I had breakfast with Samuel W. Speck, FEMA's Associate Director for State and Local Programs and Support. Although we did not discuss the emergency planning situation at Shoreham, we did discuss the proposed legislation offered by Senator Simpson, which would provide for federal implementation of an emergency plan in the event that state and local governments refuse to participate. I told Mr. Speck that based on what I had observed of the federal participation in the St. Lucie drill, I suspected that it would be very difficult, if not impossible, for the federal government to manage an effective emergency response without having a large cadre of federal employees on site at all times. I told Mr. Speck that I thought the federal response at St. Lucie was impressive, but because it was limited to a support function to the state and local response authorities, the St. Lucie federal response exercise did not demonstrate a federal capability to manage an emergency response at a commercial nuclear powerplant. I also expressed the view that legislation granting a federal management role could well serve as an incentive to a number of state and local governments not to participate in the implementation of radiological emergency response plans, thereby undermining our emergency response capability.

cc: OGC
OPE
SECY
CCA

Enclosure 6

6/5/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

SUFFOLK COUNTY AND STATE OF NEW YORK
REQUEST FOR RECUSAL AND, ALTERNATIVELY,
MOTION FOR DISQUALIFICATION OF
CHAIRMAN PALLADINO

Suffolk County and the State of New York hereby request that Chairman Nunzio J. Palladino recuse himself from participating in any matters concerning the Long Island Lighting Company's ("LILCO") Shoreham Nuclear Power Station ("Shoreham"). In the event the Chairman decides not to recuse himself, the County and State move the Commission to take cognizance of this issue and vote whether Chairman Palladino should be disqualified from participating in Shoreham-related matters.

The legal standard which applies to the issue of whether Chairman Palladino should be disqualified is whether "a disinterested observer may conclude that [the Chairman] has in some measure adjudged the facts as well as the law of a particular

$4\frac{1}{2}$ 37 pp.

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, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (1959) (Emphasis added). The documents referred to hereinafter show that Chairman Palladino's actions on Shoreham-related matters are clearly within the proscription of this legal standard. From at least March 16, 1984, the Chairman personally intervened in adjudicatory matters pending before the Licensing Board. His intervention caused the Staff, the Chief Administrative Judge of the Licensing Board Panel, and ultimately the Licensing Board Judges to take actions of factual and legal consequence that prejudiced the interests of the County and State. The Chairman did this in advance of hearing the positions of the County and State.

In short, Chairman Palladino's intervention in the Shoreham proceeding "may cause a disinterested observer to conclude" the following:

(1) The Chairman, without consulting the other members of the Commission, took the initiative with the Staff and Chief Administrative Judge to engage in substantive discussions and to formulate a strategy for the Staff and Licensing Board that would serve LILCO's interests without regard to those of the County and State;

(2) The Chairman's initiative caused the Staff to change its previous position and to support the licensing of Shoreham with no emergency onsite power system, contrary to the interests of the County and State;

(3) The Chairman's initiative caused the Chief Administrative Judge to formulate an adjudicatory proposal to permit the licensing of Shoreham with no emergency onsite power system, contrary to the express provisions of the NRC's regulations and contrary to the interests of the County and State. The Chairman circulated this proposal to the Licensing Board panel, including presumably the Shoreham Judges, thus demonstrating his approval of the proposal;

(4) The Chairman's initiative caused the Staff and Licensing Board to work in parallel for the establishment of an unconstitutional hearing format and schedule which benefitted LILCO, contrary to the rights and interests of the County and State;

(5) The Chairman commenced his initiative for the purpose of giving aid to LILCO before the Licensing Board and in the financial marketplace, a consideration which is outside the scope of interests protected by the Atomic Energy Act. He commenced his initiative in advance of hearing from the County and State and without giving them notice of what he planned to

do, and, indeed, without even consulting with other members of the Commission. The actions of the Staff and Licensing Board gave effect to his initiative, in contravention of the regulations, and prejudiced the County's and State's rights to due process of law.

The Chairman's initiative required that prejudgments be made on two issues then central to the licensing of Shoreham: (1) the schedule on which LILCO would receive a low power licensing decision; and (2) the need for an onsite emergency power source. These were issues which had been settled on February 22 by an Order of the Board chaired by Judge Brenner. On March 16, the Chairman met with the Chief Administrative Judge, B. Paul Cotter, Jr., and the Staff's Executive Director and other top-level Staff personnel, including the Director of Nuclear Reactor Regulation and the Executive Legal Director and members of their offices. The Chairman discussed with these persons the impact of the Licensing Board's February 22 Order on LILCO's financial health and formulated means to aid LILCO. In the words of the personal notes handwritten by Judge Cotter at the March 16 meeting, an "alternative solution for low power" operation of Shoreham was discussed. This "solution" involved LILCO filing a "proposal to <u>get around</u> [the] diesel [onsite emergency power source] issue <u>and</u> hold hearing on <u>operation at low power</u>." (Final emphasis in original.) The

do, and, indeed, without even consulting with other members of the Commission. The actions of the Staff and Licensing Board gave effect to his initiative, in contravention of the regulations, and prejudiced the County's and State's rights to due process of law.

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meeting also involved the formulation of an "expedited" hearing format and schedule. Again, in Judge Cotter's words, a hearing ordered by the Commission "would define 'contention' and set time frames for expedited procedure." It would also "review Board order of February 22." Significantly, Judge Cotter noted that LILCO's financial health was discussed. He wrote, "[LILCO] Says [it] will go bankrupt if [it has to wait for] 12/84 I.D. [Initial Decision of the Licensing Board]." (It was then anticipated that the Brenner Board would issue its decision on low power operation of Shoreham in December 1984.) A reasonable observer may conclude that the only prompt decision which could avert a LILCO bankruptcy was a favorable one to LILCO.

Thus, on March 16, Chairman Palladino planned and set in motion with the NRC's top judicial and Staff personnel changes in the course of the Shoreham proceeding. In short order, the following occurred:

(1) New Licensing Board Judges were appointed to hear the proposal for low power operation that LILCO filed with the Brenner Board four days after the Chairman's March 16 meeting. (Judge Cotter's notes state: "NOTE: Concern re Same Board Chairman." Also, the notes, written four days before LILCO filed its proposal to operate Shoreham at low power without

diesels, state: "LILCO file proposal to get around diesel issue and hold hearing on operation at low power");

(2) The Staff abruptly reversed its previous position and supported the licensing of Shoreham with no onsite emergency power source. (Judge Cotter's notes state: "Based on LILCO proposal, staff can issue report in 30 days as to whether plant safe at 5% w/o diesels");

(3) The new Licensing Board issued an Order defining the issues to be heard under expedited hearing procedures. (Judge Cotter's notes state: "Define 'contention' and set time frames for expedited procedure").

These actions were planned at the Chairman's initiative without regard for the interests of the County and State and in advance of the Chairman hearing from those parties. Given the legal standard set forth in the Cinderella case, supra, there is no lawful basis on which the Chairman should participate in any matters related to the Shoreham plant. Surely, the facts described above, and as set forth at length below, may cause "a disinterested observer [to] conclude that [the Chairman] has in some measure adjudged the facts as well as the law of [this] case in advance of hearing it."

The legal standard quoted above is not prosecutorial, and it does not bring into controversy the question of "guilt." The issue, rather, is one of the integrity, and the appearance of integrity, of the Shoreham proceeding. The events of record which began at the Chairman's initiative on March 16 have undermined public confidence in the impartiality of Chairman Palladino and other NRC personnel. The only way to restore public confidence in the Shoreham proceeding is for the individuals who have demonstrated, or have appeared to demonstrate, partiality toward LILCO to disqualify themselves and for scrupulously fair procedures and reasoned decisions to be followed. The starting point for this is the recusal of the Chairman.

I. The Chairman's Personal Intervention In The Shoreham Proceeding Requires Disqualification.

According to public documents, Chairman Palladino's personal intervention in the Shoreham licensing proceeding began with an ex parte meeting with the Chief Administrative Judge and the Staff on March 16, 1984. To put this intervention into perspective, we will briefly describe the posture of the Shoreham proceeding prior to March 16.

A. Events Prior to March 16, 1984

On February 22, 1984, the Licensing Board chaired by Administrative Judge Lawrence Brenner (the "Brenner Board") ruled that there was no basis for granting LILCO a low power license for Shoreham "in advance of complete litigation" of the emergency diesel issues. The Brenner Board set a schedule for litigation of those issues that, after a discovery period of approximately two months, provided for a conference of the parties on May 10, to determine subsequent procedures. In issuing that schedule the Brenner Board concluded:

> Based on what we have before us now, there is no basis to proceed towards litigation that could possibly lead to a low power license in advance of a complete litigation of Contentions 1, 2 and 3 [the outstanding diesel issues].

See Transcript of ASLB Hearing, February 22, 1984, at 21,615. Hence, as conceived by the Brenner Board, the hearing on the diesel issues would be unlikely to start before June, and a decision in all probability would not be expected before December 1984.

Significantly, as of February 22, the NRC Staff had taken the unequivocal position that under the NRC's regulations no low power license could be issued for Shoreham unless the diesel issues were first resolved. Thus, as of February 22, the

Staff position was that there could be no low power license until LILCO had an onsite electric power system which met NRC requirements or had received a proper exemption from those NRC requirements.

