

AUG 29 2018

RECEIVED IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED

AUG 29 2018

CLERK

STATE OF NEVADA,)
)
Petitioner,)
v.)
)
UNITED STATES NUCLEAR)
REGULATORY COMMISSION;)
DAVID A. WRIGHT,)
COMMISSIONER; and)
UNITED STATES OF AMERICA,)
)
Respondents.)

Case No. 18- 18-1232

PETITION FOR REVIEW

1. The State of Nevada hereby petitions the court for review of the “Decision on the Motion of the State of Nevada for Recusal of Commissioner David A. Wright,” dated and issued on July 2, 2018 (Wright Recusal Decision). A copy of this decision is attached.

2. This Petition for Review pertains to Commissioner Wright’s refusal to recuse himself from participating in any decision in the proceeding pending before the United States Nuclear Regulatory Commission on the application of the United States Department of Energy for an authorization to construct the proposed repository for the disposal of high-level radioactive waste in Yucca Mountain, Nevada (“Yucca Mountain proceeding”).

3. Nevada requests that the court (1) declare that Commissioner Wright's recusal decision was arbitrary and capricious, an abuse of discretion, contrary to Constitutional right, and otherwise unlawful; (2) set aside Commissioner Wright's recusal decision; (3) require that Commissioner Wright recuse himself from the Yucca Mountain proceeding; and (4) grant such other and further relief as may be appropriate.

4. This court has jurisdiction pursuant to 42 U.S.C. § 10139 (a) (1); venue lies in this court pursuant to 42 U.S.C. § 10139 (a) (2); the Petition is timely filed pursuant to 42 U.S.C. § 10139 (c).

Respectfully submitted,

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Attorney General
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Dated: August 29, 2018

**“Decision on the Motion of the State of Nevada for
Recusal of Commissioner David A. Wright,”**

Dated and issued July 2, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

David A. Wright

In the Matter of

U.S. Department of Energy

(High-Level Waste Repository)

Docket No. 63-001-HLW

**DECISION ON THE MOTION OF THE STATE OF NEVADA FOR RECUSAL OF
COMMISSIONER DAVID A. WRIGHT**

The State of Nevada has requested that I recuse or disqualify myself from any participation in the Commission's decision in the captioned matter, which involves the U.S. Department of Energy's (DOE) application for a construction authorization application at Yucca Mountain, Nevada.¹ After careful consideration of the motion and the applicable law on disqualification of quasi-judicial officers, I decline to recuse myself from the Yucca Mountain licensing proceeding. As discussed below, my limited participation was not related to the merits of the proceeding, and my public statements were intended as general support for a long-term nuclear waste storage solution. In short, I have not prejudged the technical, legal, or policy issues in the licensing proceeding.

I. BACKGROUND

The Nuclear Waste Policy Act (NWPA) requires DOE to submit to the U.S. Nuclear Regulatory Commission (NRC) a construction authorization permit for a geologic repository for the storage of high-level radioactive waste at Yucca Mountain, Nevada.² Upon receipt of the

¹ *Nevada Request That Commissioner Wright Be Recused* (June 7, 2018) (Motion).

² See 42 U.S.C. § 10134(b).

application, the NWPA requires the NRC to consider and render a decision approving or disapproving the issuance of the permit within three years.³ The NWPA authorizes DOE to construct only one repository.⁴

In 2008, DOE submitted its application.⁵ In September of that year, the NRC accepted the application for review, followed by the October 2008 publication of a notice offering members of the public an opportunity to request a hearing.⁶ In response, several interested parties, including the State of Nevada, requested and were granted a hearing on the application.⁷

Beginning in 2010, events unrelated to the merits of the application curtailed progress on the litigation. As relevant here, in March 2010, DOE filed a motion to withdraw its application.⁸ In response, five entities, including the National Association of Regulatory Utility Commissioners (NARUC), sought to intervene in the proceeding for the limited purpose of arguing the legal question whether DOE had authority to withdraw the application; NARUC's petition did not address the merits of any safety or environmental issue.⁹ The Construction Authorization Board

³ See *id.* § 10134(d).

⁴ See *id.* § 10222(d).

⁵ See Department of Energy; Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at Geologic Repository Operations Area at Yucca Mountain, NV, 73 Fed. Reg. 53,284 (Sept. 15, 2008).

