UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY

In the Matter of:	)	
	)	
Holtec International	)	**Docket No. 72-1051**
	)	
(HI-STORE Consolidated Interim	)	
Storage Facility	)	
for Interim Storage of Spent Nuclear Fuel)	)	

CONSOLIDATED RESPONSE BY PETITIONER ALLIANCE FOR ENVIRONMENTAL STRATEGIES TO ANSWERS BY HOLTEC AND NRC STAFF

I. Introduction

Pursuant to 10 C.F.R. § 2.309 and the hearing notice published by the Nuclear Regulatory Commission ("NRC" or "Commission") at 83 F.R. 32919 (July 16, 2018), Petitioner Alliance for Environmental Strategies ("Petitioner" or "AFES") hereby replies as follows to the Response filed by NRC Staff on October 9, 2018, and to the Answer filed by Holtec International on October 9, 2018.

II. Petitioner's Standing to Intervene

Requirements of Standing to Be Liberally Construed in Favor of Granting Petition

Although the requirements of 10 C.F.R. § 2.309 must ultimately be met, every benefit of the doubt should be given to the potential intervener in order to obviate dismissal of an intervention petition. *Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding,* LBP-94-8, 29 NRC 116 (1994). A presiding officer, in making a standing determination, should "construe the [intervention] petition in favor of the petitioner." *Georgia Inst. Of Tech. (Georgia Tech Research Reactor, Atlanta Georgia),* CLI-95-12, 42 NRC

111, 115 (1995).

The criteria for establishing administrative standing may permissibly be less demanding than the criteria for judicial standing. *Envirocare of Utah, Inc. v. NRC,* 194 F.3d 72, 74 (D.C.Cir. 1999). This is so because agencies are not constrained by Article III, nor are they governed by judicially created standing doctrines restricting access to federal courts. *Id.*

At the same time, however, standing in a case before the Nuclear Regulatory Commission is not limited to allegations of potential radiological exposure. For example, based on analogous principles of federal judicial standing, a petitioner may also assert standing based upon the alleged loss of a procedural or constitutional right. *Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1)*, CLE-93-21, 38 NRC 87, 93-94 (1993)(loss of procedural rights); *Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2*), LBP-82-43A, 15 NRC 1423, 1445 (1982)(loss of constitutional rights), *citing Chicano Police Officer's Ass'n v. Stover,* 526 F.2d 431, 436 (10th Cir. 1975), *vacated on other grounds*, 426 U.S. 944, 96 S. Ct. 3161, 49 L. Ed. 2d 1181 (1976), *holding on standing reaffirmed,* 552 F.2d 918 (10th Cir. 1977).

Finally, the test for standing does not require or permit the presiding officer to assess the petitioner's case on the merits. Thus in evaluating a petitioner's claims of injury-in-fact, care must be taken to avoid "the familiar trap of confusing the standing determination with the assessment of petitioner's cases on the merits." *In the Matter of Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility*, 37 N.R.C. 72, 72 (Feb. 5, 1993), *quoting City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478, 495 (D.C.Cir.1990) (citations omitted), *cert. denied*, 117 L.Ed.2d 460 (1992); *see also Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station Units 1, 2 & 3),* LBP-82-117B, 16 NRC 2024, 2029

(1982)(merits of expert testimony need not be decided in order to admit a petitioner as a party to an NRC proceeding). Thus a statement of asserted injury which is insufficient to found a valid contention may well be adequate to provide a basis for standing. *Consumers Power Co. (Palisades Nuclear Plant)*, LBP-79-20, 10 NRC 106 , 115 (1979).

Cognizable Interests for Standing

Radiological Exposure

Even a minor radiological exposure is sufficient to confer standing. *See, e.g., Yankee Atomic Elec. Co. (Yankee Nuclear Power Station),* LBP-96-2, 43 NRC 61, 70, *aff'd* CLI-96-7, 43 NRC 235, 246-48 (1996). For example, a base of normal, everyday activities that is within 25 miles of a nuclear facility can fairly be presumed to confer an interest which might be affected by reactor construction and/or operation. *Gulf States Utilities Co. (River Bend Station, Units 1 & 2)*, ALAB-183, 7 AEC 222, 226 (1974). Similarly, a person who regularly commutes past the entrance of a nuclear facility while conducting normal activities is presumed to have the requisite interest for standing. *Northern States Power Co. (Pathfinder Atomic Plant)*, LBP-90-3, 31 NRC 40, 45 (1990). A petitioner who lived 56 miles from the plant but routinely traveled within the geographical area for business reasons met the standing requirement under the "proximity presumption." PPL Susquehanna, LLC (*Susquehanna Steam Electric Station, Units 1 & 2*), LBP-07-10, 66 NRC 1, 20-21 (2007).

Admittedly, in "non-reactor" cases such as the Holtec license application, there is no presumption of standing based upon geographic proximity. Instead, in non-reactor cases, the Commission has developed the "proximity-plus" test, where a petitioner must show that the activity at issue involves geographical closeness to a "significant source of radioactivity

producing an obvious potential for offsite consequences." *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 75 n.22 (1994).

