



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

May 10, 2019

Mark Langer, Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001

Re: *Beyond Nuclear, Inc. v. NRC*, No. 18-1340

Dear Mr. Langer:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Respondent Nuclear Regulatory Commission (NRC), on behalf of Federal Respondents, hereby informs the Court of a development before the agency related to the above-referenced matter. The development does not change the conclusion in our motion to dismiss that the pending petition in this Court should be dismissed.

On May 7, 2019, the NRC's Atomic Safety and Licensing Board (Board) issued Memorandum and Order LBP-19-04 denying admission of the contention raised by Beyond Nuclear, Inc. (petitioner before the Court) related to the NRC's authority to issue a license to Holtec International for a spent fuel storage facility that contemplates storing spent fuel to which the Department of Energy holds title. An excerpt of the order is attached; the full version is available at <https://www.nrc.gov/docs/ML1912/ML19127A026.pdf>.

The Board found that "Beyond Nuclear no longer identifies a genuine dispute with Holtec's license application" because "Holtec seeks a license that would allow it to enter into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future." Order at 32, 34. Beyond Nuclear has twenty-five days to seek appeal of this decision to the Commission pursuant to 10 C.F.R. § 2.311. The Board has not yet reached a determination with respect to a parallel contention that Beyond Nuclear has raised before the agency with respect to the application of Interim Storage Partners LLC; oral argument on standing and contention admissibility in that case is scheduled to take place in July.

M. Langer

As we discuss on pages 4-5 and page 8 of our motion to dismiss, this Court should dismiss Beyond Nuclear's petition for review because it does not challenge a final order of the Commission, and because the issue is not yet ripe for review. The Board's decision in LBP-19-4 and the possibility of an appeal to the Commission further demonstrate that the agency's decisionmaking process was not final at the time that the petition was filed, and that the adjudication remains ongoing.

Respectfully,

/s/ Andrew P. Averbach
Solicitor

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on May 10, 2019, I served a copy of the foregoing letter on the parties to this case and filed it with the U.S. Court of Appeals for the District of Columbia Circuit by uploading it to the Court's CM/ECF system.

/s/ Andrew P. Averbach

Andrew P. Averbach

Solicitor

U.S. Nuclear Regulatory Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-19-4

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

HOLTEC INTERNATIONAL

(HI-STORE Consolidated Interim Storage
Facility)

Docket No. 72-1051-ISFSI

ASLBP No. 18-958-01-ISFSI-BD01

May 7, 2019

MEMORANDUM AND ORDER

(Ruling on Petitions for Intervention and Requests for Hearing)

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May 7, 2019

MEMORANDUM AND ORDER

(Ruling on Petitions for Intervention and Requests for Hearing)

Before the Board are six petitions to intervene and requests for a hearing concerning a license application by Holtec International (Holtec) to construct and operate a consolidated interim storage facility for spent nuclear fuel in Lea County, New Mexico. The petitioners are: (1) Beyond Nuclear, Inc. (Beyond Nuclear); (2) Sierra Club; (3) Don't Waste Michigan, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Studies Group (collectively, Joint Petitioners); (4) Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken); (5) Alliance for Environmental Strategies (AFES); and (6) NAC International Inc. (NAC).

Because Holtec has revised its license application in response to petitioners' initial contentions, both the Board's and the NRC Staff's views as to their admissibility have changed over time. It appears the NRC Staff now asserts that two of the six hearing requests should be granted because, in its view (1) Beyond Nuclear has demonstrated standing and its only

proffered contention is admissible; and (2) Sierra Club has demonstrated standing and has proffered two admissible contentions (Sierra Club Contentions 1 and 4).¹ Holtec opposes the standing of all six petitioners and asserts that none of their proffered contentions is admissible.

The Board concludes that Beyond Nuclear, Sierra Club, and Fasken have demonstrated standing. However, the Board denies Beyond Nuclear's petition, because its sole contention no longer identifies a genuine dispute with Holtec's license application. Likewise, neither Sierra Club nor Fasken has proffered an admissible contention and their petitions are therefore denied. Although the Board does not rule on its standing, AFES has not proffered an admissible contention and its petition is denied for that reason. Joint Petitioners and NAC have neither demonstrated standing nor proffered an admissible contention. Because no petitioner has both demonstrated standing and proffered an admissible contention, this proceeding is terminated.

I. BACKGROUND

The nation's growing inventory of spent nuclear fuel from commercial nuclear power reactors is generally stored at the reactor sites where it was generated, initially immersed in pools of water and then, after a suitable delay, encased in protective dry-cask storage systems.² What to do with the spent fuel "has vexed scientists, Congress, and regulatory agencies for the

¹ See NRC Staff's Consolidated Response to Petitions to Intervene and Requests for Hearing Filed by [AFES], [Beyond Nuclear], [Joint Petitioners], [NAC], and The Sierra Club (Oct. 9, 2018) at 65–67, 72–74 [hereinafter NRC Staff Consol. Answer]; NRC Staff Answer to Motions to Amend Contentions Regarding Federal Ownership of Spent Fuel (Feb. 19, 2019) [hereinafter NRC Staff Answer to Beyond Nuclear and Fasken Motion]. But see Tr. at 331–35 (NRC Staff stating at oral argument that issues identified in Beyond Nuclear's contention and in Sierra Club Contention 1 appeared "to have been cured for the present time"). Initially, the Staff also deemed Sierra Club Contention 8 to be admissible (NRC Staff Consol. Answer at 79), but announced at oral argument that it no longer was taking a position on the admissibility of that contention. Tr. at 261.

