

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE NUCLEAR REGULATORY COMMISSION

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In the Matter of)
(
Houston Lighting and Power Co.) Docket Nos. 50-498
(South Texas Project, Units 1 (50-499
and 2))

CITIZENS CONCERNED ABOUT NUCLEAR POWER (CCANP)
RESPONSE TO APPLICANTS' PETITION FOR REVIEW
OF APPEAL BOARD'S ORDER OF APRIL 15, 1982

On April 20, 1982, Applicants (Houston Lighting and Power Co., et al) filed Applicants' Petition for Review of Appeal Board's Order of April 15, 1982 (hereinafter Petition). In their cover letter accompanying said petition, Applicants note that the petition was prepared prior to the Applicants' receipt of the Appeal Board's opinion supporting the removal of Judge Ernest E. Hill as a member of the Atomic Safety and Licensing Board in this proceeding. (Letter, p. 2) Applicants characterize their petition as alerting the Commission that "there are matters deserving of its attention." (Letter, p. 2) Applicants then urge the Commission to review the Appeal Board's Order "either on the Commission's own motion under 10 C.F.R. Section 2.786(a) or in response to Applicants' Petition." (Letter, p. 2)

From Applicants' letter, it is not clear to CCANP whether the Applicants' petition for review is to be considered an informational document or a formal petition for which response time is now running. In case the latter is how the Commission is treating the petition for review, CCANP herein files a response to said petition, reserving the right to respond further should the response time in fact not have begun with service of the petition.

Additionally, if the Commission is to review the actions of the Appeal Board, presumably the Commission will be reviewing the Appeal Board's agreement with the quorum Board's denial of CCANP's motion for recusal. The responses herein will, therefore, address not only the recusal order by the Appeal Board and the petition by Applicants, but also the Appeal Board's agreement with the quorum Board's Order of April 13, 1982.

1. Both the quorum Board's Order of April 13 and the Applicants' petition for review incorrectly characterize CCANP's original recusal motion. The Quorum Board perceived CCANP as arguing the "inherent bias" created by Judge Hill's employment constituted a ground for recusal. (Order, p. 5) Similarly, the Applicants' petition for review characterized CCANP's motion for recusal as arguing "inherent bias" as a basis for recusal. (Petition, p. 2)

In fact, a careful reading of the CCANP motion of March 9, 1982 will show that what CCANP argued was that Judge Hill's private position brought an expertise to the Board which presumably the Commission desired, that there was a natural bias in Judge Hill's profession to favor the licensing of nuclear plants, and that Judge Hill had a duty to put aside that bias and contribute to the hearing as an "objective professional analyst." (Motion, p. 1)

While highlighting the specific facts that Judge Hill worked for Lawrence Livermore Laboratory and that said institution keeps intelligence files on nuclear critics, CCANP offered these facts as background to reinforce CCANP's argument that Judge Hill has a special obligation to put aside any inclinations to favor Applicants or disfavor CCANP while serving on the ASLB. CCANP concluded that Judge Hill had failed to transcend his private inclinations. At no time did CCANP argue that Judge Hill's private employment was per se a basis for disqualification.

CCANP stressed the distinction by noting CCANP is an anti-nuclear organization but "has always participated in accordance with the rules and procedures of the Commission and the federal regulatory process." (Motion, p. 1) CCANP also characterized Judge Hill's behavior as "a product of two value systems in conflict within the judge." (Motion, p. 2) Apparently the nature of previous recusal motions and rulings led the quorum Board and the Applicants to perceive CCANP as arguing employment as a basis for recusal. This perception was in error.

The Appeal Board opinion of April 21 did not specifically address this argument, but the Appeal Board appears to adopt the quorum Board's reasoning without reservation. (Opinion, p. 3)

2. Both the quorum Board and the Appeal Board chastize CCANP for not providing adequate support for its motion. The Appeal Board even suggests the motion may be an irresponsible attack. (Opinion, p. 4) CCANP believes the validation of its concerns appears in Judge Hill's statement and the Appeal Board's response to that statement.

As stated in CCANP's motion for recusal, CCANP believes Judge Hill "has normally been careful to confine his expression of bias to off the record manifestations." (Motion, p. 1) Obviously, it is very difficult to document such manifestations.

