

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

'82 MAY 20 P427

In the Matter of)

HOUSTON LIGHTING AND POWER)
COMPANY, ET AL.)

Docket Nos. 50-498 OL
50-499 OL

(South Texas Project, Units 1)
and 2))

APPLICANTS' BRIEF IN OPPOSITION
TO THE DISQUALIFICATION OF JUDGE ERNEST E. HILL

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ing herein on behalf of itself
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CITY OF SAN ANTONIO, TEXAS, act-
ing by and through the City
Public Service Board of the City
of San Antonio, CENTRAL POWER
AND LIGHT COMPANY and CITY OF
AUSTIN, TEXAS

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I.

Introduction

On March 9, 1982, Citizens Concerned About Nuclear Power (CCANP), an intervenor in this operating license proceeding, filed a motion requesting that Judge Ernest E. Hill recuse himself from further participation on the presiding Atomic Safety and Licensing Board.^{1/} On April 13, 1982, the Licensing Board denied the CCANP Motion. Memorandum and Order, April 13, 1982. Attached to the Licensing Board's Memorandum and Order was a separate statement filed by Judge Hill in which he explained why he declined to recuse himself. Id. at 9-12.

Pursuant to 10 CFR § 2.704(c), the Licensing Board thereafter referred the Motion to the Atomic Safety and Licensing Appeal Board for a determination of the "sufficiency of the grounds alleged." The Appeal Board, on April 15, 1982, issued a preliminary Order requiring Judge Hill's removal from the

^{1/} CCANP Motion For Judge Ernest Hill To Recuse Himself From Further Participation In This Proceeding, March 9, 1982.

Licensing Board despite the absence of "sufficient cause" in the CCANP Motion and CCANP's untimely affidavits. Order, April 15, 1982 at 2. The Appeal Board determined that the comments set forth in Judge Hill's separate statement gave rise to "a serious doubt respecting [his] present ability to judge CCANP . . . dispassionately." Id. The Appeal Board also indicated that a full opinion would be forthcoming. Id. In view of the hearing sessions scheduled for the immediate future as well as the degree of importance with which Applicants view the issues raised by Judge Hill's disqualification, Applicants filed with the Commission a Petition for Review of the Appeal Board's Order before receiving its formal opinion.^{2/} Subsequently, the Appeal Board issued a Memorandum, setting forth the basis for its decision to remove Judge Hill. Memorandum, ALAB-672, April 21, 1982. The matter is currently before the Commission by virtue of its Order, granting Applicants' request for review of the Appeal Board's determination. Order, May 6, 1982.

As set forth by the Commission, the issues for review are: (1) whether the Appeal Board applied "the correct legal standard in determining to disqualify Judge Hill . . ."; and

^{2/} Applicants' Petition for Review of Appeal Board's Order of April 15, 1982, April 20, 1982. On the same day, Applicants also filed a Motion for Actions by the Commission in Light of Appeal Board's Order of April 15, 1982 seeking, inter alia, a Commission order directing the Licensing Board to proceed with hearing sessions under the quorum rule while the matter is under Commission review. The Commission has not acted upon this request.

(2) whether Judge Hill's separate statement "constitute[s] evidence of bias or prejudice warranting disqualification." Id. at 1.

It is Applicants' position that the standard applied by the Appeal Board does not reflect all of the relevant considerations and that the governing precedents demonstrate that Judge Hill's statement does not warrant his disqualification. For the reasons described below, Applicants request that the Commission reverse the decision of the Appeal Board and reinstate Judge Hill as a member of the Licensing Board established to preside over this operating license proceeding.

II.

The Appeal Board Did Not Apply
An Adequate Legal Standard

The discussion in this section of this brief shows that the standard enunciated by the Appeal Board is far too generalized and fails to provide an objective benchmark for assessing Judge Hill's comments. As we show below, the case law dealing with the question of whether to disqualify judges, including administrative judges, because their comments may evidence bias or prejudice against a party, draws careful distinctions between comments of extrajudicial origin and those based on the evidence and conduct of the parties and their counsel observed during the judicial proceeding. Our analysis also reveals that where the judge's comments are of judicial origin, courts express an extreme reluctance to interpret them as evidence of disqualifying bias, and will only do so if the judge manifested a "pervasive" personal bias, which we show in section III below is not the case here. Finally our analysis reveals that in virtually every case, the significance of a judge's comments is not evaluated in the abstract, but rather is weighed in the totality of the surrounding circumstances. We conclude from this analysis that the Appeal Board failed to recognize the distinction between statements reflecting extrajudicial bias and views based on the evidence and conduct of the parties and their counsel, failed to give suitable deference to a judge's comments of judicial origin, and failed to take into account the surrounding circumstances. The legal

standard applied in this case was therefore inadequate.

