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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )  
 )  
THE REGENTS OF THE UNIVERSITY )  
OF CALIFORNIA )  
 )  
(UCLA Research Reactor) )  
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Docket No. 50-142  
(Proposed Renewal  
of Facility License)



MOTION FOR DISQUALIFICATION

OF

COMMISSIONER THOMAS ROBERTS

Committee to Bridge the Gap  
1637 Butler Avenue  
Los Angeles, CA 90025  
(213) 478-0829

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I. THE MOTION

THE COMMITTEE TO BRIDGE THE GAP, Intervenor in the license renewal proceedings for the UCLA nuclear reactor, hereby moves the Nuclear Regulatory Commission ("Commission") for the disqualification of Commissioner Thomas Roberts from participation in any decisions regarding the contested application of the Regents of the University of California ("Applicant").

The Committee to Bridge the Gap ("CBG" or "Intervenor") contends that Commissioner Roberts must be recused from any decision-making role in any aspect of the UCLA reactor case because of his activities in violation of ex parte rules, 10 CFR 2.780 and 5 USC 557(d), and separation of functions rules, 10 CFR 2.719 and 5 USC 554(d). Furthermore, CBG contends that these violations evidence such a substantial bias in favor of two of the parties in the contested proceeding, Applicant and Staff, and against the remaining party, Intervenor, that the taint of partiality can only be removed by recusal.

CBG hereby alleges that Commissioner Roberts, his legal assistant Jessica Laverty, and an unidentified additional assistant violated ex parte rules in four (4) meetings held with representatives of the Applicant on January 26, 1982, at the Applicant's facility in Los Angeles, California, and that at each of these ex parte meetings, matters in controversy in the UCLA reactor proceeding were discussed. CBG further alleges that Ms. Laverty's current role as legal advisor to Commissioner Roberts violates separation of functions rules because she previously represented one of the parties in the contested proceeding when she served as Counsel for NRC Staff in the UCLA reactor relicensing matter.

The four ex parte meetings consist of:

1. an off-the-record, closed-door meeting with (a) Russell O'Neill, Dean of the UCLA School of Engineering and Applied Sciences, the official primarily responsible for the Application now pending before the NRC, (b) William Cormier, Counsel for the Applicant in the reactor relicensing proceeding, and (c) Thomas Tugend, Applicant's public information officer. The meeting took place in Dean O'Neill's private office at UCLA; Intervenor and the press were excluded.
2. an off-the-record meeting with UCLA Reactor Director Ivan Catton and other Nuclear Energy Lab employees, a meeting from which Intervenor and the public were likewise excluded.
3. a presentation regarding the contested reactor by Reactor Director Catton and Senior Reactor Operator Charles Ashbaugh III, for which Intervenor was present but not permitted to make any statement or present any counter information.
4. a presentation by Applicant, from which Intervenor was excluded, regarding security precautions at the facility, a matter which is directly in contest in the proceedings. Intervenor's request to make a brief presentation of its concerns was also refused by the Commissioner.

Furthermore, CBG hereby alleges that Commissioner Roberts and his staff have violated 10 CFR 2.780(c) by failing to file the required reports detailing the contents of the ex parte communications which took place on January 26. Cognizant of the busy schedule of the Commissioner, CBG has provided the Commissioner and his staff ample time to file said

reports before bringing the matter to the attention of the full Commission, but as no such reports have as yet been filed, CBG has no alternative but to request relief from the Commission.

CBG further moves that should Commissioner Roberts decline to recuse himself, CBG be given discovery rights to further develop the facts as to these ex parte and separation of functions matters and the alleged bias. Furthermore, as Commissioner Roberts, his staff, and the Applicant have failed to file reports detailing the ex parte meetings or related matters, CBG respectfully requests the right to respond to responses filed to this motion.

## II. BACKGROUND

### A. Licensing Proceeding and Related History

On August 21, 1979, CBG informed NRC Region V of what CBG believed were significant violations of NRC regulations taking place at the UCLA reactor. These violations involved allegedly excessive emissions of Argon-41 from the reactor exhaust stack, placement of that stack within a few feet of a downwind air-inlet for a nearby building, and lack of occupancy restrictions in the area surrounding the exhaust stack. CBG requested enforcement action be taken.

On September 10, 1979, CBG wrote Region V, renewing its request for an unannounced inspection and appropriate enforcement. The request was renewed thereafter several times by phone, whereupon on September 27-28, 1979, an unannounced inspection took place, whereafter the inspector indicated to CBG that no enforcement action was anticipated.

On October 3, 1979, CBG published a report ("The UCLA Reactor: Is It Safe"<sup>which</sup>) detailed the alleged violations. Simultaneously, CBG wrote to Joseph Hendrie, then Chairman of the Commission, requesting the Commission take action to convene public hearings on the proposed relicensing of the UCLA reactor, grant CBG intervenor status in those hearings, and temporarily shut down the reactor in question until those hearings resolved certain matters related to the Argon-41 emissions.

On February 28, 1980, the Regents of the University of California applied to the Commission for renewal of its license to operate the UCLA reactor. On April 25, 1980, the Commission published in the Federal Register a notice of the proposed renewal of Facility License No. R-71, which would extend its expiration date to March 30, 2000.

On May 22, 1980, CBG filed a timely Petition for Leave to Intervene. In addition to the Argon-41 matter, the Petition outlined an array of other concerns about the proposed NRC action that it wished to litigate. These concerns, developed through extensive research into the reactor's operation, conducted since becoming aware of the Argon-41 matter, included matters related to reliability and adequacy of key equipment, difficulty in obtaining spare parts because the original manufacturer (AMF) was no longer in the reactor business, adequacy of monitoring, minimal educational and research use and excessive commercial use of the reactor, lack of containment structure, and a number of others.

On July 9 and 10, 1980, NRC technical and legal staff came to Los Angeles to meet with CBG and to conduct a site tour of the UCLA reactor as part of their investigation into UCLA's Application and the concerns raised in CBG's Petition. Among those attending was Jessica Laverty, then Counsel for NRC Staff assigned to the UCLA matter, now legal advisor to Commissioner Roberts. See Schnelker affidavit, attached.

On July 10, 1980, an Atomic Safety and Licensing Board was established to preside in the proceeding. On August 25, 1980, pursuant to Board Order, CBG filed its Supplemental Contentions, detailing at length the nature of and bases for the contentions it wished to litigate in the proceeding.

On September 16, 1980, Jessica Laverty, as Counsel for NRC Staff, filed "NRC Staff's Position on Contentions of Committee to Bridge the Gap," in which Ms. Laverty supported admission of certain contentions and opposed admission of a number of others. See Exhibit B, attached.

On September 25, 1980, the ASLB convened a prehearing conference in Los Angeles at which CBG was granted Intervenor status, a hearing ordered, four contentions admitted, and the parties directed to attempt to stipulate agreement on the remaining contentions. Jessica Lavery appeared at the proceeding as "lead counsel for the NRC staff in this UCLA Research Reactor operating license renewal proceeding." TR. at p.3, attached as Exhibit C. See also ASLB Order Subsequent to the Prehearing Conference, dated October 2, 1980 (unpublished).