² U.S. Gov't Accountability Off., GAO-17-340, Commercial Nuclear Waste: Resuming Licensing of the Yucca Mountain Repository Would Require Rebuilding Capacity at DOE and NRC, Among Other Key Steps at 1 (2017).

last half-century.”³ After rejecting early disposal proposals that ranged from “burying nuclear waste in polar ice caps to rocketing it to the sun,” a consensus appeared to settle on deep geologic burial in a permanent repository.⁴ Congress passed the Nuclear Waste Policy Act of 1982 (NWPA),⁵ which ultimately led the U.S. Department of Energy (DOE) to submit an application to the NRC for authorization to construct a geologic repository at Yucca Mountain, Nevada.⁶ However, shortly after DOE’s application was submitted in June 2008, Congress stopped funding the Yucca Mountain project, and a pending adjudication before an NRC licensing board was suspended in September 2011.⁷ To date, more than seven years later, Congress has provided no new funding for a permanent nuclear waste repository at Yucca Mountain.

The Holtec proposal before the Board is not for another permanent repository, but for what is acknowledged by its very name to be a temporary solution: a consolidated interim storage facility (CISF). While a license to construct and operate Yucca Mountain would have required DOE to demonstrate a reasonable expectation that it would meet specified performance standards throughout the “period of geologic stability,” defined to “end 1 million years after disposal,”⁸ the licensing requirements for an interim storage facility under 10 C.F.R. Part 72 apply to renewable terms of no more than “40 years from the date of issuance.”⁹

³ NEI v. EPA, 373 F.3d 1251, 1257 (D.C. Cir. 2004).

⁴ Id.

⁵ Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 (1983) [hereinafter NWPA].

⁶ See Letter from Edward F. Sproat III, Director, DOE Office of Civilian Radioactive Waste Management, to Michael F. Weber, Director, NRC Office of Nuclear Material Safety and Safeguards (NMSS) (June 3, 2008) (ADAMS Accession No. ML081560407).

⁷ U.S. Dep’t of Energy (High-Level Waste Repository), LBP-11-24, 74 NRC 368 (2011).

⁸ 10 C.F.R. § 63.302.

⁹ Id. § 72.42(a).

On March 30, 2017, Holtec submitted an application to the NRC to construct and operate a CISF.¹⁰ Holtec intends to construct and operate the first phase of its CISF on approximately 1,000 acres of land in Lea County, New Mexico.¹¹ Holtec seeks to store 8,680 metric tons of uranium (MTUs) in two different models of Holtec canisters, up to 500 canisters in total, for a license period of 40 years.¹² On March 19, 2018, the NRC accepted and docketed Holtec's application.¹³ If its initial license is granted, Holtec plans "19 subsequent expansion phases to be completed over the course of 20 years," with each phase necessitating a license amendment request.¹⁴

Holtec's Environmental and Safety Analysis Reports demonstrate marked differences between its proposed facility and a permanent waste repository, such as Yucca Mountain. Holtec's project is substantially less ambitious. For example, Yucca Mountain was to be constructed to comply with performance standards for one million years, but Holtec's Environmental Report anticipates storage at its proposed facility for 120 years (40 years for initial licensing, plus 80 years of potential extensions), and acknowledges that this 120 year period could be reduced if a permanent geologic repository were finally licensed and began operating.¹⁵ While Yucca Mountain was statutorily authorized to store 70,000 metric tons of

¹⁰ See Letter from Kimberly Manzione, Holtec Licensing Manager, to Michael Layton, Director, NRC Division of Spent Fuel Management, NMSS (Mar. 30, 2017) (ADAMS Accession No. ML17115A418).

¹¹ [Holtec] HI-STORE [CISF] Environmental Report, at 14 (Rev. 5, Mar. 2019) [hereinafter ER]. The petitioners' originally-filed contentions in this proceeding are based on the earlier version of Holtec's Environmental Report. See [Holtec] HI-STORE [CISF] Environmental Report (Rev. 1, Dec. 2017).

¹² See ER at 14.

¹³ See Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 12,034 (Mar. 19, 2018).

¹⁴ ER at 14.

¹⁵ Id.

high level radioactive waste,¹⁶ Holtec's initial license application requests permission to store up to 8,680 MTUs.¹⁷ While the Yucca Mountain repository would be constructed at least 700 feet below the surface,¹⁸ Holtec's license application contemplates a maximum excavation depth of 25 feet.¹⁹ And all parts of the Holtec storage system—both for transportation and storage—would use canisters and casks that have been separately approved by the NRC, and hence are not part of Holtec's license application for the Lea County storage facility.²⁰

On July 16, 2018, the NRC published notice in the Federal Register of an opportunity to request a hearing and petition to intervene by September 14, 2018.²¹ On September 12, 2018, AFES filed its petition to intervene and request for a hearing.²² On September 14, 2018, NAC,

¹⁶ 42 U.S.C. § 10134(d).

¹⁷ ER at 14. Holtec's Environmental Report, however, analyzes the potential full 20-phase capacity of up to 100,000 MTUs.

¹⁸ U.S. DOE, Office of Civilian Radioactive Waste Management, Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada at S-7 (June 2008).

¹⁹ [Holtec] HI-STORE [CISF] Safety Analysis Report at 30 (rev. 0F Jan. 2019) [hereinafter SAR]. The petitioners' originally-filed contentions in this proceeding are based on the earlier version of Holtec's SAR. See [Holtec] HI-STORE [CISF] Safety Analysis Report (rev. 0A Oct. 2017).

²⁰ See 10 C.F.R. § 72.214 (Certificate Number 1040). Holtec's license application proposes the exclusive use of the HI-STORM UMAX canister storage system.

