

**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))	July 19, 2010

**STATE OF NEVADA ANSWER IN OPPOSITION TO MOTION FOR
RECUSAL/DISQUALIFICATION**

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STATE OF NEVADA ANSWER IN OPPOSITION TO MOTION FOR RECUSAL/DISQUALIFICATION

On June 30, 2010, the Commission's Secretary issued a brief Order inviting the participants in this proceeding to file briefs with the Commission as to whether the Commission should review, and reverse or uphold, the Construction Authorization Board's (CAB's) June 29, 2010 Memorandum and Order (M&O) denying the Department of Energy's (DOE's) motion to withdraw its application for a construction authorization for the proposed high-level radioactive waste repository at Yucca Mountain, Nevada (application).

On July 9, 2010, the State of Washington, the State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada, moved that NRC Commissioners Apostolakis, Magwood, and Ostendorff recuse themselves and be disqualified from any consideration of the M&O. The State of Nevada (Nevada) opposes the motion for the reasons set forth below, and is joined in this opposition by Joint Timbisha Shoshone Tribal Group, Native Community Action Council, and Clark County.

On July 15, 2010, Commissioner Apostolakis recused himself from this proceeding for reasons completely unrelated to this Motion. Therefore, the Motion is moot insofar as it is addressed to him, and his qualifications to rule on matters related to the M&O need not be addressed in this Answer. However, in fact, the

request that he recuse himself and be disqualified is completely groundless, just as it is for the other two. If Commissioner Apostolakis had not recused himself for other reasons, he would have been perfectly qualified to rule on matters related to the M&O.

I. SUMMARY.

As explained below, the Motion is an utterly baseless effort that confuses mudslinging with proper legal argument. These commissioners have done nothing to deserve this shabby and disrespectful treatment. They have not improperly prejudged any factual or other material issue and there is no basis to assume that they will perform their adjudicatory functions related to the M&O in anything other than a completely fair and objective manner.

The motion suffers from procedural and other defects that are also sufficient to warrant denial.

II. THE FACTS.

The Motion is based entirely on selected portions of the unofficial transcript of the February 9, 2010 hearings of the Senate Committee on Environment and Public Works on the NRC Commissioner nominations of Dr. Apostolakis and Messrs Magwood and Ostendorff. During those hearings each answered "No" to the question propounded by Committee Chairman Boxer (and apparently suggested by Senator Reid) "if confirmed, would you second guess the Department of

Energy's decision to withdraw the license application for Yucca Mountain from NRC's review?" The Committee Chairman then stated "Thank you. I think he [Senator Reid] will be very pleased with that."¹

The Motion omits other relevant portions of the nominees' testimony. In particular, the Motion fails to mention Mr. Magwood's testimony that:

I believe that public service is a very great honor and a great responsibility. If confirmed, it will be my purpose to work closely with my colleagues here at the table today and the other Commissioners to fulfill my new mission with a singular focus on the interest of the American people, doing business in a manner that earns the public's trust, and always doing the right thing, even when the right thing isn't easy.²

The motion also omits Mr. Ostendorff's testimony that:

I am committed to the NRC's principles of good regulation. Those are independence, openness, efficiency, clarity and reliability. Furthermore, I appreciate the need for regulatory predictability and stability. I am humbled by the importance of the task ahead, and if confirmed, commit to work tirelessly to professionally execute the Commission's vitally important mission.³

III. ARGUMENT.

A. There Is No Prejudgment of Any Material Issue.

¹ Exhibit 1 to the affidavit of Andrew A. Fitz at pp. 51-52 (attached to the Motion). The Fitz affidavit attests to the fact that Exhibit 1 is "a true and accurate excerpt of *Hearing on Nomination of NRC Commissioners*, U.S. Senate Committee on Environment and Public Works, 111th Cong. (February 9, 2010.)" The Fitz affidavit does not state (because it cannot) that the transcript referred to is the official Committee transcript. To Nevada's knowledge, no official published transcript is available. Nevertheless, for the purposes of this Answer, Nevada will assume that the unofficial transcript accurately transcribes the testimony presented at the hearing.

² Unofficial transcript at pg. 44. (Attached as Exhibit 1).

³ *Id* at pg. 47. (Attached as Exhibit 1).