For the next two months extensive negotiations were conducted between Applicant, Intervenor, and Staff, with Ms. Lavery representing Staff, as to language and admissability of contentions. Ms. Lavery drew up the stipulation and signed it on behalf of Staff. See Exhibit D. Staff's behavior in both drawing up the Stipulation and complying with it was a matter of considerable controversy and is likely to be among the matters appealed to the Commission, when ripe for such appeal. See February 4, 1981, Prehearing Conference Transcript at 81-93; also Hirsch affidavit, attached. On November 28, 1980, Ms. Lavery withdrew as Counsel for Staff in the UCLA matter and was replaced by Colleen Woodhead. On March 10, 1981, the Board ruled on the admissability of contentions not previously admitted.

The contentions admitted into the proceeding cover a wide range of hotly contested issues. A copy of the contentions is included as an attachment.

Among the contested matters are:

- Contention I      allegations of material false statements by applicant
- Contention II     reactor used primarily for commercial activity (diamond coloration and mining ore assaying) rather than education and research as required by license
- Contention III    failure to demonstrate adequate managerial and administrative controls (e.g. operation of reactor by unlicensed operators, including junior high school students)
- Contention IV    consistent violations of NRC regulations
- Contention V      too much excess reactivity--i.e., sufficient to cause an SL-1/Borax/Spert-type destructive power excursion
- Contention VI     excessive radiation emissions, inadequate monitoring
- Contention VII    persistent pattern of unintentional scrams, abnormal occurrences, and accidents evidencing a pattern of operational unreliability
- Contention VIII   Applicant's safety analysis indicates an unacceptably high 1800 Rem thyroid dose to members of the public in case of accident
- Contention IX     failure to adequately maintain equipment and calibrate instruments
- Contention X      necessity of Staff preparing an EIS because significant potential impact on the environment
- Contention XII    inadequate or non-existent safety features (e.g. no containment structure, HEPA filters, emergency cooling system, radioactivity holdup tanks; problems with control blades and fuel plates)
- Contention XIII   excessive quantity and enrichment of SNM, creating serious, unnecessary threat of diversion or theft for atomic weapons construction
- Contention XIV    failure to analyze problems common to similar research reactors
- Contention XV     adverse siting characteristics (e.g. thousands of people within 100 feet, tens of thousands within  $\frac{1}{2}$  mile)
- Contention XVI    reactor too old (vendor no longer in the business, parts unreliable and difficult to repair and replace)
- Contention XVII   seismic vulnerability
- Contention XVIII  lack of necessary financial resources, leading to deferral of necessary expenditures for reactor safety and maintenance



Contention XIX failure to adequately analyze maximum credible accident  
Contention XX inadequate security precautions to protect against theft of bomb-grade uranium or sabotage  
Contention XXI Emergency Response Plan insufficient

B. THE EX PARTE MEETINGS OF JANUARY 26, 1982

CBG alleges that four ex parte meetings occurred on January 26 between Commissioner Roberts and members of his staff and counsel for and officials of the Applicant. The meetings all took place at the Applicant's facility in Los Angeles, California. The four ex parte meetings are detailed below and in the attachments.

1. The Ex Parte Meeting with Applicant's Attorney, Ranking Official, and Public Information Officer.

The meeting took place in the private office of Russell O'Neill,<sup>1/</sup> Dean of the UCLA School of Engineering and Applied Science, in the same building as the UCLA reactor (the Nuclear Energy Laboratory is a program of the School of Engineering.) In addition to Dean O'Neill, present for the meeting were Applicant's Attorney, William Cormier,<sup>2/</sup> and Applicant's public information officer, Thomas Tugend.<sup>3/</sup>

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<sup>1/</sup> Basiago affidavit at pg. 1

<sup>2/</sup> See Notice of Appearance filed by Mr. Cormier in the UCLA reactor relicensing proceeding, attached as Exhibit E.

<sup>3/</sup> Basiago affidavit at pg. 1-2

Dean O'Neill has primary responsibility on behalf of the Applicant for the relicensing application now pending before the NRC. Indeed, the Application was submitted in his name and over his signature.<sup>4/</sup>

Also present for the meeting were Commissioner Roberts, his legal assistant Jessica Laverty, and an unidentified male assistant.<sup>5/</sup>

The meeting lasted at least twenty-five minutes, and probably as much as forty minutes--despite initial denials by counsel for Applicant that the meeting even took place and subsequent assertions, after admission the meeting did occur, that it lasted no more than ten minutes.<sup>6/</sup>

Intervenor's representatives were neither informed of the meeting nor permitted to participate; in fact, Commissioner Roberts' legal assistant, Ms. Laverty, had directed Intervenor's representatives to appear at another location, where CBG's representatives were left waiting nearly an hour while Ms. Laverty, Commissioner Roberts, and the others were conducting what turned out to be an ex parte meeting five floors above in Dean O'Neill's office.<sup>7/</sup> Likewise, Applicant's counsel, in addition to subsequently denying both the existence and extent of the meeting in Dean O'Neill's office, knew Intervenor's representatives were waiting at the appointed location and time (the 2nd floor entrance to the Nuclear Energy Lab, for a tour that was to begin at 9:30 a.m.), and yet concealed the existence of the meeting occurring upstairs in Dean O'Neill's 7th floor office.<sup>8/</sup> While Intervenor's representatives waited for the tour to begin downstairs, as Ms. Laverty had previously informed CBG, Ms. Laverty, Mr. Cormier, Commissioner Roberts, and Dean O'Neill were meeting ex parte upstairs.

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<sup>4/</sup> See Attachment F

<sup>5/</sup> Basiago affidavit; confirmed in Schnelker affidavit; see also Hirsch affidavit, para 5-9.

<sup>6/</sup> Hirsch affidavit, para 9; Thompson affidavit, para 5; Basiago affidavit para 7

<sup>7/</sup> Hirsch affidavit, para 2-4

<sup>8/</sup> Thompson affidavit, para 2; Hirsch affidavit, para 5

As Intervenor was not permitted to attend the meeting (the existence even of which was initially denied by counsel for Applicant and refused to be confirmed by counsel for Commissioner Roberts<sup>9/</sup>), and since neither Commissioner Roberts nor his staff have filed the reports required by 10 CFR 2.780 (c), and since Applicant has filed no report detailing the contents of the meeting, and since no transcript of the meeting has been made available to CEG, Intervenor has no way of knowing precisely what matters were discussed in Dean O'Neill's office during the 25-40 minutes while Commissioner Roberts and his party met behind closed doors with the attorney representing the Applicant in this matter before the NRC and the university official responsible for the university's Application for license. At least two requests by the press to be present were refused, although one reporter and a cameraman waited outside the door to Dean O'Neill's office while the closed-door, off-the-record meeting was occurring.<sup>10/</sup> Commissioner Roberts repeatedly refused to speak to the press during the visit, so full details of the meeting have to date not been made public.<sup>11/</sup>

However, some details of the meeting's contents have been revealed. These indicate that during the lengthy meeting, at least two matters hotly contested in the proceedings were discussed. The first deals with trends in enrollment in educational programs of the School of Engineering; the second, which CEG has contended is interrelated, dealt with the financial difficulties faced by the Applicant. Both matters, as shall be shown below, relate directly to contentions admitted in the proceeding.