At the February 22 conference before the Brenner Board, the NRC Staff opposed LILCO's arguments that "enhanced" offsite power could substitute for deficient onsite power. Thus, the Staff would give no credit to LILCO's offsite power system, including the gas turbine physically located at Shoreham, because "General Design Criteria 17 requires an independent, redundant and reliable source of on-site power." See NRC Staff's Response to Suffolk County's Motion to Admit Supplemental Diesel Generator Contentions (February 14, 1984) footnote 7 (Emphasis added). The Staff took "no position upon whether applicant, upon a proper technical analysis, could or could not support an application for an exemption to allow it to go to low-power absent reliable safety-grade diesels." Id. (Emphasis added).1/

1/ The Staff's position that no license could be issued for Shoreham without an adequate onsite AC power system was publicly stated by Messrs. Harold Denton and Darrell Eisenhut at an open meeting between the Staff and the TDI Owners Group on January 26, 1984. Mr. Denton stated:

> [W]e are not prepared to go forth and recommend the issuance of new licenses on any plant that has Delaval diesels until the issues that are raised here today are

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The Brenner Board's February 22 decision to litigate the diesel issues before considering a low power license for Shoreham was a serious setback for LILCO, and one which threatened to put LILCO into bankruptcy. The Brenner Board's decision was followed two days later by a published report (Newsday, February 24, 1984) that LILCO's Chairman, William J. Catacosinos, had met with the NRC Commissioners. Moreover, in a March 9, 1984, letter to shareholders published in LILCO's 1983 Annual Report, Dr. Catacosinos noted:

> Our inability to open Shoreham has created a serious cash shortfall for LILCO. Accordingly, since January 30, I have made government officials aware of our critical situation, and I believe there now seems to be a greater understanding among federal, state and county officials of the crisis the company faces . . . . A timely resolution of the Shoreham situation and a resolution of the Company's critical cash shortage are essential to the continued viability of LILCO.

(Emphasis added). Significantly, Judge Cotter's notes of the Chairman's March 16 meeting state: "Says will go bankrupt if 12/84 I.D. [Initial Decision of the Licensing Board]." The

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adequately addressed.

Meeting transcript at 8. Mr. Eisenhut added that "prior to licensing, even a low power license," the Staff must have confidence that the TDI diesel problems have been solved. Meeting transcript at 95-96 (Emphasis added).

"greater understanding" of federal officials to which Dr. Catacosinos referred thus made itself felt in and through Chairman Palladino's office.

B. Chairman Palladino's Personal Intervention Beginning March 16

Between to February 22 and March 20 there was no pending LILCO proposal for low power operation of Shoreham. LILCO's original low power motion which relied upon the TDI diesels had been rejected on February 22 by the Brenner Board, and there was thus no prospect for an early low power decision for Shoreham. LILCO had not appealed from or sought reconsideration of the Brenner Board's February 22 ruling. In this context, the following events occurred:

1. On March 9, the NRC Staff notified the Commissioners of "potential licensing delays" of 9 months for Shoreham. The 9 month "delay" was estimated by LILCO itself and passed on to the Commissioners by the Staff. However, it has been revealed that the NRC Staff disagreed with this estimate, because the Staff did not consider LILCO's construction to be complete and thus the delay could not be attributed to the licensing process. See April 24 Memorandum from J.A. Rehm, Assistant for Operations, to the Commission. In fact, it should have been clear to all persons in March 1984 that there was no Shoreham

"delay" attributable to the licensing process; rather, the only delay was due solely to the repeated failure of LILCO's TDI diesels. Thus, the plant was not ready for licensing because the diesels would not work.

2. On March 16, in what turned out to be an improper ex parte meeting, Chairman Palladino met with members of the NRC Staff -- a party in the Shoreham Licensing Board proceeding -- "Tony Cotter" (B. Paul Cotter, Jr., the NRC's Chief Administrative Judge), and top level Staff personnel, including the Executive Director for Operations, the Director of the Office of Nuclear Reactor Regulation, the Executive Legal Director and their subordinates to discuss the alleged "delay" in the licensing of Shoreham.2/

The other Commissioners were not advised of the March 16 meeting in advance. Neither the County nor State was advised of this meeting, and no transcript was made.3/ Further, this

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2/ Chairman Palladino had met on March 15 with personnel from the Offices of Policy Evaluation and General Counsel concerning the potential delays. It was then decided to hold the March 16 meeting. See Individual Statement of Nunzio J. Palladino Before the Subcomm. on Energy and the Environment, H. Comm. on Interior and Insular Affairs, May 17, 1984, pp. 8-9 (hereafter, "Palladino Statement").

3/ Commissioner Asselstine has criticized Chairman Palladino for meeting with one party -- the Staff -- "without the opportunity for the others to have any notice of the meeting or be provided an opportunity to comment . . . ." NRC April 23 Meeting Transcript, p. 10. Similarly,

(Footnote cont'd next page)

meeting was held even though there was no new LILCO proposal for low power operation of Shoreham, and even though, as noted above, LILCO had taken no appeal of or any other action to disagree with the Brenner Board's February 22 rulings concerning low power operation, the TDI diesels, or the schedule for litigation. Nevertheless, Judge Cotter's notes of the Chairman's March 16 meeting reveal: "LILCO file proposal to get around diesel issue and hold hearing on operation at low power." While Chairman Palladino has stated that "some preliminary ideas regarding expediting the Shoreham hearing were discussed," see Palladino Memo to Commissioners, April 4, 1984, Judge Cotter's notes in fact indicate that these discussions

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Commissioner Gilinsky stated:

> The Staff is a party in the hearing; the Chairman is one of the ultimate judges. The Staff Directors should have told the Chairman politely that it is not their job to carry the ball for the Company. It is understandable that they did not say this under the circumstances. The Chairman is, by law, the Staff's direct supervisor. He controls annual bonuses worth many thousands of dollars to senior Staff members. What we have is a situation in which one member of the ultimate NRC adjudicatory tribunal appears to be directing the actions of a key party in the case.

CLI-84-8, Separate Views of Commissioner Gilinsky, May 16, 1984.

included "concern" with Judge Brenner, a "Commission ordered hearing" that would "define contention and set time frames for expedited procedure," and discussion of a LILCO "proposal to get around diesel issue and hold hearing on operation at low power."4/ Significantly, the LILCO "proposal" mentioned in Judge Cotter's March 16 notes was not filed until March 20, four days later. Nothing in the public record suggested that LILCO would file such a proposal "to get around [the] diesel issue."

4/ These documented statements sharply contradict the testimony of Chairman Palladino before the House Subcommittee on Energy and Environment on May 17. Chairman Palladino there stated:

> At that meeting, held on March 16, I was briefed as to the status of a number of cases, including the Shoreham proceeding. While the briefing included identification by the Staff of the issues of the Shoreham proceeding, I do not recall the Staff in any way stating or intimating how those issues should be resolved. I am confident that if the Staff had done that, or if any other impropriety had been committed, one or more of the several top agency lawyers present would have raised a warning flag. Likewise, I recall the staff advising that they understood that LILCO planned to appeal the denial of its low power request. But again, there was no discussion, to the best of my recollection, of the merits of that request.

Palladino Statement at 10.

One reason that Chairman Palladino met with the Staff and others on March 16 "was 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." Palladino Statement at 4-5; see id. at 11. Thus, the Chairman clearly was acting at least in part out of concern for LILCO's financial condition. Judge Cotter's notes underscore that point: the March 16 meeting included discussion that LILCO would "go bankrupt" if it had to await a Licensing Board decision -- even assuming such a decision were favorable -- in December 1984.

3. On March 20, Chairman Palladino circulated a memorandum to the other Commissioners. The memorandum purported to report on the March 16 meeting and proposed that in order to "reduce the delays at Shoreham," the Commission should "consider a proposal from OGC [Office of General Counsel] for an expedited hearing on the diesel problem, or proposals for other possible actions so that at least a low power decision might be possible while awaiting resolution of the emergency planning issue. I have asked the OGC to provide a paper on this subject soon." Chairman Palladino did not then report, as he later did in his April 4 Memorandum, that ideas for expediting the Shoreham proceeding had been discussed at his

March 16 meeting with the Staff and others who were present at that meeting. The Chairman also did not report that the "delay" estimate for Shoreham was based on LILCO's estimate, not the NRC's, and that the Staff disagreed with LILCO's estimate.

The Chairman's March 20 Memorandum was circulated to "SECY, OGC, OPE, OIA, EDO." Thus, at a minimum, the NRC Staff, through the Executive Director of Operations, was further advised of Chairman's view that the Shoreham proceeding needed to be speeded up so that a low power decision could be reached earlier than the schedule adopted by the Brenner Board. Indeed, the March 20 Memorandum specifically requested the EDO -- i.e., the Staff, a party in the Shoreham proceeding -- to respond to the March 20 Memorandum and to prepare a paper outlining steps to deal with the "delays".

4. On March 20 -- the same day that the Chairman circulated his above-described Memorandum -- LILCO filed its unprecedented proposal for a low power license, styled as a Supplemental Motion for Low Power Operating License. LILCO made essentially the same arguments for a low power license that the Brenner Board had previously rejected, except that LILCO added that it also intended to install at Shoreham four mobile diesel generators, not qualified for nuclear service, to "enhance" the

offsite AC electric power system. LILCO served copies of the Motion on the NRC Commissioners. Even though LILCO's March 20 proposal for Shoreham's operation did not comply with GDC 17 -- there would be no onsite electric power system -- LILCO did not apply for a waiver or an exemption of that regulation.

5. After March 16, Chairman Palladino had further discussions with his staff and "with EDO as well, searching for options," to deal with the alleged delay. Palladino Statement at 11. On March 22, Chairman Palladino's legal assistant read to Judge Cotter by telephone the following "working paper" prepared by the Chairman's office (this paper later was sent to Judge Cotter), which relates to LILCO's March 20 proposal:

> The EDO has recently provided the Commission an assessment for Shoreham that projects a nine-month licensing delay due to, I am told, the Shoreham Licensing Board's requirement to litigate the diesel-generator questions before allowing operation at low power.
>
> The Commission would like this matter litigated on an expedited basis with a target date of receiving the Board's decision on this matter by May 9, 1984. Would you please look into what steps are required to meet such a date and inform the Commission on these steps as soon as possible, but not later than March 30, 1984.
>
> For planning purposes, you could assume the following steps:
>
> -- A two week staff review of the proposal by LILCO;

-- A one week discovery period;

-- A two week period for filing testimony and holding a hearing;

-- A two week period to issue the Board's decision.

Final Commission guidance on the expedited hearing on this matter would be based on your submittal and follow-up discussions. If you have any questions, please let me know.5/

Chairman Palladino had not discussed this "working paper" with the other Commissioners and, thus, the reference to "The Commission" in the second paragraph was not accurate. The other Commissioners were not informed of Chairman Palladino's "working paper" or his request to Judge Cotter until April 4.

