

RAS J-238

DOCKETED  
USNRC

May 26, 2010 (10:26a.m.)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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 26, 2010

---

**Pilgrim Watch Request for Permission, and Reply to NRC Staff's Response  
To Pilgrim Watch Motion To Disqualify Judge Abramson**

---

Mary Lampert  
Pilgrim Watch, pro se  
148 Washington Street  
Duxbury, MA 02332

Template Seej-041

DS-03

**Pilgrim Watch Request for Permission, and Reply to NRC Staff's Response 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 (1) NRC Staff's Response to Pilgrim Watch's Motion to Disqualify Judge Abramson, would completely ignore the implications of 28 U.S.C. §455 (b) and Judge Abramson's obligations under them; and (2) that NRC Staff's Response would deny the fact that Judge Abramson's "impartiality might reasonably be questioned." 28 U.S.C. §455(a).

**I. Introduction**

NRC Staff contends that Pilgrim Watch's Motion does not set forth sufficient facts to satisfy the Commission's standard for judicial disqualification and should, therefore, be denied. However a plain reading of NRC Staff's Response shows that the Staff, like Pilgrim Watch, provides sufficient facts to satisfy the Commission's standard for disqualifying Judge Abramson.

**II. The Standard for Disqualification or Recusal**

NRC Staff, at 2, recognizes that the applicable legal standard for a party to move a Board member to disqualify himself 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 Staff lists the relevant provisions in the statute:

- 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. (Emphasis added)

**A. 28 U.S.C. § 455 subsection (b)**

The NRC Staff refers briefly to 28 U.S.C. § 455, subsection (b)(1), but somehow ignores its plain language.

The Staff quotes the statement in **§455(b)(1)** that a judge, in this instance Judge Abramson, shall disqualify himself where he has “personal knowledge of disputed evidentiary facts concerning the proceeding” (Staff Response at 2); but in the following sentence it ignores **§455(b)(1)** and says that “[W]hat must be decided in the application of [28 U.S.C. **§455(b)**] is whether [the specific facts presented] might lead a fully informed person to question [the judge’s] impartiality....”

What the Staff ignores is that, if Judge Abramson has “personal knowledge of disputed evidentiary facts concerning the proceeding,” recusal is mandatory whether or not a reasonable person would question his impartiality. *Renteria v. Schellpeper*, 936 F.Supp. 691 (D.Neb.1996); *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11<sup>th</sup> Cir. 1988; the rule disqualifying a judge from presiding is a per se rule that lists particular circumstances requiring recusal).

Further, the Staff agrees with Pilgrim Watch that Judge Abramson has “personal knowledge of disputed evidentiary facts concerning the proceeding.” Unlike Entergy, the Staff never denies that Judge Abramson “was involved with a lot of that [writing the code]<sup>1</sup> personally.” Indeed, the Staff goes

---

<sup>1</sup> The “that,” and the “a lot of” which Judge Abramson said he was “involved with ... personally,” is clearly the MAACS/MAACS2 code. Neither Pilgrim Watch, Entergy nor NRC Staff say that Judge Abramson was referring to anything else.

on to emphasize Judge Abramson's prior extrajudicial knowledge: "Judge Abramson made several statements referencing his prior involvement with the MACCS2 code that is relevant to PW's motion." (Staff Response, p. 2, emphasis added)

The NRC Staff Response, at 3 and 4, cite cases that "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." But the NRC Staff's statement that "Judge Abramson made several statements referencing his prior involvement with the MACCS2 code that is relevant to PW's motion." (Staff response at 2, emphasis added), confirms that Judge Abramson's disqualifying bias comes from an "extrajudicial source,"

What the Staff has missed is that only subsection (a) asks whether Judge Abramson's "impartiality might reasonably be questioned." The only question under subsection (b)(1) is whether Judge Abramson has "personal knowledge of disputed facts;" and the NRC Staff agrees that he does. If there is any question in this regard, which there is not, Judge Abramson should recuse himself. *Price Bros. Co. v Philadelphia Gear Corp.*, 629 F.2d 444 (6<sup>th</sup> Cir. 1980).

**B. 28 U.S.C. § 455 subsection (a)**

NRC Staff's Response unsuccessfully attempts to deny the fact that Judge Abramson's "impartiality might reasonably be questioned." 28 U.S.C. §455(a).

The question under subsection (a) asks "whether his impartiality might reasonably be questioned." PW explained in response to Entergy that 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 Acquisition 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 argument 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.

