UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 72-1050
INTERIM STORAGE PARTNERS LLC	)	
	)	
(Consolidated Interim Storage Facility)	)	September 24, 2018

INTERIM STORAGE PARTNERS LLC'S RESPONSE OPPOSING BEYOND NUCLEAR, INC.'S UNAUTHORIZED SEPTEMBER 14, 2018 FILING

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TABLE OF CONTENTS

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I. INTRODUCTION

Interim Storage Partners LLC ("ISP") submits this response opposing the document filed with the U.S. Nuclear Regulatory Commission ("NRC") on September 14, 2018, by Beyond Nuclear, Inc. ("BN"), styled as a "Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act" ("BN Filing").[1] As explained below, the Commission should reject the BN Filing because it is procedurally and substantively deficient on multiple, independent grounds.[2]

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[1] Beyond Nuclear Inc.'s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act (Sept. 14, 2018) (ML18257A312). *See also* Errata to Beyond Nuclear Inc.'s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act (Sept. 18, 2018) (ML18261A110).

[2] A separate but substantively similar document was filed on the Holtec docket on behalf of Fasken Land and Minerals and Permian Basin Land and Royalty Owners. *See Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility (Sept. 14, 2018) (ML18257A330) ("Fasken and PBLRO Filing"). That filing "incorporate[s] by reference the arguments and authorities" in the BN Filing. *Id.* at 7. Thus, it must be summarily rejected for all of the same reasons discussed in this Response. Furthermore, it must be rejected as to the WCS CISF docket for the additional reason that it was not served thereon, contrary to 10 C.F.R. § 2.323(a)(2), which requires that "All written motions must be filed with the Secretary and served on all parties to the proceeding." *See also* 10 C.F.R. §§ 2.302, 2.305.

In the BN Filing, BN demands that the license applications for the named proceedings "be dismissed" because the "central premise" of those applications purportedly "violates" the Nuclear Waste Policy Act of 1982, as amended ("NWPA"), and therefore, the NRC purportedly "has no lawful basis" to even "review the applications."[3] BN explicitly states that it "does not seek consideration" of the BN Filing "in either of the licensing proceedings that has [sic] been noticed in the Federal Register."[4] Rather, BN asks the Commission to "establish a separate proceeding," solely for the purpose of considering the BN Filing.[5] In support of its demand for a new, superseding proceeding, the BN Filing presents—without any coherent procedural basis—myriad generalized grievances, repetition of previously-rejected demands, untimely requests for reconsideration, and impermissible challenges to the exact statutes and regulations that govern NRC action.

At the most basic level, BN's demand to create some new proceeding and park it before those mandated by law ignores the requirements and procedures in 10 C.F.R. Part 2 in their entirety, and therefore is an impermissible challenge to the NRC's regulations and regulatory process, contrary to 10 C.F.R. § 2.335. More fundamentally, the BN Filing is an abusive ploy that disregards the Commission's decision in CLI-17-10, which explicitly considered—and rejected—this exact request, on this exact docket, filed by this same organization in 2017.[6]

Furthermore, BN makes no attempt to identify what, if any, 10 C.F.R. Part 2 procedures apply to, or permit the filing of, the BN Filing. Thus, ISP, the Staff, and the Commission are left

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3 BN Filing at 1, 22.

4 *Id.* at 2 (thus requesting the Commission *not* treat this filing as a contention in that proceeding).

5 *Id.*

6 *Waste Control Specialists LLC* (Consolidated Interim Storage Facility), CLI-17-10, 85 NRC 221, 222-23 (2017). Interestingly, BN fails even to cite, much less distinguish, this obviously controlling precedent in the very same proceeding in its pleading or accompanying table of authorities.

to speculate as to the possible regulatory requirements that arguably could apply to it. Nonetheless, for each possible construction of the BN Filing, it must be summarily rejected:

- To the extent it amounts to a general adjudicatory motion, it is untimely, and must be rejected under the principles of *res judicata* based on the Commission's decision in CLI-17-10, and further because BN failed to consult with the other parties prior to filing;[7]

- To the extent it can be viewed as a petition for reconsideration of the uncited Commission decision in CLI-17-10, it is untimely, and fails to demonstrate a clear and material error in that decision; and

- To the extent it can be viewed as a request for a stay of the NRC's licensing review, it fails to demonstrate irreparable harm, or satisfy any of the other criteria for issuance of a stay.

