February 19, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket No. 72-1051
Holtec International	)	
	)	ASLBP No. 18-958-01-ISFSI-BD01
HI-STORE Consolidated Interim Storage Facility	)	

Holtec Opposition to Late-Filed Sierra Club Contention 26 and Don't Waste Michigan Contention 14

Pursuant to 10 C.F.R. §§ 2.309(i)(1) and the Atomic Safety and Licensing Board's (the "Board") January 31, 2019 scheduling Order, Holtec International ("Holtec") submits this opposition to late-filed Sierra Club Contention 26[1] and Don't Waste Michigan et al. Contention 14.[2] Sierra Club and Don't Waste Michigan et al. (collectively, the "Petitioners") have submitted similar motions for leave to file late contentions and nearly identical (if not actually identical) late-filed contentions. The Board should find that neither Petitioner has met the standards for a late-filed contention under 10 C.F.R. § 2.309(c)(1)(i)-(iii). And, even if Petitioners had met those standards, they have not met the standards for an admissible

[1] Sierra Club's Motion to File a New Late-Filed Contention (Jan. 17, 2019). The Sierra Club filing includes a three-page motion (the "Sierra Club Motion"), and an unnumbered, eight-page document entitled "Contention 26" (hereinafter, "Sierra Club Contention 26").

[2] Motion by Petitioners 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 [hereinafter, "Don't Waste Michigan et al."] for Leave to File a New Contention (Jan. 17, 2019). The Don't Waste Michigan et al. filing includes a five-page motion (the "DWM Motion"), and an unnumbered six-page document entitled "DWM's Contention 14" (hereinafter, "DWM Contention 14").

contention. As a result, the Board should reject late-filed Sierra Club Contention 26 and late-filed DWM Contention 14.

I. Petitioners Have Failed to Demonstrate Good Cause for Their Late-Filed Contentions

The Board should not consider the late-filed contentions because they are untimely, and Sierra Club and Don't Waste Michigan et al. have failed to demonstrate the required good cause for their untimely filings. Contentions filed after the intervention deadline "*will not be entertained* absent a determination by the presiding officer that a participant has demonstrated good cause" for the late filing.[3] The good cause demonstration requires the Petitioners to show that:

> (i) The information upon 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.[4]

Here, Petitioners claim that the so-called material false statements existed in the Holtec Consolidated Interim Storage Facility ("CISF") license application and in Holtec's answers to Sierra Club Contention 1 and Don't Waste Michigan et al. Contention 2.[5] [6] If the CISF

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[3] 10 C.F.R. § 2.309(c)(1) (emphasis added).

[4] 10 C.F.R. § 2.309(c)(1)(i)-(iii).

[5] Sierra Club Contention 26 at 1; DWM Contention 14 at 1.

[6] Sierra Club Contention 1 claims that the "NRC has no authority to license the Holtec CIS facility" and that "Holtec has said DOE must take title to the waste, but the [Nuclear Waste Policy Act ("NWPA")] does not authorize DOE to take title to spent fuel in an interim facility." Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Sept. 14, 2018) (NRC ADAMS Accession No. ML18257A228) ("Sierra Club Petition") at 10-11. Sierra Club Contention 1 should be dismissed for the reasons set forth in Holtec's Answer Opposing Sierra Club's Petition to Intervene and Request for Adjudicatory Hearing on Holtec International's HI-STORE [CISF] Application (Oct. 9, 2018) (NRC ADAMS Accession No. ML18282A500) at

application contained material false statements, then Petitioners were *required* to raise that issue when they filed their original contentions on September 14, 2018.[7] Commission regulations expressly provide that initial contentions "*must* be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee . . . ."[8] To the extent Sierra Club and Don't Waste Michigan et al. claim that their late-filed contentions are based on Holtec's answers to their initial contentions[9] (which were filed on October 9, 2018), then Petitioners' motions for late-filed contentions should have been filed no later than November 8, 2019, i.e., within 30 days after the purportedly false information became available in Holtec's answers.[10] Both of these deadlines expired long ago.

