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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE .U.S. NUCLEAR REGULATORY COMMISSION

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)	)	

PILGRIM WATCH RESPONSE TO JUDGE PAUL B. ABRAMSON DECISION ON RECUSAL MOTION

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PILGRIM WATCH RESPONSE TO JUDGE PAUL B. ABRAMSON DECISION ON RECUSAL MOTION

Pilgrim Watch, by and through its pro se representative, Mary Lampert hereby files this response to address why the Commission should require Judge Paul B. Abramson recusal from this proceeding.

Background

During a telephone conference on May 4, 2010, Judge Abramson said:

> Let me ask you to submit Shannon's [Chanin's] resume because I don't believe he wrote the code. I was involved with a lot of that personally. (Tr. 665)[1]

On May 14, 2010, Pilgrim Watch filed a motion asking Judge Abramson to recuse himself on the grounds that (1) he had extrajudicial knowledge of disputed evidentiary facts pertinent to this proceeding (28 U.S.C. §455(b)(2), and (2) his impartiality might reasonably be questioned (28 U.S.C. §455(a).

On June 10, 2010, Judge Abramson filed a twenty page decision in which he denied Pilgrim Watch's motion, and noted that "10 C.F.R §2.313(b)(2) requires that my denial of PW's Motion be referred to the Commission for determination of the sufficiency of the grounds alleged." ("Abramson, Dec.")

[1] "Tr." Refers to the Transcript of May 4 Teleconference between the Board and parties. For the convenience of the Commission, pages of the Transcript referred to in this Memorandum are attached.

Introduction

Judge Abramson Decision says that the "law on this topic [recusal] is thoroughly addressed in the Energy Answer and the Staff Answer." (Abramson Dec., 6). But Entergy and the NRC Staff did not appreciate an important difference between 28 USC § 445(a) and 28 USC §445(b)(1). [2] Simply stated, the former requires recusal if Judge Abramson's "impartiality might reasonable be questioned." The latter has nothing to do with impartiality. Rather, 28 USC §445(b)(1) makes recusal mandatory if Judge Abramson has extrajudicial "knowledge of disputed evidentiary facts concerning the proceeding," whether or not "factual issues have been prejudged" or a "reasonable [person] ... would harbor doubts about the judge's impartiality." See *Renteria v. Schellpeper,* 936 F.Supp. 691 (D.Neb 1966); and *Parker 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).

Pilgrim Watch's recusal motion addressed both sections. The major focus of Judge Abramson's Decision is his narrow view of what constitutes "personal knowledge of disputed evidentiary facts concerning the proceeding" that would require recusal. In substance, Judge Abramson appears to say:

1. He has no knowledge of "disputed evidentiary facts concerning the proceeding" since, in his view,

> [T]he disputed evidentiary facts only regard meteorological modeling" (Abramson Dec. 13), "the very narrow issue of the meteorological modeling

[2] See pages 3-5 of Pilgrim Watch's Reply to Entergy and pages 2-5 of Pilgrim Watch's reply to the NRC Staff, copies of Pilgrim Watch's Replies are attached.

in the code, not in other models, its numerical techniques, or any input regarding other matters (Abramson Dec., 10).

2. Although he was deeply involved in development of computer codes for accident analysis, modeling of a variety of phenomena, and the incorporation of such models into nuclear reactor safety analysis codes (Abramson Dec., 7-8),

a. This admitted extrajudicial personal knowledge is not "personal knowledge" of the MACCS2 code (Abramson Dec., 7-9);

b. The legal standard 'would not require recusal of a technical judge "unless he or she had personal knowledge of, and had been directly involved with, the particular modeling at issue" (Abramson Dec., 10, underlining added); and

c. To recuse him would be contrary to "Congressional intent to require ASLBs to have two members with the expertise necessary to adequately evaluate the scientific and technical matters before it." (Abramson Dec., 11).

Judge Abramson also said that "[n]othing in the record could reasonably be interpreted to conclude there was an appearance of bias," and that he has no "bias relative to Pilgrim Watch's expert witness, David Chanin." (Abramson Dec., 20). Apparently, he simply doesn't believe Pilgrim Watch's statement that Mr. Chanin wrote the MACCS2 code.

