September 13, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

Holtec International's Answer Opposing Fasken's
Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019

I. Introduction

More than a month after it first attempted to submit a late-filed contention, Fasken Oil and Ranch and Permian Basin Land and Royalty Owners (collectively, "Fasken") now submits a "Motion for Leave to Reopen"[1] in an effort to cure the deficiencies with its first effort. As with its first attempt, Fasken's second effort also fails.[2]

Pursuant to 10 C.F.R. § 2.323(c), Holtec International ("Holtec") submits this answer opposing Fasken's September 3, 2019 Motion to Reopen. Last month, Fasken filed a motion for

[1] Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 3, 2019) (the "Motion to Reopen"). Included in the Motion to Reopen are (1) a 22-page pleading, the first 11-pages of which consist of Fasken's arguments under the reopening standards, and the remainder incorporating its late-filed Contention 2; (2) a new 3-page Affidavit of Stonnie Pollock, dated August 29, 2019 ("Pollock Affidavit"); and (3) five Exhibits that were previously filed with late-filed Contention 2 on August 1, 2019.

[2] On September 12, 2019, the day before this Answer was due, Fasken withdrew (or moved for leave to withdraw) its September 3, 2019 Motion to Reopen, but did not withdraw its August 1, 2019 motion to admit late-filed Contention 2. *See* "Fasken and PBLRO's Withdrawal of their 'Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019.'" The Commission has yet to accept and/or rule on Fasken's withdrawal of its Motion to Reopen (or motion for leave to withdraw). Thus, to protect its right to respond to the Motion to Reopen should it be considered by the Commission, Holtec files this Answer in opposition to the Motion to Reopen.

leave to late-file new Contention 2,[3] which both Holtec[4] and the NRC Staff[5] opposed. They opposed Contention 2 because Fasken ignored the requirements for reopening a closed record in 10 C.F.R. § 2.326,[6] and failed to meet the late-filed contention requirements under 10 C.F.R. § 2.309(c).[7] Implicitly acknowledging its failure to address the reopening standards, Fasken has now re-filed late Contention 2 with new arguments attempting to show that it has met the requirements for reopening a closed record.[8] And implicitly conceding that it had filed Contention 2 impermissibly late, Fasken now asserts that Contention 2 is an "exceptionally grave issue" under 10 C.F.R. § 2.326(a)(1).[9]

The Commission must reject Fasken's Motion to Reopen. Fasken has raised no "exceptionally grave" issue that would permit consideration of its untimely Contention 2. Far from it. Nor has Fasken met the other reopening standards. For these reasons, and the reasons previously set forth in Holtec's Opposition,[10] this now-terminated proceeding should not be reopened and Fasken's late-filed Contention 2 should not be admitted.[11]

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[3] Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention (Aug. 1, 2019) (NRC ADAMS Accession No. ML19213A171) (hereinafter, "Motion to File New Contention 2")

[4] Holtec International's Answer Opposing Fasken's Late-Filed Motion for Leave to File a New Contention (Aug. 26, 2019) (NRC ADAMS Accession No. ML19238A343) ("Holtec Opposition to Contention 2").

[5] NRC Staff Answer In Opposition to Fasken Oil and Ranch, Ltd., and Permian Basin Land and Royalty Owners' Motion to File a New Contention (Aug. 26, 2019) (NRC ADAMS Accession No. ML 19238A183) ("NRC Staff Opposition to Contention 2").

[6] Holtec Opposition to Contention 2 at 12-26; NRC Staff Opposition to Contention 2 at 9-10.

[7] Holtec Opposition to Contention 2 at 26-27; NRC Staff Opposition to Contention 2 at 6-9.

[8] Motion to Reopen at 1-12.

[9] Motion to Reopen at 4-8.

[10] Holtec incorporates by reference its previous Opposition to Contention 2, in particular Contention 2's failure to meet the requirements in 10 C.F.R. § 2.309(c) for untimely contentions and in 10 C.F.R. § 2.309(f)(1) for admissible contentions. Holtec Opposition to Contention 2 at 26-29.

[11] As argued in the Holtec Opposition to Contention 2, the Commission should also reject Fasken's late Contention 2 because Fasken does not have standing, as shown in Holtec International's Brief in Opposition to Fasken and Permian Basin Land and Royalty Owners' Appeal of LBP-19-4 at 2, 14-19 (June 28, 2019) (NRC ADAMS Accession No. ML19179A328).

