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UNITED STATES OF AMERICA  
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. 50-498 OL 50-499 OL
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CITIZENS FOR EQUITABLE UTILITIES  
REPLY BRIEF CONCERNING JUDGE HILL'S RECUSAL

William S. Jordan, III  
 Counsel for Citizens for  
 Equitable Utilities  
 HARMON & WEISS  
 1725 I Street, N.W.  
 Suite 506  
 Washington, D.C. 20006  
 (202) 833-9070

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TABLE OF AUTHORITIES

Commonwealth Edison Co. (La Salle County Nuclear  
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Nicodemus v. Chrysler Corp., 596 F 2d 152 (6th Cir. 1979). 7



Hill are without foundation, while Judge Hill's attack on CCANP has some support in the record, all the briefs essentially contend that Judge Hill's bias or appearance of bias can be excused because his views developed during the course of the hearing, and his bias cannot be shown to have existed before the hearing began. These arguments fail to take into consideration the particular facts of this case and the character of Judge Hill's statement. We first address below the question of whether CCANP's or Judge Hill's charges against each other are well-founded. We then demonstrate that Judge Hill must remain disqualified under the facts of this case and the applicable legal principles.

I. CCANP's Charges Against Judge Hill

When CCANP originally filed its motion for Judge Hill's recusal, Citizens for Equitable Utilities (CEU) chose not to participate because we did not view the charges, although serious, to be sufficient to require Judge Hill's recusal as a matter of law. Nonetheless, we agreed with CCANP's conclusion that Judge Hill had exhibited bias against CCANP.

In particular, as set out in the attached affidavit, CEU has observed the behavior set out in paragraph 10 of the affidavit of Lanny Alan Sinkin filed in support of CCANP's recusal Motion. Several times during the course of the hearing at the South Texas College of Law, those standing in the hallway next to the hearing room could clearly hear Judge Hill berating his fellow board members in the adjoining office. These harangues related to Judge Hill's attempts to limit the participation of the intervenors, and particularly CCANP.

Throughout the hearing, but particularly during the week of hearings held in San Antonio, in June 1981, Judge Hill reacted to intervenor cross examination, primarily that of CCANP, with grimaces, gestures, and off the record outbursts and complaints. Specifically, he appeared on several occasions during the week in San Antonio to make a point of turning his back when intervenors began their cross examination of the Applicant's witnesses, and on several occasions he appeared to be reading extraneous material, and even leafing through the telephone book, during intervenor cross examination. Finally, we agree with Mr. Sinkin that "Mr. Hill has repeatedly demonstrated an antagonistic and hostile attitude toward CCANP's participation in this proceeding."

Paragraphs 11-12 of the Sinkin Affidavit detail CCANP's views concerning Judge Hill's reaction to the Quadrex Report. While we would not use the same language, CEU was also surprised to the point of being shocked when Judge Hill appeared to attack the NRC Staff for undertaking the very investigation that brought the Quadrex Report to light. We found this attack to be, at best, inappropriate since the substance and handling of the Quadrex Report may reveal more about the safety of the South Texas Project and about the character and competence of the Applicant than any other aspect of this hearing. Judge Hill created the impression of wanting to protect the Applicant regardless of the facts.

Our recitation and support for these facts is not intended as further support for CCANP's Recusal Motion or the Appeal Board's Decision, as such. We continue to believe that these facts, standing alone, would not require recusal. However, we believe it important that the Commission be aware that CCANP's allegations, while not sufficient for recusal, are to a large degree accurate to the best of our knowledge and belief. The repetition is necessary so that the Commission will realize that Judge Hill was not responding to unfounded allegations, but to charges that were very close to the mark.

## II. Judge Hill's Attack on CCANP

Judge Hill's statement, which was the basis for his disqualification by the Appeal Board, contains a general charge that:

From the outset, the representatives for CCANP have in many instances actively subverted the stated objectives of this expedited proceeding by being unduly contentious with matters having little, if any, bearing on the admitted contentions. (Emphasis supplied)

Judge Hill then provides what he presumably believes are the specifics supporting that charge. They are that

- (1) CCANP has provided a constant flow of additional and largely unsupported allegations against various principals in the case.
- (2) CCANP has conducted needlessly long and unproductive cross examination, and has often been unwilling to heed the advice and admonishment of the Board to "cease such delaying and obstructing actions".