A. The "Disputed Evidentiary Facts Concerning the Proceeding"

At the outset, it is important to recognize what issues and disputed facts may or may not be relevant to this proceeding has not yet been determined. Although Judge Abramson may have made up his mind, there is a wide difference between the positions of the parties, and although the ASLB requested and has received briefing on the question of the issues to be considered, no decision has been made. It is essentially impossible to

predict in advance what evidentiary facts will prove relevant, to say nothing of predicting what the Commission's (and a reviewing court's) views might be.

At this relatively early stage, the standard for recusal should not be whether Judge Abramson actually worked on the MACCS2 code.

Judge Abramson has accepted Entergy's position that the scope of the remand hearing is limited to:

> [O]nly the variables that regard the input and models relating to meteorology contained in (or input to, in the customary meaning of the term) ATMOS are at issue, and we are to determine whether, if those parameters are varied so that the results adequately represent the meteorological patterns raised by PW (or bound the effects thereof), the EARLY and CHRONC computations employing the ATMOS output based upon those variations indicate that there are other SAMAs that become cost-effective.... (Abramson Dec., 15, underlining added)

From this, and the May 4 telephone conference, it seems clear that Judge Abramson's view of the issues for rehearing excludes not only disputed evidentiary facts (of which there are many) involving the adequacy of the Gaussian plume model embedded in the MACCS2 code' ATMOS module; but also excludes the manner in which the EARLY and CHRONC modules calculate the economic values and are prerequisite to any cost/benefit analysis.

Judge Abramson's view appears to incorrectly reflect the Commission's views and the ASLB's own order of May 4, 2010. It also fails to recognize that MACCS2's modules (ATMOS, EARLY and CHRONC) are tied together, and that one cannot separate one module from the others.

The ASLB May 4, 2010 Order (Regarding Agenda for Telephone Conference Call) recognized that potential issues involved,

> Whether the Pilgrim SAMA analysis's meteorological modeling using the straight-line Gaussian plume dispersion model is adequate, *see id.* at 14, 18, 21-28, when adequacy is defined by whether alternative modeling as argued by Pilgrim Watch would cause any additional SAMAs to become cost-beneficial (Order at 2)

Further, in CLI-10-11, the Commission made clear that issues on remand include the Gaussian plume model and whether other models would produce more accurate results:

1. The adequacy of the meteorological modeling underlying the SAMA analysis (see Commission Order, p. 26). "We agree with Pilgrim Watch and the dissent that the majority improperly excluded the issue of the straight-line Gaussian plume model." (CLI-10-11, p.14), and
2. "The conservatism of the straight-line Gaussian plume" that is embedded in ATMOS and was used by Applicant (CLI-10-11, pg. 25).

The straight line Gaussian plume model ATMOS can only handle wind speed and direction and stability class determination input data from a single location; and ATMOS assumes that the same uniform meteorological flow pattern exists over the entire modeling domain for any given hour. A different dispersion model kernel, such as those used in "puff" models is needed at Pilgrim's coastal location.[3]

But Judge Abramson apparently would exclude any meteorological model other than the Gaussian plume model that is embedded in the code used by Applicant (Abramson Dec., at 15, referenced above), and would also simply permit different inputs into

[3] CALPUFF, its predecessor CALGRID, and the meteorological model MM5 are better able to process wind data from multiple locations, break the initial effluent into sequentially emitted discrete puffs that can be transported and dispersed to wherever the wind takes them, and treat the variations of turbulent mixing rates as a function of location.

MACCS2's ATMOS module (Tr. Abramson 634-5, 643-6). Judge Abramson apparently failed to recognize that using different inputs would, at most, simply produce another set of concentration values that also do not reflect the complexity of the actual site-specific meteorological patterns. As Dr. Egan has said, "sensitivity studies do not add useful information if the primary model is flawed." The "issue of the straight-line Gaussian plume model" necessarily includes whether a different dispersion model, such as CALPUFF, would better simulate air flows in a coastal location and lead to a different SAMA analysis.

