UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of HOUSTON LIGHTING AND POWER COMPANY, ET AL. (South Texas Project, Units 1 and 2)	Docket Nos. STN 50-498 OL 50-499 OL

AMICUS BRIEF OF THE ATOMIC SAFETY AND LICENSING BOARD PANEL IN REGARD TO COMMISSION REVIEW OF ALAB-672 (DISQUALIFICATION OF LICENSING BOARD MEMBER)

If permitted to stand, the decision of the Atomic Safety and Licensing Appeal Board in ALAB-672 would establish the remarkable and wholly unprecedented proposition that an administrative judge who has presided over forty days of protracted, complex and heavily contested hearings may be disqualified from further participation at the eleventh hour simply for expressing strong criticism of the manner in which a party before him is presenting its case. It would not matter, according to the Appeal Board decision, that the charges of bias levelled against the judge in the first instance were nothing more than "sweeping and unsubstantiated assertions"[1/] that were "insufficient to justify recusal or disqualification"[2/]; it would be of no consequence whether the

1/ Houston Lighting & Power Company, (South Texas Nuclear Project, Units 1 and 2), ALAB-672, slip opinion at p. 5 (hereinafter cited as ALAB-672).

2/ Ibid., p. 3.

judge's critical comments were arguably justified or not; and it would not matter that no actual bias or prejudgment of disputed factual issues had been shown. The mere fact that the judge's words created the impression of hostility would be sufficient to justify disqualification, whether or not that impression accorded with reality.[3/] This decision is not only unsupported by any Commission precedent, it is virtually 180 degrees out of phase with the entire, clearly-established body of federal law governing disqualification of presiding officials.

3/ Ibid., p. 10.

I.

THE TEST APPLIED BY THE APPEAL BOARD IN DETERMINING TO DISQUALIFY JUDGE HILL INCORRECTLY IGNORED THE REQUIREMENT THAT BIAS, TO BE GROUNDS FOR DISQUALIFICATION, MUST STEM FROM AN EXTRAJUDICIAL SOURCE.

It is firmly established that recusal or disqualification of a judge on grounds of personal bias or prejudice is proper only when the alleged bias or prejudice stems from an extrajudicial source. In United States v. Grinnel Corp., 384 U.S. 563, 583 (1966), the Supreme Court stated the rule clearly and unequivocally:

> The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.

This standard was applied specifically by the Commission in The Commonwealth Edison Company, (LaSalle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169 (1973), to overturn an Appeal Board decision disqualifying a Licensing Board member.

The Appeal Board's opinion in the present case again seems to have ignored the requirement that alleged bias, to be disqualifying, must stem from matters outside the proceeding itself. In explaining the test it applied to disqualify Judge Hill, the Board stated:

> The question at hand was whether a disinterested observer could have reasonably inferred from Judge Hill's statement that he now has a personal animus against this intervenor which could affect his ability to pass judgment objectively upon its cause.[4/]

4/ Ibid., p. 7.

The use of the word "now" in this sentence reflects the erroneous view that Licensing Board members may be disqualified for opinions formulated during, and resulting from, the licensing proceedings themselves. This is bad policy as well as bad law.

The error in the Appeal Board's test derives from the portion of its decision in Consumers Power Co., (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 64-65 (1973), in which it interpreted the federal law governing the disqualification of judges to direct that:

> ...an administrative trier of fact is subject to disqualification if he has a "personal bias" against a participant; ...or if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Ibid. at p. 65.[5/] Although this is a correct general statement of the law, it is also extremely misleading, because the scope of the terms "personal bias" and "prejudgment of factual issues" in the context of disqualification of adjudicatory officials has been restricted by judicial interpretation to matters having an extrajudicial genesis.[6/]

5/ Curiously, Consumers Power hinges in part on court decisions whose facts are clearly distinguishable from the facts in this case. Both Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583 (D.C. Cir. 1970), and Texaco, Inc. v. Federal Trade Commission, 336 F.2d 754 (D.C. Cir. 1964), involved demonstrations of extrajudicial bias by a Commissioner. In both cases, the Commissioner made speeches outside the record which indicated that he had prejudged the facts as well as the law in the case. In Amos Treat and Co. v. S.E.C., 306 F.2d 260 (D.C. Cir. 1962), a Commissioner was disqualified for deciding aspects of a case which he had previously investigated as a member of the Staff. The Court of Appeals ruled that this violation of the separation of functions resulted in a tribunal which, structurally, was not impartial or disinterested.

