

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

APPLICANTS' BRIEF IN REPLY TO OTHER BRIEFS
REGARDING THE DISQUALIFICATION OF
JUDGE ERNEST E. HILL

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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

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	i
Statement.	1
Argument	4
I. The Circumstances of Judge Hill's Statement Do Not Create an Excep- tion To The Grinnell Rule	4
II. Judge Hill's Statement Was Not Unduly Harsh In The Circumstances.	7
III. It Would Be Inconsistent With Sound Administrative Policy and Basic Considerations Of Fairness For Judge Hill To Be Disqualified.	10
Conclusion	12

TABLE OF CITATIONS

	<u>Page(s)</u>
<u>Judicial Decisions</u>	
<u>Cinderella Career and Finishing Schools, Inc.</u> <u>v. F.T.C.</u> , 425 F.2d 583 (D.C. Cir. 1970)	6
<u>In re International Business Machines Corp.</u> , 618 F.2d 923 (2nd Cir. 1980)	9, 12
<u>In re J. P. Linahan, Inc.</u> , 138 F.2d 650 (2nd Cir. 1943)	11
<u>Nicodemus v. Chrysler Corp.</u> , 596 F.2d 152 (6th Cir. 1979)	2
<u>Texaco, Inc. v. F.T.C.</u> , 336 F.2d 754 (D.C. Cir. 1964)	6
<u>Ubiotica Corp. v. FDA</u> , 427 F.2d 376 (6th Cir. 1970).	8
<u>United States v. Bd. of School Comm'rs</u> , 503 F.2d 68 (7th Cir. 1974)	6
<u>United States v. Conforte</u> , 457 F.Supp. 641 (D. Nev. 1978)	6
<u>United States v. Haldeman</u> , 559 F.2d 31, 134-36 (D.C. Cir. 1976)	6
<u>Administrative Decisions</u>	
<u>Houston Lighting and Power Co. (South Texas Project,</u> <u>Units 1 and 2)</u> , CLI-80-32, 12 NRC 281 (1980)	9
<u>Commonwealth Edison Co. (LaSalle County Nuclear</u> <u>Power Station, Units 1 and 2)</u> CLI-73-8, 6 AEC 1969 (1973)	2, 10
<u>Long Island Lighting Co. (Shoreham Nuclear Power</u> <u>Station Unit No. 1)</u> , 4 AEC 441 (1970)	3
<u>Pacific Gas & Electric Co. (Diablo Canyon Nuclear</u> <u>Power Plant, Units 1 and 2)</u> , CLI-80-9, 11 NRC 436 (1980)	4
<u>Statement of Policy on Conduct of Licensing</u> <u>Proceedings</u> , CLI-81-8, 13 NRC 452, 453 (1981)	7, 8
<u>Toledo Edison Co. et al. (Davis Besse Nuclear</u> <u>Power Station)</u> , 4 AEC 555 (1971)	3

Statutes and Regulations

Page(s)

42 U.S.C. § 2241	2
10 CFR § 1.11	2
10 CFR Part 2, App. A, § V.(d)(5)	7

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Statement

On or about May 21, 1982, Citizens Concerned About Nuclear Power (CCANP), the NRC Staff, Citizens for Equitable Utilities (CEU), Atomic Safety and Licensing Board Panel (ASLB Panel), and Applicants filed briefs regarding the issues designated by the Commission's May 6, 1982, Order^{1/} and the Atomic Safety Licensing Board Panel (ASLB Panel) submitted an amicus curia brief.^{2/} The NRC Staff, the Applicants and the ASLB Panel

^{1/} Respectively, Intervenor Citizens Concerned About Nuclear Power's Initial Brief in Response to Nuclear Regulatory Commission Order of May 6, 1982, dated May 18, 1982 (CCANP Brief); NRC Staff's Brief on Recusal of Judge Hill dated May 21, 1982 (Staff Brief); Citizens for Equitable Utilities Initial Brief Concerning the Disqualification of Judge Hill dated May 21, 1982 (CEU Brief); and Applicants' Brief in Opposition To the Disqualification of Judge Ernest E. Hill dated May 20, 1982 (Applicants' Brief).

