5.16.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Nunzio J. Palladino, Chairman

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station, Unit 1)

Docket No. 50-322-OL

MEMORANDUM

I. Introduction

On June 5, 1984, counsel for Suffolk County and the State of New York, parties to the Shoreham operating license proceeding, filed a "Request for Recusal and, Alternatively, Motion for Disqualification" in which they alleged improper intervention on my part in the conduct of that proceeding. The request asked that I recuse myself from participating in the Shoreham proceeding. The events which underlie the Suffolk/New York request I described in detail on May 17, 1984, in Congressional testimony,[1] a copy of which I appended to my June 20 Memorandum to the Parties, and which I incorporate by reference here. I shall discuss those events further in section II.B of this memorandum.

On June 18, 1984, the applicant, Long Island Lighting Company (LILCO), filed a response to the Suffolk/New York request. On June 20, in my

[1] Hearings before the Subcommittee on Energy and Environment, Committee on Interior and Insular Affairs, U.S. House of Representatives, May 17, 1984.

D502

Memorandum to the Parties, I requested the comments of the NRC staff on the request, and I also stated my decision not to participate in any Commission deliberations on adjudicatory matters in the Shoreham proceeding until such time as I made a decision on the recusal request. The NRC staff filed its response on July 12, 1984.[2]

I have studied all the filings and have given them careful consideration. I have also had the benefit of the accounts of underlying events provided by Judges Miller, Bright, Johnson and Cotter in their responses to recusal requests. Those responses are part of the public record of this proceeding.

My conclusion is that I see nothing in the filings of the parties, or in the underlying facts, which demonstrates that I should take myself out of the proceeding. I therefore consider it my obligation to resume my adjudicatory functions in this case.

I recognize that I could have decided to recuse myself from this proceeding as a matter of discretion. I cannot deny that the preparation of a detailed response to the recusal request has been a time-consuming burden, at a time when the Commission's health and safety responsibilities have demanded continuing attention. Moreover, it may be argued that to recuse myself would remove the shadow of doubt in some persons' minds about the propriety of the Shoreham proceeding, and perhaps thereby obviate some legal challenges to the ultimate outcome of the proceeding, whatever that outcome may be.

---

[2] I have also received the amicus curiae brief of the Atomic Industrial Forum.

To my mind, such considerations could not justify my recusing myself from this case. First of all, I believe firmly that the responsibilities of a Commissioner are not optional. On the contrary, they are duties owed to the public in thorny and time-consuming cases as well as in easy ones. Indeed, it is in controversial cases in which it is most incumbent on Commissioners to take a stand and make the difficult decisions that are the essence of a Commissioner's job.

Second, once the facts are set forth, and various misstatements of fact in the recusal request are pointed out, as is done in Section II.B, I do not believe that a reasonable observer would continue to entertain doubts about my impartiality. Moreover, under the present circumstances, for me to recuse myself would not relieve public doubt but rather increase it, by appearing to give credence to an accusation that aims baseless charges of impropriety not just at me, but also at a variety of licensing board judges, NRC staff members, Commission lawyers, and other public servants, who have earned no such aspersions on their integrity.

Finally, for me to recuse myself would set a precedent that could seriously damage the ability of any NRC Chairman, now or in the future, to stay on top of the Commission's work, to monitor the agency's activities, and assure that the staff and the Commission discharge their responsibilities in an efficient and timely fashion. My recusal could be seen as support for a position I consider unsound and destructive of the agency's effectiveness -- namely, that for a Chairman to exercise the managerial functions mandated under the Energy Reorganization Act and the NRC Reorganization Plan of 1980 is both illegal and improper.

In Section II of this memorandum, I describe my reasons for finding that the Suffolk County/New York State disqualification request fails on

its merits to demonstrate that I have committed any impropriety in this proceeding, either in reality or appearance. In Section III, I describe my reasons for finding that the disqualification request, in addition to being devoid of merit, is so flagrantly untimely and so barren of any excuse for its untimeliness as to warrant its rejection on that basis as well.

II. Summary and Analysis of the Suffolk County/New York State Disqualification Request

The June 5, 1984 disqualification request filed by Suffolk County and New York State bases its claim of impropriety on a number of allegations, strung together into what purports to be a chain of cause and effect. The gist of Suffolk/New York's claim is that as of March 16, 1984, it was entirely settled, as a result of a February 22 Licensing Board decision, that no low power license could be issued to Shoreham until hearings had been completed on the contentions related to diesel generators. According to Suffolk/New York, I then intervened personally (apparently in response to an approach by LILCO's Chairman) to bring about the following: major violations of the rules against ex parte contacts; a complete reversal of position by the NRC staff on the diesels issue; the replacement of the Licensing Board with a new, more pliant Licensing Board, with "scheduling conflicts" cited as a pretext; and finally, a decision favoring LILCO from the new Licensing Board.

The Suffolk County/New York State filing paints a lurid picture of a large number of public servants, including licensing board judges, the General Counsel and his deputy, and a variety of NRC staff officials, all seemingly ready and willing at my behest to violate solemn obligations

under the law. Read superficially, or by one without knowledge of the facts, the indictment may seem damning indeed; but closer reading, and a review of the facts, reveal that inaccuracies and misrepresentations permeate the Suffolk/New York filing. It is appropriate, therefore, to look at Suffolk/New York's claims in some detail, for on examination it becomes apparent that the claimed "chain of impropriety"[3] is a fiction, founded on a seriously distorted account of the status of the proceeding as it stood in mid-March, 1984.

A. Summary of the Suffolk County/New York State Allegations

The Suffolk County/New York State allegations may be summarized as follows:

1) that as of March 16, 1984, the issue of the Shoreham TDI diesels had been "settled"[4] by a February 22, 1984 Licensing Board order holding that litigation of the diesel issue must precede any grant of a license to operate Shoreham at low power; the NRC staff had taken the "unequivocal position"[5] that the diesel issue had to be resolved prior to any low power licensing of Shoreham; LILCO "had not appealed from or sought reconsideration of" the Board's February 22 ruling;[6] and "nothing in the

---

[3] Request, p. 32.

[4] Id. at 4.

