RAJ-235

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

THE ATOMIC SAFETY AND LICENSING BOARD
Judge Ann Marshall Young, Chair, and Judge Paul B. Abramson

In the Matter of:	Docket No. 50-293-LR
	ASLBP No. 06-848-02-LR
ENTERGY NUCLEAR OPERATIONS, INC.	
(Pilgrim Nuclear Power Station)	
License Renewal Application	May 24, 2010

Pilgrim Watch Request for Permission, and Reply to Entergy's Opposition To Pilgrim Watch Motion To Disqualify Judge Abramson

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Pilgrim Watch Request for Permission, and Reply to Entergy's Opposition To Pilgrim Watch Motion to Disqualify Judge Abramson

Pursuant to 10 C.F.R. § 2.323(c), Pilgrim Watch requests that the presiding officer, Judge Ann Marshall Young, grant permission to file the following reply. Pilgrim Watch could not have anticipated that Entergy, in its Opposition to Pilgrim Watch's Motion to Disqualify Judge Abramson, would:

1. Assert that the NRC's standards for its judges are lower than those set by 28 U.S.C. §455 (See Entergy Opposition, p. 3: "The Commission applies 'a very high threshold for disqualification' when evaluating recusal motions");

2. Assert that Judge Abramson really was not involved in developing the MACCS/MACCS2 code (see Entergy Opposition, pp. 4-5);

3. Repeatedly confuse the two applicable sections of 28 U.S.C. §455, and Judge Abramson's obligations under them.

I. The Standard for Disqualification or Recusal

Entergy's Opposition seeks factually to distinguish the Commission's decisions in *Suffolk County*, 20 NRC 385 (1984), *Houston Lighting and Power Co.*, 15 NRC 1363 (1982) and *Hydro Resources, Inc.*, 47 NRC 326 (1998). But Pilgrim Watch cited these three cases not because of their facts, but because they stand for the fundamental legal principle that the NRC quite properly follows the standards set by 28 U.S.C. §455. The goal of 28 U.S.C §455, and presumably that of the Commission and its judges, is to foster the appearance of impartiality, *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157 (5th Cir. 1982); and every Judge must satisfy himself that he is actually unbiased towards the parties, and that his impartiality is not reaonably subject to question. *In re Bernard*, 31 F.3d 842 (9th Cir. 1994).

II. Judge Abramson's Statement

What Judge Abramson said in the May 4, 2010 telephone conference is set forth in the transcript[1]: "I don't believe [Mr Chanin] wrote the code. I was involved with a lot of that personally." In context, the "that," "a lot of" which Judge Abramson said he was "involved with ... personally," is the MAACS/MAACS2 code[2]. Even Entergy does not say that Judge Abramson was referring to anything else.

The only reasonable implication of Judge Abramson's statement that "he was involved with a lot of that personally," is that he was involved in the development and writing of the MACCS/MACCS2 code. The MACCS2 code, together with its limitations and inadequacies, is central to Pilgrim Watch's Contention 3 that is the subject of the remand hearing, and the operation, efficiacy, capabilities, limitations and inadequacies of that code are clearly disputed[3]

Surprisingly, Entergy goes to great length to show that what Judge Abramson said isn't so, that he really wasn't involved. (Entergy Op., p 5; Judge Abramson was "neither listed as a developer of the code, nor included in its acknowledgements.") If Entergy is correct, and Judge Abramson in fact was not involved in writing the code despite his statement to the contrary, that might avoid mandatory disqualification under 28 U.S.C. 455(b)(1), but it would raise serious questions whether Judge Abramson's "impartiality might reasonably be qustioned." 28 U.S.C. §455(a).

What matters if Judge Abramson was not involved in writing the code is not the reality of bias or prejudice, but its appearance. Recusal is required whenever impartiality might reasonably be questioned (*Liteky v. U.S.,* 510 U.S. 540 (1994)), i.e., when a reasonable person, knowing the facts, would expect that the judge knew of circumstances creating an appearance of partiality, whether or not the judge was actually conscious of those circumstances. *Liljebeg v. Health Services Acquition Corp.,* 486 U.S. 847 (1988).

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[1] Neal R. Gross & Co.,Inc.,page 665, lines 8-11

[2] MACCS was encompassed into MACCS2.

[3] See, for example the Commission Order, CLI-10-11 at 3,4,14,16,17,19; 22,25; Entergy Submission on Scope and Schedule for Remanded Hearing (May 12, 2010) at 4; David Lewis, Transscript May 4, 2010 Teleconference Call, at 607-8.

If a reasonable person said he was "involved in a lot" of what is central to this case, and really was not, such a person would certainly question why Judge Abramson made the statement in the first place. A reasonable person could easily conclude that Judge Abramson made an inaccurate statement to establish at least the perception that he had significant personal knowledge of and expertise with respect to the MACCS2 code so that his views of its adequacy would be accepted,[4] and his further statement that "I don't believe he [Pilgrim Watch's expert witness, David Chanin wrote the code] showed a predisposition against, and his desire to minimize Mr. Chanin's expertise and likely testimony to the contrary.[5]

III. 28 U.S.C. §455

Entergy's Opposition intermingles the quite different provisions of subsections (a) and (b)(1) of 28 U.S.C. §455.