^{2/} May 19, 1982, Memorandum for the Commissioners from B. Paul Cotter, Jr., entitled "Houston Lighting And Power Co., ALAB-672," with attached brief (ASLB Panel Brief). CEU (footnote continued)

each took the position that the Appeal Board in ALAB-672 did not apply the appropriate legal standard and that under the standard applied by the federal courts and adopted by the Commission in its LaSalle decision Judge Hill should not be disqualified. The two intervenor groups, CCANP and CEU, both urged affirmance of the decision below.

The briefs filed on behalf of the Applicants, the NRC Staff and the ASLB Panel demonstrated that under the governing legal standards and precedents, Judge Hill's statement does not manifest disqualifying bias or appearance of bias. The intervenors' briefs do not cite any cases inconsistent with that position; CCANP did not cite a single case in which a judge was disqualified, and the only such cases that CEU cited are examples of pervasive bias unlike the case under consideration.^{3/} Accordingly, since Applicants have already addressed

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has objected to the filing of such amicus brief by the ASLB Panel. As stated by Mr. Cotter, the Chief Administrative Judge of the ASLB Panel, in his memorandum the brief was filed pursuant to his responsibilities under 42 U.S.C. § 2241 and 10 CFR § 1.11, and was submitted because of the Panel's vital interest in the "issue of the appropriate standard of conduct for the Licensing Panel members and the appropriate standard for determining whether such members should be removed for improper conduct" In the view of the Applicants, the Commission should welcome the views of the Panel on this important issue and, notwithstanding CEU's accusation, the expression by the Panel of its views on this issue is both appropriate and salutary.

^{3/} In fact, the case CEU represents as closest to this one, Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979), was discussed and distinguished in Applicants' Brief at 18-19.

the relevant legal principles,^{4/} a lengthy reply is not necessary. However, we do consider it appropriate to address two points emphasized in the intervenors' briefs^{5/} and the policy issues expressly referred to or implicit in the NRC Staff and ASLB Panel briefs.

^{4/} In response to CEU's suggestion that the Commission is "treading close to the edge" in employing nuclear experts on its boards (CEU Brief at 4, n. *), the Commission has long ago rejected the notion that involvement in the development of atomic energy or employment at a national laboratory is disqualifying. Toledo Edison Co. et al (Davis Besse Nuclear Power Station), 4 AEC 555 (1971); Long Island Lighting Co. (Shoreham Nuclear Power Station Unit No. 1), 4 AEC 441 (1970). In the latter case the Commission cited the legislative history of Section 191 of the Atomic Energy Act, in which the report of the Joint Committee noted "It is expected that the two technically qualified members will be persons of recognized caliber and stature in the nuclear field." 4 AEC at 442.

^{5/} The failure expressly to address all of the arguments or factual misstatements in the intervenors' briefs does not, of course, constitute any form of agreement or acquiescence, but rather an attempt to avoid unnecessarily burdening the record. Thus, we do not respond to the argument contained in the CCANP Brief (pp. 19-24) that, even if it reverses the Appeal Board, the Commission should disqualify Judge Hill on the basis of CCANP's original motion and supporting affidavit. The Commission's Order of May 6, 1982, obviously did not request that such question be addressed. In any event, each of the members of the Licensing and Appeal Board who considered the matter have determined the argument to be without merit, and Applicants have already addressed it in previous filings.

Argument

I.

The Circumstances Of Judge Hill's
Statement Do Not Create An
Exception To The Grinnell Rule

The intervenors (CCANP Brief at 7-17 and CEU Brief at 4-6) argue that Judge Hill's statement was "gratuitous," did not relate to his "judicial responsibilities" and was "unrelated to the issues" They argue that as a consequence these comments were either "in effect, extrajudicial" (CEU Brief at 5) or that a finding that a comment was "gratuitous" would lead to a finding of pervasive bias under the exception to the Grinnell standard (CCANP Brief at 18). These arguments have no basis in fact nor supporting legal precedent.

CCANP makes a labored argument that Judge Hill's statement was not a part of "his function as a Judge," apparently because it was not limited to CCANP's accusations and was not "required." CCANP Brief at 13-17. Similarly, CEU argues that his statement "did not constitute judicial activity" and "was not necessary to resolve any issue." CEU Brief at 6. Nevertheless, CCANP concedes, as it must, that a challenged board member may explain his action in denying a recusal motion (CCANP Brief at 16), and CEU does not challenge that principle. In this connection, it should be noted that in ALAB-672, the Appeal Board cited with approval Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-9, 11 NRC 436 (1980), in which a challenged Appeal Board member issued an explanation of the reasons why he declined to recuse himself.

