May 14, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

HOLTEC INTERNATIONAL'S ANSWER OPPOSING SIERRA CLUB'S MOTION TO REOPEN THE RECORD

William F. Gill
Kathryn L. Perkins
HOLTEC INTERNATIONAL
Krishna P. Singh Technology Campus
1 Holtec Boulevard
Camden, NJ 08104
Telephone: (856) 797-0900
W.Gill@holtec.com
K.Perkins@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: 202-663-8000
Facsimile: 202-663-8007
jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com
anne.leidich@pillsburylaw.com

Counsel for HOLTEC INTERNATIONAL

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On October 23, 2019, after the record in this proceeding had been closed, Sierra Club moved to file a new, late-filed contention in this proceeding.[1] In violation of Commission jurisprudence, the Sierra Club's motion failed to address the standards for reopening the record. Now, almost seven months late, it seeks for the first time to address the reopening standards.[2] Nowhere in the current motion does the Sierra Club make any effort to justify this late filing. That, standing alone, is reason enough to deny both the current motion and its October Motion. A late filing, piled on top of another late filing, should by itself require the dismissal of both. For this reason, and for the reasons set forth in Holtec International's Answer to the October Motion, both motions should be rejected.[3]

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[1] Sierra Club's Motion to File a New Late Filed Contention (Oct. 23, 2019) (the "October Motion").

[2] Sierra Club Motion to Reopen the Record (May 4, 2020) ("Motion to Reopen").

[3] While the many reasons set forth herein justify rejecting the Motion to Reopen, should the Board determine that is necessary to address Sierra Club's underlying Motion to File a New Late-Filed Contention, Holtec has already demonstrated that Sierra Club has failed to meet the standards for admitted that Contention. Holtec International's Answer Opposing Sierra Club's Motion to File Late-Filed Contention 30, November 18, 2019. *See also* NRC Staff Answer in Opposition to Sierra Club New Contention 30, November 18, 2019.

I. INTRODUCTION

On May 7, 2019, the Atomic Safety and Licensing Board issued its Memorandum and Order, LBP-19-4, 89 NRC 353(2019). The Memorandum and Order dismissed the requests for hearings submitted by all five petitioners, finding that no petitioner had proffered an admissible contention meeting the requirements of 10 C.F.R. § 2.309(f)(1).[4] As a result, the Board ordered that "This proceeding is terminated."[5]

On October 23, 2019, Sierra Club filed the October Motion. The October Motion, seemingly ignoring the fact that the proceeding before the Board had been "terminated," made no effort to meet the standards for reopening the record. This failure was pointed out at length by both Holtec[6] and the NRC Staff[7] in November 2019. Not only did the October Motion fail to address the reopening standards, Sierra Club compounded its failure by making no effort to cure it for the next seven months. Only after the Commission issued its Memorandum and Order, CLI-20-04 (April 23, 2020), did Sierra Club submit its Motion to Reopen the Record (May 4, 2020) ("Motion to Reopen").

Sierra Club's Motion to Reopen should be denied for multiple reasons. First, it makes no effort to justify why it is being filed seven months late. Even if the present Motion were timely (it is not), it would still fail the standards for a motion to reopen, as it does not address a significant safety or environmental issue and it does not demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered

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4 LBP-19-04, slip op. at 135.

5 *Id.* at 137 (original emphasis).

6 Holtec International's Answer Opposing Sierra Club's Motion to File Late-Filed Contention 30, at 4-5, 9-23 (Nov. 18, 2019).

7 NRC Staff Answer in Opposition to Sierra Club New Contention 30, at 3-4, 8-9 (Nov. 18, 2019).

initially.[8] The Motion is also not accompanied by an adequate affidavit in accordance with 10 C.F.R. § 2.326(b).

II. A LATE-FILED CONTENTION FILED AFTER A PROCEEDING IS TERMINATED MUST BE ACCOMPANIED BY A MOTION TO REOPEN

The Commission's long-standing jurisprudence requires that an attempt to admit a contention after the record of the proceeding has been closed and the proceeding terminated, must be accompanied by a motion to reopen the record.[9] The Commission considers "reopening the record for any reason to be 'an 'extraordinary' action,'"[10] and places "an intentionally heavy burden on parties seeking to reopen the record."[11] Indeed, "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."[12] "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."[13] "Obviously, 'there would be little hope' of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings."[14]

Sierra Club admits that when it submitted its late-filed Contention 30, "the ASLB record was closed."[15] Yet Sierra Club failed to address the reopening standards when it moved to admit the Contention. Sierra Club at least implies that it is only required to address the reopening standards because the Commission's remand to the Board included the obvious obligation that

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[8] 10 C.F.R. § 2.326(a).

