

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Christopher T. Hanson, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of

HOLTEC INTERNATIONAL

(HI-STORE Consolidated Interim Storage
Facility)

Docket No. 72-1051-ISFSI

CLI-21-04

MEMORANDUM AND ORDER

Today we address Sierra Club's appeal of the Atomic Safety and Licensing Board's decision on remand dismissing four timely submitted contentions and a fifth contention filed after the Board's original ruling.¹ For the reasons described below, we deny the appeal.

I. BACKGROUND

Holtec has applied for a license to build and operate a consolidated interim storage facility (CISF) in southeastern New Mexico.² The proposed license would allow Holtec to store

¹ See *Sierra Club's Brief in Support of Appeal of Atomic Safety and Licensing Board Decision Denying Admissibility of Contentions in Licensing Proceeding* (July 13, 2020) (Sierra Club Appeal); LBP-20-6, 91 NRC __ (June 18, 2020) (slip op.).

² See Letter from Kimberly Manzione, Holtec International, to Michael Layton, NRC (Mar. 30, 2017) (enclosing application documents including safety analysis report and environmental report) (ADAMS accession no. ML17115A431 (package)). Holtec has since revised the application: Environmental Report on the HI-STORE CIS Facility, rev. 7 (Aug. 2019) (ML19309E337) (Environmental Report); and Licensing Report on the HI-STORE CIS Facility, rev. 0H (Mar. 30, 2019) (ML19163A062) (Safety Analysis Report).

up to 8,680 metric tons of uranium (MTUs) (500 loaded canisters) in the Holtec HI-STORE CISF for a period of forty years.³ The Environmental Report analyzes the environmental impacts of possible future expansions of the project of up to 100,000 MTU storage capacity.⁴

This is our second occasion to hear appeals in this licensing matter. At the outset of the proceeding, six different petitioners or groups of petitioners, including Sierra Club, sought to intervene and requested a hearing. As relevant here, the Board found that Sierra Club had established standing but did not offer an admissible contention.⁵ Sierra Club appealed with respect to ten of the dismissed contentions.

In CLI-20-4, we affirmed the Board's finding of standing and its decision to dismiss six of Sierra Club's contentions, but we concluded that the Board had not considered all aspects of four of Sierra Club's proposed contentions concerning the hydrogeology of the site.⁶ We therefore remanded the four contentions, in part, to the Board for further consideration.⁷ We also remanded a new Sierra Club contention (Contention 30) that was based on a recently released report from the Nuclear Waste Technical Review Board (NWTRB) concerning issues related to spent fuel transportation.⁸ Because Contention 30 was filed after the Board's decision

³ See Proposed License for Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste SNM-1051, at 1 (ML17310A223) (Proposed License).

⁴ Environmental Report at 1-7.

⁵ See LBP-19-4, 89 NRC 353, 366-67, 383-426 (2019).

⁶ CLI-20-4, 91 NRC __, __ (Apr. 23, 2020) (slip op. at 8-31).

⁷ *Id.* at __ (slip op. at 26-29).

⁸ *Id.* at __ (slip op. at 31-32). See also *Sierra Club's Motion to File a New Late-Filed Contention* (Oct. 23, 2019) (Motion to File Contention 30); Attach., U.S. Nuclear Waste Technical Review Board, "Preparing for Nuclear Waste Transportation—Technical Issues that Need to Be Addressed in Preparing for a Nationwide Effort to Transport Spent Nuclear Fuel and High-Level Radioactive Waste" (Sept. 2019) (NWTRB Report) (ML19297D141 (package)).

in LBP-19-4, we instructed the Board to consider on remand whether Contention 30 met the Commission's reopening standards.⁹

On remand, the Board dismissed the five contentions. Sierra Club appealed. Holtec and the NRC Staff oppose the appeal.¹⁰

II. DISCUSSION

To be admitted for hearing, a proposed contention must set forth with particularity the matters to be raised, be within the scope of the hearing, be material to the findings the agency must make in taking the requested action, be factually supported, and show that a genuine dispute exists with the application.¹¹