Aside from these gross procedural deficiencies, the BN Filing also should be rejected because it fails to establish any legitimate basis for its demand that the Commission convene a "separate proceeding" solely to challenge the NRC's decision to review the Applications. Specifically, neither the Atomic Energy Act of 1954, as amended ("AEA"), nor the NWPA provides an entitlement to such a proceeding. Moreover, NRC docketing decisions simply are not subject to challenge. And BN's assertion that the NRC has "no lawful basis to review the [A]pplications" is categorically false, and amounts to an impermissible attack on the AEA itself. Finally, even if BN's requested proceeding was convened, the BN Filing fails to plead facts sufficient to demonstrate standing to participate therein.

As explained further in the discussion below, for all of these many reasons, the BN Filing should be summarily rejected.

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[7] As noted above, *supra* note 2, the Fasken and PBLRO Filing also should be rejected because the movant failed to serve the pleading on ISP.

II. WCS CISF PROCEDURAL HISTORY

On April 28, 2016, Waste Control Specialists LLC ("WCS") submitted to the NRC an Application for a specific license pursuant to 10 C.F.R. Part 72 for a Consolidated Interim Storage Facility ("CISF") on its site located in western Andrews County, Texas. WCS currently operates Low-Level Waste and Mixed Waste facilities on this site.

On January 30, 2017, the NRC published a notice in the *Federal Register* announcing its acceptance of the WCS CISF Application and an opportunity to request a hearing and petition for leave to intervene.[8] On April 18, 2017, WCS requested that the NRC temporarily suspend all review activities associated with its Application.[9] The next day, WCS and the NRC Staff jointly requested that the Notice of Hearing Opportunity be withdrawn, pending possible future resumption of the Application review.[10] BN and two other petitioners filed a joint response presenting seven requests to the Commission associated with the withdrawal.[11] Most notably, the petitioners requested that, if the application review resumes, the NRC convene a "separate opportunity" outside the normal hearing process in 10 C.F.R. Part 2 for the sole purpose of considering "motions to dismiss the application for lack of jurisdiction," *i.e.*, to argue that the Application is inconsistent with the NWPA.[12]

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8 *See* License Application; Docketing and Opportunity to Request a Hearing and to Petition for Leave to Intervene, 82 Fed. Reg. 8773 (Jan. 30, 2017) ("Notice of Hearing Opportunity"). On April 4, 2017, and in a corrected notice dated April 10, 2017, the NRC published in the *Federal Register* (82 FR 16,435; 82 FR 17,297) an order granting all petitioners an extension of time until May 31, 2017, to file hearing requests on WCS's Application.

9 Letter from R. Baltzer, WCS, to NRC Document Control Desk (Apr. 18, 2017) (ML17110A206).

10 Joint Request to Withdraw the Federal Register Notice Providing an Opportunity to Submit Hearing Requests (Apr. 19, 2017) (ML17109A480).

11 Response from Beyond Nuclear, SEED Coalition, and Sierra Club to Joint Request to Withdraw the Federal Register Notice Providing an Opportunity to Submit Hearing Requests (Apr. 28, 2017) (ML17118A268).

12 *Id*. at 2.

On June 22, 2017, the Commission issued its decision in CLI-17-10 granting WCS's and the Staff's request to withdraw the Notice of Hearing Opportunity, and explicitly rejecting BN's (and the other petitioners') request for "an extra process that is not contemplated under [the NRC's] procedural regulations."[13] Rather, the Commission directed that, should the proceeding resume, such arguments "may be raised in an intervention petition" under 10 C.F.R. § 2.309.[14]

By letters dated June 8, 2018, and July 19, 2018, ISP (a joint venture between WCS and Orano CIS, LLC) submitted a request to the NRC to resume review of the Application for the WCS CISF, and submitted an updated version of the Application.[15] On August 29, 2018, the NRC published a notice in the *Federal Register* announcing its acceptance of the updated Application and providing an opportunity to request a hearing and petition for leave to intervene (on or before October 29, 2018).[16] In other words, the very opportunity to file an intervention petition contemplated by the Commission in CLI-17-10 is now pending.

On September 14, 2018, BN submitted the BN Filing on the adjudicatory dockets for both the ISP WCS CISF proceeding, and a separate proceeding involving Holtec International's ("Holtec") license application, also under 10 C.F.R. Part 72 (collectively, the "Applications").[17] However, BN disavows any consideration of the BN Filing within the scope of either of those

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13 *WCS*, CLI-17-10, 85 NRC at 222-23.