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<sup>9/</sup> affidavit of Thompson at para 6; Hirsch affidavit at para 10  
<sup>10/</sup> Hirsch affidavit at para 6; Basiago affidavit at para 2-5  
<sup>11/</sup> id; also Hirsch affidavit at para 30

a. Enrollment Trends Clearly Relate to Intervenor's Contentions<sup>12/</sup> I.3.a. and f.; II; III.5; X.3 and .4 (currently deferred); and XVIII

Intervenor has contended that enrollment in nuclear engineering courses dependent upon the reactor has been steadily dropping, which has led to a relative reduction in fund allocations to the reactor, leading to deferral of expenditures for maintenance and upgrading of safety features and pushing the Nuclear Energy Laboratory into seeking additional funding through extensive commercial activity, in violation of its Class 104 license.<sup>13/</sup> Intervenor has further contended that rising enrollment in other parts of the School of Engineering or university as a whole further reduces the ability of the Applicant to provide reasonable assurances that it will have, and devote, adequate financial resources to the upkeep of the reactor, because of pressures to put financial resources where the enrollment is.

The minimal research and educational functions of the facility have led CBG to contend in Contentions I.3.f and X.3 and 4 that numerous environmentally less harmful alternatives exist for providing the exceedingly small research and educational functions currently performed by the facility. Because enrollment in nuclear engineering classes associated with the reactor has been dropping, the need for the facility has been shrinking, CBG has alleged.

Dean O'Neill is quoted<sup>14/</sup> as having discussed with Commissioner Roberts the crisis caused by "too many students." CBG did not have an opportunity to indicate to Commissioner Roberts the contrary trend in the nuclear engineering sub-program. If and when these matters reach the Commission, Commissioner Roberts, if not recused beforehand, will have had the benefit of off-the-record discussions with the Applicant having provided information which the Intervenor was not permitted to contest as to said enrollment trends.

<sup>12/</sup> attached as Exhibit A

<sup>13/</sup> It is this commercial activity which CBG contends represents 60% of the reactor's use, while instructional uses have dropped to 30-40 hours per year.

It was clearly the Applicant's intent that Commissioner Roberts and his staff come away from the visit to the UCLA Engineering School and its Nuclear Energy Lab with the impression of a vital, vibrant and growing nuclear engineering program for which the reactor is a necessary and useful teaching and research tool. This is at variance with the facts, and is a matter hotly contested in proceedings currently before the NRC. That the Applicant would be permitted to make such a case off-the-record without opportunity for opposing information to be presented by Intervenor is clear violation of ex parte rules.

b. Discussion of "the crisis in engineering...not enough funds"<sup>15/</sup> clearly relates to Intervenor's Contentions II, IX, X.3 and 4 (deferred), XII, XVI, and XVIII

Applicant's financial qualifications are squarely at issue in this proceeding. Intervenor has contended precisely that the engineering department at UCLA cannot provide reasonable assurance of being able to devote adequate financial resources to the safe maintenance and operation of the reactor; that in fact, because of expansion of engineering programs other than nuclear fission while interest has been simultaneously dropping in the fission program at UCLA, funds needed for the safe operation of the facility have been diverted to other programs with larger student and research activities. For the Dean of the UCLA School of Engineering, Applicant before the Commission for a license in which the School's financial qualifications are at issue, to discuss those financial matters with one of the Commissioners off-the-record without opportunity for Intervenor to hear and rebut is clear violation of ex parte rules.

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<sup>15/</sup> Dean O'Neill is quoted (Attachment G) as having said he discussed with Commissioner Roberts "the crisis in engineering...too many students and not enough funds."

c. Many Other Matters Related to the Reactor Proceeding May Well Have Been Discussed in the Closed-Door Off-the-Record Meeting

Because Intervenor and the press were excluded from the meeting, and because no transcript has been made available, the possibility that other contested matters were discussed remains an open question. Certainly the public will have difficulty believing any assertion, should it be made, that the Applicant and the Commissioner met behind closed doors for 25-40<sup>minutes</sup>/in the Applicant's offices and that they only spoke about the weather. The appearance of bias cannot be cleansed from this ex parte contact because (1) it was secret, (2) its very existence was denied, (3) no transcript has been made public, and (4) the Commissioner and his staff have failed to file the requisite public reports. The presumption must remain that other contested matters, in addition to those indicated above, were discussed behind those closed doors.

2. The Ex Parte Meeting Between Commissioner Roberts and Nuclear Energy Laboratory Director Ivan Catton and Other NEL Employees

Following the ex parte meeting with Russell O'Neill, William Cormier, and Thomas Tugend in Dean O'Neill's office on the 7th floor of the Engineering Building (Boelter Hall), the Commissioner was then taken by a back entrance into the Nuclear Energy Lab, where the reactor is located. He did not enter by the main entrance, where Ms. Lavery had told CEG to wait and where Mr. Cormier knew CEG's representatives had, in fact, been waiting for the last hour. Instead, Mr. Roberts was taken in another way, and around 10:00 a.m., the Commissioner's legal assistant, Ms. Lavery, and the Applicant's attorney, Mr. Cormier, together emerged from inside the Nuclear Energy Lab (NEL) to tell the CEG representatives waiting at

the main entrance of NEL that they could now observe the presentation Applicant was giving to Mr. Roberts.<sup>16/</sup> Commissioner Roberts, however, was not with them. He was, instead, inside the Nuclear Energy Lab meeting with its Director and certain of its employees, out of sight and hearing of Intervenor's representatives.<sup>17/</sup>

Mr. Cormier at first denied the meeting with Dean O'Neill and Commissioner Roberts, and then claimed it was nothing more than a few minute "greeting."<sup>18/</sup> Ms. Laverty refused to answer direct questions even as to whether such a meeting had occurred.<sup>19/</sup> While this discussion with Mr. Cormier and Ms. Laverty was taking place near the 2nd floor main entrance to NEL, Commissioner Roberts and the man accompanying him were downstairs talking with Director Catton and other NEL representatives. CBG was not able to join them until at least ten minutes later.

When CBG representatives finally joined the Commissioner's party, he was in the midst of being shown by Director Catton and an accompanying NEL employee the machine shop for NEL and was being told how extensive were the available maintenance tools and how NEL was able to fabricate virtually any devices it needed, right there at the facility.<sup>20/</sup> These matters are directly in contest in the proceeding. (See Contentions IX, XII, and XVI). CBG has contended that the equipment is outdated and unreliable, that because the reactor vendor has gone out of the business parts are difficult to repair or replace, and that mechanical features of the facility and the supporting maintenance equipment are inadequate.

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<sup>16/</sup> Thompson affidavit para 5; Hirsch affidavit para 9

<sup>17/</sup> This is known because that is where CBG representatives were taken finally to meet him. Thompson affidavit, para 8; Hirsch affidavit, para 12.

<sup>18/</sup> Thompson affidavit, para 5; Hirsch affidavit, para 9

<sup>19/</sup> Thompson affidavit, para 6; Hirsch affidavit, para 10

<sup>20/</sup> Hirsch affidavit, para 12

Once again, CEG has no way at present of knowing what else Director Catton and Commission Roberts spoke about before CEG representatives were permitted to join them. What is known at present, however, is that they were, as the CEG representatives arrived, discussing the adequacy of the maintenance shop and the ability to replace and produce needed devices, matters which are hotly contested in the proceeding.