[9] 10 C.F.R. § 2.326.

[10] *Tennessee Valley Auth.* (Watts Bar Unit 2), CLI-15-19, 82 NRC 151, 156 (2015).

[11] *Id.* at 155.

[12] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).

[13] *Id.*

[14] *Id.* (*citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 555 (1978).

[15] Motion to Reopen at 1.

the Board apply the reopening standards. In fact, that obligation to address the reopening standards was triggered by the filing of the October Motion seven months ago.

III. CLI-20-04 DOES NOT AUTHORIZE, IMPLICITLY OR OTHERWISE, SIERRA CLUB'S DOUBLY LATE ATTEMPT TO MEET THE REOPENING STANDARDS

As the Commission explicitly noted, Sierra Club's late-filed Contention 30 was filed "after all contentions had been dismissed, the record closed and jurisdiction to consider the [October] motion passed to the Commission."[16] Since "jurisdiction to consider the motion passed to the Commission," the Commission could have decided the October Motion itself. However, it chose to pass that responsibility back to the Board.[17] Thus, the Board will now evaluate whether late-filed Contention 30 met the requirements for reopening a closed record and for a late-contention. But, notwithstanding Sierra Club's claim, nothing in CLI-20-04 suggests that the Commission considered the reopening of the record to be a "viable issue"[18] or that the procedural defects already described by Holtec and the NRC Staff, including Sierra Club's failure to address the reopening standards, were "implicitly rejected"[19] by the Commission. CLI-20-04 turns the October Motion over to the Board for it to determine whether the late-filed Contention 30 *as it was submitted by Sierra Club in October 2019* should be accepted or rejected, nothing more and nothing less.

IV. THE MOTION TO REOPEN IS UNJUSTIFIABLY LATE

In order to be admitted, the party submitting a late-filed contention must demonstrate good cause for the late filing, including showing that the filing was submitted in a timely

[16] CLI-20-04, slip op. at 31.
[17] CLI-20-04, slip op. at 32.
[18] Motion to Reopen at 1.
[19] *Id.* at 3.

fashion.[20] Sierra Club recognized this when it attempted (albeit unsuccessfully) to show why Contention 30 was being filed more than a year after the deadline for filing contentions had expired.[21] But Sierra Club's October Motion failed to include a showing that it had met the reopening standards. It made no attempt to show how it met those standards until May 4, 2020, when it filed the Motion to Reopen, apparently after being reminded of its obligation by CLI-20-04. But there is nothing in the Motion to Reopen that explains or justifies the seven-month delay in filing attempting to meeting the reopening standards. The time for Sierra Club to demonstrate that it met the reopening standards was when it filed Contention 30. A late filed motion to reopen devoid of justification for its untimeliness, on top of an inadequately justified late filing to admit the contention after the proceeding is terminated, is more than sufficient basis for the Board to reject Contention 30.

V. THE MOTION TO REOPEN, EVEN IF CONSIDERED TIMELY, FAILS TO MEET THE REOPENING STANDARDS

The standards to be met to justify reopening the record are set forth in 10 C.F.R. § 2.326(a). The criteria are:

i. The motion must be timely, but the Board has discretion to consider an untimely issue if it is "exceptionally grave";

ii. The motion must address a significant safety or environmental issue;

iii. The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

[20] 10 C.F.R. § 2.309(c).

[21] October Motion at 2. *See* 83 Fed, Reg. 32919, 32920 (July 16, 2018) (requests for hearing, including the submission of contentions, due 60 days after the Federal Registration notice, i.e., by August 16, 2018).

In addition, the motion must be accompanied by an affidavit setting forth the factual and/or technical basis for the claim that the three criteria set forth above have been met.[22] The affidavit must be from "competent individuals with knowledge of the facts alleged," or from "experts in the disciplines appropriate to the issues raised."[23] And since the motion to reopen is for the purpose of "consider[ing] additional **evidence**,"[24] the "[e]vidence contained in the affidavits must meet the admissibility standards of this subpart." [25] The Motion to Reopen must meet all of these standards, but fails to meet any of them and must be rejected.

