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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of	§	
	§	
HOUSTON LIGHTING AND POWER	§	Docket Nos. STN 50-498 OL
COMPANY, ET AL.	§	50-499 OL
(South Texas Project,	§	
Units 1 and 2)	§	

INTERVENOR CITIZENS CONCERNED ABOUT NUCLEAR POWER'S
INITIAL BRIEF IN RESPONSE TO NUCLEAR REGULATORY COMMISSION
ORDER OF MAY 6, 1982

I. Introduction

On May 6, 1982, the Nuclear Regulatory Commission issued an Order announcing its decision to review a decision by the Atomic Safety and Licensing Appeal Board in this proceeding.¹ The Appeal Board Order under review removed Judge Ernest Hill from the Atomic Safety and Licensing Board in this proceeding on the basis of an appearance of bias against intervenor Citizens Concerned About Nuclear Power.²

The Commission set forth two questions to be briefed by all parties to the proceeding below:

- (1) Did the Appeal Board apply the correct legal standard in determining to disqualify Judge Ernest Hill; and

1. Order (May 6, 1982), Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498 OL, STN 50-499 OL

2. Order (April 15, 1982), Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498 OL, STN 50-499 OL

- (2) Did Judge Hill's separate statement constitute evidence of bias or prejudice warranting his disqualification?³

Citizens Concerned About Nuclear Power respectfully submits this Initial Brief in accordance with the Commission's request in its Order.

II. Background

On March 9, 1982, intervenor Citizens Concerned About Nuclear Power (CCANP) filed a motion under 10 C.F.R. §2.704(c)⁴ calling upon Administrative Law Judge Ernest E. Hill to recuse himself from further participation in this proceeding.⁵ As required by §2.704(c), CCANP filed affidavits in support of the motion.⁶

CCANP complained that Judge Hill had "demonstrated a lack

3. Order (May 6, 1982), supra p. 1, note 2

4. 10 C.F.R. §2.704(c), which governs the disqualification of a Licensing Board member, states in part:

(c) If a party deems ... a designated member of an atomic safety and licensing board to be disqualified, he may move that ... the board member disqualify himself. The motion shall be supported by affidavits setting forth the alleged grounds for disqualification.

5. "Citizens Concerned About Nuclear Power (CCANP) Motion for Judge Ernest Hill to Recuse Himself from Further Participation in this Proceeding" (March 9, 1982) (Hereinafter "Motion")

6. "Affidavit of Lanny Alan Sinkin in Support of Citizens Concerned About Nuclear Power (CCANP) Motion for Judge Ernest Hill to Recuse Himself from Further Participation in this Proceeding" (March 23, 1982) (hereinafter "Sinkin Affidavit"); "Affidavit of Rob Hager in Support of CCANP Motion for Recusal of Ernest Hill" (April 2, 1982) (hereinafter "Hager Affidavit")

of impartiality" both by favoring the Applicants and by "overt hostility to the participation of CCANP in this proceeding."⁷ As evidence of favoritism toward the Applicants, CCANP pointed to Judge Hill's criticism of the NRC for conducting the investigation which discovered the Quadrex Report, a report highly critical of the design and engineering process at the South Texas Project.⁸ As evidence of hostility toward CCANP's participation, CCANP cited Judge Hill's behavior both on and off the bench in response to CCANP's efforts to participate.⁹

Both the Applicants and the NRC staff filed oppositions to the CCANP motion.¹⁰

On April 13, 1982, the other two members of the Licensing Board issued a denial of CCANP's motion.¹¹ Attached to the denial was a statement written by Judge Hill.¹²

7. Motion at 1

8. Motion at 2; Sinkin Affidavit at 2

9. Motion at 1; Sinkin Affidavit at 2; Hager Affidavit

10. "Applicants' Response to Citizens Concerned About Nuclear Power (CCANP) Motion for Judge Ernest Hill to Recuse Himself from Further Participation in this Proceeding" (March 23, 1982); "NRC Reply in Opposition to CCANP's Motion for Judge Ernest Hill to Recuse Himself" (March 30, 1982)

