UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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' Petition for Review of Appeal Board's Order of April 15, 1982

Pursuant to 10 CFR § 2.786(b), Houston Lighting & Power Company, et. al. (Applicants) petition for Commission review of the Appeal Board's Order of April 15, 1982, which directed that "another member of the Licensing Board Panel should be now designated to replace Judge Hill." (Order, p. 2.) The Appeal Board has not yet written an opinion supporting the Order. Nevertheless, as is demonstrated below, the Order appears to be inconsistent with a significant body of relevant judicial authority, and, in any event, raises important questions of law and public policy which require Commission review. That review is also desirable because of the disruptive impact of the Order upon the completion of a proceeding which the Commission has directed to be conducted on an expedited basis.

Action Sought To Be Reviewed

On March 9, 1982, Citizens Concerned About Nuclear Power (CCANP), an intervenor in this operating license proceeding,

moved that Judge Ernest E. Hill, a member of the presiding Atomic Safety and Licensing Board, recuse himself from further participation in the proceeding.

In essence, CCANP asserted two bases for the requested disqualification of Judge Hill. First, that an "inherent bias" was created by Judge Hill's employment at Lawrence Livermore National Laboratory, which CCANP described as "an institution which is part of the nuclear industry and which is known to keep intelligence files on nuclear critics." (Motion, p. 1.) Second, CCANP maintained that Judge Hill lacked impartiality because he allegedly has consistently and erroneously ruled against it on various matters and, in addition, has attempted to convince other members of the Board to do likewise.

Both the Applicants and the NRC Staff opposed the motion. The other intervenor in the proceeding, Citizens for Equitable Utilities, which was represented by counsel, did not respond to the motion. Judge Hill declined to recuse himself, and in a Memorandum and Order, dated April 13, 1982, the other two Board members denied the motion, holding it "totally to lack merit." (Memorandum and Order, p. 2.) In a "separate statement" (attached to the Memorandum and Order as pp. 9-12) Judge Hill subscribed "to the reasons set forth . . ." by the other Board members for denying the motion and provided "further comment on what I consider to be a personal and unwarranted attack on my professional and moral integrity." (Memorandum and Order, p. 9.)

The Memorandum and Order and Judge Hill's separate statement were referred to the Appeal Board on April 13. In its Order, the Appeal Board agreed that "Essentially for the reasons stated by the Licensing Board quorum, we do not believe that of themselves the motion and supporting affidavits provide sufficient cause for Judge Hill's recusal or disqualification." (p. 2). It went on to state, however, that

> Several of the comments contained in his separate statement give rise to serious doubt respecting Judge Hill's present ability to judge CCANP and its assertions in this proceeding dispassionately. The appearance of total objectivity being as important as the reality, we are thus compelled to the conclusion that another member of the Licensing Board Panel should be now designated to replace Judge Hill.
>
> Because we understand that the next hearing session is scheduled to commence next Tuesday, April 20, we are announcing the result of our review at this time. A full opinion will issue at a later date.

Why Matter Was Not Raised
Before the Appeal Board

As is apparent from the foregoing, each member of the Licensing Board concluded that CCANP's disqualification motion was lacking in merit; and this conclusion was unanimously concurred in by the Appeal Board. Its conclusion that Judge Hill should be removed from the Licensing Board is therefore based upon "several of the comments" contained in his Separate Statement. The Appeal Board did not, prior to issuing its Order, identify its concerns or give Judge Hill, the Licensing Board or the parties an opportunity to address the

question whether those comments were disqualifying. Clearly, therefore, this petition for review does not rely upon matters that could have been but were not raised before the Appeal Board. Alternatively, the Order which is the subject of this appeal is based upon a matter raised sua sponte by the Appeal Board (no party having raised it) and therefore is to be treated as having "been raised before the Appeal Board for the purpose of this section . . . ." (10 CFR § 2.786(b)(4)(iii).)

Why the Appeal Board's Action Appears To Be Erroneous

The Licensing Board referred its Memorandum and Order to the Appeal Board in accordance with 10 CFR § 2.704(c), which provides that, when a motion to disqualify a board member is denied, the motion is to be referred to the Appeal Board, "which will determine the sufficiency of the grounds alleged." In this instance, the Appeal Board specifically found that the motion and supporting affidavits did not provide sufficient cause for disqualification. It based its order upon its judgment about matters which were not among "the grounds alleged." It therefore appears that the Appeal Board either exceeded its authority under the regulations or exercised some general supervisory authority over licensing boards in addition to that clearly articulated in the regulations. Consequently, the situation calls for either corrective or clarifying action by the Commission.

However, even if the Appeal Board exercised authority delegated to it, its Order warrants careful review by the

Commission. The Order appears to apply to a non-lawyer member of a licensing board a standard of expression that goes far beyond that to which the federal courts hold judges -- whether the test is actual bias or the appearance of bias -- or which the Commission has to date held licensing board members.

