

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:
William D. Magwood, IV

In the Matter of)
)
)
DTE ELECTRIC CO.) Docket No. 52-033-COL
)
(Fermi Nuclear Power Plant, Unit 3))
)

**DECISION ON THE MOTION OF BEYOND NUCLEAR FOR RECUSAL FROM
PARTICIPATION IN DELIBERATIONS ON PETITION FOR REVIEW OF LBP-14-07**

INTRODUCTION

On June 25, 2014, counsel for Beyond Nuclear filed a motion requesting that I recuse myself from participating in deliberations on “Intervenors’ Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance),” currently before the Commission in the ongoing Fermi Unit 3 Combined Operating License (COL) proceeding.¹ This Motion is based on an assertion that, having accepted an appointment to serve as the Director-General of the Organisation for Economic Co-operation and Development’s (OECD) Nuclear Energy Agency (NEA) effective September 1, 2014, I am no longer able to consider the pending appeal in an impartial manner and must, therefore, recuse myself. Having reviewed the bases presented in the motion, the applicable law, and the facts surrounding my appointment to the NEA, I deny the Motion.

¹ *Intervenors’ Motion for Recusal of Commissioner Magwood from Participation in Deliberations on Petition for Review of LBP-14-07* (June 25, 2014) (Motion).

BACKGROUND

OECD was founded in 1961 with the mission “to promote policies that will improve the economic and social well-being of people around the world.”² This mission is accomplished through the cooperation of its 34 member nations from Europe, North and South America, and the Asia-Pacific region.³ The organization operates under a set of core values that include: objective, independent, and evidence-based analyses; encouraging open debate and a shared understanding of issues; challenging conventional wisdom; identifying and addressing long-term issues; and building credibility through trust, integrity, and transparency.⁴

The NEA is an agency within the OECD. Its mission, as stated in its Strategic Plan, 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. To provide authoritative assessments and to forge common understandings on key issues as input to government decisions on nuclear energy policy and to broader OECD policy analyses in areas such as energy and sustainable development.⁵

This mission is carried out by NEA’s 31 member countries. Membership includes countries with robust, mature nuclear energy programs (for example, the United States, Japan, and France); countries that are starting or expanding their nuclear energy programs (for example, Turkey and the Czech Republic); countries that are halting or reducing their nuclear energy programs (for example, Germany), and countries that do not have and are not developing commercial nuclear power programs (for example, Ireland and Italy). The NEA, with the support of its member countries, focuses on facilitating policy analyses, sharing information and experience amongst

² <http://www.oecd.org/about/>. Last accessed July 14, 2014.

³ *Id.*

⁴ *Id.*

⁵ The Strategic Plan of the Nuclear Energy Agency, 2011-2016 (Strategic Plan), at 15.

its members, developing cooperative research projects, and developing consensus positions on technical issues, including those relevant to nuclear safety regulators around the world.⁶

Following the announcement of his planned retirement by former NEA Director-General Luis Echevaria, I became a candidate for the position of Director-General. In March 2014, it was announced that I would succeed Mr. Echevaria, and that I would begin my service at the NEA on September 1, 2014. In the meantime, I have continued to serve as a Commissioner at the NRC and have observed all applicable ethics guidelines.⁷

The Motion arises in the context of the Combined Operating Licensing proceeding for Fermi Unit 3. The Intervenors have appealed to the Commission an Atomic Safety and Licensing Board order on proposed Contention 15, which challenges quality assurance within the planning effort for the proposed unit. The Motion requests my recusal from consideration of the appeal on the grounds that my future service with the NEA is inconsistent with my present duties and reveals a bias or prejudice in favor of nuclear power.⁸

DISCUSSION

The primary argument presented in the Motion for the need for my recusal is that my ability to be impartial is in question.⁹ Upon consideration of all the relevant facts and

⁶ *Id.*

⁷ The Motion states “Commissioner Magwood holds employment outside the Commission” with the NEA. I feel it is important to clarify that, although I have accepted an offer of future employment with the NEA, I am not currently employed by the NEA. While I am still employed by the NRC, I am prohibited by Federal ethics law and regulations from carrying out any duties on behalf of NEA.

⁸ Motion at 5.

⁹ The Motion also implies that there is a financial link between the Fermi proceeding and the NEA. Motion at 3. The Motion notes both that “[s]ome of OECD’s member governments own or sponsor U.S. nuclear licensees and applicants” and that the unit proposed to be built at Fermi—the General Electric-Hitachi Economic Simplified Boiling Water Reactor—has been discussed in NEA literature. 5 C.F.R. § 2635.606(a) states that a Federal officer “shall not participate personally and substantially in a particular matter that has a direct and predictable effect on the financial interests of the [organization] with whom he has an arrangement concerning future
(Continued . . .)

circumstances, I conclude that a reasonable observer would not question my ability to act as an impartial adjudicator when considering the Intervenors' appeal.