The Appeal Board's April 21, 1982, Memorandum [hereinafter cited as Memorandum] articulated the legal standard in the following manner:

"In sum . . . an administrative trier of fact is subject to disqualification . . . if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues."

. . . In other words, the question at hand was whether a disinterested observer could have reasonably inferred from Judge Hill's statement that he now has a personal animus against this intervenor which could affect his ability to pass judgment objectively upon its cause.

Memorandum at 6-7 (footnote omitted).^{3/} The Appeal Board concluded that Judge Hill's separate statement had "affirmatively 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." Id. at 10.

The standard enunciated by the Appeal Board does not give adequate consideration to the "judicial" -- "extrajudicial" distinction which the governing precedents make and to realities which those precedents recognize. During the course of a trial, particularly a lengthy one, an alert judge is constantly, and inevitably, forming impressions and views about

^{3/} The Appeal Board excerpts from, and relies heavily upon, its decision in Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60 (1973) and several cases cited in Midland. The Midland decision and the other cases are discussed at p. 8 and n. 6, infra.

the parties and their representatives, their credibility, their character, their motives and their conduct in the proceeding. Necessarily, these views are not always flattering, and from time to time judges express them in terms which are not flat or dispassionate. But strong language addressed to a litigant, his conduct of the case, or his motives, based upon what the judge has perceived during the course of the trial is rarely interpreted as evidence that he will not do his duty and decide and conduct the case with basic fairness. For that reason, such expressions are almost always distinguished from manifestations of personal bias or animus against a litigant which the judge carries into the courtroom from outside. It would clearly be inappropriate for such outside factors to influence a judge's actions. Consequently, comments are carefully examined to determine whether they reflect a bias of "extrajudicial" origin or whether the comments are "judicial" in nature, i.e., represent the judge's perceptions developed during the course of the proceeding to date. The classic articulation of this distinction was set forth by the Supreme Court in United States v. Grinnell Corp.:

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 learned from his participation in the case.

4/
384 U.S. 563, 583 (1966).

4/ The Grinnell case dealt with the standard for disqualification of a federal judge. The same standard is applied to presiding officers in administrative proceedings. Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974).

In order for bias or the appearance thereof^{5/} to be derived from an extrajudicial source, it must "arise by virtue of some factor which creates partiality arising outside of the events which occur in the trial itself." In re IBM, 618 F.2d 923, 927 (2d Cir. 1980) (emphasis added). Thus,

[a]ny opinions formed for or against a party by reason of the evidence and observed conduct before a judge in a judicial proceeding, and the judge's expressions of such opinions, however vigorous, are not the personal "bias and prejudice" required to disqualify a judge

Mirra v. United States, 379 F.2d 782, 787-88 (2d Cir.), cert. denied, 389 U.S. 1022 (1967). This principle has been applied uniformly in numerous cases. See, e.g. Johnson v. Trueblood, 629 F.2d 287 (3d Cir.), cert. denied, 450 U.S. 999 (1980); United States v. Bernstein, 533 F.2d 775 (2d Cir.), cert. denied 429 U.S. 998 (1976); United States v. Shotwell Mfg. Co., 287 F.2d 667 (7th Cir. 1961); In re J. P. Linahan, Inc., 138 F.2d 650 (2d Cir. 1943); Molinaro v. Watkins-Johnson CEI Division, 359 F.Supp. 474 (D. Md. 1973).

^{5/} Two separate statutes address disqualification of federal judges. 28 U.S.C. § 144 (1976) and § 455(a) (1982), respectively, mandate disqualification for "personal bias or prejudice" and in circumstances where a judge's "impartiality might reasonably be questioned." The principle that disqualifying bias must be extrajudicial in origin has been extended to decisions under the latter statute, which addresses the appearance of personal bias. Davis v. Board of School Comm'rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). See also, In re IBM, supra.