11. Memorandum and Order (Denying CCANP Motion for Judge Ernest Hill to Recuse Himself) (April 13, 1982), Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498 OL, STN 50-499 OL (Hereinafter "Quorum Board Denial")

12. Separate Statement of Judge Hill attached as pages 9-12 of Quorum Board Denial. Judge Hill's statement is also attached to the Appeal Board Memorandum as pages 16-19. See infra page 4. All references herein to Judge Hill's statement will be to the Appeal Board Memorandum pagination.

As required by 10 C.F.R. §2.704, the Quorum Board Denial with attachments was forwarded to the Appeal Board.¹³

On April 15, 1982, the Appeal Board filed an Order in which they agreed with the Quorum Board that the CCANP motion did not provide sufficient grounds for Judge Hill's recusal, but that Judge Hill's separate statement "compelled ... the conclusion that another member of the Licensing Board Panel should now be designated to replace Judge Hill."¹⁴

On April 20, 1982, the Applicants filed a petition requesting Commission review of the Appeal Board Order.¹⁵

On April 21, 1982, the Appeal Board issued its opinion supporting its April 15 Order. Houston Lighting and Power Co., et al. (South Texas Project, Units 1 and 2), ALAB-672, ____ NRC ____ (1982).¹⁶

On April 28, 1982, CCANP responded to the Applicants' petition for review urging the Commission to let the Appeal Board's decision stand without review.¹⁷

On May 6, 1982, the Commission issued the decision to review, as noted in the introduction hereto.

13. Quorum Board Denial at 8.

14. Order (April 15, 1982), supra p. 2, note 2

15. "Applicants' Petition for Review of Appeal Board's Order of April 15, 1982" (April 20, 1982)

16. Hereinafter "Appeal Board Memorandum"

17. "Citizens Concerned About Nuclear Power (CCANP) Response to Applicants' Petition for Review of Appeal Board's Order of April 15, 1982" (April 28, 1982)

III.

The Appeal Board selected the correct legal standard in determining to disqualify Judge Ernest E. Hill.

- A. In Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60 (1973), the Atomic Energy Commission set forth the grounds upon which a Nuclear Regulatory Commission administrative judge can be disqualified.

In Consumers, an intervenor requested appellate relief based on licensing board bias. Consumers at 60. The Appeal Board denied that relief. Id. at 67. In deciding the merits of the intervenor claim, the Appeal Board found there were "well-defined and well-recognized" grounds for disqualification. Id. at 63.

After reviewing the statutory basis for disqualification and establishing the basic rule, the Appeal Board identified five specific factual situations providing grounds for disqualification:

- (1) a direct, personal, and substantial pecuniary interest in the result;
- (2) a personal bias (partiality or animosity) toward a party;
- (3) service in a prosecutive or investigative function in the same case;
- (4) prejudgment or an appearance of prejudgment of factual issues - as opposed to legal issues; and
- (5) appearance of either bias or prejudgment of factual issues - as opposed to legal issues. Id. at 63-64.

The Nuclear Regulatory Commission subsequently reaffirmed

the Consumers standard. See Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299 (1978).

By turning to Consumers to determine the standard for disqualification, the Appeal Board examined the prevailing authority.

B. The Appeal Board used the appropriate test to determine if grounds for removal of Judge Ernest Hill existed.

In their opinion, the Appeal Board focussed on the fifth ground found in Consumers - an appearance of either bias or prejudgment of factual issues. Appeal Board Memorandum at 5.

In an extensive quote from Consumers, the Appeal Board set out the test to be used to determine whether Judge Hill should be disqualified. Id. at 5-6. The Appeal Board summarized the test as "whether a disinterested observer could have reasonably inferred from Judge Hill's statement that he now has a personal animus against the intervenor which could affect his ability to pass judgment upon its cause." Id. at 7.