The Commission's Remand also was clear that the questions regarding the code and models that the ASLB will likely have to consider include:

1. Should economic cost calculations and evacuation time portions of contention 3 be re-examined because of [material] deficiencies in the meteorological patterns modeling (CLI-10-11, pg. 27),
2. Do "material" deficiencies in the meteorological modeling call into question the overall Pilgrim SAMA cost-benefit analyses (see CLI-10-11, pg. 27),
3. Would additional meteorological information significantly change the Pilgrim SAMA cost-benefit analysis (CLI-10-11, pp. 32-33), and
4. What is the impact of the adequacy of the meteorological modeling on economic cost matters (CLI-10-11, pp. 36-37),
5. "[W]hether the inclusion of additional factors or use of other assumptions or models would change the cost-benefit conclusions" (CLI-10-11, p. 39)

Nonetheless, Judge Abramson would exclude evidence relating to "the portion of the model that calculates that economic value," (Tr. 588), to "portions of the calculation [translating the predicted levels of contamination and public dose into clean-up costs and

loss of business and other values] is not at issue" (Tr. 588-589), and along with anything else relating to computing how the "dollars are computed."

Finally, even under Judge Abramson's narrow view of the issues, the "disputed evidentiary facts concerning the proceeding" range far wider than "the very narrow issue" of meteorological inputs. Judge Abramson's apparent assumption that you can "look at the meteorological input model and see whether it alone could make another SAMA cost beneficial" (Tr. 615, underlining added) is inconsistent with CLI-10-11's recognition that inputs into the Code and what the code does (or does not) do with those inputs are inseparable: "[T]here easily may be an overlap between arguments challenging the sufficiency of the 'input data' used and challenging the model used, if the model does not require, allow for, or otherwise take into account particular types of data" (CLI-10-11, pg 15); and with Judge Young's view, expressed during the May 4 telephone conference, that "you can't completely ignore the cost issue, and where the economic cost issue comes in is in making that cost-benefit analysis." (Tr. 594)

Indeed, under Judge Abramson's narrow view, the issues before the ASLB include whether "the EARLY and CHRONC computations employing the ATMOS output ... indicate that there are other SAMAs that become cost effective." (Abramson, Dec., 15) This being so, the "disputed evidentiary facts concerning the proceeding" are not only those that "regard meteorological modeling" in the MACCS2 code (Abramson Dec., 10) disputed facts regarding "other models, its numerical techniques, or any input regarding other matters" are not irrelevant. (See, Abramson Dec., 13).

B. Judge Abramson's extrajudicial knowledge of disputed evidentiary facts

Judge Abramson's Decision repeatedly says, in effect, that, "I had no personal involvement in the creation of the MACCS2 code and I have no personal knowledge of disputed evidentiary facts concerning it (Abramson Dec., 7)

If his statement simply means that he has no personal knowledge of facts concerning the creation of the MACCS2 code per se, that may well be true, but that does not mean that he does have extrajudicial knowledge of any "disputed evidentiary facts" in this proceeding.

In his Decision, Judge Abramson admits that he has extensive extrajudicial knowledge of facts relating to the development of computer codes for accident analysis, modeling a variety of phenomena, and incorporating such models into nuclear reactor safety analysis codes. He also implies that he "collaborated relatively frequently" with respect to how models should be created, how phenomena should be modeled, how models should be verified, and how codes should be written and function. (Abramson Dec. 7, italics added):

> My explicit words, "a lot of that," were simply a statement *that I had personal involvement, as a scientist, with both development of computer codes for accident analysis and with modeling of a variety of phenomena, and with incorporating such models into nuclear reactor safety analysis codes.* In addition, *I also spent several years, while employed at Argonne National Laboratory (ANL), assisting with co-coordination of the research programs of the NRC's Research (RES) Division at national laboratories and certain universities.* The community of scientists who developed the computer codes and models for analysis of severe accidents in nuclear reactors, and for attempting to discern the consequences of such accidents was then, and remains today, quite small. *Many of us collaborated*, and some collaborated relatively frequently, *regarding how such models should be*

created, how phenomena should be modeled, how those models should be verified and validated, and how the computer codes that deployed those models should be written and function (including, for example, such matters as the numerical solution schemes). I indeed had material involvement with both the development of computer models for phenomena that occur in severe accidents and with the development, writing, and using of computer codes to make computations of the evolution of such accidents. It is that personal involvement to which I referred during the teleconference.

