



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

PDR
50-322

November 20, 1986

The Honorable Alfonse M. D'Amato
United States Senate
Washington, D. C. 20510

Dear Senator D'Amato:

On October 15, 1986 you wrote the Commission to express your concern regarding Judge B. Paul Cotter, Jr.'s decision to appoint a new Licensing Board to conduct a hearing on the February 13, 1986 Shoreham emergency planning exercise. On October 17, Judge Cotter wrote you regarding this same matter. Also, Judge Cotter has answered a letter on this subject from counsel for Suffolk County, and has further explained his views in deciding an intervenor motion on this matter. A copy of the decision is enclosed for your information.

It appears that many of your concerns arose from a widely shared misunderstanding of the original Notice of Reconstitution. I hope that Judge Cotter's direct reply to you adequately addressed the issues you raised. In the interim, while I believe that it is premature to conduct a Commission meeting on this adjudicatory matter, the Commission is closely monitoring the situation.

The Commission respects and treats with great seriousness the views of State and local governments. As an agency of the Federal government, the Commission does so in a manner that conforms with its understanding of the requirements Congress has imposed on it through the Atomic Energy Act and other applicable Federal law. Accordingly, the Commission's resolution of this matter will conform to these requirements.

The Commission's procedures provide various avenues for dissatisfied parties to seek relief and appellate review within the agency. In the event that a party remains dissatisfied with the relief provided through the system of checks and balances provided by agency process, the United States Courts of Appeals are available for judicial review and for such other relief as justice may require.

The Commission cannot discuss the merits of Judge Cotter's actions at this time since the Commission may be asked to decide any appeal. The Commission's licensing decisions for nuclear reactors are made in on-the-record adjudications and the

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Commission's Boards, as well as the Commission itself, serve as impartial judges in the adjudicatory proceedings over which they preside, approach contested safety questions with an open mind, and decide them carefully on the basis of the evidence in the adjudicatory record.

Sincerely,

Lando W. Zech, Jr.
Lando W. Zech, Jr.

Enclosure:
As Stated

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
NRC

BEFORE
CHIEF ADMINISTRATIVE JUDGE B. PAUL COTTER, JR.

'86 NOV 12 A11:27

OFFICE OF THE CHIEF ADMINISTRATIVE JUDGE
DOCKETING SERVICE
BEAR

In the Matter of:

SUFFOLK COUNTY AND STATE OF NEW YORK
MOTION TO RESCIND RECONSTITUTION OF
BOARD BY CHIEF ADMINISTRATIVE JUDGE
COTTER

(Shoreham Nuclear Power Station,
Unit 1)

SERVED NOV 12 1986

ASLBP DOCKET NO.
87-543-01 Misc.

50-322-OL-315

MEMORANDUM AND ORDER

On October 22, 1986, Intervenors Suffolk County and the State of New York filed a paper titled, "Motion for Rescission of 'Notice of Reconstitution of Board' and Subsequent 'Clarification' and Motion for Expedited Consideration" (the Motion). In this Motion Intervenors object to the Chief Administrative Judge's replacement of two Atomic Safety and Licensing Board Panel judges on a Licensing Board that is hearing one set of issues in a proceeding initiated by the Commission as part of the Shoreham proceedings and assigned NRC Docket No. 50-322-OL-5. Intervenors assert that the Chief Administrative Judge is without authority to take the action objected to, that the schedule conflicts stated as the reason for the Board's reconstitution were not explained, and that if schedule conflicts were to arise it would be a matter to be resolved between the judges and the parties. Intervenors

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cite no legal precedent in support of their motion and do not rely upon any affidavit.

The reconstitution of the Board objected to in the Motion pertained to one segment of the Shoreham proceedings which are presently assigned two separate docket numbers, namely 50-322-0L-5 (the "5" docket) and 50-322-0L-3 (the "3") docket. The notice of reconstitution was issued October 7, 1986 and a "Clarification" was issued on October 17, 1986.

The Clarification stated that the reason for the reconstitution was because of the multiple issues pending in the proceeding. The Clarification noted that the "5" docket concerned the emergency planning exercise proceeding instituted by the Commission on June 6, 1986, 23 NRC 577 (CLI-86-11, 1986), while the "3" docket concerned all other issues, namely: (1) the adequacy of the entire emergency plan remanded by the Commission; (2) issues remanded by the Appeal Board; and (3) new motions to reopen the record on several other issues. The clarification also noted that the two judges replaced in the "5" docket continue to serve on the larger body of issues under the "3" docket number and that one judge would serve on both dockets.

In an October 22, 1986 letter, counsel for the NRC Staff responded that the Motion was not well grounded. Staff asserts its understanding that there are three controlling concerns in subject reconstitution (namely, continuity in Boards, a new Board's understanding and

appreciation of prior limited appearance statements by the public, and the Commission's mandate that the exercise hearing be expedited). The Staff found those concerns satisfied.

On October 30, 1986, LILCO opposed the motion arguing that the motion was not properly filed, the matter was one committed to agency discretion, no prejudice had been shown, and that the appointments would avoid delay and resultant financial prejudice to LILCO. LILCO noted that the manner of Board expansion preserves continuity of experience, and that the expansion was done in a manner consistent with the public interest.

