UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

INTERVENOR CITIZENS CONCERNED ABOUT NUCLEAR POWER'S REPLY BRIEF IN RESPONSE TO NUCLEAR REGULATORY COMMISSION ORDER OF MAY 6, 1982

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ABOUT NUCLEAR POWER

May 29, 1982

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I. Introduction

Citizens Concerned About Nuclear Power (CCANP) hereby files this, its reply brief in accordance with the Commission's Order of May 6, 1982.[1]

II. Background

Pursuant to the Commission's May 6, 1982 Order, all parties to this proceeding filed initial briefs. In its Order, the Commission said: "A party's brief shall be in the hands of the Commission and the other parties no later than 15 days after the date of this Order." (emphasis added) The due date for initial briefs was, therefore, May 21, 1982.

CCANP requested a seven day extension of the briefing schedule which was denied.[2]

On Friday, May 21, CCANP received the briefs of the Applicants and the NRC Staff in San Antonio, Texas.

On Monday, May 24, prior to mail delivery, CCANP's representative took all pertinent material to Austin to work in the University of Texas School of Law and the Travis County Depository where the transcripts of the hearing are kept. In Austin, CCANP found the initial brief from Citizens for Equitable Utilities (CEU) mailed Express Mail from Washington and received in Austin on May 22. CEU's position is in agreement with CCANP's, so no reply is required by CCANP to that brief.

On Tuesday, May 25, CEU's attorney in Washington called CCANP's representative in Austin seeking to discuss the brief filed by the Atomic Safety and Licensing Panel as an amicus brief. CCANP had no knowledge of such a brief.

After hearing from CEU's attorney, CCANP's representative contacted a neighbor in San Antonio who informed him that the Panel brief had arrived on Monday, May 24. The envelope was postmarked May 20 and mailed

regular mail ($.71 postage). Clearly no attempt was made to have the Panel brief in the hands of CCANP by May 21, 1982.

On Wednesday, May 26, CCANP's representative returned to San Antonio to retrieve the Panel brief and to remain in San Antonio to prepare this reply brief. At that time, CCANP's representative discovered the Panel brief was dated May 11.

As a direct result of the Atomic Safety and Licensing Board Panel's failure to attempt timely delivery of their motion, CCANP's representative lost five of the ten days (including delivery time) given for reply to any initial briefs by the Commission's Order of May 6.

Furthermore, the additional burder of the last minute Panel brief denied CCANP the time to make this reply brief either as comprehensive or professional as to form as CCANP would normally have produced.[3]

As just one example of the limitation created by the Panel's lack of compliance with the Commission's Order, CCANP had to rely on the Public Document Depository in San Antonio for access to a transcript of the hearing. For some reason the supervisor of the depository was at a loss to explain, the last transcript received was dated September 18, 1981 and ends at page 9019. CCANP could not, therefore, review for reply any citations to the record after that page.

For reasons of timeliness and for what CCANP believes are very significant policy reasons, CCANP accompanied this brief with a motion to strike the Panel brief. CCANP urges the Commission to personally review that motion prior to consideration of the reply briefs.

III.

The briefs filed by the Applicants (hereinafter "App"), the NRC Staff (hereinafter "Staff"), and the Licensing Board Panel (hereinafter "Panel") to not refute the CCANP conclusion in its initial brief that the Appeal Board selected the correct legal standard in determining to disqualify Judge Hill.

The Appeal Board clearly found Judge Hill's statement so shocking that the "judicial proceedings" rule was inapplicable. Within forty eight hours of receiving Judge Hill's statement attached to the Quorum Board Denial,[4] the Appeal Board ordered Judge Hill replaced.[5] When the Appeal Board said Judge Hill's statements "speak for themselves," Appeal Board Memorandum at 8, the Board obviously meant the statements were so outrageous and so clearly created an incurable impression of bias that

Judge Hill could no longer be permitted to serve.

Besides, as CCANP demonstrated in its initial brief, Judge Hill's statement is either excluded from the "judicial proceedings" rule or falls within the exceptions. CCANP Initial Brief at 12-19 (hereinafter "CCANP").

The Applicants' initial brief and the NRC Staff's brief both find the La Salle decision, Commonwealth Edison Co. (La Salle Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169 (1973), a basis for faulting the Appeal Board's opinion.

