

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:)	
)	
Holtec International)	Docket No. 72-1051
)	
HI-STORE Consolidated Interim Storage Facility)	
)	

**MOTION BY PETITIONERS DON'T WASTE MICHIGAN, *ET AL.* TO AMEND THEIR
CONTENTION 2 REGARDING FEDERAL OWNERSHIP OF SPENT FUEL IN THE
HOLTEC INTERNATIONAL REVISED LICENSE APPLICATION**

I. Introduction

Pursuant to 10 C.F.R. §§ 2.309(c)(1), Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, San Luis Obispo Mothers for Peace, and Nuclear Issues Study Group (collectively, "Joint Petitioners" or "DWM, *et al.*") hereby move to amend their Contention 2 in Holtec International's ("Holtec's") revised licensing application proceeding to build and operate a centralized interim spent fuel storage facility ("CISF") in southeastern New Mexico. Joint Petitioners' amended contention addresses a recently-submitted revision to Holtec's Environmental Report for the facility. In addition, the contention addresses a recent report by Holtec International to its investors, "Holtec Reprising 2018" (Jan. 2, 2019) ("Reprising 2018 Report") (Att. 1).¹

¹ Joint Petitioners previously moved to amend their contentions and strike certain statements from Holtec's pleadings, based on the Reprising 2018 Report. "Motion by Petitioners Beyond Nuclear, Fasken, the Sierra Club, and Don't Waste Michigan, *et al.* to Amend their Contentions Regarding Federal Ownership of Spent Fuel to Address New Information Confirming that Holtec's License Application Contains False or Misleading Statements and Motion by Petitioners to Strike Unreliable Statements from Holtec's Responses to Petitioners' Hearing Requests" (Jan. 15, 2019) ("January 15 Motion"). The events addressed in that Motion have been superseded by Revision 3 of the Holtec Environmental Report, and so Joint Petitioners withdraw their previous motion to amend as well as their previous motion to strike because Holtec's counsel's statements are no longer inconsistent with the current application.

Background information regarding Petitioners' original contentions, changes to Holtec's license application, and the Reprising 2018 Report is provided below in Section II. The amended contention is stated and supported in Section III. In Section IV, Petitioners demonstrate that they have good cause for filing their amended contentions after the original filing deadline.

II. Background

A. Development of Holtec's License Application 2015-2016

While Holtec formally submitted its license application to the Nuclear Regulatory Commission (the "Commission" or "NRC") in 2017, *see* 83 Fed. Reg. 32,918 (July 16, 2018), it began developing the project several years earlier. During that development period, statements by Holtec officials in press interviews and industry presentations revealed that Holtec planned to depend on DOE ownership of spent fuel in order to go forward with the project. For instance, as reported in the August 7, 2015 edition of SpentFuel, Holtec Vice President Pierre Oneid responded to a question about who would hold title to the spent fuel at the CISF by stating that:

the title issue needs to be worked out but Holtec's vision is that DOE would sign a contract with Holtec to be the customer, and thus DOE would take title to the fuel at the reactor site and be responsible for transporting it to the storage facility, just as it would if DOE were sending the spent fuel to a permanent repository. Holtec is working with DOE, in parallel to its licensing work, to start discussions with DOE about this issue.

See Exhibit 1 to Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Sept. 14, 2018) ("Sierra Club Petition"), cited at page 12 of the Petition. Similarly, in the July 30, 2015 issue of World Nuclear News, Mr. Oneid was quoted as saying, "We will surely soon have official talks with them [DOE] on a contract whereby the DOE will hold title to the fuel." *See* Sierra Club Petition at 12 and Exhibit 2 to Sierra Club Petition. In a January 2016 powerpoint presentation by Holtec Vice President Joy Russell unequivocally represented that

Holtec “[r]equires federal funding to construct and operate CISF.” *See* Sierra Club Petition at 12 and Exhibit 3 to Sierra Club Petition.

B. Holtec’s 2018 License Application

Holtec applied for a license for the CISF on March 30, 2017. 83 Fed. Reg. at 32,919. This original license application, designated “Revision 0,” included a Safety Analysis Report, License Conditions, Financial Assurance and Project Life Cycle Cost Estimates, and an Environmental Report.