6. Judge Cotter responded to Chairman Palladino's "working paper" the next day. His March 23 response, in the form of a detailed 9 page proposed order for adoption by the Commission, contained the following elements:

5/ The time estimates in the "working paper" apparently were derived by Chairman Palladino from "OGC's rough estimates of the time that an expedited hearing such as suggested by OGC might take . . . . ." Palladino Statment at 12. The estimate of a two week period for Staff review of the LILCO proposal -- a reduction from the 30-day review period discussed on March 16 and reported in Judge Cotter's notes -- presumably reflects further conversation with the Staff either by the Chairman, his stff, or the OGC.

(a) A proposed decision that consideration of LILCO's low power proposal be expedited and that it be decided on the merits. This, of course, prejudged the very question at issue: whether LILCO's proposal was a challenge to GDC 17 that had to be rejected outright. It thus had the effect of deciding that the GDC 17 requirement of an onsite electric power system could be eliminated without even requiring LILCO to seek an exemption or waiver under 10 C.F.R. § 2.758 or § 50.12(a).

(b) A proposed decision that a new Licensing Board be appointed to replace the Brenner Board, which on February 22, 1984, had dealt LILCO a setback. This proposal to appoint a new Licensing Board came four days before the Brenner Board advised Judge Cotter that it had a potential schedule conflict due to the judges' involvement in the Limerick proceeding. Significantly, Judge Cotter's notes of the Chairman's March 16 meeting state: "NOTE: Concern re Same Board Chairman" [i.e., Judge Brenner].

(c) A proposed decision that LILCO's March 20 Motion be litigated on a schedule that Judge Cotter described as "brutally tight" and "[d]efinitely not recommended but possibly achievable." The Cotter schedule called for a decision on the LILCO Motion within 50 days. To achieve such "expedition,"

Judge Cotter suggested that there be 16 days for discovery, 5 days between close of discovery and filing testimony, 5 days until the start of hearing, and 10 days for the hearing. This schedule is clearly responsive to and consistent with the Chairman's "working paper" directive that Judge Cotter devise an expedited schedule for Shoreham. Further, one reason cited by Judge Cotter for adoption of this "brutally tight" schedule was "the enormous financial investment" of LILCO. See Cotter draft order, p. 4. This was the same reason cited by Chairman Palladino for his personal intervention in the first place. See ¶2, supra. Significantly, Judge Cotter's notes of the March 16 meeting with the Chairman state: "Says will go bankrupt if 12/84 I.D. [Initial Decision of the Licensing Board]." As noted previously, the only decision that could avert a LILCO bankruptcy was an early one favorable to LILCO.

7. On March 26, Suffolk County submitted preliminary views to the Brenner Board regarding LILCO's March 20 Motion. These views were submitted in response to a specific March 22 request of the Brenner Board that parties provide preliminary views on how the new LILCO Motion should be handled. In these views the County stated:

(a) The County required more than the normal ten-day period to respond to LILCO's Low Power Motion, because it raised many new and complex factual issues[6/] and the County

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6/ The NRC's Office of General Counsel has agreed that the issues raised by LILCO's Motion are "extremely complex." See ¶12, infra.

needed to retain appropriate experts to analyze those issues.

(b) Analysis of the factual issues would first require the County to obtain substantial information through discovery.

(c) Additional time was required to address legal issues raised by LILCO's Motion.

(d) A number of threshold issues should be addressed before the merits of LILCO's Low Power Motion were considered, including: (i) the Motion did not meet the criteria enunciated by the Brenner Board on February 22 for a new low power proposal, because it did not state how it met regulatory requirements or why a waiver therefrom should be granted; (ii) the Motion relied upon power sources located at the Shoreham site which were not seismically qualified, as required, but LILCO had sought no waiver of the NRC's seismic requirements; and (iii) contrary to the Board's February 22 order, the Motion appeared to rely upon the TDI diesels.

The County requested a conference with the Brenner Board to discuss the procedural matters affecting the diesel litigation and LILCO's Low Power Motion.

On March 28, the State of New York filed preliminary views which supported those submitted by the County. The County

supplemented its views on March 30, urging that the LILCO Motion be summarily dismissed for failing to comply with GDC 17.

8. On March 27, Chairman Palladino gave Judge Cotter's draft order to the Office of General Counsel. Chairman Palladino did not give the draft order to the other Commissioners until April 4.

9. On March 30, the NRC Staff responded to LILCO's Low Power Motion. In an abrupt and complete reversal of its prior position that no low power license could be issued for Shoreham until the TDI diesel problems were solved, the Staff stated instead that operation of Shoreham could be permitted in the complete absence of any onsite electric power system.

> If the protection afforded to the public at low-power levels without diesel generators is found to be equivalent to (or greater than) the protection afforded to the public at full-power with approved diesel generators, the Staff submits that LILCO's motion should be granted.

This sudden change in Staff position led a Commissioner to conclude that Chairman Palladino's intervention had been influential:

> COMMISIONER GILINSKY: I must say that this confirms me even further in my view that the staff ought not be in these hearings. Here is the staff concocting arguments on

> how all this can be rationalized and I must say that even though you didn't tell them anything about the hearings, this is after your meeting with them on the speeding up the process so the effect of it is inevitable. You have them go back and think, 'Well, how can we speed up this process?' I am not suggesting that you did anything proper [sic] mind you but that is intrinsic in the way the system works.

NRC April 23 Meeting Transcript, p. 59 (Emphasis added).7/

Further, without addressing any of the County's and State's concerns regarding the time required to respond to LILCO's Low Power Motion and without revealing the Staff's meeting with Chairman Palladino, the Staff called for an expedited hearing on the Motion with all testimony to be filed by April 23. This Staff schedule was consistent with the guidelines set forth in Chairman Palladino's "working paper" and with Judge Cotter's proposed order.

10. On March 30, Chief Administrative Judge Cotter issued an order removing the Brenner Board and establishing a new licensing board "to hear and decide" LILCO's Low Power Motion. The order noted the "advice" of the Brenner Board that "two of its members are heavily committed to work on another operating license proceeding." According to a report in Nucleonics Week, April 5, 1984:

7/ See also CLI-84-8, Separate Views of Commissioner Gilinsky, May 16, 1984 ("the Staff had been trying to run legal interference for the Company").

> Appointment of a board to hear Lilco's motion for a low-power license at Shoreham . . . [was] his idea, Cotter said through an agency spokesman. However, he said, Palladino's staff was "aware" of his decision.

Indeed, Judge Cotter informed the Chairman of the actual appointment before it was made. Palladino Statement at 14.8/ Moreover, Judge Cotter's notes of the March 16 meeting reveal that there was "concern" with Judge Brenner. In any event, Chairman Palladino was aware of Judge Cotter's decision because Judge Cotter had proposed appointment of a new Board in his March 23 draft order which was prepared at Chairman Palladino's request. Further, even if the appointment of a new Board was Judge Cotter's "idea", this idea was one of the proposals developed by Judge Cotter at the request of Chairman Palladino and, thus, the "idea" clearly was the product of the Chairman's intervention.

11. On the same day, March 30, the parties were notified by telephone that the new Licensing Board (the "Miller Board") would hear oral arguments on April 4, 1984, on LILCO's Low

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8/ The Office of General Counsel spoke with Judge Cotter several times between March 27 and March 30 regarding Judge Cotter's proposal to appoint a new board and specifically questioned whether the action did not appear to presume that LILCO's Motion would be granted. See NRC April 23, 1984 Meeting Transcript, pp. 8-9.

Power Motion. The telephonic notice stated that this Board was "established to hear and decide the motion on an expedited basis." This oral notice 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." (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. 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, 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. Nevertheless, the Miller Board decided to expedite the proceeding the very same day it was appointed -- March 30.

12. 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 discovery and the start of hearings,9/ and 15 days for hearings.

13. 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. 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

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9/ Prefiled testimony was omitted.

expediting LILCO's Low Power Motion was arbitrary and would deny the State due process of law.

14. 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 (the Miller Board) are members.

15. 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.

16. 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"). The Low Power Order stated first that LILCO could operate Shoreham at low power with no onsite electric power system, provided that the public health and safety findings suggested by the NRC Staff were made. The Board thus adopted the position urged by the Staff in its March 30 filing and by Judge Cotter in his March 23 draft order. 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." This was, as Judge Cotter's notes reflected, the means for LILCO "to get around [the] diesal issue."

Second, despite the "extremely complex" issues presented, the Board decided to expedite consideration of LILCO's Motion. Again, this decision was consistent with the Chairman's "working paper," the position of the Staff, and with Judge Cotter's draft order. 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." Significantly, 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

17. 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. The County even submitted detailed affidavits of expert consultants documenting that the April 6 Order denied the County a chance to prepare for and participate meaningfully in the hearing. 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. The TRO was granted on April 25.

II. Chairman Palladino Must Recuse Himself Or Otherwise Be Disqualified By The Commission

The standard for determining whether Chairman Palladino must recuse himself or otherwise be disqualified is whether "a "a disinterested observer" may conclude that Chairman Palladino "has in some measure adjudged the facts as well as the law" in the Shoreham case "in advance of hearing it." Cinderella, supra, 425 F.2d at 591 (emphasis supplied).10/ Under the Cinderella standard and the facts described above, a disinterested observer certainly may conclude that Chairman Palladino

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10/ Chairman Palladino has contended that he has not prejudged the Shoreham proceeding. See e.g., Palladino Statement at 20-21; Palladino Letter to Congressman Markey, April 6, 1984; CLI-84-8, Separate Views of Chairman Palladino, May 16, 1984. His position, however, does not address the legal standard set forth in the Cinderella case.

has at least in some measure adjudged the facts and law in this case before hearing it. Certainly, as noted previously, a disinterested observer could conclude that the only decision which could avert a LILCO bankruptcy was an expedited one favorable to LILCO.

