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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative judges
Marshall E. Miller, Chairman
Glenn O. Bright
Elizabeth B. Johnson

In the Matter of	Docket No. 50-322-OL-4 (Low Power)
LONG ISLAND LIGHTING COMPANY	
(Shoreham Nuclear Generating Plant, Unit 1)	June 25, 1984

ORDER DENYING INTERVENORS' MOTION FOR DISQUALIFICATION OF JUDGES MILLER, BRIGHT AND JOHNSON

On June 21, 1984 Suffolk County and the State of New York, Intervenors in this proceeding, filed a motion for the disqualification of Judges Miller, Bright, and Johnson, who comprise the entire licensing board. The Appeal Board has stated that "Obviously, the initial determination of a motion to disqualify an entire board (i.e., presiding officer) must be made by the board collegially."[1] Inasmuch as the Disqualification Motion (page 2) refers to our actions "individually and jointly", this Order will likewise be signed and entered both individually and collegially.

[1] Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-672, 15 NRC 677 at 684-85 (1982), reversed on other grounds CLI-82-9, 15 NRC 1363 (1982).

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The instant Motion purports to be supported by the "Affidavit of Herbert H. Brown, Lawrence Coe Lanpher, Fabian G. Palomino." Its stated purpose "is to furnish source data" for the motion for disqualification (page 1). An earlier (June 18) such motion was dismissed because it failed to comply with a mandatory requirement of 10 CFR §2.704(c) that it be supported by affidavits. Although the Appeal Board sustained such dismissal in a Memorandum and Order citing long-standing precedents, the Movants persist in asserting the view of the County and State that "such an affidavit is unnecessary here" (page 1, footnote 1). We hold that both the affidavit and the motion are inadequate to require disqualification.

This disqualification motion should be dismissed for untimeliness. The Appeal Board has recently stated the applicable rule as follows:

> Motions for disqualification or recusal must be filed in a timely fashion. The courts have construed the timeliness requirement to mean that motions must be submitted "as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist." We have likewise held that a claim of bias must be raised "once the information giving rise to such a claim is available to...[the movant]." To be sure, the most common illustration of a lack of timeliness is where a party files its motion after rendition of an unfavorable decision on the merits by the allegedly biased official. But any delay in filing a motion for disqualification or recusal necessarily casts a cloud over the proceedings and increases the likelihood of delay in the ultimate completion of the case in the event recusal or disqualification is warranted and a new decisional officer must be appointed. Thus, we insist that all requests for disqualification or

recusal be filed promptly. (Citations omitted)[2]

The Appeal Board further emphasized the necessity of promptness in disqualification allegations in another aspect of the Seabrook case:

> We disagree with the Coalition's contention that the date of discovery of bias does not bear significantly on the issue of timeliness. As we explained in some detail in ALAB-749, and reiterated in ALAB-751, both the federal courts and this agency insist that all requests for disqualification or recusal be filed promptly. The District of Columbia Circuit has summarized the law as follows:
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> > The general rule governing disqualification, normally applicable to the federal judiciary and administrative agencies alike, requires that such a claim be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. It will not do for a claimant to suppress his misgivings while waiting anxiously to see whether the decision goes in his favor. A contrary rule would only countenance and encourage unacceptable inefficiency in the administrative process. (Footnotes omitted)[3]

In the instant proceeding, the Movants knew of matters concerning Chairman Palladino of which they complain at least by April 11, 1984. On that date the County Executive of Suffolk County wrote a letter to the Commission making certain allegations concerning Chairman Palladino. Several more recusal letters followed shortly thereafter. The instant

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[2]Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1198 (1983).

[3]ALAB-757, 18 NRC __ (December 20, 1983). See also: Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), ALAB-556, 10 NRC 30, 32 (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 63 (1973).

motion was filed long after the alleged facts were known to the Movants, and so close to important dates in the established hearing schedule as to be productive of unnecessary delays.[4] The motion should be dismissed for untimeliness.