⁶ *Id.*; U.S. Department of Energy (High Level Waste Repository); Notice of Hearing and Opportunity to Petition for Leave to Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008).

⁷ LBP-09-6, 69 NRC 367, 377-78, 483 (2006), *aff'd in part and rev'd in part*, CLI-09-14, 69 NRC 580, 582 (2009).

⁸ *U.S. Department of Energy's Motion to Withdraw* (Mar. 3, 2010).

⁹ See *National Association of Regulatory Utility Commissioners Petition to Intervene* (Mar. 15, 2010) (NARUC Petition).

denied DOE's motion to withdraw.¹⁰ In September 2011, the Commission announced that it was "evenly divided on whether to take the affirmative action of overturning or upholding the Board's decision."¹¹ At that time, recognizing budgetary limitations, the Commission directed the Board to dispose of the matters pending before it.¹² Thereafter, the Board suspended the proceeding.¹³

In 2013, the U.S. Court of Appeals for the District of Columbia Circuit directed the parties to resume the legally mandated process. Specifically, it granted a petition for a writ of mandamus brought by various parties to the proceeding, including NARUC, and ordered the NRC to "promptly continue with the legally mandated licensing process" for the Yucca Mountain application.¹⁴ Following Commission direction in response to that decision, the NRC Staff has since completed the safety evaluation report and a supplemental environmental impact statement, among other things.¹⁵ The administrative adjudication remains suspended.

Nevada filed a motion on June 7, 2018, requesting that I recuse myself from "participating in any Commission decision pertaining to the Yucca Mountain repository licensing process, including the formal adjudicatory licensing proceeding (should it be restarted)."¹⁶ Nevada raises several concerns about my ability to be objective and fair in the licensing process.

¹⁰ LBP-10-11, 71 NRC 609 (2010). In that decision, the Board also granted the new intervention petitions, including NARUC's. *Id.* at 636-49. NARUC argued that DOE lacked authority to withdraw. NARUC Petition at 23-27.

¹¹ CLI-11-7, 74 NRC 212, 212 (2011).

¹² *Id.*

¹³ LBP-11-24, 74 NRC 368, 370 (2011).

¹⁴ *In re Aiken County*, 725 F.3d 255, 267 (D.C. Cir. 2013).

¹⁵ See CLI-13-8, 78 NRC 219, 226-27 (2013).

¹⁶ Motion at 1.

II. DISCUSSION

A. Legal Standards

A Commissioner should disqualify himself or herself only if “a reasonable man, cognizant of all the circumstances, would harbor doubts about the judge’s impartiality.”¹⁷ Courts have held that “[a]dministrative officers are presumed objective and ‘capable of judging a particular controversy fairly on the basis of its own circumstances’”¹⁸ 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.’”¹⁹ Further, “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.’”²⁰

B. Nevada’s Motion

Fundamentally, Nevada’s concerns relate to my advocacy for the interests of South Carolina ratepayers during my tenure as South Carolina Public Service Commissioner.²¹ Nevada asserts that my service as a Commissioner on the South Carolina Public Service

¹⁷ *Joseph J. Macktal*, CLI-89-14, 30 NRC 85, 91 (1989) (internal citations and quotation marks omitted). NRC case law draws upon the standards for the federal judiciary. *Id.* Pursuant to 28 U.S.C. § 455(a), “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The U.S. Supreme Court has observed that a judge should be disqualified under section 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.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (quoting *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring)).

¹⁸ *NIRS v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 2007) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)).

¹⁹ *Id.* (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980)).

²⁰ *Id.* (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

²¹ See Motion at 4.

Commission and my related support of NARUC, as well as my public statements regarding the nation's nuclear waste disposal policy, require my recusal from participation in the Yucca Mountain licensing proceeding.²² Nevada argues that my prior "advocacy is wholly inconsistent with [my] new role as a neutral adjudicatory decision-maker" and that "[a]n objective, disinterested observer fully informed of the facts set forth [in the motion] would surely entertain significant doubt that justice would be done absent ... recusal."²³ I disagree.