The Appeal Board having correctly turned to Consumers and focussed on the fifth ground therein for disqualification identified the relevant and appropriate test for disqualification. If the Appeal Board found that a disinterested observer could reasonably infer that Judge Hill had a personal bias against CCANP, prevailing NRC authority required the Appeal Board to remove Judge Hill from the Atomic Safety and Licensing Board in this proceeding.

IV.

Judge Hill's separate statement constitutes evidence of bias or prejudice warranting his disqualification.

A. Judge Hill's statement created an incurable impression of bias and prejudice.

The Appeal Board found Judge Hill did not confine himself to "a dispassionate response to the claim on which the motion rested," but rather "launched a series of direct attacks of his own upon 'the representatives for CCANP' cast for the most part in extremely pejorative terms." Id. The Appeal Board also found Judge Hill used "intemperate language" which was "at odds with the notion of judicial restraint and fairness." Id. at 9. In the Appeal Board's view, "Judge Hill's observations were totally gratuitous." Id. Finally, the Appeal Board found the damage already inflicted to be incurable "by the most sincere disclaimer of bias." Id.

CCANP agrees with and adopts the evaluation and conclusion of the Appeal Board. CCANP is particularly struck by Judge Hill's charge of subversion. Id. at 17,18. Subversion is from the verb subvert which means "to overturn or overthrow from or as if from a foundation: ruin utterly: RAZE, DEMOLISH." Webster's Third New International Dictionary 2281 (1976).

Such a pejorative charge is perhaps Judge Hill's response to CCANP's factual statement that the institution of which he is a part collects and maintains intelligence files on critics of the nuclear industry.¹⁸ Either consciously or unconsciously

18. Motion at 1; Sinkin Affidavit at 2; Hager Affidavit

Judge Hill is telling CCANP that he considers anti-nuclear groups, such as CCANP, to be subversives. He then proceeds to search for behavior by CCANP representatives to prove his point and comes up with what a disinterested observer would see as the normal activities of an advocate in an administrative proceeding - raising issues, making allegations, and cross examining. Appeal Board Memorandum at 17.

The other charge by Judge Hill is that CCANP has "blatantly used this proceeding as a forum to present CCANP's political views on subjects not at issue, at least in this expedited phase of the case." Id. The only example given by Judge Hill is "attempt[ing] to inject the internal political issues of the cities of Austin and San Antonio into this proceeding." Id.

CCANP believes Judge Hill must be referring to CCANP 's motion for a new contention regarding what CCANP termed the collapse of the partnership involved in the South Texas Project.¹⁹ CCANP offered as support for this contention the vote of the people of Austin to sell their share of the project and the remarks of the Mayor of San Antonio that the partnership was collapsing. ²⁰ CCANP also stated its intention to provide witnesses to the effect that at least one partner

19. "Citizens Concerned About Nuclear Power Motion to File Additional Contentions Based on New Information and to Establish a Discovery and Hearing Schedule with Respect to New Contentions" (November 23, 1981), Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498 OL, 50-499 OL (Hereinafter "Contentions Motion")

20. Id. at 3

had debated removing HL&P as managing partner of this project.²¹

CCANP's motion argued that the collapse of the partnership was probative of the character and competence of HL&P representing, as it did, the judgment of those involved in the project.²²

While the Board denied the new contention,²³ CCANP rejects the charge that offering such a contention represented injecting CCANP's political views, raising an irrelevant issue, or attempting to subvert the hearing process.

Overall, Judge Hill seems to find objectionable the relationship between CCANP's advocacy and the nature of this hearing as an expedited hearing. He calls CCANP's motions for new contentions and cross examination "delaying" and "obstructing." Appeal Board Memorandum at 17. Judge Hill's objection reflects a misunderstanding of why this hearing was expedited.

