

February 28, 2019

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

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

**REPLY BY PETITIONERS BEYOND NUCLEAR AND FASKEN TO  
HOLTEC’S AND NRC STAFF’S RESPONSES TO PETITIONERS’  
MOTION TO AMEND THEIR CONTENTIONS**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.309(i)(2), Beyond Nuclear and Fasken Land and Minerals and Permian Basin Land and Royalty Owners (“Fasken”) (collectively, “Petitioners”) hereby reply to responses by Holtec International (“Holtec”) and the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) Staff to the Motion by Petitioners to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address Holtec International’s Revised License Application (Feb. 6, 2019) (“Petitioners’ Motion”). Holtec argues that the contentions are both untimely and inadmissible. 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 (Feb. 19, 2019) (“Holtec Opp.”). The Staff would admit the contentions, but does not address the issue of timeliness. NRC Staff Answer to Motions to Amend Contentions Regarding Federal Ownership of Spent Fuel (Feb. 19, 2019) (“NRC Staff Response”). As discussed below, Holtec’s argument that Petitioners have not demonstrated good cause for the timing of their amended contentions lacks merit, as does its rationale for claiming the contentions are inadmissible. And the Staff commits legal error in arguing the contentions

are, in fact, admissible. Petitioners respectfully submit that the contentions are inadmissible, but only because questions of compliance with the Nuclear Waste Policy Act (“NWPA”) raised by the contentions are outside the scope of this proceeding and immaterial to the findings that the NRC and the Atomic Safety and Licensing Board (“ASLB”) must make. 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv).

## **II. DISCUSSION**

### **A. The Amended Contentions Are Timely.**

Holtec argues that Petitioners lack “good cause” for the timing of their contentions under 10 C.F.R. § 2.309(c)(1) because the information on which the amended contentions are based “was both previously available and is not materially different” from the information in Holtec’s original license application for the Centralized Interim Storage Facility (“CISF”). Holtec Opp. at 2. Holtec effectively argues that by removing the Environmental Report’s previous unequivocal assumptions of U.S. Department of Energy (“DOE”) ownership of spent fuel and replacing them with statements that either DOE or private licensees would own the spent fuel, Holtec is merely conforming the Environmental Report to other parts of the original application. Holtec asserts that Petitioners should have understood that what it really meant was to pose private and federal ownership in the alternative throughout the entire application, and that the appropriate time to have amended Petitioners’ contentions was within 30 days after Holtec’s counsel cleared that up in responding to Petitioners’ original hearing requests. Holtec Opp. at 4-5.

Holtec’s argument is fundamentally at odds with the NRC’s requirement for “particularity” of hearing requests. 10 C.F.R. § 2.309(f)(1). As Holtec itself recognizes, Petitioners had an “iron-clad obligation” to review Holtec’s license application and base their contentions on its particular language. Holtec Opp. at 4 (quoting *Northern States Power Co.*

(Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 N.R.C. 481, 496 (2010)).

Holtec's assertion that Petitioners should have disregarded the language in the application that unequivocally provides for federal ownership (Holtec Opp. at 2) is inconsistent with the NRC's requirements. By the same token, suggestions by Holtec's counsel that the plain language in the application should be read in conjunction with less clear statements elsewhere in the application (Holtec Opp. at 4-5) cannot fairly be construed to constitute notice of a change to the application itself. Petitioners complied fully with NRC pleading requirements by basing their initial hearing requests on clear and unequivocal statements in Holtec's application and by amending their contentions in response to subsequent changes to that language in the application.

**B. Holtec's and the Staff's Admissibility Arguments Lack Merit.**

Holtec and Petitioners are in agreement that Petitioners' amended contentions are outside the scope of this proceeding. Holtec Opp. at 7. But Holtec goes beyond that issue to dispute Petitioners' assertion that to approve Holtec's license application would force on Petitioners "the unfair choice between challenging a hypothetical application or living with an approved license that would violate federal law if it were carried out." *Id.* (quoting Petitioners Motion at 9). Holtec argues that the contentions are "unsupported" because they rely 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." Holtec Opp. at 8 (emphasis in original). Holtec misconstrues the contentions. Petitioners' contentions are *not* based on the assumption that the DOE *will violate* the NWPA, but rather that the Administrative Procedure Act ("APA") bars the NRC from knowingly issuing – or even considering – a license *whose terms would violate* federal law.