14 *Id*. at 223.

15 Although ISP is the new applicant name, the proposed facility name remains the "WCS CISF."

16 *See* Interim Storage Partner's Waste Control Specialists Consolidated Interim Storage Facility; Revised License Application; Opportunity to Request a Hearing and to Petition for Leave to Intervene; Order Imposing Procedures, 83 Fed. Reg. 44,070 (Aug. 29, 2018) ("Notice of Hearing Opportunity").

17 *See generally* BN Filing at 2; Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel; License application; opportunity to request a hearing and to petition for leave to intervene; order, 83 Fed. Reg. 32,919 (July 16, 2018).

proceedings; rather, BN requests that the Commission "establish a separate proceeding" solely "for consideration of" the BN Filing.[18]

III. THE COMMISSION SHOULD REJECT THE UNAUTHORIZED FILING FOR NUMEROUS, INDEPENDENT REASONS

BN fails to identify any procedural basis in the NRC's rules of practice and procedure or other authority for its filing, which is understandable because the NRC rules do not, and should not, allow an organization who is not even a party to file a dispositive motion prior to even filing a hearing request. Nevertheless, as explained further below, under any possible construction, the BN Filing must be summarily rejected on procedural grounds. It also must be rejected for lacking any legitimate basis to establish an entirely separate proceeding solely to adjudicate the BN Filing. Finally, even if some such basis were conjured, BN fails to demonstrate standing appropriate to the claim.

A. To the Extent the BN Filing Is Treated as a Motion Filed Pursuant to 10 C.F.R. § 2.323, It Must Be Rejected

The NRC's practice and procedure requirements with regard to motions in NRC proceedings are set forth in 10 C.F.R. § 2.323. These requirements specify that "[a]ll motions must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises."[19] Furthermore, the regulations unequivocally state that:

> [a] motion *must* be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.[20]

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18 BN Filing at 2. BN concedes its NWPA challenge is beyond the scope of those proceedings.

19 10 C.F.R. § 2.323(a)(2).

20 *Id*. § 2.323(b) (emphasis added).

Even if a moving party believes that consultation with an opposing party might prove futile, the regulation requires a reasonable effort to consult prior to filing a motion.[21]

The BN Filing satisfies neither of these requirements. First, BN requests that the Commission convene a proceeding to consider its demand that the NRC discontinue its review of, and dismiss, the WCS CISF Application.[22] In essence, this request seeks to challenge the NRC's decision to review the Application in the first place—*i.e.*, its docketing decision. The NRC's initial docketing decision on the WCS CISF Application was published in the *Federal Register* on January 30, 2017, more than a year and a half ago, and well past the 10-day deadline. Although the NRC Staff accepted the updated Application on August 29, 2018,[23] that event is not a new "occurrence or circumstance" for the BN Filing, because the updated Application is not materially different than the original Application for the purposes of the BN Filing.[24] Nonetheless, BN submitted the BN Filing on September 14, 2018—sixteen days after the NRC Staff published a notice in the *Federal Register* announcing its "administrative completeness review found the revised application acceptable for a technical review."[25] Accordingly, BN's motion is untimely; and BN offers no showing for why it could not have filed sooner.

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21 *Entergy Nuclear Vt. Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 130-31 (2006). While NRC tribunals have been uneven in application of the rule with parties unfamiliar with NRC process, BN and its counsel are not strangers to NRC adjudicatory proceedings or rules of procedure.

22 BN Filing at 2, 22.

23 Notice of Hearing Opportunity, 83 Fed. Reg. at 44,070.

24 Likewise, to the extent the BN Filing could be viewed as challenging the NRC's position that BN's NWPA-based arguments are "beyond the scope of the NRC staff's acceptance review," as articulated in a letter to BN's counsel in 2016, it also is woefully untimely. *See* Letter from M. Dapas, NRC, to D. Curran, Waste Control Specialists LLC (Consolidated Interim Spent Fuel Storage Facility), Docket No. 72-1050 (Dec. 8, 2016) (ML16337A024).

25 Notice of Hearing Opportunity, 83 Fed. Reg. at 44,071.

Second, the BN Filing "must"—pursuant to the plain language of the regulation—"be rejected" because it did not include a certification of a sincere effort to consult with the other parties. Nor did BN *actually* consult with ISP prior to submitting the BN Filing. Accordingly, its dismissal is required by law.

