UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before NRC Chairman Macfarlane

In the Matter of	**)**	
	)	
U.S. DEPARTMENT OF ENERGY	**)**	**Docket No. 63-001-HLW**
	)	
(High Level Waste Repository)	**)**	**August 30, 2013**

STATE OF NEVADA ANSWER IN OPPOSITION TO NYE COUNTY'S MOTION FOR RECUSAL/DISQUALIFICATION OF CHAIRMAN MACFARLANE

On August 23, 2013, Nye County, Nevada ("Nye") moved that Chairman Macfarlane recuse or disqualify herself from participation in the adjudicatory proceeding on the application for a construction authorization for the proposed Yucca Mountain repository. The State of South Carolina, Aiken County, South Carolina, and the National Association of Regulatory Utilities Commissioners ("NARUC") all concurred in the motion.

Chairman Macfarlane now joins three other sitting NRC members (for a total of four out of five) who have at one time or another been the subject of disqualification motions by determined Yucca Mountain proponents. *See* "State of Washington, State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada's Motion for Recusal/Disqualification," filed July 9, 2010, at ML101900622.

For the reasons set forth below, Nevada believes that Chairman Macfarlane need not recuse or disqualify herself from this proceeding.

A. Nye's Motion Relies on the Application of an Incorrect Recusal/Disqualification Standard.

Nye's motion is replete with legal errors. First, Nye ignores the fundamental legal principal that a party seeking disqualification of an agency adjudicator "must overcome a presumption of honesty and integrity in those serving as adjudicators…." *Withrow v. Larkin*,

421 U.S. 35, 47 (1975). As the Court stated in *NIRS v. NRC*, 509 F.3d. 562, 571 (D.C. Cir.), "[g]iven the roles that agency officials must play in the give-and-take of sometimes rough-and-tumble policy debates, courts must tread lightly when presented with this kind of challenge. Administrative officers are presumed objective and 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" [citing *United States v. Morgan*, 313 U.S. 409, 421, 61 S. Ct. 999, 85 L. Ed. 1429 (1941)].

Second, and equally important, Nye uses the wrong disqualification standard. Nye claims that an adjudicator (such as Chairman Macfarlane) must be disqualified whenever she has any prior personal knowledge of or has expressed any prior opinions on matters in controversy. *See* Nye Motion at 2, 11-12. That is not the law.

Thorough research regarding the standard for disqualification of federal judges and members of federal regulatory commissions performing adjudicatory decision-making functions begins with *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), cited by Nye at page 10. In *Cinderella Career & Finishing Schools*, the court required the disqualification of an agency adjudicator because his public statements about a pending case revealed that he "has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Id.*

The research cannot end with *Cinderella Career & Finishing Schools*. When exactly will it appear that an agency adjudicator has in fact "adjudged the facts as well as the law of a particular case in advance of hearing it"? The answer appears in cases that interpret *Cinderella Career & Finishing Schools* to mean that the adjudicator must have "demonstrably made up [his or] her mind about important and specific factual questions and [be] impervious to contrary evidence." *United Steelworkers of America v. Marshall,* 647 F.2d 1189, 1209 (D.C. Cir. 1980),

cert. denied, 453 U.S. 913 (1981). *See also Power v. FLRA*, 146 F.3d 995 (D.C. Cir. 1998); and *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995). Sometimes the formulation of the standard is whether the adjudicator had "a closed mind on the merits of the case." *United States v. Haldeman*, 559 F.2d 31, 284 n. 332 (D.C. Cir. 1976) (*en banc*) (*per curiam*); *Waterbury Hotel Management LLC v. NLRB*, 314 F.3d 645 (D.C. Cir. 2003).

This same disqualification standard was applied more recently in the leading NRC disqualification case, *NIRS v. NRC*, 509 F.3d 562 (D.C. Cir. 2007), cited by Nye on page 10. In *NIRS,* NRC Commissioner McGaffigan stated in an unrelated proceeding that that the Nuclear Information and Resource Service (a party in the case before the agency in which the disqualification issue was raised) "had used 'factoids or made-up facts or irrelevant facts' to support its positions, and that one of its expert witnesses was a 'person who doesn't know anything about radiation.'" *Id.* at 571. The Commissioner also characterized the group as the "Nuclear Disinformation Resource Service." *Id.* The Commissioner subsequently explained that his "personal style" was to "speak vigorously, sometimes colorfully," to "spark debate." *Id.* On judicial review of the Commissioner's refusal to disqualify himself, the Court held that such comments do not support the conclusion that Commissioner McGaffigan had "adjudged the facts as well as the law" regarding the particular license application at issue here. *Id.* The Court stated that "[a] party cannot overcome this presumption [of objectivity and fairness] 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.'" *Id.* [citing *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1981)]. The remarks by Commissioner McGaffigan, held not to be disqualifying, certainly were more suggestive of a closed mind than any of the statements of Chairman Macfarlane cited by Nye.

