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 Beyond Nuclear and Fasken Motion to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address Holtec International's Revised License Application

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 Beyond Nuclear and Fasken Land Minerals and Permian Basin Land Royalty Owners ("Fasken") (collectively, "Petitioners") late-filed motion to amend their contentions.[1] The Board should find that the Petitioners have not 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 contention. As a result, the Board should reject Petitioners' late-filed motion to amend their contentions in addition to rejecting the original contentions.[2]

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

[2] If, as Holtec shows below, the Board should find that the Petitioners' late-filed contentions are unjustifiably tardy, the contentions as originally submitted should be rejected for the reasons set forth in Holtec International's Answer Opposing Beyond Nuclear Inc. Hearing Request and Petition to Intervene on Holtec International's HI-STORE Consolidated Interim Storage Facility Application (Oct. 9, 2018) (hereinafter, "Holtec's Answer to Beyond Nuclear") and Holtec International's Answer Opposing Fasken Land and Minerals and Permian Basin Land and Royalty Owners' Motion / Petition to Intervene on Holtec International's HI-STORE Consolidated Interim Storage Facility Application (Dec. 3, 2018) (hereinafter, "Holtec's Answer to Fasken").

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

The Board should not consider Petitioners' late-filed motion to amend their contentions because the motion is untimely, and Petitioners have failed to demonstrate the required good cause for their untimely filing.[3] A motion for leave to file a new or amended contention 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.[4] The good cause demonstration requires 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.[5]

In this case, the information upon which Petitioners base their filing was both previously available and is not materially different from information already in the Holtec HI-STORE Consolidated Interim Storage Facility ("CISF") License Application ("Application").[6]

Here, Petitioners claim that their proposed amendments to the contentions are based on new information derived from Holtec's revised Environmental Report (Rev. 3) ("ER"), which—

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[3] Several petitioners previously submitted a motion to amend their contentions and strike certain statements from Holtec's pleadings, based on the January 2, 2019 Holtec Highlights. *See* 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). However, only Beyond Nuclear and Fasken revised their January 15, 2019 motion to a motion to amend on February 6, 2019, while the Sierra Club and Don't Waste Michigan, et al. filed separate motions to amend.

[4] 10 C.F.R. § 2.309(c)(1) (emphasis added).

[5] 10 C.F.R. § 2.309(c)(1)(i)-(iii).

[6] The Holtec International HI-STORE CISF License Application ("Application") is available at ADAMS Accession No. ML17115A431.

though filed with the NRC in November 2018[7]—only became available to them on January 17, 2019.[8] Petitioners claim that the revisions to the ER "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."[9]

However, when considering the Holtec Application in its entirety, the only "previous unequivocal assumptions of DOE ownership" were the Petitioners' own baseless assumptions. The information contained in the revised ER is no different from the information contained in Holtec's original CISF license Application. Indeed, as Petitioners acknowledge in their Motion,[10] the Application states throughout that ownership or liability may rest with either the licensees or the DOE, including in the HI-STORE CIS Facility Financial Assurance and Project Life Cycle Cost Estimates, License Condition 17 of the Proposed License, and the Licensing Report (a/k/a the Safety Analysis Report).

The Board has previously held that, where a petitioner relies on "new information" that "merely repeats what was already explained in past public filings," it is not new or materially different to satisfy the standards set out in 10 C.F.R. § 2.309(c)(1).[11] Moreover, a petitioner cannot establish good cause for a late filing where the same information prompting the contention is available to the public several months before a contention is filed.[12] That is the case here. As

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[7] *See* K. Manzione (Holtec International) to J. Cuadrado (NRC), *Holtec International HI-STORE CIS (Consolidated Interim Storage Facility) License Application Responses to Requests for Supplemental Information* (ADAMS Accession No. 18333A041).

[8] Motion at 12.

[9] Motion at 6.

[10] Motion at 3.

[11] *First Energy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), 81 N.R.C. 28 (2015).

