

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:
William C. Ostendorff

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

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Docket No. 63-001-HLW

**DECISION ON THE MOTION OF THE STATE OF WASHINGTON, THE STATE OF SOUTH
CAROLINA, AIKEN COUNTY, SOUTH CAROLINA, AND WHITE PINE COUNTY, NEVADA
FOR RECUSAL/DISQUALIFICATION**

I. Introduction

By motion dated July 9, 2010, the States of Washington and South Carolina, and the Counties of Aiken, South Carolina, and White Pine, Nevada (Movants) request that I, along with Commissioners Apostolakis and Magwood, recuse ourselves from any consideration of the Construction Authorization Board's (Board) decision to deny the Department of Energy's (DOE) motion to withdraw its application for a high level waste repository at Yucca Mountain.¹

Because Commissioner disqualification decisions are made individually by each Commissioner

¹ *State of Washington, State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada's Motion for Recusal/Disqualification* (July 9, 2010) (Motion).

whose disqualification is sought,² I speak only for myself in this matter. After carefully considering the motion and the applicable law on disqualification of quasi-judicial officers, I decline to recuse myself from this proceeding.

II. Background

The focus of the Movants' concern is my testimony before the Senate Committee on Environment and Public Works on February 9, 2010, as part of the confirmation process to be a Commissioner for the United States Nuclear Regulatory Commission (NRC). The testimony in question, which consisted of a brief exchange with Senator Barbara Boxer, went as follows:

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.³

Subsequent to this testimony, but prior to my confirmation by the Senate, DOE filed its Motion to Withdraw.⁴ This was followed by a Board order suspending the adjudicatory proceeding and consideration of the Motion to Withdraw.⁵ After I was sworn in as a

² See *In re Joseph J. Macktal*, CLI-89-18, 30 NRC 167, 170 (1989).

³ Hearing on the Nominations of George Apostolakis, William Magwood, and William Charles Ostendorff to be Members of the Nuclear Regulatory Commission Before the S. Comm. on Environment and Public Works, 111th Cong. 51-52 (2010) (unofficial transcript).

⁴ *U.S. Department of Energy's Motion to Withdraw* (Mar. 3, 2010) (Motion to Withdraw).

⁵ Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010) (unpublished).

Commissioner, the Commission then issued a decision, which I approved, vacating the Board's suspension order and remanding the matter to the Board for prompt resolution of the Motion to Withdraw.⁶ This culminated in the Board's decision to deny DOE's Motion,⁷ and appeal of that decision is now pending before the Commission.

The Movants argue that the exchange during my confirmation hearing testimony "can be reasonably interpreted to demonstrate that each [Commissioner has], in fact, prejudged this matter should the Commission choose to review the [Board's] decision."⁸ The Movants continue that "[t]here is no other logical meaning that can be ascribed to the statements not to 'second guess' DOE on the issue of withdrawal" and that "[n]o other meaning was intended or understood, nor can any other meaning be inferred."⁹

III. Discussion

As discussed below, in light of the applicable law on disqualification of quasi-judicial officers and the facts and circumstances of this case, I deny the motion for recusal/disqualification with respect to myself.

"[A]n agency official should be disqualified only where 'a disinterested observer may conclude' that the official 'has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'"¹⁰ As a general matter, courts will only reverse an

⁶ CLI-10-13, 71 NRC __ (Apr. 23, 2010) (slip op.).

⁷ LBP-10-11, 71 NRC __ (June 29, 2010) (slip op.).

⁸ Motion at 5.