In the absence of the Appeal Board's opinion, it is difficult to be certain as to which comments of Judge Hill formed the basis for the Board's judgment and which precise legal principles it applied. However, to the extent tnat all of Judge Hill's comments, which generally have support in the record, were made as part of his ruling on a motion and were based on his observation of the conduct of a party, it is questionable whether they can serve as an appropriate basis for disqualification.

In the federal courts, it is a firmly-established principle that disqualification of a judge for the appearance of impartiality is appropriate only if the judge exhibits bias which is "extrajudicial" in nature. It cannot be a result of conduct or evidence observed by the judge during the proceeding. See, e.g., Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980) cert. den. 450 U.S. 999 (1981); In re International Business Machines Corp., 618 F.2d 923, 927-29 (2d Cir. 1980); Molinaro v. Watkins-Johnson CEI Division, 359 F.Supp. 474, 476 (D. Md. 1973). As the United States Supreme Court itself has stated:

> 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.

United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

Thus the fact that a judge has ruled against a party is not sufficient grounds for disqualification, even though the ruling may have been erroneous and even though the ruling may have been one in a series of rulings adverse to a party. See Berger v. United States, 255 U.S. 22, 31 (1921); Phillips v. Joint Legislative Committee on Performance and Expenditure Review, 637 F.2d 1014, 1020 (5th Cir. 1981) (appeal pending); International Business Machine Corp., supra, 618 F.2d at 929-31. Similarly, a judge's expression of opinions and statements regarding the conduct of a party or his attorney during a proceeding is also an inadequate basis for disqualification. As one court has succinctly stated:

> Any 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 expression of such opinions, however vigorous, are not the personal "bias and prejudice" required to disqualify a judge under the statute.

Mirra v. United States, 379 F.2d 782, 787-88 (2d Cir. 1967).

Consequently the courts have, justifiably, displayed a "reticence" about finding the existence of personal prejudice based solely upon the statements of a judge. International Business Machine Corp., supra, 618 F.2d at 928 n.6. In fact, 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."[1/]

1/ 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,
(Footnote continued on page 7)

Courts have taken the position that a trial judge is "only human" and may make inappropriate statements during a long and contentious proceeding; "[s]uch isolated instances are undoubtedly endemic to a trial of this dimension, and do not provide any basis for finding personal prejudice . . ." International Business Machine Corp., supra, 618 F.2d at 931-32. The AEC/NRC precedents are consistent with those of the courts.2/

What the instant proceeding involves is a non-lawyer seeking to defend his personal integrity and actions, without the benefit of legal assistance, against an attack upon his personal integrity. An experienced judge might have used more circumspect language, although the precedents indicate that judges have frequently used far stronger language without disqualification. In sum, the comments contained in Judge Hill's statement clearly were not extrajudicial; they related solely to judgments he made in the course of a long hearing. They did not, on the basis of what appears to be pertinent precedents, indicate disqualifying personal bias or even the appearance thereof.

1/ (Footnote continued from page 6)
739 (9th Cir. 1978); for questioning the plaintiff's motives in bringing suit, Johnson, supra, 629 F.2d at 291; for stating that he was "baited" by counsel, International Business Machine Corp., supra, 618 F.2d at 931-32; and for stating that the petitioner's conduct was "outrageous" and "designed to provoke a mistrial or 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).

2/ See Wisconsin Power Co. (Point Beach Nuclear Plant, Unit No. 2), 4 AEC 940 (1972); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65, 66 (1973); Commonwealth Edison Co. (La Salle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169 (1973); Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1 (1980).

Why Commission Review Should Be Exercised

The Appeal Board's Order should be reviewed by the Commission for two reasons. First, the Appeal Board has suddenly ordered a distinguished technical member of the Board dismissed 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. Whether or not the Commission ultimately finds the Appeal Board's action to be justified, that action should not be permitted to stand without prompt and careful review by the Commission and its determination of the applicable standard.

Second, for the past year the three-member Licensing Board panel has heard testimony focusing on the issues arising from the Commission's decision directing the Board to hear on an expedited basis matters relating to whether HL&P has the requisite character and competence to be granted an operating license. CLI-80-32, 12 NRC 281 (1980). Central to those issues are the integrity and commitment to quality of the principal officers of HL&P, as well as numerous other officials and employees of the company and its contractors, who have testified in a proceeding which is -- we estimate -- 90% complete. It is therefore particularly important that the Commission focus upon the standard to be applied at a later stage of a proceeding where disqualification would deprive the Commission, the other board members and the parties of the judgment of a Board member who has had personal exposure to the parties and their witnesses.

For those reasons the Commission should undertake immediate review of the Appeal Board's Order of April 15, 1982.

Respectfully submitted,

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