

August 4, 2006 (2:11pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONOFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the matter of:

Docket No. 50-293-LR

ASLBP No. 06-848-02-LR

ENTERGY NUCLEAR OPERATIONS, INC.

(Pilgrim Nuclear Power Station)

License Renewal Application

August 4, 2006

**MOTION ON BEHALF OF PILGRIM WATCH FOR DISQUALIFICATION OF
JUDGE NICHOLAS TRIKOUROS IN THE PILGRIM NUCLEAR POWER
STATION RE-LICENSING PROCEEDING**

This motion is submitted on behalf of Pilgrim Watch, seeking disqualification of Judge Nicholas Trikouros from this proceeding based on his July 27, 2006 disclosure of past work he performed in the employment of Entergy Nuclear Operations on matters directly relevant to the facts of this case. His recusal is required by 28 Section 455.

BACKGROUND

On January 25, 2006, Entergy Nuclear Operations, Inc. submitted an application for renewal, pursuant to 10 C.F.R. Part 54 of Operating License No. DPR-35 for the Pilgrim Nuclear Power Station. On March 27, 2006, the NRC published a notice of acceptance and docketing and opportunity for hearing regarding the License Renewal Application (LRA). On May 25, 2006, Pilgrim Watch filed a Request for a Hearing and Petition to Intervene. On June 7, 2006, an Atomic Safety and Licensing Board was

established to preside over this proceeding. The members of this Board are Ann Marshall Young, Chair, Richard F. Cole, Administrative Judge, and Nicholas G. Trikouros, Administrative Judge. On July 6 and 7, 2006, the Board heard oral arguments by the parties to this proceeding in Plymouth, Massachusetts. On July 27, 2006, a teleconference was held to address further briefing on the definition of “new and significant information” in this proceeding. In the course of this teleconference Judge Trikouros disclosed that in 2004 and 2005 a company in which he was a Principal, Panlyon Technologies, had been commissioned by Entergy Northeast to provide evaluations of the time available for recovery actions given a loss of coolant from potential malicious acts in an Entergy-owned spent fuel pool. This disclosure was also distributed in an e-mail statement on July 27, 2006 (see Exhibit A)¹.

DISCUSSION

The Commission has made clear that Licensing Board members are governed by the same disqualification standards that apply to Federal judges. *Public Service Electric and Gas Company, et al.* (Hope Creek Generating Station), ALAB 759, 19 NRC 13, 20 (1984). The statutory foundation for these standards is found in 28 U.S.C. sections 455. 28 U.S.C. 455 (1988). Section 455 imposes a reasonable person standard on the grounds for disqualification. If a reasonable person knowing all the circumstances would be led to the conclusion that the judge’s impartiality might reasonably be questioned, he must recuse himself. *Hope Creek*, supra, 19 NRC at 20-21. In *Houston Lighting and Power Co.* 15 NRC 677, 680 (1982), the board emphasized that an adjudicator is subject to

¹ Judge Trikouros has not disclosed his current interest in Panlyon Technologies. The company appears to still be a going concern, and Entergy is listed as one of its current clients. As its Founder and former President, if he still has any financial stake in this consulting company it should be disclosed immediately.

disqualification for the *appearance* of bias or prejudgment of the factual issues, as well as for *actual* bias or prejudgment.

Section 455 consists of two separate, but substantially overlapping, bases for recusal, as described in a report published by the Federal Judicial Center. *Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144*, Federal Judicial Center (2002). The new section 455(a) replaced the subjective standard of the 1948 statute with an objective standard. It is no longer the case that a judge should recuse where “in his opinion” sitting would be improper, but rather where his or her impartiality “might reasonably be questioned.” *Id.* at 5. Section 455(b) spells out certain situations in which partiality is *presumed* and recusal is required. The former deals exclusively with the appearance of partiality in any circumstance, whereas the latter pertains to conflicts of interest in specific instances. *Id.* Thus, the existence of the facts listed in section 455(b) requires recusal, even if the judge believes they do not create an appearance of impropriety. *Id.*, citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 n.8 (1988). Any circumstance in which a judge’s impartiality might reasonably be questioned, whether or not touched on in section 455(b), requires recusal under section 455(a). *Id.* A distinction between 455(a) and 455(b) is that under the terms of 455(e), parties may waive the disqualification of a judge under 455(a). In contrast, a waiver is not permitted if the grounds for disqualification arise under 455(b).