CCANP finds the La Salle case an inappropriate place to look for Appeal Board error. The Commission concluded its opinion in that case by stating:

> " Read as a whole, we view Dr. de Sylva's remarks as an effort to elicit additional information, and, as the Licensing Board said, they reflected no more than tentative evaluations. At most, Dr. de Sylva had reached a conditional opinion based upon materials then before him. Indeed, it is apparent from the repeated requests for additional inquiry, that De. de Sylva was not foreclosing further consideration of the factual issues.
>
> Preliminary assessments, made on the record, during the course of an adjudicatory proceeding - based solely upon application of the decision-maker's judgment to material properly before him in the proceeding - do not compel disqualification as a matter of law. (footnote omitted)(citations omitted).
>
> We reject the automatic nature of the Appeal Board's rule whereby a remark, at any stage of the proceeding, indicating a tentative conclusion on the basis of material properly before the Board is equated with an 'appearance' of bias which, in turn, mandates disqualification. Whether the expression of such tentative conclusions creates an improper appearance involves a case-by-case evaluation of all circumstances of record, and not an automatic rule. (footnote omitted)
>
> While Board members are encouraged to question parties so as to develop a complete record, they should refrain from articulating tentative and preliminary opinions before the record is closed. Had that been done here, there would have been no need for time-consuming disputes over the 'appearance' of bias and for review procedures unrelated to the real issues of the case.
>
> Having concluded that the expression of tentative conclusions does not create an ipso facto appearance of bias, we would normally remand the matter to the Appeal Board for further evaluation of the record. ..." La Salle at 170 (emphasis added except for the word automatic in the third paragraph which was emphasized in the original).

Clearly, the Commission concern in this case was the automatic disqualification of a board member for what the record and the remaining board members showed to be merely a tentative conclusion

or opinion. The repeated references to the term "tentative" emphasized in the quoted conclusion highlight the crux of the Commission's concern in La Salle.

In the instant case, Judge Hill's remarks are in no way tentative opinions. Nor does the Quorum Board Denial create any basis for Commission deference, Id., because the Denial contains no account of any interaction between Judge Hill and his fellow board members regarding the actual content of Judge Hill's statement. The La Salle case is, therefore, an inappropriate precedent by which to judge the Appeal Board Memorandum. Efforts by the opposing briefs to focus Commission attention on this precedent, rather than those use by the Appeal Board are misdirected.

The judicial proceedings rule itself is not that clearly applied in the case law. In La Salle, the Commission finds that public speeches are different from on the record remarks, suggesting that the context, not the source, determines the extrajudicial nature of a remark. La Salle at 170, note 3. In fact, the court in Cinderella also finds context as the measure since the remarks of Commissioner Dixon were clearly based on the record of the case and directed towards the case. Cinderella Career and Finishing Schools, Inc. v. F.T.C., 425 F.2d 583, 590 and 590, note 10 (1970).

CCANP, therefore, addressed various possibilities in its initial brief and concluded that Judge Hill's statement was not part of his judicial function,[6] was not required,[7] had an extrajudicial source,[8] and was not the equivalent of a courtroom outburst.[9]

Also in La Salle, the Commission viewed the challenged judge's remarks as "an effort to elicit additional information." La Salle at 170. To the contrary, Judge Hill's statement is aimed at preventing CCANP from bringing forth additional information. CCANP at 11-12.

For example, Judge Hill inaccurately characterizes the issues in the expedited proceeding as a "rather narrow spectrum of issues to be heard...." Appeal Board Memorandum at 16. To the contrary, the Commission specifically directed the Licensing Board "to look at the broader ramifications of these charges in order to determine whether, if proven, they should result in denial of the operating license application." (emphasis added) Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291-292 (1980).

The central issues are the corporate character and technical

competence of the Applicants. Id. at 291. The issue of corporate character is a broad and vaguely defined issue in itself. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-80-5, 11 NRC 408 (1980). The Licensing Board in this proceeding requested briefs on this issue before the hearings began but decided not to rule at that time on what the term means.[10]

Having created the false limits of a "narrow spectrum of issues," Judge Hill then castigates CCANP for vigorously asserting as relevant matters Judge Hill considers outside his specturm. Appeal Board Memorandum at 17. Rather than requesting additional information or even giving guidance as to what is within his spectrum, Judge Hill calls CCANP's efforts to present such issues "subverting" the proceeding and leaves it at that.

In order to avoid Judge Hill's wrath, CCANP must now exercise self censorship based on a capricious and arbitrary standard existing only in Judge Hill's mind. Such a situation is a far cry from the situation created for those alleging bias in La Salle and further demonstrates the inappropriateness of La Salle as a precedent.

Finally, as to La Salle, the Commission recognized "the Appeal Board's diligent effort to decide a difficult and close question." La Salle at 170. Obviously in the instant case, the Appeal Board found Judge Hill's creation of an incurable impression of bias not difficult or close but obvious.