The legal standards governing the consideration of disqualification motions have been set forth by the Commission as follows:

> In the federal courts, disqualifying bias or prejudice of a trial judge must generally be extra-judicial. As the Supreme Court has held, "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge has learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). See also In Re International Business Machines Corporation, 618 F.2d 923, 927 (2d Cir. 1980) ("IBM"). The same standard applies to presiding officers in administrative proceedings. Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974). Indeed, the Commission has expressly adopted this rule, holding that "Preliminary assessments, made on the record, during the course of an adjudicatory proceeding -- based solely upon application of the decision-maker's judgment to material properly before him in the proceeding -- do not compel disqualification as a matter of law," and citing with approval United States v. Grinnell Corp., supra. Commonwealth Edison Company (La Salle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169, 170 (1973).[5]

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[4] Scheduled dates are:

June 22, 1984	Arguments on discovery motions
June 29, 1984	Discovery ends
July 16, 1984	Testimony filed
July 30, 1984	Hearing begins

[5] Houston Lighting and Power Company (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1365 (1982).

The Appeal Board has followed and applied the same principles:

> [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.[6]

The instant motion and affidavit are wholly insufficient to justify disqualification. There is a long recitation of events allegedly concerning Chairman Palladino, but they are not in any way connected with these licensing board judges. We do not intend to go through all of the lengthy statements in the motion and justify our judicial actions. The gravamen of the complaints is our judicial, not extra-judicial action. Our orders were objectively considered, and they were not influenced in the least by any of the Commissioners, including Chairman Palladino, or by Chief Judge Cotter, or by anyone else in or out of NRC. We were not acquainted with any of the actions of the Commissioners alleged in the motion, and the Individual Statement of Chairman Palladino before the Subcommittee on Energy and Environment dated May 17, 1984, is the only source of our information other than rumors, which we have disregarded.

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[6]Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), No. 50-354-OL, ALAB-759, slip op. at 12 (Jan. 25,

(Footnote Continued)

The major complaints in the motion revolve around the expedited schedule which we adopted in our Order of April 6, 1984. That schedule was solely the product of our own judgment, and was not influenced or caused by anyone else. The abbreviated period of time for discovery was based upon our judgment, after hearing the arguments of counsel, that the main controversies were over questions of law rather than issues of fact. Ironically, all of the parties including the Intervenors were able to argue all pertinent questions thoroughly before the Commission, with none of the massive discovery which Suffolk County claimed was indispensable to its case. In fact, the County prevailed on its interpretation of the regulations without any discovery. The Board's judgment on the time required for discovery, although not its construction of the regulations, was thus vindicated.

Finally, the Movants seek to make much of certain comments by certain Commissioners regarding the composition of the licensing board. Such comments were not articulated by the majority of the Commission, and they clearly were not uttered in the context of a disqualification proceeding. They were also made without hearing the reasons for the show cause order, which would have given the lawyer involved the opportunity to clear up any ambiguities. These matters were set forth

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(Footnote Continued)
1984) (quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60. 65 (1973).

at a later date (May 30, 1984) in our Order Expunging Rule to Show Cause, and we adhere to our statements therein.

Each Board Member wishes to state, categorically, that there has been no outside influence or "pressure" exerted on them, individually or collectively. Every decision or action taken by the Board was by full agreement among the three members, and we expect it to continue to be thus. We further reject any notion of bias either for or against any party in this proceeding.

The Board, neither individually nor collectively, was privy to the actions or exchanges cited at length in both the Motion and Affidavit. Since this information was not furnished to the Board, either in whole or in part, prior to the County's pleadings, it is simply not possible to have been influenced by it. The actions of this Board were dictated by no more than the simple, long-standing directive of the Commission to discharge duties in an efficient and expeditious manner. CLI-81-8, 13 NRC 452 (1981)

We do not see that that the public interest would be served should this Board voluntarily disqualify itself simply because of an alleged nexus between its orders and "events" outside its ken; there is no other reason for disqualification. Nor do we believe that such action on the part of the Board would do other than undermine public confidence in an orderly regulatory process.

For the foregoing reasons the disqualification motion filed by Suffolk County and the State of New York is denied, both collegially and by the individual judges in this proceeding.

The matter is referred to the Atomic Safety and Licensing Appeal Board pursuant to 10 CFR §2.704(c).

THE ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright, Member
ADMINISTRATIVE JUDGE

Elizabeth B. Johnson, Member
ADMINISTRATIVE JUDGE

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 25th day of June, 1984.