Here, the members of AFES live, work and recreate near anticipated routes and corridors through which canisters containing spent nuclear fuel (SNF) will be passing. SNF is inherently very deadly radiotoxic material, and each transport cask will contain considerably more radioactivity (200 times or more) than was dispersed by the Hiroshima nuclear bomb. SNF "poses a dangerous, long-term health and environmental risk. It will remain dangerous 'for time spans seemingly beyond human comprehension.'" *Nuclear Energy Inst., Inc., v. EPA*, 373 F.3d 1251, 1258 (D.C. Cir. 2004)(*per curium*).

The harms and threats from SNF that are reasonably inferable from the statements of AFES members include the potential for radiation exposures from being physically stuck in traffic proximate to truck or rail loads of SNF; spills and water runoff from accidents or leakage from those transport vehicles; downwind radioactive exposure from defective transport vehicles; and possible radioactive contamination of water sources caused by accidents. Cesium-137 is one of hundreds of listed isotopes in the SNF. If there is a fire and leakage or surface radioactive contamination on a transport cask or vehicle, Cs-137 could quite readily volatilize and escape with the smoke, driven by the heat. Radio nuclides could be inhaled by emergency responders and members of the public, could be carried downwind as fallout, and could be ingested (via drinking water or contaminated food), and then lodge in and attack human muscle tissue, including the heart or thyroid gland. Cs-137 and other likely SNF isotopes must be respected in transport accidents, especially those involving fires and leaks into surface waters. It may be difficult to assess the threats of airborne or waterborne radiation from such events with precision,

but the threats cannot be dismissed out of hand. *See Exelon Generation Co. V. LLC and PSEG Nuclear, LLC (Peach Bottom Atomic Power Station, Units 2 & 3),* CLI-05-26, 62 NRC 577, 581 (2005)(for purposes of standing, relevant inquiry is whether granting of application "could possibly lead to the offsite release of" radiological material).

AFES members raise proper allegations of threatened harms and scenarios where the health and safety of their members could be impaired. Consequently, Petitioner has set forth legitimate facts of standing for an organization to serve as a representative of its members who are exposed to threatened harm from Holtec, both as SNF in transit as well as from Holtec's CISF in New Mexico.

Whether and at what distance from the source a person can be presumed to be affected, and thus have legal standing, is judged on a case-by-case basis in NRC administrative cases, taking into account the nature of the proposed action and the significance of the radioactive source. A petitioner must show that he or she lives, works or recreates within a certain distance of the location of dangerously radioactive materials, but does not have the burden of articulating a plausible means through which those materials could cause harm to him or her (because the inherent dangers of the radioactive materials comprise the obvious potential for offsite consequences). *U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii)*, CLI-10-20, 71 NRC 216, 218 (2010), citing *USEC, Inc. (American Centrifuge Plant)*, CLI-05-11, 61 NRC 309, 311 (2005).

In this case, there can be no dispute that SNF and greater-than-Class-C wastes (GTCC) are significant sources of radiation with obvious potential for generating consequences that could affect human health, safety and the environment. This, alone, is a matter of fact and legally,

AFES is relieved of any burden of showing a plausible means of radioactive exposure. But there are demonstrable exposure routes with the possibility of affecting public health and safety and the environment within Holtec's application submission. Generally, Holtec's Environmental Report (Rev. 1) ("ER") takes a denialist perspective of the potential harm from leaky or deteriorated or externally-contaminated transportation containers – casks – used for moving SNF and GTCC waste. Holtec rejects the idea that casks with defects, breaches, leaks, external contamination or containing defective fuel will even be delivered to the Holtec site, but if they are, they will supposedly be swiftly returned to their points of origin at nuclear power plant sites. Holtec calls this its "Start Clean/Stay Clean" policy.

Holtec admits in its application that it has affirmatively created what is a serious accident potential. *Cf. In the Matter of Fla. Power & Light Co. Turkey Point Plant (Unit Nos. 3 & 4)*, 31 N.R.C. 509, 1990 WL 324451 * 5 (June 15, 1990)(where an applicant admits accident potential due to "relaxation" of standards, but fails to provide assurance that "relaxation" is safe, then a petitioner may rely on admission as evidence of admission of contention). In the "HI-STORE CIS Safety Analysis Report, Revision 0A (October 6, 2017), Holtec -9-asserts: In order to uphold the HI-STORE philosophy of "Start Clean/Stay Clean" HP personnel ensure that contamination levels on the canisters of incoming shipments meet site requirements. *Canisters exceeding the limits will be returned to the originating power plant for dispositioning. Id.*, § 3.1.4.6, p. 179/581 of .pdf. (Emphasis added). Holtec's application thus assumes – but then discounts without explanation – unintended release of "some radioactive material" on the journey to and from the proposed site.