In Commission practice, each individual Commissioner is charged with personally responding to requests for his or her own recusal, and such decisions are not appealable to the entire Commission.¹⁰ Individual Commissioners traditionally look to the standards applied to Federal judges when considering recusal requests.¹¹ Federal courts have held that “an agency official should be disqualified only where ‘a disinterested observer may conclude’ that the official ‘has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.’”¹² Similarly, the NRC recognizes that a Commissioner should disqualify him or herself only if “a reasonable man, cognizant of all the circumstances, would harbor doubts about the judge’s impartiality.”¹³

The Intervenors argue that my future employment with NEA marks a change from “safety regulator to that of an institutional advocate for expanded use of nuclear power.”¹⁴ This concern seems to be based on the portion of NEA’s Mission Statement which says that the NEA “assist[s] its member countries in maintaining and further *developing*, through international cooperation, the scientific, technological and legal bases required for a safe, environmentally employment.” That is not the case here. The simple fact that NEA—an organization of national governments that counts as a chief mission research—has discussed an emerging nuclear technology does not indicate a that there will be a direct and predictable impact on NEA’s financial interests from the Fermi proceeding.

¹⁰ See *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-6, 11 NRC 411 (1980).

¹¹ *In re Joseph Macktal*, CLI-89-14, 30 NRC 85, 91 (1989); see also *Decision on the Motion of Nye County, Nevada, for Recusal/Disqualification of NRC Chairman Allison M. Macfarlane* (September 9, 2013).

¹² *Nuclear Info. & Res. Serv. (NIRS) v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 2007) (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

¹³ *Macktal*, 30 NRC at 91.

¹⁴ Motion at 5.

friendly and economical *use of nuclear energy* for peaceful purposes.”¹⁵ The Intervenor’s focus on the NEA’s role in encouraging maintenance and development of nuclear power signals a misunderstanding of NEA’s purpose, role, and governance structure.

A clearer picture of NEA’s purpose and role—which focuses not on the “development and maintenance of . . . nuclear power,” as intervenors appear to contend, but upon the development and maintenance of the scientific, technical, and legal basis for ensuring that nuclear power, where it is used, is used in a safe, environmentally friendly, and economical manner—can be gleaned from the second portion of NEA’s Mission Statement: “To provide authoritative assessments and to forge common understandings on key issues as input to government decisions on nuclear energy policy and to broader OECD policy analyses in areas such as energy and sustainable development.”¹⁶ The NEA is primarily a research and policy agency. Working with governmental agencies from its member countries—including the NRC¹⁷—NEA works in six key areas: (1) nuclear safety and regulation activities, which “assist member countries in their efforts to develop high standards of safety . . . by supporting the development of effective and efficient regulation and oversight . . . and by helping to maintain and advance the scientific and technical knowledge base;” (2) radioactive waste management activities, which “assist . . . in the development of safe, sustainable and broadly acceptable strategies for the long-term management of all types of radioactive waste;” (3) radiological protection and public health activities, which “assist member countries in the regulation and implementation and further development of the system of radiological protection by identifying and effectively addressing conceptual, scientific, policy, regulatory, operational and societal issues;” (4) nuclear science activities, which help to “identify, collate, develop and disseminate

¹⁵ Strategic Plan at 15 (emphasis added).

¹⁶ *Id.*

¹⁷ NRC staff participate in NEA working groups, committees, and meetings. The NRC’s strategic cooperation with NEA “complements and expands NRC’s research program.” <http://www.nrc.gov/about-nrc/ip/intl-organizations.html>. Last accessed July 14, 2014.

the basic scientific and technical knowledge required to ensure the safe, reliable and economic operation of current and next-generation” technology; (5) activities related to the development and use of nuclear energy, which focus on providing governments and other users “with authoritative, reliable information on a broad range of factors relevant to the current performance and future viability of nuclear power generation . . . for use in policy analysis and decision-making;” (6) legal affairs activities, which focus on “creat[ing] sound national and international legal regimes required for the peaceful uses of nuclear energy;” (7) data bank services, which create an “international center of reference for . . . member countries with respect to basic nuclear tools . . . used for the analysis and prediction of phenomena in the nuclear field;” and (8) information and communication activities.¹⁸ These activities are funded by the NEA and OECD membership as a whole. No one country or company benefits from these activities. Moreover, the NEA has no regulatory authority; although it issues analyses and recommends actions for its member countries, it cannot impose requirements on its members. It is up to the government of each member country, and, in particular, its regulators, to decide whether to adopt NEA policy recommendations.