²¹ Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919, 32,919 (July 16, 2018) [hereinafter Notice of Opportunity to Request a Hearing].

²² [AFES'] Petition to Intervene and Request for Hearing (Sept. 12, 2018) at 1 [hereinafter AFES Pet.].

Joint Petitioners, Beyond Nuclear, and Sierra Club timely filed their petitions.²³ The NRC also received five petitions from local governmental bodies to participate in the proceeding.²⁴

On September 14, 2018, the Commission received motions to dismiss the proceeding from Beyond Nuclear and Fasken.²⁵ On September 24, 2018, Holtec and the NRC Staff filed answers opposing both motions to dismiss.²⁶ Beyond Nuclear and Fasken filed replies.²⁷

Although the Secretary of the Commission denied both motions on procedural grounds,²⁸ it

²³ Petition to Intervene and Request for Hearing of NAC International, Inc. (Sept. 14, 2018) [hereinafter NAC Pet.]; [Joint Petitioners'] Petition to Intervene and Request for an Adjudicatory Hearing (Sept. 14, 2018) [hereinafter Joint Pet'rs Pet.]; Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene (Sept. 14, 2018) [hereinafter Beyond Nuclear Pet.]; Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Sept. 14, 2018) [hereinafter Sierra Club Pet.].

²⁴ Petition by Eddy-Lea Energy Alliance to Participate as an Interested Local Governmental Body (Sept. 4, 2018) [hereinafter ELEA Pet.]; Corrected Petition by the Board of Commissioners for Lea County, New Mexico to Participate as an Interested Local Governmental Body (Sept. 12, 2018) [hereinafter Lea Cty. Pet.]; Petition by the City of Carlsbad, New Mexico to Participate as an Interested Local Governmental Body (Sept. 12, 2018) [hereinafter Carlsbad Pet.]; Petition by the City of Hobbs to Participate as an Interested Local Governmental Body (Sept. 13, 2018)[hereinafter Hobbs Pet.]; Petition by Eddy County to Participate as an Interested Local Governmental Body (Sept. 13, 2018)[hereinafter Eddy Cty. Pet.].

²⁵ Beyond Nuclear, Inc.'s Motion to Dismiss Licensing Proceedings for Hi-Store [CISF] and WCS [CISF] for Violation of the [NWP] (Sept. 14, 2018) [hereinafter Beyond Nuclear Motion to Dismiss]; Motion of [Fasken] to Dismiss Licensing Proceedings for Hi-Store [CISF] and WCS [CISF] (Sept. 14, 2018) [hereinafter Fasken Motion to Dismiss].

²⁶ [Holtec's] Answer Opposing Beyond Nuclear Motion to Dismiss Licensing Proceeding for HI-STORE [CISF] (Sept. 24, 2018) [hereinafter Holtec Answer to Beyond Nuclear Motion to Dismiss]; [Holtec's] Answer Opposing [Fasken] Motion to Dismiss Licensing Proceeding for HI-STORE [CISF] (Sept. 24, 2018) [hereinafter Holtec Answer to Fasken Motion to Dismiss]; NRC Staff's Response to Motions to Dismiss Licensing Proceedings (Sept. 24, 2018) [hereinafter NRC Staff Response to Motions to Dismiss].

²⁷ Beyond Nuclear's Reply to [Holtec], and NRC Staff Responses to Beyond Nuclear's Motion to Dismiss (Sept. 28, 2018) [hereinafter Beyond Nuclear Reply on Motion to Dismiss]; Reply of Movants Fasken and PBLRO to Staff's Response to Motions to Dismiss (Sept. 28, 2018) [hereinafter Fasken Reply to NRC Staff on Motion to Dismiss]; Reply of [Fasken] to [Holtec's] Response to Motion to Dismiss (Sept. 28, 2018) [hereinafter Fasken Reply to Holtec on Motion to Dismiss].

²⁸ Order of the Secretary, [Holtec] (HI-STORE [CISF]) [and] Interim Storage Partners LLC (WCS [CISF]) Docket Nos. 72-1051 & 72-1050 (Oct. 29, 2018) (unpublished) [hereinafter Order Denying Motions to Dismiss].

observed that Beyond Nuclear's concurrently-filed petition incorporated arguments by reference contained in its motion to dismiss.²⁹ The Secretary, therefore, referred both Beyond Nuclear's and Fasken's motions to the Board to be considered under 10 C.F.R. § 2.309.³⁰

On October 9, 2018, Holtec³¹ and the NRC Staff³² filed answers to the petitions. Holtec opposed the standing of all petitioners and the admission of all contentions. The NRC Staff supported the standing of two petitioners (Beyond Nuclear and Sierra Club) and the admissibility of four of their contentions (Beyond Nuclear's sole contention and Sierra Club Contentions 1, 4, and 8).³³ On October 16, 2018, petitioners AFES, Beyond Nuclear, Joint Petitioners, NAC, and Sierra Club filed replies.³⁴ On December 3, 2018, Holtec and the NRC

²⁹ Id. at 2.

³⁰ Id. at 2–3. On December 27, 2018, Beyond Nuclear petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Secretary's Order, which denied Beyond Nuclear's Motion to Dismiss and referred it as a petition to this Board. That appeal remains pending, although Beyond Nuclear has requested it be held in abeyance pending the outcome of this proceeding. See Notice of Beyond Nuclear's Petition for Review of NRC Order in D.C. Circuit U.S. Court of Appeals, Docket Nos. 72-1050/1051 (Jan. 16, 2019).