Moreover, in its Environmental Report, Holtec states:

> The potential exposure pathways at the CIS Facility Site include: (1) direct exposure to radiation (neutrons and gamma rays) that is emitted from the storage casks, (2) exposure to radioactive material through ingestion of contaminated water or food, including plants and animals in the vicinity of the Site that may be used for subsistence, and (3) exposure to radioactive material through submersion or inhalation of airborne Radio nuclides. The evaluation of exposures from the first route requires consideration of the radiation source (*i.e.*, the canister contents).
>
> Exposures from the second and third routes require that some radioactive material escape from the casks and the proposed CIS Facility. *Given the CIS Facility start clean/stay clean philosophy (i.e., CIS Facility plans to reject and return canisters that have unacceptable external contamination), as well as the fact that no canisters would be opened at the proposed CIS Facility, and considering the engineered features of the canister/cask, there appears to be no viable mechanism by which significant radioactive materials would migrate off-site, or even away from the casks. Thus, while the latter two exposure routes are possible, radioactive material is unlikely to be available for ingestion or inhalation via those pathways during normal conditions,* and hence, there is no opportunity for impacts from these pathways (NRC 2001, page 4-46).

Id. at p. 214/543 (emphasis added). Holtec presents no allegation, much less evidence, that there is no "plausible" radiological exposure. Instead, Holtec assumes – and even this without factual basis – only that exposure is "unlikely." *See Exelon Generation Co. V. LLC and PSEG Nuclear, LLC (Peach Bottom Atomic Power Station, Units 2 & 3),* CLI-05-26, 62 NRC 577, 581 (2005)(for purposes of standing, relevant inquiry is whether granting of application "could possibly lead to the offsite release of" radiological material).

Also, Holtec states that if the "maximum reasonably foreseeable accident associated with SNF transport to the CIS Facility" occurred – the scenario is not disclosed – that "If the accident occurred in an urban area, the estimated population radiation dose would be about 16,000 person-rem. If the accident occurred in a rural area, the estimated population radiation dose would be about 21 person-rem. Because these risks are for the entire population exposed during the

accident, the risk to any single individual would be small. In an urban area or rural area, the radiation dose from the accident for the maximally exposed individual would be 34 rem; – this is based on the individual being 1,100 feet downwind from the accident, where the maximum dose would occur (DOE 2008, Section 6.3.3.2)." ER § 4.9.3, p. 201/543 of .pdf.

These admissions of the possibility of adverse effects logically apply as well to the transportation corridors and deliveries of SNF and GTCC waste to Holtec. The presence of external contamination on a rejected, damaged and/or leaking cask ordered and in transit back to its sender by directive of Holtec comprises an intentional act by Holtec and creates a "viable mechanism by which significant radioactive materials would migrate off-site." Indeed, "Start Clean / Stay Clean" may itself violate the Atomic Energy Act.

Incomplete or Inadequate Application

Contrary to what Holtec implies in its answer and the NRC implies in its Response, a viable assertion of standing is not limited to radiological exposure. For example, standing may be based upon the alleged loss of a procedural right, as long as the procedure at issue is designed to protect against a threatened concrete injury, and the loss of rights to notice, opportunity for a hearing and opportunity for judicial review constitute a discrete injury. *Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLE-93-21*, 38 NRC 87, 93-94 (1993). An individual alleging that violation of constitutional provisions by governmental actions based on a statute will cause him identifiable injury should also have standing to challenge the constitutionality of those actions. *Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2, LBP-82-43A, 15 NRC 1423, 1445 (1982), citing Chicano Police Officer's Ass'n v. Stover,* 526 F.2d 431, 436 (10th Cir. 1975), *vacated on other grounds*, 426 U.S. 944, 96 S. Ct. 3161, 49

L. Ed. 2d 1181 (1976) *holding on standing reaffirmed* 552 F.2d 918 (10th Cir. 1977).

Here, Holtec's failure to produce an environmental impact statement that seriously addresses – in any respect – the potential discriminatory impact of the site selection process is certainly an injury to Petitioner's procedural rights, as well as a potential threat to the constitutional right of Petitioner's members to be free of discriminatory impacts in a licensing procedure permitted and governed by federal law, namely NEPA. Thus, for example, in *Kelley v. Selin*, 42 F.3d 1501, 1507 (6th Cir. 1995), "[p]etitioners alleged that the NRC had failed to comply with the NEPA by refusing to prepare an environmental impact statement or assessment considering concerns specific to the Palisades location and that the environmental assessment relating to the proposed rule, was deficient."[1] *Kelley v. Selin*, 42 F.3d 1501, 1507 (6th Cir. 1995). The United States Court of Appeals for the Sixth Circuit, in a careful opinion, held that these allegations were sufficient to confer standing. *Id.* Thus concepts of judicial standing permitted petitioners living nearby to challenge the rule of dry cask storage and assert harm to their aesthetic interests and their physical health, and that the value of their property would be diminished by the storage of nuclear waste in VSC-24 casks at a nuclear facility located at Palisades. *Id.* at 1509.

