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motions. Because they raise essentially the same issues from the different vantage points of the three intervenors, NECNP urges the Commission to consider them together.

History of the Proceeding

On November 23, 1983, NECNP filed a Motion for Disqualification of Judge Hoyt.¹ The motion charged that through improper and hostile conduct toward NECNP and other intervenors and representatives, Judge Hoyt had created an appearance of bias that pervaded the entire licensing proceeding and threatened NECNP's ability to participate effectively in the case. NECNP cited inter alia, the following instances of improper conduct by Judge Hoyt:

--Judge Hoyt blocked and manipulated the record by refusing to allow counsel for intervenors or local representatives to state their objections and arguments or to place relevant factual information on the record; by intimidating local representatives from raising certain relevant issues and forbidding them to bring them up during the hearing; by ordering the court reporter not to record certain statements; and by issuing a post hoc order stating that an event had occurred during a hearing session that had not occurred at all. NECNP Disqualification Motion at 8 - 17.

--Judge Hoyt held an unrecorded ex parte telephone conference with the Chairman of the Rye, New Hampshire Board of Selectmen in an apparent attempt to persuade Rye to dismiss Mr. Guy Chichester as its representative to the Seabrook proceeding. The Town of Rye's subsequent apology and withdrawal of its recusal motion creates the impression that Judge Hoyt successfully intimidated the town through her improper ex parte contact. Later, Judge Hoyt issued a written order incorrectly stating that she had dismissed Mr. Chichester from the proceeding on a date that preceded the telephone conference with Rye. The order created the false impression that Judge Hoyt had not illegally

¹ NECNP subsequently filed a corrected copy of the motion on November 28, 1983.

circumvented Mr. Chichester, Rye's official representative, by contacting the selectman. NECNP Disqualification Motion at 17 - 19.

--On August 31, 1983, the Licensing Board conducted a meeting for the purported purpose of gathering emergency planning information from the Commonwealth of Massachusetts. Based on the language of the Board's announcement of the meeting and assurances from the Board's law clerk that no matters substantively affecting NECNP would be discussed, NECNP did not attend the meeting. Inconsistent with the terms of the Board's announcement, Judge Hoyt conducted a lengthy discussion of the timing of the emergency planning litigation, and entertained arguments from Applicants' counsel as to how the times for filing contentions and discovery could be substantially reduced. Judge Hoyt announced that she had determined to cut the periods at least in half unless counsel could give her some reason that day. Because Judge Hoyt had stated her predetermination to cut the litigation schedule drastically, the prejudice incurred by the ex parte discussion was not cured by Judge Hoyt's subsequent offer to entertain written briefs on the issue. During the meeting, Judge Hoyt also held an in chambers discussion, from which non-lawyer representatives to the proceeding were excluded. NECNP Disqualification Motion at 19 - 22.

Judge Hoyt summarily denied NECNP's motion on the ground that it reiterated the claims of two other disqualification motions by the Seacoast Anti-Pollution League and the Commonwealth of Massachusetts, which she had also denied. Upon referral, the Appeal Board affirmed Judge Hoyt's ruling. The Appeal Board, which had also affirmed Judge Hoyt's rejection of the motions by SAPL and the Commonwealth, ruled that NECNP had not raised any new factual issues that would change its ruling. Moreover, the Appeal Board found that NECNP's motion was untimely filed, since it was submitted almost three months after the hearing that gave rise to the claim of bias.

NECNP moved the Appeal Board to reconsider its decision on December 13, 1983. NECNP pointed out that it had raised some factual issues that were different from those raised by SAPL or the Commonwealth, and that therefore the Appeal Board could not dismiss NECNP's motion without considering them. NECNP also argued that since it had filed the motion well before any further hearings would continue, the motion would not affect the conduct of the proceeding substantially, and therefore was timely. The Appeal Board denied the motion for reconsideration.

Appeal Board Error

NECNP seeks the reversal of the Appeal Board's decision on an important question of law, i.e., whether Judge Hoyt's conduct in the Seabrook licensing proceeding creates a sufficient appearance of bias to warrant her removal from the Seabrook Licensing Board. The Appeal Board incorrectly ruled that since Judge Hoyt's improper conduct occurred during the course of the Seabrook proceeding and was not "extrajudicial" in nature, it could not constitute grounds for disqualification. ALAB-751 at 3. In so ruling, the Appeal Board relied on the Commission's decision in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363 (1982). In South Texas, the Commission applied a judicial gloss to a federal disqualification statute, finding

that disqualification must ordinarily be based on extrajudicial conduct. Neither the Administrative Procedure Act nor 28 U.S.C. § 455(a), the disqualification standard for federal judges, contains any such restrictions.² As the First Circuit has recognized, § 455(a)

permits disqualification of judges even if alleged prejudice is a result of judicially acquired information, in contradistinction to the prior law that required a judge to hear a case unless he had developed a preconception by means of extrajudicial sources.