This same distinction was recognized and adopted by the Commission in Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169 (1973). There the Commission reversed an Appeal Board decision disqualifying a technical member of the Licensing Board based upon various remarks made by the Board member at a prehearing conference. In so doing, the Commission expressed its appreciation to the Appeal Board for its "diligent effort to decide a difficult and close question," but stated that the Commission was "inclined to give due deference to the judgment of the other Licensing Board members," given their first hand knowledge of the record in the proceeding. Id. at 170. The Commission distinguished the two decisions relied upon in Midland, holding that those cases involved public statements which strongly suggested that the decision-maker had been influenced by matters of extrajudicial origin.^{6/} In LaSalle,

^{6/} By contrast, in Midland the extrajudicial remarks of the Licensing Board were not held to be disqualifying. The two cases distinguished by the Commission in LaSalle (Cinderella Career And Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970), and Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964) vacated and remanded on other grounds, 381 U.S. 739 (1965)) were among the cases cited by the Appeal Board in its Midland excerpt. The Appeal Board does not even mention, let alone seek to find any distinction from, the LaSalle decision. Memorandum at 5-6. The relevance of the other two decisions cited in the Appeal Board's Midland excerpt (Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962) and In re Murchison, 349 U.S. 133 (1955)) is even more tenuous. Amos Treat involved the separation of investigative and adjudicatory functions, while Murchison addressed the propriety, under the due process clause, of a judge acting first as a single-man grand-jury and then trying contempt proceedings arising out of the grand-jury investigation.

however, the Licensing Board member's statements were based upon material "properly before him." 6 AEC at 170.^{7/}

This is not to say that a judge is always shielded from disqualification simply because his statements were made during the course of an adjudicatory proceeding on the basis of his judicial observations, or that such comments may never evidence a disqualifying bias. A judge's conduct during the course of the proceeding in extreme cases will be disqualifying if it demonstrates "a pervasive bias and prejudice."

Davis v. Bd. of School Comm'rs of Mobile County, supra, 517 F.2d at 1051. However, courts rarely find judge's comments of judicial origin to be so extreme as to justify disqualification. In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir.), cert. denied, 449 U.S. 888 (1980); Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979); United States v. Wolfson, 558 F.2d 59 (2d Cir. 1977). Thus, in recognizing this exception the second circuit noted:

While we agree that conduct in the course of a trial might be relevant to indicate a bias that can only be explained as a personal prejudice against a party, the fact is that no case in this circuit has ever found such bias on the basis of a trial court's rulings or conduct. This reticence . . . is well justified.

In re IBM, supra, 618 F.2d at 928 n. 6.

^{7/} In reversing the Appeal Board decision and directing that the Licensing Board member not be disqualified, the Commission expressly adopted the Grinnell standard. 6 AEC at 170 n. 3.

The cases also make clear that statements of a judge should be considered in light of the surrounding circumstances. In the IBM decision, for example, the court, recognizing that judges are "only human," examined the record and concluded that "[s]uch isolated instances [of intemperate remarks] are undoubtedly endemic to a trial of this dimension, and do not provide any basis for finding personal prejudice" The court also noted that given "the seemingly interminable length of the trial," even "the most stoic might well lose patience in these circumstances." Id. at 931-32. In United States v. Orbiz, 366 F.Supp. 628 (D. P.R. 1973), the court first reviewed the circumstances surrounding the judge's statements, noting the actions of defendant that gave rise to the comments, and then found that when viewed in context, the statements were merely criticism of observed conduct and did not establish the alleged bias. Again, in Whitehurst v. Wright, supra, the court first reviewed the context of the statement to show that it occurred after counsel for plaintiff admitted he had no evidence to support the claims against two of the defendants and constituted mere comment on the lack of evidence; the court then went on to note that other rulings by the judge did not manifest bias.^{8/}

^{8/} In this case, the motion for Judge Hill to recuse himself was considered by both Judge Hill and the Licensing Board quorum and rejected. The Appeal Board also reviewed the CCANP motion and affidavits and found no basis for a determination that Judge Hill's conduct during the year long evidentiary hearing evidenced disqualifying bias. Memorandum at 3.

