

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

_____)	Docket No. 63-001-HLW
In the Matter of)	
U.S. DEPARTMENT OF ENERGY)	
(License Application for Geologic)	
Repository at Yucca Mountain))	September 5, 2013
_____)	

**NYE COUNTY'S REQUEST FOR LEAVE TO FILE REPLY TO
STATE OF NEVADA'S ANSWER IN OPPOSITION TO NYE COUNTY'S MOTION FOR
RECUSAL/DISQUALIFICATION OF CHAIRMAN MACFARLANE**

In accordance with 10 C.F.R. § 2.323(c), Nye County, Nevada ("Nye County") respectfully requests leave to file a reply to State of Nevada's Answer in Opposition to Nye County's Motion for Recusal/Disqualification of Chairman Macfarlane ("Nevada's Answer"). A Reply is necessary in light of compelling circumstances.¹ Nevada's Answer is replete with errors, and Nye County could not have reasonably anticipated that Nevada would conflate the multiple standards for recusal under 28 U.S.C. § 455 and attempt to create a new legal standard applicable to all recusal based on personal knowledge. When appropriately interpreted and applied, the separate recusal standards found in 28 U.S.C. § 455(a) and (b)(1) independently warrant recusal in this case. A copy of Nye County's proposed Reply is attached for the

¹ Counsel has in good faith attempted to contact all of the parties to the Yucca Mountain proceeding in accordance with 10 C.F.R. § 2.323(2)(b). As a result of those consultations, the State of South Carolina, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners concur with Nye County's request. The Florida Public Services Commission does not oppose Nye County's request. The State of Washington, the State of California, the Staff of the Nuclear Regulatory Commission, the Department of Energy, the Timbisha Shoshone Tribe, the Native Community Action Council, White Pine County, Nevada, Inyo County, California, and the Prairie Island Indian Community took no position on Nye County's request and reserved the right to respond in the future. The State of Nevada and Clark County, Nevada oppose Nye County's request. Counsel did not receive timely responses from other parties.

convenience of the Commission. The State of South Carolina, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners concur with Nye County's request.

Respectfully submitted,

/Signed (electronically) by/

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In accordance with 10 C.F.R. § 2.323(c), Nye County, Nevada respectfully submits this Reply to State of Nevada’s Answer in Opposition to Nye County’s Motion for Recusal/Disqualification of Chairman Macfarlane (“Nevada Answer”). This Reply is necessary to respond to and refute arguments made by Nevada that Nye County could not reasonably have anticipated. The State of South Carolina, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners concur with Nye County’s reply.

BACKGROUND

Nye County’s Motion for Recusal/Disqualification of NRC Commissioner Allison M. Macfarlane (“Nye County’s Motion”) is fundamentally based on two separate grounds for recusal: (1) the Nuclear Regulatory Commission’s (“NRC’s”) adoption of 28 U.S.C. § 455(a), which requires recusal whenever a reasonable person “would harbor doubts about the judge’s impartiality” if the person knew all relevant circumstances (the “reasonable person” standard); and (2) the second prong of 28 U.S.C. § 455(b)(1), which requires recusal based upon Commissioner Macfarlane’s extensive personal knowledge of the Yucca Mountain licensing obtained extrajudicially from her personal investigation and findings regarding determinative

technical and policy issues in dispute in the licensing proceeding (the “personal knowledge” standard).²

ARGUMENT

I. **Nevada Conflates Elements of 28 U.S.C. § 455(b)(1) and Creates Its Own Universal Standard For Recusal.**

While virtually ignoring Nye County’s legal grounds for recusal under the 28 U.S.C. § 455(a) standard, Nevada appears to focus its Answer on the recusal standards under 28 U.S.C. § 455(b)(1), particularly as it relates to bias.³ Nevertheless, Nevada only specifically refers to that prong of the statutory recusal standard once, in an offhanded manner.⁴

Contrary to the implications of Nevada’s Answer, 28 U.S.C. § 455(b)(1) itself contains two different recusal standards. Disqualification is required whenever “[an adjudicator] has a personal bias or prejudice concerning a party, **or** personal knowledge of disputed evidentiary facts concerning the proceeding.” 28 U.S.C. § 455(b)(1) (emphasis added). These two sub-standards can be referred to as the “bias/prejudice” standard and the “personal knowledge” standard -- and both are enforceable and distinct from the “reasonable person” standard contained in 28 U.S.C. § 455(a).