While distinguishing cases based on their facts, U.S. v. Grinnell Corp, 384 U.S. 563 (1966), so copiously cited in this exchange of briefs, revolved around an in court statement regarding the ultimate outcome of the suit. The instant case involves a pervasive personal bias as to one party to a hearing expressed in an out of court written statement.

While cases may be distinguished on their facts, certain general principles underlying recusal override any factual considerations. The Appeal Board clearly had these principles in mind when it selected the portion of Consumers which included the statement"

> "an administrative hearing ... must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a

competence of the Applicants. Id. at 291. The issue of corporate character is a broad and vaguely defined issue in itself. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-80-5, 11 NRC 408 (1980). The Licensing Board in this proceeding requested briefs on this issue before the hearings began but decided not to rule at that time on what the term means.[10]

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> "an administrative hearing ... must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a

quasi-adjudicatory proceeding meet the basic requirements of due process." Appeal Board Memorandum at 6 quoting Amos Treat & Co v. S.E.C., 306 F.2d 260, 267 (D.C. Cir. 1962)

The Appeal Board clearly selected the correct legal standard in determining to disqualify Judge Hill.

IV.

The briefs filed by the Applicants, the NRC Staff, and the Panel do not refute the CCANP conclusion in its initial brief that the statements by Judge Hill constitute evidence of bias or prejudice warranting his disqualification.

A. The opposing briefs do not suffice to alter CCANP's conclusion in its initial brief that Judge Hill's statement created an incurable impression of bias.

Neither the Applicants, the Staff, or the Panel respond directly to CCANP's allegation of partiality towards Applicants. CCANP at 22. Despite the fact CCANP clearly set out this issue prior to the initial briefs being called for by the Commission[11], the only response of any kind is found in the Panel brief. Panel at 13. The Panel's one sentence response is in fact not responsive. Id.

The Panel characterizes CCANP as claiming "Judge Hill was inherently biased in favor of the 'nuclear industry' because of his profession." Id. This mischaracterizes what CCANP alleged as to partiality. CCANP at 20. Instead, CCANP has repeatedly pointed to Judge Hill's criticism of the NRC for conducting the investigation which discovered the Quadrex Report, a report the Commission is clearly familiar with. CCANP at 22.

The failure of Judge Hill to respond to this allegation or of any other party to even address the allegation substantively leaves the charge of partiality without refutation.

As to the allegation of hostility, the opposing parties vary in their assessment of Judge Hill's words.

The Applicants find "Judge Hill's comments were not couched in inflammatory terms ...." App at 19.

The Staff finds "Judge Hill's statements are extremely unfortunate in terms of the public perception of the hearing process," Staff at 18, "perhaps not appropriate," Id., and "may have been ill-advised." Id. at 19.

The Panel finds "it is difficult to discern how the Judge's response could be viewed as an overreaction," Panel at 12; the Judge's statement is a "reasonable effort," Panel at 14; and the Judge's statement is an

"expression of arguably accurate views." Id. at 15. The Panel also finds Judge Hill did make his views known in "harsh terms." Id.

Apparently only the Applicants find Judge Hill's statement to be neutral in tone. Their sanitized version of the statement, App at 13, is a caricature of the real statement. CCANP agrees with the Appeal Baord that the statement was made in "extremely pejorative terms." Appral Board Memorandum at 7. Furthermore, a "disinterested observer" would agree with the latter perception.

The NRC Staff, to their credit, at least view Judge Hill's remarks as unfortunate and set out a broad hint that the Commission may wish to apply a higher standard than normal to uphold the Appeal Board. Staff at 13, 19. While CCANP does not agree that any higher standard is necessary, CCANP appreciates the Staff's discomfort.

The most disturbing perception is the Panel's. Supposedly representing the views of the entire Licensing Board Panel of the NRC, the Panel brief takes a number of positions suggesting a totally unacceptable standard for the behavior of Panel members.

For example, the Panel finds that if a party says a judge "has been unable to separate his service on the ASLB from the inherent bias of his position (as a nuclear engineer)" and says the judge showed an "inability to maintain impartial professionalism," the party has made a personal attack on the judge's "professional and moral integrity." Panel at 12. The statements correctly attributed by the Panel to CCANP cannot be seen as such an attack. If the dispassionate observations of a party wishing to challenge a judge for bias are to be measured by this standard, then no motion for recusal can ever be seen as other than automatically placing the movant in a position of engaging in personal attacks on a judge warranting a response in harsh terms.

Furthermore, CCANP in no way charged Judge Hill with violating the canons of professional nuclear engineers or acting immorally. Partiality to one's own profession is not unprofessional and hostility toward critics is not immoral. Instead, these are natural human reactions. What CCANP has repeatedly argued is that these natural human reactions formed an obstacle to impartially judging an application for an operating license for a nuclear power plant, an obstacle Judge Hill failed to overcome.

