

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
Before the Atomic Safety and Licensing Board**

In the Matter of	)	Docket No. 72-1050 (NRC-2016-0231)
Interim Storage Partners LLC	)	
(Consolidated Interim Storage Facility)	)	November 26, 2018
	)	

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**Motion of Sierra Club, Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development (SEED) Coalition and Leona Morgan, Individually For Disqualification of Atomic Safety and Licensing Board**

Now come Petitioners Sierra Club, Don't Waste Michigan, Citizens for Alternatives to Chemical Contamination, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Nuclear Energy Information Service, Citizens' Environmental Coalition, and Sustainable Energy and Economic Development (SEED) Coalition and Leona Morgan, an individual (collectively, "Petitioners"), by and through counsel, and pursuant to 10 C.F.R. § 2.313(b)(2), they move for the disqualification of the three panel members appointed as the Atomic Safety and Licensing Board ("ASLB") to preside over this matter, namely, Paul S. Ryerson, Chairman; Nicholas G. Trikouros; and Dr. Gary S. Arnold. Petitioners bring their motion on the ground that the judges' appointment to serve as the ASLB members in this case as well as their appointment to serve as the ASLB members in the matter of *Holtec International* (HI-STORE Consolidated Interim Storage Facility), Docket No. 72-1051, suggests the appearance of bias and requires appointment of a different ASLB panel to preside over this case.

## ***I. Background Facts***

1. The instant case involves the ultimate issue of whether or not a Nuclear Regulatory Commission (“NRC”) license shall be granted to Interim Storage Partners LLC for the construction and operation of a Consolidated Interim Storage Facility (“CISF”) for the storage of spent nuclear fuel (“SNF”) in Andrews County, Texas.

2. On November 16, 2018, the NRC notified the parties to this proceeding, including the undersigned Terry J. Lodge, Counsel for Joint Petitioners and Affiant herein, via a formal designation entitled “Establishment of Atomic Safety and Licensing Board,” that Paul S. Ryerson, Nicholas G. Trikouros, and Dr. Gary S. Arnold had been appointed to preside over this case as the ASLB panel. Their appointments were directed by Edward R. Hawkens, the Nuclear Regulatory Commission’s Chief Administrative Judge of the Atomic Safety and Licensing Board Panel.

3. Judges Ryerson, Trikouros and Arnold were previously appointed by the NRC on October 31, 2018 to preside as the ASLB panel in the matter of *Holtec International* (HI-STORE Consolidated Interim Storage Facility), Docket No. 72-1051. Holtec International seeks an NRC license for the construction and operation of a CISF for purposes of storage of SNF in New Mexico, approximately 40 miles from the site of the Interim Storage Partners CISF in Texas.

4. The contemporaneous pendency of the two CISF license applications is unprecedented. An earlier license request was granted years ago to Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), Docket No. 72-22-ISFSI, but that project was never built. The two present proposals have some similarities to one another but differ, especially as to storage technology and associated features of the installation, and as to site-specific geology and

hydrology. Each CISF proposal implicates questions of enormous significance for nuclear waste policy. Each proposal purports to store SNF for up to “indefinite” periods of time (*i.e.*, centuries, perhaps permanently). Some of the determinations to be made in each case will be unique and complicated by the open-ended duration of “interim” storage.

5. The two CISF licensing cases each have a large number of intervenors and, at this preliminary stage, each case has over three-dozen proposed contentions pending. Many of the contentions raise thorny questions of geology, hydrology, seismic stability and efficacy of the geographical locations of the CISFs. Other contentions challenge the adequacy of the canisters proposed (or conjectured) for transport.

6. The Yucca Mountain litigation, somewhat comparable to the CISFs in magnitude and implications, involved three separate ASLBs at its peak. *See U.S. Department of Energy* (High Level Waste Repository), LBP-09-06, Docket No. 63-001-HLW (May 11, 2009). But the CISFs have even more serious implications because they will be ongoing, managed projects over (potentially) centuries, whereas the final geological repository will be filled and ultimately abandoned. Holtec International seeks permission to store up to 173,600 metric tons of SNF and Greater-Than-Class-C (“GTCC”) waste, more than 2.5 times the originally proposed 63,000 metric ton civilian capacity of the Yucca Mountain geological repository. Interim Storage Partners LLC seeks a license to store an amount equalling nearly two-thirds of the Yucca capacity. Construction of either CISF will cause transportation of dangerous SNF hundreds of thousands of additional shipment-miles, first, to the CISF, and later to a permanent repository. Each CISF proposal fails to accept delivery of defective, flawed or broken SNF identified as such at the reactor sites, and the Holtec proposal states that arriving SNF shipments with damaged

fuel, leaking canisters or external radiation will be returned to the originating reactor sites, potentially multiplying the threat of harm to the public along thousands of railroad, trucking and barge route shipment-miles.