[12] *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-11, 21 N.R.C. 609, 628-629 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986)

stated in several places throughout the original CISF application,[13] either the DOE or a nuclear power plant owner may have title to the spent fuel. The ER was simply updated for consistency to include the exact *same* information as in the other Application documents.[14]

Petitioners are now trying to remediate their original contention after previously failing to address the fact that other available application documents clearly stated that DOE holding title to the spent fuel was one *option*. But it is Petitioners that have an "iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable [them] to uncover any information that could serve as the foundation for a specific contention."[15] Petitioners failed to fulfill that obligation in their initial petitions when they failed to make their arguments against the available options, even though those options were included in the original Application.

Further, to the extent there was confusion based on Holtec's original Application, this was clarified in Holtec's replies to Petitioners' initial contentions. Holtec's October 9, 2018 Answer to Beyond Nuclear states that "[t]he application clearly states that either the nuclear plant owners from where the spent fuel originated *or* the DOE will be the customer for the HI-STORE CIS Facility."[16] Holtec's December 3, 2018 Answer to Fasken makes the same point.[17] Based on this clarification, Beyond Nuclear and Fasken had ample information on which to file amended

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[13] Motion at 3.

[14] *See* Environmental Report Rev. 3 at 1-1 (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.").

[15] *In the Matter of Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (Sept. 30, 2010) (internal citations omitted).

[16] Holtec's Answer to Beyond Nuclear (Oct. 9, 2018) (emphasis in original) at 19. Beyond Nuclear cannot say that it could not have made this argument at an earlier date: it included the exact same text in its Reply to Holtec's Answer that Sierra Club and Don't Waste Michigan now use to support their Motions. *See* Beyond Nuclear's Reply to Oppositions to Hearing Request and Petition to Intervene at 11.

[17] Holtec's Answer to Fasken (Dec. 3, 2018) at 17.

contentions at the time that Holtec first clarified its intentions its Answers, but they failed to do so. Even giving Beyond Nuclear the benefit of the most generous interpretation of the deadline, their motion to amend contentions should have been filed no later than November 8, 2018, i.e., within 30 days after the purportedly new information became available in Holtec's Answer to Beyond Nuclear. Even Fasken should have filed by January 2, 2019. Yet, Petitioners did not file a motion to amend their contentions to address this issue until February 6, 2019.[18]

Petitioners attempt to bolster their claim of timeliness by relying on a statement from the January 2, 2019 Holtec Highlights. That attempt fails. Petitioners claim that the Holtec Highlights article "demonstrates that Holtec continues to assume that DOE will, in fact, take the role of spent fuel owner as set forth in certain parts of the Environmental Report (Rev. 0)."[19] Not only is this assertion untrue, but it is also now irrelevant to the amended contention. 10 C.F.R. § 2.309(c)(1) requires Petitioners to demonstrate that the "information upon which the filing is based" was "not previously available" or "materially different from information previously available." However, Petitioners' proposed amendments are not based on the January 2, 2019 Holtec Highlights at all. Instead the amendments rely solely on the language in the revised ER.

In summary, none of the information referenced by the Petitioners is sufficient to support the late filing of the amended contention. All of the information in the ER upon which Petitioners purportedly base their amended contention was previously available in Holtec's original Application. In addition, the Holtec Highlights statement is entirely irrelevant to the amended contentions which Petitioners proffer.

[18] *See generally* Motion (Feb. 6, 2019).

[19] Motion at 6.

When the Nuclear Regulatory Commission amended 10 C.F.R. § 2.309 in 2012, it clarified that "previously available information cannot be used as the basis for a new or amended contention filed after the deadline."[20] The same is true today. Petitioners had a duty to review the publicly available material in the licensee's filing and timely file contentions or motions to amend contentions based on that information. The above discussion makes clear that Petitioners failed to meet their obligation in this case and thus the motion to amend falls short of the 10 C.F.R. § 2.309(c)(1) standards for entertaining late-filed contentions. For all of the foregoing reasons, the Board should not consider Petitioners' motion to amend their contentions.

