

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

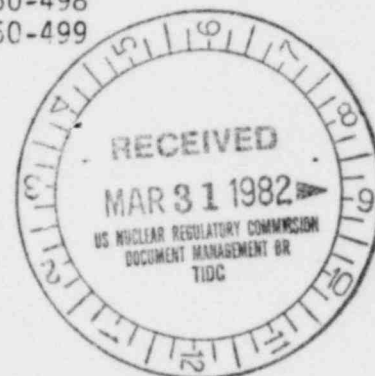
In the Matter of)

HOUSTON LIGHTING AND POWER COMPANY,)
ET AL.)

(South Texas Project, Units 1 & 2))

Docket Nos. 50-498
50-499

NRC REPLY IN OPPOSITION TO CCANP'S MOTION
FOR JUDGE ERNEST HILL TO RECUSE HIMSELF




1. INTRODUCTION

On March 9, 1982, Citizens Concerned About Nuclear Power (CCANP) filed a Motion seeking Judge Ernest Hill to recuse himself from further participation in this proceeding. That filing failed to meet the procedural requirements of 10 C.F.R. § 2.704(c) by not attaching an affidavit supporting the alleged grounds for disqualification. On March 26, 1982, a mere three days before the response of the NRC Staff was due and after the Applicant filed its response,^{1/} Lanny Alan Sinkin filed an affidavit in support of CCANP's Motion in an apparent attempt to cure the defective pleading.^{2/} The Staff opposes this Motion since CCANP has failed to establish facts through affidavits or otherwise, sufficient to warrant recusal.

^{1/} See, "Applicant's Response to Citizens Concerned About Nuclear Power (CCANP) Motion for Judge Ernest Hill to Recuse Himself From Further Participation In This Proceeding", dated March 23, 1982.

^{2/} The Board, by telephone, allow the Staff until April 1, 1982, to reply to CCANP's motion and affidavit.

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II. DISCUSSION

CCANP Has Not Established Facts Sufficient to Warrant Recusal

10 C.F.R. § 2.704(c) governs the disqualification of a Licensing Board member. It provides:

- (c) If a party deems the presiding officer or a designated member of an atomic safety and licensing board to be disqualified, he may move that the presiding officer or the board member disqualify himself. The motion shall be supported by affidavits setting forth the alleged grounds for disqualification.

The Appeal Board has set forth the grounds sufficient to warrant recusal of a Board Member:

- (1) He has a direct, personal, substantial pecuniary interest in a result;
- (2) He has a personal bias against a participant;
- (3) He has served in a prosecutive or investigative role with regard to the same facts as are in issue;
- (4) He has prejudged factual - as distinguished from legal or policy - issues; or
- (5) He has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Nuclear Engineering Co., Inc., (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 (1978). See also, Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-101, 6 AEC 60, 65 (1973) wherein the statutory and judicial grounds with respect to disqualification are further discussed.

CCANP has the burden to establish facts sufficient to warrant Judge Hill's disqualification based on one of the above grounds. Judge Hill need not prove his impartiality in light of CCANP's charges. Adjudicators are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy on its merits. Nuclear Engineering Co., Inc. (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980).

Except under narrow circumstances^{3/}, the Appeal Board has stressed that a party moving for disqualification of a Licensing Board member has the manifest duty to be most particular in establishing the foundation for its charge as well as to adhere scrupulously to the affidavit requirement. Dairyland Power Cooperative (LaCross Boiling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978); Detroit Edison Company (Greenwood Energy Center), ALAB-225, 8 AEC 379 (1974). This is so even if the motion is founded wholly on matters of public record. Greenwood Energy Center, supra at 380; Duquesne Light Co., et al. (Beaver Valley Power Station, Units 1 & 2), ALAB-172, 7 AEC 42, 43 at fn.2 (1974). The Appeal Board has explained why an affidavit should be most particular; given the solemnity of an attestation under oath, it reduces the likelihood of an irresponsible attack upon the probity or objectivity of a Board member by forcing the moving party to state with particularity the grounds supporting that

^{3/} See, Nuclear Engineering Co., Inc. (Sheffield, Ill. Low Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 301 at fn.3 (1978) wherein the failure to file affidavits was not considered fatal to the motion since the Board itself had called attention to the matters forming the basis of the disqualification motion.

Motion. See, Beaver Valley, supra fn.2; Nuclear Engineering Co., Inc. supra at fn.3.

