

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

HOLTEC INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

**NRC STAFF'S CONSOLIDATED RESPONSE TO DON'T WASTE MICHIGAN, ET AL,
AND THE SIERRA CLUB'S MOTIONS TO FILE NEW CONTENTIONS**

INTRODUCTION

The Staff of the U.S. Nuclear Regulatory Commission (Staff) hereby responds to the motions of Don't Waste Michigan, et al. (DWM)¹ and Sierra Club to admit proposed new contentions DWM Contention 14 and Sierra Club Contention 26, respectively.² For the reasons set forth below, the Atomic Safety and Licensing Board (Board) should deny the proposed new contentions because they fail to meet the requirements of both 10 C.F.R. § 2.309(c)(1) and (f)(1), and are therefore inadmissible.

¹ A consortium consisting 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, Sustainable Energy and Economic Development Coalition, and Leona Morgan.

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 for Leave to File a New Contention," (Jan. 17, 2019) ("DWM's Motion") and "Sierra Club's Motion to File a New Late-Filed Contention" (Sept. 14, 2018) ("Sierra Club's Motion").

BACKGROUND

On March 30, 2017, Holtec International (Holtec) submitted an application, including a Safety Analysis Report (SAR) and Environmental Report (ER), requesting a license for the construction and operation of a consolidated interim storage facility (CISF) for spent nuclear fuel (SNF). On July 16, 2018, the NRC published a notice of opportunity to request a hearing and to petition for leave to intervene in the *Federal Register*.³ On September 14, 2018, DWM and Sierra Club filed petitions to intervene and proffered several contentions. Among these were two contentions, DWM Contention 2 and Sierra Club Contention 1, which challenge Holtec's application as being premised on the Department of Energy (DOE) taking title to the waste.⁴ The NRC staff⁵ and Holtec⁶ filed responses on October 9, 2018.

On January 2, 2019, Holtec issued *Reprising 2018*, which included a statement that

[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.⁷

³ Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

⁴ E.g., DWM Contention 2, Sierra Club Contention 1.

⁵ "NRC Staff's Consolidated Response to Petitions to Intervene and Requests for Hearing Filed by: Alliance for Environmental Strategies, Beyond Nuclear, Inc., Don't Waste Michigan, et al., NAC International Inc., and the Sierra Club" (Oct. 9, 2018) ("Staff Consolidated Response").

⁶ "Holtec International's Answer Opposing the 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 Petition to Intervene and Request for an Adjudicatory Hearing on Holtec International's HI-STORE Consolidated Interim Storage Facility Application," 33 (October 9, 2018) ("Holtec's Response to DWM"), "Holtec International's Answer Opposing Sierra Club's Petition to Intervene and Request for Adjudicatory Hearing on Holtec International's HI-STORE Consolidated Interim Storage Facility Application," 33 (Oct. 9, 2018) ("Holtec's Response to Sierra Club").

⁷ *Reprising 2018*, Holtec Highlights (Jan. 2, 2019).

On January 15, 2019, DWM, Sierra Club, and another petitioner, Beyond Nuclear, Inc., filed a joint motion to amend certain previously-submitted contentions to include as a basis *Reprising 2018* and certain pre-application statements from Holtec regarding the potential for DOE involvement in the CISF project.⁸

On January 17, 2019, DWM and Sierra Club each requested leave to file new contentions—DWM Contention 14 and Sierra Club Contention 26, respectively—based on information in *Reprising 2018*. These proposed new contentions assert that Holtec’s statements in *Reprising 2018* relating to DOE and the U.S. Congress’ involvement in the ultimate deployment of the HI-STORE CISF conflicts with statements in Holtec’s application that the CISF may be funded by nuclear plant owners. Specifically, DWM and Sierra Club argue that the application’s repeated statement that title to the waste to be stored at the HI-STORE CISF may be held by either DOE or the nuclear plant owners is a material false statement and grounds for denying Holtec’s application. Petitioners’ January 17th motions to file new contentions incorporate by reference portions of the January 15th motion to amend previous contentions.⁹

LEGAL STANDARDS

I. Timeliness Standards for New and Amended Contentions

New or amended contentions submitted after the initial date for hearing requests must meet the requirements of 10 C.F.R. § 2.309(c)(1). To do so, a party must demonstrate good cause by showing that the following three conditions are met:

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

⁸ “Motion by Petitioners Beyond Nuclear, Fasken, the Sierra Club, and Don’t Waste Michigan, et al. to Amend their Contentions 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) (Petitioners’ Motion to Amend”).