The cases cited and discussed above specifically address prior extrajudicial opinions about contested matters. However, expressing an extrajudicial opinion on the merits of a case necessarily implies some prior extrajudicial knowledge of the disputed facts of the case as well. Therefore, the legal principle announced and applied in these cases logically must apply both to prior extrajudicial opinions and to prior extrajudicial knowledge – unless of course the judge may be called as a fact witness (the prototypical circumstance addressed by 28 U.S.C. § 455(b)(1)) – which cannot occur here.

In sum, in order for disqualification to be required it must appear from the prior extrajudicial knowledge or the prior extrajudicial opinions that the adjudicator has demonstrably made up his or her mind about important and specific factual questions, has a closed mind, and is impervious to contrary evidence.

As indicated above, Nye espouses a proposition that an adjudicator is disqualified *whenever* he or she has any prior personal knowledge of or has expressed any prior opinions on matters in controversy. This proposition is contrary to the cases cited above. Moreover, none of the cases Nye cites to support its different legal proposition actually does so. One of the cases Nye cites does not exist (*In re M.C.*, cited on page 11 of Nye's motion, is a decision by a District of Columbia local appellate court, not a decision by the U.S. Court of Appeals for the District of Columbia Circuit).

Caperton v. A.T. Massey Coal Co, 556 U.S. 868 (2009) (cited by Nye on page 7) addresses the different circumstance where a party made substantial contributions to the presiding judges' election campaign. *Public Service Electric & Gas Co. (Hope Creek Generating station, Unit 1)*, ALAB-759, 19 NRC 13 (1984) (cited by Nye on page 2) addressed the different circumstance where the administrative judge had performed expert consulting

services for the applicant in support of the application for a construction permit for the same facility. Nye does not allege that Chairman Macfarlane performed consulting services for any party in support of the Yucca Mountain application. *In re M.C.*, 8 A.3d 1215 (D.C. App. 2010) (improperly cited as a D.C. Circuit opinion) (cited by Nye on age 11), *Price Bros. Co. v Philadelphia Gear Corp.*, 629 F.2d 444 (6th Cir 1980) (also cited by Nye on page 11), and *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996) (cited by Nye on page 12) all address the entirely unrelated circumstance where a presiding judge (or his law clerk assisting him on the case) received and apparently considered *ex-parte* information relevant to the merits while the case was pending. *In re M.C* actually rejected the concept, espoused by Nye, that disqualification is required every time a judge has some personal knowledge that bears in some fashion upon a proceeding. *In re M.C.*, 8 A.3d 1215 at 1228 (D.C. App., 2010).

Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir 1988) (also cited by Nye on page 11) addressed a personal relationship between the judges' clerk and the counsel to a party in the case. No such relationship is alleged here. Moreover, the relationship was held to be harmless error. *U.S. v. Bullock*, 2005 U.S. Dist. LEXIS 1833 (E.D. Pa. 2005) (cited by Nye on page 12) merely stands for the proposition that the judges' rulings or observations on the record in the case at hand were not extrajudicial statements warranting disqualification. That proposition is not relevant here.

The other cases Nye cites – *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966), *ATX Inc. v. U.S. Dept. of Transp.*, 41 F.3d 1522 (D.C. Cir. 1994), *Liteky v. U.S.*, 510 U.S. 540 (1994), *Hayes v. Williamsville Cent. School Dist.*, 506 F.Supp.2d 165 (W.D. N.Y. 2007), *In re Joseph J. Macktal*, CLI-89-14, 30 NRC 85, 1989 NRC LEXIS 78 (1989), and *Long Island Lightning Company (Shoreham Nuclear Power Station, Unit No. 1)*, CLI-84-20, 20 NRC 1061 (1984) – are

all cited and stand for the simple and unassailable baseline propositions that (1) disqualification is required if impartiality might reasonably be questioned or prejudgment may reasonably be inferred, and (2) the appearance of bias or prejudgment and not their reality is what is relevant. None of these cases call into question Nevada's central legal proposition – that in order for disqualification to be required it must also appear from the prior extrajudicial knowledge or the prior opinions that the adjudicator has demonstrably made up his or her mind about important and specific factual questions, has a closed mind, and is impervious to contrary evidence.