The Panel suggests the Appeal Board found CCANP's allegations to be "particularly inflammatory." Panel at 11. To the contrary, the

Appeal Board specifically meant "not to suggest that CCANP's motion and affidavits were such as to provoke a response in kind." Appeal Board Memorandum at 9, note 12. Furthermore, the Appeal Board was in fact stating that even in the face of some hypothetical allegations of a particularly inflammatory nature, a judge has an obligation to "put aside his personal feelings and exercise restraint in responding to charges of bias ...." Id. at 8-9. The Appeal Board went on to stress a restrained response was called for particularly in a "written (rather than oral) statement ...." Id. at 9.

The Panel finds Judge Hill's statements "a reasonable effort to respond to admittedly vague charges presenting little more than innuendo and suspicion." Panel at 14. CCANP rejects this characterization of its motion and affidavits. Rather than innuendo, there were clear allegations. CCANP at 20-22. Rather than suspicions, CCANP stated conclusions based on its participation in the hearing and knowledge of Judge Hill's background. Id. Furthermore, the Panel is denigrating the concept of affidavits based on information and belief which are sufficient to establish grounds for recusal. Berger v. U.S., supra at 34-35; 13 Wright and Miller, Federal Practice and Procedures: Civil Section 3551 (1975) and cases cited therein.

Having improperly characterized CCANP's motion and affidavits, the Panel then finds Judge Hill's statements to be a "reasonable effort" to respond. Assuming arguendo that CCANP had made vague charges representing little more than innuendo and suspicion, the Panel's conclusion that a judge is thereby entitled to respond as did Judge Hill is totally unacceptable. The proper response is to find the motion and affidavits insufficient and forward them to the Appeal Board. 10 C.F.R. Section 2.704(c).

Finally, the Panel characterizes Judge Hill's statements as "arguably accurate views concerning the conduct" of CCANP. Panel at 15. For the Panel to characterize what Judge Hill said as "arguably accurate" leaves CCANP in the position of doubting if CCANP can receive a fair hearing before any board composed of current members of the Panel.

As previously noted,[12] the Quorum Board Denial did not mention Judge Hill's statement leaving open the possibility the quorum Board did not take issue with any of Judge Hill's views. Now CCANP faces the entire Panel, including the remaining members of the ASLB in this proceeding, actually stating for a fact they do not take issue

with Judge Hill's views.

CCANP attributes this attitude on the part of the Panel to an applicant who obviously merits denial appearing before a regulatory agency where denial is apparently inconceivable. The agency is now responding by unleashing attacks on the party responsible for exposing the applicant.

None of the opposing briefs address Judge Hill's use of the word subvert. CCANP does not consider the use of this word mere hyperbole. Judge Hill had five weeks to choose his words. CCANP at 17. The use of the word subvert is, therefore, reasonably construed as deliberate.

The sweeping manner in which the term is used is clear evidence of an intent to charge CCANP with attempting to destroy an NRC proceeding. CCANP at 7-12.

The link between Judge Hill's use of the word subvert and the intelligence gathering activities of his employer is clearly warranted. CCANP at 17, 20-21. Intelligence gathering is normally directed at those perceived as a dangerous threat to the existing system of government, whether the target be dissidents in Russia or Nazis in the United States. It would be difficult for Judge Hill to spend the majority of his working hours at an institution engaged in such activity and not be infected by such an attitude. While expressing his pride in being selected to serve on the ASLB from Lawrence Livermore Laboratory and discussing Lawrence Livermore Laboratory's functions, Appeal Board Memorandum at 18-19, Judge Hill makes no mention of the CCANP statement concerning the collection and maintenance of intelligence files. Instead, he chose to convey an explanation of that activity by his use of subvert.

Judge Hill's statement has irreparably damaged his status as an objective and impartial judge.

B. The citations to the record provided by the opposing parties do not support Judge Hill's observations.

1. The Applicants and the NRC have vainly searched the record in an effort to find support for Judge Hill's charges against CCANP.

CCANP reiterates its view that the Appeal Board had no need to search the record because Judge Hill's statement was so beyond any possible standard of acceptable statements by a judge that his removal was mandated.

Neither the Applicants nor the NRC staff argue that their citations support the view that CCANP has actively subverted the purpose of this

hearing. This charge by Judge Hill stands apart as unsupported and unsupportable. Based solely on the lack of support for this charge, the Appeal Board Order removing Judge Hill should be upheld.