II. Legal Standards Applicable to Reopening a Closed Record

The Commission considers "reopening the record for any reason to be 'an 'extraordinary' action,'"[12] and places "an intentionally heavy burden on parties seeking to reopen the record."[13] Thus, a "motion to reopen a closed record to consider additional evidence **will not be granted** unless the following criteria are satisfied:

1. The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
2. The motion must address a significant safety or environmental issue; and
3. The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially."[14]

"The level of support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements of 10 C.F.R. § 2.309(f)(1)."[15] The motion must be accompanied by affidavits that "set forth the factual and/or technical bases for the movant's claim that the [reopening criteria] have been satisfied."[16] The "[a]ffidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised."[17] In the affidavits, "[e]ach of the criteria must be separately addressed, with a specific explanation of why it has been met."[18] "Evidence contained in the affidavits must meet the [evidence] admissibility standards [in 10 C.F.R. §

[12] *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 N.R.C. 151, 156 (2015).
[13] *Id.* at 155.
[14] 10 C.F.R. § 2.326(a)(1)-(3) (emphasis added).
[15] *DTE Electric Company* (Fermi Nuclear Power Plant, Unit 2), CLI-17-07, 85 N.R.C. 111, 116 (2017).
[16] 10 C.F.R. § 2.326(b).
[17] *Id.*
[18] *Id.*

2.337].[19] "That is, it must be 'relevant, material, and reliable.'"[20] "Bare assertions and speculation," even by an expert, "do not supply the requisite support" for a motion to reopen.[21]

In addition, "a motion to reopen that pertains to a new contention must also meet the timeliness requirements in 10 C.F.R. § 2.309(c) and show that the new contention is admissible."[22] "All of these requirements must be met for a motion to reopen to be granted."[23]

Where, as here, a petitioner seeks to reopen a closed record to address an untimely raised issue, Commission regulations impose an additional and heightened test that the issue raised is "exceptionally grave."[24] When promulgating this requirement, the Commission explained that such "exception will be **granted rarely and only in truly extraordinary circumstances**."[25] The Commission further explained that, "[r]eopening will only be allowed where the proponent presents material, probative evidence which either **could not have been discovered before or could have been discovered but is so grave** that, in the judgment of the presiding officer, it must be considered anyway."[26]

The Commission has further explained the "exceptionally grave" circumstances that might permit reopening the record to consider of an untimely raised issue. For safety-related issues, an exceptionally grave issue is one that presents "immediate safety concerns" and

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[19] *Id.*

[20] *Fermi*, 85 N.R.C. at 116.

[21] *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 674 (2008).

[22] *Fermi*, 85 N.R.C. at 116 (citing 10 C.F.R. § 2.326(d)).

[23] *Fermi*, 85 N.R.C. at 116.

[24] 10 C.F.R. § 2.326(a)(1).

[25] Criteria for Reopening Records in Formal Licensing Proceedings, Final Rule, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986) (emphasis added).

[26] *Id.* at 19,538 (emphasis added).

"exigent circumstances sufficient to warrant the extraordinary step of reopening the record and restarting the hearing process,"[27] such as "'a sufficiently grave threat to public safety.'"[28] For environmental-related issues, the Commission has stated that "potential harm to an endangered species might rise to the level of an 'exceptionally grave issue,'" provided that petitioner shows "that such harm is likely to occur."[29]

Finally, "the burden of satisfying the reopening requirements is on the movant, and Boards must base their decision on what is before them."[30]

As detailed below, Fasken has not raised a significant issue, let alone an exceptionally grave one. Consequently, the Commission must reject the Motion to Reopen.

III. The Commission Must Reject Fasken's Motion to Reopen

A. Contention 2 is Not Timely

As demonstrated in Holtec's opposition to late-filed Contention 2, the issues that Fasken seeks to litigate in Contention 2 are not timely raised.[31] In brief, while Fasken claims that the June 19, 2019 State of New Mexico Land Commissioner's Letter provided the basis for the Contention, the information underpinning the Contention has long since been publicly available. For example, on July 30, 2018, Mr. Tommy Taylor, Fasken's Vice President (and an affiant for Fasken in this proceeding), wrote to the NRC claiming that

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[27] *Hydro Resources Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 N.R.C. 1, 6 (2001) (rejecting petitioners request reopen the record).