The Atomic Safety and Licensing Board in this proceeding originally considered an expedited hearing on two contentions submitted by CCANP. The Board considered the issues raised of such ongoing importance there was a need to have a full hearing at this stage of the construction process rather than the normal hearing much closer to completion of the plants.²⁴

21. Tr. at 9140

22. Contentions Motion at 38

23. Tr. at 9152

24. (Footnote 24 on page 10)

The Commission endorsed the ASLB proposal for an expedited hearing because the Order to Show Cause of April 30, 1980²⁵ and the past history of the project raised such serious questions about the Applicants's total performance to date as to possibly warrant license denial. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291 (1980). The Commission directed the addition of issues to the expedited hearing specifically as an alternative form of relief to CCANP. Id. at 282.

Expedition, then, was originally responsive to CCANP contentions and a perceived need to protect the public health and safety by either proof the contentions were incorrect or prompt corrective action. Expedition was later endorsed by the Commission as relief for CCANP and as a means of determining whether there was a sufficient and independent basis for license denial already available to the ASLB.

The contentions, issues, and possible license denial are significant questions for which CCANP considers the most complete record to be essential. If creating a complete record takes time, that is time well spent. If completing the record involves taking time to decide what is relevant

24. See Memorandum and Order (March 10, 1980); Memorandum and Order (August 1, 1980); and Second Prehearing Conference Order (December 2, 1980) all in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498 OL, STN 50-499 OL

25. Order to Show Cause (April 30, 1980), Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498 OL, STN 50-499 OL

and to hear comprehensive cross examination, that is a necessary and inseparable part of the decision making process.

Somehow in this proceeding the mandate for expedition has been transformed from an inquiry into whether the Applicant are disqualified from receiving an operating permit into a need to rush because supposedly the Commission mandated such a rush, to rush so hearings can be held and the proceeding completed, or to rush so Applicants can be cleared of charges. The clear distinction between hearings held in 1985 or 1986 and hearings held now seems to be getting replaced by a distinction between hearings taking one year and hearings taking a year and a half.

The highest priority is a complete record, not a rush to completion.

In light of the above, Judge Hill's characterization of CCANP as "actively subverting the stated objectives of this expedited proceeding," Appeal Board Memorandum at 17, reflects a total misunderstanding of the reasons for expedition, a misunderstanding which creates an impression that Judge Hill is more interested in a pro forma completion of the process than in allowing CCANP an opportunity to develop the relevant facts. Judge Hill's failure in this regard is symptomatic of what the Appeal Board found to be "a lack of sensitivity for the role that a judge must necessarily play in any adjudication." Id. at 8.

Putting forth issues or allegations to be litigated and

conducting cross-examination are exercises of the fundamental rights granted a party to an administrative proceeding. Assuming arguendo that CCANP has raised irrelevant or only marginally relevant issues, made allegations against principals in the case without support, engaged in unproductive and time consuming cross examination, tried to inject its political views, or otherwise delayed or encumbered the hearing process in this proceeding, the conclusion that CCANP was, therefore, engaged in an effort to destroy the proceeding or ruin it utterly is a debilitating mischaracterization. Such a conclusion by Judge Hill forecloses CCANP's ability to secure from this judge an impartial hearing on the merits.

What CCANP sees as contributing to building a complete record, Judge Hill sees as subversion. Such a characterization of CCANP's efforts reflects an unreasonable mind, a biased mind, a closed mind. The damage inflicted by Judge Hill on his own status as dispassionate and impartial cannot be repaired by "the most sincere disclaimer of bias." Id. at 9.