[5] Id. at p. 8.

[6] Id. at p. 11.

public record suggested"[7] that LILCO would propose any other avenue for obtaining a low power license short of full litigation of the diesel generator issue.

2) that on February 24, Newsday reported that LILCO's Chairman, William J. Catacosinos, had met with the Commissioners; on March 9, in a letter to LILCO shareholders, Dr. Catacosinos stated his belief that "there now seems a greater understanding among federal, state and county officials of the crisis the company faces;" the notes taken by Judge Cotter at the March 16 meeting include the statement "Says will go bankrupt if 12/84 I.D. [Initial Decision of Licensing Board];" and the "greater understanding" of federal officials to which Dr. Catacosinos referred was thus making itself felt in the March 16 meeting through the office of the NRC Chairman.[8]

3) that on March 16, 1984, I met with the Executive Director for Operations, the General Counsel, the Deputy General Counsel, the Atomic Safety and Licensing Board Panel Chairman, the Executive Legal Director, other staff officials, and my own personal staff, and in violation of the NRC's ex parte rules, discussed the merits of the Shoreham licensing proceeding.

4) that after March 16, I had further discussions with my staff and the Executive Director for Operations on the subject of licensing delays at Shoreham.[9]

---

[7] Id. at p. 14.

[8] Id. at 10-11.

[9] Id. at 17.

5) that on March 20, 1984, I circulated to the other Commissioners a memorandum which (a) "purported to report"[10] on the March 16 meeting, but failed to mention that ideas for expediting the Shoreham proceeding were discussed; (b) proposed that the Commission consider a proposal, which I had asked the Office of General Counsel to develop, for expedited hearings on the diesel issue or other proposals for low power operation of Shoreham; (c) included a projected Licensing Board decision date of December 1984 (absent Commission intervention), while failing to 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;"[11] and (d) specifically requested that the NRC staff, a party in the Shoreham proceeding, respond to the memorandum and prepare a paper outlining steps to deal with the supposed delays.

6) that on the same day, March 20, LILCO filed an "unprecedented proposal" making "essentially the same arguments for a low power license that the Brenner Board had previously rejected,"[12] and asking neither for a waiver of, nor an exemption from, General Design Criterion 17.

7) that on March 22, my legal assistant read to Judge Cotter over the telephone a "working paper", prepared in my office, which dealt with LILCO's March 20 request and inaccurately represented that it was the

---

[10] Id. at p. 15.

[11] Id. at 16.

[12] Id.

Commission's wish to have the matter litigated and decided by May 9, 1984.[13]

8) that Judge Cotter responded on the following day, March 23, with a proposed Commission order which: (a) provided for expedited consideration of LILCO's motion and a decision on the merits, and thus "prejudged the very question at issue: whether LILCO's proposal was a challenge to GDC 17 that had to be rejected outright;"[14] (b) proposed to replace the Brenner Board, "which on February 22, 1984, had dealt LILCO a setback, ... 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;"[15] and (c) proposed, in light of LILCO's "enormous financial investment," a schedule for Board action which Judge Cotter himself described as "brutally tight" and "definitely not recommended."[16]

9) that the NRC staff responded to LILCO's motion with an "abrupt and complete reversal"[17] (emphasis in the original) of its prior position on low power operation.

10) that even if Judge Cotter's March 30 appointment of a new Licensing Board (chaired by Judge Miller) to "hear and decide" LILCO's low power motion was, as claimed, his own idea, that idea was developed at my request, I was informed prior to the appointment, and moreover, Judge

---

[13] Id. at 17-18.

[14] Id. at 19.

[15] Id. (Emphasis in original.)

[16] Id.

[17] Id. at 22.

Cotter's notes "reveal that there was 'concern' with Judge Brenner" expressed at the March 16 meeting.[18]

11) that on March 30, the same day that the Miller Licensing Board was established, it "decided to expedite the proceeding"[19] -- before it had had time to review the pleadings and the record and make a "reasoned and independent judgment"[20] whether to expedite the proceeding.

12) that after oral argument on April 4 on the LILCO motion (including argument on the issue of "whether there was a basis to expedite the proceeding"),[21] the Miller Board on April 6 "adopted the position urged by the Staff in its March 30 filing and by Judge Cotter in his March 23 draft order,"[22] by ruling that LILCO could operate Shoreham without onsite power, provided that safety findings suggested by the NRC staff were made. The Miller Board's April 6 decision, according to Suffolk/New York thus "provided the final link in the chain which began at the Chairman's March 16 meeting;"[23] moreover, in deciding to expedite consideration of LILCO's motion, it took a position consistent with that of my office's working paper, the staff, and Judge Cotter's draft order of March 23, and it adopted time frames with a "striking similarity" to those in Judge Cotter's

---

[18] Id. at 24.

[19] Id. at 25.

[20] Id.

[21] Id. at 27.

[22] Id.

[23] Id.

draft order. The foregoing demonstrates, according to Suffolk/New York, that 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.[24]

B. Analysis of the Suffolk County/New York State Allegations

In the preceding section of this memorandum, I described in a 12-paragraph summary the essentials of the assertions and allegations made by Suffolk County and New York State in their disqualification request. In the section which follows, I will use the same format to respond, paragraph by paragraph, to Suffolk/New York's substantially inaccurate account.

1) Central to the allegations of Suffolk County and the State of New York is their seriously misleading description of the status of the Shoreham proceeding as of March 16. Contrary to their assertions, the Brenner Board's February 22 order had not "settled" the diesel issue; the staff had not declared that resolution of the diesel issue must precede low power operation; a LILCO low power proposal was expected by the parties, including Suffolk County, and the Board had not foreclosed the grant of a low power license to Shoreham. As I shall describe below, the Suffolk/New York account is wholly at odds with reality, as reflected in the statements on the public record of Suffolk's own counsel, Judge Brenner, and others.

---

[24] Id. at 32.