Although Petitioners purportedly base their late-filed contentions on the January 2, 2019 Holtec Highlights article (a copy of which is attached to each late contention), they have failed to demonstrate that "[t]he information upon which the filing is based was not previously available" and "[t]he information upon which the filing is based is materially different from information

17-21. Don't Waste Michigan et al. Contention 2 claims (among other things) that Holtec failed to provide the requisite reasonable financial assurances for the CISF because it is relying on financial guarantees from the U.S. Department of Energy ("DOE"), but the "NWPA does not contemplate a financial arrangement whereby DOE takes title to spent nuclear fuel for purposes of interim storage." Petition of Don't Waste Michigan et al. to Intervene and Request for an Adjudicatory Hearing (Sept. 14, 2018) (NRC ADAMS Accession No. ML18257A334) ("DWM Petition") at 31-36. Don't Waste Michigan et al. Contention 2 should be dismissed for the reasons set forth in Holtec's Answer Opposing Don't Waste Michigan et al. Petition to Intervene and Request for an Adjudicatory Hearing on Holtec International's HI-STORE [CISF] Application (Oct. 9, 2018) at 28-35.

[7] Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018) (establishing September 14, 2018 as the deadline for hearing requests and petitions to intervene).

[8] 10 C.F.R. § 2.309(f)(2) (emphasis added).

[9] Sierra Club Contention 26 at 1; DWM Contention 14 at 1.

[10] *See, e.g., Virginia Electric and Power Company d/h/a Dominion Virginia Power and Old Dominion Electric Cooperative* (North Anna Power Station, Unit 3), LBP-10-17, 72 N.R.C. 501, 509 n.25 (2010) ("a submission of a new contention within 30 days of the event giving rise to that contention is timely") (citations omitted).

previously available" as required by 10 C.F.R. § 2.309(c)(1)(i)-(ii). Petitioners claim that the Holtec Highlights article (1) states that Holtec "would rely on DOE to take title to the waste"; (2) "shows that DOE involvement [in the proposed CIS project] is a prerequisite"; (3) states that "DOE participation in the project is assumed"; and (4) shows that "Holtec understands that DOE involvement in the CISF project would be illegal under the [Nuclear Waste Policy Act] unless Congress acts to amend the law."[11]

As detailed later in this response, none of these assertions is true, or even remotely comes close an accurate representation of the short statement in the Holtec article. Petitioners gross mischaracterizations of the statement in the Holtec article belie any finding of good cause under the late-filing requirements in 10 C.F.R. § 2.309(c). Petitioners cannot be allowed to make up erroneous claims about a document and use those as a basis to timely raise a contention. Otherwise, the stringent late-filed requirements set forth in 10 C.F.R. § 2.309(c) would be rendered meaningless any time a petitioner claimed the existence of new information based on only its wild imagination.

But even if Petitioners' statements were true, these are the same allegations that Petitioners have been making since their original petitions. Therefore, the allegations are anything but new. Both Petitioners previously raised contentions claiming, among other things, that Holtec has said that DOE "must take title" to the spent nuclear fuel to be stored at the CISF,[12] or that Holtec has "contemplate[d] a financial arrangement whereby DOE takes title to spent nuclear fuel for purposes of interim storage," which is not permitted by the Nuclear Waste

[11] Sierra Club Motion at 2; DWM Motion at 4-5.

[12] Sierra Club Petition at 10-11.

Policy Act.[13] Petitioners' mischaracterization of the Holtec article is merely cumulative to claims already alleged by Petitioners. The claims presented in Sierra Club Contention 26 and DWM Contention 14 are not materially different than the claims previously raised by them, and cannot support a timely filing.

Petitioners have failed to show that the Holtec article contains new or materially different information for another reason: the statement that deployment of the Holtec CISF "will ultimately depend on the DOE and the U.S. Congress" is *consistent* with information that has been available to Petitioners since the opportunity for hearing was announced (if not before then). The CISF Licensing Report states that "The HI-STORE CIS will be built in several stages of storage system groups to correspond to the (expected) increasing need from the industry and the U.S. government."[14] In other words, Holtec's phased approach to building the CISF is intended to reflect customer demand. As further explained by Holtec counsel at the January 23-24 oral argument on standing and contention admissibility,

> if Congress were to take steps to put in place permanent disposal or federal interim storage on a schedule that made the CISF, the Holtec HI-STORE project unnecessary, obviously that would have an impact on the Holtec HI-STORE project. So, its deployment would ultimately depend on what DOE and Congress does. If we build Phases 1, 2, 3, 4, 5, and Yucca Mountain becomes available, we won't build Phases 6, 7, 8, 9, and 10.[15]

Thus, there is no material difference between the statement in the Holtec article and information in the application that has been available to Petitioners to challenge for months (if not longer).

[13] DWM Petition at 35.

[14] Licensing Report on The HI-STORE CIS Facility, Rev. 0C at PDF p. 21.

[15] Transcript of Oral Argument (Jan. 23-24, 2019) at p. 246.