B. Judge Hill's statement is not immunized from review by the "judicial proceedings" rule.

1. The "judicial proceedings" rule does not apply to Judge Hill's statement.

Courts generally limit review of the prejudicial impact of a judge's statements through the use of the "judicial proceedings" rule. The rule requires that a party challenging the impartiality of a judge demonstrate that the lack of

impartiality stems from extrajudicial sources of information. See United States v. Grinnel Corp., 384 U. S. 563, 583 (1966) [motion to recuse under 28 U.S.C. §144 requires proof of extrajudicial sources of information] In effect, the rule immunizes judges from review of statements, regardless of how prejudicial they are, as long as the statements are made in the judicial setting.

At least two policies underlie the rule. First, the recusal statutes must be interpreted to avoid giving litigants veto power over the judge after the judge has made unfavorable rulings. See In re International Business Machines Corp., 618 F.2d 923, 929 (2d Cir. 1980).

Second, and more important to this proceeding, is the necessity to preserve the functional ability of the courts to try cases. A judge must be free to be a judge, to make decisions. In the course of judging, the judge must be free to evaluate the credibility of parties, search for their real motives, and observe the strategy of their representatives. As an inevitable and inseparable part of his role, a judge has "an official obligation to become prejudiced." Id. at 930

But, the "judicial proceedings" rule should not extend any further than is necessary to preserve the ability of the courts to try cases. Cloaking Judge Hill's statement in this rule would be to extend the rule further than is necessary or appropriate.

The statement was not a part of Judge Hill's function as

a judge.

Judge Hill participated in formulating or drafting section 1 of the Quorum Board Denial. Quorum Board Denial at 8. In this section, the three Board members decided that if Judge Hill decided not to recuse himself, "the rest of the Board - sitting as a quorum without the questioned member - should also be given the opportunity to determine whether the accusations have merit and, if so, are legally disqualifying." Id. (emphasis added).

But Judge Hill's statement does not contain a determination of whether the accusations have merit and, if so, whether they are legally disqualifying. Judge Hill apparently did not avail himself of the legal assistance available to him to make any effort to fulfill his responsibilities. See Appeal Board Memorandum at 14, footnote 19.

Instead, Judge Hill's opening sentence adopts what the remaining Board members wrote on these questions without any participation by Judge Hill. Id. at 16. Judge Hill closed his statement with a denial he was biased against CCANP or its representatives and again endorsed the work of his colleagues. Id. at 19.

The rest of the statement, other than the introductory history of this proceeding, was, as the Appeal Board found, "totally gratuitous." Id. at 9. The only issue the Appeal Board found to be before Judge Hill was whether he has displayed personal animosity toward CCANP, its representa-

tives, or the cause it advocated. Id. (While CCANP contends that bias in favor of Applicants was also at issue, the absence of any response to the that issue in Judge Hill's statement leaves the Appeal Board analysis in tact.)

As the Appeal Board states, Judge Hill did not respond to the issue(s) with relevant, substantiated comments. Instead, he engaged in a "series of direct attacks of his own" on CCANP representatives "cast for the most part in extremely pejorative terms." Id. at 7. The Appeal Board concluded, and CCANP agrees, that the attacks were unprovoked, Id. at 9, note 12, and lacked even "the slightest relevance" to the substantive matter(s) before Judge Hill. Id. at 9.

Having failed to perform his adjudicatory function, Judge Hill should not now be allowed to immunize his totally gratuitous attacks as being part of his judicial function.

Nor does merely attaching his statement to the quorum denial transform the statement into a judicial pronouncement or eliminate the appearance of incurable bias and prejudice.

Besides, the Appeal Board ruled the quorum Board lacked authority to issue the Quorum Board denial. Id. at 10-15. Judge Hill knew there was a possibility of such a ruling because he participated in the decision which led to the issuance of the Quorum Board Denial. See supra p. 14. The Commission's Order did not contain a review of this part of the Appeal Board's decision, so arguably Judge Hill's statement stands apart from any discussion of the merits.

Judge Hill's statement was not even required by 10 C.F.R. §2.704(c).²⁶ A mere denial would have sufficed to meet regulatory requirements.