In Beaver Valley, the Appeal Board stated:

The motion to disqualify contained very little more than broad and vague assertions that the Licensing Board had manifested bias, which assertions were not accompanied by record references. Moreover, there was no attempt made by the intervenors to comply with the express requirements of Section 2.704(c) that disqualification motions be supported by 'affidavits setting forth the alleged ground for disqualification.' In view of the obvious gravity of motions of this character, these deficiencies were significant. A party leveling a charge as serious as that of bias against a licensing board or its members has a manifest obligation to be more particular in establishing the foundation for the charge as well as to adhere scrupulously to the affidavit requirement of § 2.704(c). [Citations omitted] Beaver Valley, supra at p. 43.

In the instant case, although CCANP has belatedly submitted an affidavit, it has not cured the defects in its original Motion of failing to detail and support by record citation an instance of bias, prejudice or hostility. CCANP's motion is a two page document setting forth a series of one sentence accusations against Judge Hill. The supporting affidavit adds nothing but an attestation by a member of CCANP that he feels the generalizations set forth in the Motion are true. In light of the serious nature of the charge and CCANP's failure to adhere in a meaningful way to the requirements of 10 C.F.R. § 2.704(c), the Staff submits the Motion should be denied. An examination of the allegations in the Motion and affidavit supports the Staff's position.

The gist of CCANP's motion is threefold; the Intervenor asserts Judge Hill has a personal bias against CCANP's participation in this proceeding, that he has prejudged factual issues before the Board, and that he has engaged in conduct which gives the appearance of these other

improprieties. CCANP has utterly failed to set forth sufficient facts, either in its Motion or affidavit, to support any of these accusations. For example, CCANP alleges Judge Hill "has repeatedly demonstrated his overt hostility to the participation of CCANP in this proceeding." Motion at 1. However, the affidavit in support of this Motion does not attest to a specific instance of hostility. Similarly, CCANP states Judge Hill "has demonstrated a lack of impartiality", Motion at 1, yet provides but one incident, his response to the Quadrex Report, which in the mind of one member of CCANP is an example of such bias.

Without explanation, CCANP suggests that Judge Hill's position against immediately hearing the allegation of a conspiracy to hide the Quadrex Report evidences his prejudice. However, the failure of a Licensing Board to decide questions before it with suitable promptness scarcely allows an inference that the tribunal harbors a personal prejudice against a litigant. Puget Sound Power and Light Company, et. al. (Skagit Nuclear Power Project, Units 1 & 2), ALAB-556, 10 NRC 30, 34 (1979). In fact, even if Judge Hill had been responsible for a large number of rulings against CCANP, a point CCANP assumes rather than proves, it has been held a large number of unfavorable or even erroneous rulings is not evidence of bias. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974).

CCANP further states "Judge Hill seems to perceive his role as that of defender of the NRC and applicants..." Motion at 1; however, it provides no citations to the record in either the Motion or affidavit which would substantiate that claim. CCANP states Judge Hill has been unable to separate his service on this Board from that of an employee of

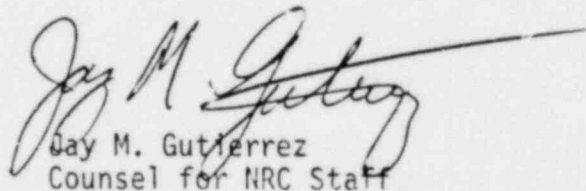
an institution which is part of the nuclear industry and with the "inherent bias" accompanying such a position. Motion at 1. However, CCANP does not tell where that bias has surfaced. It has been held that membership in or employment by an organization does not perforce disqualify a board member. Cf. Sheffield, supra at 302.

CCANP next alleges that through yelling at fellow Board members during recess, and "grimaces, gestures, off-the-record outbursts and vigorous complaints " during the Judges' off the record deliberations "... the other members of the Board have been repeatedly bludgeoned into rulings which violate the due process rights of CCANP and created a record replete with errors." Motion at 1. Curiously, CCANP does not point to a single ruling the other Board members acquiesced in while bludgeoned nor does CCANP cite to a ruling forced by Judge Hill which violates CCANP's due process rights. Lastly, CCANP offers no citations to the record allegedly replete with error.

III. CONCLUSION

For the reasons aforesaid, "Citizens Concerned About Nuclear Power (CCANP) Motion For Judge Ernest Hill To Recuse Himself From Further Participation In This Proceeding" should be denied.

Respectfully submitted,


Jay M. Gutierrez
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of March, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC REPLY IN OPPOSITION TO CCANP'S MOTION FOR JUDGE ERNEST HILL TO RECUSE HIMSELF in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 30th day of March, 1982.

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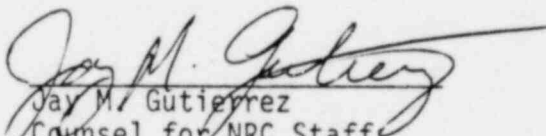
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