In the *Hope Creek* case, the facts that gave rise to disqualification are instructive here. In that case, the Judge had performed work as a consultant to the Applicant for the facility in question, but the work had been performed over a decade earlier, and did not involve facts that were in dispute or were the subject of that hearing. Nevertheless

the Appeal Board stated that no *actual* bias or prejudgment needed to be found and held that he should have recused himself. The issue was whether, under 455(a) a fully informed reasonable person would question his impartiality in that proceeding. *Id.* at 22. The Board then went on to state that “even in the absence of a perception question, Section 455(b)(2) requires disqualification in circumstances where, for example, in private practice the judge served as a lawyer in the matter in controversy,” and disqualification in such circumstances may not be waived. *Id.* at 23. Although Section 455(b)(2) was cast in terms of service as a lawyer because it was written for the Federal Judiciary, the Appeal Board in *Hope Creek* applied these disqualification standards to “an adjudicator versed in a scientific discipline rather than in the law” stating that “disqualification is required if the adjudicator had previously provided technical expertise to one of the parties related to the ‘matter in controversy’.” *Id.* at 23. Thus, the Appeal Board in *Hope Creek* found that the work performed by the Judge as a scientific consultant for the Applicant created both an *appearance* of partiality within the meaning of 455(a) and was sufficiently related to the proceeding to bring Section 455(b)(2) into play. Either one would have been sufficient for his disqualification. *Id.* at 25.

In the present case, 28 U.S.C. 455(a) and 455(b)(1) and (2) require Judge Trikouros’ disqualification. In his statement to the parties, Judge Trikouros has disclosed that, unlike the Judge in the *Hope Creek* case, he was a paid consultant to the Applicant involved with investigating the very facts that are in issue in this proceeding, and that this work was not completed until a year ago.

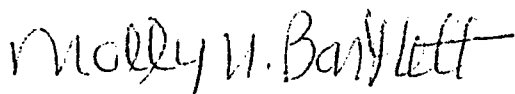
In Contention 4 of its Petition, Pilgrim Watch asserts that Entergy has failed to address Severe Accident Mitigation Alternatives which might reduce the potential for

spent fuel pool water loss and fire. As part of its basis for this Contention, the Petition outlines the risks from accidents or malicious acts that could cause partial or complete water loss and result in a catastrophic fire. Judge Trikouros states in his disclosure statement that the company of which he was President was commissioned by Entergy to provide evaluations of the time available for recovery actions if a loss of coolant occurred following malicious acts. He states that he provided management overview for this project and was consulted regarding the modeling assumptions and the viability of the results. Although not the principal investigator, his management of the project and assessment of the viability of the results have given him “personal knowledge of disputed evidentiary facts concerning the proceeding,” under Section 455(b)(1). Although he appears to distinguish this work from the facts of the present case because it was performed for pressurized water reactors as opposed to boiling water reactors, Pilgrim Watch does not find this distinction compelling, as the work was performed for the spent fuel pools of those reactors. He further states that the results were included in the National Academy of Sciences Report entitled “Safety and Security of Commercial Spent Nuclear Fuel Storage: Public Report,” noting that Pilgrim Watch referenced the NAS Report in its Contention, and implying that this somehow reduces the likelihood of bias in favor of Entergy. Pilgrim Watch rejects this notion. The fact that this Judge has worked on the exact scenario raised in the Contention, and on behalf of the Applicant, irreparably taints his involvement in this proceeding *no matter what conclusions he drew from those facts*. From this work he has “personal knowledge of disputed evidentiary facts concerning the proceeding,” under 455(b)(1). He also served as a consultant in the “matter in controversy,” under 455(b)(2), as applied to scientific consultants by the

Appeal Board in *Hope Creek*. In neither of these cases is it necessary that *actual* bias or prejudice be present or demonstrated. The specific scenarios in 455(b) spell out certain situations where partiality is presumed and recusal is required. Federal Judicial Center Report, at 5.

While Judge Trikouros asserts that his work in this area gives him special technical expertise with which to adjudicate, and Pilgrim Watch appreciates that such an expertise in this highly technical area is a valuable addition to the Board, in the present proceeding the appearance of bias is simply too overwhelming to meet the standards of 28 U.S.C. 455, and the past practices of the Commission. Pilgrim Watch does not assert any actual bias or partiality on the part of Judge Trikouros, and none is required by the statute. The past work performed by the Judge Trikouros for the Applicant creates an appearance of partiality under 455(a), personal knowledge under 455(b)(1), and was sufficiently related to the "matter in controversy" to require recusal under 455(b)(2). For the above stated reasons, Pilgrim Watch requests that Judge Trikouros recuse himself or be disqualified.

Respectfully submitted,

A handwritten signature in black ink, reading "Molly H. Bartlett". The signature is written in a cursive, flowing style with a horizontal line extending from the end.

Molly H Bartlett
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