We generally defer to a Board on whether a contention has sufficient factual support to be admitted for hearing, and we review contention admissibility rulings only where an appeal points to an error of law or abuse of discretion.¹²

A. Groundwater Contentions

Sierra Club argued in Contentions 15, 16, 17, and 19 that the Environmental Report had not accounted for various groundwater impacts and had not adequately characterized the hydrogeology of the site.¹³ We remanded these contentions for the Board to consider the narrow issue of whether they raised admissible issues concerning site characterization. Moreover, the Board examined each contention and found that none raised a genuine dispute

⁹ CLI-20-4, 91 NRC at __ (slip op. at 32).

¹⁰ *Holtec International's Brief in Opposition to Sierra Club's Appeal of LBP-20-06* (Aug. 7, 2020) (Holtec Answer); *NRC Staff's Answer in Opposition to Sierra Club's Appeal of LBP-20-6* (Aug. 7, 2020) (Staff Answer).

¹¹ See 10 C.F.R. § 2.309(f)(1)(i)-(vi).

¹² CLI-20-4, 91 NRC __ (slip op. at 3); *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-20-1, 91 NRC __ (Apr. 13, 2020) (slip op. at 7).

¹³ Sierra Club Appeal at 4-5.

with Holtec's application. Specifically, the Board found that the contentions did not address or account for information that was in the Environmental Report. Further, the Board found three of the four contentions lacked adequate factual support.

1. Contention 15: Presence of Shallow Groundwater

Sierra Club argued in Contention 15 that Holtec did not support the claim in section 3.5.2.1 of the Environmental Report that "shallow alluvium is likely non-water bearing at the Site."¹⁴ But on remand, the Board held that Contention 15 did not address the Environmental Report's discussion of the groundwater monitoring wells that Holtec drilled to investigate the presence of groundwater.¹⁵ The Board found that Sierra Club was incorrect that Holtec's conclusion was "based entirely on the absence of water in a single monitoring well observed in 2007."¹⁶ The Board pointed to Holtec's 2017 Geotechnical Data Report, which included boring logs for five groundwater monitoring wells and showed that no groundwater was encountered in the shallow alluvium.¹⁷ The Board observed that while the Geotechnical Data Report indicated that the wells were completed below the alluvium, the wells were monitored for groundwater throughout the drilling.¹⁸

On appeal, Sierra Club argues that its expert countered this information by explaining that a monitoring well was required and that "a momentary observation of no water is not

¹⁴ *Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club* (Sept. 14, 2018), at 60 (Sierra Club Petition).

¹⁵ LBP-20-6, 91 NRC at ___ (slip op. at 5).

¹⁶ *Id.* at ___ (slip op. at 4).

¹⁷ *Id.* at ___ (slip op. at 5) (citing Letter from Kimberly Manzione, Holtec International, to Jose Cuadrado, NRC (Dec. 21, 2017) (transmitting responses to requests for supplemental information), Attach. 5, GEI Consultants, Geotechnical Data Report, HI-STORE CISF Phase 1 Site Characterization (Dec. 2017) (ML17362A097 (Package))).

¹⁸ *Id.*

sufficient to determine that groundwater does not exist.”¹⁹ But Sierra Club reiterates the same arguments raised before the Board.²⁰ It does not show that the Board erred in its interpretation of the law or abused its discretion in reaching its conclusion that Sierra Club did not raise a genuine dispute with the application. Accordingly, we defer to the Board’s ruling with respect to Contention 15.

2. Contention 16: Presence of Brine

In Contention 16, Sierra Club argued that the Environmental Report “does not contain any information as to whether brine continues to flow in the subsurface under the site.”²¹ Sierra Club acknowledged that the Environmental Report states that brine disposal facilities once operated near the site and that in 2007, brine was detected in a water sample taken from the south side of the site.²² Sierra Club provided the declaration of an expert, George Rice, who opined that the Environmental Report should determine whether “brine is moving along perched zones in the alluvial materials, or along the alluvium/Dockum interface.”²³

On remand, the Board found that the contention lacked factual support because brine disposal facilities, and the site where brine was located, are on the far side of the site and downgradient of the proposed CISF.²⁴ In addition, the Board found that Mr. Rice’s declaration did not provide any facts suggesting that brine may exist beneath the proposed facility. Instead,

¹⁹ Sierra Club Appeal at 9; *see also* Sierra Club Petition, Attach., *Sierra Club Standing Declarations and Expert Declarations* (Sept. 13, 2018), Declaration of George Rice (Sept. 6, 2018), at 2-4 (Rice Decl.).

