DECISION ON THE MOTION OF THE STATE OF WASHINGTON, THE STATE OF SOUTH CAROLINA, AIKEN COUNTY, SOUTH CAROLINA, AND WHITE PINE COUNTY, NEVADA FOR RECUSAL/DISQUALIFICATION

Introduction and Background

The State of Washington, the State of South Carolina, Aiken County, South Carolina, and White Pine, Nevada (Movants) filed a motion on July 9, 2010, in which the Movants requested that Commissioner Apostolakis, Commissioner Ostendorff, and I recuse ourselves from any consideration of the Construction Authorization Board's (Board) decision to deny the U.S. Department of Energy's (DOE) motion to withdraw its application for authorization to construct a high level waste repository at Yucca Mountain. ¹ Since individual Commissioners make their own individual decisions in response to motions for disqualification, ² I respond to the motion only insofar as the Movants request my recusal. My review of the bases for the motion

¹ State of Washington, State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada's Motion for Recusal/Disqualification (July 9, 2010) (Motion).

and the pertinent legal standards lead me to a clear decision: I deny the motion that I recuse myself.

The Movants rely on my testimony before the Senate Committee on Environment and
Public Works on February 9, 2010, at the hearing concerning in part my nomination for a
position as a Commissioner of the United States Nuclear Regulatory Commission (NRC). The
testimony at issue occurred as part of a brief exchange with Senator Barbara Boxer:

    Senator Boxer: Now, I have a question here for all three of you from Senator Reid. You
can just answer it yes or no. If confirmed, would you second guess the Department of
Energy’s decision to withdraw the license application for Yucca Mountain from NRC’s
review?

    Mr. Magwood: No

    Senator Boxer: Okay. Anybody else?

    Mr. Apostolakis: No

    Mr. Ostendorff: No

    Senator Boxer: Thank you. I think he will be very pleased with that.3

    DOE had recently filed a motion with the Board to stay the proceeding, in which its
counsel stated that the President, in his budget for fiscal year 2011, had directed that the
Department of Energy discontinue its application to the NRC, and that in accord with these
determinations DOE intended to withdraw the application with prejudice and to submit a
separate motion within 30 days to determine the terms and conditions of withdrawal.4 Several
weeks later, DOE filed its Motion to Withdraw.5 After the Senate confirmed my nomination
(March 19, 2010) and I was sworn in as Commissioner (April 1, 2010), the Board issued an

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3 Hearing on the Nominations of George Apostolakis, William Magwood, and William Charles
   Ostendorff to be Members of the Nuclear Regulatory Commission Before the S. Comm. on
   Environment and Public Works, 111th Cong. 45 (2010) (unofficial transcript) (Senate Committee
   Hearing Transcript).

4 U.S. Department of Energy’s Motion to Stay the Proceeding (Feb. 1, 2010).

5 U.S. Department of Energy’s Motion to Withdraw (Mar. 3, 2010) (Motion to Withdraw).
order suspending the adjudicatory proceeding and consideration of the Motion to Withdraw.\(^6\)

The Commission subsequently issued a decision, which I supported, that vacated the Board’s suspension order and remanded the matter to the Board for prompt resolution of the Motion to Withdraw.\(^7\) The Board issued a decision that denied DOE’s Motion,\(^8\) and the Commission now has before it appeals of the Board’s decision.

The Movants contend that recusal on the matter of the Motion to Withdraw is necessary because my testimony “can be reasonably interpreted to demonstrate” that I “have, in fact, prejudged this matter should the Commission choose to review the [Board’s] decision.”\(^9\) The Movants add, among other things, that “[t]aken at face value, the testimony definitively establishes that [I] have in fact prejudged the issues in this matter.”\(^10\)

**Discussion**

Considering all relevant facts and circumstances, a reasonable person would not conclude that my testimony demonstrates prejudgment of the issues now before the Commission or raises doubt about my ability to consider the issues before the Commission fairly and impartially. “[A]n 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.’”\(^11\) NRC has long recognized that a judge (or Commissioner) should disqualify himself or herself only if “a reasonable man, cognizant of all

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\(^6\) Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010) (unpublished).

\(^7\) CLI-10-13, 71 NRC __ (Apr. 23, 2010) (slip op.).

\(^8\) LBP-10-11, 71 NRC __ (June 29, 2010) (slip op.).

\(^9\) Motion at 5.

\(^10\) Id.

