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ADJUDICATIONS STAFF

May 21, 2010

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before Administrative Judge Paul B. Abramson

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

**ENTERGY'S OPPOSITION TO  
PILGRIM WATCH MOTION TO DISQUALIFY JUDGE ABRAMSON**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.323(c), Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby oppose the May 14, 2010 "Motion on Behalf of Pilgrim Watch for Disqualification of Judge Paul B. Abramson in the Pilgrim Nuclear Power Station Re-Licensing Proceeding" ("PW Motion"). The PW Motion seeks to disqualify Judge Abramson based on a single statement he made during the May 4, 2010 teleconference to discuss the future course of the proceeding:

ADMIN. JUDGE ABRAMSON: Let me ask you to submit [Chanin's] resume because I don't believe he wrote the code. I was involved with a lot of that personally.

PW Motion at 3. The PW Motion should be rejected because it provides no basis to disqualify Judge Abramson. The vague statement by Judge Abramson is an exceptionally thin reed on which to rest the disqualification of a licensing board member, falling far short of the high threshold required by Commission precedent for disqualification. PW claims that Judge Abramson should be disqualified from this proceeding because his statement indicates that he previously worked on, and has personal knowledge of, the MELCOR Accident Consequence Code System ("MACCS2" or the "code"), which is a subject of PW Contention 3, and is biased

towards David Chanin, PW's expert witness on the MACCS2 code. PW Motion at 1-2. To the contrary, Judge Abramson's statement does not indicate any prejudgment, or any appearance of prejudgment, of factual issues relevant to the resolution of PW Contention 3. Nor does it indicate any bias against Mr. Chanin. And even if Judge Abramson has some personal knowledge of the development of the MACCS2 code, that in itself is not sufficient grounds to disqualify him because neither the disqualification rules nor Commission precedent require disqualification where a judge merely has relevant experience concerning an issue in dispute. Indeed, Commission practice, precedent, and regulations strongly favor licensing board members with relevant technical experience.

## **II. THE PW MOTION PROVIDES NO BASIS TO DISQUALIFY JUDGE ABRAMSON**

### **A. Judge Abramson expressed no prejudgment nor made any appearance of prejudgment of any factual issue**

The Commission applies a "very high threshold for disqualification" when evaluating recusal motions. Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 N.R.C. 326, 331 (1998), citing Joseph J. Macktal, CLI-89-14, 30 N.R.C. 85, 92 n.5 (1989). Longstanding Commission precedent holds that an administrative judge is subject to disqualification if: (1) he has a direct, personal, substantial pecuniary interest in a result; (2) he has a personal bias against a participant; (3) he has served in a prosecutive or investigative role with regard to the same facts as are in issue; (4) he has prejudged factual - as distinguished from legal or policy - issues; or (5) he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues. See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 A.E.C. 60, 65 (1973). These standards are based in part on 28 U.S.C. §§ 455(a) & (b), which, in relevant part, provides "[a]ny . . . judge . . . shall

disqualify himself in any proceeding in which his impartiality might reasonably be questioned” and “[h]e 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.” See Public Service Electric & Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 N.R.C. 13, 20 (1984). PW fails to come even remotely close to demonstrating any of these circumstances with respect to Judge Abramson.

PW does not allege that Judge Abramson has any “direct, personal, substantial pecuniary interest” in the proceeding, or has served in any prosecutive or investigative role related to the proceeding. Rather, PW bases its motion on its pure speculation that Judge Abramson’s statement that he “was involved in a lot of that personally” means that Judge Abramson “helped develop” MACCS2, or has “personal views of its adequacy.” PW Motion at 4. Pilgrim Watch provides no support for this speculation. Nothing in Judge Abramson’s statement gives even the slightest indication that he has personal views on, or has prejudged the adequacy of, MACCS2.