²⁰ *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017).

²¹ Sierra Club Petition at 62.

²² *Id.* at 63 (citing Environmental Report § 3.5.2.1).

²³ Rice Decl. at 6.

²⁴ LBP-20-6, 91 NRC at ___ (slip op. at 6-7).

the Board observed that the declaration did not meet the contention admissibility requirements because it only posed questions, such as “do the seeps and springs continue to flow?”²⁵

On appeal, Sierra Club argues that the presence of brine in the 2007 sample should be enough to warrant further investigation of whether brine exists in the area of the proposed facility.²⁶ But Sierra Club’s argument that more information is needed on brine in the groundwater points to no Board error of law or abuse of discretion. The application acknowledges brine in the shallow groundwater. Both the Safety Analysis Report and Environmental Report state that shallow groundwater in the area has been affected by brine discharges from potash refining and oil and gas production, and they further describe historical discharges of brine into the playa lakes surrounding the site.²⁷ The application also explains that the water table is below the excavation depth of the facility.²⁸ We therefore defer to the Board’s conclusion that this contention lacked sufficient factual support to raise a genuine dispute with the application.

3. Contention 17: Fractured Rock

In Contention 17, Sierra Club argued that the Environmental Report and Safety Analysis Report did not discuss the “presence and implications of fractured rock beneath the Holtec site.”²⁹

²⁵ *Id.* at ___ (slip op. at 7) (citing *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 324 (2007)).

²⁶ Sierra Club Appeal at 10.

²⁷ See Safety Analysis Report § 2.5 at 2-98; Environmental Report § 3.5.2.1 at 3-52 (describing brine discharges to the Laguna Plata, Laguna Toston, and Laguna Gatuna ending in 2001); *id.* § 3.5.2.1 at 3-51 (describing 2007 piezometer sampling that identified brine in the groundwater).

²⁸ See Safety Analysis Report § 2.5 at 2-98; see also *id.* § 1.0.1 at 1-5 (maximum excavation depth will be approximately 25 feet).

²⁹ Sierra Club Petition at 63-65.

The Board found the contention unsupported because both documents discuss the presence of fractured rock.³⁰ The Board pointed out that Mr. Rice's declaration acknowledges that fractures were reported in the monitoring wells' drilling logs and in the Geotechnical Data Report.³¹ The Board therefore found that the contention was factually unsupported.³² In addition, it found that aside from its inadmissible claims that contaminants could leak from the spent fuel storage containers, Sierra Club had not set forth a "significant dispute" with the application concerning the presence of fractured rock.³³

On appeal, Sierra Club argues that the Environmental Report and Safety Analysis Report do not "discuss the nature and extent of these fractures" and "that is why both documents are deficient."³⁴ But this claim does not describe any Board error—it reiterates arguments Sierra Club made before the Board. This is not sufficient to sustain an appeal.³⁵ We therefore defer to the Board.

4. Contention 19: Packer Tests/Hydraulic Conductivity

In Contention 19, Sierra Club argued that the Environmental Report did not contain sufficient information to determine whether packer tests were performed correctly.³⁶ Packer tests were used to determine the extent of hydraulic connectivity in the Santa Rosa Formation underlying the proposed site.³⁷ In his supporting declaration, Mr. Rice argued that the tests did

³⁰ LBP-20-6, 91 NRC at ___ (slip op. at 7-8).

³¹ *Id.* at ___ (slip op. at 8).

³² *Id.*

³³ *Id.*

³⁴ Sierra Club Appeal at 11.