United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978) Thus, numerous courts have disqualified judges for courtroom conduct without regard to whether or not the conduct was "extrajudicial." See, for example, the following cases in which judges were disqualified for courtroom remarks: Webbe v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977); Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980); and U.S. v. Holland, 655 F.2d 44 (5th Cir. 1981)

² Under the Administrative Procedure Act, 5 U.S.C. § 556(b), an administrative law judge may be recused

On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee...

Under 28 U.S.C. § 455(a),

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The Appeal Board also erred in refusing to find that Judge Hoyt's conduct did not meet the exception to the South Texas rule for "judicial conduct demonstrating such pervasive bias and prejudice as would constitute prejudice against a party." 15 NRC at 1366. Without discussing any of the specific factual allegations of biased conduct, the Appeal Board merely stated that the incidents cited by NECNP do not demonstrate pervasive bias. ALAB-751 at 3. To the contrary, the record shows repeated illegal and improper actions by Judge Hoyt toward intervenors and local representatives, some of them serious enough by themselves to warrant recusal. The improper conduct ranged from hostile and intemperate remarks to an illegal ex parte contact that not only excluded other parties, but the representative of the party contacted. Judge Hoyt directed some sort of improper conduct toward every single intervenor and local representative present at the August hearings. And each intervenor and local representative was affected by the general atmosphere of intimidation and hostility engendered by Judge Hoyt.

Finally, NECNP seeks reversal of the Appeal Board's ruling that its disqualification motion was not timely filed. The Appeal Board ruled that NECNP should have filed its recusal motion "promptly" after the alleged improper conduct occurred. ALAB-757 at 8. As the Third Circuit explained in Smith v. Danyo, 585 F.2d 83, 86 (3rd

Cir. 1978), however,

[E]specially where the circumstances giving rise to the charge of bias occur or are discovered after the case has commenced, timeliness should be measured not in some absolute and arbitrary manner from the date of discovery, but with respect to the future stages of the case.

NECNP filed its disqualification motion as quickly as possible. The motion was filed before the final pleading deadline for proposed findings of fact and conclusions of law concerning issues raised in the August hearings, and thus did not impinge on the Board's decisionmaking process. Because offsite emergency plans remain incomplete, the next phase of hearings will not take place until late spring at the earliest.

Moreover, NECNP did not use the interim period between the hearing and the filing of the recusal motion to attempt to obtain favorable rulings from the Board on substantive issues. During the time between the August hearings and the filing of its recusal motion, NECNP approached the Board only to object to the Board's conduct of August 31; to raise minor matters; and to comply with strict deadlines for emergency planning filings and proposed findings in order to continue participating in the case. Thus, NECNP's motion did not seriously affect the timing of the Seabrook proceeding, nor did NECNP use the interim time to attempt to obtain favorable rulings from the Board while waiting to file a recusal motion.

Reasons for Commission Review

NECNP and other intervenors have raised serious instances

of illegal and improper conduct by Judge Hoyt. The Appeal Board addressed these claims only in generalities, providing a specific discussion in reference to only one incident.

ALAB-757 at 3-7. NECNP is entitled to a full articulation of the Commission's standard for pervasive bias, as well as an explanation of how that standard applies to this egregious set of facts.

Moreover, the circumstances of the present case illustrate the need for the Commission to reexamine its ruling in South Texas. Each instance of Judge Hoyt's improper and illegal conduct occurred during the proceeding. As improper and irregular as that conduct was, the Appeal Board refused to consider whether it created the appearance of bias. Hence, as a result of the Commission's narrow ruling in South Texas, the legitimacy of the proceeding itself served as a mantle to shield highly improper conduct from question.

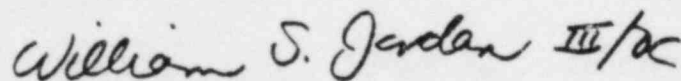
Finally, the disqualification motions now before the Commission raise fundamental questions about the Commission's policy in guaranteeing the public a fair and impartial hearing on the issuance of an operating license. The courts have long recognized that maintaining high standards of judicial conduct is especially important in administrative proceedings, "where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed." National Labor Relations Board v. Phelps, 136 F.2d 562 (5th Cir. 1943)

Commissioner Asselstine noted in his dissent from the South Texas decision, meaningful public participation in the adjudicatory process is "a vital ingredient in the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have been entrusted to us." 15 NRC at 1374, quoting Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 NRC 1, 2 (1975)

Regardless of Judge Hoyt's motivation, her conduct has created an appearance of partiality that has deeply shaken the public confidence in the fairness of the Seabrook licensing proceeding. The Appeal Board has addressed only in the most general terms the lengthy set of serious allegations by the intervenors who have moved for disqualification. As a matter of policy, the Commission should address these instances specifically, and provide the public with some assurance of its commitment to maintaining the appearance of fairness in the Seabrook licensing case.

. Respectfully submitted,


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January 9, 1984

CERTIFICATE OF SERVICE

I certify that on January 9, 1984, copies of NEW ENGLAND
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