

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-18-6

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Nicholas G. Trikouros
Dr. Gary S. Arnold

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050-ISFSI

ASLBP No. 19-959-01-ISFSI-BD01

December 13, 2018

MEMORANDUM AND ORDER

(Denying and Referring Motion to Disqualify Board)

Before the Board is a motion by some petitioners (the Moving Petitioners) to disqualify each of the Board's three members.¹ The NRC Staff opposes the motion,² and the other participants have not responded.³ Because the Moving Petitioners have not cited a valid legal basis for disqualification of the Board, we deny the motion and refer it to the Commission as required by 10 C.F.R. § 2.313(b)(2).

¹ 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 (Nov. 26, 2018) [hereinafter Motion].

² NRC Staff Response to Motion for Disqualification of Atomic Safety and Licensing Board (Dec. 6, 2018).

³ The Moving Petitioners represent that, when they solicited the agreement of other counsel, as required by 10 C.F.R. § 2.323(b), "[c]ounsel for Interim Storage Partners LLC and the NRC Staff declined to consent, stating that the disqualification request does not state a lawful reason." Motion at 6. Reportedly, the other petitioners took no position. Id.

BACKGROUND

This proceeding involves a license application to construct and operate a consolidated interim storage facility for spent nuclear fuel and high level nuclear waste in Andrews County, Texas. The Board is comprised of three Administrative Judges who were appointed by the Chief Administrative Judge to preside over the proceeding.⁴ Previously, the same three Administrative Judges were appointed by the Chief Administrative Judge to preside over a proceeding that involves a license application for another consolidated interim storage facility that would be constructed and operated in Lea County, New Mexico.⁵ To date, the Board has not issued a substantive ruling in either proceeding.

The Moving Petitioners do not allege bias based on the conduct of any Board member. Rather, they allege that appointment of the same three Administrative Judges to both the New Mexico proceeding and to this proceeding “suggests the appearance of bias and requires appointment of a different [Atomic Safety and Licensing Board (ASLB)] panel to preside over this case.”⁶ According to the Moving Petitioners, while the two storage facility proposals “have some similarities to one another,” in other ways they differ.⁷ Likewise, although the Moving Petitioners acknowledge the similarity of some of the anticipated legal issues, they caution that decisions nonetheless “will have to be made in light of the individual facts of the respective license requests.”⁸ Therefore, they conclude, the two adjudications must be assigned to “separate, non-overlapping ASLB panels to dispel any appearance or suggestion that the

⁴ Establishment of Atomic Safety and Licensing Board: Interim Storage Partners LLC, 83 Fed. Reg. 59,424 (Nov. 23, 2018).

⁵ Establishment of Atomic Safety and Licensing Board: Holtec International, 83 Fed. Reg. 55,578, 55,578–79 (Nov. 6, 2018).

⁶ Motion at 1.

⁷ Id. at 2.

⁸ Id. at 4.

complex and controversial decisions in one case are being made, but in short-shrift or summary fashion, by the same judges in the other . . . case.”⁹

ANALYSIS

The controlling statute is 28 U.S.C. § 455(a), which provides that a federal judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”¹⁰ The professed concern, however, must be objectively reasonable. What must be determined in applying section 455(a) is whether the facts presented “might lead a fully informed reasonable person to question [the judge’s] impartiality in the present proceeding.”¹¹ While the Moving Petitioners have a right to impartial judges, “they do not have a right to the judge of their choice.”¹²

The Moving Petitioners cite no case from any jurisdiction that has ever held assigning cases with some factual or legal similarities to the same judge or judges raises a reasonable question of bias, and the Board is aware of none. On the contrary, arguments much like the Moving Petitioners’ have been rejected both by another Licensing Board and by the Commission.¹³

⁹ Id. at 6.

¹⁰ See Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 203 (2010) (finding that while the statute is not specifically aimed at administrative judges, it “provides a helpful framework” for assessing a motion for disqualification); Hydro Res., Inc. (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 331 (1998); Pub. Serv. Elec. & Gas Co. (Hope Creek Generating Station, Unit 1), ALAB-759, 19 NRC 13, 20–21 (1984).

¹¹ Hope Creek, ALAB-759, 19 NRC at 22.

¹² Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 568, aff’d sub nom. Three Mile Island Alert, Inc. v. NRC, 771 F.2d 720 (3d Cir. 1985).

¹³ See, e.g., Pub. Serv. Elec. & Gas Co. (Atlantic Nuclear Generating Station, Units 1 & 2), LBP-78-5, 7 NRC 147, 148–49 (1978) (denying a motion for disqualification for, among other things, frivolously challenging the objectivity of the Board); Pac. Gas & Elec. Co. (Diablo Canyon

The Moving Petitioners set forth no reasonable grounds for their fear that the Board will be unable to distinguish between the facts of separate cases, or that we will address in one case only in “short-shrift or summary fashion” issues that have been addressed in the context of the other case.¹⁴ Indeed, as counsel for the Moving Petitioners represent many of the same petitioners in both cases, they should have opportunities to point out material differences.

Not only does the Moving Petitioners’ motion fail to raise a lawful ground for disqualification, but its fundamental premise would appear to challenge established practices throughout the federal system that are designed to promote the efficient administration of justice. Rather than disperse cases that present common issues, federal courts routinely consolidate them. Thus, cases that “involve the same parties” or “are based on the same or similar claims” or “present common issues of fact” are regularly assigned or transferred to the same judge.¹⁵

Nuclear Power Plant, Units 1 & 2), CLI-80-11, 11 NRC 511, 512–13 (1980) (denying a petition for review to disqualify a board member because the movant proffered no evidence of bias).

¹⁴ Motion at 6.

¹⁵ See, e.g., U.S. Ct. Fed. Claims R. 40.2; D.D.C. Loc. R. 40.5; S.D.N.Y. R. 13; E.D.N.Y. R. 50.3.1; see also 28 U.S.C. § 1407(a) (transfer for coordinated or consolidated pretrial proceedings “civil actions involving one or more common questions of fact”).

ORDER

The Moving Petitioners' motion to disqualify the Board is denied.

As required by 10 C.F.R. § 2.313(b)(2), the motion is referred to the Commission.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 13, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying and Referring Motion to Disqualify Board) - LBP-18-6** have been served upon the following persons by the Electronic Information Exchange:

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[Original signed by Herald M. Speiser _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of Deberner, 2018