

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Commission**

In the Matter of:)	
)	Docket No. 52-033-COL
The Detroit Edison Company)	
(Fermi Nuclear Power Plant, Unit 3))	June 25, 2014
)	

* * * * *

**INTERVENORS’ MOTION FOR RECUSAL
OF COMMISSIONER MAGWOOD
FROM PARTICIPATING IN DELIBERATIONS
ON PETITION FOR REVIEW OF LBP-14-07**

Now come Intervenors Beyond Nuclear, *et al.*¹ (hereinafter “Intervenors”), by and through counsel, and pursuant to 28 U.S.C. § 2455 and pertinent precedent and policy of the Nuclear Regulatory Commission, move for the recusal of Commissioner William Magwood from any participation in the docketing, deliberations over, and determination of any issues raised by “Intervenors’ Petition for Review of LBP 14-07 (Ruling for Applicant on Quality Assurance),” which arises from the ongoing Fermi 3 Combined Operating License (COL) proceeding.

Respectfully submitted,

/s/ Terry J. Lodge
Terry J. Lodge (OH #0029271)
Counsel for Intervenors

¹In addition to Beyond Nuclear, the Intervenors include: Citizens for Alternatives to Chemical Contamination, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, Sierra Club (Michigan Chapter), Keith Gunter, Edward McArdle, Henry Newnan, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.

MEMORANDUM

A. Background Facts

As the attached “Declaration of Intervenors’ Counsel” documents, on June 17, 2014, Intervenors filed a Petition for Review by the whole Commission of an adjudication order issued by the Atomic Safety and Licensing Board presiding over the Fermi 3 Combined Operating License proceeding, which is an adversarial litigation. The review is an appeal to the full Nuclear Regulatory Commission of the ASLB’s order as to Contention 15, which challenged quality assurance (QA) within the planning effort for proposed Fermi 3 nuclear power plant.. The ASLB ruled in favor of DTE Energy, the sponsoring utility. Contention 15 is novel and involves interpretation of NRC regulations governing quality standards directly related to the planning and construction of the proposed Fermi 3. Rigorous quality assurance is the *sine qua non* of nuclear safety but it has cost implications for proposed plants because it involves the consistent application of high standards for materials and design. Effective quality assurance is directly correlated to nuclear plant safety.

Commissioner Magwood holds employment outside the Commission which has fatally compromised his ability to function as an independent regulator of nuclear safety: he has accepted the position of Director-General with the Organisation for Economic Co-Operation and Development’s (“OECD’s”) Nuclear Energy Agency (“NEA”). The NEA actively promotes “the development of the production and uses of nuclear energy;” and its policies are set by member governments. “The objective of the Agency is to assist its member countries in maintaining and further developing, through international co-operation, the scientific, technological and legal bases required for a safe, environmentally friendly and economical use of nuclear energy for

peaceful purposes.”²

Some of OECD’s member governments own or sponsor U.S. nuclear licensees and applicants.³ Commissioner Magwood, who has been portrayed in official literature of the OECD as the NEA’s new Director-General, is now affiliated with an entity with a mandate to promote nuclear energy and the economic interests of its members. His NEA association directly conflicts with the terms of the Energy Reorganization Act of 1974 which established the NRC and dictates that safety is the Commission’s overriding concern, while leaving promotion to the U.S. Department of Energy (“DOE”).

The proposed Fermi 3 is the prototype Economic Simplified Boiling Water Reactor (ESBWR) design in the global nuclear industry. Approval of the Fermi 3 COL is being watched in several countries where the General Electric-Hitachi ESBWR design is being considered. The OECD-NEA - the very agency which Commissioner Magwood will soon head - is promoting the design.⁴

B. Applicable Legal Principles

The standards governing recusal of NRC Licensing Board members are the same as those for the federal judiciary. *In re Three Mile Island Alert*, 771 F.2d 720, 738 (3rd Cir. 1985),

²“2013 NEA Annual Report,” p.2, <http://www.oecd-nea.org/pub/activities/ar2013/ar2013.pdf>

³Statute of the OECD Nuclear Energy Agency, Articles 1 and 8 (as amended on 13 July 1995), <https://www.oecd-nea.org/nea/statute.html>. Countries that own or sponsor U.S. nuclear licensees or applicants include, for example, France (MOX Fuel Fabrication Facility through AREVA; Nine Mile Point Units 1 and 2, Calvert Cliffs Units 1 and 2, and Ginna through Electricité de France) and the Netherlands (Louisiana Enrichment Services through URENCO). NEA also promotes the financial interests of many private nuclear companies doing business in the U.S. and other countries.