Notwithstanding its obvious procedural defects, the BN Filing also must be rejected under the principles of *res judicata*. When certain issues have been adequately explored and resolved in an earlier phase of an NRC proceeding, a participant may not re-litigate that issue in a subsequent phase of the proceeding unless materially different circumstances are present.[26] Here, the demand in the BN Filing—that the NRC provide a separate opportunity to challenge the NRC's ability to review the WCS CISF Application based on BN's claim that it "violates" the NWPA—was adequately considered and addressed by the Commission in CLI-17-10. And BN identifies no new, materially different circumstances here. The Commission, not BN, decides what adjudicatory procedures to apply to issues before it. Accordingly, BN may not re-litigate that issue via the BN Filing. Rather than this unauthorized filing, BN has the opportunity now, an opportunity it acknowledges, to submit an intervention petition, which the Commission identified in CLI-17-10 as the appropriate NRC process for BN's challenge.

B. To the Extent the BN Filing Is Considered a Request for Reconsideration of CLI-17-10, It Must Be Rejected

Motions for reconsideration of previous adjudicatory rulings are subject to the requirements of 10 C.F.R. § 2.345. Specifically, § 2.345(a)(1) requires that such requests be filed "within ten (10) days after the date of the decision." Once the opportunity to file a motion for reconsideration has run, a final decision becomes the law of the case and may not

[26] *See, e.g.*, *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-942, 32 NRC 395, 402-03 (1990).

subsequently be challenged.[27] Furthermore, § 2.345(b) requires movants to "demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid." "In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales" discussed in earlier pleadings.[28]

The BN Filing satisfies neither of these requirements. First, CLI-17-10 was decided on June 17, 2017.[29] BN submitted the BN Filing on September 14, 2018—which is obviously not "within ten (10) days after the date of the decision." Accordingly, BN's reconsideration request is untimely; and BN, again, offers no showing for why it could not have filed sooner. Moreover, because the opportunity to challenge CLI-17-10 has run, it is now the law of the case and may not be challenged here.[30]

More fundamentally, the BN Filing does not even acknowledge the existence of the Commission's decision in CLI-17-10, much less plead or demonstrate any purported "clear and material error" therein. BN merely seeks to reargue facts and rationales discussed in its earlier pleading—a purpose for which the "extraordinary action" of granting a request for reconsideration is unwarranted. Accordingly, to the extent the BN Filing could be construed as a request for reconsideration of CLI-17-10, it must be denied.

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27 *Ga. Power Co., et al.* (Vogtle Electric Generating Plant, Units 1 & 2), LBP-94-16, 39 NRC 257, 259 (1994).

28 *See* Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004); *see also, e.g.*, *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980) (holding that repetition of arguments previously presented does not present a basis for reconsideration).

29 *WCS*, CLI-17-10, 85 NRC at 224.

30 *Vogtle*, LBP-94-16, 39 NRC at 259.

C. To the Extent the BN Filing Could Be Construed as a Stay Request, It Must Be Rejected

Next, to the extent the BN Filing could be interpreted as a request to stay the NRC's review of the WCS CISF Application pending resolution of the issues raised in the BN Filing, it also must be rejected. Indeed, the Commission considered—and rejected—a nearly identical challenge and stay request in the *Private Fuel Storage* ("*PFS*") proceeding.[31] And it should do so again, here, for the same reasons, and because "suspension of licensing proceedings [is] a 'drastic' action that is not warranted absent 'immediate threats to public health and safety.'"[32]

More specifically, in 2002, a party to the *PFS* proceeding submitted a filing to the Commission: (1) arguing that the NWPA deprived the NRC of "jurisdiction" to consider the *PFS* application for a license to construct and operate an independent spent fuel storage installation ("ISFSI"), because the statute purportedly prohibited "private, away-from-reactor storage facilities," and (2) requesting a stay of the license review while the issue was being resolved.[33] The factual scenario is nearly identical here: BN argues that the NRC lacks jurisdiction to consider the WCS CISF Application for a license to construct an ISFSI because such a facility purportedly would "violate" the NWPA. Thus, the *PFS* decision is highly instructive.

In determining whether to grant a stay of a licensing proceeding, the Commission looks at four factors: (1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; (2) whether the petitioner faces irreparable injury if a stay is not granted; (3) whether the issuance of a stay would harm other interested parties; and (4) where the public

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31 *See Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260 (2002).