Of course, as Holtec asserts, licensees may be presumed to comply with applicable law. Holtec Opp. at 9 and n. 34 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage

Installation), CLI-01-9, 53 N.R.C. 232, 235 (2001); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-35, 52 N.R.C. 364, 405 (2000)). But this assumption cannot be stretched to allow issuance of a license by the NRC that would expressly contemplate illegal activity as a possible alternative. 5 U.S.C. § 706(2)(A) (agency actions are unlawful and will be set aside if they “are not in accordance with the law”); *see also 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) (explaining that the APA limits agencies to “exercise *only* the authority that Congress has given them”) (emphasis added). And while Holtec cites to a variety of cases that assume federal agencies will properly discharge their duties (Holtec Opp. at 8, n. 31-33), none speaks to the very issue before this Board – may the NRC knowingly approve, or even consider, a license that would allow illegal activity? Neither Holtec nor the NRC Staff have identified a court decision that allows an agency to issue a license containing a provision so clearly contrary to law.

In attempting to defend the legitimacy of its license application, Holtec characterizes “NWPA authority” as a “factual situation” that “does not presently exist.” *Id.* at 10. Thus, according to Holtec, this proceeding is comparable to cases where the Commission allowed license applicants to satisfy financial assurance requirements by relying on future contracts with as-yet-unidentified private customers. *Id.* (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-08, 61 N.R.C. 129, 138-39 (2005) and *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 N.R.C. 294, 304 (1997)). *Private Fuel Storage* and *Louisiana Energy Services* are legally distinct from this case, however. There, the customers were hypothetical because they had not yet entered a contract with the license applicant, not because they were legally prohibited from contracting with the applicant. Federal ownership of fuel is not a question of fact; it is a legally prohibited activity. As stated

above and repeatedly throughout Petitioner’s briefing before this Board and the NRC, on this issue the APA is clear – the NRC may not issue a license that would allow activity known to be illegal under current law. 5 U.S.C. § 706(2)(A).<sup>1</sup>

Finally, Holtec makes a new argument that the contentions are inadmissible because “DOE already owns spent fuel from commercial reactors that could potentially be stored at the CISF.” Holtec Opp. at 8. As acknowledged by Holtec in a footnote, however, the spent fuel currently owned by DOE is not a subject of Holtec’s license application. *Id.* at n.39. More significantly, Rev. 3 to Holtec’s Environmental Report presents private licensees and DOE as alternative owners of the entire inventory of spent fuel. *See* Petitioners Motion at 6 (citing Rev. 3 at 1-1, 3-104). DOE is not represented as the potential owner of only an insignificant portion of the spent fuel to be stored at the facility, as would be the case if Holtec planned for DOE to own only the spent fuel the law currently allows. Moreover, the Reprising 2018 Report, cited in Petitioners’ Motion at 5-6, confirms that “deployment” of the entire CISF “will ultimately depend on the DOE and the U.S. Congress.” Additional action by the DOE and Congress would not be needed if Holtec planned to store only the limited quantity of spent fuel that already is lawfully owned by the DOE. Holtec’s 11<sup>th</sup> hour attempt to change course is not persuasive.<sup>2</sup>

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<sup>1</sup> For example, under the APA, the NRC could not lawfully issue a license that would allow Holtec to raise sufficient funds for construction of the CISF *either* by obtaining funds from reactor licensees *or* by robbing banks, with the understanding that Holtec would forego robbing banks as long as that activity remained illegal. The prohibition against bank-robbing is not a factual circumstance.

<sup>2</sup> It also bears noting that throughout the entire pre-hearing conference on Petitioners’ original contention, Holtec had the opportunity to explain to this Board and Petitioners that the option of DOE ownership of spent fuel (described by the Board as “Option 1”) was really just an option to store at the CISF an insignificant amount of spent nuclear fuel currently owned by DOE (and not the entire 100,000 MT of spent fuel contemplated by the license application). Not only did Holtec decline to do so; it stated the exact opposite:

The NRC Staff asserts that Petitioners' 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 facility." NRC Staff Response at 2. As set forth in Petitioners' Motion, however, the scope of the proceeding does not include compliance with the NWSA. Petitioners' Motion at 11. Instead, the Board must find compliance with regulations for implementation of the Atomic Energy Act ("AEA") and the National Environmental Policy Act ("NEPA"), *i.e.*, 10 C.F.R. § 72.40 and 10 C.F.R. § 51.101. *Id.* While the NRC Staff is correct that the hearing notice does not explicitly limit the scope of the hearing to questions of AEA and NEPA compliance (NRC Staff Response at 2), the hearing notice does establish that the "action" to be addressed in the licensing proceeding relates to Holtec's request for authorization to build and operate the facility, not who will be the owner of the spent fuel stored there. 83 Fed. Reg. 32,923 (July 16, 2018).<sup>3</sup> This "action" is the subject of the hearing and thereby defines the