1. CCANP does note that after filing the recusal motion, CCANP discussed the motion with Mrs. Peggy Buchorn, representative of Citizens for Equitable Utilities, the other intervenor in this proceeding. Mrs. Buchorn expressed her intention to file a supporting affidavit. Her difficulties in recovering from major surgery, however, prevented her actually filing such an affidavit.

CCANP specifically requested Mrs. Buchorn to reference and/or attach the transcript pages in which Judge Hill criticized the NRC for conducting the investigation which eventually brought the Quadrex Report to the Commission's attention. CCANP cannot afford transcripts and awaits Commission action on a proposed change in the regulations to permit the NRC to provide such transcripts to all parties. Mrs. Buchorn does have copies of the transcript and, therefore, could have given specific references had she been well enough to file her affidavit.

CEU's support for the recusal motion was also expressed by CEU's attorney William Jordan after the Appeal Board's ruling. Mr. Jordan stated:

"I did not think we could get a strong legal ruling for his removal, because the rules for removal are strict. But we did object to his demeanor in the course of the hearings. We would hear him whispering derogatory things about the intervenors to other members of the panel, and many times he would turn his back and ignore us during cross-examination," San Antonio Light, April 16, 1982; p. 18-A

Furthermore, CCANP acted based on the apparently naive assumption that merely calling the situation to Judge Hill's attention would cause him to perceive the problem and either change his attitude or recuse himself. CCANP first considered a personal letter to Judge Hill but concluded such a letter would possibly violate the ex parte communication rules of the Commission.

CCANP did not file its motion lightly. Judge Hill has been on the Board since the first evidentiary hearings in May, 1981. From the beginning, CCANP found his demeanor and attitude inappropriate for a judge. In fact, one day CCANP arranged for a volunteer to be present in Houston to record any activity by Judge Hill which might demonstrate prejudice toward CCANP. Unfortunately, the observer fell asleep.

Finally, while not being able to cite specific pages of the transcript, CCANP did state "in the last week of hearings Judge Hill went on record to criticize the NRC for conducting the investigation which discovered the Quadrex Report." (Motion, p. 2) CCANP referred to this behavior as the "clearest example of Judge Hill's inability to remain impartial . . ." (Motion, p. 1) CCANP spent almost half its motion for recusal discussing Judge Hill's reactions to the Quadrex Report in order to support CCANP's argument of conflicting values within the judge and to provide a context for the final act of criticism to which CCANP strongly objected.

CCANP is now able to cite Tr. 10355 - 10364 and 10369 - 10370 as containing this criticism and CCANP's follow up on recross. CCANP recognizes that the quorum Board was under no obligation to do CCANP's work. However, if a recusal motion is viewed by the NRC as a matter of utmost seriousness, the quorum Board, already aware CCANP does not receive transcripts, might well have located the portion of the transcript containing Judge Hill's criticism to evaluate those remarks in making their decision on CCANP's motion. The hearing that week lasted only two days, with the NRC witnesses appearing on the second day. The review would therefore be of only one day's transcript. Since the transcript provides an index wherein Judge Hill's cross examination of the NRC witnesses is set out by page number reference, finding the portion in question would have been a very simple matter. The review itself would have consisted of reading a total of eleven (11) pages.

Even without going to the trouble to locate the passage referred to in CCANP's motion, both members of the quorum Board had available to them their memories of this event. Both were present during Judge Hill's criticism. Yet the quorum Board Order reflects no consideration of what CCANP terms its clearest example in reaching their decision to deny CCANP's motion.

It was precisely CCANP's dismay at the criticism of the NRC for conducting one of the most important investigations to date at the South Texas Project which triggered the filing of the recusal motion. CCANP still spent a month considering whether to file such a motion. CCANP did not and does not consider the motion irresponsible or frivolous, though the motion could have perhaps been more developed with supporting citations and specificity.

