

Separate Statement of Commissioner Ann Marie Buerkle

As indicated in the majority opinion, I did not vote on the Final Rule for Magnet Sets because I considered it inappropriate to do so when we might have to resolve an appeal of an adjudication involving the same product.¹ I continue to adhere to that view, and the scenario I anticipated has now come to pass.

I reluctantly conclude that my colleagues should be disqualified from hearing this appeal. Based on the findings that they have made in the rulemaking, I believe they have already made up their minds that small, rare earth magnets should not be in the hands of the public under any circumstances. I also believe that all of them have made public statements that could cause a “disinterested observer” to conclude that they have “in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Cinderella II*, 425 F.2d at 591. I am not convinced that this test should apply only to statements made outside of official agency functions, or even that statements made in a speech to a trade association should be deemed “unrelated to official agency functions.” Majority Opinion at 6. Nevertheless, even if the proper test for disqualification is that the mind of a decision maker is “irrevocably closed,” I regret to say that the statements made by my colleagues suggest nothing less.

I agree with the majority that “the Commission has not had the opportunity yet to fully consider in this Appeal, the extensive testimony and exhibits about the Subject Products that the parties presented during the Magnet Adjudication.” Majority Opinion at 12. It may be that after full consideration of these materials, my colleagues will prove me wrong about their mindset here.

Finally, I do not think the majority opinion should have addressed the “rule of necessity.” Majority Opinion at 7. The opinion was written with the knowledge that individual disqualifications would not deprive the Commission of a quorum in this case. It therefore speaks to a purely hypothetical situation. I think that advisory opinions should generally be avoided and that if the Commission were actually confronted with the loss of a quorum in this matter, it might have been more creative in thinking about possible solutions.

¹ See September 26, 2014 Statement of Ann Marie Buerkle, available at: http://www.cpsc.gov/en/About-CPSC/Commissioners/Ann-Marie-Buerkle/Ann-Marie-Buerkle-Statements/Statement-on-the-Final-Rule-for-Magnet-Sets/?utm_source=rss&utm_medium=rss&utm_campaign=Commissioner+Buerkle+Statements+.