This general principle, too, was adopted by the Commission in LaSalle. There the Commission first noted its "deference" to the judgment of the other Licensing Board members who "because they saw and heard the incident -- can assess the matter with full appreciation of what appears in a cold record." The Commission then concluded that the question of disqualification must involve a "case-by-case evaluation of all circumstances of record" 6 AEC at 170. See also Midland, supra, 6 AEC at 66.

Clearly then, the standard enunciated by the Appeal Board does not fully reflect the practice in the federal courts or Commission precedent. In essence, it fails to take into account whether or not Judge Hill's remarks were derived from an extrajudicial source and, if they were not, whether they were so egregious as to manifest a "pervasive" bias against the intervenor. Furthermore, the Appeal Board's evaluation of Judge Hill's remarks fails to consider either the context in which they were made or the circumstances which gave rise to them.

In our view, the correct standard, developed through substantial judicial experience, is whether a disinterested observer, bearing in mind all pertinent circumstances, would conclude that Judge Hill had formed opinions on the basis of information other than that gleaned from the evidence and observed conduct of the parties in the proceeding or, if no extrajudicial influence is apparent, whether his comments were so egregious as to manifest a "pervasive" personal bias, jeopardizing his ability to preside impartially over the proceeding. This standard was not applied by the Appeal Board.

III.

Judge Hill's Separate Statement Does Not
Evidence Bias Or Prejudice Warranting
Disqualification

When viewed in light of the proper legal standard, Judge Hill's separate statement does not warrant his disqualification from this proceeding. We show below that his remarks provide no indication that he has formed any opinions on a basis other than his perceptions of the evidence and the conduct of the parties during the proceeding, and accordingly, no extrajudicial taint can be ascribed to his statement. We further show that Judge Hill's comments are similar to comments of judges held by courts not to be disqualifying and that this case is not at all similar to those in which a judge has been disqualified based on evidence of pervasive personal bias of judicial origin. We conclude that in the circumstances of this case Judge Hill's remarks constituted acceptable comment on the conduct of a party's representatives and do not evidence bias, let alone the pervasive bias that must be shown to justify disqualification based on purely judicial conduct.

Judge Hill began by describing CCANP's Motion as a "personal and unwarranted attack on [his] professional and moral integrity." Memorandum and Order at 9. This remark merely represents the Judge's reaction to the merit and substance of the Motion itself and implies no extrajudicial influence.^{9/}

^{9/} The Appeal Board observed that by virtue of this remark Judge Hill "laid bare the depth of his resentment respecting the motion and its content" Memorandum at 7. (footnote continued)

To explain the actions that CCANP alleged constitute evidence of bias he described his perception of the context in which he had acted: that CCANP's representatives engaged in a variety of trial tactics he found to be improper; that he had argued to his fellow Board members that the trial tactics of CCANP representatives should not be permitted to unduly delay the hearing or to inject into it irrelevant matters; and that he believed these arguments constituted the behavior to which CCANP objected.

Judge Hill's remarks were apparently intended to show that his arguments to the other Licensing Board members constituted advocacy of reasonable judicial positions on matters to be decided by the Licensing Board and did not manifest personal bias against CCANP. The Appeal Board found that the CCANP motion and affidavits did not show that Judge Hill's conduct during the proceeding evidenced bias; nevertheless the Appeal Board concluded that there was appearance of bias^{10/} in Judge Hill's articulation of his rationale for such conduct. Applicants see no basis for that conclusion.

(footnoted continued)

The remark appears to be neither an irrational nor a particularly extreme reaction to what was indeed an attack on Judge Hill's personal integrity. Indeed the members of the Licensing Board quorum also expressed resentment at CCANP's assertions. Memorandum and Order at 7.

^{10/} As discussed in footnote 5, the same legal standard is applicable to "appearance of bias" and "bias."

The remarks of Judge Hill cited by the Appeal Board in its Memorandum are based on Judge Hill's observations of the evidence and the conduct of CCANP representatives during the hearing. See Memorandum at 7-8. There is no hint of an extrajudicial source for those remarks, nor did the Appeal Board suggest that the remarks were extrajudicial. While it is true that Judge Hill could have ruled on the motion without expressing his rationale in such strong terms, that fact hardly suggests an extrajudicial basis for the remarks.

