

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD PANEL

August 30, 2006 (1:00pm)

Before Administrative Judges:

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Ann Marshall Young, Chair
Dr. Richard F. Cole
Nicholas G. Trikouros

SERVED August 30, 2006

In the Matter of:

ENTERGY NUCLEAR GENERATION
COMPANY AND ENTERGY NUCLEAR
OPERATIONS, INC.
(Pilgrim Nuclear Power Station)

Docket No. 50-293-LR

ASLBP No. 06-848-02-LR

August 30, 2006

NOTICE OF RECUSAL OF JUDGE NICHOLAS TRIKOUROS

I. Background

During a July 27, 2006 licensing board teleconference with the parties to this proceeding, I disclosed that prior to joining the Atomic Safety and Licensing Board Panel (the Panel) I was a principal in a consulting company that performed certain analytical services for Entergy regarding a spent fuel pool for a pressurized water reactor owned and operated by Entergy.¹ Further details concerning this consulting assignment, including my involvement therein, are set forth in the written Disclosure Statement I filed for the record in this proceeding.² A copy of that Disclosure Statement is attached hereto.

Motions seeking my disqualification as an Administrative Judge in this proceeding were filed on August 4, 2006, by both Pilgrim Watch³ and the Massachusetts Attorney General⁴ on the grounds that the information provided in my Disclosure Statement evidenced that the services my consulting company performed for Entergy were relevant to an issue in dispute in this proceeding and, therefore, my recusal from this licensing board is required. Entergy opposed

¹ See Tr. at 489-492.

² See Disclosure Statement of Judge Nicholas Trikouros Regarding the Pilgrim License Renewal (July 27, 2006), ADAMS accession No. ML062120730.

³ See Motion on Behalf of Pilgrim Watch for Disqualification of Judge Nicholas Trikouros in the Pilgrim Nuclear Power Station Re-Licensing Proceeding (Aug. 4, 2006) ("Pilgrim Watch Motion").

⁴ See Massachusetts Attorney General's Motion for Disqualification of Judge Nicholas Trikouros (Aug. 4, 2006) ("Mass. AG Motion").

the motion, and the NRC Staff declined to take a position.⁵

After carefully considering the motions, I have decided to recuse myself from this proceeding. I take this action, consistent with established judicial standards, to avoid an appearance of partiality, not because there is any serious question regarding my actual impartiality in this case.

II. Discussion

The facts here do not present either a conflict of interest issue or an issue of actual partiality or bias.⁶ At best, the facts present a debatable question as to “whether a reasonable person knowing all of the circumstances would be led to the conclusion that the [my] impartiality might reasonably be questioned.”⁷ Thus, this is a decision that must be analyzed pursuant to 28 U.S.C. § 455(a), which provides that: “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

A number of the reasons that previously led me to conclude that no “reasonable person knowing all of the circumstances would conclude that my impartiality might reasonably be questioned” were set forth in my Disclosure Statement and need not be repeated here. I still believe those are valid, objective reasons to conclude that my impartiality in this proceeding cannot reasonably be questioned. However, as I reviewed those reasons in light of the parties’ arguments and relevant case law, I concluded that one critical fact militates against my initial conclusion. That fact is that the work product generated by the services my company performed for Entergy ultimately found its way into the National Academy of Science report that is specifically referenced in the petitioners’ contentions and, therefore, appears to bear a nexus to this proceeding. Unlike Judge Carpenter’s work product in Hope Creek, my company’s

⁵ See Entergy’s Response to Motions for Disqualification of Judge Nicholas Trikouros (Aug. 14, 2006) (“Entergy’s Response”).

⁶ Although the Massachusetts Attorney General suggests that I may have pre-judged the merits of their contention (see Mass. AG Motion at 6), that suggestion is bereft of factual support. Cf. Pilgrim Watch Motion at 6 (“Pilgrim Watch does not assert any actual bias or partiality on the part of Judge Trikouros”).

The Massachusetts Attorney General also asserts that my impartiality may reasonably be questioned because I may, at some future date, “seek employment as a consultant to Entergy” (Mass. AG Motion at 6). Pilgrim Watch declines to adopt this argument and rightfully so. As Entergy correctly states: “Adoption of this [argument] supplied by the Massachusetts Attorney General could . . . essentially disqualify anyone with relevant technical experience, which would run counter to the reason for having technical judges on licensing boards” (Entergy’s Response at 9 n.23).

⁷ Public Service Electric and Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 22 (1984) (quoting Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1366 (1982)).

consulting work has no connection with the Pilgrim plant.⁸ However, the unique combination of factors in this case – most notably, the reference to the work performed by my company on behalf of Entergy – does create the appearance that there is some relation to this proceeding and may give rise to an appearance of partiality. This factor is determinative in my decision to recuse myself.