On November 7, 1986, Intervenors responded to the LILCO filing renewing its earlier arguments. The only new matter was a reference to a letter written in response to a Congressional inquiry. The letter noted that the areas inquired into were protected and that the reconstitution was solely an administrative decision.¹

¹The letter, dated October 31, 1986 from the Chief Administrative Judge to Congressman Markey and served on the parties, stated in pertinent part:

Your letter inquires into two protected areas: (1) the exercise of my responsibility as Chief Administrative Judge in assigning judges to a particular case and (2) the mental processes and deliberations of the judges on the Shoreham Board itself. Both of these areas are fully protected from inquiry to preserve the integrity of the adjudicatory process. It would be improper for me
(Footnote Continued)

DISCUSSION

This is at least the second time these Intervenor's have filed a motion which "is anomalous and is devoid of basis or apparent precedent" in the Shoreham proceedings. See, Suffolk County and State of New York Motion for Disqualification of Chief Administrative Judge Cotter, 20 NRC 385, at 386 (LBP-84-29A, 1984). Intervenor's position would prevent the

(Footnote Continued)

to compromise that process at this Commission by responding to inquiries into such areas.

Nevertheless, in sympathy with your expression of deep concern, I do want to go so far as to inform you that my reconstitution of the Shoreham Board on the narrow issue of the emergency exercise was wholly an internal Panel decision made solely in carrying out my responsibility under the Administrative Procedure Act. My decision was not influenced by any other consideration. There were absolutely no communications, direct or indirect, with anyone outside this office concerning that decision or the issuance of the October 17, 1986 clarification. ... the reconstitution was a purely administrative decision made in this case (as well as many others) solely for the purpose of eliminating workload conflicts in order to avoid delay. All parties to the Shoreham proceeding are entitled to a reasonably prompt decision on their concerns at minimal expense. I note also the well-established principle that judges are fungible (at the NRC within their own expertise), a truism particularly apt at this starting point in the emergency planning exercise proceeding.

Moreover, as the public record in this case makes patently clear, it is simply not true that the reconstituted board will be dealing with a subject as to which the prior board had "extensive knowledge of the issues". The proceeding concerning the emergency planning exercise at Shoreham was initiated pursuant to a Commission order dated June 6, 1986. Contentions were only recently admitted by order dated October 3, 1986. No hearings have been held, and discovery has just begun. The admitted contentions will, and by law must be decided solely on the basis of evidence and testimony that has yet to be presented.

Chief Administrative Judge (also designated Chairman) of the Atomic Safety and Licensing Board Panel from discharging his responsibility to assign judges so as to provide for the hearing and resolution of controversies ripe for decision. The Chief Administrative Judge is charged with appointing Licensing Boards to conduct hearings in the most expeditious manner consistent with due process and fundamental fairness. 10 CFR § 1.11, 2.704 and Part 2, Appendix A, at p. 120 (1986). See also Statement of Policy on Licensing Proceedings, 13 NRC 452 (CLI-81-8, 1981).

The Chief Administrative Judge is also responsible for appointing a new member to a licensing board when a sitting member becomes unavailable, even during or after the hearing. 10 CFR § 2.704(d)(1986). New England Coalition on Nuclear Pollution v. U.S. Nuclear Regulatory Commission, 582 F.2d 87 (1st Cir. 1978). The term "unavailable" applies to a variety of situations, the most frequent of which is the need to replace board members when their scheduled obligations to a case conflict either internally in a particular case or with their obligation to another case. Similarly, because of the size and complexity of NRC proceedings, the need to appoint multiple Licensing Boards in the same case is not uncommon. As a matter of good administrative practice, potential conflicts should be anticipated as early as possible in a proceeding to avoid having the parties waste time, effort, and financial

resources.² In the instant case, the citizens of Long Island and all the parties are entitled to a decision on the merits of the controversy as soon as reasonably possible.³

Ultimately, however, the decision to reconstitute a board or create a new one in a particular case is solely a matter of agency discretion. Absent some evidence of an improper exercise of that discretion, the decision is simply not open to question. Intervenors' Motion offers no evidence, not even an affidavit. In fact, there is no such evidence.

In light of the total absence of any basis for the motion, it must be denied.

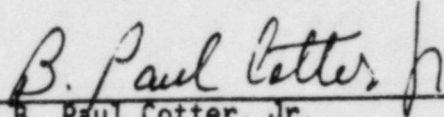
²For example, in the last two fiscal years alone, reconstitution has been necessary in 15 instances, and six cases have required multiple Licensing Boards. Since the original Shoreham operating license board was established in February 1977, 14 of the Panel's judges have served on one or more of the case's four principal dockets.

³Intervenors' Motion refers to limited appearance statements heard by the Licensing Board before reconstitution. Such statements are transcribed and thus are available for review by new judges on a Board. However, it is well established that limited appearance statements are not evidence and can be taken into account only to the extent they may alert the Licensing Board and the parties to areas where evidence may need to be adduced. 10 CFR § 2.715, Part 2. Appendix A, § III(b), Iowa Electric Light & Power Co., C AEC 195, 196 n. 4 (ALAB-108, 1973).

ORDER

For all the foregoing reasons, it is this 7th day of November, 1986

ORDERED that the Suffolk County and State of New York Motion to rescind the reconstitution of the Shoreham Board shall be, and it hereby is, denied.



B. Paul Cotter, Jr.
Chief Administrative Judge

November 7, 1986

Bethesda, Maryland