Both MACCS2 and the codes on which Judge Abramson worked are "computer codes for accident analysis," and both include "computer models for phenomena that occur in severe accidents ... and "computer codes to make computations of the evolution of such accidents." The fact that the codes on which Judge Abramson worked may be "Fords," while MACCS2 is a "Chevy," does not mean that the two are not substantively similar or, that his personal knowledge of facts about what makes a good (or a bad) "Ford" has nothing to do with the disputed facts here - whether MACCS2 is a good or bad "Chevy."

Unfortunately, Judge Abramson's Decision is silent on what specific codes he worked on, research that he did, and the extent to which the MACCS2 code substantively includes or is in any way related to his prior work. In his Decision, Judge Abramson only says that he "had absolutely nothing to do with the modeling or development of the MACCS2 code or any of its predecessor versions."[4] (Abramson, Dec. 8, underlining Judge Abramson's) But he never says that his prior work had nothing to do with the Gaussian plume model, probable releases, dose response, or economic cost calculations.

[4] MACCS2 code's predecessor versions: MACCS2 fully incorporated its predeccessor, MACCS. Further many of the assumptions in both codes encompass assumptions found in predecessor codes and analyses such as NUREG-1150 and WASH-1400.

Neither does he explain why his knowledge, based on his prior work, of how "models for analysis of severe accidents in nuclear reactors... should be created, how phenomena should be modeled, how those models should be verified and validated, and how the computer codes that deployed those models should be written and function" is not directly applicable to "disputed evidentiary facts" regarding the adequacy of the MACCS2 code in consequence analyses.

The implication of Judge Abramson's Decision seems to be that, even though the MACCS2 code was not released until after he left ANL, he does indeed have personal extrajudicial knowledge that is relevant to the MACCS2 code and its adequacy. Absent detailed further disclosure by Judge Abramson of the work he did, the specific codes and research with which he was involved, the discussions had with other scientists and their relationship to what Pilgrim Watch challenges in this proceeding, there is no basis upon which this Commission can conclude that Judge Abramson does not have "personal knowledge of disputed evidentiary facts concerning the proceeding."

Indeed, Judge Abramson's Decision that recusal is not required has little or nothing to do with the substance of his personal knowledge. Rather, it seems to be based on his positions that the "disputed evidentiary facts concerning the proceeding" are limited to facts that "regard the very narrow issue of the meteorological modeling in the [MACCS2] code" itself (Abramson Dec., p 10); and that his "involvement with the development of a computer code used to derive evidence for an NRC proceeding, in and of itself, ought [not] personal not be cause for recusal...." (Abramson, Dec. 10).

Pilgrim Watch agrees that there is potential tension between 28 U.S.C. §455(b)(1) requirement that recusal is mandatory if a judge has extrajudicial "personal knowledge of disputed evidentiary facts concerning the proceeding," and the NRC's regulations require an ASLB be "comprised of three ... members two of whom have [] technical or other qualifications ... appropriate to the issues to be decided." (See Abramson Dec., 12).

There is clearly a line between experience that "enables" a technically qualified judge "to reach a well founded technical result" (Abramson Dec. 13), and personal knowledge directly relevant to the disputed facts at issue. The former relates to a judge's ability to understand and appreciate expert testimony, and is encouraged; the latter creates the risk that the judge's decision might be based on his own knowledge rather than testimony, and is prohibited.

Contrary to Judge Abramson's Decision, Pilgrim Watch does not assert that simply "general knowledge of the computer code at issue here [] would be cause for [Judge Abramson's] disqualification or recusal" (Abramson Dec., 13) or that "general expertise ... should be reason for [his] disqualification." (Abramson Dec. 14) On the other hand, Pilgrim Watch does say that the disputed evidentiary facts of Contention 3 include whether codes and models (including the straight line Gaussian plume) used in MACCS2 are deficient and resulted in incorrect conclusions about the costs versus benefits of possible mitigation alternatives; and that Judge Abramson's "previous [extrajudicial] knowledge and experience in modeling, creating and working with computer codes intended to predict the courses" are extrajudicial knowledge of highly relevant, "disputed evidentiary facts" that unquestionably "concern[] the proceeding."