[28] 51 Fed. Reg. at 19,536 (quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-126, 6 A.E.C. 358, 365 n.10 (1973))

[29] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 501 (2012).

[30] *Cleveland Electric Illuminating Company* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 N.R.C. 233, 235 (1986).

[31] Holtec Opposition to Contention 2 at 13-21.

> The proposed site sits on top of and adjacent to oil and gas minerals to be developed by means of fracture stimulation techniques. Currently, drilling techniques used to extract minerals in the Permian Basin involve drilling horizontally into deep underground formations up to two miles beneath the earth's surface. High pressure fluids are pumped into the wells, in some cases exceeding twelve thousand pounds per square inch. This pressure is power enough to fracture the surrounding rock thus releasing the oil and gas. The pressure create's [sic] fissures and cracks beneath the surface. And, at this time, there are oil and gas operators testing a new technique of simultaneously drilling and fracturing up to 49 horizontal wellbores in a single section of land. Either the traditional or new and unproven drilling technique, involving more than 20,000,000 bbls of water and sand, *could conceivably be utilized to inject into and withdraw from the rock formation beneath and surrounding the Holtec site. Hydraulic fracturing beneath and around Holtec* should give the NRC pause and is sufficient reason not to proceed.[32]

Thus, as Holtec previously argued, because Fasken was admittedly aware at least as early as July 2018 that oil and gas drilling and extraction could occur beneath the Holtec site, it could have timely raised a contention on those grounds when it filed its initial pleadings in this case.[33] Further, Holtec's Application considered the possibility of oil and gas drilling beneath the CISF site: the Application specifically acknowledges that *there may be* "*future oil drilling or fracking beneath the Site.*"[34] Indeed, another petitioner timely submitted a contention relating to mineral rights below the Holtec site.[35]

Fasken has essentially conceded that the issues it seeks to raise in late Contention 2 are untimely. Rather than attempting to show that its claims are timely, Fasken has resorted to arguing that "a matter may be of such gravity that a motion to reopen should be granted

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[32] Holtec Opposition to Contention 2 at 15 (quoting Letter from Tommy E. Taylor (Fasken) to M. Layton (NRC-NMSS), USNRC Docket No. 72-1051 and 72-1052, Proposed Holtec High Level Nuclear Waste Storage Facility, Lea and Eddy County, NM at 2 (July 30, 2018) (NRC ADAMS Accession No. ML18219A710) (emphasis added)).

[33] *Id.* at 16.

[34] *Id.* at 16 (quoting Environmental Report, Rev. 6 at 3-2 (ML19163A146)).

[35] *Id.* at 19 (citing the contention filed by Petitioner Don't Waste Michigan).

notwithstanding that it might have been presented in a more timely fashion" under the "exceptionally grave issue exception" in 10 C.F.R. § 2.326(a)(1),[36] and that the "timeliness criteria required of 10 C.F.R. § 2.326(a)(1) can be waived when petitioner presents an exceptionally grave issue."[37] In other words, having essentially conceded that Contention 2 is untimely, Fasken's last resort is to claim that Contention 2 has raised an "exceptionally grave" issue warranting the extraordinary action of reopening the closed record. As discussed below, Fasken has fallen far short this showing.

B. Fasken Has Not Raised a Significant Issue, Let Alone an Exceptionally Grave One

In response to Fasken's motion for leave to file late Contention 2, Holtec demonstrated that Fasken had failed to raise any significant issue warranting reopening of the record.[38] Fasken claimed that oil and gas activities may occur on or near the site, that such activities may impact safe operation of the plant, and that Holtec either could not prevent such activities or had not evaluated the potential impact of such activities.[39] In its initial opposition to the admission of Contention 2, Holtec demonstrated that the Environmental Report and the Safety Analysis Report both address future oil drilling or fracking at the site,[40] and that Fasken had failed to acknowledge that the license application addressed, *inter alia*, the abandoned wells at the site; potash mining and subsidence; casing corrosion and well collapse; wells surrounding the site; and engineering solutions to be employed at the CISF for subsidence and earthquakes (whether