⁴A search of OECD-NEA’s website turns up over a dozen mentions in agency literature of the ESBWR. <http://www.oecd-nea.org/globalsearch/search.php?q=ESBWR&go-button=>

citing *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365 (1982). In *Three Mile Island Alert*, the Third Circuit Court observed:

A judge must disqualify himself if he “. . . has a personal bias or prejudice either against [a party] or in favor of any adverse party,” 28 U.S.C. Sec. 144. “The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). A rarely invoked exception to the extrajudicial source rule requires recusal when a judge displays “pervasive bias,” regardless of the source of the bias. *Houston Lighting and Power Co.* at 1366. Finally, a judge must also disqualify himself if “. . . his impartiality might reasonably be questioned,” 28 U.S.C. Sec. 455(a). This test calls for recusal “where a reasonable man knowing all the circumstances would harbor doubts concerning the judge's impartiality.” *United States v. Dalfonso*, 707 F.2d 757, 760 (3d Cir.1983).

Id. at 738-739.

These same principles have been explicitly recognized in NRC law and practice. The objective standard is whether a reasonable person knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned. *Public Serv. Elec. & Gas Co. et al.* (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 21-22 (1984); *Hydro Res., Inc.* (2929 Coors Rd., Suite 101, Albuquerque, N.M. 87120), CLI-98-9, 47 NRC 326, 331 (1998). “Section 455(a) requires a showing that would cause an objective, disinterested observer fully informed of the underlying facts [to] entertain significant doubt that justice would be done absent recusal.” *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC __ (Aug. 27, 2010) (slip op. at 6) (quoting *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001)).

Although by its terms the statute does not apply to administrative judges, the Commission and its adjudicatory boards have applied 28 U.S.C. §§ 144 and 455 in dispositioning motions for disqualification under 10 C.F.R. § 2.313. *Entergy Nuclear Generation Co. and Entergy Nuclear*

Operations, Inc., supra (slip op. at 2); *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982) (making clear that Licensing Board members are governed by the same disqualification standards that apply to federal judges).

In sum, an NRC judicial official must step aside if a party to the proceeding files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against that party or in favor of an adverse party. *Public Serv. Elec. & Gas Co. et al.* (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984). That has happened here. Commissioner Magwood is transitioning from safety regulator to that of an institutional advocate for expanded use of nuclear power. The public cannot have any confidence in the integrity of Commissioner Magwood's vote or opinion on the Petition in this case. The Commissioner's new professional affiliation conflicts with his public role and, poses, at a minimum, a prejudicial taint in the Commission's proceedings. Given the underlying circumstances, Commissioner Magwood simply cannot dispel the significant doubt that justice would be done. He must recuse himself from this proceeding.

Certification of 10 C.F.R. § 2.323 Consultation

On June 24, 2014, counsel for Intervenors sent counsel for the NRC Staff and for DTE Electric Company an email, requesting their consent to the filing of this Motion and suggesting a phone conference be had on June 25, 2014. Counsel for DTE stated that DTE has no position on the Motion and that he saw no need for a conference, and counsel for the NRC Staff stated that until she sees the Motion, the Staff has no position on it.

WHEREFORE, Intervenors respectfully pray that Commissioner Magwood recuse himself immediately and permanently from any determination of their Petition for Review.

Respectfully submitted,

/s/ Terry J. Lodge
Terry J. Lodge (OH #0029271)
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
(419) 255-7552
Fax (419) 255-7552
tjlodge50@yahoo.com
Counsel for Intervenors

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Commission**

In the Matter of)	Docket No. 52-033
The Detroit Edison Company)	June 25, 2014
(Fermi Nuclear Power Plant, Unit 3))	

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “INTERVENORS’ MOTION FOR RECUSAL OF COMMISSIONER MAGWOOD FROM PARTICIPATING IN DELIBERATIONS ON PETITION FOR REVIEW OF LBP-14-07 ” have been served by me upon the following persons via Electronic Information Exchange this 25th day of June, 2014:

Ronald M. Spritzer, Chair
Administrative Judge
Atomic Safety and Licensing
Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory
Commission
Washington, DC 20555-0001
E-mail: Ronald.Spritzer@nrc.gov

Washington, DC 20555-0001
E-mail: Michael.Kennedy@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory
Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory
Commission
Washington, DC 20555-0001
[E-mail:OCAAmail@nrc.gov](mailto:OCAAmail@nrc.gov)

Randall J. Charbeneau
Administrative Judge
Atomic Safety and Licensing
Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory
Commission
Washington, DC 20555-0001
E-mail:
Randall.Charbeneau@nrc.gov

Michael F. Kennedy
Administrative Judge
Atomic Safety and Licensing
Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory
Commission

Bruce R. Matters
Detroit Edison Company
One Energy Plaza, 688 WCB

Detroit, Michigan 48226
E-mail: matersb@dteenergy.com

David Repka, Esq.
Tyson R. Smith, Esq.
Counsel for the Applicant
Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
E-mail: drepka@winston.com
trsmith@winston.com

Marcia Carpentier
Counsel for the NRC staff
U.S. Nuclear Regulatory
Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-4126
Marcia.Carpentier@nrc.gov

/s/ Terry J. Lodge
Terry J. Lodge (OH #0029271)
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
(419) 255-7552
Fax (419) 255-7552
Tjlodge50@yahoo.com
Counsel for Intervenors