Judge Abramson's position that "even were I to have had explicit involvement with development of the MACCS2 code..., that general fact would not be a foundation for my disqualification or recusal...," and that recusal requires "a plain and direct link indicating that I had some personal involvement with a particular model or method at the heart of the litigation" (Abramson Dec., 11) goes too far. It would render the §455(b)(1), which requires only "personal knowledge of disputed evidentiary facts concerning the proceeding," essentially meaningless.

Judge Abramson recognized that "if it were held that many more models and phenomena are at issue and if it were held that my prior expertise in any of those areas would be cause for disqualification even without involvement in the development of MACCS2, then the result might not be as I have reached." (Abramson Dec., 14) As pointed out above, "many more models and phenomena" than "the very narrow issue of the meteorological modeling in the code," (Abramson Dec., 10) are at issue; and Judge Abramson's prior expertise within the areas at issue would be cause for disqualification. If the question is a close one, the balance tips in favor of recusal (*Nicos v. Alley,* 71 F.3d 347 (10th Cir. 1995)). The result should not be the one that Judge Abramson reached.

C. Reasonably Question Impartiality

Pilgrim Watch respectfully submits that reasonable person might reasonably question Judge Abramson's impartiality. 28 U.S.C. §455(a), underlining added.

As said in Pilgrim Watch's motion, "[w]hat 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). Here, a reasonable

person could "harbor doubts" about Judge Abramson's impartiality (see *Hayes v. Williamsville Cent. School Dist.,* 506 F.Supp. 165 (W.D.N.Y. 2007)). His original statement that he "was involved a lot personally" with the MACCS2 code and the statements in his Decision regarding his extensive work developing computer codes and models for nuclear reactor analysis might lead a reasonable person to conclude that he is likely to be prejudiced in favor of the work that he did, and biased against any argument made by Pilgrim Watch that related portions of the MACCS2 code are inadequate.

A reasonable person also might be concerned by Judge Abramson's statement that he "formulated, ... after input from every Party and from my colleagues, my view of the issue remanded for litigation (Abramson Dec., 19-20), since Judge Abramson expressed his views at the May 4 telephone conference, almost a week before the parties filed their briefs on the subject; and Judge Abramson's statement that he does not "believe he [Mr. Chanin] wrote the code." (Tr. 665). This was said even though David Chanin's resume was submitted to the Board in June of 2007 and the ASLB's October, 2007 Order granting Entergy's motion for summary disposition says that Mr. Chanin "states that he was 'the primary developer of the MACCS and MACCS2 computer codes under sponsorship of the U.S. NRC and DOE while working at Sandia National Laboratories 1982-1996'", (Opinion, 30) and that Pilgrim Watch "do[es] have Mr. Chanin as an expert on costs." (Opinion, 30, 42). The makes clear that Mr. Chanin "developed and implemented the models, organized and supervised the programming and the computational methodology, and was involved with the verification and validation of the resultant computations (both at the microscopic and macroscopic level." (Abramson Dec. 18)

Finally, Judge Abramson's statement the he would not recuse himself even if he "had explicit involvement with the development of the MACCS2 Code" (Abramson Dec, 11) might lead a reasonable person to question whether Judge Abramson would impartially decide the adequacy of that code.

Taken together, these circumstances would cause a reasonable person to "harbor doubts about the judge's impartiality." *Renteria v. Schellpeper,* 936 F.Supp. 691 (D. Neb. 1966); and that is all the "impartiality might reasonably be questioned" standard of 28 U.S.C. §455(a) requires.

Conclusion

For the reasons stated, Pilgrim Watch respectfully takes this opportunity to address the Commission to explain our rationale why we believe that the Commission should recuse Judge Abramson.

Respectfully submitted,

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June 16, 2010

ATTACHMENTS

Transcript May 4, 2010 Teleconference Call, Neal R. Gross Inc.