3. The quorum Board Order also took offense at CCANP's assertion that Judge Hill dominated Board decisions. (Order, p. 6-7) What CCANP was attempting to convey was that Judge Hill's hostility toward CCANP led him to argue beyond "the normal interchange between persons who may have differing views on complex questions which are rarely susceptible of black-and-white resolution." (Order, p. 6) CCANP recognizes that

vigorous debate is an essential part of the decision making process for a three judge panel. But Judge Hill seemed to go beyond vigorous debate into excessive argument as a result of his attitude toward CCANP, not a mere difference of opinion. This perception was part of the reason CCANP concluded that Judge Hill had "repeatedly demonstrated an antagonistic and hostile attitude toward CCANP's participation in this proceeding. (Motion, p. 2) This conclusion was not meant to be a "bald assertion" as the Appeal Board characterized this statement. (Opinion, p. 5, footnote 5) CCANP was concerned that over time Judge Hill's tendency to argue excessively was wearing down the other panel members. While in fact not believing they were ruling other than on the merits, the remaining judges, in CCANP's view, were tilting more and more toward agreeing with Judge Hill because Judge Hill was so energetically insistent. Again, CCANP did not perceive this insistence as a mere difference of opinion but rather a manifestation of Judge Hill's desire to limit CCANP's participation in the proceeding. Since the judges' conferences on ruling during the hearing were off the record, CCANP could not cite to specific dialogue to support this perception.

4. In their petition for review, Applicants argue that the Appeal Board ruled on a matter not raised before the Appeal Board. (Petition, p. 3-4) Specifically, the Applicants argue that Judge Hill's statement was not raised before the Appeal Board or, alternatively, the Appeal Board raised the matter of Judge Hill's statement sua sponte.

The Appeal Board opinion responds directly to this argument in two ways. First the Appeal Board stated:

"It is of no consequence that the basis for our doubts about Judge Hill's objectivity is found not in CCANP's motion and affidavits, but rather in the statement prompted by such motion. Once such evidence of bias manifests itself, we can scarcely deny its existence." (Opinion, p. 5, footnote 6)

Second, the Appeal Board specifically concluded that the quorum Board should not have ruled on the recusal motion at all. (Opinion, p. 10-15) Under this ruling, the only matter properly on appeal was Judge Hill's refusal to recuse himself. The only documentation of that refusal was Judge Hill's statement. The original motion and affidavits along with the judge's statement were, therefore, the only matter properly on appeal and the only matter on appeal raised before the Appeal Board, other than whether the quorum Board should have issued an order.

5. The Applicants object that the "Appeal Board did not, prior to issuing its Order, identify its concerns or give Judge Hill, the Licensing Board, or the parties an opportunity to address the question whether those comments were disqualifying." (Petition, p. 3-4)

The Appeal Board specifically found that Judge Hill's "statements speak for themselves." (Opinion, p. 8) The Appeal Board did not concern itself with the truth or accuracy of the statements but rather with the impression created by those statements. (Opinion, p. 10)³

2. This argument by Applicants is only one of a number of instances where waiting for the Appeal Board opinion would have afforded the Applicants an opportunity to frame a better petition. CCANP sees the rushed approach by Applicants as deleterious to a well reasoned decision making process.

3. Footnote 3 is on the next page.

In deciding whether Judge Hill's statement created an impression of bias, the Appeal Board would not be aided by the perceptions of Judge Hill (who in fact disclaimed any bias in his statement), the quorum Board, or the parties. Since the Appeal Board found the impression of bias so clear that the "Most sincere disclaimer cannot salve the damage already inflicted," explanations would be fruitless. (Opinion, p. 9)

In considering Judge Hill's statement and in reaching its determination of bias, the Appeal Board neither "exceeded its authority under the regulations or exercised some general supervisory authority over licensing boards in addition to that clearly articulated in the regulations," as asserted by the Applicants. (Petition, p. 4)

6. The Appeal Board notes that the quorum Board did not mention Judge Hill's response in their Order. (Opinion, p. 9, footnote 14) CCANP notes that Judge Hill's statement was attached to the quorum Board's Order and noted on the last page of that Order. (Order, p. 8) The quorum Board indeed did not mention the statement leaving open the possibility that the quorum Board did not take issue with any of Judge Hill's observations. CCANP does not, at this time, assert any meaning for this omission on the part of the quorum Board but does note that what was apparent as an appearance of bias to the Appeal Board was either not apparent to the quorum Board or not considered in their ruling. In either case, the omission does create some basis for considering the quorum Board ruling as in error.