Nor is Petitioners' claim for late-filing supported by the NRC Staff's Answer.[21] The NRC Staff has taken the position that the contentions are admissible as "a challenge to whether the application may propose a license condition that includes the potential for DOE ownership of spent fuel to be stored at the Holtec."[22] However, in doing so, the NRC Staff's Answer is completely silent on the timeliness of Petitioners' amended contentions.[23] The Staff seemingly refers to License Condition 17, which was specifically referenced by each of the Petitioners in their respective filings as part of the original license application.[24] As such, any challenge to the License Condition should have been included in the various Petitioners' initial petitions—not at this late stage in the proceeding—and the amended contention remains impermissibly untimely even with the NRC Staff's re-interpretation.

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[20] Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562 (Aug. 3, 2012).

[21] NRC Staff Answer to Motions to Amend Contentions Regarding Federal Ownership of Spent Fuel at 2 (Feb. 19, 2019).

[22] *Id.*

[23] *See id*. at 1-2.

[24] *See, e.g.*, BN and Fasken Motion at 3; DWM Motion at 4; Sierra Club Motion at 5.

II. Petitioners' Amended Contentions are Inadmissible.

Even if the Board were to find good cause for the late-filing of the amended contentions (which it should not do), the Board should nevertheless find that the amended contentions continue to fall far short of the Commission's contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). First, as Beyond Nuclear and Fasken openly admit, the amended Contentions are outside the scope of this proceeding and are not material to the findings that the NRC must make.[25] That candid admission by itself should be ample grounds to reject the contentions. In addition, the amended contentions fail to raise a genuine dispute on a material issue of fact or law. 10 C.F.R. § 2.309(f)(1)(vi).

The Beyond Nuclear and Fasken contentions were amended to add the following assertion:

> Language in Rev. 3 of Holtec's Environmental Report, which presents federal ownership as a possible alternative to private ownership of spent fuel, does not render the application lawful. As long as the federal government is listed as a potential owner of the spent fuel, the application violates the NWPA.[26]

In support of this addition, Petitioners state that Holtec agrees that at this time, "DOE ownership of spent fuel generated by commercial nuclear power plants violates the NWPA."[27] Petitioners then leap to the conclusion that the NRC cannot issue the license with an option for DOE ownership at some future time, because "federal agencies are not above the law, and they cannot do more than Congress allows."[28] Thus, according to Petitioners, the "NRC may not

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[25] Beyond Nuclear and Fasken Motion at 2, 11-12.

[26] Beyond Nuclear and Fasken Motion at 8.

[27] Beyond Nuclear and Fasken Motion at 8. As Holtec established during the Hearing, the DOE already has title to some spent nuclear fuel, under authority other than the NWPA. Transcript of Hearing at 249–250, Holtec International (HI-STORE Consolidated Interim Storage Facility) (Jan. 24, 2019).

[28] Beyond Nuclear and Fasken Motion at 9 (citing *State of New York, et al. v. U.S. Dept. of Commerce*, Nos. 18-CV-2921, 18-CV-5025, slip op. at 11 (S.D.N.Y. Jan. 15, 2019)). It is unclear how the *State of New York* case, which

issue the license" with an option that is currently precluded by existing law, without violating the Administrative Procedure Act ("APA") that "ensures that agencies follow the law."[29] Petitioners assert that "the APA bars the NRC from forcing on Petitioners the unfair choice between challenging a hypothetical application or living with an approved license that would violate federal law were it carried out."[30]

On the contrary, Petitioners face a simple choice: assume that the DOE (and Holtec) will follow the law. Regardless of how it is worded, the CISF application will not violate federal law. Rather, Petitioners' new argument is based wholly on the assumption that *the DOE* (and Holtec) will violate the NWPA by taking title to spent fuel prior to the existence of a repository. This assumption is wholly unsupported, and flies in the face of DOE's history of refusing to take title to spent nuclear fuel specifically because it lacks statutory authority under the NWPA.[31] Moreover, the Courts cannot blithely assume that the Government will violate the law,[32] nor is it appropriate for Petitioners to ask that the Board sit in judgment of DOE's actions.[33] Nor can

found a "veritable smorgasbord of classic, clear-cut APA violations," including arbitrary and capricious decision-making (slip. op. at 8), supports Petitioners' contention regarding the theoretical illegal actions of another agency.

