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May 10, 1984

The Honorable Nunzio J. Palladino  
 Chairman  
 U.S. Nuclear Regulatory Commission  
 1717 H Street, N.W.  
 Washington, D.C. 20555

Dear Mr. Chairman:

In my March 28, 1984, April 12, 1984 and April 24, 1984 letters, I have expressed concern about the appearance of impropriety created by your administrative involvement in the Shoreham licensing proceeding.

In response to my suggestion that you consider recusing yourself from voting on the low power or full power license for Shoreham, you have responded that you have not prejudged the merits of the proceeding in any respect. However, information obtained in the course of the Subcommittee's investigation--particularly your April 4, 1984 memorandum to the other Commissioners--strengthens the appearance that your actions have influenced the course of the proceeding. Therefore, I believe you should explain in detail why you should not recuse yourself from any further decision-making role in the Shoreham proceeding.

On March 16, 1984, you met with T. Paul Cotter, Chief Administrative Judge of the Atomic Safety and Licensing Board (ASLB) panel, other Commission offices and the Nuclear Regulatory Commission (NRC) staff. According to your April 4, 1984 memorandum "some preliminary ideas regarding expediting the Shoreham hearing were discussed" at this meeting. I believe that it was inappropriate for the Chairman of the NRC to have discussed expediting the proceeding without the other Commissioners present. The matter is further complicated because the NRC staff, a party to the proceeding, was present and the views of all other parties were not sought.

Your March 20, 1984 memorandum to the other Commissioners regarding perceived "licensing delays" recommended that the Commission consider proposals to expedite the Shoreham

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proceeding. Unlike other memoranda on this subject, you did not mark this memorandum for "Limited Distribution" and it was widely circulated. Hence, it is reasonable to conclude that you intended for the licensing judges and the NRC staff to become aware of your view that the Shoreham proceeding should be expedited. In this context, the NRC staff's sudden reversal of its previously held position on a key issue relevant to the proceeding to a "pro-LILCO" position could reasonably be seen by an objective observer as an effort to comply with your expressed wishes.

As I mentioned in a previous letter, I believe you have mischaracterized the delay at Shoreham as a "licensing delay" since the current delay is not attributable to the NRC's licensing process. The delay is not a licensing delay per se, but rather, is attributable to the lack of a qualified source of on-site power at Shoreham. To be sure, William J. Dircks, Executive Director for Operations, has informed my staff that the nine month delay cited by you as a reason to expedite the Shoreham proceeding is based on the licensee's projection. An April 24, 1984 internal memorandum from T.A. Rehm, Assistant for Operations, to the Commission, reveals that the NRC staff does not agree with LILCO's estimated construction completion date. Hence, it appears that there are no recognizably valid reasons behind your efforts to expedite the Shoreham proceeding.

Judge Cotter informed my staff that your legal assistant called him on March 22, 1984, and read him a "working paper" drafted by your office relating to Shoreham. The "working paper", a preliminary document, was attached to your April 4, 1984 memorandum and states:

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 question 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.

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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.

According to Judge Cotter this working paper was sent to him by your staff and he expressed his comments by writing a draft order which he sent to your office on March 23, 1984. You supplied it to the other Commissioners as an attachment to your April 4, 1984 memorandum in which you indicate you forwarded it to the Office of General Counsel (OGC) on March 27, 1984.

Judge Cotter's draft order, written in response to your interest in this case, if approved by the Commission, would have directed him to appoint a new licensing board to convene an expedited hearing on LILCO's motion. The introduction to the draft order states:

On March 20, 1984, LILCO filed with the Licensing Board a "Supplemental Motion for Low Power Operating License." LILCO has requested the Board either to refer the motion immediately to the Commission for decision or to decide the motion on an expedited basis and to certify its decision to the Commission pursuant to 10 C.F.R. §2.730(f) (1983). As discussed below, the Commission has reviewed LILCO's motion and has concluded that referral at this time would be inappropriate. We agree, however, that a decision on certain issues raised by the Applicant should be expedited to the extent possible consistent with the development of a sound record. In the exercise of the Commission's inherent authority over the conduct of our adjudicatory proceedings, we hereby grant that portion of LILCO's motion that requests an expedited proceeding. To that end, we direct the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, in consideration of the existing schedule and caseload

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of the Panel's members, to appoint an Atomic Safety and Licensing Board to hear and decide LILCO's supplemental motion in accordance with the procedures and schedule outlined below.

Apparently, both you and Judge Cotter had decided that LILCO's request for an expedited hearing should be granted prior to hearing from and resolving the views of all parties. I believe that it would have been improper for you or Judge Cotter to have reached a decision about a matter of both procedural and substantive importance in a formal adjudication without consulting with all parties.

Judge Cotter's draft order raises additional questions of propriety. The draft order, written by him for possible Commission use, would have directed him to expedite the hearings and appoint a new licensing board. Similarly, the "working paper" quoted to him on March 22, 1984 could reasonably have been interpreted by him as a directive to expedite the hearings at the Commission's request, although in reality you were acting unilaterally at that time. On March 30, 1984, Judge Cotter appointed a new licensing board headed by Marshall E. Miller (the Miller Board). In your April 23, 1984 response to me you implied that Judge Cotter had not taken this action as a result of your interest in this case. You wrote:

As for your comments regarding the appointment of a separate Shoreham licensing board, Judge Cotter, Chairman of the NRC Atomic Safety and Licensing Board Panel, informed my office, before making the appointment, that the decision was his own and that its basis was the questionable availability of the pre-existing board's personnel.

What you neglected to mention was that your office and Judge Cotter had apparently planned to expedite the Shoreham proceeding prior to learning of a scheduling conflict with the pre-existing board. If, indeed, the decision was "his own", I must conclude that the decision in question was not to expedite the hearing but rather a decision as to what process would be used to set the hearing on a fast track. Your explanation of the need to appoint a new board, because of scheduling problems with the old board, is difficult to understand when Judge Cotter's March 23, 1984 draft order had made this suggestion prior to hearing from Judge Lawrence Brenner (the previous board's Chairman) on March 27, 1984.

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Your statement to the Subcommittee, that Judge Cotter's decision to appoint a new board to consider LILCO's Supplemental Motion on an expedited basis was "his own", appears to have been misleading. It is clear from the documents appended to your April 4, 1984 memorandum that your office had communicated your desire to expedite the hearings prior to when Judge Cotter informed your office that the decision was "his own" and prior to hearing from Judge Brenner on March 27, 1984.

I am also concerned by the fact that the expedited hearing schedule set forth in the draft order sent to you by Judge Cotter and the schedule proposed by your staff in the "working paper" appear to be similar beyond coincidence to the actual schedule imposed by the Miller Board on April 6, 1984. These circumstances also lead me to question whether the substance of either document or your views on this matter were communicated to the Miller Board.

While the transcripts of closed Commission meetings provided to the Committee in an Executive Session last week are relevant to the issues described in this letter, they are not the basis of this letter, nor were they relied upon in the preparation of this letter. Any correspondence or communication addressing those matters will be prepared separately, identifying the source or sources of information relied upon.

The unfortunate but inevitable conclusion that must be drawn from this chronology of events is that you have not maintained the appearance of an impartial adjudicator. Because even the appearance of impropriety is unacceptable, I believe that you must explain fully why you should not be recused from any future decision-making role in this proceeding.

Sincerely,

*Ed Markey*  
Edward J. Markey  
Chairman  
Subcommittee on Oversight  
and Investigations

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Wasn't  
this done  
at 5/17  
hearing?