1. Nevada does not quarrel with the general proposition that, when acting in an adjudicatory capacity, an NRC commissioner is subject to the same recusal standard as a federal judge (Motion at pg. 3). Nor does Nevada quarrel with the general proposition that recusal is warranted whenever impartiality might reasonably be questioned (Motion at pg. 4, citing *Liteky v. United States*, 510 U.S. 540, 548 (1994)). These general principles are commonly applied when a judge has a financial or similar personal interest in the outcome of the proceeding, or when a judge has demonstrated some personal bias toward a party to the proceeding. There are no allegations along these lines here.

Instead, the allegation is made that, by their confirmation hearing testimony, the two commissioners have created the appearance that they have prejudged, and indeed have in fact prejudged, the issue whether DOE's motion to withdraw should be granted (Motion at pp. 5-6). As explained below, they have done no such thing.

2. The question asked during the confirmation hearing was whether the nominees would "second guess" DOE's decision to withdraw its license application. Neither Nevada nor the moving parties can possibly know how the two nominees understood the question and, therefore, precisely what opinions they intended to convey by their brief "no" answers. Regardless, however, their answers here cannot be taken in isolation from their other testimony, just moments before. Mr. Magwood testified that, if confirmed, he

would "do[ing] business in a manner that earns the public's trust, and always doing the right thing, even when the right thing isn't easy;" and Mr. Ostendorff testified that he was "committed to the NRC's principles of good regulation," which are "independence, openness, efficiency, clarity and reliability," and that, if confirmed, he would "work tirelessly to professionally execute the Commission's vitally important mission." Far from indicating any kind of prejudgment, the two nominees' testimony, taken as a whole, was in accord with the finest principles of regulation – doing the right thing even when it is not easy, independence, and professionalism.

3. Even taken in isolation, and to the extreme, the nominees' answers would suggest at most that, as of February 9, 2010, they were not inclined to assess the reasons DOE might offer for wanting to withdraw its application. However, this cannot constitute a prejudgment of DOE's motion, or even the appearance of having done so, for the very simple and very basic reason that the Commission's review of the M&O and DOE's Motion cannot include any assessment of the reasons DOE gave for wanting to withdraw. In short, expressing an opinion, even a firm opinion, about an issue cannot amount to a prejudgment, in appearance or otherwise, if that issue is not material to the Commission's consideration of the M&O and DOE's motion.

That the reasons DOE gave for wanting to withdraw are *not* material to the Commission's review is clear from both the M&O and well-established NRC case law. The CAB stated in its M&O that we "do not evaluate the grounds on which it [DOE] purports to rely [in its motion to withdraw]" (M&O at pg. 11, note 36). Thus, the CAB completely avoided the question whether DOE's reasons for withdrawing were convincing or reasonable and, in reviewing the M&O, the Commission will easily avoid the question as well. And a long and consistent line of Commission decisions stretching back three decades establishes the firm principle that the Commission does not review or otherwise second guess the reasons applicants give for wanting to withdraw their applications. *Northern States Power Company (Tyrone Energy Park, Unit 1)*, CLI-80-36, 12 NRC 523 (1980); *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, CLI-90-08, 32 NRC 201 (1990), *affirmed on reconsideration*, CLI-91-02, 33 NRC 61 (1991), *petition for review denied*, *Shoreham-Wading River Central School District v. NRC*, 931 F.2d 102 (D.C. Cir. 1991); *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-93-03, 37 NRC 135 (1993); *Pacific Gas & Electric Company (Stanislaus Nuclear Project, Unit 1)*, LBP-83-02, 17 NRC 45, *16 (1983) ("The decision of PG&E to withdraw its application is a business judgment. The law on withdrawal does not require a determination of whether its decision is sound.").

4. *Pillsbury Co. v. FTC*, 354 F.2d 952, 963-64 (5th Cir. 1966), does not support disqualification here. In *Pillsbury* an agency decision was reversed after a powerful United States Senator hauled the agency Chairman and one of his fellow Commissioners before a congressional committee in order to subject them to hostile and prolonged criticism for a ruling about the meaning of a statute in the (then) pending proceeding. In contrast, there was nothing even remotely hostile or threatening about Senator Boxer's question at the nomination hearing and, moreover, there was no proceeding pending on DOE's motion when the hearing colloquy occurred (DOE's motion to withdraw was not filed until one month after the nomination hearing). The facts in *Pillsbury* are virtually unique; *Pillsbury* is rarely applied to invalidate an agency decision. For example, in *California v. FERC*, 966 F.2d 1541, 1551-52 (9th Cir. 1992), the court refused to invalidate an agency licensing decision even though a powerful Congressional Committee Chairman had expressed pointed views to the agency about material issue.