Finally, Nye is wrong on another aspect of the disqualification standard. Nye truncates the brief quote from the decision in *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 889 (1994), appearing on page 9 of its motion, to create the misleading impression that disqualification is required whenever an adjudicator expresses some hostility or aversion to a party. The complete sentence in the opinion is as follows: "A judge should be disqualified only if it appears 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*" [emphasis added].

B. None of Chairman's Macfarlane's Statements Cited by Nye Require Disqualification.

Nye cites a number of statements by Chairman Macfarlane about Yucca Mountain or DOE. They do not establish the appearance that she has demonstrably made up her mind about important and specific factual questions, has a closed mind, and is impervious to contrary evidence.

Dr. Macfarlane's 2006 testimony before the Senate Committee on Environment and Public Works, cited six times by Nye, relies with a single exception on scientific information about or related to Yucca Mountain published in the 1994-2004 timeframe. The exception is the reference, without further discussion, to a 2006 DOE study making additional safety claims. Her

statements in the 2006 publication "Uncertainty Underground," cited by Nye six times, rely on scientific information about or related to Yucca Mountain published in the 1957-2005 timeframe. Most of the information used in the book is from the period 1999-2002. The DOE TSPA (Total Systems Performance Assessment) discussed in "Uncertainty Underground" is the 2002 version, long since superseded ("Uncertainty Underground" at 395, 398). Clearly, these statements and opinions do not apply directly to an application or TSPA filed years later, in 2008. Perhaps the most significant statement is the one she made in 2009 to David Talbot in the "MIT Technology Review," cited by Nye at page 10. This statement was that Yucca Mountain was unsuitable as a nuclear waste repository. This simple statement reflects an opinion as of 2009, five years ago.

None of these statements suggests she has demonstrably made up her mind, has a closed mind, and is impervious to contrary evidence. Indeed, in "Uncertainty Underground" (at x and 406), Dr. Macfarlane states that "[t]his book is not a judgment of the suitability of Yucca Mountain as a repository for spent nuclear fuel and high-level nuclear waste" and that "I am not trying to suggest abandoning Yucca Mountain and going back to the drawing board." And about one year ago, in her July 24, 2012 testimony before the House Energy and Commerce Subcommittees on Environment and the Economy and Energy and Power, Chairman Macfarlane pledged to keep an open mind about Yucca Mountain. Her full pledge (available on the Committee's web site as an archived webcast of the hearing) was as follows:

> But what I can tell you, and maybe in a sense of reassurance, is that I have spent much time researching Yucca Mountain. I believe all the analyses that I have done are technically defensible. As a scientist I would not try to publish anything that was not technically defensible; it would not be publishable. Most of the analyses that I did of Yucca Mountain for the book, which was published in 2006, were done in the early 2000 time frame. That was before the license application was submitted. I have not read the license application. I have not read – yet – the NRC's technical analysis. Of course, with time, knowledge changes, more evidence comes to light and I intend to keep an open mind.

Finally, accusing DOE of basing decisions on politics (see Nye motion at page 9) is hardly disqualifying. The standard is whether a fair-minded person could set this kind of comment aside when judging the dispute. *See Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 889 (2009). There can be no doubt that Chairman Macfarlane could and would set this comment aside when deciding Yucca Mountain matters. The comment was made in 2006, some seven years ago. Moreover, the suggestion that a Cabinet level agency would be swayed by political considerations is not an expression of hostility or aversion but a commonplace observation of likely political reality. Cabinet level agency heads and senior Cabinet agency officials serve at the pleasure of the President and, under the Constitution, are expected to follow his or her policies within the limits of the law. *See* Constitution Article II, Section 1.

C. Conclusion.

Nye has shown that, in the past, Chairman Macfarlane took public positions, expressed strong views, and held an underlying philosophy with respect to matters related to Yucca Mountain. But this is not disqualifying. What is required is a demonstration that Chairman Macfarlane has a closed mind on contested Yucca Mountain matters that is impervious to contrary evidence. Nye has made no such demonstration.

As the Supreme Court stated over 70 years ago, agency adjudicators "may have an underlying philosophy in approaching a specific case. But [they] are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *U.S. v. Morgan*, 313 U.S. 409, 421 (1941). Nye has not rebutted the presumption that Chairman Macfarlane is a person of "conscience and intellectual discipline" who is capable of putting aside prior opinions and judging Yucca Mountain "fairly on the basis of its own circumstances."

Chairman Macfarlane need not recuse or disqualify herself from this proceeding.

Respectfully submitted,

(*signed electronically*)
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Dated: August 30, 2013

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *State of Nevada Answer in Opposition to Nye County's Motion for Recusal/Disqualification of Chairman Macfarlane* has been served upon the following persons by the Electronic Information Exchange:

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