⁹ DWM Contention 14 at 1, Sierra Club Contention 26 at 2.

- (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.

The petitioner has the burden of demonstrating that any new or amended contention meets the standards in 10 C.F.R. § 2.309.¹⁰

II. General Requirements for Contention Admissibility

In addition to meeting the requirements of 10 C.F.R. § 2.309(c)(1), new or amended contentions must also satisfy the six contention admissibility requirements of 10 C.F.R.

§ 2.309(f)(1). That section requires that each contention:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . ; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

¹⁰ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009).

The contention admissibility requirements are “strict by design”¹¹ and “do not permit . . . ‘notice pleading, with details to be filled in later.’”¹² It is the petitioner’s burden to come forward with support for its contention.¹³ A board must reject a contention that rests on an incomplete or inaccurate reading of the application or the Staff’s review document.¹⁴ Finally, if a petitioner provides a document as a basis for a contention, the petitioner must explain the significance of the document and how it supports the contention.¹⁵

Further, a petitioner must do more than assert generally that there are deficiencies in the application. A petitioner must identify all pertinent portions of the document it is challenging and state both the challenged position and the petitioner’s opposing view.¹⁶ To demonstrate a genuine, material dispute, the petitioner must address the specific analysis in the document and

¹¹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

¹² *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999).

¹³ *Oyster Creek*, CLI-09-7, 69 NRC at 260-61; *see also Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,171 (August 11, 1989) (final rule).

¹⁴ *Cf. Georgia Institute of Technology* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 300 (1995) (rejecting a contention based on mistaken reading of the Safety Analysis Report).

¹⁵ *See USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (“references to articles or correspondence, without ‘explanation or analysis’ of their relevance, [do] not provide an adequate basis” for admitting a contention); *id.* at 457 (“it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves; boards may not simply ‘infer’ unarticulated bases of contentions”); *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003) (stating that it is insufficient to refer generally to voluminous documents with no further analysis and supporting evidence showing why particular sections of those documents provide the basis for a contention).

¹⁶ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

explain how it is incorrect.¹⁷ To show that a dispute is “material,” a petitioner must show that its resolution would make a difference in the outcome of the proceeding.¹⁸

DISCUSSION

In DWM Contention 14 and Sierra Club Contention 26, Petitioners assert that “Holtec has made material false statements that this CIS[F] project might rely on nuclear plant owners to retain title to the radioactive waste destined for storage at the [CISF].”¹⁹ Specifically, Petitioners assert that Holtec’s statement in *Reprising 2018* that the CISF’s “deployment will ultimately depend on the DOE and the U.S. Congress” conflicts with statements in the application that title to the waste stored at the CISF may be held by DOE and/or the nuclear power plant owners.²⁰ Petitioners assert that, in light of earlier statements by Holtec officials regarding their expectation that DOE will take title to future waste stored at the CISF, the *Reprising 2018* statement constitutes Holtec’s actual intent with respect to ownership of the waste.²¹ Accordingly, Petitioners claim, because the information in *Reprising 2018* was published after Holtec submitted its application, the repeated statement in Holtec’s application that private ownership of the fuel is a possibility is a “calculated effort to mislead the Commission and the ASLB and to cloud Holtec’s true intention for DOE to take title to the waste” and warrants denial of Holtec’s application.²²

¹⁷ 10 C.F.R. § 2.309(f)(1)(vi).

¹⁸ See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3) CLI-99-11, 49 NRC 328, 333–34 (1999).

¹⁹ Sierra Club’s Motion at 2, DWM’s Motion at 4.

²⁰ Sierra Club Contention 26 at 1, DWM Contention 14 at 1.

²¹ See Sierra Club Contention 26, DWM Contention 14.

²² Sierra Club Contention 26 at 7, DWM Contention 14 at 4.

Petitioners' motions should be denied because the information on which they rely is not materially different from previously-available information, as required for new contentions under 2.309(c)(1)(ii). In addition, DWM Contention 14 and Sierra Club Contention 26 are inadmissible because they fail to demonstrate that the issue raised in the contentions is material to the findings the NRC must make, as required under 10 C.F.R. § 2.309(f)(1)(iv); fail to provide a concise statement of the alleged facts which support the petitioner's position, as required under 10 C.F.R. § 2.309(f)(1)(v); and fail to show that a genuine dispute exists with the applicant on a material issue of law or fact, as required under 10 C.F.R. § 2.309(f)(1)(vi).