What the Brenner Board ruled, in its orally delivered order of February 22, 1984, was that a license based on "reasonable assurance that the TDI diesel generators can reliably be depended upon" was not possible without first litigating contentions related to the diesel generators.[25] The Board's order (which included responses to clarifying questions posed by counsel), made clear that though operation could not be authorized on the submissions then before the Board, LILCO would not be precluded from filing a proposal for allowing operation under a theory that did not involve reliance on the TDI diesels. Judge Brenner stated that the Board's ruling "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 [the diesel generator contentions] on the merits. Or possibly seeking some sort of waiver under 2.758 or other procedures." TR 21,616.

The Board was emphatic that it was "up to LILCO" to develop and submit such a proposal. TR 21,617. With regard to the nature of such a proposal, the Board commented that "while someone could imagine different things in combination, we do not know what is feasible or what LILCO would seek to propose." TR 21,617. When LILCO's counsel sought reassurance that "the Board is not foreclosing other ways to low power?", Judge Brenner replied, "That's right but you are going to have to propose something ...." TR 21,631. To a further question whether the Board's order might preclude a particular type of proposal, Judge Brenner replied, "No, it does not

---

[25] Transcript of the Conference of the Parties, February 22, 1984, at p. 21,617. References to this transcript, which forms part of the record of the operating license proceeding, will hereinafter be indicated by "TR".

preclude anything. It is solely based on what was before us ...." TR 21,631. Thus it is simply not true that the Brenner Board's February 22 Order had "settled" the issue of the need for an onsite emergency power source, or the schedule for a possible decision on low power operation.

Likewise, it is flatly inaccurate of Suffolk/New York to claim that "as of February 22, the NRC staff had taken the unequivocal position" that resolution of the diesel issues was necessarily a prerequisite to issuance of a low power license. The transcript of the February 22, 1984 Conference of the Parties makes clear that while the staff believed that what LILCO had proposed as of that date was insufficient, it had not ruled out the possibility that LILCO could nevertheless satisfy the regulatory requirements for low power operation. Staff counsel stated explicitly that it was "quite possible" that "they [LILCO] do not need diesels at all." TR 21,513. He added that staff could not, however, make such determinations until it received a formal submission from LILCO, and that "we want to see what LILCO gives us." Id. Staff counsel told that Board that it was "very difficult to answer your questions until we get that submission from LILCO." Id. The context makes plain that staff was fully expecting LILCO to file such a submission.

The staff was not the only party expecting such a submission from LILCO, and saying so on the public record. Suffolk/New York's claim that "[n]othing in the public record suggested that LILCO would file such a proposal"[26] is belied by the statements on the public record of Suffolk's

---

[26] Request, p. 7.

own counsel. At the February 22 Conference of Parties, Mr. Alan Dynner, counsel for Suffolk County, stated:

> So what is being asked here, by LILCO's proposal, which it will apparently -- it intends to make sometime in the near future -- to have inadequate diesels for low power operation. (Emphasis added.) TR 21,521.

Even more striking, in view of Suffolk/New York's condemnation of the procedures followed in this case, is the following statement, also by Mr. Dynner, in the same conference:

> The County's point of view, we would expect that such a proposal by LILCO, if it wishes to make it in the proper context, would involve a separate proceeding. (Emphasis added.) TR 21,518.

Moreover, when the LILCO motion was filed, Suffolk County, in its "Preliminary Views on Scheduling Regarding LILCO's New Motion," filed March 26, 1984, noted that the Board's February 22 order "did not preclude LILCO from later filing a proposal to obtain a low power license for Shoreham without relying upon the EDGs [emergency diesel generators]." (Emphasis in the original.)[27] Suffolk described the motion as "the type of proposal which this Board envisioned to require an entirely separate collateral proceeding."[28] This further underscores that Suffolk foresaw both a LILCO low power proposal and the need for a separate proceeding.

---

[27] "Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion," at 1.

[28] Id. at 3.

The Suffolk/New York charges against me are thus based on what the public record shows to be a seriously distorted account of where the proceeding stood on March 16, 1984. The accusation that I intervened in March to alter a "settled" Board decision on operation of Shoreham is belied by a public record which makes clear that already in February, the Board and the parties regarded the question of low power operation as far from settled. The charge that in March I brought about a "complete reversal" of the staff's position is belied by a public record which demonstrates that already in February, the staff was open-minded on the question of low power operation of Shoreham. The assertion that there was nothing in the public record to suggest that LILCO would seek early approval of low power operation is belied by a public record which shows that already in February, Suffolk County's own counsel was expecting such a motion to be filed shortly.

Although an understanding of these distortions is sufficient by itself to make the bulk of the charges against me evaporate, I think it important to proceed through a systematic analysis of the rest of the Suffolk/New York claims, in order to make fully clear that I have committed no improprieties, and that I have in no way prejudged the issues in the Shoreham proceeding.

2) The Suffolk/New York account of the meeting with Dr. Catacosinos is also misleading. Dr. Catacosinos paid a brief get-acquainted call on all of the Commissioners on February 23. Dr. Catacosinos did not discuss any aspect of the Shoreham proceeding with

me, nor did he discuss LILCO's financial difficulties, in our approximately five-minute conversation.[29]

Suffolk/New York's charge that Dr. Catacosinos' March 9, 1984 letter to LILCO stockholders is evidence that he had influenced me in favor of Shoreham is frivolous. (That letter, according to Suffolk/New York, asserted that "federal, state, and county" officials showed "greater understanding" of LILCO's problems.) Although Suffolk/New York are correct in stating that a February 24, 1984 Newsday article reported that Dr. Catacosinos had met with the Commissioners, they omit to mention the title of the article: "Three Senators Offer Measures to Help LILCO Out of Crisis." (The article also described a meeting between Dr. Catacosinos and the Secretary of Energy, and a letter from Dr. Catacosinos to the Secretary

---

[29] In a recent search of my files, responding to a Freedom of Information Act appeal, a follow-up letter from Dr. Catacosinos was found. I reproduce it in its entirety:

February 28, 1984

Dear Chairman Palladino:

I am writing to express my appreciation for your taking the time to meet with me on Thursday.

As you are aware, the vast majority of LILCO's current problems are related, either directly or indirectly, to the future of our Shoreham Nuclear Power Station.

As I am sure is obvious, our highest priority is to operate a safe, reliable and efficient power station, and to do so as soon as is consistent with appropriate safety considerations.

