

5/17/82

Before the
UNITED STATES
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555

In the Matter of)
)
UNITED STATES DEPARTMENT OF ENERGY)
PROJECT MANAGEMENT CORPORATION) Docket No. 50-537
TENNESSEE VALLEY AUTHORITY)
)
(Clinch River Breeder Reactor Plant))

MEMORANDUM OF INTERVENORS, NATURAL RESOURCES DEFENSE
COUNCIL, INC. AND THE SIERRA CLUB, IN SUPPORT OF THEIR
MOTION FOR RECUSAL OF COMMISSIONER ASSELSTINE

Intervenors, Natural Resources Defense Council, Inc. and the Sierra Club (the "Intervenors"), submit this memorandum in support of their motion seeking the recusal of Commissioner Asselstine from any reconsideration of the Commission's March 16 decision on Applicant's Section 50.12 request (CLI-84-4) (the "Order"). Intervenors believe that the process leading to Applicants' request for reconsideration and surrounding Commissioner Asselstine's nomination has created an appearance of bias, partiality and loss of independence. Consequently, under the Commission's regulations, it is inappropriate for Commissioner Asselstine to sit on this matter.

Lest there be any misunderstanding, Intervenors should stress that they are not suggesting that Mr. Asselstine is personally biased or that he has actually prejudged reconsideration. Rather, the issue here is one of appearance. The effect of process leading up to reconsideration of the Order has been to create an impression that the reconsideration decision is a foregone conclusion, based on political philosophy rather than independent judgment of the facts and law. And, because of the importance of maintaining public confidence in the integrity and impartiality of the Commission's decision making process, the appearance of bias, partiality or loss of independence is as important a factor under the Commission's Code of Conduct as actual bias, partiality or loss of independence.

In essence, there have been four elements critical in creating the impression of bias, partiality or loss of independence: (1) the earlier statements of the Chairman with respect to reconsideration; (2) the apparent efforts of the Administration to find someone "to vote their way"; (3) the mention of the reconsideration issue by Administration officials to Mr. Asselstine prior to the confirmation process; and (4) the very speed with which the reconsideration process has proceeded since Mr. Asselstine's confirmation. Each is discussed briefly below.

First, even before the Commission voted on the Section 50.12 request in March, the Chairman, sensing the votes were not going his way, publicly noted his interest in reconsidering the Order when the "composition" of the Commission changed. Commissioner Bradford, who voted against the Applicants, was leaving. A new Commissioner, to be appointed by the Administration, would be replacing him. And, the Chairman seemed to assume, more or less implicitly, that a new Commissioner might vote a different way. Thus, at the March 1 Commission meeting, the Chairman, after noting that denial of the exemption "would be a very sad mistake," Transcript of March 1 Meeting at 48, stated that he'd "like to keep the options open for a new Commission or a Commission that has a different membership," id. In fact, a vote was put off several days until Commission counsel could provide legal advice with respect to how to go about reconsideration and, on March 5, counsel advised the Commission that the Chairman could vote with the minority and still move to reconsider later, and, further, that reconsideration, on the basis of the existing record, might take place within 60 days (the period for seeking judicial review of the Order). Transcript of March 5 Meeting at 1-3. The discussions on March 1 and March 5 thus plainly set the stage for reconsideration of the Order in what would be expected to be a more favorable climate for Applicants.

Second, the Chairman's interest in reconsideration seems not to have been lost upon the Applicants. They appear, as far as press reports indicate, to have embarked upon a course designed to get a new (and presumably favorably disposed) Commissioner on board within 60 days. Thus, for example, Judith Miller of the New York Times reported on March 6, "There were indications today that the Administration would act swiftly to provide Mr. Palladino with a Republican-dominated commission so that he could reconsider the exemption." N.Y. Times, March 6, 1982. And, at every stage of the way, there has been an expectation that somehow, if the Administration's nominee could be confirmed and sworn in by May 15, reconsideration (and presumably a switched vote) would be the result. See, e.g., Environmental Energy Study Conference Weekly Bulletin, May 3, 1982 at C14.

Third, although Commissioner Asselstine has stated that no promises were sought or given in connection with his nomination, he has noted in a response, dated May 10, 1982, to questions from Senator Stafford, Chairman of the Senate Committee on Environment and Public Works, "I was told by one individual [left blank] that the Administration wished to fill the existing vacancy on the Commission as soon as possible, and that one factor was the desire to resolve the DOE exemption request." However brief this reference, it clearly

put Commissioner Asselstine on explicit notice of the Administration's interest in obtaining reconsideration in connection with his nomination.

Fourth, and finally, the haste with which the Applicants and the Commission itself appear to be pursuing reconsideration adds to the entire atmosphere of prejudgment. Commissioner Asselstine was confirmed Thursday, May 13. On Friday, May 14, Applicants filed a request for reconsideration. Without even providing Intervenors with a chance to respond, a Commission meeting with respect to that request was apparently scheduled for the afternoon of Monday, May 17, one working day later. And, we understand that Commissioner Asselstine may be sworn in just in time for that meeting. This sequence of events creates the impression of a rapid and unreflective effort to reverse the Commission's prior Section 50.12 decision.