- (3) CCANP has "blatantly used this proceeding as a forum to present CCANP's political views on subjects not at issue, at least in this expedited phase of the case. In particular, they have attempted to inject the internal political issues of the cities of Austin and San Antonio into this proceeding."

Since Judge Hill provides no specifics for his charges, it is impossible for us to respond directly. However, in our view, none of these charges is accurate. While CCANP has provided additional allegations during the course of the hearing, these have always been based directly upon information provided to CCANP, often by workers at the project who would not provide their names for fear of retribution.

They have also been based upon developments such as the apparent collapse of the partnership that owns the South Texas Project. Although we do not have the resources to search the record, as best we can recall most of these additional contentions were directly related to the character and competence of the Applicant, or otherwise raised important issues that should be addressed in the expedited phase of the operating license proceeding. Apparently Judge Hill has already reached his factual conclusions with respect to most of those issues, although he has yet to hear all of the relevant testimony. With respect to CCANP's cross examination, it is probably that case that the cross examination has lasted longer than necessary in some cases. However, Judge Hill apparently gives no weight whatsoever to the fact that CCANP has usually been represented by a lay person. In our view

CCANP's cross examination has been relatively productive in light of the organization's limitations. It is also the case that CCANP has from time to time been frustrated by the Board's efforts to cut off its substantive examination. However, at no time, in our view, did CCANP persist in cross examination for the purpose of delay or obstruction. In all cases of which we are aware, CCANP was pursuing, however ineffectively, specific substantive purposes.

Judge Hill's charge that CCANP has injected its political views into this proceeding is particularly troubling. It arises from the fact that the City of Austin has decided to withdraw from the South Texas Project, and that there is apparently considerable political pressure in San Antonio to do the same. In bringing these matters to the attention of the Board, and attempting to raise an additional contention, CCANP was not injecting its own political views to the proceeding. Rather, it was raising the legitimate question of whether this project could be expected to continue without undue pressures if the partnership that owned it fell apart. It is a gross mistreatment of CCANP's effort in that regard to charge CCANP with using the hearing process as a forum to present its own political views. If anything, CCANP assisted the Board in minimizing the political impact of the hearings by advising the Board of the likely impact on the Austin election of any decisions that the Board might reach concerning where the hearings should be held.

Unlike CCANP's charges against Judge Hill, we believe Judge Hill's attack on CCANP is wholly unfounded. It contains no support in the record. The examples given by the NRC Staff highlight rather than excuse the bias demonstrated by Judge Hill. All of the examples involve normal adversary activity that would in no way justify the astonishing and libelous charge of subversion against CCANP.

### III. The Legal Standard

The relevant case law on disqualification has been thoroughly briefed by the parties. In sum, the governing principles are as follows:

1. A judge will be disqualified if a disinterested observer of the proceeding could conclude that the judge has to some degree prejudged the facts of the case, or that he has a personal bias or appearance of personal bias against one of the parties to the case.
2. To be disqualifying, a judge's view of the facts or his apparent bias must stem from an extrajudicial source.
3. A factual judgment or bias is not extrajudicial if it arises from a judge's performance of his judicial responsibilities. Such judicial responsibilities may include, for example, the initial judgment of various facts or the credibility of witnesses. Commonwealth Edison Co., supra.
4. Even where a judge's judgment or bias does not derive from extrajudicial sources, a judge may be disqualified where "pervasive bias and prejudice is shown by otherwise judicial conduct." See, e.g., Nicodemus v. Chrysler Corp., 596 F.2d 152, 155-156 (6th Cir. 1979), in which the judge charged the defendant with a "blatant attempt to intimidate witnesses and parties" and stated that those representing the defendant were "a bunch of villains and they are interested only in feathering their own nest. . . ."

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This case hinges on points 3 and 4 above. The issue is whether Judge Hill's intemperate statement is extrajudicial in that it was wholly unsupported and utterly irrelevant to his responsibilities as a judicial officer, and whether, even if the statement is not extrajudicial, Judge Hill has demonstrated such pervasive bias or the appearance of such pervasive bias that he should be disqualified. The Appeal Board implicitly and properly applied these standards when it emphasized that Judge Hill's charges were "totally gratuitous" and had not "the slightest discernable relevance to the only matter before Judge Hill for consideration." ALAB-672, Slip op. at 9.