32 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 (2008) (citing *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000)).

33 *PFS*, CLI-02-11, 55 NRC at 261.

interest lies.[34] In *PFS*, the Commission found that the stay request met none of these. Moreover, if the presiding officer finds that the first two factors are met, it is not necessary to give lengthy consideration to balancing the other two factors.[35]

As to the first factor, the Commission in *PFS* found that, because the NWPA did not "directly," "on its face," prohibit licensing of the contemplated ISFSI, the movant had not made a strong showing of probable success on the merits.[36] Likewise, here, BN does not argue that the NWPA, in explicit terms, prohibits licensing of the contemplated CISF.[37] Thus, as in *PFS*, BN also has not made a strong showing of probable success.

Second, in *PFS*, the Commission found that the movant had not demonstrated irreparable injury where its only asserted harm was litigation expense.[38] "It is well established in Commission case law . . . that we do not consider the incurrence of litigation expenses to constitute irreparable injury in the context of a stay decision."[39] Here also, BN's only assertion

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34 *Id*. at 262-63 (citing *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); *Allied-Gen. Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975)).

35 *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985) (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1& 2), ALAB-794, 20 NRC 1630,1635 (1984)); *Hydro Res., Inc.*, LBP-98-5, 47 NRC 119, 120 (1998).

36 *PFS*, CLI-02-11, 55 NRC at 263.

37 *See* BN Filing at 11-15, 20-22 (discussing the "History of Spent Fuel Storage and Policy in the U.S." and raising arguments about title to, and transportation of, spent fuel, but making no assertion that the NWPA facially prohibits construction and operation of a CISF). Moreover, the BN Filing is facially deficient because BN's argument—that the Applications purportedly "violate" the NWPA—relies on the false assumption that the activities contemplated in the Applications inherently would require DOE to take title to the spent fuel at some point prior to the completion of a permanent repository (which BN contends is impermissible under existing law). But, in fact, the WCS CISF Application does not rely on this assumption; rather, it contemplates a range of scenarios, including some supported by private activities that would not require DOE involvement.

38 *PFS*, CLI-02-11, 55 NRC at 263.

39 *Id*. (citing *Sequoyah*, CLI-94-9, 40 NRC at 6; *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984)).

of harm is from "the costly and unnecessary expenses of challenging the applications."[40] And likewise, it is not enough to warrant a stay of the license review.

Finally, the Commission in *PFS* found that, in light of its findings on the first two factors, delaying the proceeding would inconvenience the other parties, and be contrary to the public interest.[41] So too here. Accordingly, to the extent the BN Filing is construed as a stay request, it should be rejected for the same reasons articulated in the *PFS* case.

D. BN Fails to Identify Any Legitimate Basis to Establish a New "Proceeding" Solely to Consider the BN Filing

Aside from its obvious procedural deficiencies, the BN Filing also should be rejected because it fails to establish any basis for its demand that the Commission convene a "separate proceeding" solely to challenge the NRC's decision to review the Applications.

1. Neither the AEA nor the NWPA Provide a Hearing Opportunity for a Proceeding to Challenge the NRC's Docketing Decision

BN does not base its BN Filing on any active "proceeding." Instead, it requests that the Commission convene an entirely *new* proceeding in order to adjudicate its demand in the BN Filing that the NRC discontinue its review of, and dismiss, the Applications.[42] In essence, this request seeks to challenge the NRC's decisions to review the Applications in the first place—*i.e.*, its docketing decisions. But BN fails to identify any legal right to a hearing for this purpose. Nor is there one.

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40 BN Filing at 1.

41 *PFS*, CLI-02-11, 55 NRC at 263.

42 BN Filing at 2, 22.

Section 189(a) of the AEA "does not confer the automatic right of intervention upon anyone."[43] Rather, the AEA specifies the limited subset of proceedings that allow for a hearing opportunity.[44] Specifically, the AEA requires a hearing opportunity in any proceeding for:

- "the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control;"
- "the issuance or modification of rules and regulations dealing with the activities of licensees;" or
- "the payment of compensation, an award, or royalties" under certain sections of the AEA.[45]

Hearings are not required for any other proceeding, or where there is no proceeding at all, because, "as should be obvious, there is no general right to a hearing for a hearing's sake."[46] And as the Commission has repeatedly held, "[a]gency actions that are not among those listed [in section 189a] do not give rise to a hearing right."[47] Because a proceeding to challenge a docketing decision is "not among those listed in section 189a," there is no hearing right associated with the type of proceeding contemplated in the BN Filing.

