

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman  
Jeff Baran  
Stephen G. Burns  
Annie Caputo  
David A. Wright

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050-ISFSI

**CLI-19-03**

**MEMORANDUM AND ORDER**

This proceeding involves the application of Interim Storage Partners LLC for a license to construct and operate a consolidated interim storage facility (CISF) in Andrews County, Texas. Numerous petitioners sought to intervene and requested a hearing in this proceeding, and the Board has not yet ruled on any of the petitions. On November 26, 2018, a group of petitioners (referred to as the “Moving Petitioners”) requested that each of the Board’s three members disqualify himself from hearing this matter.<sup>1</sup> The Staff opposed the motion, and other participants in the hearing did not respond to it.<sup>2</sup>

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<sup>1</sup> See *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) (Motion).

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

The Board denied the motion and referred its ruling to the Commission, as our regulations require with respect to motions to disqualify.<sup>3</sup> We agree with the Board that the Moving Petitioners did not provide a valid justification for disqualifying the Board or any of its members, and we affirm its ruling.

## I. DISCUSSION

NRC regulations provide that, if the Commission itself does not designate the presiding officer, then the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will do so.<sup>4</sup> The Chief Judge has “broad authority” to manage the Panel’s docket efficiently, including such matters as splitting an adjudication between two boards.<sup>5</sup>

Although the regulation pertaining to disqualification of a judge does not describe what circumstances justify disqualification, we have held that Licensing Board members should look to standards that apply to federal judges.<sup>6</sup> Those standards hold that a judge must disqualify himself or herself whenever the judge’s impartiality in the proceeding “might reasonably be questioned,” as well as in specific circumstances in which conflict of interest is shown.<sup>7</sup> While the Moving Petitioners did not claim in their motion that any of the Board judges have an actual

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<sup>3</sup> LBP-18-6, 88 NRC \_\_\_ (Dec. 13, 2018) (slip op.); see 10 C.F.R. § 2.313(b)(2).

<sup>4</sup> 10 C.F.R. § 2.313(a).

<sup>5</sup> See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 311 (1998) (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 438 (1989)).

<sup>6</sup> *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982).

<sup>7</sup> 28 U.S.C. § 455(a)-(b).

conflict of interest, they argued that the circumstances would “suggest[] the appearance of bias” to an objective observer.<sup>8</sup>

Specifically, the Moving Petitioners argued that the three members of the Board should disqualify themselves because the same three judges are serving as the Board members in a similar license proceeding, involving the application of Holtec International for a CISF in New Mexico; that proceeding is also now in its preliminary stages.<sup>9</sup> The Moving Petitioners point to caselaw that holds that even where there is no actual conflict of interest, a judge should disqualify himself or herself where a reasonable person would question the judge’s impartiality.<sup>10</sup> They argue that having the same three judges preside over the two licensing proceedings “poses the appearance of bias.”<sup>11</sup> They cite no other facts supporting their argument. They do not explain how there could be an appearance of bias at this point in the proceeding, when the Board has made no substantive rulings in either proceeding.

The Moving Petitioners argue that an appearance of bias could arise in the future; that is, that a reasonable observer would infer bias if, after ruling on an issue in one proceeding, the Board then makes a similar ruling in the other proceeding.<sup>12</sup> At this point, there is no indication

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<sup>8</sup> Motion at 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 4-5 (citing, among others, *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 541 U.S. 913 (2004) (Scalia, J., in chambers); *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 331 (1998)). In *Hydro*, we rejected the argument that a reasonable person might believe the Presiding Officer would be biased in favor of a party represented by a law firm with which the Presiding Officer had recently discussed, but had not been offered, employment. CLI-98-9, 7 NRC at 331.

<sup>11</sup> Motion at 4.