1. *NARUC Petition to Intervene*

As stated above, in 2010 NARUC sought to intervene in the Yucca Mountain application adjudication not to challenge or otherwise engage the merits of construction authorization application, but to raise the limited legal question, which is no longer before the Commission, whether DOE could withdraw the application. As part of its intervention petition, NARUC included an affidavit signed by me for the purpose of establishing representational standing to intervene in the proceeding and solely to convey NARUC's legal position that DOE lacked authority to withdraw the license application.²⁴ Nevada argues that my affidavit compels my recusal pursuant to 28 U.S.C § 455(b)(3).²⁵ Section 455(b)(3) requires judicial disqualification where the judge "has served in government employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion

²² See *id.* at 3-5, 6, 8-10.

²³ *Id.* at 11.

²⁴ NARUC Petition, Attach. 1, *Affidavit of the Honorable David Wright, NARUC Member Commissioner, In Support of the Standing of the National Association of Regulatory Utility Commissioners* (Mar. 15, 2010) (Affidavit); see NARUC Petition at 8-9; LBP-10-11, 71 NRC at 638-39 ("The Commissioner of the South Carolina Public Service Commission is not seeking to be admitted as party to represent the State of South Carolina. Rather, NARUC names the Commission member for the purpose of establishing representational standing, so that NARUC may be admitted as party."). See generally 10 C.F.R. § 2.309(d); *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 258-59 (2008) (describing requirements for representational standing).

²⁵ Motion at 3-4.

concerning the merits of the particular case in controversy.” Nevada contends that as an affiant, I served as an “adviser or material witness” on the merits of the proceeding.²⁶

Even assuming for the sake of argument that this provision governs recusal motions here,²⁷ I do not believe that my actions are disqualifying because they are not germane to the ultimate question of my impartiality about the issues at stake before the Commission, should the license application adjudication be restarted. As noted above, neither NARUC nor I sought to weigh in on the merits of the application, the suitability of the Yucca Mountain site from a safety and environmental standpoint. Rather, NARUC sought to intervene—relying on my affidavit to establish standing—regarding the peripheral issue of whether DOE could withdraw its application. My purpose in providing an affidavit was to advocate adherence to the statutorily mandated process for *consideration* of the Yucca Mountain site.²⁸ I did not advocate for a particular result of the NRC’s evaluation of DOE’s application. NARUC’s petition, and my affidavit, was intended solely to move along the statutorily mandated process of the NRC’s assessment of DOE’s application. The affidavit did not speak to any issue that is material to the merits of the NRC’s evaluation of the application.

Nevada also contends that my affidavit contested the merits of the proceeding, in violation of section 455(b)(3).²⁹ Specifically, Nevada asserts that my affidavit concerned the

²⁶ *Id.* at 4-5.

²⁷ See *Ctr. for Auto Safety v. FTC*, 586 F. Supp. 1245, 1250 (D.D.C. 1984) (“If one member of [a regulatory] commission is disqualified or recused, he cannot, under the law, be replaced ... and the body may thus be left ... unable to make an effective decision by virtue of an even split. For that reason, there may remain here, unlike in the judicial area, vestiges of a duty to sit.” (internal citations and quotation marks omitted)); *Washington v. Dep’t of Interior*, 81 M.S.P.R. 101, 104 (1999) (“There is no requirement that the [Merit Systems Protection Board] be bound by the federal judicial rule [on judicial disqualification], inasmuch as it is not a court.”).

²⁸ See 42 U.S.C. § 10134(b), (d).

²⁹ Motion at 5.

merits of one of the contentions admitted by the Board, NEV-NEPA-22.³⁰ In NEV-NEPA-22, Nevada argued that DOE's final environmental impact statement should not be adopted by the NRC because its discussion does not adequately describe the "no-action alternative."³¹ Nevada claims that a statement in my affidavit reflects "apparent approval" of DOE's analysis of the no-action alternative.³² Contrary to Nevada's argument, my affidavit did not vouch for the adequacy of DOE's analysis of the no-action alternative or in any way suggest that the no-action alternative constituted an accurate assessment of what impacts would occur without the licensing of a repository. I included this provision in order to demonstrate the potential harm, sufficient to establish standing, that could result from a continued lack of a long-term nuclear waste storage solution.³³ I had not at the time read Nevada's intervention petition (or reviewed any other contention in the case) and was unaware of NEV-NEPA-22. Indeed, aside from reading Nevada's contention for the purpose of responding to this motion, I have not reviewed the adjudicatory record and have formed no views on any of the challenges posed to the application. Accordingly, I see no reason to recuse myself based on 28 U.S.C. § 455(b)(3).