ALAB-672, slip op. at 11, n.15. Intervenors, echoing the Appeal Board, nevertheless argue that the statements did not deal with the issues, but were "totally gratuitous" and an "unprovoked attack." CCANP Brief at 14, 16.

As explained in Applicants' Brief at 12-13 and in the ASLB Panel Brief at 13-14, Judge Hill's statement was purely and simply an explanation of why he was not recusing himself. CCANP was claiming that he had manifested bias by his arguments to his fellow board members regarding various evidentiary issues.^{6/} Accordingly, his statement explained that his arguments were based on his judgment regarding the scope of this limited expedited hearing, not any bias against CCANP. Judge Hill reasonably, and we think correctly, believed that he was directly addressing an issue raised by the CCANP motion.

Since Judge Hill was following accepted procedure in issuing an explanation of the reasons for denying the CCANP motion and his statement related directly to an issue raised by the motion, any argument that the statement was not part of a judicial function is untenable.

Even if Judge Hill had made his statement in a context that was not part of his judicial responsibilities, the question of whether the statement manifests a disqualifying bias would still be the same: whether views expressed by the

^{6/} The CCANP motion alleged, inter alia, "vigorous complaints during the numerous off the record conferences held by the judges prior to ruling on a particular motion." Citizens Concerned About Nuclear Power (CCANP) Motion for Judge Ernest Hill to Recuse Himself From Further Participation in this Proceeding (March 9, 1982), at 1.

judge were based on the evidence and conduct of the parties and their counsel or on some extrajudicial basis.^{7/} Although the CCANP Brief addresses Judge Hill's statement at great length in an apparent effort to show that it does not properly characterize CCANP's conduct, there is virtually no suggestion that the statement has any extrajudicial origin (CCANP Brief at 7-12).^{8/} Since the CCANP discussion concerns matters in the record, it is clear that no extrajudicial origin for the statement is urged.

^{7/} Whether the statements were made as part of a judge's responsibilities or in some other context, even a purely private context, the test is still whether the views expressed are based on an extrajudicial source as opposed to observation of the evidence and conduct of all of the parties and their counsel in judicial proceedings. Where the views were based on judicial sources disqualification has been denied, even for statements outside the proceeding. See United States v. Bd. of School Comm'rs, 503 F.2d 68, 80-81 (7th Cir. 1974) (statements of judge in newspaper interview); United States v. Haldeman, 559 F.2d 31, 134-36 (D.C. Cir. 1976) (statements of judge in press interview), United States v. Conforte, 457 F.Supp. 641, 657-58 (D. Nev. 1978) (private conversations and correspondence). Cinderella Career and Finishing Schools, Inc. v. F.T.C., 425 F.2d 583 (D.C. Cir. 1970) and Texaco, Inc. v. F.T.C., 336 F.2d 754 (D.C. Cir. 1964), the cases relied upon by intervenors, are inapposite for the reasons discussed in Applicants' Brief and those of the NRC Staff and the ASLB Panel.

^{8/} The only possible suggestion of extrajudicial origin is at page 17, where CCANP transmogrifies Judge Hill's observation that CCANP's representatives "subverted" the objectives of this expedited proceeding into a manifestation of hostility to CCANP and even to all "anti nuclear groups," and fancies a connection between such inferred hostility and alleged files maintained by Lawrence Livermore National Laboratory. CCANP never submitted any proof that such files exist or of their nature or purpose. More importantly, there is never any hint of a connection between such files and Judge Hill, nor how such files might foster a bias against CCANP. The entire suggestion is yet another example of an unsupported CCANP charge bearing little or no relevance to this proceeding.

II.

Judge Hill's Statement
Was Not Unduly Harsh In
The Circumstances

CCANP argues that even if its representatives were unduly contentious, raised unsupported allegations and conducted long and unproductive cross-examination, Judge Hill's statement that such pattern of activity subverted the objectives of the hearing "reflects an unreasonable mind, a biased mind, a closed mind." CCANP Brief at 11-12.