A. The Motion to Reopen Is Not Timely

In its Motion to Reopen, Sierra Club only addresses the timeliness of Contention 30.[26] However, the issue is not whether the October Motion was timely: it was not, as already explained in our November Answer.[27] The Motion to Reopen also must be timely, and it is not. In fact, Sierra Club fails to explain why the Motion to Reopen was filed on May 4, 2020, seven months after the October Motion was filed.

Sierra Club should not be permitted to submit a motion to reopen in support of a late-filed contention months after it has filed the contention. Section 2.326(a)(1) states that a motion to reopen the record will not be granted unless it is timely, and Section 2.326(d) requires 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

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[22] 10 C.F.R. § 2.326(b).

[23] *Id.*

[24] 10 C.F.R. § 2.326(a) (emphasis added).

[25] *Id.*

[26] Motion to Reopen at 2, 5 (Taylor Affidavit). In its Motion to Reopen, Sierra Club only provides legal support related to thirty-day timeline for late-filed contentions. Sierra Club provides no support for a months-late Motion to Reopen. *See* Motion to Reopen at 2, 5 (Taylor Affidavit).

[27] *See* Holtec International's Answer Opposing Sierra Club's Motion to File Late-Filed Contention 30 at 11-21 (Nov. 18, 2019); NRC Staff Answer in Opposition to Sierra Club New Contention 30 at 5-8 (Nov. 18, 2019).

deadline in § 2.309(b)."[28] 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." Here, Sierra Club claims that the "new information" forming the basis of its complaint is the September 23, 2019 NWTRB report. While we disagree that the NWTRB report is in any way "new information," even if it were new this Motion to Reopen would still be exceedingly late, having been filed eight months after the publication of the supposedly new information.[29]

The Commission's decision of April 23, 2020 also did not open the door for Sierra Club to supplement its original filing. The Commission stated that "Sierra Club's *motion for a new contention*" i.e. the October Motion, must "meet the standards for reopening a closed record."[30] The October Motion was clearly deficient in this regard: it failed to even mention the reopening standards, let alone meet them.[31] Sierra Club should not be allowed to remedy this deficiency in its original filing now simply because the Commission reiterated the appropriate standard.

This is particularly true given that Sierra Club was already on notice that the reopening standards applied. We first explained the standard in our Answer to Fasken Oil and Ranch and Permian Basin Land and Royalty Owners' ("Fasken's") August 1, 2019 Motion for Leave to File a New Contention, and the issue arose again when Fasken later filed a Motion for Leave to Reopen on September 3, 2019. In addition, we reiterated this requirement in our November 2019

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[28] 10 C.F.R. § 2.326(d).

[29] To the extent that Sierra Club now challenges the 60-day deadline for filing new contentions, *see* Motion to Reopen at 5 (Taylor Affidavit), Sierra Club's personal delays and inability to perform an adequate review "before expiration of the prescribed time period constitutes no legal justification for petitioners' delay." *Deukmejian v. NRC*, 751 F. 2d 1287, 1318 (D.C. Cir. 1984). "If it did, the principle of finality underlying filing deadlines, statutes of limitations and other legal time bars would be rendered subordinate to the financial and practical vicissitudes of individual litigants." *Id.*

[30] CLI-20-04, slip op. at 32 (emphasis added).

[31] *See generally* October Motion.

Answer to Sierra Club's October Motion—an Answer to which Sierra Club never replied.[32] Instead, Sierra Club waited for months before addressing the standards that should have been part of its original filing. Sierra Club should not be permitted to wait for months to remediate clear deficiencies in its original filing.

B. The Issue that the Motion to Reopen and Contention 30 Seeks to Raise is not Exceptionally Grave

Given that the issues raised in Contention 30 are untimely, Sierra Club can only gain entry by establishing that the issues are "exceptionally grave" to justify reopening pursuant to 10 C.F.R. § 2.326(a)(1).[33] As an example, exceptionally grave matters may include "potential harm to an endangered species" if it is "likely to occur."[34] As with its October Motion, Sierra Club alleges no imminent, or even any particular, environmental harm, providing no additional justification for reopening the record, in the absence of a timely filing.