The Applicants and NRC Staff do, however, attempt to find support for criticisms of specific activities by CCANP. Taken as a whole, the citations offered do not portray anything more than the best advocacy efforts of an organization represented primarily by a lay individual in a complex administrative hearing.

CCANP does not intend to respond specifically to each citation in a long string, e.g. App at 15, note 13. Such an undertaking is entirely too burdensom and would createa reply brief of incomprehensible proportions.

CCANP will respond to a meaningful selection of the Applicant and NRC Staff citations to demonstrate that these citations do not support the charges against CCANP.

At the same time, CCANP notes that neither the Applicants nor the NRC Staff qualify as disinterested observers since both favor licensing. The Applicants are openly hostile toward CCANP as demonstrated by their statement that Judge Hill did not use inflammatory wording. App at 19. The selection of citations was, therefore, made from a perspective which would find a basis for condemnation were none exists.[13] The selections reflect this perspective.

Also, in the absence of any but the most minimal citations by Judge Hill, the opposing parties are dealing in speculation in selecting citations they think Judge Hill must have meant. To some extent the Applicants and the NRC Staff recognize this difficulty. App at 15; Staff at 14, 15, 17.

2. CCANP's procedural conduct has been at worst cumbersome but not worthy of harsh condemnation.

The Applicants find support for the allegation that CCANP engaged in lengthy and unproductive cross examination. APP at 15.

First of all, in appointing technically trained personnel to NRC licensing boards, there is a recognition that the issues to be resolved are complex. In this proceeding, the adequacy of backfill, concrete, welding, and the Quality Assurance program are inter alia at issue. Cross examination on such issues if often tedious.

CCANP has, up until this time, not had the money to bring in technical consultants. But CCANP has always hoped that someday it would

have available expert help in understanding what has gone wrong at the South Texas Project. CCANP cross examination was, therefore, in part aimed at getting a very complete record of the history and of the views of those involved in construction and quality assurance. Whether the cross examination was truly unproductive will be determined when the findings of fact are done.

Second, CCANP is represented primarily by a law student who has just finished his second year and who has no formal technical training. Such a representation will not be as well versed in the rules and procedures of the Commission or the rules of trial as the other parties represented by paid professionals. Not will such a representative be well informed on the technical issues, as noted above.

CCANP's performance may not have been as efficient as a more expert and experienced representative could have provided. But CCANP did at all time try to put forth its best efforts and never intentionally obstructed the proceeding or harassed a witness.

The Applicants argue that CCANP continued to argue after Board rulings. App at 15. This allegation is almost humorous in light of the Applicants recent behavior.

The quorum Board in this proceeding convened a conference call on April 30, 1982 to discuss the evidentiary hearing scheduled to begin on May 4. The Board began the conference by informing the parties of the Board's preliminary decision to cancel that hearing based on the unresolved question of Judge Hill's status. The Applicants moved for reconsideration and argued vigorously and at length for continuing the hearings. The Board again ruled the hearings would be cancelled. The Applicants then demanded the Board reconsider still again.[14]

The Board terminated the conference call to reconsider. The parties were later informed the hearings were cancelled. The Applicants then filed a motion with the Commission asking the Commission to order the quorum Board to hold hearings despite their obvious and explicit desire not to do so.[15]

The concern of the Applicants was the prior scheduling of and arrangements made for witnesses. Nevertheless, all of the reargument activity took place around a scheduling matter. For Applicants to find CCANP's reargument of substantive decisions evidence of unacceptable behavior flies in the face of their own performance.

The NRC Staff perceive any action by CCANP which might delay the hearings as supportive of Judge Hill's criticism of CCANP. This view reflects a misunderstanding of the purpose of expedition. CCANP at 9-11. There is no reason for rushing this proceeding as the Applicants have stated that these hearings are not delaying construction[16] and operation is in the far distant future, if ever.

Furthermore, the suggestion by the NRC Staff that appealing adverse rulings, Staff at 14-15, is forbidden in an "expedited" hearing is clearly erroneous. Due process rights are superior to any perceived need to move quickly.

To deal with the specific NRC citations, the request by both intervenors for a delay in the beginning of the hearings, Id. at 15, note 16, resulted from circumstances beyond the control of intervenors.[17] The intervenors sincerely believed there was good cause for delay and appealed in a timely fashion from the Licensing Board's ruling denying adequate relief on the scheduling.

The motions accompanied by a motion for leave to file out of time, Id., note 17, resulted from the same circumstances.