With a full understanding of the breadth and purpose of the activities at the NEA, which are all focused on information exchange and policy, it is clear to me that no reasonable individual would harbor doubts about my impartiality in the Fermi COL proceeding. The granting or denial of the Fermi COL—let alone a decision regarding a contention based on the license application—will have no impact on the NEA’s financial health or even its future research or policy activities. Similarly, future activities by the NEA will only affect the Fermi COL proceeding—or other NRC licensing activities—if the NRC decides to adopt future NEA policy recommendations. Such a decision would be based on the NRC’s usual regulatory procedures, including any necessary public input and interaction.

¹⁸ Strategic Plan at 17-25.

Courts have long held that “[a]dministrative officers are presumed objective and ‘capable of judging a particular controversy fairly on the basis of its own circumstances.’”¹⁹ It has been my duty since I began my tenure at the Commission to meet my quasi-adjudicatory duties by weighing the evidence and arguments impartially and basing each decision on the adjudicatory record and applicable law. So long as I remain an administrative officer of the NRC, I fully intend to continue to discharge my duties in a fair and impartial manner.

CONCLUSION

I have considered carefully both the arguments presented in the Motion and the applicable legal standards. I find no basis for my recusal and respectfully decline to recuse myself from review of LBP-14-07 or any other matter before the Commission in this proceeding.

/RA/

William D. Magwood, IV
NRC Commissioner

Dated at Rockville, Maryland
this 14th day of July, 2014

¹⁹ *NIRS*, 509 F3d at 572 (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DTE ELECTRIC COMPANY) Docket No. 52-033-COL
)
(Fermi Nuclear Power Plant, Unit 3))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “**Decision on the Motion of Beyond Nuclear for Recusal from Participation in Deliberations on Petition for Review of LBP-14-07**” have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-7H4
Washington, DC 20555-0001
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
hearingdocket@nrc.gov

Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Marcia Carpentier, Esq.
marcia.carpentier@nrc.gov
Sara Kirkwood, Esq.
sara.kirkwood@nrc.gov
Patrick Moulding, Esq.
patrick.moulding@nrc.gov
Kevin Roach, Esq.
kevin.roach@nrc.gov
Michael Spencer, Esq.
michael.spencer@nrc.gov
Robert M. Weisman, Esq.
robert.weisman@nrc.gov
Anthony Wilson, Esq.
anthony.wilson@nrc.gov
Megan Wright, Esq.
megan.wright@nrc.gov
Nicholas Koontz, Paralegal
nicholas.koontz@nrc.gov

Ronald M. Spritzer, Chair
Administrative Judge
ronald.spritzer@nrc.gov

Randall J. Charbeneau
Administrative Judge
randall.charbeneau@nrc.gov

Onika Williams, Law Clerk
onika.williams@nrc.gov

Matthew Zogby, Law Clerk
matthew.zogby@nrc.gov

OGC Mail Center: Members of this office have received a copy of this filing by EIE service.

Decision on the Motion of Beyond Nuclear for Recusal from Participation in Deliberations on Petition for Review of LBP-14-07

Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
Bruce R. Matters, Esq.
matersb@dteenergy.com

Beyond Nuclear, Citizens for Alternatives
To Chemical Contamination, Citizens
Environmental, Alliance of Southwestern
Ontario, Don't Waste Michigan, Sierra Club,
et al.
316 N. Michigan Street, Suite 520
Toledo, OH 43604-5627
Terry J. Lodge, Esq.
tjlodge50@yahoo.com
Michael J. Keegan, Esq.
mkeeganj@comcast.net

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Counsel for the Applicant
Noelle Formosa, Esq.
nformosa@winston.com
Rachel Miras-Wilson, Esq.
rwilson@winston.com
David Repka, Esq.
drepka@winston.com
Tyson R. Smith, Esq.
trsmith@winston.com
Carlos L. Sisco, Senior Paralegal
CSisco@winston.com

Beyond Nuclear
Reactor Oversight Project
6930 Carroll Avenue Suite 400
Takoma Park, MD 20912
Paul Gunter, Director
paul@beyondnuclear.org

Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, NW
Washington, DC 20037-1122
Counsel for Progress Energy
Robert Haemer, Esq.
robert.haemer@pillsburylaw.com

[Original signed by Brian Newell]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 14th day of July, 2014