Sincerely,

/s/ W. J. Catacosinos

I understand that identical letters were received by at least three other Commissioners. I regard this letter as no more than a courtesy note.

of the Treasury, seeking relief from provisions of the tax laws.) Thus at least three "federal officials" (U.S. Senators) were on record as supporting relief for LILCO's financial difficulties, and the inference which Suffolk/New York seek to draw -- that the mention of "federal officials" was a reference to me -- is without foundation.

Finally, the fact that I was concerned, as I readily acknowledged in my testimony before Congress,[30] lest NRC's failure to make timely decisions be the cause of Shoreham's going under, is hardly evidence of improper communications from anyone. LILCO's financial difficulties with Shoreham were common knowledge, discussed in Congressional hearings and amply covered in the press.[31] My desire to assure that NRC processes be timely and efficient was not a prejudgment as to what the outcome of the Shoreham proceeding should be.

3) My March 16, 1984 meeting with the Executive Director for Operations, the General Counsel, the Deputy General Counsel, the Executive Legal Director, Judge Cotter, and others, was a meeting to discuss the licensing status of a number of plants, in advance of a Congressional hearing at which I expected to be asked questions about delays in the licensing process.

As I stated in my Congressional testimony, the March 16 meeting had its origin in a meeting held the previous day with representatives of the Office of Policy Evaluation (OPE) and the Office of General

---

[30] Testimony, p. 5, p. 11.

[31] The Newsday article cited in the Suffolk/New York request is one example: "Three Senators Offer Measures to Help LILCO Out of Crisis," Feb. 24, 1984.

Counsel (OGC) to discuss potential licensing delays at a number of facilities. At that March 15 meeting, there was a consensus that these delays warranted a broader discussion, to include the Executive Director for Operations and his staff, the General Counsel and his deputy, and the Chairman of the Atomic Safety and Licensing Board Panel.[32] It should be noted that, as I described in my testimony, Congress has repeatedly made clear its disapproval of unwarranted licensing delays, and that, under Section 2(b) of NRC Reorganization Plan No. 1 of 1980, the Chairman is the "principal executive officer of the Commission, ... responsible to the Commission for assuring that the Executive Director for Operations and the staff of the Commission ... are responsive to the requirements of the Commission in the performance of its functions."[33] Thus to the extent that licensing delays at various plants might be attributable to the NRC staff's performance of its functions, it was my responsibility to identify deficiencies and see that they were addressed.

At the March 16 meeting, the status of Shoreham was of particular interest to me, since a week before, on March 9, the Executive Director for Operations had informed the Commission that, based on the licensee's estimates,[34] a licensing delay of nine months was projected,

---

[32] Testimony, pp. 8-9.

[33] 45 Fed.Reg. 40561 (1980).

[34] The staff also provides the Commissioners with weekly memoranda on the status of plants under construction in which both licensees' estimated completion dates and the staff's estimated completion dates are included. The weekly memorandum of March 6, 1984 indicated that the staff projected a construction completion date for Shoreham two months later than LILCO's estimate. Under either estimate, the gap between facility completion and a

[Footnote Continued]

whereas the Commission had informed the Congress as recently as January 25, 1984, also based on the licensee's estimates, that no licensing delay was projected for Shoreham. (The other plant for which the March 9 memorandum projected a licensing delay was Limerick.)

In the portion of the meeting that dealt with Shoreham, there was no violation of the ex parte rules, because there was no discussion of the merits of the issues in controversy; rather, the discussion was of status, scheduling, and of the procedures by which the proceeding might be moved along.

As I stated in my testimony, there was discussion -- initiated, I believe, by OGC -- of the possibility of holding an expedited hearing on the question of low power operation of Shoreham. I would note that the Executive Legal Director recalls that he pointed out, during that discussion, that the same Board chairman who was presiding over the Shoreham operating license proceeding was also presiding over another active case.[35] (That case was Limerick.) It is worth stressing that none of the lawyers present indicated any ex parte problems with any part of the discussion.

4) With regard to further discussions of Shoreham, after the meeting on March 16, I had a number of discussions with my personal staff

---

[Footnote Continued]

decision on operation was substantial. The April 24, 1984 memorandum which Suffolk/New York cite was part of this series. All these memoranda were addressed to all Commissioners.

[35]Joint Affidavit of William J. Dircks and Guy H. Cunningham, III, p. 3.

of the problem of delays at Shoreham and elsewhere. I recall only one conversation, perhaps two or three minutes long, in which I discussed Shoreham at all with anyone from the NRC staff. That conversation took place on March 21, after the Executive Director for Operations and I returned from a Congressional hearing. Mr. Dircks, Mr. Norman Haller (my Executive Assistant), and I were present. I recall Mr. Dircks commenting, in essence, that the problem of delay at Shoreham was not within the staff's power to correct, but was now a matter for the Commission and the Boards to resolve. I recall no discussion of the merits of the issues in the proceeding in this very brief exchange.

5) There is no validity to the suggestion that my March 20 memorandum concealed anything from my fellow Commissioners, or that it presented misleading information of any kind. The memorandum reported to the Commissioners that I had held a status and scheduling meeting on March 16 with the "staff, OGC, OPE, and Tony Cotter" to discuss actual and potential delays at Shoreham, Limerick, and other plants. The memorandum also stated that I had asked the Office of General Counsel to provide a paper to the Commission "soon" on a proposal for expediting the Shoreham proceeding. In context, it was implicit that my request to OGC had been made at the March 16 meeting, and that our discussion included consideration of how scheduling changes might reduce or avert actual and potential delays. Certainly I did not seek to conceal the substance of the meeting from my colleagues.

Suffolk/New York's claim that my memorandum of March 20 to the other Commissioners failed to 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," is without merit. First, the other

Commissioners already knew that the nine-month delay estimate came from LILCO, since the estimate appeared in a March 9 memorandum, addressed to all Commissioners, in which the EDO stated explicitly: "Therefore, based on the applicant's estimate, there will be a nine-month licensing delay." (Emphasis added.) Likewise, the staff's April 24 memorandum (discussed in footnote 34, above) was also addressed to all Commissioners. Thus the suggestion that in my March 20 memorandum I withheld relevant information from my fellow Commissioners is without foundation, since I knew that they were receiving the same staff memoranda I was receiving.

