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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

'84 AGO-3 P4:34

Administrative Judges:

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

August 3, 1984
(ALAB-779)

In the Matter of)
LONG ISLAND LIGHTING COMPANY)
(Shoreham Nuclear Power Station,)
Unit 1))

SERVED AUG 6 1984

Docket No. 50-322-OL

DOCKET NUMBER 50-322-OL-4
PROD. & UTIL. FAC.

MEMORANDUM

On June 22, 1984, intervenors Suffolk County and the State of New York filed a motion calling upon B. Paul Cotter, Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, to disqualify himself from participating in any matters concerning the Long Island Lighting Company's (LILCO) Shoreham Nuclear Power Station. This motion is one of three filed by the intervenors seeking disqualification of, respectively, the presiding Licensing Board in the low-power phase of the Shoreham operating license proceeding, NRC Chairman Palladino, and Judge Cotter. Administrative Judges Marshall E. Miller, Glenn O. Bright, and Elizabeth B. Johnson, who constitute the low-power Licensing Board, declined to step down. As required by 10 CFR § 2.704(c) their decision was referred to us. We affirmed. See ALAB-777, 20 NRC ____ (July 20, 1984). The

motion to disqualify Chairman Palladino is pending before him.


Judge Cotter denied the motion for his disqualification in a memorandum and order issued on August 1, 1984. In a footnote in his decision, he observed that 10 CFR § 2.704(c) provides for referral "to the Commission or the Atomic Safety and Licensing Appeal Board as appropriate" of only those disqualification motions addressed to the "presiding officer or a designated member of an Atomic Safety and Licensing Board. . . ." Thus, he did not refer the motion to us.

We agree with Judge Cotter's disposition insofar as referral to this Board is concerned. To begin with, the express terms of the regulation apply only where "the presiding officer does not grant the motion or the board member does not disqualify himself. . . ." (emphasis added). Judge Cotter is neither the "presiding officer" nor a "member" of a licensing board assigned to hear this case. Moreover, as best we can tell from the administrative history of this regulation, there was no intent to include within its scope anyone other than members of individual licensing boards.¹ Finally, it appears that Judge Cotter

¹ When the Commission revised Section 2.704 in 1975, it explained: "Section 2.704 currently contains provisions
(Footnote Continued)

came into contact with the Shoreham litigation only in his administrative capacity as Chairman of the Atomic Safety and Licensing Board Panel. His functioning in that role here is better supervised by the Commission rather than an appeal board.

We have stated our intention not to review Judge Cotter's decision for the information of the parties and the Commission. In the circumstances, we express no view whatsoever with respect to the merits of the motion for disqualification.


C. Jean Shoemaker
Secretary to the
Appeal Board

(Footnote Continued)
pertaining to the disqualification of a 'presiding officer' on his own motion or that of a party. Clarifying language has been added to reflect current understanding and practice that these provisions apply to all members of a licensing board. In addition, this Section is revised to reflect that a motion to disqualify a Board member shall be referred to the Commission, or the Atomic Safety and Licensing Appeal Board, as appropriate." 40 Fed. Reg. 51,995-96 (1975).