3. Presentation by Applicant where Intervenor was permitted to be present but not permitted to make any statement or presentation of its own.

Following the ex parte meeting between the Commissioner and the NEL Director and other NEL employees, a tour of and presentation about the reactor was given by Applicant's representatives (primarily Director Catton and Senior Reactor Operator Charles Ashbaugh III). Intervenor's representatives, despite repeated objections, were not permitted to make any statement whatsoever to the Commissioner on any of the matters about which Applicant was making its presentation.<sup>21/</sup> As indicated in the attached Hirsch affidavit, a great many aspects of Applicant's presentation directly relate to matters in controversy (e.g. adequacy of specific safety devices, adequacy of radiation monitoring, need for and existence of HEPA filters, actual use to which facility is put, reactor operation by unlicensed operators, etc.) Applicant's presentation amounted to a self-serving lobbying of the Commissioner to influence his view of the MA reactor in such a fashion that he would see it as a safe, well-run, well-equipped, educationally active facility, with no mention of any safety problems or any other contrary information. Intervenor was "muzzled"<sup>22/</sup>, by Applicant and by the Commissioner

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<sup>21/</sup> Thompson affidavit, para 7-9; Hirsch affidavit, para 11-28

<sup>22/</sup> Id



and his staff attorney, so that the only presentation on these contested matters heard by the Commissioner came from the party requesting the Commission issuance of a license for the reactor in question. A detailed description of the biased presentation on the array of contested matters is contained in the Hirsch affidavit; a description of the bias evidenced by Commissioner Roberts and his legal assistant Ms. Laverty in refusing to hear a single word of contrary information is found in both the Thompson and Hirsch affidavits.

4. The ex parte meeting on security matters (Contention XX)

Representatives of Intervenor were permitted to observe only part of the actual tour of the reactor. Despite the fact that the adequacy of the facility's security measures has been explicitly admitted into controversy as an extensive contention (attached as an exhibit hereto) in the proceeding, Commissioner Roberts permitted, over vehement objections by Intervenor, an ex parte presentation by the Applicant on this matter. Intervenor was not permitted to be present, let alone to make a presentation. Intervenor's strenuous protests were overruled. <sup>23/</sup>

Intervenor requested that, if Commissioner Roberts insisted on hearing Applicant's presentation on this contested matter, and if he insisted on Intervenor being excluded, that he should at minimum permit Intervenor to make a three-minute presentation on security problems and weaknesses in the Applicant's security system prior to Applicant's presentation of the strengths in that system. This request was likewise refused. <sup>24/</sup>

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<sup>23/</sup> Thompson affidavit, para 9; Hirsch affidavit, para 25-29

<sup>24/</sup> Id.

CEG's representatives were thus ushered out of the facility, having been unable during the entire time they were in the Commissioner's presence to counter anything said by Applicant, and the Commissioner and his staff then proceeded to have another ex parte meeting with Applicant's staff about a matter in deep controversy in the proceedings--perhaps the most significant of all the matters at issue given the uses to which bomb-grade uranium (93% enriched) can be put--security. Even were the Commissioner's interest in the security precautions at the UCLA research reactor solely a general policy interest in security at research reactors generically, a hardly credible interpretation, his refusal to hear proffered information about serious security problems raises disturbing questions about serious bias.

C. COMMISSIONER ROBERTS AND HIS STAFF FAILED TO FILE THE REPORTS REQUIRED BY 10 CFR 2.780(c)

Despite the verbal protests by Intervenor to Commissioner Roberts and his staff about the ex parte meetings, neither Mr. Roberts, Ms. Lavery, nor the unidentified man accompanying them have filed, either with the Intervenor or with the local public document room, reports detailing the contents of their off-the-record meetings with Applicant.<sup>25/</sup> More than sufficient time, even considering the busy schedule of the Commissioner, has elapsed for those reports to be filed, and yet none have. Applicant has likewise made no detailed disclosure of the contents of the meetings.

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<sup>25/</sup> Hirsch affidavit at para 32

### III. DISCUSSION

A. Commissioner Roberts Must Be Disqualified From The UCLA Reactor License Renewal Proceeding Because Of His Ex Parte Discussions With The Applicant.

1. Commissioner Roberts' meetings with Applicant violates provisions of the APA and the NRC regulations prohibiting ex parte communications.

The meetings between Commissioner Roberts and officials of the Applicant plainly violate both the Administrative Procedures Act ("APA") and the NRC regulations. The APA provision prohibiting ex parte communications, 5 U.S.C. § 557(d)(1), states:

- (A) No interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;
- (B) No member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding [ . ]

The NRC's parallel regulation, 10 CFR 2.780(a), states:

[ N ] either (1) Commissioners, members of their immediate staffs, or other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions will request or entertain off the record except from each other, no (2) any party to a proceeding for the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit, or any officer, employee, representative, or any other person directly or indirectly acting in behalf thereof, shall submit off the record to Commissioners or such staff members, officials, and employees, any evidence, explanation, analysis, or advice, whether written or oral, regarding any substantive matter at issue in a proceeding on the record then pending before the NRC for the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit. For the purposes of this section, the term "proceeding on the record then pending before the NRC" shall include any application or matter which has been noticed for hearing or concerning which a hearing has been requested pursuant to this part.

(emphasis added)

Thus, the communications Commissioner Roberts and his staff had with Applicant are considered to be prohibited ex parte contacts if

(a) they were off-the-record, whether written or oral, (b) they involve "evidence, explanation, analysis, or advice," regarding "any substantive matter at issue in a proceeding on the record then pending before the NRC," a category which includes license renewal applications for which a hearing has either been noticed or requested, (c) among those participating in the communications were "Commissioners, members of their immediate staffs, or other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions", and (d) also involved in the communications was any party to the proceeding, including "any officer, employee, representative, or any other person directly or indirectly acting in behalf thereof."

The meetings which took place on January 26, 1982, meet all of the above conditions and thus are clear violations of ex parte prohibitions:

(a) The meetings were off-the-record. No transcript has been provided of the meetings. The press and public were excluded from all four of the meetings, and Intervenor from three. Full contents of the meetings are thus unknown; Intervenor therefore has no way of knowing in full what information, explanation, analysis, or other evidence may have been provided the Commissioner by the opposing party. No opportunity has been provided for Intervenor to reply to any such communication; indeed, requests for such an opportunity have been explicitly refused by the Commissioner and his staff<sup>26/</sup>. Even were Intervenor at some point provided an opportunity to respond, it would be unable to do so, because Intervenor will never know fully what transpired off-the-record and thus to what it should respond.

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<sup>26/</sup> Hirsch affidavit, para 10-11, 26-29; Thompson affidavit, para 9

In addition, the appearance of independence and respect for due process necessary to a fair proceeding has been irreparably damaged because neither the public nor Intervenor will ever know precisely what was discussed behind those closed doors.

(b) Matters at issue in a proceeding before the NRC were discussed.