For all of the foregoing reasons, the Board should not even consider Sierra Club Contention 26 and DWM Contention 14 because they fall far short of the 10 C.F.R. § 2.309(c) standards for entertaining late-filed contentions.

II. Petitioners' Late-Filed Contentions are Inadmissible

Even if the Board were to find good cause for entertaining the late-filed contentions (which it should not do), the Board should nevertheless find that the contentions fail to meet the Commission's contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). In particular, the late contentions are outside the scope of this proceeding, raise immaterial issues, and fail to raise a genuine dispute on a material issue. 10 C.F.R. § 2.309(f)(1)(iii), (iv), (vi).

The late-filed contentions claim that the NRC should "not issu[e] the license" to Holtec for a CISF "in the first instance" because Holtec has purportedly made a "material false statement" in its license application and its responses to Sierra Club Contention 1 and Don't Waste Michigan et al. Contention 2 by "stating repeatedly that title to the waste to be stored at the CIS facility would be held by DOE and/or the nuclear plant owners." [16] Petitioners claim that the statements that nuclear plant owners might retain title to the waste have been "shown to be false by a January 2, 2019, e-mail message from Holtec to the public titled 'Reprising 2018,'" which states in relevant part, "'[w]hile 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." [17] Petitioners explain that "Holtec's recurring insistence that

[16] Sierra Club Contention 26 at 1; DWM Contention 14 at 1. *See also* Sierra Club Motion at 1; DWM Motion at 2.
[17] Sierra Club Contention 26 at 2; DWM Contention 14 at 2.

completely private ownership of the CISF and its spent fuel inventory was one possible scenario for operation of the CISF" has been "belied" by the statement that deployment of the CISF "will ultimately depend on the DOE and the U.S. Congress." [18] Petitioners also claim that the Holtec article shows that "Holtec knows DOE taking title violates the Nuclear Waste Policy Act (NWPA) and that it would take Congressional action to make it legal."[19] Thus, they argue that the NRC, based on the license revocation authority set forth in Atomic Energy Act ("AEA") Section 186, should not issue Holtec a license for the CISF.

Petitioners grossly mischaracterize the statement from the Holtec Highlights article—their mischaracterization of the sentence is so obviously inconsistent with the sentence itself, that it cannot support admitting the contention. The statement that deployment of the Holtec CISF "will ultimately depend on the DOE and the U.S. Congress":

- Makes **no** mention of spent nuclear fuel title, or otherwise references any entity or entities that may (or may not) hold title to that spent nuclear fuel in the future.

- Says **nothing** about DOE "participation" or "involvement" in the Holtec project (whatever "participation" or "involvement" may mean).

- **Nowhere** states that DOE may act illegally or otherwise contrary to law, or otherwise states that Congress must amend the law so that DOE does not act contrary to law.

[18] Sierra Club Contention 26 at 2; DWM Contention 14 at 2.

[19] Sierra Club Contention 26 at 5-6; DWM Contention 14 at 4.

Petitioners' "misapprehension (or mischaracterization) of the statement in the [article] cannot, and does not, serve to bootstrap its claim into a genuine dispute with the application."[20]

With respect to Petitioners' claim that DOE cannot take title to spent nuclear fuel absent congressional authorization, such claim impermissibly assumes that Holtec (and DOE) would be complicit in violating the law, which is not a sufficient basis for admitting a contention.[21]

Furthermore, nothing in the Holtec article alters the clear statements in the license application that **either** the nuclear plant owners from where the spent fuel originated and/or the DOE will be the customer for the HI-STORE CIS Facility. For example, proposed License Condition #17 states that "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."[22] Similarly, License Condition #18 states that "[t]he licensee [i.e., Holtec] shall: (1) include in its service contracts provisions requiring customers to retain title to the spent fuel stored, and allocating legal and financial liability among the licensee and the customers; (2) include in its service contracts provisions requiring customers to provide periodically credit information, and where necessary, additional financial assurances such as guarantees, prepayment, or payment bond; and (3) include in its

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[20] *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), LBP-13-8, 73 N.R.C. 1, 30 (2013). *See also Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 N.R.C. 331, __ (2009) (ruling inadmissible a contention based on mischaracterization of the license application).

[21] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 N.R.C. 232, 235 (2001) ("the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises"), citing *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 N.R.C. 193, 207 (2000) ("this agency has declined to assume that licensees will contravene our regulations"). *See also Curators of the University of Missouri*, CLI-95-8, 41 N.R.C. 386, 400 (1995) (rejecting assumption that a licensee "will violate an explicit and unambiguous condition of its license").