Motion On Behalf Of Pilgrim Watch For Disqualification Of Judge Paul B. Abramson In The Pilgrim Nuclear Power Station Re-Licensing Proceeding (May 14, 2010)

Pilgrim Watch Request For Permission, And Reply To Entergy's Opposition To Pilgrim Watch Motion To Disqualify Judge Abramson (May 24, 2010)

Pilgrim Watch Request For Permission, And Reply To NRC Staff's Response To Pilgrim Watch Motion To Disqualify Judge Abramson (May 26, 2010)

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Shannon goes to site restoration costs.
MS. LAMPERT: Well, no. Shannon, remember, he wrote the code, so I think he goes to quite a few things.
MR. LEWIS: Okay.
MS. LAMPERT: And Lyman and a couple of the others can --
ADMIN. JUDGE ABRAMSON: Let me ask you to submit Shannon's resume because I don't believe he wrote the code. I was involved with a lot of that personally.
MS. LAMPERT: Okay. I'd be more than happy to.
CHAIR YOUNG: Let me just ask--
COURT REPORTER: Who was that?
CHAIR YOUNG: That was Judge Abramson and Ms. Lampert. Ms. Lampert, which of your experts are not going to be available until September again?
MS. LAMPERT: The two on the telephone.
CHAIR YOUNG: Oh, Egan and Gundersen?
MS. LAMPERT: Correct.
CHAIR YOUNG: Okay, all right. Correct me if I'm wrong, but I think that what we need to get from the parties at this point are, first, indications whether you would like to have a settlement judge

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are postulated to be excluded by Pilgrim Watch? And from that, can we get a handle on through some sort of bounding analysis whether or not the meteorologic modeling is so flawed that it might make other SAMAs cost effective?
MR. LEWIS: Judge Abramson, the model does, in the end, produce an economic value which is used, but I don't think that the portion of the model that calculates that economic value is at issue.
ADMIN. JUDGE ABRAMSON: I agree.
MR. LEWIS: The upmost portion of the

model calculates the property's contamination levels or the level of contamination on property and the doses that individuals in the 50mile area receive. And the issue about whether the Gaussian plume model is accurate goes to whether that predicted levelof contamination and that predicted level of public dose is accurate.
The model then does additional things. It uses an economic model to take the level of contamination and translate that into cleanup costs and loss of business andother values.
ADMIN. JUDGE ABRAMSON: If I understand correctly, the Commission has been clear that that portion of the calculation is not at issue.

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MR. LEWIS: Yes. So that portion of the methodology we submit should not be at issue. Similarly, the model takes the radiological exposure of individuals and that radiological exposure is also turned into a monetary value. How that is done is also not at issue. So our belief of what is at issue is how the plume is modeled and howthe level of contamination and off-site exposure are calculated.
ADMIN. JUDGE ABRAMSON: Right. And that's the way I see it. And if you were to change the input that's used to select Gaussian plumes in a way that it bounded every possible windpattern, frequency of wind patterns, etcetera, that are proposed by Pilgrim Watch, we could then get a handle, it seems to me, on whether or not the overall SAMA calculation can be at error to a degree that it would cause other SAMAs to be cost effective.
MS. LAMPERT: May I interject something?
CHAIR YOUNG: I want to try to keep all-- this is Judge Young-- keep each party --
MS. LAMPERT: That was Mary Lampert. I'm sorry.

23 CHAIR YOUNG: Right.
24 ADMIN. JUDGE ABRAMSON: Can Ihear from
25 Mr. O'Kula? Is this something that could be done?

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1 technical person, ask a question here and sort of
2 state what my understanding is, and then all the
3 parties can respond to it, keep continuing the order
4 that we started and coming back to you, Ms. Lampert.
5 And that is that, in terms of the economic cost
6 issues, my understanding of how those come in is that
7 if, well, first a comparison of the modeling using
the
8 straight-line Gaussian plume model with alternative
9 modeling suggested and put forward by the intervenor,
10 if that would lead to significantly different
results
11 or results that -- well, here's where it gets a
little
12 complicated. If that would lead to different
results,
13 and then what we ultimately look at is whether there
14 would be any additional cost-beneficial SAMAs that
15 might be considered by Entergy, and how we determine
16 that is by looking at what benefits would come from
17 the different modeling and compare it to the cost,
and
18 the costs that would be different in the analysis
that
19 are open for litigation are those costs that we
20 discussed in admitting the contention and not
21 including those types of costs that the Commission
22 said were not relevant, so that it sort of seems to
me
23 that, in doing that analysis of whether different
24 modeling would lead to the addition of new cost-
25 beneficial SAMAs, you can't completely ignore the
cost