As detailed at pages 4-17 above, and in the attached Hirsch affidavit, at each of the four meetings, matters at issue in the contested relicensing proceeding were discussed. The UCLA license renewal matter meets the criteria for a "proceeding before the NRC" because a hearing has been requested in the matter by the Intervenor and a hearing ordered by the licensing board convened to rule on the request.<sup>27/</sup> A wide range of matters in controversy in this proceeding were discussed by the Commissioner and the Applicant, providing the Applicant an off-the-record way of attempting to influence the Commissioner's views on these matters and of providing Applicant's case to the Commissioner in the absence of opposing argument. This clearly prejudices the case.

(c) Mr. Roberts, as Commissioner, and Ms. Lavery, as legal advisor, were clearly prohibited from engaging in such discussions. The NRC regulations and the APA make very clear that a member of the Commission and members of their immediate staffs are prohibited from such ex parte communications. Both Mr. Roberts and Ms. Lavery "may reasonably be expected to be involved in the decisional process on the proceeding" (5 U.S.C. 557(d)(1)(A)); Ms. Lavery clearly "advise[s] the Commissioners in the exercise of their quasi-judicial functions." (10 CFR 2.780(a).)

(d) Mr. Cormier, as Attorney for Applicant, and Messrs. O'Neill, Catton, Ashbaugh, and Tugend, as Officers and Employees of Applicant, were likewise clearly prohibited from engaging in such discussions. Mr. Cormier is counsel for Applicant in the relicensing proceedings currently

before the NRC and as such was clearly prohibited from making ex parte communications with a Commissioner or members of his staff. Mr. O'Neill, as Dean of the School of Engineering at UCLA, is the responsible officer for the reactor and for the application now pending before the NRC and was thus, likewise prohibited from such conversations with the Commissioner and his staff. Dr. Catton, as Reactor Director, and Mr. Ashbaugh and Mr. Tugend and the other employees of Applicant who had communications with the Commissioner and his staff likewise violated the ex parte rules.

2. Commissioner Roberts' failure to file reports detailing the contents of his ex parte communications with Applicant clearly violates 10 CFR 2.780(c).

When counsel for and officials of Applicant attempted to conduct ex parte conversations with Commissioner Roberts and his accompanying staff, it was their duty to attempt to prevent such communication and, failing that, to "make a fair, written summary of such communication" and serve copies thereof upon the parties to the proceeding and place copies in the Public Document Room. (10 CFR 2.780(c)). Commissioner Roberts and his accompanying staffmembers not only failed to attempt to prevent such communication, they encouraged and initiated it<sup>28/</sup>; furthermore, they have failed to file the requisite reports detailing the ex parte contacts<sup>29/</sup>.

10 CFR 2.780(c) states as follows:

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<sup>28/</sup> Hirsch affidavit, para 2-3, 6, 9-11, 25-30; Thompson affidavit, para 2, 5, 6, 7, 8, 9.

<sup>29/</sup> Hirsch affidavit, para 32-35.

A Commissioner, member of his immediate staff, or other NRC official or employee advising the Commissioners in the exercise of their quasi-judicial functions, to whom is attempted any oral communication concerning any substantive matter at issue in a proceeding on the record as described in paragraph (a) of this section, will decline to listen to such communication and will explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof will advise the communicator that a written summary of the conversation will be delivered to the NRC public document room and a copy served by the Secretary of the Commission on the communicator and the parties to the proceeding involved. The recipient of the oral communication thereupon will make a fair, written summary of such communication and deliver such summary to the NRC public document room and serve copies thereof upon the communicator and the parties to the proceeding involved.

No such filings have been made, and no such efforts to prevent the communications having occurred, despite protestations at the time by Intervenor, clear violations of 10 CFR 2.780(c) were made by Commissioner Roberts, Ms. Lavery, and the additional NRC assistant. Not only have they failed to disclose the contents of the ex parte meetings, Ms. Lavery at the time refused to even indicate whether a meeting had occurred at all.<sup>30/</sup>

3. The refusal by Commissioner Roberts and his assistants to permit Intervenor to attend all but one of the meetings, and the refusal to permit Intervenor to present counter information in response to any of the communications by Applicant, clearly violates due process guarantees.

It is inherently unfair to allow persons outside an agency to privately persuade agency decisionmakers in licensing proceedings. It is precisely for that reason that rules of evidence (10 CFR 2.743), requirements for public hearings on the record (10 CFR 2.750, 2.751), appeal procedures for Commissioner review (10 CFR 2.760 and 2.760a) and other regulations guaranteeing fair and impartial proceedings were established. As a recent NRC study of ex parte and separation of functions rules put it, "...fundamental principles of due process' dictate that the decisionmakers

<sup>30/</sup> Hirsch affidavit at para 10; Thompson affidavit at para 6  
Note that the ex parte meetings were solicited and initiated by Commissioner Roberts and Ms. Lavery; Hirsch affidavit at 2.

should not be exposed to off-the-record input from parties or staff intimately associated with making the case for or against those parties."<sup>31/</sup>

Section 554(d) of the APA provides that an agency employee "who presides at the reception of evidence" may not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate."

(emphasis added). Commissioner Roberts and his staff clearly violated those requirements--not only was Intervenor prohibited from participating at all in any of the four discussions held off-the-record between the Commissioner and Applicant, Intervenor was excluded from even attending three of the four off-the-record meetings. In addition, not only was Intervenor not on notice of several of the meetings, what notice it was given was misleading. While Ms. Laverty had told Intervenor to be at one location, where it waited nearly an hour, she and Commissioner Roberts were in another location meeting with Applicant.<sup>32/</sup> And not only was Intervenor not on prior notice, the existence of at least one of the meetings was denied after the fact.<sup>33/</sup>

As the NRC study on ex parte and separation of functions rules noted:

The Commission has never formally interpreted the phrase "off-the-record" which appears in 10 CFR 2.780(a). However, in SECY 75-435 at 3 (August 12, 1975), the General Counsel stated that with regard to written communications, the term means "not filed according to the usual rules of practice and not served on all parties." The Commission has apparently adopted an analogous interpretation for oral communications -- that is, they are "off-the-record" if they are not made according to the usual rules of practice and not presented in the presence of other parties. The "usual rules of practice" have been that all parties should have an opportunity to make an oral statement if one party does so.

(emphasis added)<sup>34/</sup>

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<sup>31/</sup> "A Study of the Separation of Functions and Ex Parte Rules in Nuclear Regulatory Commission Adjudications for Domestic Licensing", 1980, at 57, citing 1947 Attorney General's Manual at 55

<sup>32/</sup> Hirsch affidavit, para 2-12; note also Applicant's attorney knew CEG representatives were waiting downstairs at appointed location and time while ex parte meeting was going on upstairs.

<sup>33/</sup> Hirsch affidavit, para 10 & Thompson affidavit, para 6 note Ms. Laverty refused to even provide subsequent notice of one of the meetings.

<sup>34/</sup> "A Study..." supra, n. 171 at 99-100



The rules of practice were thus repeatedly violated. For three of the meetings, the communications were not presented in the presence of the opposing party. For all four meetings, Intervenor was denied an opportunity to make an oral statement even though Applicant was provided extensive opportunity to do so.