³¹ [Holtec's] Answer Opposing [AFES'] Petition to Intervene and Request for Adjudicatory Hearing on [Holtec's] HI-STORE [CISF] Application (Oct. 9, 2018) [hereinafter Holtec Answer to AFES]; [Holtec's] Answer Opposing Beyond Nuclear's Hearing Request and Petition to Intervene on [Holtec's] HI-STORE [CISF] Application (Oct. 9, 2018) [hereinafter Holtec Answer to Beyond Nuclear]; [Holtec's] Answer Opposing [NAC's] Petition to Intervene and Request for Hearing on [Holtec's] HI-STORE [CISF] Application (Oct. 9, 2018) [hereinafter Holtec Answer to NAC]; [Holtec's] Answer Opposing Sierra Club's Petition to Intervene and Request for Adjudicatory Hearing on [Holtec's] HI-STORE [CISF] Application (Oct. 9, 2018) [hereinafter Holtec Answer to Sierra Club]; [Holtec's] Answer Opposing [Joint Petitioners'] Petition to Intervene and Request for an Adjudicatory Hearing on [Holtec's] HI-STORE [CISF] Application (Oct. 9, 2018) [hereinafter Holtec Answer to Joint Pet'rs].

³² NRC Staff Consol. Answer.

³³ The NRC Staff also did not oppose the admissibility of NAC Contention 3, but deemed it to be moot inasmuch as the Staff opposed NAC's standing.

³⁴ Consolidated Response by Petitioner [AFES] to Answers by [Holtec] and NRC Staff (Oct. 16, 2018) [hereinafter AFES Reply]; Beyond Nuclear's Reply to Oppositions to Hearing Request and Petition to Intervene (Oct. 16, 2018) [hereinafter Beyond Nuclear Reply]; Combined Reply of [Joint Petitioners] to Holtec and NRC Answers (Oct. 16, 2018) [hereinafter Joint Pet'rs Reply]; Reply in Support of Petition to Intervene and Request for Hearing of [NAC] (Oct. 16, 2018)

Staff filed supplemental responses opposing consideration of Fasken's motion to dismiss as a petition.³⁵ Fasken filed a reply on December 10, 2018.³⁶

The Board heard oral argument on January 23 and 24, 2019 in Albuquerque, New Mexico. Numerous motions proffering new and amended contentions that were filed after oral argument are addressed infra.

II. STANDING ANALYSIS

In a licensing proceeding such as this, the NRC must grant a hearing "upon the request of any person whose interest may be affected by the proceeding."³⁷ However, to determine whether a petitioner has a sufficient interest, the Commission applies contemporaneous judicial concepts of standing.³⁸ Although the Commission instructs us to construe the petition in favor of the petitioner when we determine standing,³⁹ it is nonetheless each petitioner's burden to demonstrate that standing requirements are met.⁴⁰ As relevant here, a petitioner may satisfy this burden in one of three ways.

[hereinafter NAC Reply]; Sierra Club's Reply to Answers Filed by [Holtec] and NRC Staff (Oct. 16, 2018) [hereinafter Sierra Club Reply].

³⁵ [Holtec's] Answer Opposing [Fasken's] Motion / Petition to Intervene on [Holtec's] HI-STORE [CISF] Application (Dec. 3, 2018) [hereinafter Holtec Supplemental Answer to Fasken Motion to Dismiss]; NRC Staff's Supplemental Response to Motion to Dismiss by [Fasken] (Dec. 3, 2018) [hereinafter NRC Staff Supplemental Answer to Fasken Motion to Dismiss].

³⁶ Reply of [Fasken] to Holtec's Answer Opposing Movants' Motion to Dismiss/Petition to Intervene (Dec. 10, 2018) [hereinafter Fasken Reply to Holtec]; Reply of [Fasken] to NRC Staff's Supplemental Response and Opposition to Motion to Dismiss (Dec. 10, 2018) [hereinafter Fasken Reply to NRC Staff].

³⁷ 42 U.S.C. § 2239(a)(1)(A).

³⁸ Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-15-25, 82 NRC 389, 394 (2015).

³⁹ Id.

⁴⁰ See Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-00-05, 51 NRC 90, 98 (2000). 10 C.F.R. § 2.309(d) specifies information that a petitioner should include in its petition to establish standing, but does not set the standard the Board must apply when deciding whether that information is sufficient.

IV. CONTENTION ANALYSISA. Beyond Nuclear

Understanding Beyond Nuclear's sole contention (as well as some of the contentions proffered by other petitioners¹³⁵) requires further explanation of the statutory scheme that was established by the NWPA. As discussed supra, Congress contemplated that DOE would build a national nuclear waste repository, but that the nuclear power companies would help pay for it. Under section 302 of the NWPA, power reactor licensees were required to pay into a Nuclear Waste Fund for construction of the repository.¹³⁶ In exchange, section 302(a)(5)(B) committed DOE to begin disposing of the nuclear power plants' spent fuel no later than January 31, 1998. When a permanent repository failed to materialize, the power plant licensees sued and began to recover from the federal government substantial damages to cover the cost of continuing to store spent fuel at their reactor sites.¹³⁷ Contract damage lawsuits under the NWPA are now commonplace, and the federal government pays out damages to power reactor licensees on a regular basis.¹³⁸

Thus, both DOE and the nuclear power plant owners potentially have an interest in contracting to use Holtec's proposed interim storage facility. DOE might want to take responsibility for the nuclear plants' spent fuel, pay Holtec to store it, and stop paying out damages. The nuclear plant owners, on the other hand, might be willing to apply their ongoing damage payments toward paying Holtec to store their spent fuel, so that it would be off their sites and no longer their responsibility to keep secure. Because the NWPA was drafted on the

¹³⁵ See, e.g., Sierra Club Contention 1 and Joint Petitioners Contention 2, discussed infra.