The only question under subsection (b)(1) is whether Judge Abramson has "personal knowlede of disputed facts." Unlike Entergy, Pilgrim Watch takes Judge Abramson at his word, and accepts his statement that he "was involved with a lot of that [writing the code] personally." If Judge Abramson's statement was correct, then he "has ... personal knowledge of disputed evidentiary facts concerning the proceeding," and disqualification under 28 U.S.C. §455(b)(1) is mandatory whether or not a reasonable person would question his impartiality. *Renteria v. Schellpeper*, 936 F.Supp. 691 (D.Neb.1996); *Parker*

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[4] Contrary to the implications in Entergy's Opposition (p 6), Pilgrim Watch does not say Judge Abramson's "general prior technical experience and expertise" is necessarily disqualifying. But there is a vast difference between the NRC's desire to have judges "who have techical training and experience regarding the many technical issues that come before NRC licensing boards," and whether a judge who has "personal knowledge of disputed evidentiary facts concerning [a particular] proceeding should recuse himself." 28 U.S.C. §455(b)(1).

[5] Entergy's argument that Judge Abramson's statement was simply part of the process of inquiring into Mr. Chanin's expertise ignores that this judgment is made after, rather than before, hearing relevant evidence. The record shows that (1) David Chanin's resume was attached *to Pilgrim Watch Answer Opposing Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3*, June 2007- Adams Accession Number ML071840568. (2) The record also shows specific references to David Chanin's role in the MACCS/MACCS2 code in the *MEMORANDUM AND ORDER (Ruling on Motion to Dismiss Petitioners Contention 3, regarding Severe Accident Mitigation Alternatives)*, October 30, 2007. The Order says that, "David I. Chanin, who asserts that he "was primary developer of the MACCS and MACCS2 computer codes . . . while working at Sandia National Laboratories ("SNL") from 1982-1996, (and) sole individual who was responsible for writing the FORTRAN in question . . ." (Order at 17, 30); and "Mr. Chanin as an expert on costs," (Order at 42).

v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988; the rule disqualifying a judge from presiding is a per se rule that lists particular circumstances requiring recusal).

The question under subsection (b)(1) is not limited to whether Judge Abramson has "prejudged the actual issue of whether the Pilgrim SAMA analysis results are correct [or] has personal knowledge of the results of the Pilgrim SAMA analysis" (Entergy Op., p 4). Rather, it is whether he has "personal knowledge of" any disputed underlying evidentiary facts relevant to the SAMA analysis or any other aspect of this case. If there is any question in this regard, Judge Abramson should recuse himself. *Price Bros. Co. v Philadelphia Gear Corp.*, 629 F.2d 444 (6th Cir. 1980).

The question under subsection (a) is quite different. It asks "whether his impartiality might reasonably be questioned."

What matters here is not the reality of bias or prejudice, but its appearance. Recusal is required whenever impartiality might reasonably be questioned (*Liteky v. U.S.,* 510 U.S. 540 (1994)), i.e., when a reasonable person, knowing the facts, would expect that Judge Abramson knew of circumstances creating an appearance of partiality, whether or not he was actually conscious of those circumstances (*Liljebeg v. Health Services Acquition Corp.,* 486 U.S. 847 (1988)), or would harbor doubts about Judge Abramson's impartiality *Hayes v. Williamsville Cent. School Dist.*, 506 F.Supp.2d 165 (W.D.N.Y. 2007). For example, a reasonable person could "harbor doubts" about Judge's Abramson's impartiality because of Judge Abramson's statement that he was "involved a lot [with the MACCS/MACCS2 code] personally." It would show not only that he likely has prior personal knowledge about the disputed facts in this case, but also because he was involved in writing the code, he is likely to be prejudiced in favor of the work that he did and participated in and biased against any argumentd made by Pilgrim Watch regarding changes to the code, or the "inclusion of an additional factor or use of other assumptions or models (would) change the cost-benefit conclusions." (CLI-10-11, Memorandum and Order, at 39)

Under subsection (a), whether Judge Abramson actually has "personal knowledge of disputed evidentiary facts" is relatively unimportant. What is important is whether his statement that he had such knowledge could lead a reasonable person to believe he knows of disqualifying facts or in other respects

to believe there is an appearance of impropriety. If so, Judge Abramson, should recuse himself. *U.S. v. Garrudo*, 869 F.Supp. 174 (S.D.Fla. 1994), aff'd 139 F.3d 806.

Under either subsection (a) or subsection (b)(1), the question is not limited by what the NRC said regarding "prejudgment" (Entergy Op., pp. 3-4) or in disqualification decisions in (except for *Hope Creek)* very different circumstances. (see Entergy Op., pp. 8-10)

Judge Abramson, like every other judge, has a self-enforcing obligation to recuse himself if legal grounds exist for disqualifiaction (*U.S. v. Garrudo*, 869 F.Supp. 174 (S.D.Fla. 1574, aff'd 139 F.3d 806), or if his impartiality might reasonably be questioned. *U.S. v. Ferguson*, 550 F.Supp. 1256 S.D.N.Y. 1982).

If the question is a close one, the balance tips in favor of recusal. *Nicols. v. Alley*, 71 F.3d 347 (10th Cir. 1995). To insure public confidence in this, and other NRC proceedings, Judge Abramson should recuse himself under subsection (b)1) if he has personal knowledge of disputed evidentiary facts, and should exercise his discretion in favor of recusal under subsection (a) if he has any question about the propriety of continuing to sit in this case. *Hall v. Small Business Admin.*, 639 F.2d 175 (5th Cir. 1983)

Respectfully submitted,

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May 24, 2010

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of — Docket # 50-293-LR

Entergy Corporation

Pilgrim Nuclear Power Station

License Renewal Application — May 24, 2010

CERTIFICATE OF SERVICE

I hereby certify that *Pilgrim Watch Request for Permission, and Reply to Entergy's Opposition To Pilgrim Watch Motion to Disqualify Judge Abramson* was served May 24, 2010 in the above captioned proceeding to the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class.

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