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The Staff suggests that the "disinterested observer" standard applies only to the observation of actions taken or bias developed prior to the hearing. There is nothing in the case law to support this proposition. Rather, the standard applies throughout. It assumes that the disinterested observer will have observed the same facts and witnesses during the course of the proceeding, will recognize preliminary judgments, sympathies, or biases that are developed as part of the judge's judicial responsibilities and will be able to distinguish them from either extrajudicial bias or pervasive bias. Ultimately, the question is whether a disinterested observer, knowing all of the circumstances, would discern personal bias on the part of the the judge, as opposed to opinions or even biases that derive from the conduct of the hearing and are expressed as part of the judge's judicial responsibilities.

#### IV. Judge Hill's Statement Requires His Disqualification

Judge Hill must be disqualified both because his statement was extrajudicial in nature and because it demonstrated a pervasive bias on his part. Judge Hill's charges against CCANP were both wholly unwarranted and wholly unnecessary to Judge Hill's response. Judge Hill could simply have explained that there were indeed times when he believed that CCANP undertook excessive cross examination, and he could have explained why he appeared to attack the Staff for pursuing the investigation into the handling of the Quadrex Report. He could also have explained why from time to time he grimaced or gestured in a manner that appeared to indicate hostility towards CCANP. That would have been more than sufficient. However, he chose to go far beyond such a response. In particular, he charged CCANP with "actively subvert[ing] the stated objectives of this expedited proceeding by being unduly contentious with matters having little, if any, bearing on the admitted contentions." Judge Hill provided no specifics for that charge, and he provided no basis whatsoever for his conclusion that CCANP has, in effect, acted in bad faith in the course of these hearings. That is an extremely serious charge against a party, and it was unnecessary and unfounded.

The same is true of Judge Hill's accusation that CCANP attempted to inject its political views into the hearing. CCANP did no such thing. It simply raised to the attention of the Board as a potentially legitimate issue the fact that political developments in Austin and elsewhere raised serious

questions about the future of the South Texas project. Judge Hill's grossly incorrect characterization of those facts demonstrates that he may well have brought to the hearing a bias that prevents him from viewing the activities of organizations such as CCANP in objective terms.

Accordingly, the bulk of Judge Hill's statement and his strong attack against CCANP are all irrelevant to his responsibilities as a judicial officer. As such, they are extrajudicial and require his disqualification.

It is extremely important that the Commission take into account the facts of this particular case. As we have previously emphasized, Judge Hill did not make these charges in the heat of oral combat during the hearing. His situation appears to be distinct from virtually all of those in which judges were not disqualified. Judge Hill first saw the charges in writing. He had more than a month to give serious consideration to the response, to consult with his fellow Board Members, and if he felt it necessary to respond in kind, to search the record for examples and citations that could support these charges.<sup>3</sup> He did not search the record. He provided no specifics. And he ultimately placed in the written record an intemperate, pejorative, unfounded and inaccurate diatribe against CCANP. The fact that he was unable to calm down and to avoid this

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<sup>3</sup>For this reason, Judge Hill's situation is not comparable to that of a Judge whose outburst arises in the midst of a 9-day trial that frays his nerves. Panel Amicus Brief at 12 n. 13.

outburst even in the quiet of his own office demonstrates that he is unalterably biased against CCANP and must not be allowed to return to the Board of this proceeding. Even if his statements would be permissible in the course of debate and confrontation, they are not permissible in the factual context in which they were made. Judge Hill must be removed because his biased comments were outside of his judicial responsibilities and thus "extrajudicial", and they demonstrate a pervasive bias that prevents a fair hearing.

Conclusion

For the reasons stated above, we urge the Commission to affirm the Appeal Board's disqualification of Judge Hill in ALAB-672.

Respectfully submitted,



William S. Jordan, III

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Counsel for Citizens for  
Equitable Utilities

HARMON & WEISS

1725 I Street, N.W.  
Suite 506  
Washington, D.C. 20006

(202) 833-9070