<sup>12</sup> See *id.* at 6 (arguing that two different boards should be appointed “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”).

that the Board or any of its members have established views about any issue pertaining to this proceeding. Moreover, in order to provide a basis for disqualification, the prejudgment, or appearance of prejudgment, must relate to a factual dispute rather than a legal one.<sup>13</sup> While a judge should not have preconceived beliefs about the facts, it is not grounds for disqualification for a judge to have formed an opinion about the applicable law.<sup>14</sup> If two proceedings occasionally present overlapping legal issues, then consistency between the legal rulings of the two cases is to be expected, regardless of the composition of the boards. And where the facts and legal issues between the two proceedings are distinguishable, we have confidence in the boards' abilities to distinguish between them.

The Moving Petitioners' argument concerning bias is not persuasive. Nothing in the motion suggests that any of the Board judges either have a conflict or have prejudged any issue involved in this case. The motion does not provide any reason why a reasonable observer might question the Board's impartiality.

The bulk of the Moving Petitioners' motion is devoted to arguments implying that the judges would be overworked by the complexity and confused by the similarity of the issues in the two licensing proceedings.<sup>15</sup> These claims do not relate to prejudice. As for the prospect that the judges may be overworked, the Chief Administrative Judge appoints members of each board and has the discretion to manage the boards if the complexity of the issues involved

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<sup>13</sup> See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 34 (1984).

<sup>14</sup> *Id.* at 35 (citing *S. Pac. Commc'ns Co. v. AT&T*, 740 F.2d 980, 990-91 (D.C. Cir. 1984)); see also *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 64, 65, 66 (1973).

<sup>15</sup> Motion at 3-4.

makes it expedient to do so.<sup>16</sup> That would include substituting Board members, or replacing an entire Board, if necessary for workload reasons.<sup>17</sup> We decline to take over this duty of the Chief Administrative Judge. In addition, we are not persuaded by the suggestion that the Board members may become confused by the factual similarities between the two proceedings. We traditionally give a high level of deference to the boards as the fact finder in our adjudicatory proceedings.<sup>18</sup> The Moving Petitioners have not provided a sufficient basis for the Commission to do otherwise in the instant proceeding.

## II. CONCLUSION

We therefore find that the Moving Petitioners' grounds for disqualification are insufficient and affirm the Board's ruling.

IT IS SO ORDERED.

For the Commission

**NRC SEAL**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 11th day of March, 2019.

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<sup>16</sup> See *Private Fuel Storage*, CLI-98-7, 47 NRC at 311; *Seabrook*, ALAB-916, 29 NRC at 438.

<sup>17</sup> See *Private Fuel Storage*, CLI-98-7, 47 NRC at 311.

<sup>18</sup> See, e.g., *Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 73 (2010); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-19-03)** have been served upon the following persons by the Electronic Information Exchange:

U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
Washington, DC 20555-0001

Paul S. Ryerson, Chair  
Administrative Judge  
E-mail: [paul.ryerson@nrc.gov](mailto:paul.ryerson@nrc.gov)

Nicholas G. Trikouros  
Administrative Judge  
E-mail: [nicholas.trikouros@nrc.gov](mailto:nicholas.trikouros@nrc.gov)

Dr. Gary S. Arnold  
Administrative Judge  
E-mail: [gary.arnold@nrc.gov](mailto:gary.arnold@nrc.gov)