C. The Motion to Reopen and Contention 30 Do Not Raise a Significant Safety or Environmental Issue

The Motion to Reopen, and Contention 30, fail to raise an issue that is material to the proceedings, let alone a significant safety or environmental issue, as required by 10 C.F.R. § 2.326. Sierra Club claims that the Motion to Reopen raises "significant safety or environmental issues" for a variety of reasons, including: the Application's alleged failure to address the 18 technical issues in the NWTRB report, a claim that not all of the fuel could be

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[32] Even if Sierra Club had attempted to address the reopening standards on reply it would be an improper expansion of arguments and improper attempt to remedy a contention that is inadequate on its face. *See, e.g.*, *Nuclear Management Co. LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 731-32.

[33] 10 C.F.R. § 2.326(a)(1).

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

moved to the Holtec CISF within 20 years, and a variety of claims raised in the Alvarez declaration. [35]

Regarding the Application's alleged failure to address the 18 technical issues in the NWTRB report, Sierra Club never establishes that Holtec was *required* to address any of these issues in its application and never challenges any specific portion of the application.[36] To the extent that Sierra Club is asserting that the spent fuel will not all be moved to Holtec within 20 or 40 years, again Sierra Club never establishes that the timing of spent fuel shipments must be addressed in the Application. The NRC Staff's environmental review does not need to find whether it is feasible to store all 100,000 MTU in 20 years, as the timing of when spent fuel will delivered to the Holtec facility is not material to the findings that the NRC must make.[37] Thus, there is no reason to include such a business case analysis in the Application. Finally, as to claims in the Alvarez Declaration, those claims do not even address or challenge the Holtec Application. As we noted in November, the Alvarez declaration appears to have been created for a different proceeding and never references any specific portion of the Holtec Application.[38]

Sierra Club's argument that the Motion to Reopen raises "significant safety or environmental issues" culminates in the claim that:

> The impacts of transportation of the nuclear waste are an integral part of the licensing process for the Holtec CIS facility. 10 C.F.R. § 72.108 clearly states that the ER must evaluate environmental issues related to transportation. The recently released NWTRB report raises significant issues regarding transportation of nuclear waste that must be adequately addressed in the Holtec ER, but are not.[39]

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[35] Motion to Reopen at 6-12 (Taylor Affidavit).

[36] November Answer at 25-28.

[37] November Answer at 24.

[38] November Answer at 28.

[39] Motion to Reopen at 12 (Taylor Affidavit).

On the contrary, there is no environmental issue from the "issues" raised in the NWTRB report without a failure of the transportation packages, and 10 C.F.R. § 72.108 does not require that the environmental report prove the safety of transportation packages, as already found by the Board in this proceeding.[40] To the extent that Sierra Club is challenging any other issue, such as the dose analysis, we have already addressed the inadequacy of their claims in our November Answer.[41]

In summary, these claims are already addressed at length in our November Answer, and none raises a genuine dispute with the Application on a material issue of law or fact. Thus, the same issues cannot rise to the level of a significant safety or environmental issue for the purpose of Sierra Club's Motion to Reopen.

D. The Motion to Reopen Fails to Demonstrate that a Materially Different Result Would Have Been Likely Were Contention 30 Initially Considered

The Motion to Reopen fails to even address the requirement to demonstrate that a materially different result would have been likely if Contention 30 were considered initially. Sierra Club claims that its Contention 30 "would likely have been admissible if considered initially." However, in addition to being inaccurate,[42] that is not even a recitation of the applicable standard. Sierra Club is required to demonstrate that "consideration of [its] evidence will materially affect the outcome of this proceeding"[43] or, in other words, to "show a likelihood that consideration of [its] contention would result in the *denial or conditioning*" of Holtec's

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[40] LBP-19-04, slip op. at 76.

[41] November Answer at 24-27.

[42] Contention 30 would not have been admissible if considered initially. First, Sierra Club never addressed the admissibility standards in 10 C.F.R. § 2.309(f)(1) in its October Motion, and to do so now is clearly an improper, and inadequate, attempt to remediate a deficient Contention. Moreover, the additional discussion on admissibility in the Motion to Reopen does nothing to change the arguments presented in our November Answer.

[43] *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 23, *aff'd* CLI-08-28, 68 NRC 658 (2008).

license application for the consolidated interim storage facility.[44] Sierra Club does not attempt to meet that standard now, nor could it, for the reasons already explained in our November Answer.