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So, there are cases where DOE has title. But what we're talking about – and those are very, very small quantities compared to the amounts we're talking about, and *that's not the focus of this project.*

Transcript of Jan. 24, 2019 Pre-Hearing Conference (Silberg) at 250 (emphasis added). *See also* tr. at 247-48 (Silberg) (emphasis added):

[T]he reason DOE is in [Rev. 3 of the Environmental Report] is, *DOE may have the ability to take title.* They don't know, we agree with that, for commercial fuel that they don't already have -- unless it's through an R&D program, because DOE has a few assemblies from commercial reactors that it took for R&D that are probably at Idaho National Labs.

*But if Congress passes legislation that allows DOE to take title, Congress passes legislation which authorizes direct funding for this project, then sure, DOE could have a role.* That isn't the situation now. We aren't depending on it, we don't assume it.

<sup>3</sup> The hearing notice describes the "action" proposed by Holtec as follows:

NRC received an application from Holtec for a specific license pursuant to part 72 of title 10 of the *Code of Federal Regulations* (10 CFR), "Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-

scope. *Id.* (“Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) *with respect to the action.*”) (emphasis added).

As a practical matter, therefore, the scope of issues to be addressed in the licensing proceeding is limited to whether Holtec’s application satisfies the AEA and NEPA and their implementing regulations, and does not include the question of whether the NWPA imposes limits on what entity or entities can own the spent fuel to be stored there.

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Related Greater Than Class C Waste.” On March 19, 2018, notice of the NRC’s acceptance and docketing of the application and the public availability of the application was provided in the Federal Register (83 FR 12034).

Holtec is proposing to construct and operate the HI–STORE Consolidated Interim Storage (CIS) Facility on a large parcel of presently unused land owned by the Eddy-Lea Energy Alliance (ELEA), LLC. The ELEA was formed in 2006 in accordance with enabling legislation passed in New Mexico and consists of an alliance of the city of Carlsbad, Eddy County, the city of Hobbs, and Lea County. The proposed site for the CIS facility is located in southeastern New Mexico in Lea County, 32 miles east of Carlsbad, New Mexico, and 34 miles west of Hobbs, New Mexico.

Holtec is proposing to construct and operate Phase 1 of the CIS facility within an approximately 1,040 acre parcel. Holtec is currently requesting authorization to possess and store 500 canisters of spent nuclear fuel (SNF) containing up to 8,680 metric tons of uranium (MTUs), which includes spent uranium-based fuel from commercial nuclear reactors, as well as a small quantity of spent mixed-oxide fuel. If the NRC issues the requested license, Holtec expects to subsequently request additional amendments to the initial license to expand the storage capacity of the facility. In its plans, Holtec proposes expanding the facility in 19 subsequent expansion phases, each for an additional 500 canisters, to be completed over the course of 20 years. Ultimately, Holtec anticipates that approximately 10,000 canisters of SNF would be stored at the CIS facility upon completion of 20 phases. Each phase would require NRC review and approval.

According to its application, Holtec intends to only use the HI–STORM UMAX Canister Storage System for storage of spent nuclear fuel canisters at the facility. The HI–STORM UMAX Canister Storage System stores the canister containing SNF entirely belowground, providing a clear, unobstructed view of the entire CIS facility from any location.

### III. CONCLUSION

For the foregoing reasons, the ASLB should grant Petitioners' motion to amend its contentions.<sup>4</sup>

Respectfully submitted,

\_\_\_\_/signed electronically by/\_\_\_\_

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<sup>4</sup> As stated in Beyond Nuclear's hearing request and motion to amend, Petitioners' contentions do not meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii) and (iv) for scope and materiality, and therefore they are not admissible. Nevertheless, Petitioners seek a ruling that they have satisfied the other requirements of 10 C.F.R. § 2.309(f)(1) and that they have good cause for the timing of their motion under 10 C.F.R. § 2.309(c).



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**CERTIFICATE OF SERVICE**

I hereby certify that on February 28, 2019, REPLY BY PETITIONERS BEYOND NUCLEAR AND FASKEN TO HOLTEC'S AND NRC STAFF'S RESPONSES TO PETITIONERS' MOTION TO AMEND THEIR CONTENTIONS was posted on the NRC's Electronic Information Exchange System.

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