6/ Even prior to Grinnell, federal courts had interpreted the words "personal prejudice" under the statutes governing the disqualification of a judge to require evidence of an attitude derived otherwise than through the judicial proceedings. See e.g. United States v. 16,000 Acres of Land, 49 F.Supp. 645, (D. Kan. 1942), and cases cited therein.

The Consumers Power decision correctly noted that the rules governing the disqualification of presiding officials under the Administrative Procedure Act are similar to those applicable to federal judges.7/

7/ Section 556(b) of the Administrative Procedure Act provides as follows:

> The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matters as a part of the record and decision in the case.

This statutory language, as the Appeal Board indicated in Consumers Power, is similar to that appearing in section 21 of the Judicial Code (28 USC § 144) which is applicable to the disqualification of federal district judges:

> Whenever a party to a proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to near such proceeding.

In 1974 (post Consumers Powers Co.) 28 USC § 455 was amended to address the disqualification of judges on the grounds of partiality and personal bias. That section provides in relevant part:

(Footnote 7/ continued on page 6)

The latter standards are "the outgrowth as well as the subject of a long line of judicial decisions."[8/] Grinnell is the end of that line, and its teaching should control here as it did in LaSalle, not only as a matter of stare decisis, but for very pragmatic reasons as well.

7/ (cont.) (a) Any justice, judge, magistrate or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentuary facts concerning the proceeding.

Since 1974, federal courts have considered both 28 USC § 144 and 28 USC § 455 in determining whether the disqualification of a judge is appropriate. However, the test is the same under both, according to court decisions which have examined both statutes. See Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044 (5th Cir. 1978), at 1052, and In re International Business Machines Corp., 618 F.2d 923 (5th Cir. 1980) at 928 (hereinafter referred to as In re IBM).

8/ Consumers Power Co., supra at p. 63.

The "extrajudicial source" test for determination of claims of bias against presiding officials is critical to the proper functioning of any adjudicatory process. At some point, judges must become biased if they are doing their jobs. As noted by the court in U.S. V. Conforte, 457 F.Supp. 641, 657 (D. Nev. 1978):

> "Opinions or biases developed by a judge during the course of court proceedings...are generally regarded as inevitable and, in fact, as essential to decision-making."

The frequently quoted language of Judge Frank in In re J. P. Linahan, Inc., 138 F.2d 650, 653-54 (2d Cir. 1943) is even more expressive on this point:

> "[A judge must] shrewdly observe the stratagems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not make child-like innocence. If the judge did not form judgments of the actors in those courthouse dramas called trials, he could never render a decision."

II.

JUDGE HILL'S SEPARATE STATEMENT DOES NOT CONSTITUTE EVIDENCE OF DISQUALIFYING BIAS BECAUSE IT IS ADDRESSED ENTIRELY TO MATTERS THAT OCCURRED DURING THE COURSE OF THE LICENSING PROCEEDING, AND IT SUGGESTS ABSOLUTELY NO ANTECEDENT OR EXTERNAL SOURCE OF BIAS OR PREJUDICE AGAINST THE INTERVENORS

The "extrajudicial source" requirement for a finding of bias requires tangible evidence of the external basis for the alleged prejudice. The existence of such a source cannot be inferred from the judge's conduct of the proceedings.

In re IBM provides a significant recent example of the application of this rule. In denying a petition for writ of mandamus to compel the trial judge to recuse himself from further proceedings, the Court of Appeals observed that:

> IBM has not shown and does not purport to establish or identify any personal connection, relationship or extrajudicial incident which accounts for the alleged personal animus of the trial judge. IBM's claim of prejudice is based completely on Chief Judge Edelstein's conduct and rulings in the case at hand. These we have repeatedly held form no basis for a finding of extrajudicial bias.

In re IBM at 928. (emphasis supplied) The Appeal Board's principal indictment of Judge Hill--that he responded to intervenor CCANP's motion to disqualify with "a series of direct attacks...upon the representatives of CCANP, cast...in extremely pejorative terms,"[9/]--should be considered against this legal background.

9/ ALAB-672, p. 7.