⁹ *Id.*

¹⁰ *Nuclear Info. & Res. Serv. (NIRS) v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 2007) (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (emphasis added). See also *In re Kempthorne*, 449 F.3d 1265, 1269 (D.C. Cir. 2006) (explaining that "Under 28 U.S.C. § 455(a) [an adjudicator] must recuse himself 'in any proceeding in which his impartiality might reasonably be questioned . . . by one fully apprised of the surrounding circumstances'" (quoting *Cobell v. Norton*, 334 F.3d 1128, 1143-44 (D.C. Cir. 2003))).

agency official's decision not to recuse himself when the official "demonstrably made up [his] mind about important and specific factual questions and [is] impervious to contrary evidence."¹¹

It is also well-settled that "[a]dministrative officers are presumed objective and 'capable of judging a particular controversy fairly on the basis of its own circumstances'" and that "[a] party cannot overcome this presumption with a mere showing that an official 'has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute.'"¹²

At the time of Senator Boxer's question, I had only limited knowledge and appreciation for the matters at issue as part of the licensing proceeding, as well as only limited familiarity with DOE's latest efforts with regard to that application. I certainly had no knowledge of the legal issues pertaining to the withdrawal of the application. I understood Senator Boxer's question to ask whether or not I would take a position on DOE's decision to seek withdrawal of the application *as a matter of policy*. My belief at the time was, and still is, that it was not my place to question the decision made by the Secretary of Energy to *pursue* such a withdrawal.

It was not my belief, nor do I think that any reasonable person could conclude as such in light of all the facts and circumstances, that Senator Boxer was asking for my opinion as to whether the application could be withdrawn as a matter of law. It was simply not conceivable to me that the Senator would ask me to provide an on-the-spot opinion on a legally and technically complex subject with simply a "yes or no" answer, or to opine on the matter without having been given sufficient opportunity to understand the extensive history or complicated technical or legal issues.

At the time of the hearing, the specific issue of the withdrawal of DOE's application was not before the Commission, nor was I familiar with the laws and regulations applicable to that

¹¹ *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

¹² *NIRS*, 509 F.3d at 571 (quoting *United Steelworkers of America*, 647 F.2d at 1208).

issue. Therefore, no reasonable person, knowing all of the facts and circumstances of the confirmation hearing, the Yucca Mountain licensing proceeding, and the NRC's adjudicatory processes, could have understood my "no" answer to mean that I "had demonstrably made up [my] mind about important and specific factual questions and was impervious to contrary evidence," or had formed firm views on the pertinent legal issues.

Furthermore, though the courts generally do not "tolerate undue legislative interference with an administrative agency's adjudicative functions,"¹³ the threshold for a court to reach such a conclusion is high. Disqualification is generally only found as the result of an administrative decision-maker being subjected to a "searching examination" or "investigation [that] focuse[d] directly and substantially upon the mental decisional processes of [an adjudicatory body] *in a case which is pending before it.*"¹⁴ "A point of view - even bias induced by legislative interference - as to questions of law . . . does not necessarily render invalid an agency's decision."¹⁵

Senator Boxer asked a single "yes or no" question (in fact directing the nominees that we could "just answer it yes or no"), and did not ask why I answered as I did. The question itself contained the ambiguous phrase "second guess," and there was no follow-up questioning that would have provided further illumination of the rationale behind my answer. This exchange could hardly be construed as a "searching examination" and could not be viewed as an "investigation [that] focuse[d] directly and substantially upon" my decision-making process.

IV. Conclusion

Throughout my many years of federal service, my ability to objectively and fairly consider the matters that have demanded my attention has never been challenged. In my role as an

¹³ *Gulf Oil Corp. v. Fed. Power Comm'n*, 563 F.2d 588, 610 (3d Cir. 1977).

¹⁴ *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966) (emphasis added). *Accord ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527-1530 (D.C. Cir. 1994).

¹⁵ *Gulf Oil Corp.*, 563 F.2d at 612.

NRC Commissioner, I have objectively and fairly considered and decided on all of the matters that have been brought before me based on their individual merits, and without prejudgment.

This is also the case in this particular proceeding.

/RA/

William C. Ostendorff
NRC Commissioner

Dated at Rockville, Maryland
this 11th day of August, 2010

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ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Commissioner Ostendorff Decision on Motion for Recusal/Disqualification**, dated August 11, 2010, have been served upon the following persons by Electronic Information Exchange.

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[Original Signed by Linda D. Lewis]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 11th day of August 2010