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 Don't Waste Michigan, et al.'s Motion to Amend Contention 2

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 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's (collectively, "DWM's") late-filed motion to amend its contention.[1] The Board should find that DWM has not met the standards for a late-filed contention under 10 C.F.R. § 2.309(c)(1)(i)-(iii). And, even if DWM had met those standards, it has not met the standards for an admissible contention. As a result, the Board should reject DWM's late-filed motion to amend its contention in addition to rejecting the original contention.[2]

[1] 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 (Feb. 6, 2019) (hereinafter, "Motion").

[2] If, as Holtec shows below, the Board should find that the DWM's late-filed contention is unjustifiably tardy, the contention as originally submitted should be rejected for the reasons set forth in 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 (Oct. 9, 2018) (hereinafter, "Holtec's Answer to DWM").

I. DWM Has Failed to Demonstrate Good Cause for Its Late-Filed Motion to Amend Contention 2.

The Board should not consider DWM's late-filed motion to amend Contention 2 because the motion is untimely, and DWM has failed to demonstrate the required good cause for its 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 the petitioner to show that:

> (i) The information upon which the filing is based was not previously available;
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> (ii) The information upon which the filing is based is materially different from information previously available; and
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> (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 DWM bases its 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, DWM claims that its proposed amendment to Contention 2 is based on new information derived from Holtec's revised Environmental Report (Rev. 3) ("ER"), which—though

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[3] Several petitioners previously submitted a combined 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 original Holtec International HI-STORE CISF License Application ("Application") is available at ADAMS Accession No. ML17115A431.

filed with the NRC in November 2018[7]—only became available to them on January 17, 2019.[8] DWM claims that the revisions to the ER "removed the previous unequivocal assumption 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 DWM's 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 DWM acknowledges in the 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 6.

[9] Motion at 6.

[10] Motion at 3-4.

[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 NRC 609, 628-629 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986).

conceded by DWM,[13] several places in the Application state 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 the other Application documents.[14]

DWM is now trying to remediate its 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 DWM that has an "iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."[15] DWM failed to fulfill that obligation in its initial petition when it failed to make its 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 several of the petitioners' initial contentions. As DWM acknowledges, Holtec's Answer to DWM's Petition established that title would lie with either "*either* the DOE *or* private licensees."[16] Indeed, Holtec's October 9, 2018 Answer to DWM stated "that prospective users/payers for spent fuel storage at the CIS would be 'USDOE and/or a nuclear plant owner.'"[17] Based on this clarification, DWM had ample information on which to file an amended contention at the time that Holtec first clarified its intentions in its Answer, but it failed to do so. Even giving DWM the benefit of the most generous interpretation of the deadline, its

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[13] *See* Motion at 3-4.

[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] Motion at 5.

[17] Holtec's Answer to DWM at 34 (Oct. 9, 2018).

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. This is particularly true given that DWM's argument in this Motion is almost entirely copied verbatim from Beyond Nuclear's Reply to Oppositions to Hearing Request and Petition to Intervene filed on October 16, 2018.[18] Yet, DWM did not file a motion to amend until February 6, 2019.[19]

DWM attempts to use an allegation of false statements to bolster its timeliness arguments.[20] That attempt fails. The false statement allegations are irrelevant to the amended contention, which is based entirely on "federal ownership as a possible alternative to private ownership of spent fuel."[21] Additionally, there is no separate timeliness standard related to the submission of false statements. Nor do any of the cases cited by DWM support such a standard.[22]

In summary, none of the information referenced by the DWM is sufficient to support the late filing of an amended contention. All of the information in the Holtec ER upon which DWM purportedly bases the amended contention was previously available in Holtec's original Application. In addition, the Holtec Highlights statement is entirely irrelevant to the amended contention that DWM proffers, with its focus on DOE ownership as an alternative option.[23]

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."[24] The same is true today. DWM had a duty to review the publicly

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[18] *Compare* Beyond Nuclear's Reply to Oppositions to Hearing Request and Petition to Intervene at 11-12, *with* Motion at 9.

[19] DWM Motion to Amend Contention 2 (Feb. 6, 2019).

[20] Motion at 7-8.

[21] Motion at 11.

[22] The cases cited by DWM are of no relevance to this case. For example, in the Orem case the Commission was in the posture of approving a settlement agreement. CLI-93-47, 37 N.R.C. 423, 427 (June 4, 1993). The case has no bearing on the timeliness standard for late-filed contentions.