The Atomic Safety and Licensing Board is perhaps the most unique administrative adjudicatory body to be found anywhere in our government's executive branch agencies. What makes it unique is the statutory requirement of Section 191 of the Atomic Energy Act (Act) that licensing boards be comprised of three members, two of whom shall be technical experts.⁹ Section 191 was added to the Act in 1962 as part of a series of amendments that Congress adopted to improve the regulatory process in nuclear licensing activities. The purpose of Section 191 was clearly stated in the Senate Report addressing the amendments:

Membership.— A Board will consist of three members, “two of whom shall be technically qualified” and one of whom shall be “qualified in the conduct of administrative proceedings.” Board members could be appointed by the Commission from private life or designated from the staff of the Commission or another Federal agency. It is expected that the two technically qualified members will be persons of recognized caliber and stature in the nuclear field.¹⁰

⁸ Petitioners discount the fact that the spent fuel pool analyses performed by my company for Entergy only concerned a plant other than Pilgrim and one that is generically different from Pilgrim. Thus, they incorrectly contend that my objectivity regarding a contention concerning Pilgrim's spent fuel pool would be prejudiced by my company's earlier work.

⁹ Pub. L. No. 87-615, § 1, 76 Stat. 409, 409 (1962). Section 191 of the Atomic Energy Act of 1954, as amended, 42 USC 2241.

¹⁰ S. Rep. No. 87-1677 (1962), reprinted in 1962 U.S.C.C.A.N. 2207, 2211. Again, several pages later in the same Senate Report: “It is the committee's intent in authorizing the Atomic Safety and Licensing Board to facilitate bringing to bear technical expertise in the resolution of the difficult scientific and technical problems associated with atomic energy licensing. It is also the committee's hope that the use of the Board will facilitate safety determinations and further enhance public confidence in such determinations” (id. at 2215).

It must be understood and accepted by parties to ASLB proceedings that to be technically expert in the nuclear field, one must have worked extensively in the nuclear field. This point should be self-evident. Entergy's rebuttal of the petitioners' arguments in this regard (see supra note 6) is persuasive.¹¹

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹²



Nicholas G. Trikouras
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 30, 2006

¹¹ See Entergy's Response at 8-9.

¹² Copies of this Order and its attachment were sent this date by Internet e-mail transmission to all participants or counsel for participants.

DOCKETED
USNRC

July 27, 2006 (1:53pm))

DISCLOSURE STATEMENT OF JUDGE NICHOLAS TRIKOUROS
REGARDING THE PILGRIM LICENSE RENEWAL APPLICATIONOFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

I am placing this statement in the record of the Pilgrim boiling water reactor License Renewal proceeding in order to provide full disclosure of certain information which may be perceived to be a conflict of interest in this proceeding.

Early in 2004, Panlyon Technologies, of which I was a Principal, was commissioned by Entergy Northeast to provide best estimate separate effects evaluations of the time available for recovery actions given a loss of coolant from potential malicious acts in an Entergy-owned pressurized water reactor spent fuel pool. Scenarios considered included various degrees of partial uncovering of spent fuel as well as complete drainage of the pool. While I was not the principal investigator, I did provide a management overview of the project and was consulted regarding modeling assumptions and the viability of the results as they progressed. The work was completed in 2005.

Entergy provided preliminary results from this work in a presentation to the National Academy of Sciences (NAS) in Wash D.C. on May 10, 2004, in which I participated as one of several presenters. I have had no other communications with the National Academy prior to or since that day. As it turned out, statements regarding these presentations were included in support of the findings in Section 3 of the subsequent NAS report entitled "Safety and Security of Commercial Spent Nuclear Fuel Storage: Public Report," which has been referenced in the contentions of the Massachusetts Attorney General and Pilgrim Watch in this case.

I have evaluated the impact of my involvement in the technical effort described above and I have concluded that a reasonable person, knowing all of the relevant facts and circumstances about my work for Entergy, would have no reasonable basis to question my impartiality in this case. The work was not associated with the Pilgrim Nuclear Plant nor with any other boiling water reactor. The study was performed in an independent manner using a commonly accepted methodology. We had complete freedom to choose the methodology, the modeling inputs and the analysis assumptions. At Entergy's request, the final documentation of this work was provided to the NRC Staff.

This was just one of many technical tasks regarding spent fuel pool cooling that I have been associated with throughout my career. The background understanding I bring to my current adjudicatory role was generated in part by carrying out consulting work for more than a dozen clients in the nuclear industry, including Entergy. This work put me in a better position to fulfill one of the responsibilities as a Licensing Board Judge, i.e., to review and to question the material presented from a knowledgeable technical perspective.

The above circumstances will not affect my impartiality or independence of judgment in this case, but I have concluded that disclosure was necessary to avoid the possibility of any misunderstanding or misperception.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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ENTERGY NUCLEAR OPERATIONS, INC.) Docket No. 50-293-LR
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(Pilgrim Nuclear Power Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB NOTICE OF RECUSAL OF JUDGE NICHOLAS TRIKOUROS have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-293-LR
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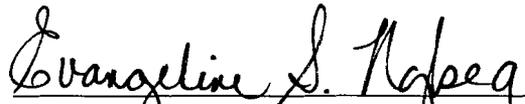
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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 30th day of August 2006