B. Any Prejudgment Here Cannot Possibly Be Improper or Unlawful.

Although the record (the transcript) does not support it, let us assume, for the purposes of argument, that Commissioners Magwood and Ostendorff were (as of February 9, 2010) of the firm opinion that DOE's motion to withdraw should be granted. DOE's motion, and the M&O denying it, both raise purely legal questions for the Commission to resolve, the principal one being whether the Nuclear Waste

Policy Act of 1982, as amended (NWPA), allows DOE to withdraw its application.

It is settled law that there is nothing disqualifying about having and expressing firm opinions on legal questions before the cases raising those questions arise. *See Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *FTC v. Cement Institute*, 333 U.S. 683 (1948). *Republican Party v. White* is worth quoting extensively.

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-JUSTICE REHNQUIST observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." *Laird v. Tatum*, 409 U.S. 824, 835, 34 L. Ed. 2d 50, 93 S. Ct. 7 (1972) (memorandum opinion). Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias. *Ibid.*

Id. at 777-78.

The Commission has followed these judicial decisions in holding that "the fact that a member of an adjudicatory tribunal may have a crystallized point of view on questions of law or policy is not a basis for his or her disqualification." *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, ALAB-777, 20 NRC 21, 26 (1984), citing *Northern Indiana Public Service Co. (Bailly Generating Station, No. 1)*, ALAB-76, 5 AEC 312, 313 (1972).

As indicated above, Commissioners Magwood and Ostendorff do not appear to have expressed any opinions on any issues that are material to DOE's motion. However, even if they had done so, this would not be a basis for their disqualification for the reasons given above.

C. If Necessary, the Rule of Necessity Would Apply To This Case.

1. There is a maximum of five NRC Commissioners, and a quorum of three is required for any decision, including an adjudicatory decision taking review or after review. 42 U.S.C. §5841(a)(1). Commissioner Apostolakis will not participate and, if we assume (contrary to everything in the analysis above) that Commissioners Magwood and Ostendorff are disqualified, only two Commissioners remain and there is no quorum. Without a quorum there is, in legal effect, no NRC adjudicatory body that is authorized to review the M&O. This invokes the "rule of necessity" that "an adjudicatory body (judges, boards, commissions, etc) with sole or exclusive authority to hear a matter [may] do so

even if the members of that body may have prejudged the [case]." *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1052 (5th Cir. 1997). *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *U.S. v. Will*, 449 U.S. 200, 214 (1980); *Malone v. City of Poway*, 746 F.2d 1375, 1376 (9th Cir. 1984). This rule of necessity requires a member of the Commission to participate and to vote on an adjudicatory matter even if he or she is otherwise disqualified from doing so. As explained above, however, no disqualification is justified here.

2. In their opening briefs in response to the Secretary's June 30, 2010 Order, the moving parties argue that the rule of necessity does not apply here because the U.S. Court of Appeals for the D.C. Circuit is an alternate tribunal. This is not the case. Under section 119 of the NWPA, 42 U.S.C. 10139, the relationship between the Court and the CAB is not the same as the relationship between the Commission and the CAB. The Commission would review the CAB's legal decisions *de novo*, *Entergy Nuclear Vermont Yankee LLC (Vermont Yankee Nuclear Power Station)*, CLI-10-17, __ NRC __ (2010) (slip opinion at pg. 11), while the Court would apply the deferential review standards in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). It is the manifest duty of the Commission to interpret the statutes that govern its actions in the first instance. *See, e.g., New England Legal Foundation v. Massachusetts Port Authority*, 883

F.2d 157 (1st Cir. 157) (District Court decision interpreting a statute reversed because (among other things) the interpretation question should first have been referred to the Federal Department of Transportation under the doctrine of primary jurisdiction). While the rule of necessity does not apply when there is an alternate tribunal, none of the cases suggests, let alone holds, that a reviewing court is an alternate tribunal.

D. The Motion Should Be Denied Because of Its Procedural Defects.

Finally, the Motion may be denied because it is untimely and must by regulation be denied because it was filed without the certification required by 10 C.F.R. § 2.323(b).