[29] Beyond Nuclear and Fasken Motion at 9.

[30] Beyond Nuclear and Fasken Motion at 9.

[31] *See, e.g., Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed.Reg. 21,793-94, 21,797 (1995); *Indiana Michigan Power Co. v. Dept. of Energy*, 88 F.3d 1272, 1274 (D.C. Cir. 1996) ("The [DOE] also determined that it had no authority under the NWPA to provide interim storage in the absence of a facility that has been authorized, constructed and licensed in accordance with the NWPA."); *Northern States Power Co. v. Dept. of Energy*, 128 F.3d 754, 756 (D.C. Cir. 1997) ("The Department also took the position that 'it lacks statutory authority under the Act to provide interim storage.'").

[32] *See Oregon State Police Officers Ass'n v. Peterson*, 979 F. 2d 776, 778 (9th Cir. 1992) ("We cannot assume as a matter of course that [state] units of government will violate the law."). Furthermore, there is a presumption of regularity that applies to federal agencies, founded on the commonsense idea that courts should assume that government officials "have properly discharged their official duties." *See, e.g., U.S. v. Chem. Found., Inc.*, 272 U.S. 1, 14-15, 47 S.Ct 1, 71 L.Ed. 131 (1926) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties."); *U.S. v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996).

[33] *Arizona Public Service Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), 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.").

Petitioners assume that Holtec will knowingly violate the law.[34] Yet, without the unsupported assumption that both the DOE and Holtec will independently violate federal law, there is no violation of the NWPA.[35]

Nonetheless, Petitioners argue that the Application must be rejected in total, because it contains the "illegal" DOE option. Petitioners argue that the doctrine of severability does not apply to the Application because the license has not yet issued.[36] However, the NRC has previously accepted license applications with options that were not authorized by law at the time the application was filed, or even when the license was granted.[37] Moreover, the DOE "option" is only that: an option. The Application is not dependent on DOE taking title to the spent nuclear fuel. Petitioners prove this point by suggesting that Holtec sever those same provisions and resubmit the Application to move forward.[38] DOE ownership of the fuel is unnecessary for this

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[34] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 N.R.C. 232, 235 (2001) ("[I]n the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises."); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-35, 52 N.R.C. 364, 405 (2000) (explaining that the Board will not assume, without evidence, that PFS will violate National fire Protection Association standards).

[35] Petitioners may argue that the existence of the DOE option in the Application is somehow proof that Holtec and the DOE (contrary to its long history of refusing to accept title to spent fuel) intends to violate the NWPA. However, the Application covers the option of DOE ownership both because (1) DOE does own some spent fuel that may be stored at the CISF, (2) because in the future the NWPA may be amended and DOE ownership may become a legal option prior to the existence of a repository, and (3) because at some point in the future, we sincerely hope that there will be a repository. It is appropriate to bound those options now. *As Beyond Nuclear and Fasken openly admit*, this issue is not material to the findings that the NRC must make to issue the CISF license. Beyond Nuclear and Fasken Motion at 11. Thus, DOE ownership would not change the SAR or ER or the NRC Staff analyses.

[36] Beyond Nuclear and Fasken Motion at 11.

[37] In the Private Fuel Storage ("PFS") proceeding, the Environmental Impact Statement acknowledged that the Bureau of Land Management would approve of only one of the PFS right-of-way applications, leaving at least one potential right-of-way illegal. Yet, both right-of-way options were analyzed in detail in the EIS. *See* NUREG-1714 at 1-17, 2-40.

[38] Beyond Nuclear and Fasken Motion at 11. Petitioners' suggestion that the NRC would be required to re-notice the application if Holtec were to strike the mention of DOE is absurd. Petitioners' own citations acknowledge that the NRC is only required to re-notice an application after significant changes (a delay of five years, and a change in a proposed rule that was so major that it changed subject of discussion). Beyond Nuclear and Fasken Motion at 11, n.5. Petitioners have not demonstrated that eliminating DOE ownership would cause *any* material change in the application, let alone a significant one: there is no allegation that the environmental impacts or the safety analysis would change. Indeed, Petitioners acknowledge that their contention is not material to findings

project to move forward, and as the Petitioners acknowledge, the Application can stand alone without that option.