While such comments, even if erroneous, are not disqualifying (United States v. Orbiz, supra, 366 F.Supp. at 630), in this case they represent a reasonable comment on the course of this proceeding. At the time Judge Hill issued his statement explaining the reasons for his decision not to recuse himself, the proceeding had been underway for about three years, and Judge Hill had observed the conduct of CCANP's representatives for over a year. During that time over 10,000 pages of transcript and 280 exhibits were accumulated. He was a member of the Board that presided over hearing sessions in which CCANP representatives cross-examined about 50 witnesses, including numerous senior officers of Houston Lighting & Power Company and of its contractor, Brown & Root, Inc., as well as witnesses for the NRC Staff. This experience clearly afforded Judge Hill an opportunity to form judgments of the

sort expressed in his statement.^{11/}

Without attempting to provide an exhaustive list, it is not difficult to identify portions of the record reflecting actions by CCANP's representatives that could readily be described in the terms used by Judge Hill. In addition to the recent example cited by Judge Hill, CCANP representatives were admonished by the Board Chairman on numerous other occasions to curtail cross-examination that was lengthy and unproductive;^{12/} it was a routine practice for CCANP representatives to continue to argue after the Board's ruling;^{13/} CCANP charges against Houston Lighting & Power Company, its officers and contractors

^{11/} The fact that Judge Hill has observed the testimony of these witnesses is significant in another respect. The issues here relate to the character and competence of HL&P and evaluation of the character of HL&P's officers and senior personnel must be an important factor in the ultimate decision. It would detract from the decision-making process to remove a judge who has observed those key witnesses and substitute a judge who must rely primarily on a review of the cold record. Although this factor would not be controlling if Judge Hill had demonstrated disqualifying bias, it does mean that he should not lightly be removed from this case.

^{12/} While the bulk of CCANP cross-examination may be viewed as unduly long and unproductive, on a number of occasions the Board Chairman admonished CCANP counsel to stop wasting time on unproductive cross-examination (e.g. Tr. 2030-31, 2321-32, 9838, 9845, 9869, 9892, 9894-95); on several occasions the Board placed time limits on CCANP cross-examination to cut off the waste of time (e.g. Tr. 3988-3989, 3994, 6809, 6818, 9879-80, 9916-17), and the Board expressed concern about the repetitive nature of CCANP questions (e.g. Tr. 9495-98, 9898).

^{13/} E.g. Tr. 1357-58, 1490-91, 2030-31, 2041, 2315, 2358, 2380-82, 3976-77, 4035-39, 5530-32, 5721-22.

have come in a steady stream since the outset of this proceeding,^{14/} and CCANP has at times sought to inject political issues, including CCANP's anti-nuclear views, into this proceeding.^{15/} The

^{14/} At the first prehearing conference Judge Hill attended, CCANP charges were discussed, and the stream of unsubstantiated charges from CCANP has continued throughout. Examples of these charges include "the FBI has found extensive evidence of false documentation of cadweld inspections [at the South Texas Project]" (Tr. 499-505); "a climate of fear exists at the construction site" (Tr. 507-08, 564); project employees "refused to provide information for fear of losing [their] job" (Tr. 509, 565); there have been "extensive, pervasive and willfull violations of 10 CFR 50 [at STP]" (Tr. 511-12); an HL&P Vice President, Mr. J. H. Goldberg, was involved in violations of NRC regulations by his prior employer (Tr. 2339); HL&P's award of a contract to Brown & Root, Inc. involved some sort of conflict of interest (Tr. 3983); HL&P legal representatives attempted to intimidate the Texas Attorney General (Tr. 2626-31); HL&P pressured Intervenor witnesses not to testify (Tr. 4121-22); HL&P's public information director attempted to intimidate a journalist (Tr. 2648); HL&P attempted to keep a union from funding intervenors (Tr. 5219-20); Mr. Richard A. Frazar, then HL&P's Quality Assurance Department Manager, made statements to NRC investigators which were "not credible" (Citizens Concerned About Nuclear Power Motion, to File Additional Contentions . . . dated November 21, 1981 at 28); there is a "serious question about HL&P management's commitment to comply with NRC regulations" (Id.); the credibility of the testimony of an NRC inspector to the effect that HL&P management has good character was subject to question because he had ordered his office sound proofed (Tr. 10,116-17). This is just a sampling of a great variety of endless unsupported charges, many of little or no relevance to the issues, which have been made by CCANP against principals in this case. The charges against Judge Hill and the "supporting" affidavits, which both the Licensing Board and the Appeal Board found insufficient to demonstrate bias, similarly fall in the category of unsupported charges.