1. Judicial and NRC case law is clear that a motion to disqualify must be filed as soon as the moving party has a reasonable basis to believe that there are grounds for disqualification. *Village of Bensenville v. FAA*, 457 F.3d 52, 73 (D.C. Cir. 2006); *Power v. FLRA*, 146 F.3d 995, 1002 (D.C. Cir. 1998); *Pharaon v. Board of Governors of the Federal Reserve System*, 135 F.3d 148, 155 (D.C. Cir. 1998); *Pfister v. Office of Workers' Compensation Programs*, 675 F.2d 1314, 1318 (D.C. Cir. 1982); *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, ALAB-777, 20 NRC 21, 24 (1984).

The moving parties would (or should) have known of the grounds they now argue in support of disqualification as soon as the nominees' testimony was given

and then reported in the media on February 11, 2010 (see article in the *Las Vegas Review Journal* attached as Exhibit 2). A motion to disqualify Commissioners Magwood and Ostendorff could have been filed promptly after April 1, 2010, when they took office (were sworn in). At the latest, a motion should have been filed promptly after DOE petitioned for Commission review of the CAB's Suspension Order on April 12, 2010, when it would have been apparent that the two Commissioners might be exercising their adjudicatory review functions in this proceeding. Therefore, the Motion is inexcusably late.⁴

2. Moreover, 10 C.F.R. § 2.323 (b) provides that "[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful." There is no such certification.

IV. CONCLUSION.

The Motion for Recusal/Disqualification should be denied.

⁴ It is no excuse that the moving parties (other than White Pine County) were not admitted as parties until the M&O was issued on June 29, 2010. Washington State, South Carolina, and Aiken County could have filed their Motion as petitioners to intervene. Indeed, all three (then) petitioners to intervene responded to DOE's April 12, 2010 petition for Commission review.

Respectfully submitted,

(signed electronically)

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Dated: July 19, 2010

Exhibit 1

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U. S. Senate Tuesday, February 9, 2010

Committee on Environment Washington, D.C.
and Public Works

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STATEMENT OF WILLIAM D. MAGWOOD, IV, NOMINATED BY THE PRESIDENT
TO BE A COMMISSIONER OF THE NUCLEAR REGULATORY COMMISSION

Mr. Magwood. Thank you, Chairman Boxer. It is a pleasure to be here today to speak with you about my nomination. It is an honor to appear before this panel. I have worked with some of you and some of your staffs over the years on other matters. I look forward to working with you regarding the Nuclear Regulatory Commission.

Before I begin, I would like to recognize the service of Edward McGaffigan, whose term I have been nominated to complete. Commissioner McGaffigan was a strong, independent voice on the Nuclear Regulatory Commission for more than 11 years. His commitment, passion and intellect have set a very high standard for all public servants, and if confirmed, I will always view his example as one to emulate.

I would also like to thank Senator Cardin for his introduction. He did such a wonderful job of talking about my background, I think I will give you a little bit different perspective about my background. Rather than talk about my academic background and work background, I wanted to let you know I appear you today as a grandson of a man who worked in the coal mines of West Virginia and the steel mills at Pittsburgh. My

the management and operation of nuclear power plants, nuclear fuel facilities, medical and educational facilities, waste treatment and disposal facilities and may other areas for which NRC must provide effective regulation. Because of my experience, I firmly believe that maintaining uncompromisingly high levels of safety is the first and most important job of any organization that handles nuclear materials. I look forward to bringing these high expectations to the work of the Nuclear Regulatory Commission.

Chairman Boxer, I believe that public service is a very great honor and a great responsibility. If confirmed, it will be my purpose to work closely with my colleagues here at the table today and the other Commissioners to fulfill my new mission with a singular focus on the interest of the American people, doing business in a manner that earns the public's trust, and always doing the right thing, even when the right thing isn't easy.

With that, I thank you for your attention and look forward to answering your questions.

[The prepared statement of Mr. Magwood follows:]

STATEMENT OF WILLIAM C. OSTENDORFF, NOMINATED BY THE PRESIDENT TO
BE A COMMISSIONER OF THE NUCLEAR REGULATORY COMMISSION

Mr. Ostendorff. Chairman Boxer, Senator Inhofe, members of the Committee, I want to thank you for this opportunity to appear before you today.

I am honored to have been nominated by President Obama to serve on the Nuclear Regulatory Commission. I am also privileged to be in the company of my fellow NRC nominees, George Apostolakis and Bill Magwood, and look forward to the possibility of working with both if confirmed.