The motion by CCANP to compel the NRC to reveal the names of inspectors who supplied information about harassment, Id., was in fact granted by the Licensing Board[18] but later revered in a split decision by the Appeal Board.[19] The Commission on a 2-2 vote declined to review the Appeal Board decision.[20]

CCANP pursued these identities in order to complete the record and because the Commission had clearly stated to CCANP that these identities would be provided. Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 289. When the Licensing Board agreed the identities would be provided, the NRC Staff waited until the last possible minute and then appealed the Licensing Board decision.

Surely a party is entitled to appeal from rulings honestly believed to be adverse to its interests without being accused of obstructing a proceeding.

As to the final NRC citation, Staff at 16, note 23, CCANP's primary representative was not present that day, and the transcript is not available for review. While the cited pages, in part, appear

in the Panel Brief, Panel at 14-15, the context is not available to CCANP for purposes of this reply brief. (This citation is the only citation offered by the Panel.)

The idea that the totality of the citations to CCANP's procedural conduct adds up to "obstruction" is ridiculous. Judge Hill's criticism in this regard is unwarranted.

At the same time, the Commission has available to it in Judge Hill's statement a basis for determining why Judge Hill might make such a criticism of CCANP. CCANP at 21. Since Judge Hill had a prejudicial attitude toward CCANP prior to the hearing even beginning, it is not surprising that he would want to turn to criticisms of little substance to prove his point. Nothing CCANP did could satisfy such a judge or prevent his being critical of CCANP's behavior.

3. CCANP has always been prepared to support its allegations but has not always been given the opportunity to do so.

The Applicants' citations in support of the allegation of unsupported charges by CCANP is unpursuasive. App. at 15-16.

First the Applicants cite a CCANP charge stemming from an FBI investigation. App. at 16, note 14. A reading of the transcript cited reveals that CCANP informed the Board that the source of the information was a leak, that the remark itself was prefatory in nature, and that CCANP did not intend to pursue the matter as a contention since CCANP's Freedom of Information Act request to the FBI did not produce the expected confirmation. The Board declined to compel CCANP to reveal its source.

Second, the Applicants cite CCANP's charges relative to the intimidation carried out by Applicants and the violation of NRC regulations by the Applicants. Id. Far from being unsupported, these charges are clearly supported by the April 30, 1980 Order to Show Cause,[21] a fact which CCANP stated but the Applicants chose not to cite to the Commission.[22]

In relation to matters such as Mr. Goldberg's prior history of regulatory compliance, a conflict of interest in the selection of Brown and Root, HL&P intimidation of the Attorney General of Texas, HL&P attempting to intimidate a journalist, and HL&P attempting to prevent a union from funding intervenors, Id., the Licensing Board denied CCANP the right to pursue these allegations for the record even though, if proven, they clearly reflect adversely on the corporate character of the applicants. Having been denied its requests to subpoena witnesses

and to cross examine in support of these allegations, CCANP is now accused of failing to provide support for its allegations. CCANP trusts the Commission perceives the obvious Catch-22 nature of this charge against CCANP.

As to the credibility of Mr. Frazer's statement, Id., CCANP stands behind its conclusion for the reasons stated in the motion cited by the Applicants.

As to serious question about HL&P management's commitment to comply with NRC regulations, that is what this proceeding is all about and support is found for such a question in the Order to Show Cause, supra p. 13, note 21.

As to the Resident Reactor Inspector soundproofing his office, CCANP was again not permitted to cross examine on this event to determine the purpose of the soundproofing.

The NRC Staff also purports to offer citations in support of the "unsupported a-legations" charge by Judge Hill. Staff at 15-16. The citations duplicating those of the Applicants, e.g. Staff at 16 (union funding blocked), are not responded to again.

The NRC Staff cites CCANP's allegation of failure to report and deliberate withholding in relation to HL&P's handling of the Quadrex Report. Id. at 16.

There is no evidentiary record yet on these contentions, but CCANP did submit a thirteen page chronology and commentary to support its allegation.[23] This document contained a record of facts determined during an independent investigation conducted by CCANP. The NRC began an investigation of the deliberate withholding allegation on February 2, 1982 but has still not issued a report on the results.

The allegations against HL&P's corporate QA manager appear in a part of the transcript not available for review.

CCANP for four years has brought to the attention of the Commission serious violations by the Applicants which the Commission has in large part confirmed. There is no basis for criticizing CCANP as making unsupported allegations, and the citations offered by the Applicants and NRC Staff to prove this criticism fail to establish any basis for such a charge.

4. CCANP has not attempted to inject CCANP's political views into this proceeding.

Once again the examples offered by the Applicants are hardly pursuasive. App. at 16.

The request to the Licensing Board to consider a contention on the partnership collapsing, App. at 16, note 15, has been dealt with previously. CCANP at 8-9.