¹³⁶ 42 U.S.C. § 10222.

¹³⁷ See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy, 736 F.3d 517, 520 (D.C. Cir. 2013); Me. Yankee Atomic Power Co. v. United States, 225 F.3d 1336, 1341-42 (Fed. Cir. 2000); Ind. Mich. Power Co. v. U.S. Dep't of Energy, 88 F.3d 1272, 1276-77 (D.C. Cir. 1996).

¹³⁸ See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs, 736 F.3d at 520.

assumption that DOE would not accept title to spent nuclear fuel until a permanent repository becomes operational, however, it appears (as discussed infra) that in general only the second possibility would be consistent with the terms of the statute.

Beyond Nuclear's contention, as originally proffered in its hearing petition, therefore stated:

The NRC must dismiss Holtec's license application and terminate this proceeding because the application violates the NWPA. The proceeding must be dismissed because the central premise of Holtec's application—that the U.S. Department of Energy ("DOE") will be responsible for the spent fuel that is transported to and stored at the proposed interim facilities—violates the NWPA. Under the NWPA, the DOE is precluded from taking title to spent fuel unless and until a permanent repository has opened. 42 U.S.C. §§ 10222(a)(5)(A), 10143.¹³⁹

In other words, initially Beyond Nuclear assumed that the "central premise" of Holtec's application was that Holtec would contract with DOE to store nuclear power companies' spent fuel. This would be unlawful under the NWPA, Beyond Nuclear contended.

After Holtec conceded that (with limited exceptions) such contracts would indeed be unlawful at the present time,¹⁴⁰ Beyond Nuclear moved to amend its contention to add the following statement:

Language in Rev. 3 of Holtec's Environmental Report, which presents federal ownership as a possible alternative to private ownership of spent fuel, does not render the application lawful. As long as the federal government is listed as a potential owner of the spent fuel, the application violates the NWPA.¹⁴¹

As discussed infra, the Board grants Beyond Nuclear's motion to amend its contention, in order to allege that even presenting federal ownership as a possible alternative to private ownership of spent fuel violates the NWPA.

¹³⁹ Beyond Nuclear Pet. at 10.

¹⁴⁰ Tr. at 250–52.

¹⁴¹ Motion by Petitioners Beyond Nuclear and Fasken to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address [Holtec's] Revised License Application (Feb. 6, 2019) at 8 [hereinafter Beyond Nuclear and Fasken Motion to Amend].

As events have unfolded, therefore, Beyond Nuclear's contention now raises this fundamental question: May the NRC license Holtec's storage facility to enter into lawful contracts with potential customers, including those that may later become lawful? Or, if Congress were to expand the category of lawful contracts (specifically, to include most contracts with DOE), would it be necessary (as Beyond Nuclear claims) for Holtec to re-submit its license application and for the NRC to re-notice a new opportunity for a hearing?¹⁴² We conclude that, to implement the will of Congress in such circumstances, the NRC need not require Holtec to begin the licensing process all over again.

As explained supra, initially Beyond Nuclear filed with the Commission a motion to dismiss the Holtec licensing proceeding as violating the NWPA.¹⁴³ At the same time, out of an abundance of caution, Beyond Nuclear also filed essentially the same claim in the form of a hearing request and contention.¹⁴⁴ The Secretary of the Commission denied Beyond Nuclear's motion to dismiss on procedural grounds, without prejudice to its underlying arguments, and directed that the matter should proceed before a licensing board on the basis of Beyond Nuclear's hearing petition.¹⁴⁵

In support of its contention, Beyond Nuclear incorporated by reference portions of its motion to dismiss.¹⁴⁶ Beyond Nuclear identified language in Holtec's Environmental Report that said Holtec would enter into a contract with DOE by which DOE will take title to spent fuel and be responsible for transporting it to the site.¹⁴⁷ It also identified language in Holtec's Safety

¹⁴² See id. at 11 n.5.

¹⁴³ Beyond Nuclear Motion to Dismiss at 1.

¹⁴⁴ Beyond Nuclear Pet.

¹⁴⁵ Order Denying Motions to Dismiss at 2.

¹⁴⁶ Beyond Nuclear Pet. at 10.

¹⁴⁷ Beyond Nuclear Motion to Dismiss at 16 (citing ER, rev. 0 at 1-1, 3-104).

Analysis Report that said Holtec might either contract with DOE or with nuclear plant owners themselves, leading to an inconsistency in the application documents.¹⁴⁸

Beyond Nuclear contended that the first scenario (that is, Holtec's contracting with DOE) would be unlawful under the NWPA. As Beyond Nuclear pointed out, the NWPA provides that until a permanent waste repository (such as Yucca Mountain) opens, "the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel."¹⁴⁹ For this reason, Beyond Nuclear argued, the NWPA states that DOE will take title to spent fuel only "following commencement of operation of a repository."¹⁵⁰ It is undisputed that no such repository has been licensed or constructed, much less become operational.

The NRC Staff agreed that Beyond Nuclear's contention should be admitted to the extent it challenged the inconsistency between Holtec's Environmental Report and its Safety Analysis Report.¹⁵¹ The Staff, however, deemed it "premature to take a position on how the applicant will address the inconsistency."¹⁵²

Holtec, for its part, contended that the inconsistencies were a mistake, that its actual intent is to contract either with DOE or with nuclear plant owners, and that the inconsistencies were "in the process of being revised to eliminate any confusion."¹⁵³ Holtec also suggested it "worth noting that Petitioner's claims of current NWPA restrictions may well be superseded by

¹⁴⁸ Id. at 16 n.4 (emphasis added).