Importantly for present purposes, the *Palisades* line of cases, including an opinion by the Nuclear Regulatory Commission, established that the absence of a procedurally or substantively sufficient environmental impact statement could confer standing.

[Petitioner's] claim that an environmental impact statement should be issued in

---

[1] In *Kelly,* the Sixth Circuit addressed the failure to produce an environmental impact statement to accompany a proposed rule, but the analysis of standing applies equally to Holtec's license application.

> itself constitutes a showing how its members' interests may be affected. Failure to produce an environmental impact statement in circumstances where one is required has been held to constitute injury – indeed, irreparable injury. *Jones v. D. C. Redevelopment Land Agency*, 499 F.2d 502, 512 (D. C. Cir. 1974); *Sherr v. Volpe*, 466 F.2d 1027, 1034 (7th Cir. 1972); *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 164, 1184 (6th Cir. 1972); *Izaak Walton League v. Schlesinger*, 337 F.Supp. 287, 295 (D.D.C. 1971); *cf. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB–437, 6 NRC 630, 633 (1977). Persons residing within close proximity to the locus of a proposed action, such as [Petitioner's] members, constitute the very class which an impact statement is intended to benefit.

In the Matter of Consumers Power Co. (Palisades Nuclear Plant), 10 N.R.C. 108, 115–16 (July 23, 1979). In *Kelley*, the Sixth Circuit adopted this same reasoning. Petitioner, on behalf of its members, had standing to seek an injunction to stop the application from proceeding until the applicant *"fully explore[d] all of the environmental impacts."* *Kelley*, 42 F.3d at 1509 (emphasis added).

Here, the declarations submitted by Ms Gardner and Ms. Villegas in support of the AFES Petition to Intervene make clear that community members were entirely excluded from the scoping process preceding Holtec's submission of its application. This makes the Holtec EIS deficient, and grants Petitioner standing to challenge the deficiencies in the process, as community members whose procedural rights were directly negated by the truncated process adopted by Holtec.

III. Contentions

In determining the admissibility of a contention, all that is required for a contention to be acceptable for litigation is that it be specific and have a basis. Whether or not the contention is true is left to litigation on the merits in the licensing proceeding. *Washington Public Power Supply System (WPPSS Nuclear Project No. 2)*, ALAB-722, 17 NRC 546, 551 N. 5 (1993). Thus

a presiding officer should not address the merits of a contention when determining its admissibility. *Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2)*, LBP-82-106, 16 NRC 1649, 1654 (1982).

Moreover, and significantly in this case, whether or not a basis for a contention has been established must be decided by considering the contention in the context of the entire record of the case up to the time the contention is filed. Thus, when an application for a license *is itself incomplete*, the standard for the admission of contentions is lowered, because it is easier for petitioners to have reasons for believing that the application has not demonstrated the safety – or in this case the non-discriminatory impact – of the proposed license. *Wisconsin Electric Power Co. (Point Beach Nuclear plant, Units 1 & 2)*, LBP-81-45, 14 NRC 853 (1981).

A. Contention 1: As a Matter of Law, The Applicant Has Not Performed a Sufficient Investigation and Has Not Done a Sufficient Analysis to Support that the Holtec Site Will Not Have a Disparate Impact on the Minority and Low Income Population of Lea and Eddy County

In the face of literally nothing in the Holtec application supporting a valid environmental justice analysis as to site selection, both the NRC Staff and Holtec insist that because Holtec has presented superficial comparative demographic information concerning the minority and low income populations in Lea and Eddy County, the burden somehow shifts to community members to show that a sufficient analysis by Holtec *would have* revealed discriminatory impacts requiring redress. This is "through the looking glass" logic, that declares the verdict before the trial. By this logic, Holtec is permitted to say only, "We found and selected this site because a group of local officials told us they wanted us to come. Here's some statistics on how many low income and minority persons live in these counties," without any discussion of the particular impact,

possible alternative sites, and mitigation. Quite simply, this ignores Holtec's affirmative burden and is directly contrary to federal law.

In response, Holtec insists that community members have the burden of proof to show that a valid analysis would be helpful to the process of reviewing the disparate impact of the deficient site selection process. In response, with apparently no irony whatsoever, Holtec insists that AFES community members are not permitted to point out that Eddy Lea Energy Alliance ("ELEA") – the group of local officials explicitly cited by Holtec in its application, who purportedly invited Holtec to dump casks of nuclear waste in their community – do not, in fact, represent the community. Holtec submits that AFES cannot provide evidence of ELEA's lack of representational capacity because, as Holtec now admits, local political support is not legally relevant to the NRC permitting process.