Nevada also argues for my recusal based on 28 U.S.C. § 455(b)(2), which requires recusal of a federal judge where "in private practice he served as a lawyer in the matter in controversy." Nevada claims, based on case law from the Atomic Safety and Licensing Appeal

³⁰ *Id.*

³¹ See *State of Nevada's Petition to Intervene as a Full Party* (Dec. 19, 2008), at 1132-35.

³² Nevada cites the affidavit at 6 but appears to be referencing the affidavit's paragraph 8, at page 5. Motion at 5; see NARUC Petition, Attach. 1, Affidavit ¶ 8 (citations omitted).

³³ This is hardly a controversial proposition, and not one for which DOE's no-action alternative provides the only proof. The Commission itself has acknowledged that storing waste at the site of nuclear power plants on an indefinite basis will have environmental impacts. See Continued Storage of Spent Nuclear Fuel; Final Rule, 79 Fed. Reg. 56,238 (Sept. 19, 2014); "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" (Final Report), NUREG-2157, vols. 1 & 2 (Sept. 2014) (ADAMS Accession No. ML14196A105 and ML14196A107).

Board, that this statutory provision applies to “an adjudicator versed in a scientific discipline rather than in the law” if that adjudicator “previously provided technical services to one of the parties in connection with the matter in controversy.”³⁴ Accordingly, Nevada asserts, “a non-lawyer Commissioner is subject to disqualification under 28 U.S.C. § 455(b)(2) whenever a lawyer would be disqualified under that same provision.”³⁵ Here again, Nevada’s inaccurately characterizes my limited role in NARUC’s petition. I did not provide technical services to NARUC in connection with the Yucca Mountain adjudicatory proceeding or engage in any way with the substance of the application. As noted above, my involvement related only to the peripheral issue of whether DOE was authorized to withdraw its application. Accordingly, I decline to recuse myself based on 28 U.S.C. § 455(b)(2).

Nevada also argues that I should recuse myself by citing two federal cases.³⁶ First, in *Williams v. Pennsylvania*, a judge was disqualified from participating in a case in which he previously served as a supervisory prosecutor and had authorized the prosecution to seek the death penalty.³⁷ There, the United States Supreme Court held that “there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.”³⁸ The Court explained that “[n]o attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision” such as the decision to seek the death penalty.³⁹ Nevada cites *Williams* without attempting to explain how those facts relate to my participation. My involvement with NARUC’s

³⁴ Motion at 6 (quoting *Public Service Electric & Gas Co.* (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 23 (1984) (internal quotation marks omitted)).

³⁵ *Id.*

³⁶ *Id.* at 7.

³⁷ *Id.* (citing *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016)).

³⁸ *Williams*, 136 S. Ct. at 1905.

³⁹ *Id.* at 1906; see *id.* at 1907.

petition to intervene is clearly distinguishable from the circumstances described in *Williams*; as stated previously, I provided an affidavit that helped NARUC establish standing to intervene on a limited issue unrelated to the merits of the application under adjudication and had no significant, personal involvement in the adjudication. Accordingly, Nevada does not demonstrate how *Williams* would compel me to recuse myself.

Second, Nevada cites *TWA v. Civil Aeronautics Board*, in which the court stated that “[t]he fundamental requirements of fairness ... require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit.”⁴⁰ In *TWA*, the individual sought to be recused had served as the attorney signing the brief on behalf of the government.⁴¹ Here again, Nevada cites *TWA* without attempting to explain how the circumstances of that case relate to my participation in the Yucca mountain proceeding. In my view, providing an affidavit to demonstrate representational standing is not equivalent to the signature of legal counsel representing a party on a brief. Legal counsel is responsible for formulating litigation strategy and advocating for merits positions in a case. The role of counsel is far broader than that of a procedural affiant who participates solely with respect to a limited issue unrelated to the technical merits of the case. Nevada's citation to *TWA* does not convince me otherwise.

In sum, Nevada does not explain how my limited participation as an affiant for representational standing approaches the circumstances described in *Williams* and *TWA*. Considering the facts and circumstances surrounding my participation in the administrative adjudication (solely with respect to a secondary issue), a reasonable person would not conclude

⁴⁰ Motion at 7 (quoting *TWA v. Civil Aeronautics Bd.*, 254 F.2d 90, 91 (D.C. Cir. 1958)).