Nevada jumbles the elements of 28 U.S.C. § 455(b)(1) recusals in a confusing and misleading set of statements. Nevada first states that “expressing an extrajudicial opinion on the merits of the case necessarily implies some prior extrajudicial knowledge of the disputed facts.” It then takes an illogical leap, concluding that the standard for recusal based on “personal knowledge” also requires a showing that an adjudicator has “demonstrably made up

² Additionally, the first prong of 28 U.S.C. § 455(b)(1) requires recusal whenever a commissioner has a personal bias or prejudice concerning a party. These are three completely independent standards, and if any standard is met, recusal is required.

³ Nevada prefaces its analysis and assertions by referring to Nye County’s Points and Authorities at 2,11-12 which address the personal knowledge standard under 28 U.S.C. § 455(b)(1).

⁴ See Nevada’s Answer at 4.

his or her mind about important and specific factual questions, has a closed mind, and is impervious to contrary evidence.”⁵

In essence, Nevada has attempted to create a new standard for recusal by combining the independent prongs of 28 U.S.C. § 455(b)(1). By conflating the two separate standards for recusal under 28 U.S.C. § 455(b)(1), Nevada has created its own personal knowledge standard: “Nevada’s central legal proposition [is] that in order for disqualification to be required it must also appear from the prior extrajudicial knowledge . . . 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.” Nevada’s Answer at 6.

Simply put, this is not the standard for recusal based solely on personal knowledge. See *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996) (ordering disqualification after applying **only** the personal knowledge prong of (b)(1), without any showing of a “closed mind, impervious to contrary evidence,” prejudice, or bias whatsoever). Under the discrete personal knowledge standard, actual bias or prejudice is irrelevant, and recusal is warranted when an adjudicator conducts an extrajudicial investigation into the disputed facts of the case, and reached conclusions, as Dr. Macfarlane has done here. See Nye County’s Motion at 12–13. Thus, an investigator’s knowledge, focused upon the issues in dispute, obtained outside the adjudicatory process, is independent grounds for recusal from the later adjudication process.

Nevada asserts that none of the cases cited by Nye County concerning recusal call into question its central “legal proposition.” Of course, no court addressing NRC’s “reasonable person” standard for recusal, under 28 U.S.C. § 455(a), or the “personal knowledge” prong of 28 U.S.C. § 455(b)(1), independent of any added bias allegation, would call Nevada’s “legal proposition” into question, because it appears that no court has used Nevada’s formulation in applying only those standards.

⁵ *Id.*

Nevada's standard for all § 455(b)(1) recusals is based on language found in *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980), which involved the potential bias of an agency commissioner acting as a rulemaker, not an adjudicator. The Court required a showing that the commissioner had "demonstrably made up [his or] her mind about important and specific factual questions and [was] impervious to contrary evidence" in order to be disqualified. See Nevada Answer at 2. *Marshall*, along with most cases cited by Nevada, fundamentally involved allegations of bias,⁶ a different basis for recusal than the personal knowledge standard found in the second prong of § 455(b)(1) or the reasonable person standard found in § 455(a).⁷ In addition, the bias accusations in *Marshall* were based on extrajudicial statements completely unrelated to the determinative issues in the case. 647 F.2d 1189, 1208–1210.

Nevertheless, Commissioner Macfarlane should still be disqualified even under Nevada's confusing and veiled application of the 28 U.S.C. § 455(b)(1) bias standard, regardless of its validity and applicability in this case. The unequivocal mindset Dr. Macfarlane has exhibited on dispositive issues in the Yucca Mountain licensing proceeding meets Nevada's standard, in addition to passing NRC's "reasonable person" test. In reaching her

⁶ The majority of cases cited by Nevada involved requests for recusal based upon claims of bias. See *Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645 (2003) (alleging bias because a judge had ruled against a predecessor company in a different case, used language from an opponent's brief in a judicial order, and issued adverse evidentiary rulings); *Power v. FLRA*, 146 F.3d 995 (D.C. Cir. 1998) (alleging bias based on a prior incident that occurred when the petitioner and adjudicator worked for the same employer); *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995) (alleging bias based on speculation that a commissioner had made improper statements; the Court also quoted the language from *Marshall* as part of an appellate standard of review, including a deferential abuse of discretion standard, that is different from the standard that would apply to a commissioner in determining whether recusal is warranted); *U.S. v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (a criminal case where judicial bias and prejudice was alleged based on harmless remarks in which a judge expressed his belief that juries are fair-minded); *NIRS v. NRC*, 509 F.3d 562 (D.C. Cir. 2007) (denying a demand for recusal based on comments that were interpreted as a bias against a party, made in a completely unrelated proceeding that in no way indicated that the commissioner had prejudged the substantive issues of the proceeding in question).