Joseph McManus, Law Clerk  
Taylor Mayhall, Law Clerk  
E-mail: [joseph.mcmanus@nrc.gov](mailto:joseph.mcmanus@nrc.gov)  
[taylor.mayhall@nrc.gov](mailto:taylor.mayhall@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of Commission Appellate Adjudication  
Mail Stop: O16-B33  
Washington, DC 20555-0001  
E-mail: [ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of the Secretary of the Commission  
Mail Stop: O16-B33  
Washington, DC 20555-0001  
Hearing Docket  
E-mail: [Hearing.Docket@nrc.gov](mailto:Hearing.Docket@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop - O-14A44  
Washington, DC 20555-0001  
Joe Gillespie, Esq.  
Sara Kirkwood, Esq.  
Mauri Lemoncelli, Esq.  
Emily Monteith, Esq.  
Patrick Moulding, Esq.  
Carrie Safford, Esq.  
Thomas Steinfeldt  
Alana Wase, Esq.  
E-mail: [joe.gillespie@nrc.gov](mailto:joe.gillespie@nrc.gov)  
[sara.kirkwood@nrc.gov](mailto:sara.kirkwood@nrc.gov)  
[mauri.lemoncelli@nrc.gov](mailto:mauri.lemoncelli@nrc.gov)  
[emily.monteith@nrc.gov](mailto:emily.monteith@nrc.gov)  
[patrick.moulding@nrc.gov](mailto:patrick.moulding@nrc.gov)  
[carrie.safford@nrc.gov](mailto:carrie.safford@nrc.gov)  
[thomas.steinfeldt@nrc.gov](mailto:thomas.steinfeldt@nrc.gov)  
[alana.wase@nrc.gov](mailto:alana.wase@nrc.gov)

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Counsel for Beyond Nuclear

Diane Curran, Esq.  
Harmon, Curran, Spielberg and Eisenberg  
1725 DeSales Street NW, Suite 500  
Washington, DC 20036  
E-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Mindy Goldstein, Esq.  
Emory University School of Law  
Turner Environmental Law Clinic  
1301 Clifton Road  
Atlanta, GA 30322  
E-mail: [magolds@emory.edu](mailto:magolds@emory.edu)

Diane D'Arrigo  
Nuclear Information and  
Resource Service (NIRS)  
6930 Carroll Avenue  
Suite 340  
Takoma Park, MD 20912  
Email: [dianed@nirs.org](mailto:dianed@nirs.org)

Chris Hebner, Esq.  
City of San Antonio, TX  
P.O. Box 839966  
San Antonio, TX 78283  
E-mail: [chris.hebner@sanantonio.gov](mailto:chris.hebner@sanantonio.gov)

Counsel for Fasken Land and Oil and  
Permian Basin Land and Royalty Owners  
Robert V. Eye Law Office, L.L.C.  
Robert Eye, Esq.  
Timothy Laughlin  
4840 Bob Billings Parkway, Suite 1010  
Lawrence, KS 66049  
E-mail: [bob@kauffmaneye.com](mailto:bob@kauffmaneye.com)  
[tijay1300@gmail.com](mailto:tijay1300@gmail.com)

Karen D. Hadden  
Executive Director,  
Sustainable Energy and  
Economic Development (SEED) Coalition  
605 Carismatic Lane  
Austin, TX 78748  
E-mail: [karendhadden@gmail.com](mailto:karendhadden@gmail.com)

Counsel for Interim Storage Partners LLC  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue NW  
Washington, DC 20004  
Stephen Burdick, Esq.  
Timothy Matthews, Esq.  
Ryan Lighty, Esq.  
Paul Bessette, Esq.  
E-mail: [stephen.burdick@morganlewis.com](mailto:stephen.burdick@morganlewis.com)  
[timothy.matthews@morganlewis.com](mailto:timothy.matthews@morganlewis.com)  
[ryan.lighty@morganlewis.com](mailto:ryan.lighty@morganlewis.com)  
[paul.bessette@morganlewis.com](mailto:paul.bessette@morganlewis.com)

Counsel for Sierra Club  
Wallace Taylor  
4403 1<sup>st</sup> Avenue S.E.  
Suite 402  
Cedar Rapids, IA 52402  
E-mail: [wtaylorlaw@aol.com](mailto:wtaylorlaw@aol.com)

Counsel for Don't Waste Michigan, et al  
Terry Lodge, Esq.  
316 N. Michigan Street  
Suite 520  
Toledo, OH 43604  
E-mail: [tjlodge50@yahoo.com](mailto:tjlodge50@yahoo.com)

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

Dated at Rockville, Maryland,  
this 11<sup>th</sup> day of March, 2019