The Chairman's March 16 meeting with top-level Staff personnel -- an ex parte meeting prohibited by Section 2.780 of the regulations -- and his meeting with Judge Cotter, the NRC's Chief Administrative Judge, dealt with establishing a strategy and an action plan to help LILCO without any regard for the effects on the rights and interests of the County and State. This strategy and plan were based on the concern that the substantive rulings and hearing procedures adopted by the Brenner Board might permit LILCO to go bankrupt before a low power license decision could be issued. Therefore, to get around those rulings and procedures, the strategy and actions following the intervention of Chairman Palladino produced a new Licensing Board, a new legal standard which would permit the low power operation of Shoreham with no onsite power and without waiver of GDC 17, and a new expedited hearing schedule which effectively barred the County and State from preparing for and participating meaningfuly in the hearing. The County and State submit that these results would not have been produced but for the personal intervention of Chairman Palladino.11/

11/ Chairman Palladino on May 16, 1984 disputed the assertion of Commissioner Gilinsky that Chairman Palladino had

Significantly, Judge Cotter's notes reveal that the discussion at the Chairman's March 16 meeting focused on how to change what was then the law of the case. The discussion thus focused on an "alternative solution for low power" -- that is, an alternative to what had been decided on the record by the Brenner Board with the participation of the parties under the provisions of the NRC's regulations. The March 16 meeting was an entirely different setting: It dealt with a "LILCO proposal" which had not even been submitted and of which the County and State had no knowledge; it was a secret meeting of which there was no public notice; the discussion was not on the record; the parties (except for the Staff) were not present; it focused on a means of obtaining a favorable decision in time to avert a LILCO bankruptcy; and the NRC's ex parte rules were violated.

(Footnote cont'd from previous page)

directed the Staff's ideas on any issue in the Shoreham case. The Chairman suggested, in fact, that the Staff had taken positions in February 1984 before the Brenner Board which were consistent with those taken by the Staff on March 30, 1984. See CLI-84-8, Separate Views of Chairman Palladino, May 16, 1984. However, before the Brenner Board, the Staff had insisted that for a low power license, LILCO needed to fix the diesels or seek an exemption or waiver. See Section I.A, supra. On March 30, the Staff took the entirely new position (after meetings with the Chairman) that: (a) the diesels did not need to be fixed; (b) LILCO could operate at low power with no onsite power system at all; and (c) LILCO did not need to seek a waiver or exemption. We submit that Commissioner Gilinsky was clearly correct: the Staff got its marching orders from the Chairman and carried them out.

In essence, the March 16 meeting was a planning session to figure out how to get around the lawful rulings of the Brenner Board. Its purpose was improper; its discussion was improper; and the actions of NRC personnel that followed it were improper. Each of these personnel acted as a link in a chain of impropriety that commenced in the Chairman's office on March 16.

Under the Atomic Energy Act, the zone of interests to be protected by the NRC is the public's health and safety. See Power Reactor Development Corp. v. International Union of Electrical, Radio, and Machine Workers, 367 U.S. 409, 415 (1961); cf. Portland General Electric Co., (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 N.R.C. 610 (1976). In the present case, however, there is every indication that Chairman Palladino used the power and prestige of his office to set in motion actions which prejudiced the rights and interests of the County and State, but aided LILCO's efforts to secure an operating license in time to avoid bankruptcy. (Judge Cotter's notes of the Chairman's March 16 meeting underscore this concern for LILCO.) Under the circumstances set forth herein, a disinterested observer may surely conclude that Chairman Palladino has in some measure prejudged the facts as well as the law in the Shoreham proceeding in advance of the hearing. The final evidence of the Chairman's prejudgment can be seen in the actions of the Chief Administrative Judge, the Staff, and

the Licensing Board personnel who along the way gave effect to his wishes.

The Shoreham proceeding has been pervasively tainted by the Chairman and others who worked in parallel with him to aid LILCO at the expense of Suffolk County and New York State. The only way to begin the process of restoring institutional integrity in this proceeding is by the disqualification of those whose actions have created the taint. The place to start is with the Chairman's recusal. If he does not recuse himself, the County and State move the Commission to take cognizance of this matter and vote on whether to disqualify the Chairman.

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June 5, 1984

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY AND THE STATE OF NEW YORK REQUEST FOR RECUSAL AND, ALTERNATIVELY, MOTION FOR DISQUALIFICATION OF CHAIRMAN PALLADINO, dated June 5, 1984, have been served to the following this 6th day of June 1984 by U.S. mail, first class, except that some are being served by hand (when indicated by one asterisk), and some by Federal Express (when indicated by two asterisks).

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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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY AND STATE OF NEW YORK MOTION FOR DISQUALIFICATION OF JUDGES MILLER, BRIGHT, AND JOHNSON, dated June 21, 1984, have been served on the following this 21st day of June 1984 by U.S. mail, first class; by hand when indicated by one asterisk; and by Federal Express when indicated by two asterisks.

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DATE: June 21, 1984

Enclosure 7

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LILCO June 18, 1984

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)	)	
	)	

LILCO'S RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK'S REQUEST FOR RECUSAL AND, ALTERNATIVELY, MOTION FOR DISQUALIFICATION OF CHAIRMAN PALLADINO

I. INTRODUCTION

Nearly two months after first improperly demanding the recusal of Chairman Palladino, Suffolk County and Governor Cuomo have now formally moved for the Chairman's recusal and, alternatively, for his disqualification by the entire Commission. The facts upon which Chairman Palladino must decide the motion are uniquely known to him; LILCO will not comment upon them. LILCO is concerned, however, that this motion not be used as a further delaying tactic by the County and Governor Cuomo in an effort to avoid reaching the merits of various licensing matters pertinent to Shoreham. Indeed, LILCO

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is troubled by the intervenors' implicit suggestion that improper bias is indicated merely by administering the process to ensure that the substantive merits, rather than procedural delays, determine the ultimate result. Accordingly, LILCO sets forth below the applicable law which ought to be taken into account by Chairman Palladino.

II. THE DECISION ON RECUSAL RESTS SOLELY WITH THE CHAIRMAN

The decision with respect to recusal must be made solely by Chairman Palladino and is not to be second-guessed by the Commission. Commission precedent establishes that the motion for consideration and disqualification by the whole Commission must be denied:1/

> 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.

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power

1/ Research has not disclosed any difference between the substantive standards for recusal, which is simply self-disqualification by a person acting in the capacity of a judge, and for disqualification of such a person by others.

Plant, Units 1 and 2), CLI-80-6, 11 NRC 411, 412 (1980).2/

III. TIMELINESS OF THE MOTION MUST BE CONSIDERED

Both federal courts and administrative agencies require that a motion for recusal be filed as soon as the party asking for recusal becomes aware of the information leading to the request. Marcus v. Director, Office of Worker's Compensation Programs, 548 F.2d 1044, 1051 (D.C. Cir. 1976); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983). This requirement for prompt action increases administrative efficiency by avoiding unnecessary delay in the proceeding should recusal be warranted, id., and prevents conversion of "the serious and laudatory business of insuring judicial fairness into a mere litigation strategy." Delesdernier v. Porterie, 666 F.2d 116, 121 (5th Cir.), cert. denied, 103 S. Ct. 86 (1982).

2/ The County/Cuomo motion's failure to cite any of the abundant Commission precedent on recusal and disqualification and specifically its failure to mention this case -- directly on point and contrary to their position -- is disturbing and potentially unethical. It is all the more surprising in view of the fact that Suffolk County's counsel were counsel of record for Governor Jerry Brown in the Diablo Canyon proceeding at the time this decision was rendered.

The actions by Chairman Palladino of which the County and Governor Cuomo complain occurred between March 16, 1984 and, at the latest, April 4, 1984. The County and Governor Cuomo were clearly aware of them by April 11, when the County Executive wrote a letter to the Commission alleging that Chairman Palladino was biased. The instant motion was not filed until almost two months later, a period of delay which has not been tolerated in other comparable proceedings. See Seabrook, 18 NRC at 1199 (motion for disqualification late when party waited almost two months to raise its concerns); Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32 n.6 (1979) (motion filed more than six weeks after the order on which it was predicated is untimely).

Timeliness should not be considered solely for the sake of adjudicatory efficency, but also to the extent that it reflects on the credibility of the County's and Governor Cuomo's asserted belief that recusal is necessary. At least three times beginning April 11, the County, with or without Governo Cuomo, has called for the Chairman's recusal without any factual predicate and without any properly filed motion.3/

3/ These include the letter of County Executive Peter Cohalan on April 11, the Amended Complaint in Cuomo v. NRC, Civ. Action

(Footnote cont'd)

Each request appears to have been prompted solely by progress toward adjudicating the merits of LILCO's low power license request. A request for recusal should not be used to delay the adjudicatory process. The two-month delay in properly raising this issue, particularly give the multiplicity of attempts to raise it improperly in the interim, suggests that litigation tactics, rather than any concern with fairness, may have prompted the motion.

IV. STANDARD FOR RECUSAL

Disqualification of a judge or an agency official acting in an adjudicative capacity is unusual. There is a presumption of the decisionmaker's honesty and integrity. See Withrow v. Larkin, 421 U.S. 35, 47 (1975). This presumption is overcome only if the decisionmaker harbors an attitude that a

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(Footnote cont'd from previous page)

No. 84-1264 (D.D.C. filed April 23, 1984), and Suffolk County's memorandum of April 27, 1984 to counsel for parties in Cuomo v. NRC (quoted in the Licensing Board's Status Report to Commissioners dated April 30, 1984). Further, Mr. Cohalan, and counsel for Governor Cuomo, delivered lengthy accusations of misconduct by Chairman Palladino in prepared and live testimony at May 17, 1984 oversight hearings on the regulatory process at Shoreham called by the Subcommittee on Energy and the Environment of the House Interior Committee. (Prepared Testimony of Peter Cohalan at 2-4; Prepared Testimony of Fabian G. Palamino, at 4-5).

fair-minded person would be unable to set aside so that he could evaluate objectively the arguments presented by all parties. See United States v. Conforte, 624 F.2d 869, 881 (9th Cir.), cert. denied, 449 U.S. 1012 (1980). Thus, for example, a general bias in favor of nuclear power does not disqualify an adjudicator from participating in a nuclear licensing decision if the adjudicator can base his decision on the evidence before him. See Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975).

The standards for determining whether recusal is warranted are as follows:4/

> [An] 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 that 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.

4/ The County/Cuomo motion cites as its standard for recusal the formulation first addressed in Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (motion at 1-2). However, the motion never mentions any of the numerous cases before the Commission which have applied and construed that very general verbal formula under circumstances applicable to Commission practice.

Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), No. 50-354-OL, ALAB-759, slip op. at 12 (Jan. 25, 1984) (quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973)); cf. 28 U.S.C. § 455 (providing standards for disqualification of a federal judge). The Commission has held in applying these standards that only bias or prejudgment attributable to extra-judicial sources requires disqualification. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363 (1982), citing United States v. Grinnel Corp., 384 U.S. 563, 583 (1966).5/

The County/Cuomo motion does not meet this standard. Even if accepted at face value, the facts averred in it would not lead a disinterested observer to conclude that the Chairman has prejudged the facts concerning Shoreham in advance of hearing the issues. The primary basis for the recusal motion is the Chairman's alleged role in expediting the schedule for reaching a decision on whether a low power license should issue for Shoreham. Such an attempt to ensure that the process

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5/ The Commission left open the possibility that in the most extreme cases judicial conduct demonstrating pervasive bias and prejudice against a party might be grounds for disqualification. South Texas, 15 NRC at 1366. Obviously, no such facts exist here.

itself (specifically, its length) does not artifically dictate the result indicates no predisposition on the merits. Interestingly, the motion contains no particularized averment that Chairman Palladino has reached any substantive view concerning LILCO's low power license request or that he has attempted to influence the substantive views of others involved in the process. Indeed, in the one low power license matter that has thus far reached the Commission, the Chairman voted against LILCO's position. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC ____ (May 16, 1984).

In contrast, scheduling questions are procedural. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-757, 18 NRC 1356, 1359 n.17 (1983). The public interest in setting a schedule for licensing hearings is usually best served by proceeding as rapidly as is possible, consistent with the opportunity for all parties to be heard. See Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 684-85 (1975); Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975). The Commission has recognized the public interest in concluding licensing proceedings expeditiously and certainly prior to

completion of construction of a nuclear plant. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981); Statement of General Policy and Procedure: Conduct of Proceedings for the Issuance of Construction Permits and Operating Licenses for Production and Utilization Facilities for Which a Hearing is Required under Section 189A of the Atomic Energy Act of 1954, as amended, 10 CFR Part 2, Appendix A. As a result, the Commission's policy is to encourage expedited hearings as a means of avoiding licensing delays and to maintain its commitment to a fair and thorough hearing process.

To the extent Chairman Palladino sought to encourage an expedited hearing on LILCO's application for a low power license, his actions appear simply to have been consistent with implementation of this policy.6/ The Chairman has many duties in addition to his adjudicatory role, including responsibility for ensuring that the Commission staff is responsive to

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6/ The meeting on March 16, 1984 did not, as alleged by the County and State, involve ex parte contacts. Ex parte communications involve substantive matters at issue in the proceeding. 10 C.F.R. § 2.780(a)(2); Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-313, 3 NRC 94, 96 (1976). Scheduling questions are purely procedural. See Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-757, 18 NRC 1356, 1359 n.17 (1983).

Commission policy. See Reorganization Plan No. 1, 45 Fed. Reg. 40561 (1980). The mere fact that he performs these other duties does not necessitate his recusal. If it did, it would be impossible for any agency chairman to carry out both his adjudicatory and his other legal duties. Cf. Kennecott Copper Corp. v. FTC, 467 F.2d 67, 79-80 (10th Cir. 1972) (Commission not disqualified when Act requires it to perform other duties involving the very subject matter of the case), cert. denied, 416 U.S. 909 (1974).

Further guidance may be gleaned by comparing the present situation to two other instances in which recusal or disqualification was an issue. In the Diablo Canyon proceeding, Commissioner Hendrie declined to recuse himself after discussing scheduling matters with the applicant in an off-the-record meeting. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant), Nos. 50-275-OL and 50-323-OL (Commissioner Hendrie's Memorandum to Counsel for Parties, March 13, 1980). In contrast, in the only instance disclosed by research in which an adjudicative officer at NRC has been removed from a case, the Hope Creek Appeal Board found that an appearance of impropriety existed because the disqualified judge had actually worked for the applicant on the particular plant at issue and that work had been cited in the

decision approving a construction permit. See Hope Creek, slip op. at 17. Chairman Palladino's alleged actions far more closely resemble the first example than the latter.7/

7/ Additional perspective on whether the previous conduct or statements of Chairman Palladino, or any other Commissioner, may be of such a nature as to lead a disinterested observer to conclude that prejudgment of facts or law has occurred is gained by comparing them with actions or statements which were not considered by the only competent judge -- the Commissioner himself -- to warrant recusal. In that regard, it is helpful to remember Commissioner Gilinsky's May, 1983 dissent from the Commission's refusal of Suffolk County's demand that it pre-emptively terminate emergency planning proceedings at Shoreham before ever allowing any evidence to be taken. There, Commissioner Gilinsky clearly indicated his views on the outcome:

> [T]he Commission has failed to deal with the actual issue in this case. That is: can there be adequate emergency preparedness (as distinct from planning) if neither the State nor the County Governments will participate?
>
> The answer is, clearly, No. There cannot be adequate emergency preparedness for the surrounding population without the participation of a responsible government entity.

Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-83-13, 17 NRC 741, 744 (1983). Such views, if logically pursued by Commissioner Gilinsky, would utterly preclude his voting in favor of an operating license for Shoreham, despite statutory and regulatory provisions which not only empower but obligate the Commission to hear fairly the merits of a plan sponsored only by a utility. Chairman Palladino's actions and statements, unlike those of Commissioner Gilinsky, go only to scheduling, not to substance; yet Commissioner Gilinsky has not recused himself from Commission decisions and deliberations on Shoreham.

V. CONCLUSION

In deciding the motion for his recusal, Chairman Palladino should consider the matters discussed above. Based on the facts as alleged, recusal does not appear to be warranted in these circumstances.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

By Robert M. Rolfe 1983
W. Taylor Reveley, III
Donald P. Irwin
Robert M. Rolfe
Anthony F. Earley, Jr.

Hunton & Williams
Post Office Box 1535
Richmond, Virginia 23212

DATED: June 18, 1984

...LCO, June 18, 1984

CERTIFICATE OF SERVICE

'84 JUN 18 P3:43

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

I hereby certify that copies of LILCO'S RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK'S REQUEST FOR RECUSAL AND, ALTERNATIVELY, MOTION FOR DISQUALIFICATION OF CHAIRMAN PALLADINO were served this date upon the following by U.S. mail, first-class, postage prepaid, and in addition by hand (as indicated by one asterisk), by Federal Express (as indicated by two asterisks).

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Enclosure 8

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Nunzio J. Palladino, Chairman

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

MEMORANDUM TO THE PARTIES

On June 6, 1984, counsel for Suffolk County and the State of New York served on me a formal request that I recuse myself from the Shoreham operating license proceeding. On June 18, the applicant filed a response to that request. In considering the Suffolk County/New York State request, it would be useful to have the comments of all parties as to whether I should recuse myself from this proceeding, either as a matter of legal requirement or of discretion. Accordingly, by this memorandum I request the submission of views by the NRC staff, to be filed no later than July 6, 1984.

Until such time as I make a decision on the Suffolk County/New York State request, I intend not to participate in any Commission deliberations on adjudicatory matters in the Shoreham proceeding. My decision to refrain from such

participation while the request remains pending should in no sense be taken to suggest, one way or the other, any judgment on the legal merits of the request.

For the benefit of the parties, I have requested the Secretary, in serving copies of this Memorandum on the parties, to attach a copy of my testimony, prepared for the hearing of the House Committee on Interior and Insular Affairs on May 17, 1984, in which I presented an account of my participation in this proceeding.

NUNZIO J. PALLADINO
CHAIRMAN

Dated at Washington, D.C.
This 20th day of June, 1984.

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

I WILL BEGIN MY STATEMENT BY BRIEFLY COVERING SOME OF THE SHOREHAM BACKGROUND. THE LONG ISLAND LIGHTING COMPANY, OR "LILCO", APPLIED FOR A CONSTRUCTION PERMIT FOR THE SHOREHAM NUCLEAR POWER STATION IN 1968, AND RECEIVED THAT PERMIT IN 1973. IN 1975 LILCO APPLIED FOR AN OPERATING LICENSE. A LICENSING BOARD WAS APPOINTED IN 1981 TO CONDUCT A PUBLIC HEARING, AND THE HEARING STARTED IN 1982. A SECOND BOARD WAS APPOINTED IN AUGUST, 1982 TO ADDRESS PHYSICAL SECURITY ISSUES IN THE CASE. A THIRD BOARD WAS APPOINTED IN MAY, 1983 TO DEAL WITH OFFSITE EMERGENCY PLANNING.

ON JUNE 3, 1983 LILCO FILED A MOTION WITH THE LICENSING BOARD REQUESTING A LICENSE TO OPERATE AT LOW POWER -- THAT IS, AT UP TO 5% OF RATED POWER. ON SEPTEMBER 21, 1983 THE FIRST LICENSING BOARD ISSUED A PARTIAL INITIAL DECISION IN WHICH IT RULED THAT FUEL LOADING AND LOW POWER OPERATION COULD BE AUTHORIZED IN ALL OTHER RESPECTS EXCEPT FOR THE NEED TO RESOLVE A PENDING

CONTENTION RELATED TO EMERGENCY ONSITE DIESEL GENERATORS.

(LBP-83-57, 18 NRC 468 (1983).)

ON FEBRUARY 22, 1984 THE LICENSING BOARD ADMITTED THREE CONTENTIONS, FILED BY SUFFOLK COUNTY, RELATING TO THE DIESEL GENERATORS. IN AN ORAL RULING THE BOARD STATED THAT, ON THE BASIS OF THE RECORD THEN BEFORE IT, IT COULD NOT FIND THE DIESEL GENERATORS ADEQUATE TO PERMIT LOW POWER OPERATION UNLESS IT CONSIDERED THE THREE CONTENTIONS ON THE MERITS. HOWEVER, THE BOARD ADDED:

> 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.

(TRANSCRIPT OF CONFERENCE OF PARTIES, FEBRUARY 22, 1984, PAGE 21,616.)

FOUR WEEKS LATER, ON MARCH 20, 1984 LILCO FILED SUCH A REQUEST WITH THE LICENSING BOARD.