While no single one of the elements just described might be enough, standing alone, to require recusal of Commissioner Asselstine, all the elements taken together inevitably create the impression that the process by which the reconsideration issue reaches the Commission has been designed to achieve a preconceived result. And, it is precisely this impression which the Commission's Code of Conduct is in-

tended to protect against. More particularly, 10 CFR
§0.735-49a provides:

"An employee shall avoid any action,
whether or not specifically prohibited by
this Part 0, which might result in, or
create the appearance of:

* * *

(d) Losing complete independence or
impartiality;

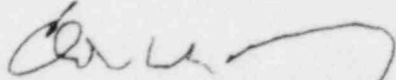
(e) Making a Government decision outside
of official channels; or

(f) Affecting adversely the confidence
of the public in the integrity of the
Government."

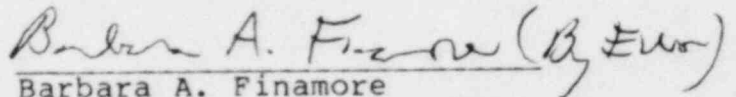
Under this regulation, quite apart from any actual bias, partiality or loss of independence, recusal of Commissioner Asselstine is not only appropriate, it is compelled. Only in this way will the appearance of integrity of the Commission's decision making process be fully maintained.

In sum, for all the reasons set forth above, Intervenor's submit that Commissioner Asselstine should decline to deal with any matters relating to reconsideration of Applicants' Section 50.12 request.

Respectfully submitted,



Eldon V. C. Greenberg
TUTTLE & TAYLOR
1901 L Street, N.W.
Washington, D.C. 20036
(202) 861-0666



Barbara A. Finamore
S. Jacob Scherr
Natural Resources Defense
Council, Inc.
1725 Eye Street, N.W.
Washington, D.C. 20006
(202) 223-8210

Attorneys for Intervenors
Natural Resources Defense
Council, Inc., and the
Sierra Club

Dated: Washington, D.C.
May 17, 1982

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MOTION FOR RECUSAL OF COMMISSIONER ASSELSTINE and MEMORANDUM OF INTERVENORS, NATURAL RESOURCES DEFENSE COUNCIL, INC. AND THE SIERRA CLUB, IN SUPPORT OF THEIR MOTION FOR RECUSAL OF COMMISSIONER ASSELSTINE were delivered by hand this 17th day of May, 1982 to:

The Honorable Nunzio J. Palladino
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

The Honorable James K. Asselstine
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

The Honorable Victor Gilinsky
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

The Honorable John F. Ahearne
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

The Honorable Thomas F. Roberts
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Daniel Swanson, Esquire
Stuart Treby, Esquire
Bradley W. Jones, Esquire
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Maryland National Bank Building
7735 Old Georgetown Road
Bethesda, Maryland 20814

R. Tenney Johnson, Esquire
Leon Silverstrom, Esquire
Warran E. Bergoholz, Jr., Esquire
Michael D. Oldak, Esquire
L. Dow Davis, Esquire
Office of General Counsel
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

82 MAY 17 P1:00

DOCK
BRANCH

George L. Edgar, Esquire
Irvin N. Shapell, Esquire
Thomas A. Schmutz, Esquire
Gregg A. Day, Esquire
Frank K. Peterson, Esquire
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(3 copies)

Leonard Bickwit, Esquire
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20545

And by mail, postage prepaid, to the following:

Marshall E. Miller, Esquire
Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
4350 East West Highway
Bethesda, Maryland 20814

Mr. Gustave A. Linenberger
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
4350 East West Highway
Bethesda, Maryland 20814

Dr. Cadet H. Hand, Jr.
Director
Bodega Marine Laboratory
University of California
P.O. Box 247
Bodega Bay, California 94923

Atomic Safety & Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety & Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Herbert S. Sanger, Jr., Esquire
Lewis E. Wallace, Esquire
James F. Burger, Esquire
W. Walker LaRoche, Esquire
Edward J. Vigluicci
Office of the General Counsel
Tennessee Valley Authority
400 Commerce Avenue
Knoxville, Tennessee 37902

William B. Hubbard, Esquire
Assistant Attorney General
State of Tennessee
Office of the Attorney General
422 Supreme Court Building
Nashville, Tennessee 37219

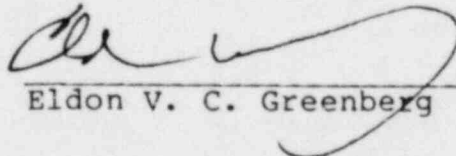
Lawson McGhee Public Library
500 West Church Street
Knoxville, Tennessee 37902

William E. Lantrip, Esquire
City Attorney
Municipal Building
P.O. Box 1
Oak Ridge, Tennessee 37830

Oak Ridge Public Library
Civic Center
Oak Ridge, Tennessee 37820

Mr. Joe H. Walker
401 Roane Street
Harriman, Tennessee 37748

Commissioner James Cotham
Tennessee Department of Economic
and Community Development
Andrew Jackson Building, Suite 1007
Nashville, Tennessee 32219


Eldon V. C. Greenberg