^{15/} E.g., Tr. 9137-41 (arguing that the Licensing Board should consider a contention regarding political attitudes in Austin and San Antonio toward the South Texas Project and Houston Lighting & Power Company); Tr. 6742-43 (arguing that decisions on location of hearings would affect (footnote continued)

hearing record thus supplies ample support for Judge Hill's comments; indeed they constitute a rational appraisal of the conduct of CCANP's representatives and of their motives for filing the recusal motion. There can thus be no doubt that Judge Hill's remarks are not of extrajudicial origin.

Since Judge Hill's comments were not of extrajudicial origin they are to be judged under the standard applicable to judicial remarks, i.e. whether they manifest "a pervasive bias and prejudice." Davis v. Bd. of School Comm'rs of Mobile County, supra, 517 F.2d at 1051. Whether or not one agrees with Judge Hill's assessment of the conduct of CCANP's representatives, his remarks clearly fall within the ambit of language found by the courts not to evidence disqualifying bias. There are numerous cases in which the courts have refused to disqualify a judge even though the judge used language which was "intemperate," "ill-advised," or otherwise "not condoned."^{16/}

(footnote continued)

an imminent Austin referendum); Tr. 6442-48 (arguing that hearings should be held in San Antonio because of alleged greater public interest); Tr. 9842-45 (attempted cross-examination on the dangers of nuclear power); and Tr. 787-91 (opening statement of CCANP comparing South Texas Project to Three Mile Island Unit 2 and citing a recent Scientific American article regarding the dispersal of the radioactive plume during a hypothetical nuclear accident).

^{16/} For example, courts have refused to disqualify a trial judge for stating that he would not believe anything the defendant said, United States v. Azhocar, 581 F.2d 735, 739 (9th Cir. 1978), cert. denied, 440 U.S. 907 (1979); for questioning the plaintiff's motives in bringing suit, Johnson v. Trueblood, supra, 629 F.2d at 291; for stating that he was "baited" by counsel, In re IBM, supra, 618 F.2d at 931-32; for stating that the petitioner's conduct was "outrageous" and "'designed to provoke a mistrial or

(footnote continued)

The kind of remarks that demonstrate disqualifying bias are found in Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979). There the trial judge accused the defendant of "'blatant attempt[s] to intimidate witnesses and parties . . .;'" indicated that he would not believe "'anything that anybody from Chrysler [told him] . . .;'" and characterized defendant as "'a bunch of villains . . . interested only in feathering their own nests'" The trial judge also opined that Chrysler had engaged in a "'deliberate and calculated attempt to inflict damage on the plaintiff . . .'" and that it had "'willfully'" and "'obstinately'" attempted "'to defy the Court and to hurt the other parties'" Id. at 155-57. The court also cited other instances of "alleged judicial overbearing," stating that taken alone they would appear proper, "[b]ut when the above cited instances are considered in conjunction with the district court's vilification of appellant the scales are tipped perceptively" Id. at 155 n. 8. In addition the court noted that the judge had used intemperate language in another case. Id. at 156 n. 9.

The distinction between the judge's scathing remarks and overbearing conduct toward Chrysler in Nicodemus and Judge Hill's remarks in the present case is clear. In the former

(footnote continued)
terrorize this jury or the court,'" Mirra v. United States, 255 F.Supp. 570, 583-84 (S.D. N.Y. 1966), aff'd 379 F.2d 782 (2d Cir. 1967); for stating that the defendant was trying to delay trial, United States v. Orbiz, supra, 366 F.Supp. at 630-31.

case, the severity of those remarks, coupled with direct references to the defendant itself and other pervasive conduct, left the court little choice but to conclude that the trial judge could no longer impartially preside over the proceeding. To the contrary, in the instant case Judge Hill's comments were not couched in inflammatory terms, no instances of overbearing or other improper conduct exist, and the statement related only to the conduct of CCANP's representatives at the hearing, not to CCANP or the merits of its position.