¹⁴⁹ 42 U.S.C. § 10131.

¹⁵⁰ Id. § 10222(a)(5)(A). See also id. § 10143 ("Delivery, and acceptance by the Secretary [of Energy], of any high-level radioactive waste or spent nuclear fuel for a repository . . . shall constitute a transfer to the Secretary of title to such waste or spent fuel.") (emphasis added).

¹⁵¹ NRC Staff Consol. Answer at 66.

¹⁵² Id. at 66 n.296.

¹⁵³ Holtec Answer to Beyond Nuclear at 20.

Congress.”¹⁵⁴ But Holtec did not initially concede in its response that contracting for DOE to take title to nuclear power companies’ spent fuel would necessarily be unlawful under the NWPA as currently in effect.

The Board, therefore, was inclined to agree with the NRC Staff that Beyond Nuclear’s contention was admissible, but to admit it as a legal issue contention for a broader purpose: that is, to determine whether or not Holtec could lawfully contract directly with DOE to take title to power companies’ spent nuclear fuel. At the very least, the Board tentatively concluded, Beyond Nuclear had set forth a plausible case that Holtec could not lawfully elect this option, consistent with the NWPA.¹⁵⁵

At oral argument, however, Holtec’s counsel conceded that, with very limited exceptions, it would violate the NWPA as currently in effect for DOE to take title to nuclear plant owners’ spent fuel. He stated:

I will agree with you that, on their current legislation, DOE cannot take title to spent nuclear fuel from commercial nuclear power plants, under the current statement of facts, but that could change, depending on what Congress does.¹⁵⁶

Holtec’s counsel committed, however, that Holtec has no intention of contracting with DOE to accept most nuclear power plants’ spent fuel unless and until Congress amends the NWPA to make that lawful.¹⁵⁷ Meanwhile, Holtec represented, it has every intention of

¹⁵⁴ Id. at 21 (citing proposed but unenacted amendments to the NWPA).

¹⁵⁵ A contention may state an “issue of law or fact.” 10 U.S.C. § 2.309(f)(1)(i). As should be obvious, a legal issue contention need not necessarily address every requirement of section 2.309(f)(1), such as the requirement to provide “a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue.” Id. § 2.309(f)(1)(v). See U.S. Dep’t of Energy (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588–91 (2009) (“We agree, for example, with the Boards’ view in this proceeding that requiring a petitioner to allege ‘facts’ under section 2.309(f)(1)(v) or to provide an affidavit that sets out the ‘factual and/or technical bases’ under section 51.109(a)(2) in support of a legal contention—as opposed to a factual contention—is not necessary.”).

¹⁵⁶ Tr. at 250. See also Tr. at 251–52.

¹⁵⁷ Tr. at 248.

proceeding with the project on the assumption it will contract directly with the nuclear plant owners themselves.¹⁵⁸ Finally, Holtec has, in fact, revised its Environmental Report to say that the proposed facility's customers could be either DOE or the nuclear power plant owners.¹⁵⁹

In the aftermath of these developments, Beyond Nuclear moved to amend its contention to add the statement set forth above. In essence, Beyond Nuclear now claims that reference to the mere possibility of contracting directly with DOE must be expunged from Holtec's application—regardless of Holtec's intentions and regardless of whether Congress might amend the NWPA.

Because Beyond Nuclear seeks to amend its contention after the deadline for filing petitions, we must first consider whether its motion to file the contention satisfies the three-prong test in 10 C.F.R. § 2.309(c)(1)(i)-(iii). Although Holtec argues to the contrary,¹⁶⁰ we conclude that it does. Holtec's revised Environmental Report (Rev. 3) was not available until January 17, 2019. Its revised Environmental Report is materially different from Holtec's original license application because it replaces unequivocal language regarding DOE ownership of spent fuel with language stating that either DOE or private entities will own the spent fuel. Beyond Nuclear's motion to amend was timely filed less than three weeks after the availability of Holtec's revised Report—well within the 30 days in which licensing boards have generally allowed petitioners to respond to new information.¹⁶¹ We therefore grant Beyond Nuclear's motion to amend.

¹⁵⁸ Id.

¹⁵⁹ See ER at 3-117.

¹⁶⁰ Holtec Opposition to Beyond Nuclear and Fasken Motion to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address [Holtec's] Revised License Application (Feb. 19, 2019) at 2–6 [hereinafter Holtec Opposition to Beyond Nuclear and Fasken Motion]. The NRC Staff response addresses the admissibility of the amended contention without considering its timeliness. See NRC Staff Answer to Beyond Nuclear and Fasken Motion.

¹⁶¹ See Shaw AREVA MOX Servs., LBP-08-11, 67 NRC at 493.

Turning to the amended contention itself, however, we conclude that Beyond Nuclear no longer identifies a genuine dispute with Holtec's license application. The inconsistency between Holtec's Environmental Report and its Safety Analysis Report has been fixed: Holtec's application now consistently says that its customers will be either DOE or the nuclear power plant owners. As Holtec's proposed License Condition 17 states, it will undertake construction only after it has established "a definitive agreement with the prospective user/payer for storing the used fuel (USDOE and/or a nuclear plant owner)."¹⁶² At the same time, Beyond Nuclear, Holtec, and this Board all agree that, with limited exceptions, DOE may not lawfully take title to spent nuclear waste under the NWPA as currently in effect.¹⁶³

Beyond Nuclear claims that the mere mention of DOE renders Holtec's license application unlawful. But that is not so. First, DOE does, in fact, already hold title to a relatively small amount of spent nuclear fuel from commercial reactors that could lawfully be stored at Holtec's facility in the future without violating the NWPA.¹⁶⁴ Second, the Board assumes Holtec will honor its commitment not to contract unlawfully with DOE to store any other spent nuclear fuel (that is, the vast majority of spent fuel from commercial reactors, which is currently owned

¹⁶² Holtec Proposed License at 2.

