

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) Docket No. 63-001-HLW
)
(High-Level Waste Repository))

NRC STAFF ANSWER TO
STATE OF WASHINGTON, STATE OF SOUTH CAROLINA,
AIKEN COUNTY, SOUTH CAROLINA, AND WHITE PINE COUNTY
NEVADA'S MOTION FOR RECUSAL/DISQUALIFICATION

INTRODUCTION

On July 9, 2010, State of Washington, State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada (“Movants”) filed a joint motion seeking the recusal of Commissioners Magwood, Apostolakis and Ostendorff from “any consideration” of the decision of the Atomic Safety and Licensing Board (“Board”), which denied the Department of Energy’s (DOE) motion to withdraw its licensing application for a high-level waste repository at Yucca Mountain, Nevada. “State of Washington, State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada’s Motion of Recusal/Disqualification,” dated July 9, 2010 (Motion), at 1.

For the reasons set forth below, the Motion should be denied because the Movants fail to carry their burden to demonstrate that, as a matter of law, the listed Commissioners have prejudged the issues regarding the DOE motion or that a reasonable person, cognizant of all the circumstances, would harbor doubts about their impartiality.

BACKGROUND

On June 29, 2010, the Board issued an order denying the DOE's motion to withdraw with prejudice its license application and granting intervention petitions. *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC __ (June 29, 2010) (slip op) ("LBP-10-11).

On June 30, 2010, the Commission issued an order inviting participants to file briefs as to whether the Commission should review, and reverse or uphold, the Board order, which among other things, denied the DOE motion to withdraw with prejudice its license application. See Order, dated June 30, 2010.

On July 9, 2010, Movants filed their motion to recuse/disqualify the Commissioners based on testimony given at their February 9, 2010, confirmation hearing before the United States Senate Committee on Environment and Public Works. Motion at 1-2 (quoting Unofficial Transcript of Hearing on Nomination of NRC Commissioners, U.S. Senate Committee on Environment and Public Works, 111th Cong. (Feb. 9, 2010) (Unofficial Transcript) at 45. Attached to the motion is the Affidavit of Andrew A. Fitz in Support of Motion of Recusal/Disqualification dated July 9, 2010, two newspaper articles and an excerpt from the transcript of the Senate Confirmation Hearing. See Motion at 2 and Exhibits 1-4.

On July 15, 2010, Commissioner Apostolakis recused himself from the above-captioned proceeding based on his prior involvement with Sandia National Laboratories (SNL), the DOE's lead laboratory for repository systems. Notice of Recusal, dated July 15, 2010. Commissioner Apostolakis stated that he decided not to participate in the proceeding prior to and independent of the recusal motion and his decision was based on his prior involvement in Yucca Mountain related activities for SNL. *Id.*

DISCUSSION

A. Legal Standards Applicable to Disqualification or Recusal Motions

The standards governing motions for disqualification or recusal are set forth in the case law and the process governing disqualification is set forth in 10 C.F.R. § 2.313(b). The standards are generally the same as those for the federal judiciary. *Pub. Serv. Elec. & Gas Co.* (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 21(1984); *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982). An adjudicator must recuse himself where he is biased against a party, or where there is the appearance of bias or prejudgment of the factual issues. *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), ALAB-672, 15 NRC 677, 680 (1982), *rev'd on other grounds*, CLI-82-9, 15 NRC 1363, 1364-1365 (1982); *Hydro Resources, Inc.* (2929 Coors Rd. Suite 101, Albuquerque, NM 87120), LBP-98-11, 47 NRC 302, 305 (1998), *aff'd*, 47 NRC 326, 331-332 (1998). The party moving for disqualification bears the burden of establishing the foundation of its motion. *Dairyland Power Cooperative* (La Crosse Boling Water Reactor), ALAB-497, 8 NRC 312, 313 (1978), *citing Duquesne Light Co.* (Beaver Valley Power Station, Units 1 & 2), ALAB-172, 7 AEC 42, 43 (1974); *U.S. v. Hanhardt*, 134 F.Supp.2d 972, 977 (N.D. Ill. 2001).