Moreover, even with the DOE option in the Application, Petitioners have not demonstrated that there is an "illegal" provision. The DOE "option" is already legal. As described during the hearing, the DOE currently owns spent fuel from commercial reactors that could potentially be stored at the CISF.[39] Thus, in the future, DOE could store some spent fuel at the CISF without violating the NWPA. Consequently, there is no "illegal" provision in the Application under any circumstance.

Petitioners' arguments are also at odds with long-standing NRC precedent. NRC's practice has been to approve license applications that are premised on factual situations (like NWPA authority) that do not presently exist. For example, in the Private Fuel Storage proceeding, financial qualifications were established based on a model contract with "hypothetical customers," none of which contracts had in fact been entered into.[40] The absence of signed contracts providing the necessary financial resources for the construction, operation and decommissioning of the facility did not provide a justification to deny the permit application where the applicant was obligated to demonstrate the existence of signed contracts prior to starting construction.[41] In the current situation, if the NWPA is not amended to permit DOE to

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that the NRC must make. Beyond Nuclear and Fasken Motion at 11. Petitioners provide no support for their claim that such immaterial changes would require the NRC to re-notice the application.

[39] *See* Tr. 37:22 -38:12 (Curran); Tr. 249:11-250:9 (Silberg). Although NRC Staff counsel stated that DOE's non-NWPA spent fuel is not stored in Holtec's UMAX systems and is therefore outside of Holtec's application, Tr. 337:14-18, that statement ignores Holtec's ability to amend the UMAX Certificate of Compliance (if necessary) at some point in the future.

[40] "[J]ust as PFS relies on what Utah styles 'hypothetical customers,' LES had no executed enrichment contracts in hand at the licensing phase. Both LES and PFS relied primarily on their own commitments not to go forward with the project without the contracts in hand." *Private Fuel Storage LLC* (Independent Spent Fuel Storage Installation), CLI-05-8, 61 N.R.C. 129, 138-39 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 N.R.C. 294, 304 (1997)).

[41] *Id.*

take title to spent nuclear fuel (other than fuel owned by DOE via non-NWPA authority), the "DOE Option" will remain an option, nothing more. The only way that Petitioners can posit a violation of law is to posit that DOE will violate the law. As shown above, this hypothetical is one that this Board need not, and should not, accept.

In summary, Petitioners' amended contentions are outside the scope of this proceeding and immaterial, are inappropriately based on unsupported and speculative assumption of illegal action by DOE and Holtec, and fail to raise a genuine dispute with the application on a material issue of fact or law. As a result, even if the Board were to entertain the inexcusably late-filed amended contentions of Beyond Nuclear and Fasken, the Board should find that the contentions fall short of the Commission's contention admissibility requirements.

The NRC Staff's position that the contention is admissible as "a challenge to whether the application may propose a license condition that includes the potential for DOE ownership of spent fuel to be stored at the Holtec"[42] is also incorrect. As detailed in the above discussion on *PFS*, NRC precedent is contrary to the NRC Staff's unsupported position. "Hypothetical" options and factual situations that do not yet presently exist are well within the range of an NRC license application. The NRC has provided no justification for the Board to ignore NRC and Commission precedent in support of this amended contention.

[42] NRC Staff Answer to Motions to Amend Contentions Regarding Federal Ownership of Spent Fuel at 2 (Feb. 19, 2019).

III. Conclusion

For all of the foregoing reasons, the Board should reject the amended contentions.

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Holtec Opposition to Beyond Nuclear and Fasken Motion to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address Holtec International's Revised License Application has been served through the EFiling system on the participants in the above-captioned proceeding this 19th day of February 2019.

/signed electronically by Anne R. Leidich/

Anne R. Leidich