

June 28, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR GENERATION)	
COMPANY AND ENTERGY NUCLEAR)	Docket No. 50-293-LR
OPERATIONS, INC.)	
)	
(Pilgrim Nuclear Power Station))	

NRC STAFF'S OPPOSITION TO PILGRIM WATCH'S MOTION REQUESTING
LEAVE TO FILE RESPONSE TO JUDGE
PAUL B. ABRAMSON DECISION ON RECUSAL MOTION (JUNE 10, 2010)

INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), the NRC staff ("Staff") hereby responds to Pilgrim Watch's ("PW") extra-regulatory filing entitled "Motion Requesting Leave to File Response to Judge Paul B. Abramson Decision on Recusal Motion (June 10, 2010)" ("PW's Motion"), and its exhibit to the motion entitled "Pilgrim Watch Response to Judge Paul B. Abramson Decision on Recusal Motion" ("PW's Response"). The Commission should deny PW's Motion because it would require the recusal of qualified technical judges based on their familiarity with issues in which they had no direct involvement, including modeling physical phenomena, writing and designing computer codes, and validating and certifying results. If PW's assertion were taken as correct, NRC could have difficulty appointing technical judges from the small community of professionals with sufficient expertise in nuclear power regulation and licensing to adjudicate hearings involving complex technical areas. Thus, PW's Motion should be denied. Moreover, PW's Motion is an extra-regulatory filing that is neither authorized nor precluded by the existing regulations. Thus, the Commission may, in its discretion, dismiss PW's Motion as unnecessary or solicit additional briefs from all the parties to aid in its review of the issue.

PROCEDURAL BACKGROUND

On May 4, 2010, the Atomic Safety and Licensing Board (“Board”) convened a telephone conference to discuss, *inter alia*, the scope and schedule for the conduct of the hearing on the contention remanded to the Board by the Commission on March 26, 2010.¹ PW filed motion to disqualify Judge Abramson, based on a single vague statement by the Judge regarding his familiarity with reactor accident codes and his request for the qualifications of each party’s experts and specifically Mr. Chanin (one of PW’s experts).² Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc (collectively “Entergy”) filed its answer opposing PW’s motion to disqualify Judge Abramson.³ Three days later, the Staff filed its answer in opposition to PW’s motion to disqualify.⁴ PW filed a motion for leave to reply and its reply to Entergy’s response.⁵ On May 26, 2010, PW filed a motion for leave to reply and its reply to the Staff’s response.⁶ On June 10, 2010, Judge Abramson denied PW’s motion to disqualify and referred the decision to the Commission. Judge Abramson denied PW’s motion to disqualify based on the fact that (1) he had “no involvement in the modeling and development of the MACCS2 code or any of its predecessors” or meteorology modeling⁷ and (2) the Judge’s request for additional

¹ Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11 (“Commission’s Order”), 71 NRC ___ (March 26, 2010) (slip op. at 39).

² “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).

³ “Entergy’s Opposition to Pilgrim Watch Motion to Disqualify Judge Abramson” (May 21, 2010).

⁴ “NRC Staff’s Response to Pilgrim Watch’s Motion to Disqualify Judge Paul B. Abramson” (May 24, 2010).

⁵ “Pilgrim Watch Request for Permission, and Reply to Entergy’s opposition to Pilgrim Watch Motion to Disqualify Judge Abramson” (May 24, 2010).

⁶ “Pilgrim Watch Request for Permission, and Reply to NRC Staff’s Response to Pilgrim Watch Motion to Disqualify Judge Abramson” (May 26, 2010).

information regarding the credentials of a party's proffered expert was in keeping with the Judge's role and does not support PW's assertion of bias.⁸ Finally, PW filed with the Commission its Motion and Response to Judge Abramson's denial decision and attached copies of its replies to Entergy's Response and the Staff's Response.