An adjudicator may disqualify himself in any proceeding in which his impartiality might reasonably be questioned. See 28 U.S.C. § 455(a); *U.S. v. Hanhardt*, 134 F.Supp.2d at 975. As with federal judges, an objective standard is imposed when determining the impartiality of a Commissioner in that a Commissioner should disqualify himself or herself only if “reasonable person, cognizant of all circumstances, would harbor doubts” about his or her impartiality. *Joseph J. Macktal*, CLI-89-14, 30 NRC 85, 91, *reconsid. denied*, CLI-89-18, 30 NRC 167 (1989) (denial of request for disqualification of the entire Commission). The Commission has determined that when a request for recusal or disqualification of an individual Commissioner is made, the recusal/disqualification decision resides with the challenged Commissioner and is not

reviewable by the Commission. See *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI 80-6, 11 NRC 411 (1980); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-84-20, 20 NRC 1061 (1984) (denial of request for disqualification of Chairman Palladino); *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1)*, CLI-83-25, 18 NRC 327 (1983) (dismissal of request for disqualification of Commissioner Gilinsky). When there is a request for recusal of more than one member of the Commission, a joint opinion may be issued in response to the motion by the particular Commissioners whose recusal is sought. See *Joseph J. Macktal*, CLI-89-18, 30 NRC at 169-70. The individual Commissioner, however, must make the initial decision. *Diablo*, CLI 80-6, 11 NRC at 411 (1980).¹

There is a presumption that public servants and administrative officers will discharge their responsibilities with integrity. See *Porter County Chapter of the Izaak Walton League v. NRC*, 606 F.2d 1363, 1372 (1979) (there is a basic assumption of intellectual integrity in assessing a whole record); *Nuclear Info. & Resource Serv. v. NRC*, 509 F.3d 562, 571-72 (D.C. Cir. 2007) (noting Commissioner McGaffigan denied a motion for his disqualification and that administrative officers are presumed objective and capable of judging a particular controversy fairly).

These standards are applicable in deciding this motion.

B. The Movants Fail to Demonstrate Prejudgment or Appearance of Bias That Requires Recusal As a Matter of Law

The Movants argue that an extrajudicial statement by each Commissioner during their confirmation hearing that, if confirmed, they would not “second guess DOE’s decision to

¹ The Internal Commission Procedures also similarly provide that Commissioners have the discretion to recuse themselves to avoid appearance of bias. Internal Commission Procedures, Nuclear Regulatory Commission (August 4, 2006) (ML062220342).

withdraw the license application for Yucca Mountain from NRC's review,"² indicates that they have prejudged the DOE withdrawal motion or raises doubts about their impartiality in their adjudicatory capacity. See Motion at 2-6.

While each Commissioner should apply the standards discussed herein and decide for himself whether recusal or disqualification is warranted, the Staff's view is that the Movants fail to show that statements made at the Congressional hearing rise to the level of actual bias requiring recusal.

An adjudicator will not be disqualified on the basis of occasional actions which may be controversial or may provoke strong reactions by parties in the proceeding. See *Three Mile Island*, CLI-85-5, 21 NRC at 569; *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 721 (1985); *Shoreham*, LBP-88-29, 28 NRC at 641, *aff'd*, ALAB-907, 28 NRC 620, 624 (1988); *Joseph J. Macktal*, CLI-89-14, 30 NRC at 92. *Nuclear Info. & Resource Serv. v. NRC*, 509 F.3d at 571.³

² The Movants cite the following exchange.

Senator Boxer. Now, I have a question here for all three of you from Senator Reid. You can just answer it yes or no. If confirmed, would you second guess the Department of Energy's decision to withdraw the license application for Yucca Mountain from NRC's review?

Mr. Magwood. No

Senator Boxer. Okay. Anybody else?

Mr. Apostolakis. No.

Mr. Ostendorff. No.

Senator Boxer. Thank you. I think he will be very pleased with that.

Motion at 2 (citing Unofficial Transcript at 45).