¹⁶³ Although Beyond Nuclear, Holtec, and the Board are all in agreement, the NRC Staff has not taken a position, despite having multiple opportunities to do so. See NRC Staff Answer to Beyond Nuclear and Fasken Motion. Accordingly, the Staff would find Beyond Nuclear's amended contention admissible "specifically as a challenge to whether the application may propose a license condition that includes the potential for DOE ownership of spent fuel to be stored at the Holtec facility." Id. at 2. The Staff cautions, however, that "in agreeing that the contention is admissible in part, the Staff takes no position on the underlying merits of the contention." Id. As best we can tell, the Staff would prefer the Board address the issue as a legal issue contention, precipitating yet another round of briefing and perhaps another oral argument. After thus far receiving well over a thousand pages of briefs and conducting two days of oral argument, the Board is prepared to address this legal issue in the context of deciding contention admissibility.

¹⁶⁴ Tr. at 237, 249–50.

by the nuclear power companies). Likewise, we assume DOE would not be complicit in any such unlawful contracts.

Holtec represents that it is committed to going forward with the project by contracting directly with nuclear plant owners that currently hold title to their spent fuel.¹⁶⁵ Whether Holtec will find that alternative commercially viable is not an issue before the Board, because the business decision of whether to use a license has no bearing on a licensee's ability to safely conduct the activities the license authorizes. As the Commission instructs us, "the NRC is not in the business of regulating the market strategies of licensees or determining whether market strategies warrant commencing operations."¹⁶⁶

Holtec readily acknowledges that it hopes Congress will change the law and allow it in most instances to contract directly with DOE to store spent nuclear fuel.¹⁶⁷ Meanwhile, we assume that Holtec—having acknowledged on the record that (with limited exceptions) it would be unlawful to contract with DOE under the NWPAs as currently in effect—will not try to do just that. Nor may we assume that DOE would be complicit in a violation of the NWPAs.¹⁶⁸ On the contrary, DOE has also taken the position publicly that it may not take title to most private plant companies' spent nuclear fuel without violating the NWPAs as currently in effect.¹⁶⁹

¹⁶⁵ Tr. at 248.

¹⁶⁶ La. Energy Servs. (Nat'l Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005) (quoting Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-01-4, 53 NRC 31, 48–49 (2001)).

¹⁶⁷ Tr. at 248, 250.

¹⁶⁸ A presumption of regularity applies to federal agencies, which should be assumed to act properly in the absence of evidence to the contrary. See, e.g., United States v. Armstrong, 517 U.S. 456, 464 (1996); United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926).

¹⁶⁹ See, e.g., Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21,793, 21,793–94, 21,797 (1995); N. States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754, 756 (D.C. Cir. 1997) ("The Department also took the position that 'it lacks statutory authority under the Act to provide interim storage.'") (quoting 60 Fed. Reg. at 21,794); Ind. Mich. Power Co. v. U.S. Dep't of Energy, 88 F.3d 1272, 1274 (D.C. Cir. 1996) ("The [DOE] also determined that it

Neither the facts nor the law, therefore, remain in dispute. Holtec seeks a license that would allow it to enter into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future. If Congress decides to amend the NWPA to allow DOE to take title to spent nuclear fuel before a national nuclear waste repository becomes operational, the only difference would be that DOE could then lawfully contract with Holtec to store the same spent fuel that presently belongs to the nuclear power plant owners. The NRC Staff assures us that it is reviewing Holtec's application in light of both possibilities: "[T]he Staff bases its safety and environmental reviews on the application as presented, which seeks a license on the basis that either DOE or private entities may hold title to the waste."¹⁷⁰

We see no discernable purpose that would be served, in such circumstances, by requiring Holtec to file a new or amended license application for its storage facility or by the NRC entertaining a fresh opportunity to request a hearing. Beyond Nuclear correctly points out that the Administrative Procedure Act (APA) requires federal agencies to follow the law,¹⁷¹ but we do not interpret either the APA or NWPA to require the NRC to perform a useless act.

Beyond Nuclear's contention, as amended, is not admitted.¹⁷²

had no authority under the NWPA to provide interim storage in the absence of a facility that has been authorized, constructed and licensed in accordance with the NWPA.").

¹⁷⁰ NRC Staff's Consolidated Response to [Joint Petitioner's] and Sierra Club's Motions to File New Contentions (Feb. 19, 2019) at 9 [hereinafter NRC Staff Response to Joint Pet'rs and Sierra Club Motions].

¹⁷¹ Beyond Nuclear Motion to Dismiss at 12.

¹⁷² Although Fasken purports to join in Beyond Nuclear's motion to amend, it may not properly do so. As explained *infra*, Fasken did not initially submit an admissible contention of its own, and its hearing request must therefore be denied. In any event, the procedural point is moot, because the Board rules that Beyond Nuclear's contention, as amended, is not admissible.

NRC Staff stated that it “does not object to the participation of any of these governmental bodies . . . if a hearing is granted.”⁶⁹¹ Neither Holtec nor any other petitioner has raised an objection.

Pursuant to 10 C.F.R. § 2.315(c), a local governmental body that is not admitted as a party under section 2.309 shall, upon request, be permitted a reasonable opportunity to participate in a hearing as an interested non-party. Section 2.315(c) does not require a demonstration of standing, but does require identification of those contentions on which the non-party intends to participate.⁶⁹²

As the Board denies all the petitioners’ requests for a hearing, the motions of the City of Carlsbad, New Mexico; Eddy-Lea Energy Alliance; Lea County, New Mexico; City of Hobbs, New Mexico; and Eddy County, New Mexico are accordingly denied as moot.