NRC argues that PW's motion should be denied because it does not allege sufficient facts to cause a reasonable person to question Judge Abramson's impartiality. (NRC Staff at 5) Staff says that "Judge Abramson's statements during the telephone conference do not indicate a final conclusion of the disputed merits of the MACCS2 code." The question of the prejudgement is not the issue; instead Judge Abramson's 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.

NRC argues further that "mere experience with a particular topic does not constitute grounds for disqualification" referring specifically to "technical experience" and "prior (involvement) in the nuclear field." PW finds no problem with a Judge’s technical or nuclear background; rather the problem is that "he was involved with a lot of that (MACCS/MACCS2 code) personally;" and as NRC Staff said, "Judge Abramson has “personal knowledge of disputed evidentiary facts concerning the proceeding.” (Emphasis added)

The Staff concludes that they "acknowledge that Judge Abramson's statements raise questions regarding his involvement with the MACCS2 code" NRC Staff should know that if the question is a close (in their minds) 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 (5<sup>th</sup> Cir. 1983)

Respectfully submitted,

A handwritten signature in black ink that reads "Mary Lampert". The signature is written in a cursive style with a large, looping initial "M".

Mary Lampert  
Pilgrim Watch, pro se  
148 Washington Street  
Duxbury, MA 02332

**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 26, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that *Pilgrim Watch Request for Permission, and Reply to NRC Staff's Response To Pilgrim Watch Motion to Disqualify Judge Abramson* was served May 26, 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.

Secretary of the Commission  
Attn: Rulemakings and Adjudications  
Staff  
Mail Stop 0-16 C1  
United States Nuclear Regulatory  
Commission [2 copies]

Administrative Judge  
Richard F. Cole  
Atomic Safety and Licensing Board  
Mail Stop -T-3-F23  
US NRC  
Washington, DC 20555-0001

Administrative Judge  
Ann Marshall Young, Chair  
Atomic Safety and Licensing Board  
Mail Stop - T-3 F23  
US NRC  
Washington, DC 20555-0001

Office of Commission Appellate  
Adjudication  
Mail Stop 0-16 C1  
United States Nuclear Regulatory  
Commission  
Washington, DC 20555-0001

Administrative Judge  
Paul B. Abramson  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
US NRC  
Washington, DC 20555-0001

Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
United States Nuclear Regulatory  
Commission  
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission  
Office of Commission Appellate  
Adjudication  
Mail Stop: 0-16C1  
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission  
Office of General Counsel  
Mail Stop: 0-15 D21  
Washington DC 20555-0001  
Susan L. Uttal, Esq.  
Marcia Simon, Esq.  
Andrea Jones, Esq.  
David Roth, Esq.  
Brian Harris, Esq.  
Michael Dreher, Esq.  
Brian Newell, Paralegal

U.S. Nuclear Regulatory Commission  
Office of Nuclear Reactor Regulation  
Mail Stop: 011-F1  
Washington, DC 20555-0001

Lisa Regner, Project Mgr. Plant Lic.  
Branch 1-1, Operator Reactor Licensing  
Washington, DC 20555-0001

Paul A. Gaukler, Esq.  
David R. Lewis, Esq.  
Jason B. Parker, Esq.  
Pillsbury, Winthrop, Shaw, Pittman,  
LLP - 2300 N Street, N.W.  
Washington, DC 20037-1128

Katherine Tucker  
ASLB, Law Clerk  
U.S. Nuclear Regulatory Commission  
Mail Stop T-3-E2a  
Washington, DC 20555-0001

Martha Coakley, Attorney General  
Matthew Brock, Assistant Attorney  
General Commonwealth of  
Massachusetts  
Office of Attorney General  
One Ashburton Place  
Boston, MA 02108

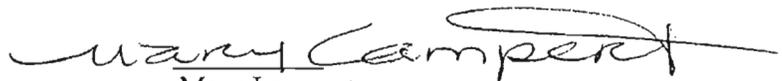
Mark Stankiewicz  
Town Manager, Town of Plymouth  
11 Lincoln Street  
Plymouth MA 02360

Sheila Slocum Hollis, Esq.  
Town of Plymouth MA  
Duane Morris, LLP  
505 9<sup>th</sup> Street, N.W. 1000  
Washington D.C. 20004-2166

Richard R. MacDonald  
Town Manager, Town of Duxbury  
878 Tremont Street  
Duxbury, MA 02332

Fire Chief & Director DEMA,  
Town of Duxbury  
688 Tremont Street  
P.O. Box 2824  
Duxbury, MA 02331

Terence A. Burke, Esq.  
Entergy Nuclear  
Mail Stop M-ECH-62  
Jackson, MS 39213



Mary Lampert  
Pilgrim Watch, pro se  
148 Washington St.,  
Duxbury, MA 02332  
May 26, 2010