³ For example, former Commissioner McGaffigan declined to disqualify himself due to his public criticism of a party and expert witness, concluding that as a Commissioner he (1) is permitted to have an opinion on non-adjudicatory matters, and (2) despite his criticism, he would objectively consider the evidence in the record and the parties' arguments. *Louisiana Energy Servs. L.P.*, Docket No. 70-3103-

In addition, the asserted prejudgment (or appearance of prejudgment) must relate to factual as distinguished from legal or policy issues. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 34-35 (1984). *Cf. NIRS v. NRC*, 509 F.3d at 571 (disqualification warranted only where a disinterested observer concludes the agency official prejudged the facts as well as the law of a particular matter), *citing Cinderella Career & Finishing Sch., Inc. v. FTC*, 424 F.2d 583, 591 (D.C. Cir. 1970). The fact that an adjudicator has a crystallized point of view on questions of law or policy is not a basis for the adjudicator's disqualification. *Shoreham*, ALAB-777, 20 NRC at 34-35. For example, the Commission denied a motion seeking the recusal of Chairman Jackson and Commissioner Rogers finding that "regulatory interpretation, and policy judgments and tentative observations about dose estimates that are derived from the public record, are not factual prejudgments." *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 58-59 (1996).

Here, the Commissioners' answers do not appear to be a prejudgment of fact because the answers can reasonably be construed to pertain to DOE's policy reasons for withdrawal when viewed in the context of the surrounding circumstances. The Commissioners' Senate confirmation hearing was held on February 9, 2010, prior to the filing of the DOE motion and subsequent reply that delineated DOE's legal arguments as to why the withdrawal should be granted. See Unofficial Transcript of Nomination Hearing; U.S. Department of Energy's Motion to Withdraw, dated March 3, 2010; U.S. Department of Energy's Reply to Responses to Motion to Withdraw, dated May 27, 2010. Under the circumstances, the Commissioners' answers were not likely to have been directed to the merits of the case.

(continued)

ML "Decision on the Motion of Nuclear Information and Resource and Public Citizen for Disqualification of Commissioner," dated June 2, 2006 (unpublished) at 2-4.

Although Movants argue that the Commissioners' responses created an appearance of partiality regarding DOE's motion to withdraw the license application, see Motion at 3, they have not demonstrated that, as a matter of law, the comments by the Commissioners during their confirmation hearings require recusal because of doubts regarding their adjudicatory impartiality. Speculative assertions in newspaper articles about the Commissioners' views or intention, and the mere filing of the motion, do not constitute "reasonable doubts as to impartiality." See Motion at 22-26.

Given the vagueness of the question posed and the fact that no withdrawal motion or legal filings on the DOE motion were pending before the NRC at the time of the confirmation hearing, a reasonable person cognizant of all the circumstances could conclude that the Commissioners' response pertained to DOE's Secretary's reasons for its motion rather than prejudging the merits of the motion in a future adjudicatory review by the Commission.

In light of the presumption that public servants will properly and dispassionately discharge their responsibilities, see *Porter County*, 606 F.2d at 464-66, and the timing of the hearing, and the vagueness of the question posed, a reasonable person cognizant of all the circumstances could conclude that the Commissioners' answers indicate that they would not second guess the soundness of DOE's judgment, or reasons, for seeking to withdraw the license application. Thus, the Movants have not shown that the Commissioners had prejudged (or gave the appearance of prejudging) the facts or law related to the DOE withdrawal motion. However, each Commissioner has the discretion to determine whether recusal or disqualification is appropriate.

CONCLUSION

In sum, the Movants have failed to meet their burden to demonstrate that three Commissioners should be recused or disqualified because of a prior statement during their confirmation hearing. While a decision on whether to recuse is within the discretion of each

Commissioner, neither recusal nor disqualification is required if the affected Commissioners determine that their prior comments do not reflect prejudice or the appearance of prejudice of adjudicatory issues associated with the DOE motion and that, in fact, they have not prejudged the DOE withdrawal motion.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
this 19th day of July, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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U. S. DEPARTMENT OF ENERGY) Docket No. 63-001-HLW
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(High-Level Waste Repository)) ASLBP No. 09-892-HLW-CAB04
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO STATE OF WASHINGTON, STATE OF SOUTH CAROLINA, AIKEN COUNTY, SOUTH CAROLINA, AND WHITE PINE COUNTY NEVADA'S MOTION FOR RECUSAL/DISQUALIFICATION" in the above-captioned proceeding have been served on the following persons this 19th day of July, 2010, by Electronic Information Exchange.

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