I would like to thank Senator Webb for his kind introduction. Also I want to thank my family, especially my wife, Chris, for their encouragement and support over many years.

If confirmed, I look forward to working closely with members of this Committee and their respective staffs to carry out the duties of a Commissioner. The Commission's mission, to license and regulate the Nation's civilian use of nuclear materials, ensure adequate protection of public health and safety, to promote the common defense and security, and to protect the environment, is critical to our Country. The Nation is currently fortunate to have a highly talented and dedicated staff at the Nuclear Regulatory Commission to carry out its strategic goals of

ensuring safety and security of commercial nuclear facilities.

I will tell the members of the Committee that I am committed to the NRC's principles of good regulation. Those are, independence, openness, efficiency, clarity and reliability. Furthermore, I appreciate the need for regulatory predictability and stability. I am humbled by the importance of the task ahead, and if confirmed, commit to work tirelessly to professionally execute the Commission's vitally important mission.

I have been privileged to serve our Country for many years, as a career nuclear submarine officer, as a counsel on Committee Staff Director for the House Armed Services Committee and as Principal Deputy Administrator of the National Security Administration. While I will have much to learn, I am confident this prior management and leadership experience will serve me well if I am confirmed. I will add, my experience as a senior Congressional staff member and as a senior leader at the Department of Energy has given me a deep appreciation for the role of Congressional oversight and the importance of your Committee.

If confirmed, I commit to communications with you founded on integrity and responsiveness. Again, I appreciate the opportunity to appear here today and I look forward to your

Exhibit 2

Feb. 11, 2010
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NRC nominees won't stand in way of Yucca Mountain shutdown

By STEVE TETREULT
STEPHENS WASHINGTON BUREAU

WASHINGTON -- Three officials nominated to fill seats on the Nuclear Regulatory Commission indicated this week that they would not stand in the way of a shutdown of the Yucca Mountain nuclear waste program.

But one suggested that because it now looks as if radioactive spent fuel will remain at power plants for the foreseeable future, their steel-and-concrete storage canisters should be checked for safety.

"When we first started storing spent fuel at reactor sites, nobody was thinking it was going to be there for 100 years," said William Magwood, a former Department of Energy official. "I think we have to go back and take a look at what we have in place now and assure ourselves it is able to stay in place another 50 years if necessary."

The NRC has indicated that nuclear waste can remain on site for decades at least. But if there are places where it might not stay safe that long, Magwood said, he would call for "corrective action as soon as possible."

At a Senate hearing Tuesday, Magwood and two other NRC nominees said they would not "second-guess" a decision by the Obama administration to withdraw a license application for the Yucca Mountain waste repository that is pending at the commission. The administration has created a blue-ribbon commission to recommend alternatives for waste management.

Sen. Barbara Boxer, D-Calif., chairwoman of the Environment and Public Works Committee, posed the question. She said it came from Sen. Harry Reid, D-Nev., who is engineering the Nevada project shutdown with administration officials.

"You can just answer yes or no: If confirmed, would you second-guess the Department of Energy's decision to withdraw the license application for Yucca Mountain from the NRC's review?" Boxer asked.

Magwood, former director of the Office of Nuclear Energy at the Department of Energy: "No."

George Apostolakis, nuclear science and engineering professor at the Massachusetts Institute of Technology: "No."

William Ostendorff, former principal deputy administrator at the National Nuclear Security Administration: "No."

Boxer said she expected a speedy confirmation for Apostolakis, Magwood and Ostendorff, who were nominated by President Barack Obama to fill three seats on the five-member NRC board.

The exchange at the hearing means that, if confirmed, a majority of the NRC board will be on record that they will not intervene to keep the Yucca project alive.

Reid wanted to get the nominees on record saying just that, spokesman Jon Summers said. Reid sought acknowledgement "that as regulators they are in no position to question DOE's decision to withdraw the license application for Yucca," Summers said.

A fourth member of the NRC board, Chairman Gregory Jaczko, may also be expected not to intervene. Jaczko worked as Reid's science adviser before being sworn onto the commission in January 2005.

Find this article at:

http://www.lvrj.com/news/breaking_news/nrc-nominees-won_t-stand-in-way-of-yucca-mountain-shutdown-84067267.html

Check the box to include the list of links referenced in the article.

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada Answer in Opposition to Motion for Recusal/ Disqualification has been served upon the following persons by the Electronic Information Exchange:

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