UNWARRANTED LICENSING DELAYS

IN THE MEANTIME, HOWEVER, OTHER EVENTS HAD TAKEN PLACE. AS THE COMMITTEE IS AWARE, THE COMMISSION ROUTINELY REPORTS TO THE CONGRESS ON THE STATUS OF OUR LICENSING CASES. THAT REPORT INCLUDES ESTIMATES OF THE DATES ON WHICH THE COMMISSION IS PROJECTED TO REACH LICENSING DECISIONS IN THESE CASES. AS RECENTLY AS JANUARY 25, 1984 THE COMMISSION HAD ADVISED THE CONGRESS THAT IN ONLY ONE CASE WAS IT PROJECTED THAT THE FACILITY WOULD BE PHYSICALLY COMPLETE, AND THEREFORE POTENTIALLY READY FOR OPERATION, PRIOR TO A DECISION ON ITS OPERATING LICENSE. THAT

PLANT WAS LIMERICK, AND THE ESTIMATED TIME GAP INVOLVED WAS 7 MONTHS.

ON MARCH 9, 1984, HOWEVER, OUR EXECUTIVE DIRECTOR FOR OPERATIONS NOTIFIED THE COMMISSION THAT THE AMOUNT OF DELAY HAD INCREASED SIGNIFICANTLY. THE EDO NOW PROJECTED A TOTAL TIME GAP OF 14 MONTHS -- 5 MONTHS ATTRIBUTABLE TO LIMERICK AND 9 MONTHS TO SHOREHAM. I WAS FURTHER INFORMED ORALLY BY THE EDO, ON OR ABOUT MARCH 13, THAT ADDITIONAL DELAYS MIGHT BE DEVELOPING WITH RESPECT TO THE WATERFORD AND COMANCHE PEAK FACILITIES, AND THAT SIZEABLE NRC STAFFING ADJUSTMENTS WERE BEING MADE FOR THESE TWO PLANTS. I BELIEVE THE EDO ALSO INFORMED ME AT THAT TIME THAT HE WAS SENDING A NOTE (OR NOTES) ON BYRON AND SHOREHAM. I DO NOT RECALL THAT HE DESCRIBED THE NOTES FURTHER. NEVERTHELESS, I WAS MINDFUL OF CONCERNS FROM THIS COMMITTEE AND FROM INDIVIDUAL COMMISSIONERS ABOUT SURPRISES AS A RESULT OF A RECENT BOARD DECISION DENYING THE BYRON LICENSE. ALSO IN MY MIND AT THAT TIME WAS 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. I DON'T RECALL THAT THESE THOUGHTS ON SHOREHAM WERE DISCUSSED WITH THE EDO. ALL OF THIS BACKGROUND CONTRIBUTED TO MY DESIRE TO HAVE A BRIEFING ON THE STATUS OF THESE MATTERS.

I WAS CONCERNED ABOUT THE INFORMATION I WAS RECEIVING, AND I THINK I WAS RIGHT, AS CHAIRMAN, TO BE CONCERNED. I FELT THE SITUATION I WAS BEING INFORMED OF WARRANTED PROMPT ATTENTION. ALSO, ANY TIME THAT THE CHAIRMAN OF THE AGENCY DISCOVERS THAT INFORMATION HE PROVIDED TO THE CONGRESS ONLY SIX WEEKS EARLIER WAS NO LONGER ACCURATE IN A SIGNIFICANT RESPECT, I THINK HE <u>OUGHT</u> TO BE CONCERNED, AND HE <u>OUGHT</u> TO BE ASKING HOW THIS CAME ABOUT. THE LAST THING I WANTED TO HAPPEN WAS TO HAVE THE PROJECTED

DELAYS CONTINUE TO INCREASE RAPIDLY AND CATCH THE COMMISSION AND THE CONGRESS BY SURPRISE.

OVER THE LAST SEVERAL YEARS, CONGRESS HAS INDICATED ITS CONCERN ABOUT UNWARRANTED LICENSING DELAY. IN ITS REPORT ON THE NRC APPROPRIATION FOR FY 1981, THE HOUSE APPROPRIATIONS COMMITTEE DIRECTED THE COMMISSION TO PROVIDE A MONTHLY REPORT TO THE CONGRESS ON THE STATUS OF LICENSING PROCEEDINGS. (H.REP. NO. 96-1093, 96TH CONG., 2D SESS., 146-47 (1980).) THE HISTORY OF THIS REQUIREMENT MAKES CLEAR THE CONCERN OVER UNWARRANTED LICENSING DELAY. ANOTHER EXAMPLE IS THE TEMPORARY OPERATING LICENSE AUTHORITY IN THE COMMISSION'S AUTHORIZATION FOR FY 1982-83 IN WHICH THE CONGRESS DIRECTED THE COMMISSION TO ADOPT ADMINISTRATIVE MEASURES TO MINIMIZE THE NEED TO LICENSE PLANTS PRIOR TO THE COMPLETION OF PUBLIC HEARINGS. (PUB. LAW 97-415, 96 STAT. 2067, § 11 (1983).) IT IS CLEAR TO ME THAT THE INTENT OF THIS CONGRESSIONAL INSTRUCTION WAS THAT THE COMMISSION SHOULD

ADDRESS ADMINISTRATIVELY THE MATTER OF UNWARRANTED LICENSING DELAY IN SPECIFIC CASES.

THE COMMISSION'S POLICY AND PLANNING GUIDANCE ALSO ADDRESSES THE MATTER OF DELAY IN THE LICENSING PROCESS. AMONG OTHER THINGS, IT PROVIDES THAT, "CONSISTENT WITH MAINTAINING THE SAFETY OF OPERATING FACILITIES, STAFF REVIEWS AND PUBLIC HEARINGS SHOULD BE COMPLETED ON A SCHEDULE THAT ASSURES THE LICENSING PROCESS WILL NOT BE A CRITICAL PATH ITEM WHICH COULD UNNECESSARILY DELAY REACTOR STARTUP." AS CHAIRMAN, IT IS MY RESPONSIBILITY TO TAKE STEPS TO GATHER DATA AND INFORM THE COMMISSION OF ACTION NEEDED TO FULFILL THIS GUIDANCE.

THE ADMINISTRATIVE PROCEDURE ACT (APA) REQUIRES THAT AGENCY LICENSING PROCEEDINGS BE CONDUCTED BOTH WITH DUE REGARD FOR THE RIGHTS OF ALL THE PARTIES AND COMPLETED "WITHIN A REASONABLE TIME." SINCE THE COMMISSION HAS SUPERVISORY RESPONSIBILITY OVER

ALL OF ITS ADJUDICATIONS, IT IS ENTIRELY IN KEEPING WITH THE SPIRIT OF THE APA THAT I, AS CHAIRMAN, SUGGEST MEASURES DESIGNED TO ASSURE THAT THE COMMISSION COMPLIES WITH BOTH THESE STATUTORY REQUIREMENTS.

MARCH 16, 1984 MEETING

THE BEST THING TO DO IN MY VIEW WAS TO TRY TO GATHER AS MANY FACTS AS POSSIBLE ABOUT THE VARIOUS PLANTS THAT WERE POTENTIALLY DELAYED, AND THEN ALERT THE COMMISSIONERS (AND ULTIMATELY THE CONGRESS) ABOUT THE PROBLEM AND ADVISE THEM OF PROPOSED COURSES OF ACTION TO ADDRESS IT. ON MARCH 15 I MET WITH REPRESENTATIVES FROM OUR OFFICES OF POLICY EVALUATION AND GENERAL COUNSEL CONCERNING WHAT COULD BE DONE ABOUT THE PLANTS IMPACTED BY THE POTENTIAL DELAYS NOW BEING PROJECTED. DURING THAT DISCUSSION THERE WAS A CONSENSUS THAT I SHOULD CALL A MEETING WITH THE EXECUTIVE DIRECTOR FOR OPERATIONS, MEMBERS OF HIS STAFF, THE GENERAL COUNSEL AND HIS DEPUTY, AND THE CHAIRMAN OF THE ATOMIC

SAFETY AND LICENSING BOARD PANEL TO DISCUSS THE STATUS OF A NUMBER OF PLANTS AT WHICH THERE WERE PROBLEMS OR POTENTIAL PROBLEMS.

I WOULD LIKE TO SAY A FEW WORDS AT THIS TIME ABOUT THE ATTENDANCE AT THAT MEETING. THE NRC STAFF WAS TO BE THERE BECAUSE EXPERIENCE SHOWS THAT THE STAFF'S REVIEW AFFECTS LICENSING SCHEDULES. THE CHAIRMAN OF THE LICENSING BOARD PANEL WAS ASKED TO ATTEND BECAUSE IT IS HIS JOB TO BE KNOWLEDGEABLE ABOUT THE STATUS OF LICENSING CASES AND HE MIGHT HAVE IDEAS AS TO HOW UNNECESSARY DELAYS INVOLVING THE BOARDS COULD BE AVOIDED. HE WAS ALSO ASKED TO BE THERE TO CLARIFY ANY QUESTIONS ABOUT WHETHER OR NOT DELAYS WERE DUE TO THE NEED FOR STAFF DOCUMENTS BEFORE HEARINGS COULD BEGIN. THE GENERAL COUNSEL AND HIS DEPUTY WERE ASKED TO ATTEND IN ORDER TO PROVIDE ADVICE BASED ON THEIR EXPERIENCE AND TO ENSURE THAT OUR DISCUSSIONS WERE WITHIN LAW AND

COMMISSION RULES. THE OTHER ATTENDEES WERE ASKED TO ATTEND BECAUSE THEY MIGHT HAVE INFORMATION OR ADVICE TO CONTRIBUTE.