[22] Proposed License for Independent Storage of Spent Nuclear Fuel at 2 (NRC ADAMS Accession No. ML17310A223) (emphasis added).

service contracts a provision requiring the licensee not to terminate its license prior to furnishing the spent fuel storage services covered by the service contract."[23] In addition, the note to Table 1.0.2 of the CISF Licensing Report states: "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."[24] And the Financial Assurance & Project Life Cycle Report (HI-2177593 rev. 0), which is a part of the Application, states in Sec. 1.0 at PDF page 3, "[a]dditionally, as a matter of financial prudence, Holtec will require the necessary user agreements in place (from the USDOE and/or the nuclear plant owners) that will justify the required capital expenditures by the Company."[25] The recently issued Revision 3 of the Environmental Report corrected inconsistencies with the previous version and makes clear that "Phase 1 construction would begin after issuance of the license and after Holtec successfully enters into a contract for storage with the *U.S. Department of Energy (DOE) or utility*" and "*DOE or utility licensees* would be responsible for transporting SNF from existing commercial nuclear power reactor storage facilities to the CIS Facility." [26] The generalized statement in the Holtec Highlights article says nothing about the project's customers, spent nuclear fuel ownership, contractual arrangements, or spent nuclear fuel transportation, and therefore fails to raise any dispute (let alone a genuine one) on these issues.

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[23] *Id.*

[24] Licensing Report on The HI-STORE CIS Facility, Rev. 0C at 26 (NRC ADAMS Accession No. ML18254A413) (emphasis added). This language remains unchanged in the recently issued Rev. 0E of the Licensing Report (NRC ADAMS Accession No. ML19016A488).

[25] Financial Assurance & Project Life Cycle Report at PDF p. 3 (NRC ADAMS Accession No. ML18058A608) (emphasis added). This language remains unchanged in the recently issued Rev. 1 of the report (NRC ADAMS Accession No. ML18345A143).

[26] Environmental Report, Rev. 3 at PDF pp. 14,157 (NRC ADAMS Accession No. ML19016A493) (emphasis added).

Petitioners' late-filed contentions also lack an adequate basis and fail to demonstrate that the issue raised in the contention is material to the findings the NRC must make in this proceeding, and thus run afoul of 10 C.F.R. § 2.309(f)(1)(ii), (iv). The various statements in the Holtec CISF Licensing Report and the Environmental Report referencing the U.S. DOE and/or a nuclear plant owner are intended to identify likely customers for the project, but are otherwise irrelevant to any material safety or environmental findings that the NRC must make in this proceeding. Petitioners assert that these statements related to customers for the proposed project occur in areas of the application concerning "waste management, offsite liability, and financing."[27] But Petitioners have not articulated any material safety or environmental finding related to the project customer statements that is not being met, or will not be met.

Finally, even if Petitioners had raised an adequately supported, genuine dispute on any material issue (they have not), the remedy Petitioners seek for a material false statement under Atomic Energy Act (AEA) Section 186 is irrelevant and inappropriate for this licensing proceeding.

First, there is no material false statement for all of the reasons set forth above. Nothing in the Holtec Highlights article calls into question, let alone disputes, any of the information submitted to the NRC in license application. Indeed, the statement in the Holtec article that deployment of the Holtec CISF "will ultimately depend on the DOE and the U.S. Congress" is consistent with the application's statement that the "HI-STORE CIS will be built in several

[27] Sierra Club Contention 26 at 8; DWM Contention 14 at 5.

stages of storage system groups to correspond to the (expected) increasing need from the industry and the U.S. government." [28]

Moreover, the Commission has limited the definition of "material false statements" to egregious situations where there is an element of intent to mislead. Commission regulations on "completeness and accuracy of information" require that information submitted to the Commission by an applicant "be complete and accurate in all material respects."[29] When promulgating this regulation, the Commission *reversed* its prior policy whereby a material false statement "could be either an affirmative statement, oral or written, or an omission, and could be unintended and inadvertent as well as intentional."[30] The Commission determined to limit use of the term "material false statement" to "egregious situations, which will be determined on a case-by-case basis" "where there is an element of intent"[31] Petitioners have put forward no information remotely suggesting any intent to mislead the Commission. Indeed, Petitioners argue that intent to mislead is not required to show a material false statement, relying on the material false statement definition that was repealed by the NRC over three decades ago.[32]

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[28] Licensing Report on The HI-STORE CIS Facility, Rev. 0C at PDF p. 21.