6) It is hard to square Suffolk/New York's claim that the LILCO motion made "essentially the same arguments for a low power license that the Brenner Board had previously rejected"[36] with Suffolk's March 26, 1984 filing before the Licensing Board, in which it stated:

> The Motion is a voluminous, new proposal for low power operation of Shoreham, based upon complex technical factual information and novel legal arguments never before presented to the County or this Board. (Emphasis added.)[37]

Suffolk County further stated:

> The LILCO Motion obviously is an entirely new and radical change from LILCO's initial application for a low power license.[38]

---

[36] Request at 16.

[37] "Suffolk County's Preliminary Views on Scheduling Regarding LILCO's New Motion," at 2.

[38] Id. at 11.

There is no merit in Suffolk/New York's apparent belief that it is highly significant that the LILCO motion sought neither a waiver under 10 CFR 2.758 nor an exemption under 10 CFR 50.12(a), in proposing a legal theory for low power operation. Suffolk/New York neglect to mention two crucial points. First, it was never assumed by the Brenner Board or the parties that the only pathways LILCO might propose were those two regulations. Suffolk County itself recognized that the LILCO proposal might take any of various forms. Once again, the proof of this is to be found in the words of Suffolk's own counsel, who at the February 22 Conference of the Parties said:

> From the County's point of view we can, of course, object to any motion they wish to file for a waiver of regulations, or a change in the FSAR, or waiver of specifications, or a motion to proceed to obtain a low power license on the grounds, as I understand the argument, that diesels which have not been proven to be reliable can nevertheless be used in a low power license because the demands and requirements for public safety may be less. TR 21,517.

Judge Brenner's statements in the same Conference of the Parties, cited above under II.B.1, also indicate that the Board had not decided what procedural form LILCO's motion would be required to take.

Suffolk/New York also fail to mention that the particular legal theory advanced by LILCO was rejected by me and all other Commissioners when we addressed its merits in our order of May 16, 1984.

7) The charge that my legal assistant incorrectly purported to speak for the Commission as a whole, in talking with Judge Cotter, is baseless. When he read the draft "working paper" to Judge Cotter on March 22, he was not purporting to represent the views of the Commission, but rather was seeking to obtain Judge Cotter's reaction to a possible

approach that I might propose for Commission consideration. Judge Cotter's public statement of August 1, 1984, confirms that he was under no misapprehension on this point.[39]

8) With regard to Suffolk/New York's assertions regarding Judge Cotter's draft order of March 23, the following comments are in order:

(a) Judge Cotter's draft order was drafted by him on his own initiative, not mine, and he has discussed it in his response to the request for his disqualification. There is, therefore, no need for me to discuss it in any detail here. I would add, however, that I did not read Judge Cotter's order as prejudging the factual issues (i.e., the safety of the plant if operated as proposed by LILCO) or the legal issue of whether satisfactory resolution of the factual issues would permit a low power license for Shoreham.

(b) The Suffolk County/New York State request suggests that Judge Cotter could not have learned of the potential scheduling conflict between the Shoreham and Limerick boards until four days after his March 23 draft order; in fact, his awareness of that scheduling conflict appears plainly in the March 23 document itself. On page 8, under the heading "Some Considerations," Judge Cotter stated that the Shoreham and Limerick Licensing Boards were among seven Boards "committed to hearings or partial or initial decision writing in April and May." [40]

---

[39] Statement of B. Paul Cotter, Jr., p. 6.

[40] Judge Cotter, in his August 1 statement, states that he had been monitoring the Shoreham-Limerick scheduling conflict since around September

[Footnote Continued]

(c) Again, Judge Cotter is in a better position than I to respond to criticisms of the March 23 draft order, and he has done so in his statement of August 1. I sent the draft order to the Office of General Counsel for its evaluation on March 27. Soon thereafter,[41] Judge Cotter advised my office and OGC that he was considering the appointment of a new board to act on the LILCO motion, in view of the scheduling conflict between the Shoreham and Limerick boards, and on March 30, a new board was established.

9) Contrary to the Suffolk/New York assertion, the position taken by the NRC staff in response to the LILCO motion was not only not an "abrupt and complete reversal" of the staff's previous position, it was not a reversal at all. What is more, Suffolk counsel knows this. As indicated under (1) above, the staff told the Licensing Board on February 22 that it would respond to any specific LILCO motion when such a motion was filed, and that it did not rule out the possibility of low power operation with no diesels available. Suffolk counsel's awareness of the staff's position is a matter of record. In the Conference of the Parties on February 22, Mr. Dynner, counsel for Suffolk County, referred to the staff's position:

> We do not know of cases where diesels have been waived or as Mr. Reis [NRC staff counsel] has said, where diesels may not even be required at all. Maybe there are such cases out there and maybe LILCO will cite them when they make their proposal, if they make their proposal. ... I think our responses will have to wait and see what LILCO comes up with and if they come up with something,

---

[Footnote Continued]

1983, and had been checking periodically with Judge Brenner, who was Chairman of both boards.

[41] Judge Cotter's statement indicates that he advised my legal assistant of his intention in this regard on March 28, 1984.

> we will have our experts look at it and we will be in a position to respond. (Emphasis added.) TR 21,549-50.

To this Judge Brenner commented: "You sound a lot like the staff on that answer." TR 21,550.

10) With regard to Suffolk/New York's assertions regarding Judge Cotter's order of March 30 (which established a new Licensing Board, empowered to act on LILCO's motion), the following comments are appropriate. Judge Cotter has explained in his August 1 statement that he believed that a failure to act by him would mean the de facto denial by the agency of the request for expeditious treatment.[42] It does not appear to me that Judge Cotter's order, which aimed at making it possible for the NRC to act on the motion expeditiously, in any sense prejudged whether the motion should be granted on its merits. Moreover, as noted above, Suffolk County had stated at the February 22 Conference of the Parties its expectation that the LILCO motion would entail a separate proceeding. TR 21,518.