Obviously CCANP does not appreciate that the licensing boards have a duty to conduct efficient hearings and "to [see] that the process moves along at an expeditious pace, consistent with the demands of fairness." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981). Indeed, boards are generally directed to expedite their proceedings "by limiting unnecessary direct oral testimony and cross-examination"^{9/} and "to prevent argumentative, repetitious or cumulative cross-examination"^{10/} It hardly manifests bias when a trial judge finds that trial tactics which include unnecessary cross-examination, unnecessary argument, unsupported allegations and raising irrelevant issues subvert or make

^{9/} Id. at 457.

^{10/} 10 CFR Part 2, App. A, § V.(d)(5).

futile^{11/} the objectives of an expedited proceeding; rather such findings indicate efforts to implement the Commission's directions in the Rules of Practice and in the Statement of Policy on Conduct of Licensing Proceedings. Supra. Thus, in similar circumstances, the Sixth Circuit held that it did not show bias for the hearing examiner to state that "counsel's conduct had been 'dilatory, recalcitrant, obstructive of orderly process, and contemptuous;' that counsel had deliberately refused to follow the directions of the Chair to the point that an orderly hearing was impossible" (Ubiotica Corp. v. FDA, 427 F.2d 376, 382 (6th Cir. 1970)), and that exclusion of counsel from further oral participation was justified. Id.

In this connection, CCANP makes much of the use of the word "subvert," resorting to a dictionary to interpret it. There was no need, Judge Hill explained exactly what he meant:

the representatives for CCANP have in many instances actively subverted the stated objectives of this expedited proceeding by being unduly contentious with matters having little, if any, bearing on the admitted contentions.

ASLB Memorandum and Order dated April 13, 1982, (Denying CCANP Motion for Judge Ernest Hill to Recuse Himself) at 9-10 (separate statement of Judge Hill). His statement mentions not some general "subversive" activities but trial tactics that frustrated the Board's attempt to comply with the Commission's mandate in CLI-80-32 to hear "a narrow spectrum of issues . . . in an expedited manner" Id.

^{11/} Subvert has been defined "3b: to make invalid or futile" Webster's Third New International Dictionary of the English Language Unabridged, G. & C. Merriam Co., 1967.

CCANP argues that Judge Hill misunderstood why the hearing was expedited.^{12/} CCANP claims that the hearing was to be expedited to benefit CCANP, apparently believing it was therefore CCANP's prerogative to dispense with a speedy trial. CCANP Brief at 9-10. CCANP's argument twists history. An expedited hearing was suggested by the Licensing Board "so that, if corrective action is required, it may be undertaken as early as possible in the construction schedule." ASLB Memorandum (March 10, 1980) at 2. Applicants supported the Licensing Board's suggestion. Applicants' Response to ASLB Memorandum of March 10, 1980 (March 19, 1980). CCANP did not. Its reply emphasized that CCANP "has certainly not expressed a desire for such a hearing." Citizens Concerned About Nuclear Power, Inc. Response to Board Memorandum of March 10, 1980 (March 24, 1980). In denying CCANP's request for a hearing on the Show Cause Order the Commission endorsed the ASLB's suggestion of an early hearing on the quality assurance contentions "because they could prove disqualifying." CLI-80-32, 12 NRC 281 at 291 (1980). The decision to hold an expedited hearing thus was clearly not for CCANP's benefit, but to give Applicants early knowledge of any actions it should take with respect to the Project. CCANP's argument to the

^{12/} Of course an argument that Judge Hill wrongly decided some issue of fact or law, even if true, could not form the basis of a finding of bias. In re International Business Machines Corp., 618 F.2d 923, 934 (2nd Cir. 1980).

contrary is disingenuous.^{13/}

III.