This is precisely the point! Holtec bases its entire "analysis" of the validity of Holtec's site selection process *on the fiction* of local political support by ELEA, without any real site selection process or consideration of alternatives whatsoever. Instead, Holtec's analysis *in its application* is that "This is the best home for us, because the home owner invited us to stay." Now that AFES has pointed out the fallacy of reliance on political support to sidestep the real work of an actual review of the factors relevant to environmental justice, Holtec cries foul that AFES has taken issue with the view that ELEA "represents" the communities of Lea and Eddy County for purposes of addressing the question of discriminatory disparate impact.

AFES heartily agrees that the endorsement of the Holtec site by ELEA it not remotely relevant to the analysis required by relevant federal law. That's precisely why Holtec's EJ analysis is deficient, because it relies on political support rather than facts and law to support the

EJ portion of its EIS. Thus Holtec's Answer sets the NRC licensing application process entirely on its head, by assuming that a petitioner's assertion that an application is deficient because it relies entirely on an invitation to the dance by ELEA, is *not* a sufficient contention, because *now* politics are no longer relevant to the inquiry. In other words, said the Queen, "[S]ometimes I've believed as many as six impossible things before breakfast." Carroll, L., *Alice Through the Looking Glass*.

In contrast, the NRC has previously held that the contents of an application can, indeed, be held against the applicant, and can therefore form the foundation for a valid contention.

> The question this presented to us was: could an allegation, based solely on an admission of Applicant, that some of its technical specifications are being " relaxed" — while others are being made more rigorous —, form the basis of a contention which should be admitted under the newly applicable rules? We have concluded that there is no simple answer to this question but that we must look further and examine Applicant's explanations for why a particular relaxation is not hazardous. If Applicant provides a clear explanation that is not directly challenged by Petitioner — through evidence or citations to sources or reasoning — then Applicant's admission of a " relaxation" is not by itself sufficient to admit a contention. If, however, Applicant's "analysis" is merely conclusional and therefore fails to provide any assurance that its "relaxation" is safe, then we accept Petitioner's reliance on Applicant's admission as sufficient grounds for the admission of a contention.

In the Matter of Fla. Power & Light Co. Turkey Point Plant (Unit Nos. 3 & 4), 31 N.R.C. 509, 1990 WL 324451 * 5 (June 15, 1990); *see also Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2)*, LBP-79-6, 9 NRC 291, 303 (1979)(a petitioner for intervention may look to the applicant's environmental report for factual material in support of a proposed contention). Just as affirmative statements in an application can be "held against" the applicant, so, too, can the *absence* of necessary and critical information be "held against" an applicant. *See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, LBP-

82-75 (16 NRC 986, 993 (1982)(it is a sufficient contention to specify in some way each portion of the plan alleged to be inadequate).

Nothing in federal law suggests that a deficient analysis of potential discriminatory impact shifts the burden to the affected community to affirmatively prove discriminatory impact. In this regard, Holtec scolds undersigned counsel for not having cited to the applicable Policy Statement by NRC regarding environmental justice matters. *See* Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01 ("Policy Statement"). Well and good – undersigned counsel is making her first foray into NRC licensing issues, and will address the Policy Statement directly, *infra*. But as an attorney with over thirty-five years in practice, counsel *is* familiar with such old-fashioned notions as "burden of proof" and "burden of going forward." Both belong squarely to Holtec, not to local residents – after all, local residents are not the ones seeking a license from a federal commission.

In seeking a license, Holtec bears the burden of proof. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-697*, 16 NRC 1265, 1271 (1982). Petitioners therefore need do nothing more than "give some basis for further inquiry." *Id., citing cf. Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2)*, ALAB–613, 12 NRC 317, 340 (1980). By the same token, at the allegation stage, Holtec must present a sufficient analysis of the environmental justice issues to demonstrate its application is complete.

> Once BCOC crossed the admissibility threshold relative to its accident sequence contention, the ultimate burden in this . . . proceeding then rested with the proponent of the NEPA document — the Staff (and the Applicant to the degree it

> becomes a proponent of the Staff's EIS-related action) – to establish the validity of that determination on the question whether the accident sequence is an EIS-preparation trigger.

In the Matter of Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), 53 N.R.C. 239, 249 (Mar. 1, 2001)(footnote omitted).

Here, Holtec prepared what it *calls* an environmental justice analysis, but the reasoning in *Carolina Power & Light* applies by analogy to the gaping deficiencies in Holtec's EIS.

> Although it might be asserted that the . . . burden imposed [the intervener] on BCOC as the party seeking an evidentiary hearing to establish there are appropriate factual or legal disputes is the equivalent of the "burden to go forward" that is normally ascribed to an intervener challenging a license application, *see Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-262, 1 NRC 163, 191 (1975), this does not account for the fact that an intervener generally is accorded the opportunity to build its case on the basis of witness cross-examination alone, *see Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B)*, ALAB-463, 7 NRC 341, 356 (1978).

In the Matter of Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), 53 N.R.C. 239, 272 n. 3 (Mar. 1, 2001).