7. The Applicants argue that as a "non-lawyer member" of the licensing board, Judge Hill should not be subject to the standards of behavior to which lawyer members would be subject. (Petition, p. 5,7)

The Appeal Board answers this concern by noting Judge Hill was entitled to consult his colleagues, who included Judge Bechhoefer, an attorney, and the legal counsel available to the Licensing Board Panel. (Opinion, p. 14, footnote 19) The quorum Board in its Order does not inform us whether Judge Hill did in fact consult with his colleagues prior to issuing his statement.

CCANP would further suggest that when a judge has a private career immersed in the field being regulated, the NRC must expect a special effort on the part of such judges to avoid even the appearance of favoring the regulatee or harboring hostility toward critics of the regulatee.

8. The Applicants and the Appeal Board clearly differ on what constitutes disqualifying behavior by a judge. CCANP has not had time to brief this question, but offers the following observations.

If a three judge appeal board of the NRC unanimously perceives a judge's written statements as creating an incurable impression of bias (Opinion, p. 9), the Commission should hesitate to review that

3. Because the Appeal Board ruling is based solely on the impression created and not the substance of Judge Hill's allegations against CCANP, CCANP is not responding specifically to the judge's statement at this time. Should the Commission decide to go beyond the impression created, CCANP is fully prepared to respond in detail to the judge's statement.

ruling as long as the Appeal Board cited sufficient authority to support their opinion and their opinion can in no way be considered capricious and arbitrary.

The Appeal Board found Judge Hill's statements to contain "a series of direct attacks" upon CCANP representatives. (Opinion, p. 7) The Appeal Board found particularly objectionable the allegation that CCANP was subverting the NRC process. (Opinion, p. 7-8) The Appeal Board found the statements to "reflect a lack of sensitivity for the role that a judge must necessarily play in any adjudication." (Opinion, p. 8) The Appeal Board found the damage already inflicted to be incurable by "the most sincere disclaimer of bias" (Opinion, p. 9) The Appeal Board found Judge Hill's statements to be "totally gratuitous." (Opinion, p. 9) The Appeal Board found Judge Hill's statements to be unsubstantiated. (Opinion, p. 9) The Appeal Board found "Judge Hill affirmatively created the impression that he harbors a deep-seated personal hostility towards CCANP and its representatives, which could be expected to affect materially his future determinations on matters of concern to that intervenor." (Opinion, p. 10)

These findings by the Appeal Board are supportable by the contents of Judge Hill's statement. The findings are a sufficient basis to conclude Judge Hill should be replaced.

9. What the Applicants are essentially asking the Commission to do is to consider substituting the Commission's perceptions of Judge Hill's statements for those of the Appeal Board. The Applicants are also asking the Commission to substitute its judgment of the legal import to be given those statements for the judgment of the Appeal Board.

CCANP responds that such a course of action is fraught with short term and long term adverse consequences for the Commission. Where three appeal judges perceived clear and incurable appearance of bias is the Commission prepared to say such bias cannot be perceived? Where the Appeal Board found the bias to be legally disqualifying based on cases particularly applicable to administrative hearings is the Commission prepared to place Judge Hill back on the Board based on a different reading of precedent?

The essential point being made in these CCANP questions is that the damage is done. To place Judge Hill back on the ASLB in this proceeding would taint the entire proceeding with an indelible stain and create doubts about the ultimate fairness of the NRC process itself.

CCANP would be placed in the untenable position of appearing before a judge whose conduct clearly evidenced to a unanimous NRC panel an impression of animus specifically directed toward CCANP.

To review the Appeal Board ruling only to affirm the decision would be to prolong this unfortunate incident unnecessarily.

Conclusion: For the above and foregoing reasons, Citizens Concerned About Nuclear Power urges the Commission to let stand without review the ruling of the Appeal Board in this matter. Specifically, CCANP urges the Commission not to review the Appeal Board's decision on the Commission's own motion and to deny Applicants' petition for review.

Respectfully submitted,
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Lanny Sinkin
for the intervenor, CCANP

April 28, 1982