DISCUSSION

I. Acceptance of PW's Broad Basis For Disqualifying a Technical Judge Could Hamper NRC Efforts to Appoint Qualified Judges to Its Atomic Safety And Licensing Appeal Boards

In previous pleadings, PW has asserted that Judge Abramson's familiarity with other reactor accident codes, modeling of physical phenomena in general, and creating and working with unrelated computer codes should disqualify him from serving on the Board.⁹ These assertions ignore the Commission's precedent denying disqualification of technical judges based on their familiarity with the issues raised in any proceeding. The community of technical professionals with sufficient expertise to perform their duties as a technical judge Board member is small. Any individual with the expertise to serve as a technical judge would likely be familiar with risk analysis methodology including modeling physical phenomena, computer codes, and validating and certifying particular models and codes. Under PW's overly expansive disqualification standards, a technical judge's basic qualification to serve as member of the Board would also work to disqualify them in the first instance. As Judge Abramson has correctly determined in his denial decision, disqualification cannot be based on the Board member's broad professional experience in the nuclear field or his general familiarity with issues similar to

(. . .continued)

⁷ Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), Decision (Denying Motion on Behalf of Pilgrim Watch for My Self-Disqualification from the Remand Proceedings and Referring Motion to the Commission), slip op. at 15-16 (June 10, 2010).

⁸ *Id.* At 17-19.

⁹ PW's Response at 9-11.

the issues before the Board. Instead, disqualification must be directly related to their work on the specific issue to be determined by the Board.¹⁰ The Commission, when faced with substantially the same issue, stated:

No realist would expect those vested with decisional responsibility to approach their tasks with minds untouched by experience and reflection so as to be obliged to treat every event as unprecedented. The Commission fails to see the basis for the [intervenor's] presumed conclusion that a Licensing Board's members' broad professional experience in industrial and academic nuclear programs would itself necessarily result in the members being unable, in any proceeding, to reach an impartial decision based on the adjudicatory record and applicable law.¹¹

Here, as in *Shoreham*, PW is concerned with Judge Abramson's general familiarity with modeling reactor accidents, computer codes, validation and certification of codes that are not at issue before the Board. Thus, PW's Motion should be denied.

II. The Commission Will Direct When Additional Pleadings Are Needed

Under 10 C.F.R. § 2.313(b), a party seeking to have a member of the Board disqualified may file a motion setting forth the alleged grounds for disqualification. The regulation states:

If a party believes that a presiding officer or a designated member of an Atomic Safety and Licensing Board should be disqualified, the party may move that the presiding officer of the Licensing Board member disqualify himself or herself. The motion must be supported by affidavits setting forth the alleged grounds for disqualification. If the presiding officer or the Licensing Board member does not disqualify himself, the motion must be referred to the Commission. The Commission will determine the sufficiency of the grounds alleged.

¹⁰ Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), Decision (Denying Motion on Behalf of Pilgrim Watch for My Self-Disqualification from the Remand Proceedings and Referring Motion to the Commission), slip op. at 6-7 (June 10, 2010); Entergy's Response at 6; Staff's Response at 6.

¹¹ *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit No. 1), 4 A.E.C. 441, 443 (1970).

The regulation does not specifically provide nor prohibit any party to file additional replies or motions in response to the Licensing Board member's decision or his referral to the Commission. The regulation contemplates that the Commission will review any decision denying a motion to disqualify, *de novo*. Quite simply, if the Commission deems that additional briefs will aid its review of the issues, it may order the parties to address any particular issue in supplemental briefs.

PW appears to apply the standard articulated in 10 C.F.R § 2.323(c) as authority in seeking leave to reply. However, under Section 2.323(c), a party making a motion may seek to leave to reply only to another party's answer. This regulation is inapposite to whether a party has a right to respond to a Judge's referral to the Commission.

CONCLUSION

PW's Motion and Response paints too broad a brush that would require the recusal of qualified technical judges based on their familiarity with modeling physical phenomena and computer codes not at issue before the Board. The Commission's procedural regulations do not require a technical judge to recuse him or herself merely because he or she has skills, knowledge or experience on matters that are before the Board. Thus, the Commission should deny PW's Motion.

Respectfully submitted,



Brian G. Harris

Susan Uttal
Brian G. Harris
Counsel for NRC Staff

Dated at Rockville, Maryland
This 28th day of June, 2010

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OPPOSITION TO PW'S MOTION REQUESTING LEAVE TO FILE [A] RESPONSE TO JUDGE PAUL B. ABRAMSON DECISION ON RECUSAL MOTION (JUNE 10, 2010)" in the above-captioned proceeding have been served on the following by electronic mail and by deposit in the U.S. Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk (*), by electronic mail and by deposit in the U.S. Mail system this 28th day of June, 2010.

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