CCANP does not contend that a challenged board member may not issue an explanatory document without creating a reasonable appearance of bias. But Judge Hill's statement was an unprovoked attack, not an explanatory document confined "to a dispassionate response to the claims on which the motion rested." Appeal Board Memorandum at 7.

Nor should it matter that the particulars of Judge Hill's attacks on CCANP appear to come from his participation in this proceeding. In Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583 (D.C. Cir. 1970), F.T.C. Chairman Dixon made public statements regarding a pending case. Despite the fact that Dixon's information derived from his adjudicatory role, the court found his statements sufficiently prejudicial to order Dixon off the case. The reasoning of Cinderella, was, of course, adopted by the Atomic Energy Commission in Consumers and reaffirmed by the Nuclear Regulatory Commission in Nuclear Engineering Co. Inc., supra p. 6.

26. 10 C.F.R. §2.704(c) states in relevant part:

(c) If ... the board member does not disqualify himself, the motion shall be referred to the Commission or the Atomic Safety and Licensing Appeal Board, as appropriate, which will determine the sufficiency of the grounds alleged. (emphasis added)

Besides, Judge Hill's use of the word subvert provides an extrajudicial source for a most significant part of his statement and for his motivation in saying what he did. An institution which collects and maintains intelligence files on nuclear critics has a prejudicial attitude toward such critics. Judge Hill's use of the word subvert demonstrates he was infected by this attitude apart from anything CCANP said or did in the hearings.

Finally, Judge Hill had five weeks to ponder the specific allegations set forth in CCANP's motion. His response was in written form. The statement cannot be equated with a spontaneous courtroom outburst that is unavoidable and inseparable from the judicial function. Judge Hill had time to "put aside his personal feelings and exercise restraint" prior to responding to the CCANP motion. Appeal Board Memorandum at 9.

To place Judge Hill's statement within the context of the "judicial proceedings" rule would be an abuse of that rule.

2. Even if the Commission decides the "judicial proceedings" rule applies to Judge Hill's statement, Judge Hill's statement falls within the well recognized exceptions to the immunity afforded by this rule.

"[T]he single fact that the judge's remarks were made in a judicial context does not prevent a finding of bias."
Whitehurst v. Wright, 592 F.2d 834, 838 (1979)

Even when the courts recognize the "judicial proceedings"

rule as applying, exceptions are provided where there is a continuing and personal bias or "where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044, 1051 (5th Cir. 1975) cert. denied, 425 U.S. 944 (1976).

In considering the first exception for a continuing and personal bias, CCANP agrees with the Appeal Board that Judge Hill's statement "affirmatively created created the impression that he harbors a deep-seated personal hostility towards CCANP and its representatives, which could be expected to affect materially his future determinations on matters of concern to that intervenor." Appeal Board Memorandum at 10 (emphasis added). Judge Hill's statement, therefore, falls within this exception to the "judicial proceedings" rule.

In considering the second exception of pervasiveness, Judge Hill's characterization of CCANP's pursuit of the rudimentary aspects of representation as "subversive" means CCANP has no way to reach Judge Hill with CCANP's theory of the case, issues, evidence, or findings. Furthermore, Judge Hill provides no supporting citations for this charge leaving the inference that rather than applying to specific instances, Judge Hill's prejudicial view of CCANP is an overall view which will affect his entire response to CCANP. Judge Hill's statement, therefore, also falls within the pervasiveness exception to the "judicial proceedings" rule.

V.

Even if the Commission finds it cannot affirm the Appeal Board's decision to disqualify Judge Hill, the Commission should find Judge Hill to be disqualified.

- A. Based on the entire record before the Commission, the Commission should grant CCANP's original motion for Judge Hill to recuse himself.

The issues in this brief did not arise spontaneously or originate at the appellate level. An intervenor in a licensing proceeding convened by the Commission filed a motion to remove a member of the licensing board. The essential grievances of the intervenor were that the judge had shown bias in favor of the applicants and hostility toward the intervenor.