⁷ Nye County's Motion admittedly included one sentence and citation indicating that Dr. Macfarlane has exhibited "hostility or aversion" to DOE and its positions. See Nye County's Motion at 9. However, the fundamental basis for its Motion is clearly NRC's "reasonable person" standard for recusal, under 28 U.S.C. § 455(a), and the "personal knowledge" prong of 28 U.S.C. § 455(b)(1).

conclusions, Dr. Macfarlane initiated and conducted her own independent scientific, technical, and factual investigations of Yucca Mountain outside the NRC proceeding. Indeed, Yucca Mountain was a major focus of her professional activities for many years. Under these circumstances, any presumptions of impartiality and objectivity allegedly conferred upon Dr. Macfarlane by virtue of the cases cited by Nevada⁸ have been overcome.

II. A Reasonable Person Would Harbor Doubts About Commissioner Macfarlane's Impartiality.

Nevada ignores NRC's adoption of 28 U.S.C. § 455(a), the first standard discussed at length in Nye County's Motion. NRC has properly interpreted 28 U.S.C. § 455(a) to require recusal whenever a reasonable person "would harbor doubts about the judge's impartiality" if the person knew all relevant circumstances. *In re Joseph J. Macktal*, CLI-89-14, 30 NRC 85, 91 (1989); *Long Island Lighting Co.*, (Shoreham Nuclear Power Station, Unit 1), CLI-84-20, 20 NRC 1061, 1078 n. 46 (1984). Actual bias or prejudice need not be demonstrated under this standard for recusal. See, e.g., *Hayes v. Williamsville Cent. School Dist.*, 506 F. Supp. 165 (W.D.N.Y. 2007). Nevada has failed to address this precise standard.

A reasonable person would certainly conclude that Commissioner Macfarlane has prejudged a number of issues at the center of this licensing adjudication, and would harbor doubts about her impartiality in this case. In fact, the public, the regulated industry, and a broad range of media outlets, spanning the entire political spectrum, have no problem assessing the situation and concluding that Commissioner Macfarlane has prejudged the issues in this case.⁹ Nevada on the other hand ignores the facts.

⁸ *Withrow v. Larkin*, 412 U.S. 35, 47 (1975); *NIRS v. NRC*, 509 F. 3d. 562, 571 (D.C. Cir. 2007); *United States v. Morgan*, 313 U.S. 409, 421, 61 S. Ct. 999, 85 L. Ed. 1429 (1941).

⁹ See, e.g., Karoun Demirjian, *Few barriers between Nevada and nation's nuclear waste*, LAS VEGAS SUN: BLOGS, August 13, 2013 ("[H]er history opposing Yucca Mountain is well documented."); Todd Sperry, *Nuke regulators, new chief hope to move beyond controversial predecessor*, CNN Wire, July 9, 2012 ("Like Jaczko, Macfarlane is considered an ally to Senate Majority Leader Harry Reid's steadfast opposition of disposing nuclear waste in his home state of Nevada."); Lisa Mascaró, *BLOG: Politics Now: Yucca Mountain critic among nominees confirmed to nuclear panel*, D.C. Now (LOS ANGELES TIMES), June 30, 2012 ("Macfarlane's nomination by Obama gave nod to the continued power of the Yucca

As demonstrated by Nye County, however, Commissioner Macfarlane has gone beyond what is required for recusal under 28 U.S.C. § 455(a) by prejudging and reaching conclusions on a number of critical issues in contention in the Yucca Mountain licensing proceeding, including, but not limited to: whether the Total System Performance Assessment (“TSPA”) can demonstrate safety at the repository; whether the TSPA can be calibrated and validated as part of the license application process; whether all essential features, events, and processes (“FEPs”) have been adequately identified and assessed by DOE; whether numerous fundamental DOE conclusions, such as precipitation rates, water percolation rates, climate change, volcanism, and seismic activity, have been correctly addressed; and even whether Yucca Mountain is suitable for a nuclear waste repository. Nye County’s Motion at 3–10. Dr. Macfarlane’s answer to each of the questions is “No.” See *Id.*

It is no wonder that Nevada fails to find these issues worthy of recusal. Dr. Macfarlane’s conclusions and Nevada’s contentions on each of these critical issues are nearly