I. Petitioners have not shown that the information on which they rely is materially different from previously-available information

In their associated motions to submit DWM Contention 14 and Sierra Club Contention 26 as late-filed contentions, Petitioners assert that the 10 C.F.R. § 2.309(c)(1) factors are satisfied because *Reprising 2018* contains new and materially different information regarding Holtec's assumptions about ownership of waste that was not available before its publication on January 2, 2019.²³ However, Petitioners' own arguments in support of previously-filed contentions (DWM Contention 2 and Sierra Club Contention 1) undermine their assertions that Holtec's statement in *Reprising 2018* is "materially different" from previously-available public information. As DWM and Sierra Club acknowledge in DWM Contention 14 and Sierra Club Contention 26, their previously-filed DWM Contention 2 and Sierra Club Contention 1 are premised on a purported conflict between certain statements by Holtec officials that Holtec would require a contractual arrangement with DOE to take title to the waste and the application's statements that either DOE or nuclear plant owners may have title to the waste.²⁴ Petitioners assert that

²³ Sierra Club's Motion at 2, DWM's Motion at 4–5.

²⁴ Sierra Club Contention 26 at 3–4, DWM Contention 14 at 2–3.

the statement in *Reprising 2018* “shows that DOE involvement is a prerequisite[,] confirms [the] accuracy of statements by Holtec officials prior to submitting the license application regarding DOE involvement, and that Holtec understands that DOE involvement . . . would be illegal under the NWPA.”²⁵ But these issues are already disputed by Petitioners’ own timely-filed contentions.²⁶ Indeed, Petitioners themselves acknowledge that the information in *Reprising 2018* merely “confirms [previous] statements by Holtec officials,” statements on which Petitioners relied to support their previously-filed contentions.²⁷ As such, the statement in *Reprising 2018* is, at most, additional evidence in support of the same fundamental premise of Petitioners’ previous contentions. Because Petitioners have not shown how this is “materially different” information from what was previously available, Petitioners have not met 10 C.F.R. § 2.309(c)(1)(ii).

The failure to meet the criteria of 10 C.F.R. § 2.309(c)(1) is sufficient grounds to reject these new contentions. However, as discussed below, they also do not meet the admissibility criteria of § 2.309(f)(1).

II. Petitioners have not provided sufficient evidence to demonstrate that their contentions are material because the issues raised are already part of the NRC’s review of the application

DWM and Sierra Club do not address the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1) in their respective proposed contentions or associated motions. Petitioners rely on a statement in *Reprising 2018* relating to DOE and the U.S. Congress’ involvement in the ultimate deployment of the HI-STORE CISF and assert that this statement contradicts information in the

²⁵ Sierra Club’s Motion at 2, DWM’s Motion at 4–5.

²⁶ DWM Contention 2 and Sierra Club Contention 1.

²⁷ Sierra Club’s Motion at 2, DWM’s Motion at 4.

SAR indicating that nuclear power plant owners may retain title to waste stored at the CISF.²⁸

Petitioners also note that Holtec does not mention the possibility of power plant owners retaining title to waste in the “ER 1.0,” and they claim that *Reprising 2018* and the ER both reveal that Holtec’s intent “has always been to rely on DOE, not the nuclear plant owners, taking title to the waste.”²⁹

DWM Contention 14 and Sierra Club Contention 26 are inadmissible because they fail to demonstrate that the issue is material to the NRC’s required findings, provide an adequate factual basis, or raise a genuine dispute with the application on an issue of material fact or law, as required by 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi).

First, DWM and Sierra Club have not shown how the concerns raised in DWM Contention 14 and Sierra Club Contention 26 are material to the findings the Staff must make with respect to its review of the application. Petitioners’ proposed contentions rely on an assumption that Holtec’s true intent, as expressed in *Reprising 2018* and version 1.0 of the ER, is to have DOE, not power plant owners, take title to the waste, and that any statement to the contrary in the SAR amounts to a “material false statement” that necessitates denial of Holtec’s application.³⁰ However, the Staff bases its safety and environmental reviews on the application as presented, which seeks a license on the basis that either DOE or private entities may hold title to the waste. Because the application presents both options, regardless of whether Holtec may in fact prefer the option in which DOE takes title to the waste stored at the CISF, the

²⁸ Sierra Club Contention 26 at 5–6, DWM Contention 14 at 3–4.