The judge filed a response which clearly demonstrated hostility to the intervenor. The statement failed utterly to address the grievance of bias in favor of the applicants.

The remaining license board members filed a memorandum and order denying the intervenor motion. The quorum board also did not address the grievance of bias in favor of the applicants.

The appeal board endorsed the reasoning of the quorum board in denying the intervenor motion while denying the authority of the quorum board to issue such a denial. The appeal board did not address the issue of bias in favor of the applicants. On the basis of the statement filed by the judge, however, the appeal board removed the judge for reasons of hostility toward the intervenor.

The applicants filed a petition for review with the

Commission and the intervenor responded to the petition for review.

This entire history from the original motion through the intervenor's response to the petition for review is now before the Commission. The Commission must decide whether to overturn the unanimous decision of its appellate board and put the judge back on the licensing board. This decision should reflect a weighing of all arguments and evidence before the Commission.

In the light of the entire record, CCANP contends that CCANP's motion and affidavits constitute a sufficient basis for the Commission to disqualify Judge Hill.

CCANP stated that Judge Hill was a nuclear engineer employed by Lawrence Livermore Laboratory in Livermore, California.²⁷ CCANP also stated that the Lawrence Livermore Laboratory collects and maintains intelligence files on critics of the nuclear industry.²⁸

CCANP did not contend that either Judge Hill's profession or his institutional affiliation constituted an independent and sufficient basis for his recusal. Instead, CCANP argued, and continues to argue, that Judge Hill's profession and affiliation created a potential obstacle to impartiality. Judge Hill's employment clearly relates to the continued use and development of nuclear power. Intelligence gathering

27. Motion at 1; Sinkin Affidavit at 2; Hager Affidavit

28. Motion at 1; Sinkin Affidavit at 2; Hager Affidavit

aimed at a particular group demonstrates prejudicial attitudes toward such groups and the persons composing such groups. These are factors to be weighed in evaluating the import and tone of Judge Hill's statement, especially his use of the word subvert.

The CCANP motion stated that Judge Hill repeatedly demonstrated hostility towards CCANP's participation in the licensing proceeding.²⁹ Judge Hill's statement, as the Appeal Board correctly observed, contained "direct attacks of his own upon 'the representatives for CCANP' cast for the most part in extremely pejorative terms." (footnote omitted) Appeal Board Memorandum at 7. Judge Hill, again as the Appeal Board correctly observed, "affirmatively created the impression he harbors a deep seated personal hostility towards CCANP and its representatives" Id. at 10. The CCANP motion and affidavits on this point are, therefore, sufficient.

CCANP complained of Judge Hill's determined efforts to prevent or curtail CCANP cross examination.³⁰ Judge Hill states he viewed CCANP's cross examination as part of an overall effort by CCANP to subvert the proceeding. Id. at 17, 18. The Commission, therefore, has before it direct evidence on Judge Hill's highly prejudicial state of mind during the occurrence of events complained of by CCANP. The CCANP motion and affidavits on this point are also, therefore, sufficient.

29. Id.

30. Id.

CCANP complained of Judge Hill's criticism of the NRC for conducting the investigation which discovered the Quadrex Report.³¹ The idea that the NRC was wasting its resources in conducting this investigation and that the investigation, therefore, should not have been conducted is totally opposed to the purposes of the Inspection and Enforcement function within the NRC. See generally 47 Fed. Reg. 9987 (1982). For a judge to hold such an opinion is clear evidence of bias in favor of applicants for operating licenses. Judge Hill in no way refuted or responded to this complaint on the part of CCANP. His silence entitles CCANP to an inference the complaint is substantive. The CCANP motion and affidavits are, therefore, sufficient as to this point as well.

Since the totality of the record supports most of the major complaints of CCANP's motion to recuse Judge Hill, the Commission should grant CCANP's motion however the Commission rules on the actions of the Appeal Board.