As indicated in the above-cited study, violation of the requirements that communications be on the record with opportunity for opposing parties to respond would also "run afoul" of other sections of the APA--

e.g. 554(c)(1) ("agency shall give all interested parties opportunity for the submission, and consideration of facts [and] arguments . . . When time, the nature of the proceeding, and the public interest permit"); 556(e) ("the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision . . . ."); 557(c) ("parties are entitled to a reasonable opportunity to submit . . . supporting reasons for the exceptions or proposed findings or conclusions"); 556(d) ("party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts").<sup>35/</sup>

Indeed, Commissioner Roberts and Ms. Laverty did "run afoul" of said sections of the APA. They solicited and permitted, over objections of the opposing party, presentation off-the-record, and denied opposing party the right to respond. Commissioner Roberts, because of the information transmitted in these ex parte meetings, is now incapable of making a judgment solely on the basis of "the exclusive record for decision" (the official record of the proceeding), and Intervenor's rights to submit rebuttal evidence and to conduct cross-examination have been irreparably abridged.

Extremely important matters in contest have been the subject of these off-the-record communications in which Intervenor's right to respond was refused:

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<sup>35/</sup> "A Study..." supra, n. 171 at 100

- (a) \* adequacy of Applicant's physical security precautions (Contention XX)
- (b) \* Applicant's financial qualifications (Contention XVIII)
- (c) \* Applicant's ability to repair and replace aging components (Contention XVI)
- (d) \* adequacy of Applicant's maintenance and calibration equipment (Contention IX)
- (e) \* need for and existence of HEPA filters (Contention XII.3)
- (f) \* operation of reactor solely by licensed operators--CBG contends unlicensed operators, including junior high school students and open house visitors, have been routinely permitted to operate the reactor, in violation of the regulations (Contention III.5)
- (g) \* adequacy of radiation monitoring systems and equipment and procedures (Contention VI)
- (h) \* actual use to which facility is put--Applicant contends education and research, CBG contends primarily outside commercial use (Contention I.3.a. and f and II)
- (i) \* usefulness of facility (Contention X)
- (j) \* adequacy of safety features such as radioactivity holding tanks, containment structure, emergency cooling system, control blade systems, etc. (Contention XII)
- (k) \* adequacy of supervision and managerial controls (Contention III)
- (l) \* safety of reactor exhaust ventilation system--CBG contends the air from the reactor room is exhausted a few feet away from a major airinlet downwind for a nearby building (Contention VI)

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36/ See Hirsch affidavit at (a) para 25-29, (b) 31, (c) 12, (d) 12, (e) 15, (f) 37, (g) 14,17, (h) 13, (i) 21, (j) 15,16, 18, (k) 19,23, 22, 13 (l) 15,16

Thus, just from the information currently available to Intervenor regarding the contents of the off-the-record communications between Applicant and the Commissioner, it is clear that self-serving presentation by Applicant was made, in a manner prejudicial to Intervenor, on the bulk of contentions at issue in the proceeding. Intervenor has no way at present of knowing what additional argument, presentation, analysis, and information was provided the Commissioner in the sessions from which Intervenor was excluded.

As can be seen from the above discussion and the attached affidavit, there can be no basis for an assertion, should it be made, that the off-the-record communications were merely on general policy matters and did not touch on matters in controversy in this proceeding. The oral communications of which Intervenor is currently aware dealt with a great many matters directly in contest in the proceedings, and in a fashion extremely prejudicial to Intervenor's interests.

As can also be seen from the above discussion, excluding Intervenor from the final Applicant-Commissioner meeting because it dealt with security matters cannot be justified. Because security matters are squarely at issue in the proceeding, it was highly improper for the Commissioner to discuss the matters with Applicant at all. He should have, as mandated by 10 CFR 2.780(c), refused to entertain the communication whatsoever, explaining "that the matter is pending for determination." Furthermore, directly refusing to permit even a three-minute presentation by Intervenor while agreeing to an extensive presentation by Applicant, from which Intervenor was excluded, is highly improper. If, for security reasons, Intervenor could not attend the presentation, the Commissioner should likewise have refused because of the ex parte rules, or delayed that part of his visit until suitable Affidavits of Nondisclosure were in place by all parties. At the very least, refusal to permit brief

presentation by opposing party while permitting extensive presentation by Applicant is extremely prejudicial and demonstrative of substantial bias.

3. Commissioner Roberts Must Be Disqualified From the UCLA Reactor License Renewal Proceeding Because of Violation of the Separation of Functions Rules and Ex Parte Rules Regarding Off-the-Record Contacts with Former Counsel for NRC Staff in the UCLA Proceeding.

Commissioner Roberts' legal assistant is Ms. Jessica Laverty who, until recently, represented one of the parties to the UCLA proceeding now pending before the NRC. Ms. Laverty was, in fact, lead counsel for NRC Staff in that matter. She now provides legal advice to Commissioner Roberts with regards his quasi-judicial duties. She has already provided advice to Commissioner Roberts on matters related to the UCLA proceeding<sup>37/</sup>; off-the-record conversations with the Commissioner as to matters related to the case, including providing details garnered by Ms. Laverty from off-the-record sources while representing Staff in the instant proceeding, cannot be ruled out and must, in fact, be considered likely.

Ms. Laverty's current role as legal assistant to Commissioner Roberts is a clear violation of the separation of functions rules.

The APA rule, 5 U.S.C. 554(d)(2), in pertinent part, states:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency on a case may not, in that or a factually related case, participate or advise in the decision, recommend decision or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

The companion NRC regulation, 10 CFR 2.719(d), states in pertinent part:

no officer or employee of the Commission who has engaged in the performance of any investigative or prosecuting function in the case or a factually related case may participate or advise in the initial or final decision, except as a witness or counsel in the proceeding.

<sup>37/</sup> Hirsch affidavit, para 11, 27; other advice cannot be ascertained without discovery rights.

The hiring of Ms. Laverty as legal counsel by Commissioner Roberts, given her prior representation of one of the parties in the contested proceeding at issue, raises serious separation-of-functions concerns.

There are two reasons for the separation of functions rules: prevention of biased advice and prevention of the interpolation of ex parte facts that the former investigator or advocate for Staff may have gathered in the previous role that may be injected off the record during the decisionmaking process.<sup>38/</sup> Both concerns are at play regarding Ms. Laverty's presence on Commissioner Roberts' staff. Ms. Laverty's presence on Commissioner Roberts' staff, particularly in such a sensitive position as legal advisor, provides daily opportunity for the proffering of biased advice and interpolation of ex parte facts relevant to the matters at issue in the case which she previously served as Staff counsel and advocate. The "will to win" can so disable an advocate for a party that it is incapable of providing unbiased advice to a decisionmaker reviewing a contested matter wherein that advocate's positions are being litigated. As the Attorney General's Committee on Administrative Procedure agreed:

A man who has buried himself on one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide.<sup>39/</sup>

Ms. Laverty, as lead counsel for Staff in the instant proceeding, as advocate for numerous Staff positions in contest in said proceeding, has "buried herself on one side" of the issues in contest and is disabled from providing dispassionate judgment required by fundamental canons of fairness. One party to the proceeding, Staff, has thus had months of unrestricted off-the-record access to a key decisionmaker regarding that