It Would Be Inconsistent With Sound
Administrative Policy and Basic Considerations
Of Fairness For Judge Hill To Be Disqualified

The Staff concludes that under the legal standard used by the courts and adopted by the Commission in LaSalle Judge Hill's statement "is not sufficient as a matter of law to require his recusal." Staff Brief at 19. Although the Staff goes on to note that "[t]he Commission may wish, however, to apply a higher standard than that set as a strict matter in law . . .," Id., it does not suggest that such a higher standard should be adopted, nor indeed how such a standard might be articulated.^{14/}

Applicants agree that the Commission has discretion to set standards of conduct within the limitations of the Administrative Procedure Act. In our view, however, there is no need to adopt

^{13/} In its brief, CCANP also implies that Judge Hill was critical of the NRC Staff in connection with its "discovery" of the Quadrex Report because of the questions and comments he raised concerning Investigation 81-28. CCANP Brief at 3. Such statement wholly distorts Judge Hill's questioning and observations. See Tr. 10,355-64. In view of the nature and scope of the allegations the NRC Staff elected to investigate, a board member could well have expressed skepticism as to the process by which investigations are undertaken. However, notwithstanding CCANP's inferences, none of Judge Hill's questions or remarks addressed in any fashion the Quadrex Report or the subsequent review this Report will be given in this proceeding.

^{14/} The Staff also states that Judge Hill's "statements are extremely unfortunate in terms of the public perception of the hearing process." Staff Brief at 18. Because, as demonstrated above, Judge Hill's statement was justified, we do not believe this assessment is correct. In any (footnote continued)

a new standard for licensing board behavior; Judge Hill's statement is acceptable under any reasonable standard, and disqualification would be unfair to Judge Hill and the parties.

As shown in Applicants' Brief and the discussion above, Judge Hill's statement reflects not bias but appropriate judgments reached during the course of a year long hearing. "If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." In re J. P. Linahan, Inc., 138 F.2d 650, 654 (2nd Cir. 1943). Accordingly, disqualification of Judge Hill would not be justified in this case under any reasonable standard adopted by the Commission.

This proceeding has been underway for several years; the evidentiary hearing began over a year ago; some fifty witnesses have testified, including the President of Houston Lighting & Power Co. and various senior officers, managers and engineers of HL&P and its prior contractor, Brown & Root, Inc.; and the Licensing Board must determine not only the credibility of witnesses but in some cases their very character. A new Board member would not have observed these witnesses and thus would have significantly less basis for deciding the issues. The disqualification of Judge Hill would thus diminish, rather than enhance, the acceptability of the ultimate decision. In somewhat similar circumstances the Second Circuit remarked

More than 70 live witnesses have appeared. Chief Judge Edelstein has undoubtedly made determinations of their credibility based upon their conduct and demeanor, influential factors that are not disclosed in a printed

(footnote continued)
event, any such "public perception" has to be balanced against what would be the public perception of undisciplined hearings, as well as the perils of restricting licensing board members from speaking the truth.

record. Moreover, the trial judge's exposure to the relevant product market has been intense. The difficulties of learning from a cold record the technical issues here involved are enormous. . . . The labors of Sisyphus pale by comparison to those that would be imposed upon a new judge

In re IBM Corp., supra, 618 F.2d at 934.

NRC proceedings must be fair, but fairness must extend to all parties. As noted above, the proceedings to date have involved extensive efforts by the Applicants and the NRC Staff to present their cases before the Licensing Board appointed by the NRC, including the application of valuable management resources by the Applicants. It would be manifestly unfair to Applicants and the NRC Staff if, after forty days of hearing, and, as the ASLB Panel notes, at the eleventh hour of this hearing, CCANP is able to have a judge disqualified without proper basis.

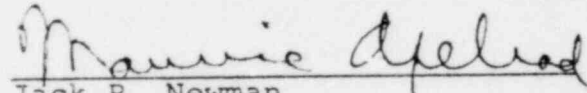
As stated in Applicants' Petition for Review of Appeal Board's Order of April 15, 1982, disqualification of Judge Hill would unfairly and unjustly remove a distinguished technical member of the Board from service for the Commission. Such action cannot fail to discourage men of similar training and ability from making their talents available as technical members of licensing boards. The concern the ASLB Panel feels for this issue is evident in its brief.

Conclusion

Judge Hill's statement is a rational explanation of his reasons for not recusing himself; it is based on his observation of

the proceeding, and not extrajudicial matters. Reversal of ALAB-672 would further the goal of fairness and proper conduct of licensing proceedings. Accordingly, the Commission should reverse ALAB-672 and direct that Judge Hill not be disqualified.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of Applicants' Brief in Reply to Other Briefs Regarding the Disqualification of Judge Ernest E. Hill dated June 1, 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 1st day of June 1982.

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