A review of the excerpts from Judge Hill's statement quoted in the Appeal Board's decision reveals quite clearly that his so-called "attacks" were aimed directly at conduct observed by him in the course of hearings before the Licensing Board of which he was a member. Judge Hill criticized CCANP for "being unduly contentious with matters having little, if any, bearing on the admitted contentions;" "conducting needlessly long and unproductive cross-examination;" being "unwilling to heed the advice or admonishment of [the] Board to cease...delaying and obstructing actions;" using the proceeding "as a forum to present CCANP's political views on subjects not at issue;" and generally "subverting the stated objectives of this expedited hearing."[10/] All of these criticisms are concerned with the manner in which CCANP was conducting its case. None gives even a hint of any extrajudicial source for the Judge's opinions.

The Appeal Board's assertion that "these statements speak for themselves" as evidence of a "a lack of sensitivity for the role [of] a judge"[11/] is utterly unsupported by any objective interpretation of Judge Hill's words. Even viewed in the light most hostile to the interests of CCANP, Judge Hill's statements convey nothing more than his determination to continue to object to certain tactics that in his opinion were unduly "delaying and obstructing" the hearing process. This is nothing more than his duty as a Licensing Board member. Even if his opinion were incorrect, it would not give rise to any grounds for disqualification, because it was wholly derived from the proceedings before him.

10/ Ibid., pp. 7-8.

11/ Ibid., p. 8.

That his criticism of CCANP was cast in strong terms may reflect Judge Hill's strong feeling that the problems presented by the conduct described were serious. It certainly does not constitute grounds for disqualification. In re Union Leader Corp., 292 F.2d 381 (1961), for example, held that a judge's conclusion that a party's action was contemptuous and reprehensible, and his showing of irritation were in no way equivalent to personal bias or prejudice.

Strong words and harsh action by a judge may even at times be necessary. In City of Cleveland v. Cleveland Electric Illuminating Company, the court concluded that a judge's statements and comments critical of a party, counsel, or witness were not only insufficient to support a claim of partiality, but that such treatment might actually stem from the judge's "duty to protect the record from distortions and obfuscations."12/

There can be no doubt that adjudicatory officials are required to conduct the proceedings for which they are responsible in a manner that is free from prejudice, favoritism or partiality. The adjective "dispassionate" when used to describe judicial conduct does not mean "without feeling" and does not imply that judges must ignore their subjective reactions to parties before them in evaluating the issues presented for decision.

12/ 503 F.Supp. 368, 378 (N.D.Ohio, 1980).

The Appeal Board, on the other hand, enunciates a standard of judicial decorum that is utterly unrealistic and wholly unsupported by precedent. At ALAB-672, pp. 8 and 9, the Board states:

> A judge must put aside his personal feelings and exercise restraint in responding to charges of bias, even where they may be particularly inflammatory. The use of intemperate language, particularly in a written (rather than oral) statement like Judge Hill's, is at odds with the notion of judicial restraint and fairness, and the most sincere disclaimer of bias cannot salve the damage already inflicted.

It is hardly surprising that the Board cites no cases to support its remarkable proposition that a judge's use of "intemperate language"in response to "particularly inflammatory" charges of bias is grounds for disqualification even in the absence of evidence of actual bias. The cases are uniformly to the contrary.

In re IBM, for example, involved a complaint that the trial judge treated IBM counsel and witnesses with "asperity, incivility, and hostility." Id. at 930. On several occasions the judge expressed his dissatisfaction with counsel for IBM. In fact, there were indications that he had reached the conclusion that he had been "baited" by counsel through their persistence in raising points which he believed had already been determined by previous rulings. Id. at 931. The Court of Appeals made the following comments with respect to the trial judge's behavior:

> Although we cannot condone intemperate behavior on the part of a trial judge, we have observed following a trial of only nine days, "Judges, while expected to possess more than the average amount of self-restraint, are still only human. They do not possess limitless ability, once passion is aroused, to resist provocation."

Id. at 932.[13/]

The Appeal Board's opinion expressed concern over the "depth of...resentment" reflected in Judge Hill's characterization of the CCANP motion for his disqualification as a "personal and unwarranted attack on on [his] professional and moral integrity."[14/] Inasmuch as the unsupported allegations against Judge Hill included the claims that he "has been unable to separate his service on the ASLB from the inherent bias of his position [as a nuclear engineer]" and that he demonstrated an "inability to maintain impartial professionalism,"[15/] it is difficult to discern how the Judge's response could be viewed as an overreaction.

13/ If, as the IBM court suggests, a 9-day trial may fray the nerves of a judge, then it is worth noting in this case that Judge Hill and his fellow board members had sat through some 40 days of hearings prior to the filing of the instant motion.

14/ ALAB-672, p. 7.