VI. RULING ON PETITIONS

Although Beyond Nuclear, Sierra Club, and Fasken have demonstrated standing in accordance with 10 C.F.R. § 2.309(d), no petitioner has proffered an admissible contention meeting the requirements of 10 C.F.R. § 2.309(f)(1). Therefore, in accordance with 10 C.F.R. § 2.309(a), the Board denies the requests for hearing and petitions for leave to intervene submitted by Beyond Nuclear, Sierra Club, Joint Petitioners, Fasken, AFES, and NAC.

VII. ORDER

For the foregoing reasons:

- A. Beyond Nuclear’s petition is denied. Beyond Nuclear’s contention is not admitted.
- B. Sierra Club’s petition is denied. Sierra Club’s contentions are not admitted.
- C. Joint Petitioners’ petition is denied. Joint Petitioners’ contentions are not admitted.
- D. Fasken’s petition is denied. Fasken’s contention is not admitted.
- E. AFES’s petition is denied. AFES’s contentions are not admitted.

⁶⁹¹ NRC Staff Consol. Answer at 3–4, n.11.

⁶⁹² 10 C.F.R. § 2.315(c).

- F. NAC's petition is denied. NAC's contentions are not admitted.
- G. The petitions of City of Carlsbad, Eddy-Lea Energy Alliance, Lea County, City of Hobbs, and Eddy County to participate as local interested government bodies are denied as moot.
- H. Holtec's October 26, 2018 motion to strike is denied as moot.⁶⁹³
- I. Holtec's November 8, 2018 Motion for Leave to Reply to Alliance Response is denied as moot.⁶⁹⁴
- J. Fasken's December 10, 2018 motion to file a supplemental declaration is granted.⁶⁹⁵
- K. Joint Petitioners' and Sierra Club's January 11, 2019 motions to adopt each other's contentions are denied as moot.⁶⁹⁶
- L. Sierra Club's and Joint Petitioners' joint motion for a subpart G hearing is denied as moot.⁶⁹⁷
- M. Sierra Club's January 17, 2019 motion to late-file new Contention 26 is granted.⁶⁹⁸
- N. Joint Petitioners' January 17, 2019 motion to late-file new Contention 14 is granted.⁶⁹⁹
- O. Sierra Club's February 6, 2019 motion to amend its Contention 1 is granted.⁷⁰⁰
- P. Beyond Nuclear and Fasken's February 6, 2019 motion to amend Beyond Nuclear's contention is granted.⁷⁰¹
- Q. Joint Petitioners' February 6, 2019 motion to amend their Contention 2 is granted.⁷⁰²

⁶⁹³ Holtec Motion to Strike.

⁶⁹⁴ [Holtec's] Motion for Leave to Reply to [AFES'] Response to [Holtec's] Motion to Strike (Nov. 8, 2018).

⁶⁹⁵ Motion for Permission to File Supplemental Standing Declaration of Tommy E. Taylor (Dec. 10, 2018).

⁶⁹⁶ Sierra Club's Motion to Adopt the Contentions of [Joint Petitioners] (Jan. 11, 2019); Motion of [Joint Petitioners] to Adopt and Litigate Sierra Club Contentions (Jan. 11, 2019).

⁶⁹⁷ Joint Motion to Establish Hearing Procedures by Sierra Club, [Joint Petitioners] (Jan. 3, 2019).

⁶⁹⁸ Sierra Club's Motion to File a New Late-Filed Contention (Jan. 17, 2019).

⁶⁹⁹ Motion by [Joint Petitioners] for Leave to File a New Contention (Jan. 17, 2019).

⁷⁰⁰ Sierra Club's Motion to Amend Contention 1 (Feb. 6, 2019).

⁷⁰¹ Motion by Petitioners Beyond Nuclear and Fasken to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address Holtec International's Revised License Application (Feb. 6, 2019).

⁷⁰² Motion by [Joint Petitioners] to Amend Their Contention 2 Regarding Federal Ownership of Spent Fuel in the Holtec International Revised License Application (Feb. 6, 2019).

R. Sierra Club's February 18, 2019 motion to amend its Contention 16 is denied.⁷⁰³

S. Joint Petitioners' February 18, 2019 motion to amend their Contentions 4 and 7 is denied.⁷⁰⁴

T. Joint Petitioners February 25, 2019 motion to amend their Contention 2 is denied.⁷⁰⁵

U. Sierra Club's February 25, 2019 motion to file new late-filed Contentions 27, 28, and 29 is denied.⁷⁰⁶

V. This proceeding is terminated.

Any appeal of this decision to the Commission shall be filed in conformity with 10 C.F.R.

§ 2.311.

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
May 7, 2019

⁷⁰³ Sierra Club's Motion to Amend Contention 16 (Feb. 18, 2019).

⁷⁰⁴ Motion of [Joint Petitioners] to Amend Their Contentions 4 and 7 Regarding Holtec's Decision to Have No Dry Transfer System Capability and Holtec's Policy of Returning Leaking, Externally Contaminated or Defective Casks and/or Canisters to Originating Reactor Sites (Feb. 18, 2019).

⁷⁰⁵ Motion of [Joint Petitioners] to Amend Their Contention 2 Regarding Holtec's Proposed Means of Financing the Proposed Consolidated Interim Storage Facility (Feb. 25, 2019).

⁷⁰⁶ Sierra Club Additional Contentions.