<sup>38/</sup> See "NRC Study of the Separation of Functions and Ex Parte Rules..." p. 82, 89

<sup>39/</sup> as cited at 52 id

proceeding, with no way for the other parties to know the contents of nor respond to any of said communications. As the NRC Study of the separation of functions rules stated:

Thus, in view of Congress, two important facts that distinguish rulemaking from adjudication were critical for establishing a separation of functions requirement for the latter and none for the former: the general accusatory nature of adjudication and the typical dispute over evidentiary facts. While there may be benefits to be derived from consultations between agency staff and decision-makers in adjudications, "fundamental principles of due process" dictate that the decisionmakers should not be exposed to off-the-record input from parties or staff intimately associated with making the case for or against those parties. <sup>125/</sup> It was felt that such staff would have developed the zeal of an advocate in an accusatory proceeding, and thus would have abandoned the state of mind compatible with providing neutral and dispassionate private advice to decisionmakers. <sup>40/</sup> (emphasis added)

<sup>125/</sup> 1947 Attorney General's Manual at 55

It was precisely for these reasons that the separation of functions rules have been established. Yet Commissioner Roberts has been "exposed to off-the-<sup>parties</sup> record input from / or staff intimately associated with making the case for or against those parties" (both Staff and Applicant have had Mr. Roberts' ear off-the-record, with Intervenor excluded). Furthermore, unless disqualified, Commissioner Roberts will be relying for his legal advice regarding the UCLA proceeding on former counsel for one of the parties--an untenable and grossly unfair situation.

From the first contested reactor licensing case to the present, the Commission has prohibited those members of the NRC staff involved in that party's case from participating "in advising the Commission ... except by briefs and other statements on the record."<sup>41/</sup> The basis for this prohibition "emanated from a desire to follow judicial procedures of fairness, under which trial advocates do not consult privately with adjudicators."<sup>42/</sup> Ms. Laverty, until recently Staff advocate in the UCLA contested matter, currently consults privately and daily with an adjudicator

<sup>40/</sup>"NRC Study of the Separation of Functions..." (hereafter "NRC Study") at 57  
<sup>41/</sup>"A Study of AEC Procedures", April 1957 JCAE Print, cited at 11, NRC Study  
<sup>42/</sup>NRC Study at 47

likely to make decisions in the matter. The conflict is irreparable, for the violations have already occurred. Advice and ex parte information must be presumed to have already been passed to the Commissioner; he cannot be an impartial decisionmaker relying solely on the evidentiary record presented to him.

C. Commissioner Rocerts Must Be Disqualified Because His Ex Parte Contacts With Applicant And With Ms. Laverty Violated Due Process Of Law; His Participation In the UCLA Proceeding As An Agency Decisionmaker Would Further Seriously Violate Due Process

Parties are entitled to a decision from an impartial decisionmaker. American Public Gas Association v. Federal Power Commission, 567 F. 2d 1016, 1069 (D.C. Cir. 1977). Not only must the decisionmaker be impartial, he or she must appear to be impartial; the "appearance of impartiality [is] the sine qua non of American judicial justice ...." Pillsbury v Federal Trade Commission, 354 F. 2d 952 964 (D.C. Cir. 1966) (emphasis in original). An impartial decisionmaker is one who has not prejudged the facts in advance of hearing them on the record. Cinderella Career & Finishing Schools, Inc. v. Federal Trade Commission, 425 F. 2d 583, 591 (D.C. Cir. 1970). Fairness dictates that facts and arguments not presented on the record not reach the adjudicators as a result of their contacts with agency staff or persons outside the agency. Seacoast Anti-Pollution League v. Costle, 572 F. 2d 872, 881-882 (1st Cir. 1978); Carvey v. Freeman, 397 F. 2d 600, 610-611 (10th Cir. 1968).

The Fifth Amendment to the Constitution provides due process guarantees which are not to be abridged. In Amos Treat & Co. v. Securities and Exchange Commission, 306 F. 2d 260, 266-267 (D.C. Cir. 1962), it was

ruled that it "would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed" to allow a Commissioner to partake in an agency adjudication after having been promoted from a staff position where he initiated an investigation, weighed its results and perhaps recommended the filing of charges. It appears equally a violation of due process to permit a Commissioner to be advised regarding a proceeding pending before the NRC by someone promoted from a staff position where s/he initiated investigation into an application, determined staff positions on matters being litigated, and argued those positions on behalf of staff. This seems to have been Congress' intent-- "an agency attorney litigating the case for the agency will not be involved in the decisionmaking process of the agency ...."<sup>43/</sup>

Violations of due process can cause an adjudicatory decision to be reversed. In Trans World Airlines v. Civil Aeronautics Board, 245 F. 2d 90 (D.C. Cir. 1958), a C.A.B. order was reversed because a C.A.B. member had signed a brief for one of the parties in the proceeding prior to assuming membership on the Board. In American Cyanamid Company v. F.T.C., 363 F. 2d 757 (6th Cir. 1966) <sup>the court</sup> found a due process violation by the F.T.C.

where one of the Commissioners had previously served as counsel to a Senate Committee investigating the same facts and issues that were before the F.T.C. In reaching its decision the court emphasized that in holding that the Commission<sup>er</sup> should be disqualified, the court need not question "in the slightest degree" the integrity of the Commissioner. Id. at 768. In Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456 (1975), the Supreme Court concluded that a violation of due process exists when it is demonstrable that the comingling of investigative and judicial functions in an administrative proceeding results in unfairness. Id. at 1468



Subsequent to Withrow, the Ninth Circuit held that a Commissioner of the F.T.C. should have disqualified himself from participation in a matter where he had participated in the case as counsel. American General Insurance Co. v. F.T.C., 589 F. 2d 462 (9th Cir. 1979). The court noted that it was not only customary, but a statutory requirement to disqualify himself in a case in which he "has participated as counsel." Id. at 463. The court also observed that the fact that a judge's participation as counsel may have been unsubstantial did not affect the applicability of the principle. Id. at 464.

#### SUMMARY OF DUE PROCESS VIOLATIONS

The activities of Commissioner Roberts in the UCLA license renewal matter seriously violate due process in a number of ways. First, Commissioner Roberts, in violation of ex parte rules, has engaged in four meetings with one party to the contested proceeding at which matters in controversy were discussed and from which opposing party was excluded and/or refused the right to respond. Second, Commissioner Roberts has violated ex parte rules by numerous contacts with the former counsel for one of the parties to the instant proceeding, an individual whom he has now placed in a position where she can influence the decisionmaking process for a proceeding in which she represented one of the parties to the contested proceeding by providing off-the-record information and views garnered from extra-record investigations and contacts while representing one<sup>of</sup> the parties. Third, Commissioner Roberts has violated separation of functions rules by placing Ms. Laverty, former counsel for one of the parties, in a position where she may advise and otherwise participate in the decisionmaking process for a proceeding in which she was intimately involved as counsel for a party and in which she is so deeply wedded that unbiased advice may not be possible. Fourth, Commissioner Roberts has violated regulations requiring him to disclose the contents of his ex parte meetings. Fifth, Commissioner Roberts has evidenced such substantial bias that the appearance of impartiality

and fairness cannot be regained, the likelihood of prejudgment being so great. Thus, Commissioner Roberts, after having repeatedly violated due process guarantees must, as a matter of law, be disqualified.