AT THAT MEETING, HELD ON MARCH 16, I WAS BRIEFED AS TO THE STATUS OF A NUMBER OF CASES, INCLUDING THE SHOREHAM PROCEEDING. WHILE THE BRIEFING INCLUDED IDENTIFICATION BY THE STAFF OF THE ISSUES OF THE SHOREHAM PROCEEDING, I DO NOT RECALL THE STAFF IN ANY WAY STATING OR INTIMATING HOW THOSE ISSUES SHOULD BE RESOLVED. I AM CONFIDENT THAT IF THE STAFF HAD DONE THAT, OR IF ANY OTHER IMPROPRIETY HAD BEEN COMMITTED, ONE OR MORE OF THE SEVERAL TOP AGENCY LAWYERS PRESENT WOULD HAVE RAISED A WARNING FLAG. LIKEWISE, I RECALL THE STAFF ADVISING THAT THEY UNDERSTOOD THAT LILCO PLANNED TO APPEAL THE DENIAL OF ITS LOW POWER REQUEST. BUT AGAIN, THERE WAS NO DISCUSSION, TO THE BEST OF MY RECOLLECTION, OF THE MERITS OF THAT REQUEST.

AT THE MARCH 16 MEETING, AS WAYS OF LESSENING THE PROJECTED 9 MONTH TIME GAP FOR SHOREHAM WERE DISCUSSED, AMONG THE SUGGESTIONS MADE -- AS I RECALL, BY OUR OFFICE OF GENERAL COUNSEL -- WAS THAT AN EXPEDITED HEARING COULD BE HELD ON THE DIESEL GENERATOR ISSUE. AT THAT MEETING, OGC WAS ASKED TO PREPARE AN OPTIONS PAPER FOR THE COMMISSION. MY MEMORANDUM OF MARCH 20, 1984 TO THE OTHER COMMISSIONERS REPORTED ON THAT MEETING.

MARCH 22 WORKING PAPERS AND MARCH 23 DRAFT ORDER

FOLLOWING THE MEETING, I CONTINUED TO BE QUITE CONCERNED ABOUT THE 9 MONTH DELAY FORECAST FOR SHOREHAM. FRANKLY, I WAS 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. I THEREFORE FELT A NEED AS CHAIRMAN TO CONSIDER DOING MORE. I HAD OTHER CONVERSATIONS WITH MY STAFF AND, AT ONE POINT I BELIEVE, WITH THE EDO AS WELL, SEARCHING FOR OPTIONS.

THESE CONVERSATIONS CONFIRMED THAT, OTHER THAN AFFECTING THE STAFF'S REVIEW TIME, FURTHER OPTIONS WOULD HAVE TO BE DEVELOPED AT THE COMMISSION LEVEL.

AT MY REQUEST, AND BASED ON OGC'S ROUGH ESTIMATES OF THE TIME THAT AN EXPEDITED HEARING SUCH AS SUGGESTED BY OGC MIGHT TAKE, MY STAFF PREPARED A ONE-PAGE CONCEPTUAL DRAFT DIRECTIVE FROM THE COMMISSION TO THE CHAIRMAN OF THE LICENSING BOARD PANEL. I WAS CONSIDERING THE POSSIBILITY OF CIRCULATING SUCH A DRAFT TO THE OTHER COMMISSIONERS FOR REVIEW AS A POSSIBLE CONCEPT FOR EXPEDITING THE PROCESS. HOWEVER, I HAD NO BASIS TO ESTIMATE WHETHER THE ROUGH ESTIMATES OF A SCHEDULE WERE REASONABLE OR EVEN FEASIBLE.

ON MARCH 22 A WORKING PAPER CONTAINING THE SUBSTANCE OF THAT POSSIBLE DRAFT DIRECTIVE WAS SENT TO JUDGE COTTER. JUDGE COTTER MONITORS AND PERIODICALLY REPORTS TO THE COMMISSION ON THE STATUS

OF ACTIVITIES IN THE MANY LICENSING CASES PENDING BEFORE LICENSING BOARDS. I WAS INTERESTED IN HIS OPINION ON THE POSSIBLE SCHEDULE IN THE DRAFT WORKING PAPER BECAUSE OF HIS EXPERIENCE IN COMPLEX LITIGATION AND HIS FAMILIARITY WITH THE SHOREHAM CASE.

ON OR ABOUT MARCH 23, I WAS INFORMED OF A PAPER RECEIVED BY MY OFFICE FROM JUDGE COTTER WHICH WAS TAKEN TO BE HIS COMMENTS ON THE BRIEF WORKING PAPER WHICH MY STAFF HAD SENT TO HIM. IT WAS IN THE FORM OF A DRAFT COMMISSION ORDER DIRECTING THAT AN EXPEDITED HEARING BE CONDUCTED BEFORE A NEWLY APPOINTED LICENSING BOARD. ON MARCH 27 MY OFFICE GAVE A COPY OF THE DRAFT ORDER TO OGC, WHICH WAS PREPARING A PAPER ON OPTIONS FOR COMMISSION ACTION IN SHOREHAM.

APPOINTMENT OF THE MILLER BOARD

AS STATED IN MY EARLIER TESTIMONY, ON MARCH 30, 1984 JUDGE COTTER APPOINTED A NEW LICENSING BOARD, WITH JUDGE MARSHALL MILLER THE PRESIDING OFFICER, TO CONSIDER LILCO'S LOW POWER MOTION. IN HIS ORDER ESTABLISHING THE NEW BOARD, JUDGE COTTER STATED THAT HE HAD BEEN ADVISED BY THE EXISTING SHOREHAM BOARD THAT TWO OF ITS MEMBERS WERE HEAVILY COMMITTED TO WORK ON ANOTHER OPERATING LICENSE PROCEEDING. A COPY OF JUDGE COTTER'S APPOINTMENT ORDER WAS PROVIDED TO ALL COMMISSIONERS.

JUDGE COTTER INFORMED MY OFFICE, BEFORE MAKING THE APPOINTMENT, THAT THE DECISION WAS HIS OWN AND THAT ITS BASIS WAS THE QUESTIONABLE AVAILABILITY OF THE PREEXISTING BOARD'S PERSONNEL. HOWEVER, SUCH ACTION WAS CONSISTENT WITH MY EXPRESSED CONCERN THAT WE USE OUR RESOURCES AS EFFICIENTLY AS POSSIBLE TO PROVIDE THE PARTIES REASONABLY PROMPT RESOLUTION OF THE ISSUES. I BELIEVE THAT JUDGE COTTER'S ACTION WAS CONSISTENT WITH COMMISSION POLICY TO ELIMINATE UNWARRANTED DELAY.

APRIL 2 AND APRIL 4 MEMORANDA

ON APRIL 2, I ALONG WITH MY FELLOW COMMISSIONERS RECEIVED FROM THE GENERAL COUNSEL A MEMORANDUM, PREPARED AT MY REQUEST, DISCUSSING POSSIBLE MEANS FOR COMMISSION ACTION TO EXPEDITE THE LOW POWER PROCEEDING. THE COMMISSION PROVIDED A COPY OF THAT MEMORANDUM TO THE HOUSE INTERIOR COMMITTEE IN EXECUTIVE SESSION ON MAY 2, 1984. THE MEMORANDUM DESCRIBED SEVERAL OPTIONS FOR COMMISSION CONSIDERATION.

INASMUCH AS NO REFERENCE WAS MADE IN THE APRIL 2 MEMORANDUM TO JUDGE COTTER'S DRAFT ORDER, ON APRIL 4 I CIRCULATED TO MY FELLOW COMMISSIONERS AND TO THE GENERAL COUNSEL THE DRAFT ORDER OF MARCH 23, TOGETHER WITH THE ONE-PAGE WORKING PAPER OF MARCH 22. IN MY COVER MEMORANDUM, I MENTIONED THAT FURTHER ACTION ON THIS OR ANY OTHER DRAFT ORDER WILL DEPEND ON THE NATURE OF COMMISSIONER COMMENTS ON OGC'S APRIL 2 MEMORANDUM.

IN MY VIEW, NEITHER MY MEMORANDUM OF APRIL 4, NOR THE GENERAL COUNSEL'S MEMORANDUM OF APRIL 2, CONSTITUTED ANY ATTEMPT TO MANIPULATE THE OUTCOME OF THE PROCEEDING, OR SUGGESTED ANY JUDGEMENT AS TO THE TECHNICAL MERITS OF THE SHOREHAM CASE. IN THE ABSENCE OF OBJECTIONS TO THE APRIL 4 MEMORANDUM, INCLUDING ANY FROM THE MANY LAWYERS WHO RECEIVED IT, I HAD NO REASON TO BELIEVE THAT ANYONE WOULD SUPPOSE THAT ANY IMPROPRIETY HAD BEEN COMMITTED BY THE ACTIONS COVERED IN THE APRIL 4 MEMORANDUM.

FURTHER, I HAD NO REASON TO BELIEVE THAT ANY COMMISSIONER THOUGHT I HAD OVERSTEPPED MY ROLE AS CHAIRMAN AT THAT TIME. IF ANY COMMISSIONER HAD BELIEVED THAT THE APRIL 4 MEMORANDUM WAS IMPROPER, OR OTHERWISE SAW ANY IMPROPRIETY IN MY EXPLORATION OF MEANS OF EXPEDITING THE DECISIONAL PROCESS, I BELIEVE IT WAS INCUMBENT ON THAT PERSON TO SPEAK UP AS SOON AS POSSIBLE, SO THAT THE COMMISSION MIGHT CONSIDER PROMPTLY THE NEED FOR ACTION TO

ADDRESS ANY ALLEGED COMPROMISE IN THE INTEGRITY OF THE PROCEEDING.

MAY 2 REPORT TO CONGRESS

ON APRIL 24, 1984 THE COMMISSION MET ON LICENSING DELAYS IN PUBLIC SESSION. FOLLOWING THAT MEETING A QUARTERLY REPORT WAS SENT TO THE CONGRESS. THE REPORT, DATED MAY 2, PROJECTED A TOTAL LICENSING DELAY OF 17 MONTHS: 2 MONTHS FOR SHOREHAM, 5 MONTHS FOR LIMERICK, 7 MONTHS FOR COMANCHE PEAK, 1 MONTH FOR WATERFORD, AND 2 MONTHS FOR BYRON. THE REPORT ALSO STATED THAT THE ADDITIONAL TIME IT WILL TAKE TO COMPLETE THE NECESSARY REVIEWS AND THE POTENTIAL FOR FURTHER LITIGATION OF FINANCIAL QUALIFICATION ISSUES AT INDIVIDUAL HEARINGS COULD RESULT IN SIGNIFICANT ADDITIONAL DELAYS.