[36] Motion to Reopen at 4-5.
[37] Motion to Reopen at 11.
[38] Holtec Opposition to Contention 2 at 21-24.
[39] Motion to File New Contention 2 at 7, 9.
[40] Holtec Opposition to Contention 2 at 22.

natural or man-made).[41] For these reasons, Fasken had failed to show any deficiency in the license application and thus failed to raise any significant safety or environmental issue.[42]

In the Motion to Reopen, Fasken now claims that Contention 2 raises an "exceptionally grave issue because [Holtec] does not own the mineral rights located below its proposed site," which Mr. Pollack asserts "poses a serious threat to public safety" because Holtec allegedly "cannot put a moratorium on oil and gas extraction activities below the site."[43] But Fasken's and Mr. Pollack's assertions are nothing more than baseless speculation that fail to demonstrate the existence of a significant issue, let alone an exceptionally grave one.

Nowhere do Fasken or Mr. Pollack provide "the technical details and analysis required to support reopening the proceeding."[44] The most that Fasken and Mr. Pollack claim is that (1) "oil and gas extraction activity on its own **can in some cases** be dangerous and pose a serious threat to public safety"[45]; (2) "once the presence of a nuclear storage facility is added to this equation, safety risks **are even more likely to pose** a serious threat to public safety"[46]; (3) "there are **concerns** about the **unknown interaction** between nuclear waste storage and preexisting oil and gas development on the very same tract of land"[47]; and (4) the safety risks associated with the presence of nuclear storage facilities atop preexisting oil and gas extraction activity **is [sic] mostly unknown**"[48]; and "[e]ven if an oil and gas company has complete control over its

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[41] *Id.* at 23.
[42] *Id.* at 22-23.
[43] Motion to Reopen at 6, 8; Pollack Affidavit at ¶¶7-8.
[44] *Oyster Creek*, CLI-08-28, 68 N.R.C. at 674.
[45] Motion to Reopen at 6 (emphasis added).
[46] Motion to Reopen at 7(emphasis added). *See also* Pollack Affidavit at ¶7.
[47] Pollack Affidavit at ¶8 (emphasis added).
[48] Motion to Reopen at 7-8 (emphasis added).

operation, there are situations that **can** elevate those risks and **potentially cause** a serious threat to the safety of others and the environment."[49] Fasken and Mr. Pollack thus admit that they do not know what the safety impact may be from oil and gas drilling beneath the site, **if there is any impact at all**. Their assertions belie any claim of exceptionally grave circumstances warranting reopening the record—if the safety risks are unknown, they can hardly be grave (or even significant). Fasken and Mr. Pollack have not asserted, let alone provided any material, probative evidence demonstrating the existence of any "immediate safety concerns," "exigent circumstances," or an imminent threat to public health and safety or irreparable environmental consequences or other exigent circumstances or that might be considered exceptionally grave. Nor could they, as it will at least be several years before spent nuclear fuel will be stored at the proposed site—which has not yet received its license and has not yet been constructed.[50]

Fasken and Mr. Pollack also point to a 2011 publication from the International Atomic Energy Agency (IAEA), which, according to Fasken, shows that the IAEA "believes" and "recommends" that "storage sites like the one Holtec has proposed" "should be situated on an adequately controlled single-use piece of land" that has no underlying mineral and energy resources.[51] Fasken's and Mr. Pollack's reliance on the IAEA study is wholly inapt. The IAEA publication has nothing to do with spent fuel storage. As the title and content of the IAEA

[49] Pollack Affidavit at ¶7 (emphasis added).

[50] NRC letter to K. Manzione (Holtec), Holtec International's Application for Specific Independent Spent Fuel Storage Installation License for the HI-STORE Consolidated Interim Storage Facility for Spent Nuclear Fuel – Revised Review Schedule (July 1, 2019) (NRC Accession No. ML19182A147) (stating that the NRC Staff intends to complete the final safety evaluation report and the final environmental impact statement by March 2021).