Holtec’s original license application made representations about the ownership of the spent fuel that were internally contradictory. Consistent with the representations described in Section A above, Holtec’s Environmental Report (Rev. 0) stated that Holtec does not plan to begin construction of the proposed CISF until “after Holtec successfully enters into a contract for storage with the U.S. Department of Energy (DOE).” *Id.* at 1-1. The Environmental Report (Rev. 0) also stated that “DOE would be responsible for transporting SNF from existing commercial nuclear power reactor storage facilities to the CIS Facility.” *Id.* at 3-104. These parts of Holtec’s original Environmental Report thus assumed that DOE would take responsibility for the spent fuel to be stored at the CISF, beginning with transfer of ownership to DOE at reactor sites before shipment.

In contrast, in other parts of Holtec’s license application, Holtec hedged the assumption that DOE will own the spent fuel, instead asserting that ownership or liability may rest with *either* licensees *or* the DOE. *See, e.g.:*

- HI-STORE CIS Facility Financial Assurance and Project Life Cycle Cost Estimates, Rev. 0 (Report No. HI-2177593) at 3 (“Additionally, as a matter of financial prudence, Holtec

will require the necessary user agreements in place from the *USDOE and/or the nuclear plant owners*") (emphasis added);

- License Condition # 17, Proposed License for Independent Storage of Spent Nuclear Fuel at 2 (ADAMS Accession No. ML17310A223) ("the construction program will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel (*USDOE and/or a nuclear plant owner*) at the HI-STORE CIS has been established") (emphasis added); and
- Safety Analysis Report, Table 1.0.2 at 26 (ADAMS Accession No. ML18254A413) ("In accordance with 10CFR72.22, the construction program will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel (*USDOE and/or a nuclear plant owner*) at HI-STORE CIS has been established.") (emphasis added).

C. Joint Petitioners' Hearing Request

DWM *et al.* submitted separate hearing requests challenging Holtec's license application on the ground that it impermissibly relies on federal ownership of spent fuel to be transported to and stored at the proposed CISF. Petition of Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace and Nuclear Issues Study Group to Intervene and Request for an Adjudicatory Hearing (Sept. 14, 2018) ("DWM Petition").

The DWM Petitioners contended that Holtec's assumption of federal ownership of spent fuel violated the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. §§ 10222(a)(5)(A). Under the NWPA, the DOE is precluded from taking title to spent fuel unless and until a permanent

repository has opened. DWM *et al.* relied in part on statements in Holtec’s Environmental Report and statements made in 2015 and 2016 by Holtec officials that Holtec assumes DOE will take title to the spent fuel during transportation to the CISF and storage at the CISF. *See* DWM Petition at 32-34.

D. Holtec’s Responses to Petitioners’ Hearing Requests

In responding to Joint Petitioners’ contention, Holtec disavowed the statements in the Environmental Report and other statements by Holtec officials to the effect that Holtec assumes the DOE will take title to spent fuel to be transported to and stored at the proposed CISF. Holtec asserted that it would revise the document to make clear that the owner of spent fuel stored at the proposed CISF would be *either* the DOE *or* private licensees. Holtec also disavowed, as outdated and in any event merely aspirational, the 2015 and 2016 public statements of its officials discussed in Section II.A above. For instance, in response to DWM *et al.*, Holtec stated:

Petitioners also cite three quotations from Holtec personnel. The quotations upon which Petitioners rely from *Spent Fuel* and *World Nuclear News* are from 2015, predating the Application which was submitted in 2017. Those statements discuss Holtec’s “vision” for the project, and how Holtec would be discussing with DOE whether DOE “will hold title to the fuel.”¹³² Nothing in these statements indicate that Holtec relied (then or now) on a contract with DOE to satisfy the NRC’s financial qualifications requirement. Nor do those quotes contradict statements in the Financial Assurance Plan that Holtec will fund the plant from its own resources, and that Holtec will enter into customer contracts with DOE “and/or” nuclear plant owners. At most, they show that Holtec would be pursuing DOE as a customer.