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1 well, let's say it had 80 percent and then it changed
2 it to make it 85 percent. But had you considered
3 those economic cost differences, it would have made a

difference, it would have changed that figure from 15 percent to 20 percent, which would make it more significant. It doesn't seem to be a difficult concept here, and I'm trying to get an answer to why you're arguing that you don't take into account the economic cost figures when you're looking at the adequacy of the meteorological modeling. And then I guess the next question to followup on that, then how would you determine whether the meteorological monitoring would have a material impact on the economic cost matters?
MR. LEWIS: I'll say this as clearly as I can. A very common way of looking at how different parameters affect a calculationis you vary that parameter that you're interested in and you hold all others constant. So here we're interested in knowing whether the meteorological input, including the Gaussian plume model, would affect the outcome. You look at those inputs and you vary them and you see how would a change in those inputs change the results, holding everything else constant. I think that's what the Commission intended. So what our understanding of

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clarifying question to yourself and Judge Abramson and perhaps Mr. Lewis, as well, and that is with respect to the materiality, at what point between 5 percent and the 70 percent does the materiality of the new meteorological outcomes in the modeling, when does something become material on this scale between--
ADMIN. JUDGE ABRAMSON: Therein lies the rub.
CHAIR YOUNG: Right. And that's what I was trying to get to earlier-- this is Judge Young --
in asking about standards. Before we get to that level of precision, just my re-framing of how Judge Abramson framed it. Judge Abramson, does that make sense to you?

ADMIN. JUDGE ABRAMSON: Yes, I think we're on the same page, and I agree that, as an attorney, putting on my attorney hat for a moment and taking off my techie hat, that the question ultimately has to be what's material, and that will only be determinable once we have the first computation. And by the way, while I'm on my preaching mode, it would certainly aid expeditious resolution ofthis if the staff's experts and the applicant's experts would get together with Pilgrim Watch's meteorological experts and try to determine a way to construct input to the code that

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would encompass what it is that Mr. Egan thinks is relevant. And when I say encompasses, I do not mean worst case. I mean encompassed in a realistic way so that we can compute or the parties can compute, as the Commission has said, a recomputation so that that can be used for the SAMA analysis. And once the parties' experts tackle that, the first-level computation can be done, and then you'll see whether there's an issue or not.

CHAIR YOUNG: I think also, just to follow-up, I think the question that Ms. Hollis raised, if there are, in fact, some standards somewhere, then that would be part of the evidence. I haven't heard anyone respond to my earlier questions on that. If anyone knows the answer, you can give it now. But it would seem, based on what I've heard so far, that we look to see whether the applicant has shown that it would be impossible to change the economic cost figures enough to lead to a new cost beneficial SAMA; and, in determining that level of impossibility or possibility, it's a matter of weighing the evidence and hearing the arguments of the parties.

ADMIN. JUDGE ABRAMSON: I think you're right, Judge Young, except that I wouldn't use the

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time to set a schedule for the hearing. I don't know how long that may take, given that we're going to be getting arguments from the parties. Judge Abramson also raised the possibility of seeking more guidance from the Commission, and we obviously haven't had a chance to talk about that. But it seems to me that it would make sense to get input, get the parties' filings, and then if we feel we need more argument on that we can set another telephone conference and, at that or a future telephone conference, we can finalize the schedule for this. Meanwhile, we might hear from the parties on what your thoughts are on when you think you'll be ready based on what you need to do between now and then, but I think probably we're going to take all arguments under advisement at the conclusion of this conferencetoday.

ADMIN. JUDGE ABRAMSON: Judge Young, can I interject something, please?

CHAIR YOUNG: Yes.

ADMIN. JUDGE ABRAMSON: I'd like to just pursue for a moment a line of discussion that I started earlier, and that is I'd like to ask the applicant and the staff and Mr. Egan whether you believe it's feasible for the technical people to get together and try to address or to determine manners in

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which the input to the MACCS code might be suitably modified to accommodate thewind patterns, meteorological patterns, that Mr. Egan wants to raise because maybe that would be an expeditious way to move this along.

CHAIR YOUNG: I think he said that that's not possible and that it's a different modeling that he would propose.