The decision to appoint the new board was Judge Cotter's. The idea was not developed at my request, but it was certainly consistent with my view that the Shoreham proceeding should be handled with efficiency and expedition. My office was informed by Judge Cotter of his intent to appoint a new Board, and I see nothing inappropriate about his so informing me.

---

[42] Judge Cotter's statement indicates that he based this judgment on two factors: an expression of doubt by Mr. Reamer of my office that the Commissioners could take action on the LILCO motion sooner than April 5 or April 12, and verification by the Brenner Board that its scheduling commitments made it unable to consider the motion. Statement of B. Paul Cotter, Jr., p. 8.

Finally, I recall no one at any time suggesting that the substance of Judge Brenner's decisions was or should be a reason for creating a new Board. Also, the Executive Legal Director recalls pointing out at the March 16 meeting that the Shoreham licensing proceeding and another active case were both assigned to the same board chairman (Judge Brenner).[43]

11) The fact that the "Notice of Oral Arguments" was issued the same day that the Miller Board was established does not support, as Suffolk County and New York State imply, an inference of improper influence or of prejudgment in favor of an expedited proceeding. As I read the Miller Board's order of March 30, 1984, it was not, as Suffolk County and New York State claim, a decision to "expedite the proceeding," but rather a decision to receive filings and hear oral argument on issues raised by the motion. Indeed, the title of the order is "Notice of Oral Arguments."

Where a motion requests that a proceeding be expedited, it is no more improper for a board to schedule a prompt oral argument on that motion than it is for a court to schedule prompt argument on a request for emergency relief. In neither case has the decisionmaker thereby shown a prejudice in favor of the motion itself.

In the present case, one of the issues raised by the motion was the scheduling of any proceeding. Indeed, the County and State concede as much, for they note in their request that one of the issues argued on April 4 was "whether there was a basis to expedite the proceeding."[44]

---

[43] Dircks & Cunningham Affidavit, p. 3.

[44] Request, p. 27.

12) Contrary to Suffolk/New York's claim, the Miller Board's April 6 decision was not the product of any "chain of impropriety" instigated by me at the March 16 meeting or elsewhere. It is certainly true that at the March 16 meeting I expressed the view that the Shoreham proceeding should be handled with efficiency and expedition, but I was not prejudging the issues in controversy. My office's working paper was a further expression of my interest in expedition, but again it prejudged nothing.

I had occasion to address the question of prejudgment of the Shoreham proceeding in response to a March 28, 1984 letter from Chairman Edward Markey of the Subcommittee on Oversight and Investigations of the Committee on Interior and Insular Affairs. In that letter, Chairman Markey asserted that my March 20 memorandum had prejudged the merits of the Shoreham proceeding, and urged me to retract my suggestions for expediting the proceeding; otherwise, he said, it was "imperative" that I recuse myself from it altogether.[45] In my reply, dated April 5, I said:

> I have not prejudged the merits of the Shoreham licensing proceeding in any respect, nor does my March 20, 1984 memorandum contain any suggestion that I have prejudged it, in reality or in appearance. My recommendation that the Commission consider options for an expedited hearing on the diesel problem, so that a low power decision might be possible, implies no judgment how the diesel generator problem should be resolved. Moreover, to assume that there will be a resolution of the emergency planning issue says nothing about how that issue might be resolved: the issue could be resolved either in granting or denying the Shoreham license.

---

[45] This letter was one of several in which Chairman Markey took exception to particular actions related to the Shoreham proceeding. See also Chairman Markey's letters of April 12, April 24, and May 10, 1984.

> 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. That is all that my March 20, 1984 memorandum attempts to do.

Finally, it must be pointed out that for Suffolk County and the State of New York, the history described in their request ends on April 6, 1984. This is perhaps understandable, for when the April 6 order came before me on the merits, on May 16, 1984, I voted to reject its legal holding.

In sum, the theory advanced by the Suffolk County/New York State disqualification request does not hold water. The individual elements of the supposed "chain of impropriety" turn out on examination to be flawed by misstatements, errors, and omissions. Joining them into a "chain" only compounds and magnifies the distortions of fact and interpretation. I do not believe that I committed any impropriety, nor do I believe that a reasonable observer, once acquainted with the actual facts, which are a matter of record, would question my impartiality in this proceeding. Accordingly, I find that the legal standards for recusal from Commission proceedings, which follow the statutory standards, have not been met.[46]

---

[46]The standard applicable in the federal courts, and applied by the NRC as well, is that a judge shall disqualify himself in any proceeding in which "his impartiality may reasonably be questioned." 28 U.S.C. § 455(a). The courts have made clear that this is an objective standard. One court has said that a judge faced with a disqualification request should consider

[Footnote Continued]

That is not to say that an observer who did not know the facts, and who was not aware of the circumstances, might not be swayed by the mass of allegations in the disqualification request, if that observer were to accept those allegations at face value. But the standard for disqualification is not how artfully a motion can distort the public record; rather, the standard relates to reality, and to the perception of reality by an informed, disinterested, reasonable observer.

I recognize that the argument may be made that merely by filing their request, Suffolk County and the State of New York have created sufficient uncertainty that public concerns for the integrity of the process might suggest my voluntarily recusing myself. I reject that approach. First, I believe any such uncertainty is removed when one examines the actual record. Moreover, the public has an interest in knowing that the decision-makers who make crucial health and safety decisions are persons of integrity, and that they appreciate the importance of the duties they owe to the public. Under these circumstances, to recuse myself could appear to give credence not only to the charges against me, but also to unwarranted and unfounded accusations directed at a large number of individuals -- licensing board judges, NRC staff members, and other NRC personnel -- whom I consider to be persons of dedication and integrity. This I will not do.

[Footnote Continued]

"how his participation in a given case looks to the average person on the street; ... disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.), cert. denied, 449 U.S. 820 (1980). See also Hall v. Small Business Administration, 695 F.2d 175 (1983); Houston Lighting and Power Company (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982); Cinderella Career and Finishing Schools v. FTC, 425 F.2d 583 (D.C. Cir. 1970).

In my view, the public has every reason for confidence in the integrity and devotion to duty under the law of the men and women who make the decisions affecting the public's health and safety in the field of nuclear energy.