²⁹ Sierra Club Contention 26 at 3–4; DWM Contention 14 at 2–3. DWM and Sierra Club appear to refer to the December 2017 version of the ER. Holtec subsequently revised the ER to reflect that title to the waste would be held by either DOE or power plant owners. On February 6, 2019, DWM and Sierra Club each filed a motion to amend previously-filed contentions (DWM Contention 2 and Sierra Club Contention 1) to reflect the ER revision.

³⁰ Sierra Club Contention 26 at 7, DWM Contention 14 at 4.

applicant's preference is not material to the Staff's review of the application. Accordingly, Petitioners have not demonstrated that the issues raised in their new proposed contentions are material to the Staff's review, as required by 10 C.F.R. § 2.309(f)(1)(iv).

Second, Petitioners have not provided adequate support for their position that inclusion in the application of the option for nuclear plant owners retaining title to the radioactive waste is a material false statement. As previously explained, the Staff conducts its review based on the SAR and ER submitted by the Applicant. The SAR explains that Holtec is seeking to obtain a license on the basis that either DOE, or power plant owners, or both, may hold title to the waste to be stored at the CISF. Precisely because Holtec's application is structured on the basis that all of these options may be available, it is not apparent how Holtec's expression of preference for one of these options could establish as a factual matter that Holtec's statement in the SAR is "materially false," i.e., that Holtec is only seeking a license on the basis that DOE will take title to the waste. Similarly, Petitioners' reliance on version 1.0 of the ER does not support their proposed new contentions. As Petitioners acknowledge in their recently-filed motion to amend certain previously-submitted contentions, Holtec has revised the ER to reflect, consistent with the SAR, the potential that power plant owners may have title to the waste to be stored at the CISF.³¹ Accordingly, the ER also does not establish as a factual matter that Holtec's SAR contains material false statements regarding ownership of waste.

In addition, with respect to the adequacy of the specific information relied upon by Petitioners in support of their proposed new contentions, the statement in *Reprising 2018* is only that "deployment [of the proposed CISF] will ultimately depend on the DOE and the U.S. Congress." The Petitioners do not demonstrate how this brief statement, which does not specify

³¹ "Sierra Club's Motion to Amend Contention 1," 8–9 (Feb. 6, 2019); "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," 6 (Feb. 6, 2019).

how the proposed CISF will depend on DOE and Congress, is even clearly inconsistent with the challenged language in Holtec’s SAR.³² Therefore, Petitioners have not provided adequate support for their claims, as required by 10 C.F.R. § 2.309(f)(1)(v).

Third, Petitioners have not shown that their dispute with the application is on a material issue of law or fact. To show that a dispute is “material,” a petitioner must show that its resolution would make a difference in the outcome of the licensing proceeding.³³ As explained above, Petitioners have not shown how Holtec’s expressed preference for one out of multiple options described in its application would affect the outcome of the proceeding. And given the application’s proposed multiple-option framework, Petitioners have not shown that whether Holtec intends to pursue the project in the absence of DOE involvement is relevant to the Staff’s review, because the business decision of whether to use a license has no bearing on the licensee’s ability to safely conduct the activities once authorized.³⁴ Accordingly, Petitioners have not shown that their proposed new contentions satisfy 10 C.F.R. § 2.309(f)(1)(vi).

CONCLUSION

For the reasons described above, the Board should deny admission of Don’t Waste Michigan Contention 14 and Sierra Club Contention 26.

³² See *Tr.* at 244–247 (Mr. Silberg) (providing Holtec’s interpretation of the statement in *Reprising 2018*).

³³ See *Oconee*, CLI-99-11, 49 NRC at 333–34.

³⁴ See *Louisiana Energy Servs., L.P.* (Nat’l Enrichment Facility), 62 NRC 721, 726 (2005) (“the NRC is not in the business of regulating the market strategies of licensees or determining whether market conditions warrant commencing operations, and . . . we leave to licensees the ongoing business decisions that relate to costs and profit.”).

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR 2.304(d)

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Dated in Rockville, MD
this 19th day of February 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

HOLTEC INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S CONSOLIDATED RESPONSE TO DON'T WASTE MICHIGAN, ET AL, AND THE SIERRA CLUB'S MOTIONS TO FILE NEW CONTENTIONS," dated February 19, 2019, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding, this 19th day of February 2019.

/Signed (electronically) by/

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Dated in Rockville, MD
this 19th day of February 2019