[51] Motion to Reopen at 7; Pollack Affidavit at ¶7.

publication make clear, it pertains to the "**Disposal** of Radioactive Waste," [52] and not a spent nuclear fuel **storage** facility like that which Holtec has proposed. Indeed, the IAEA publication explicitly states that that it "is concerned with the stage of **disposal** of solid or solidified materials, which is **the last step** in the process of radioactive waste management."[53] It further explains that "term 'disposal' refers to the emplacement of radioactive waste into a facility or a location with no intention of retrieving the waste" whereas "the term 'storage' refers to the retention of radioactive waste in a facility or a location with the intention of retrieving the waste . . . . The important difference is that **storage is a temporary measure** following which some future action is planned. This may include further conditioning or packaging of the waste and, ultimately, its disposal."[54] Thus, the IAEA recommendations on which Fasken and Mr. Pollack rely are simply irrelevant and immaterial to the proposed Holtec consolidated interim **storage** facility.

And even if these references to IAEA's recommendations for a "disposal facility" were applicable to the Holtec storage facility (which they obviously are not), Fasken and Mr. Pollack nowhere explain how an 8-year old "recommendation" from the IAEA meets the exceptionally grave threshold required to reopen the record. Even if this IAEA recommendation were relevant to the Holtec facility (which it is not), the potential for spent nuclear fuel storage on sites atop of exploitable mineral and energy resources would surely prompt more than a mere **recommendation** from the IAEA if such storage truly posed exceptionally grave circumstances.

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[52] IAEA Safety Standards for Protecting People and the Environment, Disposal of Radioactive Waste, *available at* https://www-pub.iaea.org/MTCD/publications/PDF/Pub1449_web.pdf.

[53] *Id.* at p.2.

[54] *Id.* at p.3.

A case involving the Perry Nuclear Power Plant over three decades ago illustrates the extraordinarily high burden of demonstrating even a significant issue (let alone an exceptionally grave one) warranting reopening the record. On January 31, 1986, several months prior to issuance of the Perry Plant's full power operating license, a 5.0 magnitude earthquake struck northeastern Ohio with its epicenter approximately 10 miles south of the Perry facility.[55] Three days later, an intervenor in the operating license proceeding timely filed a motion to reopen the record of the proceeding to admit a new contention challenging the adequacy of the facility's seismic design based on the fact that the earthquake had exceeded of the facility's seismic design parameters.[56] The applicant and the NRC Staff opposed the motion to reopen on the ground that the earthquake and its effects did not present a significant safety question for the facility.[57] The Atomic Safety and Licensing Appeal Board was not able to determine, based on the papers before it, whether the issues raised by the motion to reopen had true safety significance and decided to hold an exploratory hearing to assist its determination.[58] The Commission intervened under its inherent supervisory authority, vacated the Board determination to hold an exploratory hearing, and denied the motion to reopen.[59] The Commission ruled that, "[i]f the Board, after considering the parties' submissions, was not convinced that the motion raised a matter of safety significance, it should have denied the motion to reopen."[60] The Sixth Circuit affirmed the Commission's decision on appeal.[61]

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[55] *Perry*, CLI-86-7, 23 N.R.C. at 235.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 236.
[60] *Id.* at 235.
[61] *State of Ohio v. Nuclear Regulatory Commission*, 814 F.2d 258, 260 (6th Cir. 1987).

Fasken and Mr. Pollack have presented far less significant claims than those in *Perry*. Just as the Commission denied the motion to reopen in *Perry*, it must do the same here.

C. Fasken Has Not Demonstrated that a Materially Different Result Would Be Likely

Even if Fasken had demonstrated exceptionally grave circumstances that would permit consideration of its untimely Contention 2 (it has not), Fasken is still required to meet the remaining provisions of Section 2.326, including Section 2.326(a)(3)'s requirement that it demonstrate a "materially different result would be or would have been likely had the newly proffered evidence been considered initially."[62] Fasken's **sole** basis for claiming that it has satisfied Section 2.326(a)(3) is the NRC Staff's position that late-filed Contention 2 was admissible in part.[63] Fasken's argument here falls far wide of the mark.

A petitioner does **not** comply with Section 2.326(a)(3) merely by showing that another party to the proceeding found a part of the proffered contention to be admissible. The reopening standards require much more. Commission case law is clear that its reopening standards are "more stringent" than its general contention admissibility standards.[64] Fasken's argument would turn the Commission case law on its head. For example, a movant does not meet the Section 2.326(a)(3) requirement to demonstrate a likely, materially different outcome in the proceeding

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[62] 10 C.F.R. § 2.326(a)(3); 51 Fed. Reg. at 19,536 (fulfilling the exceptionally grave requirement "does not exempt the movant from any other requirement" of Section 2.326).