Mountain issue in the critical electoral swing state of Nevada. Senate Majority Leader Harry Reid (D-Nev.) praised her confirmation.”); Stephens Washington Bureau, *Senate confirms Yucca critic as NRC chairman*, LAS VEGAS REVIEW-JOURNAL, June 30, 2012 (“The Senate on Friday confirmed a nuclear waste expert and Yucca Mountain critic to become chairman of the Nuclear Regulatory Commission. Allison Macfarlane ... was the choice of Sen. Harry Reid, D-Nev.”); Hannah Northey, *NRC: Quick confirmation of Macfarlane, Svinicki likely, but can new leader bring peace to the commission?*, Environment and Energy Daily, June 11, 2012 (“Senate Majority Leader Harry Reid ... is hoping for a quick confirmation for Macfarlane, as he publicly opposes the Yucca project.”); Matthew L. Wald, *An N.R.C. Nomination Is Shining a Spotlight On the Disposal of Waste*, THE NEW YORK TIMES, June 11, 2012 (“Dr. Jackzo used [administrative decisions] to slow down consideration of Yucca Mountain; if Yucca questions reached her desk in the next few months, Dr. Macfarlane is expected to do the same.”); Lisa Mascaro, *Yucca Mountain Critic Picked to Head Nuclear Panel*, ABERDEEN AMERICAN NEWS (South Dakota), May 25, 2012 (“[I]n choosing Macfarlane, who has raised scientific concerns about the viability of storing waste in Nevada, the White House gave nod to the continued importance of the issue for the crucial campaign swing state of Nevada - and its senior senator, Majority Leader Harry Reid.”); Geof Koss, *Obama Nominates Yucca Critic to Replace Jaczko at NRC*, Congressional Quarterly Today May 24, 2012 (“President Obama nominated a George Mason University environmental science professor and critic of the proposed Yucca Mountain radioactive waste disposal site to replace the outgoing head of the Nuclear Regulatory Commission.”); Todd Sperry, *Obama nominates successor to Nuclear Regulatory Commission's top post*, CNN Wire, May 24, 2012 (“Macfarlane’s ... criticism of plans to dispose nuclear waste at the Yucca Mountain Nuclear Repository in Nevada makes her nomination a more popular choice with Senate Majority Leader Harry Reid. The Yucca Mountain site has long been a political lightning rod for the Nevada senator.”); Adam J. White, *Yucca Mountain: A Post-Mortem*, NEW ATLANTIS, Fall 2012 (“When the White House tapped Macfarlane in 2012 to chair the NRC, it was clearly with the aim of continuing the dismantling of Yucca that her predecessor had begun.”); Darius Dixon & Darren Goode, *Reid's 'rat' slam shows tough side*, Politico.com, July 30, 2012 (“[T]he term of newly confirmed Chairwoman Allison Macfarlane - another Yucca Mountain critic - doesn't expire until next summer.”).

identical. Further, despite Nevada's caveats concerning the timing of her book, and other public statements, neither Dr. Macfarlane's conclusions nor DOE's approach have fundamentally changed since 2006, and DOE's application was based upon the same modeling and technical records that Commissioner Macfarlane has repeatedly criticized. Indeed, in 2009, after the DOE application had been filed, she flatly stated that the Yucca Mountain site is unsuitable for a nuclear waste repository. See David Talbot, *Life After Yucca Mountain*, MIT Technology Review, June 23, 2009 (where, when asked whether Yucca Mountain was "unsuitable" as a nuclear waste repository, Dr. Macfarlane responded: "Yes."). A reasonable person would be understandably perplexed as to why that statement does not end the debate on whether recusal is appropriate.

CONCLUSION

Any presumption of impartiality or objectivity that could be conferred upon Commissioner Macfarlane has been overcome, and Commissioner Macfarlane's recusal is warranted under the proper NRC recusal standards. A reasonable person would harbor serious doubts about her impartiality, and recusal is warranted under the NRC's adoption of 28 U.S.C. § 455(a). Additionally, the personal knowledge she obtained from conducting her own independent investigation of the Yucca Mountain site warrants recusal under 28 U.S.C. § 455(b)(1). Though Nevada has conflated and confused these legal standards for recusal, recusal would still be warranted even under its proffered standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Nye County's Request for Leave to File Reply to State of Nevada's Answer in Opposition to Nye County's Motion for Recusal/Disqualification of Chairman Macfarlane" in the above-captioned proceeding have been served on the following persons this 5th day of September, 2013, by Electronic Information Exchange.

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