The remark that the refusal to hold hearings in Austin would affect the outcome of the referendum on the nuclear plant was merely a passing remark which proved prescient, not an "argument" as the Applicants characterize it. App. at 16-17, note 15.

The argument that holding almost all the hearings in Houston was inappropriate given the much greater public interest in San Antonio and Austin, Id., is a legitimate argument. The people of San Antonio and Austin are just as affected by this plant as the people of Houston and deserve the opportunity to observe the licensing process.

The allegation about cross examination on the dangers of nuclear power, Id., is in a part of the transcript not available for review by CCANP. Even if truly a basis for criticism, three pages out of ten thousand shows remarkable restraint on the part of an anti-nuclear organization.

The citation to CCANP's opening statement, Id., is clearly inappriopriate. In 10 C.F.R. Part 2, Appendix A, Section V (c), it is anticipated that the Applicants will make an opening statement describing "the principal safety and environmental considerations involved" in licensing the operation of a nuclear reactor. The other parties are similarly permitted to make an opening statement. CCANP availed itself of that opportunity. The plume from a nuclear accident is clearly a "safety or environmenal consideration." The comparison of the South Texas Project to Three Mile Island is appropriate since, to CCANP's knowledge, these are the only two cases before the Commission where managerial character is an issue. See Three Mile Island, supra p. 5.

The citations offered by the Applicants do not provide any substance to the allegation CCANP has injected its political views into this proceeding.

The partnership contention, supra, is the only source of NRC cited support for the "political views" allegation.

Based on this CCANP response to the efforts of opposing parties to support Judge Hill's criticisms, CCANP finds no substantive basis to conclude the cited acts constituted subversion of this proceeding. Nor do the citations support the specific criticisms Judge Hill made of CCANP. Thus, a search of the record by two opposing parties has failed to turn up any real basis for the criticisms. CCANP has already set out what it considers the real basis for Judge Hill's criticisms. CCANP at 7-8.

c. The case law requires Judge Hill's removal.

The cases most appropriate to assessing Judge Hill's statement are Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976); Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979); Berger v. U.S., 255 U.S. 11 (1921); and Davis v. Board of Com'rs of Mobile Co., 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

In Reserve, the appellate court removed a judge for becoming an advocate for one of the parties. This allegation is precisely what CCANP alleged in its motion and affidavits.[24] As support, CCANP pointed to Judge Hill's initial professionalism in responding to the Quadrex Report and his subsequent rejection of the implications of that report.[25]

In Nicodemus, the appellate court sua sponte removed a district judge who called the defendants a "bunch of villians ... interested only in feathering their own nest at the expense of everyone they can ...." Nicodemus at 155. Such a charge is quite similar to accusing an intervenor of subverting a proceeding by making unsupported allegations against various principals and for purposes of injecting political opinions.

In Berger, the judge announced his prejudice against German-Americans and his view that German-Americans were disloyal. Berger at 35-36. An overall view of Judge Hill's statement shows him responding with prejudice to an anti-nuclear organization and charging them with subversion.

In Davis, the court said prejudice against a class of people would be disqualifying. Davis at 1051. Judge Hill's class prejudice derives from his institutional employment and is obviously directed at anti-nuclear groups.[26]

The case law most appropriate to the instant case mandates Judge Hill's removal.

V. Conclusion

CCANP members live in Texas. Some live in the immediate area of the South Texas Project. Most live in San Antonio, downwind of the South Texas Project eight months out of the year. We oppose licensing of nuclear power plants. Given the South Texas Project's extraordinary history of poor construction practices and willful violations of NRC regulations, we are doubly opposed to licensing the South Texas Project.

But our presence in this proceeding is not a threat to the NRC. We bring an uncompromising scepticism to this proceeding from which the Atomic Safety and Licensing Board can benefit. Our commitment and our job as an opposing intervenor is to present every possibly relevant issue, probe deeply into the commitments and performance of the Applicants, and challenge routine acceptance of facts in question. If we do our job well, this plant will either be safer or not licensed at all. We thought that was what the NRC process was all about.

We apologize to the Commission for the fact that our motion to recuse Judge Hill was not as comprehensively prepared as it might have been. Even though we doubt that even a comprehensive motion would have led Judge Hill to recuse himself, we still should have presented our views based on as much evidence as we could gather. We do believe that Judge Hill, from previous experience, was careful not to make his most agregious remarks on the record.

But Judge Hill provided all the evidence necessary to support the allegation of partiality and prejudice made by CCANP. Given the entire record regarding Judge Hill's removal, the Commission must find Judge HIll disqualified to serve on the Licensing Board for this proceeding. To do otherwise would place an irradicable stain on the proceeding and a cloud over the entire NRC process.