For the reasons stated above, I decline to recuse myself from this proceeding.

III. Timeliness

In the preceding section of this memorandum, I have explained my reasons for determining that the allegations in the Suffolk County/New York State request do not, on their merits, warrant my recusal from the Shoreham proceeding. Although it is therefore not strictly necessary for the disposition of this request that I go on to consider whether the request was timely, I do so because I strongly believe that the issue deserves public airing. For in my view, the timing of the Suffolk/New York request regrettably presents all too vivid an example of the type of problems which Congress and the courts have sought to prevent through the requirement that recusal requests be timely filed.

The recusal request before me was submitted on June 5, 1984, by counsel for Suffolk County and the Governor of New York. It was presented as a formal filing in the Shoreham adjudication, and as such, was served on all the parties. Once it was filed, I withdrew temporarily from Commission deliberations and decisions concerning Shoreham. Under the circumstances, I thought it appropriate that I address and resolve the question of my

recusal before participating in further Commission consideration of Shoreham-related matters.[47]

The Suffolk County/New York State request came 55 days after the Suffolk County Executive, Peter F. Cohalan, wrote to me on April 11, 1984, to protest what he termed my "personal intervention in the Shoreham licensing proceeding," which in his view had resulted in a "mockery of due process." It is worth examining that letter in some detail, since in virtually every particular -- save only the request for my recusal or disqualification -- it prefigures the formal recusal request which came 55 days later. Mr. Cohalan's letter cited, among other things: my March 20 memorandum to the Commissioners on licensing delays; my March 16 meeting with NRC staff members, Judge Cotter, and others; Judge Cotter's order of March 30, establishing a new Licensing Board under Judge Miller; the April 6 order of the Miller Board; the alleged change of position on the diesel issue by the NRC staff; my meeting with the LILCO Board Chairman; and my purported intent to "aid LILCO's efforts to gain access to Wall Street money markets."

Mr. Cohalan characterized my actions in the following terms:

> Mr. Chairman, the inevitable inference to be drawn from these events is that your meeting with LILCO's Board Chairman, your expression of interest to "expedite" the Shoreham proceeding when meeting with Mr. Cotter and the NRC Staff on March 16, and your March 20 memorandum proposing "expedited" treatment of LILCO's low power license request signalled the Licensing Board Judges and the Staff to shift gears; they were now to rush forward and

---

[47] See my Memorandum to the Parties, June 19, 1984. In the interval between the filing of the recusal request and the issuance of that Memorandum, I abstained from participating in the only Shoreham-related matter to come before the Commission. See Order of June 8, 1984 (separate statement).

> issue a low power license for Shoreham, despite the effect this would have on the concerns for safety expressed by Suffolk County and New York State. The Licensing Board and Staff, in turn, took your signal as a marching order. And without any justification, they "expedited" the Shoreham proceeding so faithfully that the Board is now poised to issue a low power license for Shoreham....

Mr. Cohalan's letter, which was not served by him on the parties to the Shoreham proceeding,[48] did not request my recusal or disqualification; rather, it requested that I and my fellow Commissioners take action to disestablish the Miller Licensing Board, and to direct the staff and the Licensing Board that the Shoreham proceeding should not be expedited except under specified circumstances.

I do not find any substantial difference between the allegations in the June 5 recusal request and those in Mr. Cohalan's letter, sent 55 days earlier. To be sure, the June 5 request includes references to a few documents, notably Judge Cotter's notes, which were not in the possession of Suffolk County and New York State in early April. But even if one were to accept the Suffolk County/New York State interpretation of those documents (which interpretation I reject), they would serve merely to support the same allegations, about the same events, which Mr. Cohalan had made in his April 11 letter.

There can be no doubt that the attorneys for Suffolk County and New York State had obtained by April all the information they needed to form the basis of a disqualification motion, since on April 23, they asked the United States District Court for the District of Columbia to disqualify me,

---

[48] In accordance with procedures for handling ex parte communications, the letter was placed in the Shoreham docket file and served on the parties by the NRC's Docketing and Service Branch.

as well as Judges Miller, Bright, Johnson, and Cotter, from the Shoreham proceeding.[49] In their amended complaint, filed April 26, 1984, they made essentially the same allegations contained in Mr. Cohalan's letter of April 11. In its response, the NRC pointed out that although the Commission's regulations explicitly provide for the filing of disqualification motions (at 10 CFR 2.704(c)), Suffolk County and the State of New York had not even attempted to invoke the prescribed procedure.[50]

Despite having the correct procedural course pointed out to them by this NRC filing, counsel for Suffolk County and the State of New York continued to stay their hand. Meanwhile, the Deputy County Executive of Suffolk County, Frank R. Jones, wrote to the Commissioners on April 27, renewing the April 11 request and adding a request for the disqualification (or alternatively, the voluntary recusal) of Judges Miller, Bright, Johnson, and Cotter, and of me.[51] The letter, which urged promptness on the Commission "in the strongest possible terms," stated: "As a follow-up to this request, on which the County urges prompt Commission action, the County's counsel have been instructed to serve on the named individuals additional formal papers." (Emphasis added).

It thus appears that counsel's delay in filing the disqualification request -- a delay for which no explanation has even been offered -- was

---

[49] Cuomo, et al. v. USNRC, et al., Civil Action No. 84-1264. The court's temporary restraining order, issued April 25, 1984, hinged on scheduling matters, and did not address the disqualification request.

[50] Memorandum in Support of Defendants' Motion to Dismiss the Complaint (April 27, 1984), at 15, fn. 1.

[51] Copies of this letter, unlike the April 11 letter, were sent by Suffolk County to the other parties to the proceeding.

more than mere dawdling. It seems also to have been contrary to the instructions of Suffolk County officials, who recognized that additional formal filings by counsel were required. Not until almost six weeks after the date of Mr. Jones' letter was the formal request for my disqualification filed; almost eight weeks passed before the disqualification of Judges Miller, Bright, Johnson, and Cotter was requested.