⁴¹ See *TWA*, 254 F.2d at 91.

that my participation in the NARUC filing demonstrates prejudgment of the issues that would remain before the Commission in the event the adjudication were recommenced.

2. *Public Statements*

Nevada also asserts that my previous public statements with respect to Yucca Mountain warrant my recusal pursuant to 28 U.S.C. § 455(a), which “requires recusal of a [f]ederal judge whenever ‘his impartiality might reasonably be questioned.’”⁴² Nevada argues that remarks I made prior to and following DOE’s submission of its application to the NRC demonstrate bias in favor of the application.⁴³

For example, Nevada objects to my 2005 announcement of the formation of the Yucca Mountain Task Force and my participation on the Task Force;⁴⁴ it argues that the following statement demonstrates bias:

The key activities of the Task Force will include ... [p]roviding a fresh new voice to the critical importance of expeditious implementation of the Yucca Mountain program given vital economic, energy and national security considerations—as well as the importance of progress on Yucca Mountain to new nuclear energy plant operation.⁴⁵

As an initial matter, my role at the time I made the statements to which Nevada objects must be understood—as a public utility commissioner, my general policy views reflected the interests of South Carolina ratepayers, who faced increased costs due to the lack of a long-term nuclear waste storage solution.⁴⁶ Based on that perspective, I intended those statements to provide

⁴² Motion at 7 (quoting 28 U.S.C. § 455(a)).

⁴³ *Id.* at 8-10.

⁴⁴ *Id.* at 8.

⁴⁵ *Id.*, Ex. 2, “Statement by David A. Wright, Comm’r, S.C. Pub. Service Comm’n & Chairman Yucca Mountain Task Force” (Task Force Announcement).

⁴⁶ See NARUC Petition, Attach. 1, Affidavit ¶ 12 (noting the high cost to ratepayers due to the lack of a high-level waste repository and stating that “[a]s State Commissioners, my NARUC colleagues across the country and I have an obvious interest in this proceeding—protecting ratepayers”).

general support for the furtherance of the process set forth in the NWPA. While I advocated for the federal government to follow the process set forth in the NWPA, I had formed no opinions on the suitability of the Yucca Mountain site from a safety or environmental perspective. Moreover, I emphasized that the construction and operation of the facility must comport with NRC's public health and safety standards.⁴⁷

Nevada suggests that my public statement following DOE's submission of its application for Yucca Mountain to the NRC shows prejudgment of the merits of the application.⁴⁸ But the very language Nevada quotes demonstrates that I had not presupposed that the facility would be licensed. I stated that "all roads eventually lead to the need for a national repository *like* Yucca Mountain if we're going to continue to operate current plants and build a new generation of nuclear energy plants."⁴⁹ My wording here, "a national repository *like* Yucca Mountain" shows that I was expressing my view of the importance of a geologic repository—not necessarily at Yucca Mountain—for the continued operation of nuclear power plants and the development of new nuclear energy technologies.

Nevada objects to congressional correspondence and testimony commenting favorably on Yucca Mountain as a long-term nuclear waste storage solution.⁵⁰ Specifically, it points to a letter in which I "stated (as co-sponsor) that 'we believe the best candidate for an interim storage or early receipt facility is Yucca Mountain. Clearly this highlights the importance of moving on with tangible progress on the licensing front and with construction of the surface

⁴⁷ Motion, Ex. 2, Task Force Announcement at 1.

⁴⁸ *Id.* at 9 (quoting *id.*, Ex. 5, "Statement of the Honorable David Wright, Comm'r, S.C. Pub. Serv. Comm'n & Co-Chair, Yucca Mountain Task Force (June 4, 2008)).

⁴⁹ *Id.* (emphasis added).

⁵⁰ *Id.* at 9-10.

facilities at Yucca Mountain.”⁵¹ The context for this remark is important; as stated above, the law requires that DOE apply for a construction authorization permit for a repository at Yucca Mountain and for the NRC to consider DOE’s application. I intended my statement to reflect the legal framework surrounding our nation’s nuclear waste storage policy and to urge that the country move forward with the process for ascertaining whether Yucca Mountain is a suitable site.