MS. LAMPERT: May I also add that we would

10 want to include expert David Shannon, who, after all,
11 wrote the code.
12 CHAIR YOUNG: Let me just ask--
13 MS. LAMPERT: That was Mary Lampert,
14 Pilgrim Watch.
15 CHAIR YOUNG: Right. And this was Judge
16 Young before and this is Judge Young again. Let me
17 just ask Mr. Egan, do you--
18 DR. EGAN: I'm on. I'm sorry.
19 MS. LAMPERT: Oh, Egan. I thought
20 Shannon. I was getting everybody confused. I'm
21 sorry.
22 CHAIR YOUNG: Mr. Egan, I thought I
23 understood you to say before that it would require the
24 use of another model.
25 DR. EGAN: The straight-line Gaussian

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1 model is not the appropriate model for this because a
2 sea breeze is a very much a threedimensional
3 phenomena.
4 CHAIR YOUNG: Well, Dr. Egan, Judge
5 Abramson had asked whether it would be possible for
6 you to get together with staff and the applicant and
7 see whether the MACCS code could be adapted or
8 adjusted to account for the effects that you're
9 talking about. Do you think that that would possibly
10 lead to some better understanding and possibly
11 narrowing of the issues?
12 DR. EGAN: Well, of course, I'd be happy
13 to accommodate a meeting with the other folks. I
14 don't know whether it will be able to come to a
15 resolution. It seems like they're very much
16 constrained to using the straightline Gaussian model.
17 CHAIR YOUNG: That's something that you
18 might consider.
19 MR. LEWIS: Judge Abramson, this is David
20 Lewis. I think your question presupposed that there
21 is a need to adjust the model to take into account
22 these scenarios, and that may not be the case.
23 CHAIR YOUNG: You're talking about Judge

24 Abramson's suggestion? Judge Abramson, do you want to
25 say anything more on that, orshould we move on to the

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1 request for information and the sharing of information
2 prior to the hearing, which would include the
3 mandatory disclosures and possibly a meeting like
4 you're talking about, but that would be up to the
5 parties obviously.
6 ADMIN. JUDGE ABRAMSON: No, I have nothing
7 further to say. If the parties are going to dig in
8 their heels about their positions, we'll wind up
9 having a lengthy hearing on the merits of their
10 arguments. I just think we could eliminate a lot of
11 that if the parties would take an objective look at
12 what can be done and cannot be done.
13 CHAIR YOUNG: Let's move on to Pilgrim
14 Watch's request for information. The first thing that
15 they're asking for is to have the CDs that have been
16 provided, to have Entergy index those so that they are
17 more usable. Mr. Lewis, do you have any objection to
18 doing that?
19 MR. LEWIS: Yes, Judge Young. I mean, we
20 produced our additional disclosure in November 2006,
21 three years ago. And I think it's very late for
22 Pilgrim Watch to now apparently be looking at for the
23 first time and deciding that they would like an index.
24 There aren't an extraordinary number of documents.
25 Pilgrim Watch said that the CDs include contentions

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

---

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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 ignore 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 (11th 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 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][5]

[5] 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.

personally." Indeed, the Staff goes 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 (6th 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 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 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 prejudgment 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 (5th Cir. 1983)

Respectfully submitted,

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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 reasonably 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[6]: "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[7]. 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, efficacy, capabilities, limitations and inadequacies of that code are clearly disputed[8]

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 questioned." 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

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

[7] MACCS was encompassed into MACCS2.

[8] 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.

actually conscious of those circumstances. *Liljebeg v. Health Services Acquition Corp.*, 486 U.S. 847 (1988).

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,[9] 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.[10]

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 knowledge 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

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[9] 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).

[10] 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).

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 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 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.

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 disqualification (*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)

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I. Introduction

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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 (11th Cir. 1988; the rule disqualifying a judge from presiding is a per se rule that lists particular circumstances requiring recusal).

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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 Acquition Corp.*, 486 U.S. 847

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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 (5th Cir. 1983)

Respectfully submitted,

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE U.S. NUCLEAR REGULATORY COMMISSION

In the Matter of — Docket # 50-293-LR

Entergy Corporation

Pilgrim Nuclear Power Station

License Renewal Application — June 16, 2010

CERTIFICATE OF SERVICE

I hereby certify that *Pilgrim Watch Response to Judge Paul B. Abramson Decision on Recusal Motion* was served June 16, 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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