Holtec, as the applicant, has the burden to demonstrate that it has sufficiently investigated enough sites, as alternatives to the present site in Lea and Eddy County, to support a finding by the Nuclear Regulatory Commission that the selected site will not have a disparate impact on the minority population of Lea and Eddy County. *As a matter of law*, Holtec has not carried its burden. Therefore, Holtec must conduct an investigation of alternative sites and amend its application to comply with federal law, prior to any shifting of the burden to Petitioner to demonstrate that the site selection process impermissibly burdens the local minority and low income population.

Holtec rejects this burden, both in its Application and in its Answer to the AFES Petition.

Thus contrary to Holtec's insistence in its Answer that it has completed all necessary steps for a valid analysis of the potential disparate impact of Holtec dump site, Holtec's Application provides absolutely no allegation, much less evidence, that it ever considered *any* alternative sites. *See* Section 2.3 of Holtec's Environmental Report, Rev. 0, beginning on page 42 of Holtec's March 2017 Report (ADAMS Accession No. ML17139C535), *and* Rev. 1 of December 2017 (ADAMS Accession No. ML18023A904). In Section 2.3, Holtec candidly admits that there was, in fact, *no site selection process for the Holtec site*, other than a cursory review of a report on a different site selection process, by ELEA. March 2017 report, Section 2.3, pages 42-43.

In its Answer, Holtec insists that Louisiana Energy Services ("*LES*") does not require Holtec to do anything more than cite the census numbers for minority and low income populations, and refer the reader to the invitation to the dance purportedly issued by the ELEA. And in any event, Holtec's argument goes, *LES* is somehow outdated, having been replaced by the NRC's Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01 ("Policy Statement").

In fact, in the Policy Statement, the NRC relied on the analysis in *LES* to reiterate that the burden is on the applicant to gather information and analyze the disparate impact of the site selection on local minority and low income populations.

> In 1998, the Commission, for the first time in an adjudicatory licensing proceeding, analyzed [President Clinton's Executive Order] in *Louisiana Energy Services (LES). See Louisiana Energy Services (Claiborne Enrichment Center)*, CLI-98-3, 47 NRC 77 (1998). In *LES*, the applicant was seeking an NRC license to construct and operate a privately owned uranium enrichment facility on 70 acres between two African American communities, Center Springs and Forest Grove. *See id.* at 83. One of the impacts of constructing and operating the facility

> entailed closing and relocating a parish road bisecting the proposed enrichment facility site. *See id.* The intervenor's contention alleged that the discussion of impacts in the applicant's environmental report was inadequate *because it failed to fully assess the disproportionate socioeconomic impacts of the proposal on the adjacent African American communities*. *See id.* at 86.
>
> In *LES*, the Commission held that "[d]isparate impact analysis is our principal tool for advancing environmental justice under NEPA. The NRC's goal is *to identify and adequately weigh, or mitigate, effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities*." *Id.* at 100. The Commission emphasized that the [Executive Order] did not establish any new rights or remedies; instead, the Commission based its decision on NEPA, stating that "[t]he only "existing law" conceivably pertinent here is NEPA, a statute that centers on environmental impacts." *Id.* at 102.
>
> [E]nvironmental justice, as applied at the NRC, means that *the agency will make an effort* under NEPA to become aware of the demographic and economic circumstances of local communities where nuclear facilities are to be sited, and take care to mitigate or avoid special impacts attributable to the special character of the community."

Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01 (emphasis added; some internal punctuation and and citations omitted).

Nothing in this language remotely suggests that the burden is on the local community "to fully assess the disproportionate socioeconomic impacts of the proposal" on the local minority population. *Id.* Instead, "[w]hile the policy statement clarifies that EJ per se is not a litigable issue in our proceedings, it does not de-emphasize the importance of adequately weighing or mitigating the effects of a proposed action on low-income and minority communities by assessing impacts peculiar to those communities." *Id.,* 69 FR 52040-0. Thus "[i]n the licensing context, the NRC's focus is on *full disclosure*, as required by NEPA, of the environmental impacts associated with a proposed action *and to take care to mitigate or avoid special impacts*

attributable to the special character of the community." *Id.*, 69 FR 52040-01, Response to Comment C.2, *52041 (emphasis added; internal punctuation and citation omitted).

In the interest of NRC's focus on full disclosure, environmental justice "is a tool, within the normal NEPA context, to identify communities that might otherwise be overlooked and identify impacts due to their uniqueness as part of the NRC's NEPA review process." *Id.*, 69 FR 52040-01,*52047. In this context, a petitioner may assert an admissible contention "that the proposed action will have significant adverse impacts on the physical or human environment *that were not considered* because the impacts to the community *were not adequately evaluated.*" *Id.* (emphasis added). All that is necessary to trigger this review is a "clear potential for offsite impacts." *Id.*, 69 FR 52040-01, *52045.

One factor that must be addressed in the EIS is cumulative impact, that is, the proliferation of waste sites in a particular community.