D. The Facts of the Matter Regarding Commissioner Roberts Mandate He Be Disqualified.

An administrative trier of fact is subject to disqualification if he or she is personally biased against a participant; has acted in prosecuting or investigating the facts in issue; has prejudged factual issues; or has engaged in conduct giving "the appearance of personal bias or prejudgment of factual issues." Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60,65 (1973).

Commissioner Roberts had demonstrated significant personal bias against Intervenor. He has permitted off-the-record detailed discussion of matters in controversy in the instant proceeding by all parties but Intervenor. He has repeatedly refused Intervenor the right to respond to off-the-record assertions and presentations made by other parties on matters in controversy. He has excluded Intervenor from ex parte meetings with other parties, over direct protests. He has requested and solicited presentation by one of the parties and refused requests that the other be permitted to provide a presentation.<sup>44/</sup> He has directed his staff to inform Intervenor of only one of four meetings to be held with Applicant, failing thus to even provide notice. He has hired, in violation of the separation of functions rules, and relied on for advice in the instant proceeding, counsel for one of Intervenor's opposing parties. He has permitted said former counsel to determine whether her opposing party would be permitted to even address the Commissioner, but has made no such requirement for Applicant. He has directed Intervenor to appear

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<sup>44/</sup> The very request that Applicant provide the Commissioner with an ex parte presentation came from the Commissioner; Intervenor's requests

at one location while he met secretly with Applicant in another. He has met privately with counsel for and responsible officers of Applicant, in the personal office of the Applicant's official chiefly responsible for an application now pending before the NRC. He failed to notify Intervenor, either before or after said meeting, even of the existence of said meeting. He has failed to report these meetings, and has not filed the required documents outlining the contents of these ex parte meetings. He has refused to listen to one word from Intervenor, but listened at length to Applicant and to former counsel for Staff.

Commissioner Roberts has violated ex parte regulations of the NRC itself (10 CFR 2.78(a)) by soliciting off-the-record presentation by Applicant and by someone who until recently was advocate for Staff. He violated ex parte regulations by not attempting to prevent such communications from occurring. He violated ex parte regulations by not reporting the contacts and not filing reports detailing their contacts. He violated separation of functions rules by hiring and receiving advice from former counsel to one of Intervenor's opposing parties in this contested licensing proceeding.

Despite numerous opportunities to rectify the wrongs done to Intervenor, to somehow restore due process so badly damaged by the Commissioner's actions, he has made no effort whatsoever to reverse the unfairness demonstrated. His willingness to hear only Applicant's and Staff's views on matters in contest and absolute and total refusal to hear Intervenor's views or information can only indicate a total prejudgment of the facts in the case, before even seeing the evidentiary record. That prejudgment appears to be so all-encompassing that the Commissioner will not even obey the

rules of practice regarding refusing to entertain information provided off-the-record; instead/<sup>he refused</sup> Intervenor the right to respond to information permitted to be improperly provided by the opposing parties, refused to even notify Intervenor of the existence of these off-the-record exchanges and refused to obey the requirements for reporting their contents.

In Dugesne Light Company, et al (Beaver Valley Power Station, Units 1 and 2) ALAB-17, 7 AEC 42, the Appeal Board discussed requirements for disqualification motions: (1) all disqualification motions must be accompanied by affidavits establishing basis of charge, (2) disqualification motions must be timely filed, and (3) all such motions must be served on all parties or their attorneys. All three requirements are met herein. Affidavits are attached hereto; the motion is timely; and all parties have been served. Given "the obvious gravity of motions of this character" and the due respect that must be given someone who holds the high position that Commissioner Roberts holds, more than sufficient time has been given the Commissioner to attempt to rectify the due process violations incurred. Yet no notice of the existence of ex parte contacts with Applicant or Ms. Laverty has been given Intervenor to date; no reports as to their contents as required by 10 CFR 2.780(c) have been served on Intervenor; no response to the invitation Intervenor presented the Commissioner (see Hirsch affidavit at para 28) to take a facility tour with Intervenor pointing out the opposing information neglected in Applicant's presentation has been received from the Commissioner; no change in Ms. Laverty's status as legal advisor has been noticed to Intervenor; and no explanation provided as to the failure to notify Intervenor of the ex parte meetings, CEG's exclusion from said meetings, and refusal of right of response has been made. Even given the pressing weight of other Commission duties, CEG has provided the Commissioner sufficient time to attempt to come into compliance with the regulations.

The Commissioner must be disqualified because he meets four of the Midland standards supra: he has shown grave personal bias towards Staff and Applicant and against Intervenor; he is directly advised by someone who has acted as advocate and investigator for a party to the proceeding; he has prejudged factual issues; and he has engaged in conduct giving "the appearance of personal bias or prejudgment of factual issues."

The appearance and reality of a fair, impartial tribunal would be serverely damaged were the Commission to permit Commissioner Roberts to act in a decisionmaking capacity in this case after all the violations of due process and the NRC's own regulations. Public confidence in the Commission's resolve to enforce its own regulations would be severely weakened were the Commission to fail to act in the face of these violations. Final decisions in the UCLA proceeding may be overturned if the Commissioner is not disqualified, a prospect which can involve substantial impacts on the entities the Commission regulates and the public it is to protect. Recusal is essential.

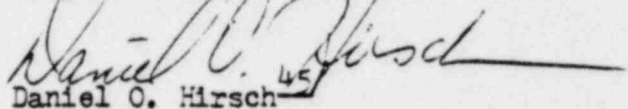
#### THE RELIEF REQUESTED

CEG respectfully requests that Commissioner Thomas Roberts be recused from participation in any decision related to any aspect of the UCLA reactor license renewal proceeding. CEG requests that should Commissioner Roberts not be immediately disqualified on the basis of this motion alone, that CEG be granted discovery rights to further develop the facts as to matters related to the alleged ex parte contacts, separation of functions violations, and appearance of bias. And because no reports have been filed in compliance with 10 CFR 2.780(c) to date, nor any filing made by Applicant as to the contents of the ex parte contacts, CEG respectfully requests that it be granted opportunity to respond to

any filings made in response to this motion.

Dated at Los Angeles, Calif.  
March 12, 1982

Respectfully submitted,



Daniel O. Hirsch<sup>45</sup>  
President  
COMMITTEE TO BRIDGE THE GAP  
Intervenor

<sup>45</sup> Subsequent to the withdrawal of Intervenor's legal counsel, Mr. Hirsch has been authorized by the Intervenor organization to represent it pro se in the UCLA reactor proceeding. A notice of appearance and instruments from the Intervenor organization authorizing said appearance have been filed with the presiding ASLB in the proceeding.

AFFIDAVIT LIST

AFFIDAVIT OF DANIEL O. HIRSCH	7 pages
AFFIDAVIT OF DOROTHY THOMPSON	6 pages
AFFIDAVIT OF ANDREW BASIAGO	2 pages
AFFIDAVIT OF WENDY SCHNELKER	2 pages