PW claims that MACCS2 is “central to this entire adjudication,” PW Motion at 2, and is apparently suggesting that any prior knowledge of or experience with the code would require a board member’s recusal. This suggestion, however, far overshoots the mark. Statute and Commission precedent require that the grounds for disqualification be tied to the factual issues in dispute in the proceeding at hand. Disqualification under 28 U.S.C. § 455 must be predicated on “personal knowledge of disputed evidentiary facts concerning the proceeding.” 28 U.S.C. § 455(b) (emphasis added). Commission precedent calls for disqualification where factual issues have been prejudged. Midland, ALAB-101, 6 A.E.C. at 65. See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 N.R.C. 21, 34 (1984) (“in order to provide a basis for disqualification, the asserted prejudgment (or appearance of prejudgment)

must relate to ‘factual – as distinguished from legal or policy – issues’”). In CLI-10-11<sup>1</sup>, the Commission clearly set forth what factual issues are to be resolved at hearing, and Judge Abramson’s statement during the teleconference says nothing of them. The Commission remanded for hearing Pilgrim Watch’s claims regarding meteorological input data and dispersion modeling, including “the adequacy of the straight-line plume dispersion model for the purpose of the Pilgrim SAMA analysis,” CLI-10-11 at 18 (emphasis added), “emphasizing that the issue here is whether the Pilgrim SAMA analysis resulted in erroneous conclusions on the SAMAs found cost-beneficial to implement.” *Id.* at 37 (emphasis added). Nothing in Judge Abramson’s statement suggests that he has prejudged the factual issue of whether the Pilgrim SAMA analysis results are correct, and nothing suggests that he has personal knowledge of the results of the Pilgrim SAMA analysis. Nor is there any indication that Judge Abramson has any personal knowledge of the adequacy of ATMOS, the Gaussian plume dispersion model within MACCS2. PW has therefore failed to “identif[y] any specific factual issue that a disinterested observer might conclude has been prejudged” by Judge Abramson. *Shoreham*, ALAB-777, 20 N.R.C. at 35 (emphasis in original). Grounds for his disqualification simply do not exist here.

The PW Motion does little more than attempt to stretch a vague statement, with no relevant evidence or support, into grounds for disqualification. PW offers no other documentation or other record evidence demonstrating any disqualifying behavior by Judge Abramson.

Indeed, it is not clear how, if at all, Judge Abramson “helped develop” MACCS2 as PW claims. PW Motion at 4. Sandia began developing MACCS in 1982, with its first full release in

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<sup>1</sup> Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. \_\_ (Mar. 26, 2010) (“CLI-10-11”).

1989. Judge Abramson's biography<sup>2</sup> indicates that he worked at Argonne, not Sandia, prior to his legal career, and that he graduated from law school in 1984.<sup>3</sup>

Moreover, it does not appear that Pilgrim Watch engaged in any type of due diligence or made any attempt to examine objective evidence before leveling its claim of bias. For example, Pilgrim Watch makes no reference to the MACCS documentation indicating who was involved in developing the Code. The MACCS User's Guide<sup>4</sup> was developed by D. I. Chanin from Technadyne Engineering Consultants, Inc.; and J. L. Sprung, L.T. Ritchie, and H-N Jow from Sandia National Laboratories. The developers also acknowledged the assistance provided by Sarbes Acharya from the NRC and Chuck Dobbe of the Idaho National Engineering Laboratory. Similarly, the MACCS Model Description<sup>5</sup> was developed by H-N Jow, J. L. Sprung, J.A. Rollstin (GRAM, Inc.), L.T. Ritchie, and D.I. Chanin (Technadyne). The Model Description again acknowledged the assistance provided by Sarbes Acharya from the NRC and Chuck Dobbe of the Idaho National Engineering Laboratory, as well as the assistance provided by Jay D. Johnson of SAIC and Bob Ostmeyer from the Department of Energy. Judge Abramson is neither listed as a developer of the code, nor included in its acknowledgements. Notably, Pilgrim Watch fails to provide any support from its prospective witness, Mr. Chanin, who presumably could shed some light on who "helped develop" MACCS.