Respectfully submitted,

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May 31, 1982

FOOTNOTES

1. Order (May 6, 1982), Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498 OL, STN 50-499 OL.

2. "Citizens Concerned About Nuclear Power (CCANP) Motion for Extension of Time to Respond to Commission Order of May 6, 1982" (May 9, 1982). On May 11, 1982, Mr. Sheldon Truebadge of the NRC called the home of Mr. Lanny Sinkin, CCANP Representative. When told by Mr. Sinkin's wife that he was not at home, Mr. Truebadge hung up without requesting a number where Mr. Sinkin could be reached or leaving any message. On May 13, 1982, Mr. Truebadge again called Mr. Sinkin's home. This time, when told Mr. Sinkin was not in, he left a message that the Commission had denied the requested extension, apparently on May 11. It appears Mr. Truebadge failed to notify the other parties about the Commission decision, as the Applicants filed their "Applicant's Response to CCANP motion for Extension of Time to Respond to Commission Order of May 6, 1982" on May 12; and the NRC Staff filed the "NRC Staff Response to CCANP Motion for Extension of Time to Respond to Commission Order of May 6, 1982" on May 18, 1982. No written order has ever been received by CCANP.

3. CCANP notes that all parties except CCANP have representatives in Washington. CCANP does not, therefore, have the last day of the ten days available to it for production. The Panel action, therefore, essentially gave CCANP four days to incorporate a response to the Panel brief into the response to the other two opposing briefs.

4. Memorandum and Order (Denying CCANP Motion for Judge Ernest Hill to Recuse Himself) (April 13, 1982), Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498 OL, STN 50-499 OL.

5. Order (April 15, 1982), Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498 OL, STN 50-499 OL.

6. CCANP at 14-15

7. CCANP at 16. The Panel argues to the contrary that Judge Hill should have responded. Panel at 13. CCANP reiterates that 10 C.F.R. Section 2.704(c) envisions no such response.

8. CCANP at 17

9. Id.

10. Tr. at 657-658

11. "Citizens Concerned About Nuclear Power (CCANP) Response to Applicants's Petition for Review of Appeal Board's Order of April 15, 1982" (April 28, 1982) at 3

12. Id. at 5

13. The Applicants once suggested the Licensing Board chairman demonstrated bias when he found an apparent link between CCANP's filing contentions charging intimidation and harassment of Quality Control inspectors and the NRC Office of Inspection and Enforcement initiating an investigation. Tr. at 475-478. The chairman's statement did not even approach the tentative conclusion level of Dr. de Sylva's statement in La Salle. Obviously, the Applicants' perception was baseless and unwarranted.

14. The Applicants once argued it might be necessary for them to ask the Commission to reconstitute the Board based on scheduling difficulties. Tr. at 398-399.

15. "Motion for Actions by the Commission in Light of Appeal Board's Order of April 15, 1982" (April 20, 1982).

16. Tr. at 385-387

17. Tr. at 358-393

18. Unfortunately, the records containing this ruling were inadvertently left in Austin. The Staff fails to provide this citation while supplying the appellate citations.

19. Houston Lighting and Power Co., et al. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469 (1981). In this instance, the NRC Staff appealed what they considered an adverse ruling by the Licensing Board.

20. Houston Lighting and Power Co., et al. (South Texas Project, Units 1 and 2), CLI-81-28, 14 NRC 933 (1981).

21. Order to Show Cause (April 30, 1980), Houston Lighting and Power Co., et al. (South Texas Project, Units 1 and 2), Docket Nos. STN 50-498 OL, STN 50-499 OL.

22. Tr. at 567

23. "Citizens Concerned About Nuclear Power (CCANP) Motion for Reconsideration of Scheduling for Hearings on Applicants' Handling of the Quadrex Report" (February 10, 1982).

24. Motion at 2; Sinkin Affidavit at 3; Hager Affidavit

25. Motion at 1-2; Sinkin affidavit at 2-3.

26. The Panel's endorsement of these views becomes all the more serious and far reaching in its implications for all anti-nuclear intervenors.

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 O

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing CITIZENS CONCERNED ABOUT NUCLEAR POWER (CCANP) MOTION TO STRIKE AMICUS BRIEF OF THE ATOMIC SAFETY AND LICENSING PANEL and INTERVENOR CITIZENS CONCERNED ABOUT NUCLEAR POWER'S REPLY BRIEF IN RESPONSE TO NUCLEAR REGULATORY COMMISSION ORDER OF MAY 6, 1982 were mailed, first class postage prepaid, to the following, this ~~29th~~ 31st day of May, 1982.

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