³⁵ *See Turkey Point*, CLI-17-12, 86 NRC at 219.

³⁶ Sierra Club Petition at 66.

³⁷ *See Rice Decl.* at 8.

not conform to the methods given in the U.S. Bureau of Reclamation's Field Manual (which the Geotechnical Data Report used).³⁸ Mr. Rice claimed three insufficiencies: (1) the applicant did "not appear to have cleaned the hole" prior to conducting the tests; (2) there was no description of the water used in the tests; and (3) the "test duration appear[ed] to be too short."³⁹

The Board found that Mr. Rice's declaration offered "mere speculation" that the packer tests were done incorrectly. It held that the fact that the Geotechnical Data Report is silent on some details did "not provide grounds to assume" that the tests were performed improperly.⁴⁰ And it observed that the geotechnical work described in the report was performed under a quality assurance program.⁴¹ The Board therefore concluded that the contention lacked factual support and did not raise a genuine dispute with the application.⁴²

On appeal, Sierra Club argues that the Board placed an "unjustified burden" on its expert because Mr. Rice could not conduct his own test and "does not have access, absent the discovery mechanisms available after a contention is admitted, to the information the [Board] claims he must have to form an admissible contention."⁴³

We find persuasive the Staff's argument that Sierra Club has not explained "how the asserted departures would ultimately have any significance for any analysis or conclusion" in the Environmental Report.⁴⁴ We agree with the Staff that Sierra Club has not demonstrated a

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ LBP-20-6, 91 NRC at __ (slip op. at 9).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Sierra Club Appeal at 11-12.

⁴⁴ *Id.* at 14.

genuine dispute with the application on a material issue, and, consequently, we find that Sierra Club has not shown legal error by the Board. Thus, we defer to the Board's finding that Contention 19 was not admissible.

B. Contention 30: NWTRB Report

Sierra Club argued in Contention 30 that the NWTRB Report showed that the project is infeasible because “the transportation of nuclear waste cannot be technically accomplished within the 40-year period of the initial license Holtec is seeking.”⁴⁵ Sierra Club argued that the report showed that if spent fuel from all nuclear plants were repackaged into smaller, standardized canisters, the fuel could be removed by 2070, but if the fuel is not repackaged, “some of the hottest spent nuclear fuel would not be cool enough to meet transportation requirements until 2100.”⁴⁶ Sierra Club claimed that Holtec's Environmental Report must consider other unresolved issues identified in the report, including possible damage to waste containers during shipment and the need for new transportation container designs.⁴⁷ The motion to admit Contention 30 was accompanied by the declaration of Sierra Club's expert, Robert Alvarez.⁴⁸ Following our remand of Contention 30 to the Board, Sierra Club filed a motion to reopen the record and admit the contention, along with an affidavit addressing our reopening standards.⁴⁹

⁴⁵ Motion to File Contention 30 at 1.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1-2.

⁴⁸ See Declaration of Robert Alvarez in Support of Motion of Intervenor Sustainable Energy and Economic Development Coalition for Leave to File Late-Filed Contention (Oct. 23, 2019) (Alvarez Decl.).

⁴⁹ *Sierra Club's Motion to Reopen the Record* (May 4, 2020) (Motion to Reopen).

The Board rejected the contention for the following reasons: (1) Contention 30 was inadmissible because it did not raise a genuine dispute with Holtec's application; (2) Sierra Club had not met the standard for showing good cause for filing a new contention after the deadline; and (3) Sierra Club had not met the standard for reopening a closed record. As discussed below, Sierra Club does not show that the Board erred with respect to any of them.