E. The Motion to Reopen Is Not Accompanied by an Appropriate Affidavit

Not only does Sierra Club fail meet the requirements of 10 C.F.R. § 2.326(a), it also fails to meet the independent requirements of 10 C.F.R. § 2.326(b). Under 10 C.F.R. § 2.326(b), the motion to reopen the record must be accompanied by affidavits that specifically address the criteria of 10 C.F.R. § 2.326(a) and explain why each has been met. This affidavit "must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised."[45]

Contrary to this requirement, Sierra Club submitted an affidavit from its attorney representative, Mr. Wallace Taylor. Mr. Taylor is neither a factual witness nor an expert competent in the issues raised. Mr. Taylor is an attorney, and accordingly his affidavit provides nothing more than legal argument. If an attorney could draft an affidavit and substitute his or her own legal argument for the supporting affidavit required under 10 C.F.R. § 2.326(b), it would significantly lower than the "intentionally heavy burden"[46] placed on parties seeking to reopen the record in Commission proceedings.

Indeed, when the rules for a motion to reopen were first set, commentators argued that "affidavits of lawyers repeating allegations of undisclosed principals should not be sufficient" to

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[44] *Oyster Creek*, CLI-08-28, 68 NRC at 673 (emphasis added).

[45] 10 C.F.R. § 2.326(b).

[46] *Florida Power & Light, Co* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-16-6, 83 NRC 329, 333 (2016) ("Given the importance of finality in adjudicatory proceedings, the Commission's rules place an intentionally heavy burden on parties seeking to reopen the record. Otherwise, there would be little hope of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings. Accordingly, the Commission consider[s] reopening the record for any reason to be an extraordinary action." (Internal quotations omitted.))

support a motion to reopen.[47] In response, the Commission codified the standard set forth in *Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 3), ALAB-775, 19 NRC 1361, 1367 n.18 (1984), that affidavits "must be given by competent individuals with knowledge of the facts or experts in the disciplines appropriate to the issues raised." While Mr. Taylor may have knowledge of the law, he has no knowledge of the facts or expertise in the issues raised in Contention 30.

To the extent that Sierra Club argues that the Alvarez Declaration provides expert analysis to fulfil the affidavit requirement, that is clearly not the case. In accordance with 10 C.F.R. § 2.326(b), the affidavit submitted in support of the Motion to Reopen must address each of the reopening criteria. The Alvarez Declaration does not address the requirements for a Motion to Reopen, nor does it even address specific portions of the Holtec Application. Thus, Alvarez (as an affiant) has not fulfilled any of the requirements of an affidavit supporting a motion to reopen.[48]

In conclusion, Sierra Club did not submit an affidavit sufficient to meet the requirements set forth in 10 C.F.R. § 2.326(b). For this reason alone, its Motion to Reopen should be rejected.

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[47] *Criteria for Reopening Records in Formal Licensing Proceedings*, 51 Fed. Reg. 19535, 19537 (1986).

[48] Alvarez also is not an expert in the disciplines appropriate to the issues raised. Mr. Alvarez is not an expert in nuclear engineering, nuclear science, or nuclear fuel. His Curriculum Vitae submitted with his Declaration, describes his education as follows: "Attended the Dana School of Music in Youngstown, Ohio 1964-1966. Majored in music theory and composition." Notice of Filing of CV of Robert Alvarez at 4 (dated Nov. 17, 2018; submitted to the docket Oct. 23, 2019).

VI. Conclusion

For the reasons set forth above, Holtec respectfully requests that the Board deny Sierra Club's Motion to Reopen.

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

William F. Gill
Kathryn L. Perkins
HOLTEC INTERNATIONAL
Krishna P. Singh Technology Campus
1 Holtec Boulevard
Camden, NJ 08104
Telephone: (856) 797-0900
W.Gill@holtec.com
K.Perkins@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: 202-663-8707
Facsimile: 202-663-8007
jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com
anne.leidich@pillsburylaw.com

Counsel for HOLTEC INTERNATIONAL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Holtec International's Answer Opposing Sierra Club's Motion to Reopen the Record has been served through the EFiling system on the participants in the above-captioned proceeding this 14th day of May, 2020.

/signed electronically by Anne R. Leidich/

Anne R. Leidich