Nevada also challenges congressional testimony in which I stated that “we believe that the license application shows that Yucca Mountain will meet the requirements of the NWPA and regulations.”⁵² But here again, context for my statement is important. While my first impression of the application was favorable, I had not (and still have not) had the opportunity to consider the various contentions raised with the application and I remain open-minded as to whether or not the record will suggest otherwise.⁵³ And in any case, I acknowledged that a Plan B may be necessary, precisely because it is possible that the Yucca Mountain site may not meet regulatory requirements. I went on to state that “[i]f Yucca Mountain cannot be licensed through the NRC process, or is licensed but not built, we interpret NWPA as still requiring DOE to

⁵¹ *Id.* at 9 (quoting *id.*, Ex. 3, Letter from Charles P. Pray and David A. Wright, Yucca Mountain Task Force, to the Honorable Joe Barton, Chairman, House Energy and Commerce Comm. (June 10, 2005), at 1); see also *id.* (citing *id.*, Ex. 4, Joint Statement by Hon. David Wright, Comm’r, S.C. Pub. Serv. Comm. and Hon. Charles Pray, Nuclear Safety Advisor, State of Me. & Co-Chairman, Yucca Mountain Task Force (May 25, 2005)); *id.* at 10 (quoting *id.*, Ex. 10, *Recommendations of the Blue Ribbon Commission on America’s Nuclear Future, Hearing Before the Subcomm. on Env’t and the Econ. of the Comm. on Energy and Commerce, H.R.*, 112th Cong. 137 (2012) (statement of David A. Wright, President, National Association of Regulatory Utility Comm’rs)).

⁵² *Id.* at 10 (quoting *id.*, Ex. 8, *Budget Implications of Yucca Mountain, Hearing Before the Comm. on the Budget, H.R.*, 111th Cong. 44, 46 (2010) (statement of David A. Wright, Vice Chairman, Public Service Commission of South Carolina) (2010 Hearing)).

⁵³ See *Zen Magnets, LLC v. CPSC*, 2018 WL 2938326, 13-14 (D. Colo. 2018) (finding that a Commissioner who had made statements that “demonstrated an irrevocably closed mind” should be disqualified but noting that disqualification was not required for another Commissioner who “[left] open the possibility that her opinion could be swayed”).

develop and dispose of spent nuclear fuel in a geologic repository.”⁵⁴ Indeed, I specifically contemplated the possibility that Yucca Mountain might not meet applicable safety and environmental requirements.⁵⁵

Nevada further points to my statement to Congress that “the proposed Yucca Mountain repository remains the nation’s best hope for ‘promptly’ developing geologic disposal.”⁵⁶ My statement reflects that the NWPA designated Yucca Mountain as the only potential repository; given that designation, Yucca Mountain would have to be the promptest geologic repository possible. These remarks were not intended to prejudge the adequacy of DOE’s application or the NRC Staff’s evaluation of the application but to advocate for continued progress within the framework set forth in the NWPA. My statements were intended to serve as general support for the establishment of a high-level waste repository as a policy matter; they were not the result of review or analysis of the particular technical issues raised by DOE’s application in particular. None of these prior expressions of opinion are grounds for disqualification. And as noted above, I acknowledged that Yucca Mountain must meet regulatory requirements.

As explained previously, agency officials are presumed to be objective and capable of judging a controversy fairly and this presumption cannot be rebutted 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.’”⁵⁷ Further, “an agency official should be

⁵⁴ Motion, Ex. 8, 2010 Hearing at 44, 46.

⁵⁵ *Id.*, Ex. 8, 2010 Hearing at 50 (“[W]e were encouraging working alongside the Department of Energy and pushing forward trying to get a license application submitted so that we could move forward and get the process started and consider the science of Yucca Mountain. If science proves it is not workable, then it is not, and then the Congress can do what they want.”).

⁵⁶ *Id.* at 10 (quoting Ex. 9, *The Nuclear Waste Administration Act, Hearing Before the Comm. on Energy and Nat. Res., U.S. S., 112th Cong. 70* (2012) (statement of David A. Wright, Chairman, South Carolina Public Service Commission, Nuclear Waste Strategy Coalition)).

⁵⁷ *NIRS*, 509 F.3d at 571 (quoting *United Steelworkers of Am.*, 647 F.2d at 1208).