15/ Affidavit of Lanny Sinkin in Support of Citizens Concerned About Nuclear Power (CCANP) Motion for Judge Ernest Hill to Recuse Himself from Further Participation in This Proceeding, p. 2.

The Appeal Board further asserts that Judge Hill's observations concerning CCANP's conduct "were totally gratuitous."[16/] Apparently the inference to be drawn from this conclusion is that unnecessary critical remarks must reflect the presence of some deep-rooted bias against the subject of the criticism. Even if this inference could be justified in general, however, it would clearly be inappropriate in this case because the assertion that Judge Hill's statements bore no "discernible relevance" to the charges of bias against him is simply not correct.

As noted above, both the Licensing and Appeal Boards found that the motion for disqualification of Judge Hill "contained very little more than broad and vague assertions."[17/] Nevertheless, the regulations governing the disposition of such motions at the Licensing Board level, and the available case precedent, though unclear, seemed to suggest that Judge Hill should respond individually to the charges.

A reading of the CCANP motion suggests two principal bases for the intervenor's claim of bias: (1) that Judge Hill was inherently biased in favor of "the nuclear industry" because of his profession; and (2) that he had "repeatedly demonstrated his overt hostility to the participation of CCANP in this proceeding."[18/] Judge Hill addressed the former charge directly in a response that was apparently considered unobjectionable by

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16/ ALAB-672, p. 9.

17/ Ibid., p. 4.

18/ CCANP Motion for Judge Ernest Hill to Recuse Himself, p. 1.

the Appeal Board. The allegation of "overt hostility," however, devoid as it was of any specific record citations, was necessarily more difficult. Judge Hill's response indicates that he considered the charge to be an outgrowth of his expressed position on various procedural issues involving CCANP's conduct of its case. Accordingly, he delineated those matters which he presumably considered to be most serious and stated the basis for his objections. That his statements are highly critical of CCANP's conduct is clearly true. Far from "gratuitous attacks", however,they constitute a reasonable effort to respond to admittedly vague charges presenting little more than innuendo and suspicion.

Finally, what is most disturbing about the Appeal Board's decision is its total disregard for the substance as opposed to the "import and tone"[19/] of Judge Hill's statements. Indeed, the opinion strongly suggests that the accuracy of his observations concerning CCANP's actions and motives was immaterial to the issue of disqualification!

The transcript reference included by Judge Hill in his statement certainly suggests that his views were not without some merit. In that excerpt, the Licensing Board chairman directs the following comments to counsel for CCANP following counsel's decision to discontinue cross-examination of an NRC Staff panel:

> The interruptions primarily resulted from the large number of objections which were advanced by other parties and upheld by us. In large part, our rulings were premised on the lack of materiality of, or the lack of foundation for the question...

19/ ALAB-672, p. 9.

> [M]any of the questions rejected because of lack of foundation involved assumptions as to the allegedly hazardous nature of nuclear energy. The degree of hazard, if any, of nuclear energy is not for these witnesses or the board to consider.
>
> Both the Staff and this Board are charged with enforcing or applying the rules, regulations and standards of the Commission, not for determining whether the rules, regulations and standards are appropriate...
>
> Finally, --and I emphasize--much of the delay, and hence, the discontinuity in the cross-examination was the result of repeated attempts to re-argue rulings which we had made and repeated interruptions of various speakers, including this Board.
>
> Such actions are completely inappropriate, and we admonish counsel in the future to bear these thoughts in mind.

Transcript pp. 9981-9983.

The Appeal Board's decision, if upheld, would validate the seriously disturbing proposition that a licensing board member may be disqualified for the expression of arguably accurate views concerning the conduct of a party, if those views are stated in harsh terms. Clearly this is wrong. To grant a motion for disqualification based solely on an overt expression of hostility toward the manner in which a party is conducting itself in a proceeding would effectively reward that party for behavior antithetical to the fair and efficient conduct of the hearing.

The formation of opinions concerning the character, integrity and competence of hearing participants is a normal and necessary aspect of the adjudicatory process. No judge is required to conceal those opinions and

maintain unwaivering civility in the face of every provocation; or to recuse himself whenever he finds that he is in strong disagreement with the conduct of a party or its counsel. He must step down only when his ability to determine objectively the issues presented for decision is irretrievably impaired by matters outside the scope of the proceeding. Judge Hill has flatly denied any such bias, and not one scintilla of evidence to contradict him has been presented.

Respectfully submitted,

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