1. Admissibility

The Board found that Contention 30 did not raise a genuine dispute with Holtec's application because "[c]ontrary to Sierra Club's claims, the findings in the NWTRB Report do not contradict Holtec's plans."⁵⁰ Specifically, the Board found that while the NWTRB Report found that "some technical issues must be resolved 'before the nation's entire inventory can be transported,' it agrees that not all such issues 'must be resolved before the first of the waste can be transported.'"⁵¹ The Board found that the report "most certainly does not support the conclusion that 8,680 MTU could not be moved" during the forty-year term of Holtec's initial license request.⁵²

The Board explained that the NWTRB's responsibility under the Nuclear Waste Policy Act Amendments of 1987 is to "evaluate the technical and scientific validity" of the Department of Energy's activities under the Act.⁵³ The NWTRB does not license private spent fuel transportation systems, and it is not tasked with evaluating the technical viability of private spent fuel storage ventures. The Board also observed that the commercial viability of the proposed facility is not within the scope of this proceeding.⁵⁴ Therefore, to the extent that the waste

⁵⁰ LBP-20-6, 91 NRC at __ (slip op. at 16).

⁵¹ *Id.* (internal citation omitted) (quoting NWTRB Report at xxiii).

⁵² *Id.*

⁵³ *Id.* at __ (slip op. at 17) (quoting NWTRB Report at 1).

⁵⁴ *Id.*

transportation issues identified in the report might impede the future expansion of Holtec's facility to the 100,000 MTU capacity discussed in the Environmental Report, they are not material to the findings the NRC must make in licensing this facility.

The Board also found that other issues raised in Contention 30, such as the suitability of NRC-approved casks for transportation of high-burnup fuel, were outside the scope of the proceeding. The Board reasoned that Holtec's application is for a Part 72 storage facility license, not a Part 71 transportation license.⁵⁵ Insofar as Contention 30 questioned the safety of NRC-approved transportation packages, the Board found that the contention ran afoul of 10 C.F.R. § 2.335, which prohibits challenges to regulations in an adjudicatory proceeding without a waiver.⁵⁶

On appeal, Sierra Club argues that the Board ruled on the merits of Contention 30 rather than its admissibility and that it shifted the burden to Sierra Club to rebut all of Holtec's allegations.⁵⁷ But Sierra Club does not point to any merits ruling and provides no examples where the Board shifted the burden to Sierra Club. We note that the Board did not dismiss the contention due to its lack of factual support but because it did not challenge material in the license application and raised issues outside the scope of the proceeding. We therefore defer to the Board's ruling on the admissibility of Contention 30.

2. *New Contention Filed After the Deadline*

The Board found that Sierra Club had not shown good cause for filing Contention 30 after the deadline because the information on which the contention was based was not new.⁵⁸

⁵⁵ *Id.*

⁵⁶ *Id.* at __ (slip op. at 18).

⁵⁷ Sierra Club Appeal at 14.

⁵⁸ LBP-20-6, 91 NRC at __ (slip op. at 13-15).

Although the NWTRB Report had been released within a month before Sierra Club filed Contention 30, the Board found that the information in the report “was either previously available or not materially different from the information that was previously available.”⁵⁹ According to the Board, the report aggregated publicly available information that the DOE had gathered from 2012 to 2018.⁶⁰ The Board further observed that the supporting declaration of Mr. Alvarez “merely repeats conclusions in the NWTRB Report” and noted that “his Declaration also demonstrates that Sierra Club Contention 30 is based on facts and theories that were available long before the contention was filed.”⁶¹

On appeal, Sierra Club argues that the Board imposed an unrealistic standard requiring a prospective intervenor to “be aware of, understand and digest, and have expert support for every bit of information in the vast universe of possible sources of information.”⁶² It argues that even if all the information in the NWTRB Report was previously available in some form, “the report was the first source to put that information together in a way that informs the issues in this case.”⁶³

We have previously rejected the argument that old information repackaged in a new report is new information.⁶⁴ In *Prairie Island Nuclear Generating Plant*, we reversed a board’s finding that a “safety culture” contention was timely based on a section in a Safety Evaluation Report that listed prior adverse findings against the applicant, some of which dated back many

⁵⁹ *Id.* at __ (slip op. at 13).

⁶⁰ *Id.* at __ (slip op. at 14).

⁶¹ *Id.* at __ (slip op. at 15).

⁶² Sierra Club Appeal at 14.