[63] Motion to Reopen at 8-9.

[64] *Pilgrim*, CLI-12-21, 76 N.R.C. at 501; *Oyster Creek*, CLI-08-28, 68 N.R.C. 658, 669 ("A party seeking to reopen a closed record to raise a new matter faces an elevated burden to lay a proper foundation for its claim. Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention") (quotation omitted).

simply by asserting the existence of a genuine dispute over material facts.[65] Nor are the reopening requirements met even where the reviewing authority "'is uncertain whether or not the new evidence is important.'"[66]

Section 2.326(a)(3) requires that Fasken demonstrate that "consideration of [its] evidence will materially affect **the outcome of this proceeding**,"[67] not merely that a portion of one contention **might** be admitted into the proceeding. This means that Fasken must "show a likelihood that consideration of [its] contention would result in the denial or conditioning of" Holtec's license application for the consolidated interim storage facility.[68] While this does not mean that a reviewing authority would reach an ultimate decision on the merits of a contention, "[t]he evidence must be sufficiently compelling to suggest a likelihood of materially affecting the ultimate results in the proceeding."[69]

Fasken's Motion to Reopen does not assert, let alone demonstrate, that consideration of its evidence would result in the denial or conditioning of a license for the CISF, or result in any other materially different outcome in the proceeding.[70] Nor does Mr. Pollack in his Affidavit, which only asserts that the "Commission would likely admit this issue and contention because the NRC Staff agreed that [Fasken] satisfied, in part, the contention requirements of 10 C.F.R. 2.309(f) in [its] Motion for Leave to File a New Contention filed on August 1, 2019."[71] All

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[65] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 N.R.C. 479, 498-499 (2012) (rejecting petitioner's argument that it only needed to show that there are genuine facts in dispute in order to show a materially different result would have been likely).

[66] *Pilgrim*, CLI-12-10, 75 N.R.C. at 479, 498 (citing 51 Fed. Reg. at 19,537).

[67] *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 N.R.C. 5, 23, *aff'd* CLI-08-28, 68 N.R.C. 658 (2008) (emphasis added).

[68] *Oyster Creek*, CLI-08-28, 68 N.R.C. at 673.

[69] *Pilgrim*, CLI-12-10, 75 N.R.C. at 499.

[70] *See* Motion to Reopen at 8-9.

[71] Pollack Affidavit at ¶9.

Fasken and Mr. Pollack suggest is that Contention 2, had it been proffered at the outset of this proceeding, **might** have been found admissible in part, because the NRC Staff argued that a portion of it was admissible. But this says nothing about the likelihood of success on the merits, or any other materially different outcome of the proceeding. In any event, just because the NRC Staff found a portion of a contention admissible does not mean that the Licensing Board or Commission would, as was the case in this proceeding. The Board rejected all six intervention petitions, finding that no petitioner had proffered admissible contentions, notwithstanding the fact that the NRC Staff believed that two petitioners had proffered three admissible contentions among them.[72]

For these reasons, Fasken has failed to satisfy the requirement set forth in Section 2.326(a)(3).

D. Fasken Has Not Complied with the Affidavit Requirements in 10 C.F.R. § 2.326(b).

The Commission's reopening standards require that Fasken support its Motion to Reopen with affidavits that set forth the factual and/or technical bases for its claim that the reopening criteria have been satisfied, and with evidence that is relevant, material, and reliable.[73] As discussed throughout this Opposition, Fasken has failed to do so. The information presented and claims made by Mr. Pollack in his Affidavit are vague, speculative, and unsupported. For example, Mr. Pollack's unspecified "concerns" about admittedly "unknown interactions between

[72] *See Holtec International* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, __ N.R.C. __, slip op. at 1-2 (2019) (ruling that none of the six intervention petitions should be granted, notwithstanding the NRC Staff's position that two should be granted because two petitioners had standing and had proffered admissible contentions).