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<sup>2</sup> <http://www.nrc.gov/about-nrc/organization/panel-members.html#Abramson>

<sup>3</sup> The first version of MACCS released to the public, version 1.4, was distributed by Sandia National Laboratories beginning in 1987. NUREG/CR-6613, Code Manual for MACCS2, Vol.1, User's Guide (May 1998) at 1-2. MACCS2 development was initiated at Sandia in 1992 (see id. at 1-4), long after Judge Abramson left Argonne for his legal career.

<sup>4</sup> NUREG/CR-4691 SAND86-1562 Vol. 1 MELCOR Accident Sequence Code System (MACCS), User's Guide (Feb. 1990).

<sup>5</sup> NUREG/CR-4691 SAND86-1562 Vol. 2 MELCOR Accident Sequence Code System (MACCS), Model Description (Feb. 1990).

Even if Judge Abramson has some level of familiarity with who developed MACCS, that in itself is not sufficient grounds for disqualification. Neither the disqualification rules nor Commission precedent require recusal where a judge has relevant technical experience and expertise concerning an issue in dispute. Indeed, technical judges are appointed to licensing boards so that the boards will have members who have technical training and experience concerning the many technical issues that come before NRC licensing boards. See 10 C.F.R. § 2.321. Commission precedent makes clear that “experience which comes from private involvement in the nuclear field has, with good reason, not been considered a disabling circumstance. To the contrary, since the inception of the use of atomic safety and licensing boards . . . , the Commission has turned for qualified board members” to persons “with nuclear experience” from both the academic community and private industry. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit No. 1), ALAB-12, 4 A.E.C. 413, 414 (1970); see also Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-76, 5 A.E.C. 312, 313 (1972). Thus, the fact that Judge Abramson may be familiar with the development of MACCS does not mandate his disqualification as a judge where there is no demonstration of prejudgment of the factual issues in dispute (here, the results of the Pilgrim SAMA analysis) in the proceeding at hand.

B. Judge Abramson expressed no bias against Mr. Chanin

There is likewise no merit to PW’s argument that Judge Abramson is biased against PW’s expert, David Chanin. Because no other participant raised questions concerning Mr. Chanin’s credentials, PW argues that Judge Abramson’s statement creates the appearance that Judge Abramson “doubts the credibility of David Chanin and would discredit any evidence that[Chanin] provides.” PW Motion at 4. PW’s arguments are without merit. Commission

precedent describes personal bias as “the manifestation of animosity or partiality toward one or more of the parties or their counsel.” Midland, ALAB-101, 6 A.E.C. at 65. A mere request for a copy of an expert witness resume falls far short of this standard.

Further, rather than indicating any bias against Mr. Chanin, Judge Abramson’s statement at most merely indicates that he was questioning whether PW’s representative, Ms. Lampert, was accurately characterizing Mr. Chanin’s role when she stated during her argument, that “he wrote the code.”<sup>6</sup> Indeed, the MACCS documentation discussed above indicates that Mr. Chanin was just one of a number of contributors, which is very different from Ms. Lampert’s implication that Mr. Chanin wrote the entire code himself.<sup>7</sup>

Even if Judge Abramson’s statement was interpreted as questioning Mr. Chanin’s qualifications, NRC licensing boards have “considerable discretion in . . . deciding whether a witness is qualified to serve as an expert.” Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 N.R.C. 21, 27 (2004). It is up to the licensing board “to decide whether the expert witness will be of assistance” by making “careful inquiry” into an expert’s qualifications. Id. at 28. Certainly a careful inquiry begins with the examination of an expert’s resume. Indeed, application of PW’s rationale – that a licensing board member’s request for an expert’s resume equates to an appearance of bias – would effectively chill the careful inquiry licensing board members are required to make into the qualifications of expert witnesses.

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<sup>6</sup> Hearing Transcript, Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station) (May 4, 2010) at p. 665.

<sup>7</sup> Mr. Chanin’s resume, attached to the PW Motion, states: “Performed diverse duties relating to the development of MACCS and MACCS2. From 1992–1996 was technical leader of the MACCS2 project after obtaining DOE sponsorship for it.” PW Motion at 15. This description hardly indicates that Mr. Chanin “wrote the code.”

