UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE JUDGE PAUL B. ABRAMSON

In the Matter of	)	
	)	
Entergy Nuclear Generation Co. and	)	
Entergy Nuclear Operations, Inc.	)	Docket No. 50-293-LR
	)	
	)	ASLBP No. 06-848-02-LR
(Pilgrim Nuclear Power Station)	)	

NRC STAFF'S RESPONSE TO PILGRIM WATCH'S MOTION TO DISQUALIFY JUDGE PAUL B. ABRAMSON

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "Motion on Behalf of Pilgrim Watch for Disqualification of Judge Paul Abramson in the Pilgrim Nuclear Power Station Re-Licensing Proceeding" ("Motion"), filed May 14, 2010. Because Pilgrim Watch's Motion does not set forth sufficient facts to cause an objectively reasonable person to question Judge Abramson's impartiality, it fails to satisfy the Commission's standard for judicial disqualification and should, therefore, be denied.

BACKGROUND

This proceeding concerns the application by Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. to renew the operating license for the Pilgrim Nuclear Power Station ("Pilgrim"). On May 4, 2010, the Atomic Safety and Licensing Board ("Board") held a telephone conference with the participants to discuss, among other things, the scope of remanded Contention 3. On May 14, 2010, Pilgrim Watch ("PW") filed its Motion to disqualify Judge Abramson, based upon a statement he made during the telephone conference regarding prior involvement with the MACCS2 code.[1] *See* Motion at 3-4.

[1] MELCOR Accident Consequence Code System 2 (hereinafter "MACCS2 code").

During the telephone conference, Judge Abramson made several statements referencing his prior involvement with the MACCS2 code that are relevant to PW's Motion. First, in requesting additional briefing from the participants, he stated that "[i]t would be very helpful to me if you would, in that response, outline how the code does these computations. . . . " Transcript of Telephone Conference, p. 598, ln. 4-6 (May 4, 2010) ("Transcript"). Later in the conference, he said: "As I understand the code, and I trust the experts will tell me if I've got it wrong, we do thousands of calculations and then try to find the mean." *Id.* at 605, ln. 14-17. In a discussion regarding expert witnesses who may testify in this proceeding, he stated: "I'd like to ask all the parties to submit full credentials on their experts, please, because I want to look at them." *Id.* at 653, ln. 14-17. Finally, Judge Abramson stated: "Let me ask you to submit [PW's proffered expert David Chanin's] resume because I don't believe he wrote the code. I was involved with a lot of that personally." Transcript at 665, ln. 8-11. It is this final statement that PW cites and relies upon in its Motion. *See* Motion at 3-4.

DISCUSSION

I. Applicable Legal Standard

Pursuant to the Commission's rules of practice, a party may move a Board member to disqualify himself. 10 C.F.R. § 2.313(b). The motion "must be supported by affidavits setting forth the alleged grounds for disqualification." *Id.* The relevant statutory foundation for the NRC's rules on disqualification of a Board member is found in 28 U.S.C. § 455. *See Public Service Elec. and Gas Co.* (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20-21 (1984). The statute provides, in part:

> a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

The standard for disqualification under NRC rules is one of objective reasonableness: "[W]hat must be decided in the application of [28 U.S.C. § 455(a)] is whether [the specific facts presented] might lead a fully informed reasonable person to question [the judge's] impartiality in the present proceeding." *Hope Creek*, ALAB-759, 19 NRC at 22. *See also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI–84–20, 20 NRC 1061, 1078 n. 46 (1984). Further, the alleged partiality must stem from an extrajudicial source and must result in an opinion on the merits; preliminary assessments, statements, and questions based upon material properly before a judge in a proceeding do not compel disqualification. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI–82–9, 15 NRC 1363, 1365 (1982). A judge may be subject to disqualification if, for example, he "served in a prosecutive or investigative role with regard to the same facts [at issue], prejudged factual issues, or engaged in conduct that gives the appearance of personal bias or prejudgment of factual issues." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB–777, 20 NRC 21, 33-34 (1984).