[73] 10 C.F.R. § 2.326(b); 10 C.F.R. § 2.337(a).

nuclear waste storage and preexisting oil and gas development on the very same tract of land" is hardly reliable and material. The Commission requires "technical details and analysis" in order to support reopening the proceeding.[74] One can search Mr. Pollack's Affidavit in vain for any such details or analysis.

E. Fasken Has Failed to Timely Submit the Motion to Reopen Under 10 C.F.R. § 2.309(c).

Even if Fasken had fulfilled the exceptionally grave requirement (it has not), that "does not exempt [Fasken] from any other requirement"[75] in Section 2.326, including the requirement in Section 2.326(d) that a "motion to reopen that relates to a contention not previously in controversy among the parties must also satisfy the § 2.309(c) requirements for new or amended contentions filed after the deadline in § 2.309(b)."[76] This includes the requirement in 10 C.F.R. § 2.309(c)(1)(iii) that the "filing has been submitted in a timely fashion based on the availability of the subsequent information."[77] Here, Fasken claims that the June 19, 2019 New Mexico Land Commissioner's Letter prompted its present concerns.[78] As both Holtec and the NRC Staff previously argued, the Letter was reasonably available to the public in multiple news

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[74] *Oyster Creek*, CLI-08-28, 68 N.R.C. at 674.

[75] 51 Fed. Reg. at 19,536.

[76] 10 C.F.R. § 2.326(d).

[77] Fasken argues that because it claims to have raised an exceptionally grave issue, it has complied with the timeliness standards in Section 2.309(c). Motion to Reopen at 11. However, the Commission has stated that fulfilling the exceptionally grave requirement "does not exempt the movant from any other requirement of" Section 2.326, which would include compliance with Section 2.326(d), which in turn requires compliance with Section 2.309(c). *See* 51 Fed. Reg. at 19,536. While the Commission has since stated that the "exceptionally grave test supplants the section 2.326(a)(2) significant safety or environmental issue test," *see Southern Nuclear Operating Company* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 N.R.C. 214, 225 n.44 (2011) (quotation omitted), the Commission has never stated that any other requirement in Section 2.326 would be supplanted, including the requirement in Section 2.309(c)(1)(iii) that the filing be submitted in a timely fashion. If the Land Commissioner's Letter truly had alerted Fasken to an exceptionally grave concern, Fasken should have moved to reopen the record as expeditiously as possible, and certainly far sooner than 76 days later.

[78] Motion to Reopen at 6.

publications on June 19, 2019.[79] Thus, June 19 would be the appropriate date by which to judge compliance with § 2.309(c)(1)(iii). Here, Fasken filed its Motion to Reopen on September 3, 2019, 76 days after the Land Commissioner's Letter became reasonably available to the public. Even if the Commission were to allow up to 60 days for a timely filing, as Fasken argues,[80] Fasken has not met that deadline.

Fasken never explains why it waited another month to file its Motion to Reopen to admit late Contention 2. At the time Fasken initially filed Contention 2 and its subsequent Motion to Reopen, Fasken was represented by experienced counsel[81] who is undoubtedly familiar with (or should be familiar with) the Commission's procedural requirements. Fasken has no excuse for failing to follow them.

[79] Holtec Opposition to Contention 2 at 13-14; NRC Staff Opposition to Contention 2 at 7-9.

[80] Motion to Reopen at 11.

[81] Until September 12, 2019, when he withdrew as Fasken's counsel, Fasken was represented in this proceeding by Robert V. Eye, who has been practicing before the NRC for decades. *See, e.g.*, the "Notice of Appearance for Robert V. Eye" filed in the Comanche Peak combined license proceeding (Apr. 6, 2009) (NRC Accession No. ML090970375); *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-10-2, 71 N.R.C. 190, 197, 201 (2010); *Kansas Gas and Electric Company* (Wolf Creek Generating Station), Director's Decision, DD-88-6, 27 N.R.C. 591 (1988).

IV. Conclusion

For the reasons set forth above, Holtec respectfully requests that the Commission deny Fasken's Motion to Reopen.

Respectfully submitted,

/Signed electronically by Timothy J. V. Walsh/

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September 13, 2019

Counsel for Holtec International

September 13, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer Opposing Fasken's Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 has been served through the EFiling system on the participants in the above-captioned proceeding this 13th day of September, 2019.

/signed electronically by Timothy J. V. Walsh/
Timothy J. V. Walsh