

July 19, 2010

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

U.S. Department of Energy  
(High Level Waste Repository)

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Docket No. 63-001-HLW

NUCLEAR ENERGY INSTITUTE ANSWER TO MOTION FOR  
RECUSAL/DISQUALIFICATION

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this 19<sup>th</sup> day of July 2010

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I. INTRODUCTION

On July 9, 2010, the State of Washington, the State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada filed a joint Motion<sup>1</sup> requesting that Commissioners Apostolakis, Magwood, and Ostendorff all “recuse themselves and be disqualified” from any consideration of the issue of whether the Commission should take review of the decision of the Atomic Safety and Licensing Board (“Board”) in LBP-10-11<sup>2</sup> and from any consideration of the merits of that decision. In LBP-10-11, the Board denied the motion filed by the Department of Energy (“DOE”) on March 3, 2010, to withdraw with prejudice DOE’s application for construction authorization for the Yucca Mountain spent nuclear fuel repository. In accordance with 10 C.F.R. § 2.323 (c), the Nuclear Energy Institute (“NEI”) herein responds to the Motion.

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<sup>1</sup> “State of Washington, State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada’s Motion for Recusal/Disqualification,” dated July 9, 2010 (“Motion”).

<sup>2</sup> “Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion),” LBP-10-11, dated June 29, 2010.

Given that Commissioner Apostolakis has recused himself from this proceeding for unrelated reasons, the Motion is moot as it pertains to him.<sup>3</sup> NEI concludes that the Motion as it pertains to Commissioners Magwood and Ostendorff is not yet ready for resolution, given that the Commission has not yet determined to take review of the Board decision. NEI has separately stated, in its brief filed on July 9, 2010 (“Brief”), its position that the Commission should not take review of the Board decision. The Motion will become ripe only if the Commission opts for review. If that circumstance arises, the Commissioners will need to decide the Motion in the context of the precise issue or issues accepted for review. At the present time, NEI does not believe that one-word answers given by the Commissioners as nominees during confirmation hearings (the sole basis for the Motion) are sufficient to conclude unequivocally that the Commissioners have pre-judged any or all of the issues presented in LBP-10-11. NEI remains confident that the Commissioners can exercise their independent judicial functions and reach a fair and accurate conclusion of law on the merits.

## II. DISCUSSION

The facts that are the basis for the Motion are fully set out in the Motion (Motion, at 2-3). NEI does not dispute the facts. During a confirmation hearing on February 9, 2010, before the Senate Committee on Environment and Public Works, Commissioner nominees Apostolakis, Magwood, and Ostendorff were all asked the following question by Senator Barbara Boxer:

If confirmed, would you second guess the Department of Energy’s decision to withdraw the license application for Yucca Mountain from NRC’s review?

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<sup>3</sup> “Notice of Recusal,” dated July 15, 2010.

All three nominees, without any further discussion or clarification of what the question might mean, responded “no.” At the time the confirmation hearing was held, DOE had not yet filed a motion to withdraw the application. However, in a prior filing of February 1, 2010, DOE had indicated to the Board its intent to submit a motion to withdraw the application with prejudice within 30 days.<sup>4</sup>

NEI also agrees with the discussion of the standard for recusal/disqualification to be applied by the NRC. *See* Motion, at 3-4. A Commissioner should disqualify himself or herself if a “reasonable man, were he to know all the circumstances, would harbor doubts about the judge’s impartiality.” *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-84-20, 20 NRC 1061, 1078 n. 46 (1984) (quoting *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980). Furthermore, Congressional interest cannot be allowed to influence the judicial functions of an independent regulatory commission. *Pillsbury Co. v. Fed. Trade Comm’n*, 354 F.2d 952, 963-64 (5th Cir. 1966). Finally, in a case not cited in the Motion, addressing whether a speech by a sitting Commissioner necessitated recusal/disqualification, the Court of Appeals reiterated the standard:

The test for disqualification has been succinctly stated as being whether ‘a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.’ *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 986, 80 S.Ct. 200, 4 L.Ed.2d 152 (1959).

*Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970).

In the present circumstances, NEI shares the concern expressed in the Motion regarding the appearance of Congressional pressure with respect to the NRC’s independent

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<sup>4</sup> “U.S. Department of Energy’s Motion to Stay the Proceeding,” dated February 1, 2010 at 1-2.

judicial functions. Nonetheless, NEI does not believe that recusal/disqualification of the Commissioners is necessary at the present time with respect to the threshold question of whether the Commission should take review of portions or all of LBP-10-11. Nothing in the confirmation process suggests that the three Commissioners have pre-judged that question. Indeed, at the time of the testimony the DOE motion to withdraw the application had not even been filed, so the legal and factual bases for the motion had not been stated. The one word answer (“no”) certainly does not respond to the threshold issue before the Commission — that is, whether it should take discretionary review of LBP-10-11. If the Commission decides not to take review, the Board decision will stand and the Motion, as it pertains to a merits review, will be moot. Conversely, if the Commission opts to take review, it will presumably decide precisely what issues it will review on the merits. This specificity should inform any further decision on whether recusal/disqualification of the Commissioners is appropriate for a merits review.<sup>5</sup>

In the event the Commission does opt to take review of the central questions addressed in the Board decision related to the DOE motion to withdraw (*e.g.*, whether the Secretary is authorized to withdraw the license application based on no more than a disagreement with the policy in the Nuclear Waste Policy Act, or whether the license application should be allowed to be withdrawn “with prejudice”), the issue of recusal/disqualification will ripen. And only the two affected Commissioners will be able to say what they understood the Senator’s question to be asking (*i.e.*, what would constitute “second guessing” DOE’s decision?) or what they meant by their one-word answer (“no”).

In the abstract, and devoid of any additional context and/or explanation, NEI finds the confirmation hearing question and answers to be inscrutable. In contrast, the legal issues

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<sup>5</sup> Most clearly, for example, the confirmation hearing testimony would appear to have no bearing on any review of the issue of the late-filed intervention petitions.

raised by the motion to withdraw and addressed by the Board in LBP-10-11 have been comprehensively briefed (on several occasions) by the parties, both before the Board and the Commission. The Board also held extensive oral argument on the issues, addressing very specific questions of law. In this context, and without more insight into the Commissioners' inner thought processes, NEI finds the hearing testimony to be an inadequate basis on which to assume that the Commissioners have prejudged the issues.<sup>6</sup>

### III. CONCLUSION

The Motion requesting that Commissioners Magwood and Ostendorff recuse themselves and be disqualified from addressing any consideration of the Board decision denying the DOE motion to withdraw the Yucca Mountain license application is premature with respect to the threshold issue of whether the Commission should take review. NEI instead again urges, as it did in its July 9 Brief, that the Commission not take review, mooted the Motion. Should the Commission opt to take review, the Motion should be considered in the context of the precise issue under review and further explanation by the Commissioners of what was intended in their responses during the confirmation hearings. Based on the present bare record, NEI does not believe that the one-word answers constitute a pre-judgment of any or all the issues.

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<sup>6</sup> For example, the answers may be read to mean that the Commissioners will not “second guess” the DOE decision to file a motion to withdraw the application. That is a decision of the Department to make (rightly or wrongly as a matter of law). But this would not necessarily signal an intent by the Commissioners to decline from exercising their independent responsibilities, as part of an independent agency of the federal government, to address specific legal issues in an adjudicatory proceeding.

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Nuclear Energy Institute Answer to Motion for Recusal/Disqualification” have been served upon the following persons on this 19<sup>th</sup> day of July 2010 by Electronic Information Exchange.

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