> The Commission considers cumulative impacts when preparing an environmental impact statement for a proposed action. With regard to environmental justice matters, applicants are asked to provide NRC staff with a description of cumulative impacts to low-income and minority populations and socioeconomic resources, if applicable, in their environmental report (ER) submitted with any license application. NUREG-1748, 6.4.11.

Id., 69 FR 52040-01, Response to Comment A.8, 52042-52043.

Here, Holtec did not even attempt to address the potential cumulative impact of targeting rural New Mexico counties on the border for the dumping of nuclear waste. Indeed, the *only* site considered by Holtec was Lea and Eddy County. Outside of these isolated, low income communities, there has been absolutely no review of other sites, even in New Mexico, much less outside of New Mexico. One factor that was treated as "positive" by Holtec in terms of

environmental justice was that unnamed local officials, acting as the ELEA, had already asked to be considered as a possible site – indeed, several dump sites are already located in these isolated counties. This purportedly "positive" factor should have been weighed *against* choosing Lea and Eddy County for even more dumping, due to the cumulative impact of the proliferation of dump sites.

Instead, Holtec appears to believe that because this geographic area was *previously targeted* for industrial and nuclear dumping, this provides an "all clear" for additional dumping, when, in fact, the reverse is true – the targeting of rural, impoverished, low income communities in a border state is precisely the sort of *de facto* result of the institutional racism embedded in prevailing dump site selection processes nationwide that was decried over thirty years ago in the United Church of Christ study cited by the Licensing Board in *Louisiana Energy 45. See Toxic Wastes and Race In the United States, A National Report on the Racial and Socio–Economic Characteristics of Communities With Hazardous Waste Sites," cited with approval in Louisiana 45,* 45 N.R.C. at 372–73.

This failure is not cured by comparing the minority population of Lea and Eddy County with the minority population of New Mexico, because this approach simply exacerbates the potential targeting of minority populations in a border state. Notably, in performing the required environmental justice analysis, the "numeric criteria" of the comparative proportion of minority and low income residents, is intended as "guidance" and "a starting point." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, *52046. "[T]he geographic scale should be commensurate with the potential impact area and should include a sample of the surrounding population because the goal is to evaluate the

communities, neighborhoods, and areas that may be disproportionately impacted." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, *52047.

> The methods used to define the geographic area for assessment and to identify low-income and minority communities should be clear, yet allow for enough flexibility that communities or transient populations that will bear significant adverse effects are not overlooked during the NEPA review. Therefore, in determining the geographic area for assessment and in identifying minority and low-income communities in the impacted area, standard distances and population percentages should be used as guidance, *supplemented by the EIS scoping process*, to determine the presence of a minority or low-income population.

Id., 69 FR 52040-01, Response to G-1, *52046.

Here, rather than a careful study of potential alternative sites, Holtec relies entirely on the study by ELEA, which in turn failed to address any sites but Lea and Eddy County. Within Lea and Eddy County, the sole criterion for ELEA, in terms of the "environmental justice" factor, was low population density, a factor which also targets rural impoverished communities, as the Licensing Board pointed out in *Louisiana Energy 45* when it noted that a purposeful "selection out" of populated and popular areas has the *de facto* result of dumping waste on minority, low income, isolated rural communities. *Louisiana Energy 45,* 45 N.R.C. at 387-88.

Finally, to properly support a sufficient environmental justice analysis as part of its EIS, Holtec was required to engage in an effective scoping process pursuant to 10 CFR 51.29. "In performing a NEPA analysis for an EIS, published demographic data, community interviews and public input through well-noticed public scoping meetings should be used in identifying minority and low-income communities that may be subject to adverse environmental impacts." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing

Actions, 69 FR 52040-01, * 52048.

> The NRC will emphasize scoping, the process identified in 10 CFR 51.29, and public participation in those instances where an EIS will be prepared. Reliance on traditional scoping is consistent with the E.O. and CEQ guidance. *See* E.O. 12898, 59 FR at 7632 (Section 5-5); CEQ Guidance at 10-13. CEQ guidance reminds us that "the participation of diverse groups in the scoping process is necessary for full consideration of the potential environmental impacts of a proposed agency action and any alternatives. By discussing and informing the public of the emerging issues related to the proposed action, agencies may reduce misunderstandings, build cooperative working relationships, educate the public and decisionmakers, and avoid potential conflicts." CEQ Guidance at 12. Thus, it is expected that in addition to reviewing available demographic data, a scoping process will be utilized preceding the preparation of a draft EIS. This will assist the NRC in ensuring that minority and low-income communities, including transient populations, affected by the proposed action are not overlooked in assessing the potential for significant impacts unique to those communities.

Id., 69 FR 52040-01a, *52048.