7. Appointment of the identical licensing panel to adjudicate each of these wholly-separate CISF cases poses the appearance of bias. There presently are multiple objections to the facial legality of each CISF proposal which have to be determined at the threshold stage of the licensing cases. Each separate proposal will require the evaluation of many unique factors and details. Even though some of the anticipated legal issues implicit in the pending proposed contentions are similar as between the two CISF proposals, the decisions as to their admissibility will have to be made in light of the individual facts of the respective license requests. A major example will be the applicability of the Continued Storage Generic Environmental Impact Statement to some aspects of both plans, which will be very fact-specific. Another distinction is that the Interim Storage Partners application, unlike Holtec's application, does not reflect an inclination toward storing high burnup fuel, which has become ubiquitous throughout the industry. An amendment of ISP's application may change the thrust of its plan.

## ***II. Legal Considerations***

Two sections of the U.S. Code, 28 U.S.C. §§ 144 and 455, require a federal judge to step aside if a party to the proceeding files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against that party or in favor of an adverse party. *Public Serv. Elec. & Gas Co. et al.* (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20 (1984). Section 455(a) imposes an objective standard: whether a reasonable person knowing all the circumstances would be led to the conclusion that the judge's

impartiality might reasonably be questioned. *Id.* at 21-22; *Hydro Res., Inc.* (2929 Coors Rd., Suite 101, Albuquerque, N.M. 87120), CLI-98-9, 47 NRC 326, 331 (1998).

The Commission and its adjudicatory boards apply 28 U.S.C. § 455 to their rulings upon motions for disqualification under 10 C.F.R. § 2.313. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC \_\_ (Aug. 27, 2010) (slip op. at 2); *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982) (making clear that Licensing Board members are governed by the same disqualification standards that apply to federal judges).

A judge contemplating disqualification under § 455(a) should not ask whether he or she believes he or she is capable of impartially presiding over the case. Rather, the question is whether a judge's impartiality might be questioned from the perspective of a reasonable person. Every federal appellate circuit has adopted some version of the "reasonable person" standard to answer this question. In the context of denying a motion for his disqualification from *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004) (mem.) (Scalia, J.), Justice Scalia noted that this "reasonable person" is aware "of all the surrounding facts and circumstances." *Id.* at 924 (citing *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000)).

The Second Circuit has characterized the reasonable person as an "objective, disinterested observer" who is privy to full knowledge of the surrounding circumstances. *United States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000). The Fourth Circuit has clarified that the hypothetical reasonable observer is not a judge because judges, keenly aware of the obligation to decide matters impartially, "may regard asserted conflicts to be more innocuous than an outsider would." *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998), *cert. denied*, 119 S. Ct.

1793 (1999). The Seventh Circuit has likewise noted that an outside observer is “less inclined to credit judges’ impartiality and mental discipline than the judiciary . . . .” *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990); *see also O’Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 988 (7th Cir. 2001). The Fifth Circuit has commented that “[p]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.” *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1998).

The two pending CISF licensing adjudications are momentous and easily comprise the most visible litigation before the NRC since the Yucca Mountain repository case. There will be multiple portentous rulings within each separate CISF case. It is incumbent that the two adjudications be assigned to separate, non-overlapping ASLB panels to dispel any appearance or suggestion that the complex and controversial decisions in one case are being made, but in short-shrift or summary fashion, by the same judges in the other CISF licensing case.

#### **Certification of Consultation With Opposing Counsel**

As required under 10 C.F.R. § 2.323(b), counsel for Petitioners solicited the agreement of opposing counsel to this motion on November 19, 2018. Counsel for Interim Storage Partners LLC and the NRC Staff declined to consent, stating that the disqualification request does not state a lawful reason. Counsel for Fasken Oil and Beyond Nuclear took no position.

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## CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that on November 26, 2018, a copy of the foregoing “Motion of Sierra Club, Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development (SEED) Coalition and Leona Morgan, Individually for Disqualification of Atomic Safety and Licensing Board” and accompanying declarations and attachments were deposited in the Electronic Information Exchange (the NRC’s E-Filing System) in this proceeding, for automated distribution to all registered counsel and parties.

/s/ Terry J. Lodge  
Terry J. Lodge, Esq.  
Counsel for Joint Petitioners