A review of prior Commission cases illustrates the facts which may or may not require disqualification. For example, in *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI–85–5, 21 NRC 566, 568-69 (1985), *aff'd sub nom. Three Mile Island Alert, Inc. v. NRC*, 771 F.2d 720 (3d Cir. 1985) ("TMI"), the Commission held that the judge correctly denied several intervenors' motions seeking his disqualification, saying that while parties have a right to an impartial adjudicator, "they do not have a right to the judge of their choice." 21 NRC at 568-69. In that case, the intervenors argued that disqualification was warranted based on, *inter alia*, the judge's treatment of intervenor's counsel, its witnesses, and comments regarding a stipulation between the licensee and one of the intervenors. *Id.* at 568. Rejecting the intervenors' arguments, the Commission held that the judge's actions and statements did not convey reason to believe that he was partial. Moreover, the Commission explained, strong language or controversial actions are not sufficient grounds for disqualification. *Id.* at 569.

In *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB–819, 22 NRC 681, 725 n.60 (1985), the Atomic Safety and Licensing Appeal Board ("Appeal Board") rejected an intervenor's allegation of bias based on statements by the board commenting on the adequacy of the intervenor's performance in the hearings, e.g., "the Board's reference to 'an unfortunate apparent inability [by AWPP's representative] to understand the testimony.' LBP–84–31, 20 NRC at 459." *Id.* at 721 (citing board decision below). The Appeal Board held that a "disqualifying bias must stem from an extrajudicial source—that is, it must be based on something other than what the adjudicator has learned from participating in the case." *Id.* In a different part of the decision, the Appeal Board dismissed an allegation of bias based on the board's conditional rejection of the intervenor's contention. *Id.* at 725-726. Noting that the board reversed its decision on reconsideration, the Appeal Board ruled that expressions of views on pending matters, or inadvertent and possibly inaccurate statements, do not establish bias and are not grounds for disqualification. *Id.*

In *South Texas*, the Commission reversed an Appeal Board's ruling that a judge should have granted the intervenors' motion to disqualify himself. *South Texas*, CLI–82–9, 15 NRC at 1366 (reversing *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB–672, 15 NRC 677 (1982)). The Commission held that the judge's statements – including characterizations of the intervenors' motion to disqualify as a "personal and unwarranted attack on [his] professional and moral integrity," and accusing the intervenors of "actively subvert[ing] the stated objectives of this expedited proceeding by being unduly contentious" – were not sufficient evidence of bias. Finding that the judge's statements were based solely on his participation in the case, rather than stemming from an extra-judicial source (including his prior employment at Lawrence Livermore National Laboratory, *id.* at 1364), the Commission noted that "a judge is more than a passive observer in a case involving a technical and complex field; he must penetrate through the parties' posturing to decide the accuracy of their presentations.

Thus . . . occasional outbursts toward counsel during a long trial do not provide any basis for finding judicial bias against the party...." *Id.* at 1366.

The standard that emerges from the decisions in these cases is one of objective reasonableness, amplified by deference to the complicated nature and subject matter of NRC adjudications. As the Commission states in *South Texas*, NRC judges must sift through technically complicated issues and, in order to do so, a great deal of latitude exists for a judge's methods in querying parties' arguments. *Id.* at 1366. Indeed, as the *TMI* ruling illustrates, a judge is free to question the behavior and agreements of parties and witnesses, even harshly, as long as that questioning does not give objective reason to believe that the judge is biased. *Three Mile Island*, CLI–85–5, 21 NRC at 569. Further, as the Commission recognized in *Limerick*, judges should not be subject to disqualification for tentative, preliminary, or even erroneous statements. *Limerick*, ALAB–819, 22 NRC at 726. Instead, to be subject to disqualification, it must be shown that the judge's decision on the merits was – or may reasonably be perceived as – a product of bias. *See South Texas*, CLI–82–9, 15 NRC at 1365.