[29] *See, e.g.*, 10 C.F.R. § 72.11(a), which is the completeness and accuracy provision applicable to a proceeding for an away-from-reactor independent spent fuel storage installation.

[30] Completeness and Accuracy of Information, 52 Fed. Reg. 49,362, 49,363 (Dec. 31, 1987).

[31] 52 Fed. Reg. at 49,365; *See also Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Units 1 and 2), DD-93-1, 37 N.R.C. 39, 46 n.16 (1993) ("The Commission decided to exercise its discretion in the application of the term 'material false statement' by limiting the use of the term to egregious situations where there is an element of intent to mislead.").

[32] Before 1987, the Commission used the standard set forth in *Virginia Electric & Power Co*. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 N.R.C. 480 (1976), *aff'd*, 571 F.2d 1289 (4th Cir. 1978) ("*VEPCO*") for material false statements, but that standard has been superseded by the Commission's rulemaking on completeness and accuracy of information. Under the old standard, "knowledge of the falsity of a material statement [was] not necessary for a material false statement under section 186 and that material omissions [were] actionable to the same extent as affirmative material false statements." 52 Fed. Reg. at 49,363. Both Sierra Club and Don't Waste Michigan et al. erroneously rely on the pre-1987 standard in claiming that a material false statement "does not depend on whether the applicant or licensee knew of the falsity." Sierra Club Contention 26

Lastly, Petitioners' reliance on AEA Section 186 for a remedy is misplaced. Petitioners assert that, under Section 186, the remedy for making a material false statement is license revocation and therefore is also "grounds for not issuing the license in the first instance."[33] However, Section 186 applies to revoking licenses that have been issued, and is not applicable to this proceeding on initial issuance of a license. The plain language of Section 186 clearly applies only to existing licenses (i.e., licenses that have been issued), which can be revoked:

> Any *license may be revoked* for any material false statement in the application or any statement of fact required under section 2232 of this title, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission.[34]

An entirely different section of the AEA, Section 182, License Applications, addresses the completeness and accuracy of statements in license applications. That Section states in relevant part,

> The Commission may at any time after the filing of the original application, and before the expiration of the license, require further written statements in order to enable the Commission to determine whether the application should be granted or denied or whether a license should be modified or revoked. All applications and statements shall be signed by the applicant or licensee. Applications for, and statements made in connection with, licenses under sections 2133 and 2134 of this title shall be made under oath or affirmation. The Commission may require any other applications or statements to be made under oath or affirmation.[35]

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at 7-8 (citing cases predating the 1987 rulemaking, including *VEPCO*); DWM Contention 14 at 5 (citing cases predating the 1987 rulemaking, including *VEPCO*). From 1987 forward, the Commission has required an element of intent before finding any material false statement.

[33] Sierra Club Contention 26 at 1; DWM Contention 14 at 1.

[34] 42 U.S.C. § 2236(a) (emphasis added).

[35] 42 U.S.C. § 2232(a).

Consistent with AEA Section 182, during the NRC's review of a licensing application, the NRC reviewer will typically seek additional information from the applicant, if needed, to clarify understandings of information already submitted.[36] Such requests for clarification do not necessarily mean that incomplete information that might violate the Commission's completeness and accuracy regulation has been submitted.[37]

The Commission has confirmed the application of Section 186 to post-licensing situations in its rulemaking on completeness and accuracy of information when stating that Section 186 "permits *a license* to be revoked because of conditions which would warrant refusing to grant a license on an original application."[38] Section 186 simply is not the appropriate tool to redress the concern Petitioners (erroneously) perceive to exist here.

For all of the foregoing reasons, even if the Board were to entertain the inexcusably late-filed Sierra Club Contention 26 and DWM Contention 14, the Board should find that the contentions fall far short of the Commission's contention admissibility requirements.

[36] *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-17-3, 85 N.R.C. 195, 205 (2017) (rejecting a request for enforcement action against a licensee for allegedly failing to include all of the accurate information needed by the NRC to complete its review of a license amendment request).

[37] *Id.*

[38] 52 Fed. Reg. at 49,365 (emphasis added).

Respectfully submitted,

/Signed electronically by Timothy J. V. Walsh/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Holtec Opposition to Late-Filed Sierra Club Contention 26 and Don't Waste Michigan Contention 14 has been served through the EFiling system on the participants in the above-captioned proceeding this 19th day of February 2019.

/signed electronically by Timothy J. V. Walsh/

Timothy J. V. Walsh