⁶³ *Id.*

⁶⁴ See *Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2)*, CLI-10-27, 72 NRC 481, 494-96 (2010).

years.⁶⁵ We rejected the *Prairie Island* Board's reasoning that the Safety Evaluation Report provided the "final 'piece of the puzzle'" that allowed the petitioner to formulate its contention.⁶⁶

Sierra Club provides no reason to revisit our ruling in *Prairie Island*. It does not explain its argument that the NWTRB Report put information together in a way that supported the claims in Sierra Club's contention even though the individual reports and studies cited therein did not. We are also unpersuaded by Sierra Club's suggestion that the studies and reports cited in the NWTRB Report were too obscure for Sierra Club to be aware of them prior to the issuance of the report. As the Board pointed out, Sierra Club's expert's declaration cites NWTRB conclusions concerning high-burnup fuel dating to 2016 and also cited his own work raising the same issues dating back to 2013.⁶⁷ Therefore, Sierra Club's expert was aware of the challenges DOE faces in creating a permanent repository well before the NWTRB collected them in its report. We find no error in the Board's ruling that the motion to admit Contention 30 was untimely.

⁶⁵ *Id.* at 485-86.

⁶⁶ *Id.* at 493.

⁶⁷ See LBP-20-6, 91 NRC at ___ (slip op. at 15) (citing Alvarez Decl. at 1).

3. Reopening

As we noted in our remand to the Board, the Board terminated this proceeding when it denied all petitions to intervene.⁶⁸ The Board therefore considered whether the motion met the criteria for reopening a closed record found in 10 C.F.R. § 2.326; that is, the motion must (1) be timely, (2) address a significant safety or environmental issue, (3) demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially, and (4) be accompanied by affidavits that set forth the bases for the movant's claim that each of the foregoing criteria have been satisfied.⁶⁹

The Board found that Contention 30 did not meet the reopening standards because Sierra Club did not supply the necessary affidavit with its motion to admit the contention initially. Rather, Sierra Club submitted a motion and affidavit addressing the reopening criteria in May 2020, following our remand.⁷⁰ The Board stated that it did not interpret our remand as an invitation to Sierra Club to submit a motion to reopen that should have accompanied its motion to file Contention 30 in October 2019.⁷¹ The Board further noted that the motion to reopen would fail because it was not timely.⁷²

On appeal, Sierra Club argues that its failure to file a motion to reopen and accompanying affidavit with its original motion to admit Contention 30 could not be a bar to reopening, because otherwise we would not have bothered to remand the matter to the Board.⁷³

⁶⁸ See CLI-20-4, 91 NRC at ___ (slip op. at 31-32).

⁶⁹ See 10 C.F.R. § 2.326(a), (b).

⁷⁰ See Motion to Reopen.

⁷¹ See LBP-20-6, 91 NRC at ___ (slip op. at 12-13).

⁷² *Id.* at ___ (slip op. at 13).

⁷³ Sierra Club Appeal at 13.

But we directed the Board to consider the reopening standards when we remanded the contention.⁷⁴ Moreover, the rules permit that even an untimely motion may be granted where it raises an “exceptionally grave” issue.⁷⁵ In remanding the motion to admit the contention despite the absence of a motion and affidavit addressing the reopening standards, we declined to pre-judge the issues. We therefore find no error in the Board’s ruling with respect to the reopening standards.

III. CONCLUSION

For the foregoing reasons, we deny Sierra Club’s appeal of LBP-20-6.

IT IS SO ORDERED.

For the Commission



Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of February 2021.

⁷⁴ CLI-20-4, 91 NRC at __ (slip op. at 32).

⁷⁵ See 10 C.F.R. § 2.326(a)(1).

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Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-21-04)** have been served upon the following persons by Electronic Information Exchange (EIE).

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Holtec International - Docket No. 72-1051-ISFSI
COMMISSION MEMORANDUM AND ORDER (CLI-21-04)

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Holtec International - Docket No. 72-1051-ISFSI
COMMISSION MEMORANDUM AND ORDER (CLI-21-04)

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Dated at Rockville, Maryland,
this 18th day of February 2021

Office of the Secretary of the Commission