I WOULD LIKE TO NOTE THAT THE 2 MONTH DELAY PROJECTED FOR SHOREHAM WAS REDUCED FROM THE PREVIOUS 9 MONTH ESTIMATE ON THE

PRESUMPTION THAT A DECISION AUTHORIZING LOW POWER OPERATION IN EARLY JUNE, 1984 WOULD BE POSSIBLE. HOWEVER, THAT DATE NOW APPEARS HIGHLY UNLIKELY.

CLOSING REMARKS

THIS COMPLETES THE HISTORY FOR MY ROLE IN THE SHOREHAM PROCEEDING, EXCEPT FOR MY PARTICIPATION IN THE COMMISSION ACTIONS DESCRIBED IN MY EARLIER TESTIMONY.

UNQUESTIONABLY, I TRIED TO BRING SOME MEASURE OF EFFICIENCY AND EXPEDITION TO THIS PROTRACTED LICENSING PROCEEDING, AS I HAVE ATTEMPTED TO BRING GREATER EFFICIENCY AND EXPEDITION TO THE AGENCY AS A WHOLE. I WOULD BE FAILING IN MY DUTY TO THE PUBLIC IF I DID NOT, IN MY CAPACITY AS CHAIRMAN OF THE AGENCY, DO JUST THAT. PEOPLE SOMETIMES FORGET THAT, IN A MULTI-MEMBER COMMISSION, ULTIMATELY THE RESPONSIBILITY FOR INITIATING ACTION RESTS WITH THE CHAIRMAN. AND IT RIGHTLY SHOULD REST WITH THE CHAIRMAN, AS THE NRC REORGANIZATION PLAN MAKES CLEAR. SUBJECT TO

THE CONSTRAINTS FIRST, THAT THE CHAIRMAN'S ACTIONS BE CONSISTENT WITH THE POLICIES OF THE COMMISSION, AND SECOND THAT THE CHAIRMAN BRING TO THE COMMISSION'S ATTENTION MATTERS THAT BEAR UPON THE COMMISSION'S FUNCTIONS.

I BELIEVE THAT MUCH OF WHAT IS AT ISSUE HERE GOES TO THE HEART OF THE ABILITY OF THE CHAIRMAN OF THE NRC TO PERFORM HIS FUNCTIONS IN THE MANNER WHICH THE NRC REORGANIZATION PLAN MANDATED. I SUBMIT THAT NO NRC CHAIRMAN CAN AFFORD TO STAND BACK AND SIMPLY OBSERVE THE AGENCY'S FUNCTIONING WITH ALOOF DETACHMENT. HE MUST BE INVOLVED IN ASSURING THAT THE AGENCY IS RUNNING EFFICIENTLY. HE MUST BE ASSURING THAT THE AGENCY'S 3,300-PERSON STAFF IS PERFORMING ITS FUNCTIONS SOUNDLY AND EXPEDITIOUSLY. HE MUST BE KEEPING HIMSELF INFORMED, THROUGH THE NRC STAFF, OF THE STATUS OF ALL IMPORTANT MATTERS PENDING BEFORE THE AGENCY.

I DO NOT SUBSCRIBE TO THE VIEW THAT, WHEN WE ARE TALKING ABOUT ADJUDICATORY ACTIVITIES, THE COMMISSION AND ITS CHAIRMAN MUST AT ONCE ABANDON ANY CONCERN FOR EFFICIENCY AND TIMELINESS. LIKE ANY JUDGE, WE HAVE A LEGITIMATE INTEREST IN THE EFFICIENT RUNNING OF THE ADJUDICATORY PROCESS. I THINK IT'S MORE THAN JUST AN INTEREST; IT'S ALSO AN OBLIGATION. I BELIEVE PARTIES DESERVE PROMPT ATTENTION TO THE ISSUES THEY RAISE, AND I AM REMINDED OF THE STATEMENT THAT "JUSTICE DELAYED IS JUSTICE DENIED." JUST AS A JUDGE MAY BE INTERESTED IN SEEING CASES MOVED ALONG, MY CONCERN FOR EXPEDITION IMPLIES NO JUDGMENT WHATSOEVER AS TO THE MERITS OF A PARTICULAR CASE. I INTEND TO MAKE ANY DECISION ON ANY REQUEST FOR A LICENSE FOR SHOREHAM ON THE ADJUDICATORY RECORD WHICH WILL BE PRESENTED TO US.

I HAVE NOT PREJUDGED THE ISSUES IN DISPUTE IN THIS PROCEEDING. I DO NOT PLAN TO RECUSE MYSELF FROM IT BECAUSE I HAVE NEITHER PREJUDGED THE MERITS OF THE CASE NOR HAVE I COMMITTED ANY

IMPROPRIETIES OF WHICH I AM AWARE. ON THE CONTRARY, I BELIEVE THAT MY EFFORTS REFLECT MY DETERMINATION TO DISCHARGE MY DUTIES TO THE PUBLIC, THE CONGRESS, AND THE COMMISSIONERS WITH COMPETENCE AND INTEGRITY.

AS A RESULT OF ACCUSATIONS MADE IN LETTERS FROM MEMBERS OF CONGRESS ON SHOREHAM, WHICH ACCUSATIONS ARE BEING AIRED TODAY, A CLOUD HAS BEEN CAST OVER THE CHAIRMAN'S AUTHORITY TO MONITOR THE STATUS OF LICENSING CASES, COLLECT THE FACTS SURROUNDING THE STATUS, AND BRING THEM TO THE ATTENTION OF THE COMMISSION.

I BELIEVE THAT THIS CLOUD MUST BE LIFTED BECAUSE IT IS IN DIRECT CONTRADICTION TO THE RESPECTIVE ROLES ASSIGNED TO THE CHAIRMAN AND THE COMMISSION BY THE NRC REORGANIZATION PLAN OF 1980. I ALSO BELIEVE IT SHOULD BE LIFTED IN ORDER TO ENSURE THE COMMISSION'S ABILITY TO DO ITS BUSINESS IN A TIMELY FASHION.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I WOULD LIKE TO CLOSE WITH THE FOLLOWING OBSERVATIONS.

I BELIEVE THIS NATION IS AT A CROSSROADS WITH RESPECT TO ITS ABILITY TO BRING NEW NUCLEAR POWER PLANTS INTO OPERATION. I BELIEVE THAT THE AMERICAN PEOPLE ARE ENTITLED TO HAVE DECISIONS ON NEW NUCLEAR PLANTS MADE ON THE MERITS OF THE ISSUES INVOLVED -- NOT MADE BY DEFAULT THROUGH GOVERNMENTAL INEFFICIENCY. WE OWE THE PUBLIC SOUND SAFETY DECISIONS; WE ALSO OWE THE NATION EFFICIENCY IN OUR PROCESSES. THAT IS WHERE MY EFFORTS HAVE BEEN DIRECTED.

SINCE I HAVE BEEN CHAIRMAN, CONGRESSIONAL DIRECTION AS WELL AS COMMISSION POLICY HAVE SENT A CLEAR SIGNAL THAT IT IS IN THE PUBLIC INTEREST TO MAKE LICENSING DECISIONS ON NUCLEAR POWER PLANTS EXPEDITIOUSLY, SO LONG AS THEY ARE SAFE. I SUBMIT THAT IF

THE CONGRESS OR THE COMMISSION WISH TO CHANGE THAT SIGNAL, THEN THE CONGRESSIONAL DIRECTION AND POLICY SHOULD BE CHANGED.

I WILL NOW ANSWER ANY QUESTIONS YOU MAY HAVE.

Enclosure 9

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)	)	
	)	

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

Robert G. Perlis
Counsel for NRC Staff

July 5, 1984

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
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LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-4 (Low Power)
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NRC STAFF RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK REQUEST FOR RECUSAL OF CHAIRMAN PALLADINO

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.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

JOINT AFFIDAVIT OF WILLIAM J. DIRCKS AND GUY H. CUNNINGHAM, III

Now come William J. Dircks and Guy H. Cunningham, III, and being duly sworn, depose and say as follows:

1. The purpose of this affidavit is to provide factual information concerning the meeting that took place in the Chairman's conference room on March 16, 1984 and which has been cited by New York State and Suffolk County in support of their motion that the Chairman recuse himself from further participation in the Shoreham proceeding. Attendance at this meeting included, in addition to the Chairman and his immediate staff, representatives of the Office of Congressional Affairs, the General Counsel and his Deputy, the Chairman of the Licensing Board Panel, the Executive Director for Operations, the Director of Nuclear Reactor Regulation, the Executive Legal Director and the Chief Hearing Counsel from OELD, and Robert Purple from NRR.

2. The purpose of the meeting was to assist the Chairman in preparing for the hearings before Congressman Bevill, Chairman of the House Appropriations Committee, in which it was anticipated that

questions would be asked about the status of near-term operating licenses. In the past, this Committee has been critical of what it perceived as licensing delays, and the Chairman had to be prepared to expect hard questions on this subject. Parenthetically we observe that there have been suggestions that this meeting was an ex parte session convened by the Chairman for the purpose of discussing Shoreham. We emphasize that the purpose was not to discuss Shoreham, but to discuss a number of near-term operating licensing actions and that in our view, no impermissible ex parte discussion took place during the meeting.

3. Mr. Purple went through a number of prepared summary sheets describing the status of several of the plants deemed to be of concern and highlighted possibly troublesome issues, i.e. items that could cause delay beyond currently projected licensing dates. The briefings were addressed to status matters.

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 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 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.

William J. Dircks

Subscribed and sworn to before me
this 3rd day of July 1984

Malinda L. McDonald
Notary Public

My Commission expires: 7/1/86.

Guy H. Cunningham, III

Subscribed and sworn to before me
this 3rd day of July 1984

Malinda L. McDonald
Notary Public

My Commission expires: 7/1/86.

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SUFFOLK COUNTY AND STATE OF NEW YORK REQUEST FOR RECUSAL OF CHAIRMAN PALLADINO" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 5th day of July, 1984.

Judge Marshall E. Miller, Chairman*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Judge Glenn O. Bright*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Elizabeth B. Johnson
Oak Ridge National Laboratory
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