B. Under 28 U.S.C. §§455(a) or (b), Judge Hill is under a continuing obligation to remove himself from this proceeding.

Congress passed 28 U.S.C. §455 as a "statutory standard for disqualification of a judge." Davis at 1051. This provision is "self-enforcing on the part of the judge". Id. This standard is applicable by analogy to NRC administrative judges. Nuclear Engineering Co., Inc., *supra* p. 6, at 303.

Under §455(a), "[a]ny judge ... shall disqualify himself

31. Motion at 2; Sinkin Affidavit at 3; Tr. at 10355-10364

in any proceeding in which his impartiality might reasonably be questioned." This section establishes "the reasonable factual basis - reasonable man test in determining disqualification" Davis at 1052. The reasonable factual basis - reasonable person test is quite similar to the disinterested observer test articulated in Cinderella Career and Finishing School, Inc., supra p. 16 and Texaco, Inc. v. Federal Trade Commission, 336 F.2d 754 (D.C. Cir. 1964) vacated and remanded on other grounds, 381 U.S. 563 (1965).

The purpose is to purge a judicial proceeding of even the appearance of bias and to remind judges of "the distinct obligation of an adjudicator to exercise particular care to avoid doing anything - in a governmental or private capacity - which might erode public confidence in his ability to dispatch his quasi-judicial duties in an entirely dispassionate manner." Consumers at 67; See also Amos Treat & Co. v. S.E.C., 306 F.2d 260 (D.C. Cir. 1962).

Even if the Commission answers both questions set forth in its May 6, 1982 Order in the negative and finds that the totality of the record is not a basis for granting CCANP's original motion, Judge Hill is still faced with the fact that an NRC Appeal Board unequivocally and unanimously stated that his impartiality can reasonably be questioned. The Appeal Board opinion is also a basis for Judge Hill to reconsider his earlier conclusion that he was not biased and conclude that his is. See 28 U.S.C. §455(b).

The Appeal Board opinion is not the opinion of an intervenor wishing to remove a judge. It is, instead, the opinion of an appellate board within the very agency Judge Hill serves. Judge Hill's obligation to remove himself (or be removed as a result of challenge) exists however the Commission decides the various questions raised earlier in this brief.

An Appeal Board judge of the Commission, faced with far less reason than Judge Hill now has, removed himself "to avoid the slightest possibility of even the appearance of partiality in the determination of matters which very well may come before the Board in the future" Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-355, 5 NRC 772, 788 (1977).

VI.

Conclusion

"A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). In the face of Judge Hill's affirmative expression of hostility toward CCANP and his silence in response to an allegation of favoritism toward the Applicants, CCANP cannot get a fair hearing before the Atomic Safety and Licensing Board in this proceeding if Judge Hill continues to serve on this Board.

If taking a position that a license should be denied and advocating that position is subversive, then the licensing proceeding is a sham with the ultimate issue prejudged.

To establish a clear standard of impartiality in NRC proceedings, to meet the basic constitutional requisites for due process, and to ensure CCANP a fair hearing, the Commission should find Judge Hill to be disqualified from further participation in this proceeding.

Respectfully submitted,

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May 18, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of	§	
	§	
HOUSTON LIGHTING AND POWER	§	Docket Nos. STN 50-498 OL
COMPANY, ET AL.	§	50-499 OL
(South Texas Project,	§	
Units 1 and 2)	§	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing INTERVENOR CITIZENS CONCERNED ABOUT NUCLEAR POWER'S INITIAL BRIEF IN RESPONSE TO NUCLEAR REGULATORY COMMISSION ORDER OF MAY 6, 1982 was mailed, first class postage prepaid, to the following, this 18th day May, 1982.

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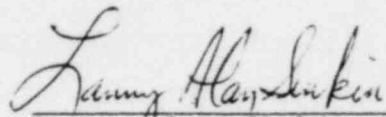
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