It is well established in the case law on the timeliness of disqualification motions that such requests must be filed at the earliest moment after the moving party obtains knowledge of the facts demonstrating a basis for disqualification. United States v. Patrick, 542 F.2d 381, 390 (7th Cir. 1976), cert. den. 430 U.S. 931 (1977); Duffield v. Charleston Area Medical Center, 503 F.2d 512, 515-16 (4th Cir. 1974).

In assessing whether a disqualification request is timely, reviewing courts look not only at the period of time which elapsed between the receipt of the underlying information and the filing of the request; they also consider what if anything was going on during that period in the trial or administrative proceeding at issue. Where trial has not begun, or is in abeyance, a lengthy delay in filing may do little or no practical harm, but where a proceeding is actively underway, with issues actually being decided by the decisionmaker whose participation is challenged, even a short delay may be destructive.

Courts are most disposed to find a disqualification motion untimely when it appears that the moving party obtained the information forming the basis for its motion but then held back while it speculated on whether the decisionmaker was likely to decide the case in its favor. This is especially true where the moving party has filed motions with the court or agency that gave it the opportunity to "sampl[e] the temper of the court before

deciding whether or not to file" a claim of bias.[52] Peckham v. Ronrico Corp., 288 F.2d 841, 843 (1st Cir. 1961). As the U.S. Court of Appeals for the Third Circuit wrote in Smith v. Danyo, 585 F.2d 83 (1978):

> The judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming. 585 F.2d at 86.

In such situations, requiring timeliness is not mere procedural nit-picking. On the contrary, it is a matter of preserving the integrity of the adjudication. Without watchfulness on the part of courts and agencies, cynical litigants could use disqualification motions to manipulate the outcome of the judicial or administrative process. As one court has put it:

> It may be said, of course, that it is inconsistent with the interests of justice in most cases to reject any motion purely on the basis of procedural technicalities. But our courts have long recognized that in this sensitive area of claimed partiality on the part of a Judge, strict construction of the statutory provisions is essential to prevent abuse and to insure the orderly functioning of the judicial system. Bumpus v. Uniroyal Tire Co., 385 F. Supp. 711, 713 (1974).

The tardiness of Suffolk County and the State of New York in filing their disqualification motion might be more excusable if the proceeding had been in an inactive phase during the 55-day period from Mr. Cohalan's

---

[52] Courts also scrutinize carefully any claim by a moving party that the motion's untimeliness should be excused because evidence forming the basis of the motion developed cumulatively. In such cases, courts will be particularly strict in assuring that the motion was filed at the earliest possible moment after the necessary information was obtained. Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 510 (1975).

letter of April 11 to the June 5 date of the motion. This was hardly the case. On the contrary, during that period Shoreham was the subject of intense activity before the Commission. Between those dates, the Commission met 13 times to discuss the Shoreham proceeding. No other single topic was the subject of so many meetings during that period.

Those meetings included: an April 23 discussion, lasting almost three hours, of whether the Licensing Board's disposition of substantive and procedural issues in the low power proceeding warranted involvement at that time by the Commissioners; discussions on April 26 and April 27 of a proposed Commission order in the proceeding; an April 30 meeting to affirm such an order; oral argument before the Commission on May 7, involving both substantive and procedural issues; Commission discussions on May 9 and 10 of the issues which had been in dispute at the May 7 argument; two meetings on May 10 and a third on May 16 to review a draft Commission order addressing those issues; a May 16 meeting to affirm the order; a discussion on May 22 of substantive issues certified to the Commission by the Appeal Board; and on May 31, a meeting to affirm a Commission order on those certified questions.

All of those 13 meetings involved, directly or indirectly, consideration of views and proposals submitted by Suffolk County and the State of New York. The most striking example is the oral argument held before the Commission on May 7, 1984.[53] At oral argument, the substantive legal issue of the applicability of the General Design Criteria to LILCO's proposal to

---

[53]The order setting forth the issues for decision and scheduling the oral argument was issued on April 30, 1984.

operate Shoreham at low power was central; procedural issues (notably the scheduling issue, which is at the heart of the disqualification motion) were also addressed by the parties.

One might imagine that Suffolk County and the State of New York would have been reluctant to have these crucially important issues argued before, and adjudicated by, a decisionmaker whom they considered to be biased against them. Yet the formal objection to my participation remained in counsel's hip pocket. In their 42-page pre-argument submission, dated May 4, 1984, Suffolk County and the State of New York did not even mention the issue of my disqualification, although that filing did state Suffolk County's view that Judges Miller, Bright, and Johnson should be replaced in the event that further hearings were ordered. At oral argument, counsel for Suffolk County and the State said not a word on the subject of my disqualification or recusal. Nor did the County or the State mention the issue in their joint supplemental filing, submitted on May 10, 1984. Only after the Commission issued its decision,[54] by a 3-2 vote in which I formed part of the majority on the question of whether to disestablish the Miller Board, did the County and the State see fit to revive the issue, and at last bring their accusations of impropriety into the adjudicatory proceeding.

With the proceeding in so active a phase, and with Commissioners meeting so frequently on issues in dispute, it was especially essential for the County and the State to file their disqualification request expeditiously. As I mentioned earlier, when the formal request for my

---

[54]CLI-84-8 (May 16, 1984).

disqualification or recusal finally arrived, I withdrew from consideration of adjudicatory matters related to Shoreham pending my decision on the request. If, as early as April, Suffolk County and the State of New York sincerely believed my conduct to have been so improper as to destroy the procedural integrity of this proceeding, then it is beyond my comprehension that for almost two months, they should have permitted me to participate in meeting after meeting, deliberation after deliberation, and decision after decision, when at any time they could have brought the disqualification issue to a head through a single filing.

Under these circumstances, I find the Suffolk County/New York State request to be untimely, and seriously so. To do otherwise would be a disservice to the Commission and its processes, since it would serve notice on litigants that the Commission's processes may be abused with impunity. I feel a strong institutional concern -- as opposed to accusations against me personally, which "go with the territory" -- to assure that untimely disqualification motions do not become a device for manipulating the NRC's adjudicatory process.

IV. Conclusion

For the reasons set forth in this memorandum, the request for recusal is DENIED.

Nunzio J. Palladino

NUNZIO J. PALLADINO
Chairman

Dated at Washington, D.C.
this 21st day of September, 1984.