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.'"⁵⁸

Nevada's motion relies on the mistaken notion that I have somehow prejudged DOE's license application. At the time I made the statements to which Nevada objects, I had not—and as of this date still have not—considered DOE's license application; indeed, several of the statements Nevada references predate the submission of the application to the NRC. I can state without hesitation that I have not prejudged the technical, policy, or legal issues in this licensing proceeding. In fact, I have not considered the merits of the application, looked at the NRC Staff's safety or environmental reviews (neither of which had been issued at the time I made my statements), or considered how to apply the law or NRC regulations to determine the adequacy of the application. I have not made up my mind on any of the issues raised by the application.

Nevada confuses my public statements with regulatory decision-making in an adjudicatory proceeding on a license application. While I previously expressed generalized support for the establishment of a high-level waste repository as a policy matter, this support in no way presupposes my actions on a licensing decision, the details of which I was unaware. In reaching a licensing decision, the Commission is required to review each position advanced by the litigants and determine whether the application satisfies regulatory requirements. I state unequivocally that I have formed no opinions as to the adequacy of DOE's license application or the NRC Staff's safety or environmental review. I understand that the NRC Staff and the Commission will need to consider whether the Yucca Mountain site is suitable from a safety and environmental perspective; if not, a different long-term nuclear waste storage solution will be needed.

⁵⁸ *Id.* (quoting *Cinderella*, 425 F.2d at 591).

When exercising the Commission's quasi-judicial role, it is my responsibility to weigh the evidence and arguments impartially, and to render my decision solely on the adjudicatory record and the applicable law, taking into account the views of all parties. I intend to exercise that responsibility consistent with my sworn duty to faithfully execute the laws of the United States, in this matter, and in every matter that comes before me.

III. CONCLUSION

I have carefully considered the Motion seeking my disqualification from participating in this proceeding and the applicable legal standards. I find no basis requiring my recusal or disqualification, and therefore deny the motion.

/RA/

David A. Wright

Dated at Rockville, Maryland,
this 2nd day of July, 2018

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

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AGENCY DOCKETING STATEMENT

Administrative Agency Review Proceedings (To be completed by appellant/petitioner)

1. CASE NO. _____
2. DATE DOCKETED: _____
3. CASE NAME (lead parties only) State of Nevada v. U.S. Nuclear Regulatory Commission
4. TYPE OF CASE: ☒ Review ☐ Appeal ☐ Enforcement ☐ Complaint ☐ Tax Court
5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED? ☐ Yes ☒ No
If YES, cite statute _____
6. CASE INFORMATION:
 - a. Identify agency whose order is to be reviewed: U.S. Nuclear Regulatory Commission
 - b. Give agency docket or order number(s): Docket No. 63-001-HLW
 - c. Give date(s) of order(s): July 2, 2018
 - d. Has a request for rehearing or reconsideration been filed at the agency? ☐ Yes ☒ No
If so, when was it filed? _____ By whom? _____
Has the agency acted? ☐ Yes ☐ No If so, when? _____
 - e. Identify the basis of appellant's/petitioner's claim of standing. See D.C. Cir. Rule 15(c)(2):
Among other things, NRC licensing of the Yucca Mountain repository would contaminate the groundwaters of the State which are
owned by the State of Nevada and administered in trust by the State; the Nuclear Waste Policy Act protects this interest..
 - f. Are any other cases involving the same underlying agency order pending in this Court or any other?
☐ Yes ☒ No If YES, identify case name(s), docket number(s), and court(s) _____
 - g. Are any other cases, to counsel's knowledge, pending before the agency, this Court, another Circuit Court, or the Supreme Court which involve *substantially the same issues* as the instant case presents?
☐ Yes ☒ No If YES, give case name(s) and number(s) of these cases and identify court/agency: _____
 - h. Have the parties attempted to resolve the issues in this case through arbitration, mediation, or any other alternative for dispute resolution? ☐ Yes ☒ No If YES, provide program name and participation dates. _____

Signature _____

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ATTACH A CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 7 calendar days by letter, with copies to all other parties, specifically referring to the challenged statement.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Petition for Review and Docketing Statement* has been served upon the following persons by certified mail, return receipt requested, this 29th day of August, 2018:

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And per Rule 15(c) by mail to parties
in the underlying NRC proceeding,
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