Finally, Petitioners quote from a January 2016 presentation, which included one bullet point on a slide which stated that Holtec “[r]equires federal funding to construct and operate the CISF.” That presentation was given in January of 2016 – more than a year before Holtec submitted its Application to the NRC. As the Financial Assurance Plan states, Holtec will fund the project from its own resources and plans to enter into customer contracts with DOE and/or nuclear plant owners. Petitioners have provided no basis to disregard the statements in the Application in favor of a bullet in a slide presentation given more than a year before the Application was filed.

Holtec Response to DWM at 34-35 (footnotes omitted).

E. Holtec’s January 2, 2019 Report “Reprising 2018”

On January 2, 2019, Holtec issued the Reprising 2018 Report. The report makes clear that DOE involvement in the CISF project is a prerequisite for operation of the proposed CISF.

In particular, the Report states:

While we endeavor to create a national monitored retrievable storage location for aggregating used nuclear fuel at reactor sites across the U.S. into one (HI-STORE CISF) to maximize safety and security, *its deployment will ultimately depend on the DOE and the U.S. Congress.*

Id. at 1 (emphasis added). This statement demonstrates that Holtec assumes that DOE will, in fact, take the role of spent fuel owner assumed in certain parts of the Environmental Report. This statement also effectively acknowledges that DOE ownership of spent fuel prior to the opening of a repository is unlawful under the NWPA, and therefore that Congressional action will be required before DOE can take title to the spent fuel.

E. Environmental Report, Rev. 3

On January 17, 2019, an e-mail from NRC Staff counsel Alana Wase indicated that a revision to Holtec’s license amendment application had been posted on ADAMS. The revisions included Rev. 3 to the Environmental Report (Nov. 2018), which removed the previous unequivocal assumptions of DOE ownership of spent fuel and replaced them with statements that the spent fuel would be owned by either the DOE or private licensees. *See* Environmental Report Rev. 3 at 1-1 (now stating that construction of the CISF would begin “after Holtec successfully enters into a contract for storage with the U.S. Department of Energy (DOE) or utility”); *id.* at 3-104 (“DOE or utility licensees would be responsible for transporting [spent nuclear fuel] from existing commercial nuclear power reactor storage facilities to the CIS Facility.”).

F. Oral Argument on Contention Admissibility

On January 23 and 24, 2019, the Atomic Safety and Licensing Board (“ASLB”) held an oral argument on the issues of standing and contention admissibility. During the oral argument, counsel for Holtec and Petitioners were questioned on the issue of federal ownership of spent fuel, and also made opening and closing statements that addressed the issue. The oral argument was transcribed.

III. REQUEST FOR LEAVE TO AMEND DWM’s CONTENTION 22

A. Applicable Standards

NRC regulation 10 C.F.R. § 2.309(c) allows a petitioner to amend its contentions if the presiding officer finds that the petitioner “has demonstrated good cause” by satisfying the following factors: (i) the information on which the filing is based was not previously available; (ii) the information upon which the filing is based is materially different from information previously available; and (iii) the filing has been submitted in a timely fashion based on the availability of the subsequent information. An amended contention generally is considered timely if it is filed within 30 days of the date upon which the new information became available. *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 N.R.C. 460, 493 (2008) (“Many times, boards have selected 30 days as [the] specific presumptive time period” for timeliness of contentions filed after the initial deadline).

DWM *et al.* respectfully submit that permitting the amendment of a contention is appropriate where new information shows that material statements in a license application are false or incorrect, given the “importance” placed by the Commission on “completeness and accuracy of information submitted by applicants and licensees” and the Commission’s demand for “[n]othing less than candor.” *Randall C. Orem, D.O.*, CLI-93-14, 37 N.R.C. 423, 427 (1993) (citing *Petition for Emergency and Remedial Action*, CLI-78-6, 7 N.R.C. 400, 18 (1978); *Hamlin*

Testing Laboratories, Inc., 2 A.E.C. 423, 428 (1964), *aff'd*, 357 F.2d 632 (6th Cir. 1966);
Virginia Electric and Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 N.R.C.
480 (1976), *aff'd*, 571 F.2d 1289 (4th Cir.1978)).