A case much more closely analogous to the one at issue, but still representing comments more extreme than those of Judge Hill, is Davis v. Bd. of School Comm'rs of Mobile County, supra, 517 F.2d at 1050 n. 7, where plaintiff's counsel cited as grounds for disqualification the trial judge's accusation that he had engaged in "a not too veiled effort to circumvent this Court's ruling[s]" The court continued that "[s]uch subterfuge borders on the edges of contempt." Id. In addition, in an earlier decision the judge had suggested that counsel had been guilty of "barratry and champerty." Id. at 1049. After determining that the controversy with plaintiff's counsel was not extrajudicial in origin, the court concluded that there had been an insufficient showing to warrant a finding of pervasive bias.^{17/}

^{17/} The Davis decision is important in the present context for two additional reasons. First, the remarks in question, appear to have been embodied in written, judicial orders, as are Judge Hill's comments here. Although many of the (footnote continued)

Although the Appeal Board referred to Judge Hill's remarks as "intemperate" and cast in "extremely pejorative terms," such characterization hardly seems warranted by the actual tone and content of the remarks. In any event, the authorities show that the comments should not be held disqualifying; they were neither so harsh nor unjustified as to reflect a personal animosity toward CCANP. Viewed by the standards applied by courts to the statements of judges, who presumably have received training in legal or judicial expression, Judge Hill's remarks would fall well within the ambit of acceptable comment.^{18/}

(footnote continued)

decisions on point involve oral statements, the fact that the written remarks in Davis were subjected to the same legal standard set forth in the other decisions, casts doubt upon the Appeal Board's unsupported implication that written statements should be scrutinized more carefully than oral comments. Memorandum at 9.

Secondly, in Davis as well as the present case, the Judge's remarks concerned the conduct of the representatives of the litigating party, rather than the party itself. Both the federal statutes and the NRC precedent appear to require or involve a showing of personal bias against a party rather than its counsel. Davis v. Bd. of School Comm'rs of Mobile County, supra; Smith v. Danyo, 441 F.Supp. 171 (M.D. Pa. 1977); Midland, supra. In fact, the Appeal Board's own pronouncement of the applicable legal standard notes that a personal animus against "this intervenor" must be demonstrated. Memorandum at 7. The court in Davis concluded that "an appellate court, in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct which shows bias or prejudice . . . by focusing on a party rather than counsel. . . . Here we have judicial activity toward lawyers without more and the result . . . is that we find no error [in the judge's refusal to disqualify himself]." 517 F.2d at 1052.

^{18/} It could be argued that even greater latitude in expression should be accorded technical members of licensing boards since they are selected for their expertise in a technical field, not their experience in legal draftsmanship.

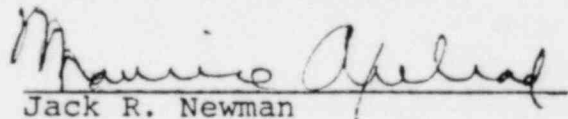
IV.

Conclusion

A careful examination of Judge Hill's remarks reveals that they were neither extrajudicial in origin nor so egregious as to manifest a pervasive personal bias against CCANP. There is no reason to believe that Judge Hill has formed opinions on any basis other than the evidence to date and the observed conduct of the parties to the proceeding.

Furthermore, the Appeal Board's basic premise appears to be that the statements "speak for themselves," Memorandum at 8, and can be evaluated in a vacuum. This approach fails to comport with the practice uniformly followed by the federal courts and specifically adopted by the Commission in LaSalle. A careful review of Judge Hill's remarks in light of all pertinent circumstances mandates a conclusion that his disqualification was unwarranted and that he should be reinstated as a member of the Licensing Board.

Respectfully submitted,



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AND LIGHT COMPANY and CITY OF
AUSTIN, TEXAS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

*82 MAY 20 P4:27

In the Matter of)
)
HOUSTON LIGHTING AND POWER)
COMPANY, ET AL.)
)
(South Texas Project, Units 1)
and 2))

Docket Nos. 50-498 OL
50-499 OL

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicants' Brief In Opposition To The Disqualification Of Judge Ernest E. Hill dated May 20, 1982, have been served on the following individuals and entities by deposit in the United States mail first class, postage prepaid, or by arranging for delivery as indicated by asterisk, on this 20th day of May, 1982.

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