\(^11\) 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)).
the circumstances, would harbor doubts about the judge’s impartiality.\footnote{In re Joseph J. Macktal, CLI-89-14, 30 NRC 85, 91 (1989) (citations and internal quotation marks omitted). NRC case law draws upon the standards for the Federal judiciary. \textit{Id.} Under 28 U.S.C. § 455(a): “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” In a recent opinion, the U.S. Supreme Court observed that a judge should be disqualified under 455(a) only if it appears to a reasonable, objective observer “that he or she harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside when judging the dispute.” \textit{Caperton v. A.T. Massey Coal Co.}, 556 U.S. __, 129 S. Ct. 2252, 2266 (2009) (quoting \textit{Litecky v. United States}, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring)).} Further, 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’\footnote{NIRS, 509 F.3d at 571 (quoting \textit{United States v. Morgan}, 313 U.S. 409, 421 (1941)).} and that “[a] party cannot overcome this presumption with a mere showing that an official ‘has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute.’\footnote{\textit{Id.} (quoting \textit{United Steelworkers of America v. Marshall}, 647 F.2d 1189, 1208 (D.C. Cir. 1980)).}”

When Senator Boxer asked me if I would second guess DOE’s decision to withdraw the application, it had been my understanding for some time, as learned through the media, that the President had decided to withdraw the application. At the time of the hearing, I believed this to be, in essence, a policy matter that had been already decided. I was aware of the policy debate associated with the intent to withdraw, but was not aware of legal questions regarding DOE’s ability to withdraw.

I had resolved not to comment during the hearing on any specific regulatory or adjudicatory issue that might come before the Commission. While there may be some ambiguity about the meaning of “second guess,” I certainly did not understand Senator Boxer’s question in any sense to ask for my commitment to ignore the law or prejudge an adjudicatory issue of law or fact as to whether DOE could withdraw the application. I answered “no” in response to Senator Boxer’s question because I had no intention of undertaking a gratuitous
assessment or criticism of the reasons for the intent to withdraw. My response reflected my view that the NRC – a regulatory organization – would simply not be a position to “second guess” a policy decision made by the President. Moreover, I was not familiar with how motions to withdraw are handled in cases before the NRC’s licensing boards or what legal issues might be raised with such motions.

Further, I did not answer Senator Boxer’s question in the context of DOE’s Motion to Withdraw or the issues now associated with it. DOE did not file its Motion to Withdraw until several weeks after the hearing. At the time of the hearing, the Commission did not have before it – as it does now – extensive pleadings by multiple parties on the legal questions related to DOE’s Motion to Withdraw. No laws or legal questions were the subject of discussion or even mentioned during the brief colloquy with Senator Boxer. Indeed, the brevity of the exchange with Senator Boxer is consistent with my belief that a reasonable person, knowing all the circumstances, would not see my response as seriously suggesting, or Senator Boxer’s question as requesting, a fixed and unalterable position on a specific question of law and fact in this agency adjudication.15

Finally, for me to have indicated at the hearing an unwillingness to judge an issue fairly and impartially would have been entirely contrary to my testimony that I aspired to be a “strong, independent voice” and always “do the right thing, even when the right thing [isn’t] easy.”16 In the Commission’s quasi-adjudicatory role, it is my responsibility to weigh the evidence and arguments impartially and to base my decision on the adjudicatory record and the applicable

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15 The brevity, nature, and timing of the exchange with Senator Boxer also belie the notion that it amounts to such undue and extensive legislative interference with my ability to exercise independent judgment in the agency’s adjudicative function as to render invalid such decision-making. The circumstances presented here simply bear no resemblance to the facts that would meet such a high threshold. See Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966). Accord ATX, Inc. v. U.S. Dep’t of Transp., 41 F.3d 1522, 1527-30 (D.C. Cir. 1994).

16 Senate Committee Hearing Transcript at 36-37.
law. I intend to exercise that responsibility to the very best of my ability and consistent with my sworn duty to execute faithfully the laws of the United States.

Conclusion

I have considered carefully the motion seeking my disqualification and the applicable legal standards. I find no basis for my recusal and respectfully decline to recuse myself from the matters before the Commission in this proceeding.

/RA/
William D. Magwood, IV
NRC Commissioner

Dated at Rockville, Maryland
this _11_ day of August, 2010
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

Docket No. 63-001-HLW
ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Commissioner Magwood Decision on Motion for Recusal/Disqualification, dated August 11, 2010, have been served upon the following persons by Electronic Information Exchange.

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