B. Request for Leave to Amend Contentions

DWM *et al.* seek to amend the basis statement of their Contention 2. That Contention asserts:

Holtec cannot provide reasonable assurances that it can obtain the necessary funds to cover the costs of construction, operation maintenance and decommissioning of the CISF.

DWM Petition at 31. The basis statement for Contention 2 asserts, *inter alia*, that:

Under existing law, financial guarantees could be forthcoming from DOE only by means of DOE taking title to the spent nuclear fuel at the commercial nuclear reactor site. There is no legal authority under the Nuclear Waste Policy Act of 1983, as amended for DOE to enter into any agreement, either with Holtec or any commercial nuclear reactor utility, to pay for such centralized interim storage facility construction, operations, maintenance, decommissioning, etc.

The following new paragraph should be inserted directly after “decommissioning, etc.:

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 Holtec’s financial assurance plan lawful. As long as Holtec includes the federal government as a potential guarantor or financier of the project, which in turn requires federal ownership of spent fuel, the application violates the NWPA.

Holtec attempts to defend the language of its application presenting DOE ownership of spent fuel as a possible alternative to private ownership on the ground that the “DOE may have the ability to take title” to spent fuel in the future “if Congress passes legislation” allowing it. Tr. 247-248 (Silberg). According to Holtec’s counsel:

Severability clauses exist throughout private contracts and public statutes. There's no indication that putting DOE as a possible participant in this would make illegal private participation in the absence of DOE ability.

Tr. 248 (Silberg).

Holtec's argument is without merit. At the outset, it is important to recognize that by seeking approval of an operational scheme that *could* include DOE ownership of spent fuel, and therefore *could* result in NWPA violations if carried out, Holtec violates the NWPA. And by entertaining a license application containing provisions that would *approve and allow* Holtec to violate the NWPA, the NRC would also violate the NWPA. *Arizona Public Service Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 N.R.C. 1964, 1991 (1964) (“[I]t would be improper for the Board to entertain a collateral attack upon any action *or inaction* of sister federal agencies on a matter over which the Commission is totally devoid of any jurisdiction.”) (emphasis added). *See also U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 N.R.C. 580, 605-06 (2009) (refusing to admit a contention challenging DOE's integrity as an applicant for a repository license where “Congress has already determined DOE as the appropriate license applicant, indeed the *only* appropriate applicant.”). The fact that Holtec *might not* violate the NWPA does not contemplate an NRC licensing decision that would give Holtec the unchecked opportunity. To rule otherwise would violate not only the NWPA, but basic principles of “comity” between federal agencies. *Arizona Public Service Co.*, LBP-82-117A, 16 N.R.C. at 1991.

IV. DEMONSTRATION OF GOOD CAUSE FOR LATE FILING

Petitioners satisfy the three-prong test for good cause to file amended contentions based on new information, as follows:

(i) The information upon which the filing is based was not previously available.

The Environmental Report (Rev. 0) was not available until January 17, 2019.

(ii) The information upon which the filing is based is materially different than information previously available.

The text of the Environmental Report (Rev. 0) is materially different from Holtec's original license application, because it replaces unequivocal language regarding DOE ownership of spent fuel with alternative language suggesting that either DOE or private licensees will own the spent fuel.

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The amended contention is being filed within 30 days of Petitioners' having learned of the issuance of the Environmental Report (Rev. 3) and therefore is timely. *Shaw AREVA MOX Services*, 67 N.R.C. at 493.

V. CONCLUSION

For the foregoing reasons, the ASLB should grant Petitioners' motion to amend their contention.

Respectfully submitted,

___/signed electronically by/___
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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2019, the foregoing MOTION BY PETITIONERS DON'T WASTE MICHIGAN, *ET AL.* TO AMEND THEIR CONTENTION 2 REGARDING FEDERAL OWNERSHIP OF SPENT FUEL IN THE HOLTEC INTERNATIONAL REVISED LICENSE APPLICATION was posted by me in the NRC's Electronic Information Exchange System.

____/signed electronically by/____
Terry J. Lodge
Counsel for DWM *et al.*, Petitioners