Here, Holtec reports that county officials, acting in the name of the ELEA, "educat[ed] local leaders and gain[ed] community support" for the project, but there is absolutely no support in the Holtec Application for this bald-faced assertion – either with regard to alleged "community outreach" or alleged "community support." There is nothing in the current record to support that any community outreach occurred, much less outreach to the minority low income population of Lea and Eddy County – quite the opposite, according to the declarations submitted by Ms Gardner and Ms. Villegas. In the absence of any evidence of a scoping process that included any true community outreach – indeed, any community outreach whatsoever to minority and low income communities – Holtec should be required to "start over" and complete a sufficient EIS, that actually takes environmental justice into account.

B. Contention 2: As a Matter of Fact and Expert Opinion, the Siting Process Will Have a Disparate Impact on the Minority and Low Income Population of Lee and Eddy County

Holtec dismisses the well-reasoned and well-documented opinion of Dr. Myrriah Gomez, Petitioner's expert, as mere "flowery language," which in two words speaks more to Holtec's contempt towards the entire subject of environmental justice than AFES could do in the twenty-four pages of its Reply. Dr. Gomez' opinion is not flowery language – it is a *Grito de Dolores.*[2]

Dr. Gomez provides historical and contemporaneous documentation for the factual basis of Petitioner's contention that the selection of Lea and Eddy County for location of the Holtec site, without consultation with the local largely minority population, exacerbates the historical disparate and discriminatory impact caused by the targeting of New Mexico for nuclear dump sites. Dr. Gomez' opinion thus supports Petitioner's overarching contention that Holtec's reliance on an invitation for siting by a small group of local officials is a deficient process from the outset, that will result in cumulative dumping of nuclear waste in an already burdened state, most especially in isolated, rural, low income, minority counties along the southern border.

Other than a pejorative characterization, Holtec offers nothing to counter Dr. Gomez' expert opinion. Accordingly, this contention should be accepted by the NRC. *See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2)*, LBP-82-98, 16 NRC 1459, 1466 (1982)(NRC will not exclude a contention based solely on criticism of the credibility of an expert).

---

[2] The "Grito de Dolores" is translated as the Cry of Dolores. It refers to an historical event that happened in Mexico in the early morning of 16 September 1810. Father Miguel Hidalgo rang the bell of his church and gave the call to arms that triggered the Mexican War of Independence. Notably among his cries was "Death to bad government!"

C. Contention 3: There Is No Factual Support for Holtec's Primary Site Selection Criterion, which Is Community Support

Holtec's environmental impact statement is not a three-legged stool; it's a one-legged stool, consisting entirely of its reliance on the invitation by the ELEA to select Lea and Eddy County as the site for more dumping of nuclear waste. Holtec insists in its application that ELEA consulted the community in deciding to make this invitation to Holtec. Contrary to applicable federal law, Holtec apparently believes this is a sufficient scoping process. To repeat, "In performing a NEPA analysis for an EIS, published demographic data, *community interviews and public input through well-noticed public scoping meetings should be used in identifying minority and low-income communities that may be subject to adverse environmental impacts*." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, * 52048 (emphasis added). "Eyeballing" the relevant community is not sufficient.

Contention 3 makes clear that no valid scoping process preceded the site selection by Holtec – Holtec just "RSVP'd" an invitation by the ELEA, who most definitely did *not* speak for the community. Once again, in dismissing the information Mr. Maxwell has provided and the complaints by local residents that they were never made aware of the proposal, Holtec belies its indifference to the required scoping process to address environmental justice concerns.

While Holtec need not demonstrate majority community support, neither can it substitute a "Potemkin Village"[3] of community support for the real deal. While Holtec need not conduct a

---

[3] In politics and economics, a Potemkin Village . . . is any construction (literal or figurative) built solely to deceive others into thinking that a situation is better than it really is. The term comes from stories of a fake portable village built solely to impress Empress Catherine II by her former lover Grigory Potemkin during her journey to Crimea in 1787. . . . [T]he original

vote, it cannot avoid the required scoping process of informing and listening to the local minority population, and including the data it derives in the EJ portion of its EIS. This EJ scoping process, pursuant to the NRC's own Policy Statement, must precede or at least accompany the scoping process for site selection, and cannot be remedied by a vague *nunc pro tunc* reference to support by local officials.

IV. Conclusion

For the foregoing reasons, Petitioner's contentions should be admitted and Petitioner should be admitted as a party to this proceeding.

/signed electronically by/

by: LAW OFFICES OF NANCY L. SIMMONS, P.C.
Nancy L. Simmons
120 Girard Blvd SE
Albuquerque, NM 87106
505-232-2575
nlsimmons@swcp.com
nlsstaff@swcp.com

October 16, 2018

CERTIFICATE OF SERVICE

I certify that on October 16, 2018 a true and correct copy of the foregoing was served via electronic submission to all counsel of record.

/signed electronically by/
Nancy L. Simmons

---

story was that Potemkin erected phony portable settlements along the banks of the Dnieper River in order to impress the Russian Empress; the structures would be disassembled after she passed, and re-assembled farther along her route to be viewed again as if another example. "Potemkin Village," *Wikipedia*.