II. PW's Motion Should Be Denied Because It Does Not Allege Sufficient Facts to Cause a Reasonable Person to Question Judge Abramson's Impartiality

The facts alleged in PW's Motion are inadequate to cause an objectively reasonable person to question Judge Abramson's impartiality. Judge Abramson's statements during the telephone conference, taken as a whole, do not indicate a final conclusion on the disputed merits of the MACCS2 code. To the contrary, such statements as "[i]t would be helpful to me if you would . . . outline how the code does these computations," and "I trust the experts will tell me if I've got it wrong," acknowledge that the speaker requires more information on the topic before reaching a conclusion. Thus, the cited statements bear more resemblance to the sort of active questioning advocated by the Commission in *South Texas*, than to a biased decision on the merits arising from an extra-judicial source. *See id.*

The Staff also notes that the basis for PW's Motion, i.e., Judge Abramson's prior technical experience, is not supported by NRC precedent, which holds that mere experience with a particular topic does not constitute grounds for disqualification. *See, e.g., Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-76, 5 AEC 312, 313 (1972) (holding a judge's expertise, based on prior experience, is not a basis for disqualification). *See also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit No. 1), ALAB-12, 4 AEC 413, 414 (1970) ("While the [Commission] carefully reviews appointments [of Board members] for possible conflicts of interest . . . [prior involvement] in the nuclear field has, with good reason, not been considered a disabling circumstance."). The Commission has previously noted that Congress, in providing for the creation of atomic safety and licensing boards, stated that its intent was that the boards be distinctively composed of both legal and technical judges.[2] Consequently, the Commission has declined to disqualify judges whose extrajudicial involvement does not create an appearance of bias. This point is well-illustrated in *Hope Creek*, a case relied upon by PW in its Motion:

> [T]here is a marked difference between the present case and [*Bailly*], in which the recusal of a Licensing Board member was likewise sought on the ground that he had previously had a consultant relationship with an electric utility seeking a nuclear license. In affirming the denial of the recusal motion in *Bailly*, we emphasized, *inter alia*, that that relationship had been with a different utility and, moreover, had not involved its license application.

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[2] *See, e.g., Bailly*, ALAB-76, 5 AEC at 313 n. 8, (quoting the report of the Joint Committee on Atomic Energy, which added Section 191 to the Atomic Energy Act:

> 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.

Id. at 313 n.8 (quoting S. Rep. No. 1966, 87th Cong., 2d Sess., p.5, July 5, 1962, as cited by *Long Island Lighting Co.* (Shoreham Nuclear Power Station Unit No. 1), Docket No. 50–322, Commission Memorandum and Order dated October 28, 1970, at 4-5.)

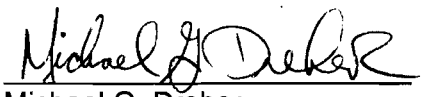
ALAB-759, 19 NRC at 23 n.30. In *Hope Creek*, by contrast, not only had the disqualified judge served as a consultant for the applicant's licensing efforts for the Hope Creek facility, but the judge's final project for the Hope Creek license application resulted in a document that was cited by the licensing board in its decision in favor of the application. *Id.* at 23. *Hope Creek*, therefore, is inapposite under the present facts, where there is no allegation that Judge Abramson consulted with or did any work on Entergy's renewal application for Pilgrim, further challenging the basis for PW's Motion.

While the Staff acknowledges that Judge Abramson's statements raise questions regarding his involvement with the MACCS2 code, nothing in the transcript indicates that he cannot remain impartial in this proceeding. Moreover, the Staff does not believe that PW has alleged sufficient facts in its Motion to cause "a reasonable man, cognizant of all the circumstances [to] harbor doubts" about Judge Abramson's impartiality. *See Shoreham Nuclear Power Station*, CLI-84-20, 20 NRC at 1078 n. 46. Because it fails to allege facts sufficient to support its assertions, PW's Motion should be denied.

CONCLUSION

Therefore, PW's Motion should be denied, as it fails to allege sufficient facts that would cause an objective reasonable person to question Judge Abramson's impartiality in this proceeding, and thus cannot satisfy the Commission's standard for judicial disqualification.

Respectfully submitted,



Michael G. Dreher
Counsel for the NRC Staff

Dated at Rockville, Maryland
This 24th day of May, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR GENERATION	)	
COMPANY AND ENTERGY NUCLEAR	)	Docket No. 250-293-LR
OPERATIONS, INC.	)	
	)	
(Pilgrim Nuclear Generating Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO PILGRIM WATCH'S MOTION TO DISQUALIFY JUDGE PAUL B. ABRAMSON" in the above-captioned proceeding have been served on the following by electronic mail and by deposit in the U.S. Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk (*), by electronic mail and by deposit in the U.S. Mail system this 24th day of May, 2010.

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