Furthermore, Judge Abramson's request for Mr. Chanin's resume demonstrates that Judge Abramson had "not foreclos[ed] further consideration of the factual issue[]" of Mr. Chanin's experience and, rather, was engaging in an appropriate "effort to elicit additional information." Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 A.E.C. 169, 170 (1973) (overturning an Appeal Board decision disqualifying a Licensing Board member). Judge Abramson did precisely what licensing board members are required to do – to determine the relevant experience of a proposed witness. No bias against Mr. Chanin is evident here.

C. The case law relied on by PW offers no support for its Motion

Finally, the case law cited by PW fails to support its Motion. PW cites Hope Creek, PW Motion at 2, 3 n.4, but the circumstances in that case do not support disqualification of Judge Abramson. In Hope Creek, the Appeal Board disqualified a licensing board judge in the Unit 1 operating license proceeding who had previously worked as a consultant for the applicant and whose work product was cited in the licensing board decision granting construction authorization of the facility, both of which might have caused a reasonable person to question the judge's impartiality. Hope Creek, ALAB-759, 19 N.R.C. at 22-23. There is no comparison between the circumstances in Hope Creek and those alleged by PW here.

PW also cites to Suffolk County and State of New York Motion for Disqualification of Chief Administrative Judge Cotter (Shoreham Nuclear Power Station, Unit 1), LBP-84-29A, 20 N.R.C. 385 (1984). But, Shoreham concerned a failed effort to disqualify the Chief Administrative Judge of the ASLB Panel, who had no adjudicatory role on any matter in the Shoreham proceeding. That case has no relevance here.

PW also cites Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 N.R.C. 1363 (1982).<sup>8</sup> PW Motion at 2. In South Texas Project, the Commission reversed an Appeal Board ruling (ALAB-672, 15 N.R.C. 677 (1982)) disqualifying a licensing board member. The Appeal Board based its disqualification decision on a written statement made by the board member concerning the petitioner's representatives. ALAB-672, 15 N.R.C. at 681-83. Among other things, the judge stated that the petitioner's representatives had actively subverted the expedited proceeding, engaged in delaying and obstructing actions, and were using the proceeding to advance the petitioner's political views. Id. at 682. Reversing the Appeal Board, the Commission held that these statements were made in the context of the adjudicatory proceeding, were based solely on the petitioner's behavior during the proceedings, and therefore did not legally require the judge's removal. CLI-82-9, 15 N.R.C. at 1367. These circumstances support the conclusion that Judge Abramson should not be disqualified. If the statements made in South Texas Project did not disqualify a licensing board member, then, for example, Judge Abramson's mere request for Mr. Chanin's resume certainly would not either.

PW's reliance on Hydro Resources, Inc. is also misplaced. Among other things, the circumstances in Hydro Resources involved a licensing board judge who, six months prior to being designated to sit on the panel, had engaged in employment discussions with the law firm representing the applicant. Hydro Resources, CLI-98-9, 47 N.R.C. at 331. The law firm declined to hire the judge, and the Commission did not remove the judge from the proceeding, finding that a situation involving fruitless employment discussions six months prior to the start of a proceeding was not even remotely close to its very high standards for disqualification. Id.

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<sup>8</sup> The PW Motion erroneously captioned the case as a decision in the Allens Creek facility proceedings.

This situation is also inapplicable here. Thus, Hydro Resources does not support the PW Motion.

### III. CONCLUSION

For the foregoing reasons, PW's Motion to disqualify Judge Paul B. Abramson should be denied.

Respectfully Submitted,



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Dated: May 21, 2010

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of	)	
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Entergy Nuclear Generation Company and	)	Docket No. 50-293-LR
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(Pilgrim Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy Opposition to Pilgrim Watch Motion to Disqualify Judge Abramson" were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk, by electronic mail, this 21st day of May, 2010.

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