[23] Motion at 8.

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

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 DWM failed to meet its 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 DWM's motion to amend Contention 2.

Nor is DWM's claim for late-filing supported by the NRC Staff's Answer.[25] The NRC Staff has taken the 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."[26] However, in doing so, the NRC Staff's Answer is completely silent on the timeliness of DWM's amended contention.[27] 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.[28] 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.

II. DWM's Amended Contention Is Inadmissible.

Even if the Board were to find good cause for the late-filing of the amended contention (which it should not do), the Board should nevertheless find that the amended contention continues to fall far short of the Commission's contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). First, DWM makes no attempt to establish that the amended contention is

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

[26] *Id*.

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

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

within the scope of this proceeding and material to the findings that the NRC must make.[29] That failure alone should be ample grounds to reject the contention. In addition, the amended contention fails to raise a genuine dispute on a material issue of fact or law. 10 C.F.R. § 2.309(f)(1)(vi).

The DWM contention was 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 Holtec's financial assurance plan lawful. As long as Holtec includes the federal government as a potential guarantor or financer of the project, which in turn requires federal ownership of spent fuel, the application violates the NWPA.[30]

However, DWM does little to support the amended contention. In fact, DWM does *nothing* to address how the revised Environmental Report has any impact on Holtec's financial assurance plan. Holtec's financial assurance plan, addressed in detail in Holtec's Answer to DWM at 28-35, has not changed, nor has Holtec's ability to recover damages from DOE for breach of the standard contract through litigation and the DOE settlement agreements. Aside from ignoring the existing reality of spent fuel damages recovery, DWM does nothing to support the allegation that the DOE will be a "potential guarantor or financer of the project."[31]

Instead, DWM supports the amended contention with a series of hypotheticals. According to DWM, "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."[32]

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[29] *See generally* Motion.

[30] Motion at 8.

[31] Motion at 8.

[32] Motion at 9 (emphasis in original).

DWM's extended chain of hypotheticals is incorrect. Regardless of how it is worded, the CISF application will not violate federal law. For any of these hypotheticals to take place, DWM must assume 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 it also 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.[33] Moreover, the Courts cannot blithely assume that the Government will violate the law,[34] nor is it appropriate for DWM to ask that the Board sit in judgment of DOE's actions.[35] Nor can DWM assume that Holtec will knowingly violate the law.[36] Yet, without the unsupported assumption that both the DOE and Holtec will independently violate federal law, there is no violation of the NWPA.[37]

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[33] *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.'").

[34] *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).

[35] *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."). Ironically, both DWM and Sierra Club cite this case in support of their own arguments, even though the case supports dismissing their contentions.

[36] *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).

[37] DWM 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

Nonetheless, DWM argues that the Application must be rejected in total, because it contains the "illegal" DOE option giving Holtec "the unchecked opportunity" to violate the NWPA.[38] 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.[39] Moreover, even with the DOE option in the Application, DWM has not demonstrated that there is an "illegal" provision. The DOE "option" is already legal. As acknowledged during the hearing, the DOE currently owns spent fuel from commercial reactors that could potentially be stored at the CISF.[40] 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.

DWM's 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.[41] The absence of signed

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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.

[38] Motion at 9.

[39] 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.

[40] *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.

[41] "[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)).

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.[42] In the current situation, if the NWPA is not amended to permit DOE to 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 DWM 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, DWM's amended contention is outside the scope of this proceeding and immaterial, is inappropriately based on unsupported and speculative assumption of illegal action by DOE and Holtec, and fails 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 Contention 2, the Board should find that the contention falls 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"[43] 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.

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[42] *Id.*

[43] 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 contention.

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

Andrew Ryan
General Counsel
Holtec International
Krishna P. Singh Technology Campus
1 Holtec Boulevard
Camden, NJ 08104
Telephone: (856) 797-0900 x 3975
e-mail: a.ryan@holtec.com

Jay E. Silberg
Timothy J. V. Walsh
Anne R. Leidich
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Telephone: 202-663-8063
Facsimile: 202-663-8007
jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com
anne.leidich@pillsburylaw.com

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Counsel for HOLTEC INTERNATIONAL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Holtec Opposition to Don't Waste Michigan et al.'s Motion to Amend Contention 2 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