Furthermore, BN identifies no provision in the NWPA that would confer on it a right to a hearing before the NRC to challenge an NRC Staff docketing decision—nor is there such a provision. Thus, the NWPA likewise does not support the BN Filing.

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43 *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) (quoting *Business and Professional People for the Public Interest v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974)).

44 AEA § 189(a)(1)(A).

45 *Id*.

46 *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-01-10, 53 NRC 273, 282 (2001), *aff'd*, 54 NRC 349 (2001), *reconsid. denied*, 55 NRC 1 (2002).

47 *Entergy Nuclear Vt. Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-16-17, 84 NRC 99, 116 (2016) (citing *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 466 (2001) (in turn, citing *Mass. v. NRC*, 878 F.2d 1516)).

2. NRC Docketing Decisions Are Not Subject to Challenge

The NRC's docketing decisions are a matter of NRC Staff discretion and are not subject to challenge. As the Commission has clearly stated, a "docketing decision is not challengeable in an adjudicatory proceeding. Instead, in adjudicatory proceedings 'it is the license application, not the NRC staff review, that is at issue.'"[48] Notably, the NRC has previously advised BN's counsel on this very issue, explaining that, "[e]ven after a notice of opportunity to request a hearing and intervention has been issued, the Staff's docketing decision is outside the scope of our adjudicatory proceedings."[49] Because BN seeks, again, to challenge the NRC Staff's decision to docket and review the WCS CISF Application—a discretionary act not subject to challenge—and because the Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing,"[50] BN has not identified any cognizable basis for an entirely new proceeding.

3. BN's Assertion that the NRC Is Prohibited from Reviewing the WCS CISF Application Is an Impermissible Challenge to the AEA

BN's overarching assertion in the BN Filing—that the NRC "has no lawful basis to review the [A]pplications"[51]—is both flatly incorrect and amounts to a challenge to the AEA itself. As explained in Section 161.h of the AEA,[52] the Commission is authorized to "consider in

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48 *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-08-15, 68 NRC 1, 3 n.2 (2008) (quoting *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 350 (1998)).

49 *See* Letter from A. Bates, NRC, to D. Curran and J. Blackburn, TSEP, Exelon Nuclear Texas Holdings, LLC (Victoria County Station, Units 1 and 2), Docket Nos. 52-031-COL and 52-032-COL at 2 (Dec. 30, 2008) (ML083650299) (citing *U.S. Dep't of Energy* (High Level Waste Repository), CLI-08-20, 68 NRC 272, 274 (2008)).

50 Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

51 BN Filing at 22.

52 AEA § 161.h (codified at 42 U.S.C. § 2201(h)).

a single application one or more of the activities for which a license is required by this Act." The WCS CISF Application seeks a license to construct and operate a CISF, which are activities that require a license under the AEA.[53] The AEA provides no other limitations on the Commission's ability to "consider" an "application." Thus, pursuant to the plain text of the AEA, and contrary to BN's assertion, the NRC most assuredly has a "lawful basis" to "consider" the WCS CISF Application.

To the extent BN seeks a new proceeding to argue that the NRC *should* be prohibited from considering applications with which BN has policy objections, its remedy lies with the legislative process to amend the AEA.[54] Otherwise, the BN Filing amounts to an impermissible collateral attack on the AEA as it exists today, and fails to identify a legitimate basis for convening a new proceeding, because "[a] petitioner may not challenge applicable statutory requirements as part of an administrative adjudication."[55]

4. BN Fails to Demonstrate Standing for Its Contemplated Proceeding

Finally, even assuming *arguendo* that the AEA provided a right to the hearing BN requests, and that BN was not prohibited by law from challenging the NRC's docketing decision and the AEA itself, BN still fails to demonstrate standing to participate in such a proceeding. By BN's own account, the proceeding contemplated by BN would address only one issue: the NRC's authority to engage in the administrative action of reviewing the Applications. It would *not* consider the NRC's ability to make the requisite AEA *safety* findings to grant the licenses

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53 *See generally* 10 C.F.R. Part 72.

54 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-08-9, 67 NRC 421, 431 (2008) (citing *Peach Bottom*, ALAB-216, 8 AEC at 21 n.33) (explaining that the adjudicatory process is not the proper venue for a challenge "that merely addresses petitioner's own view regarding the direction regulatory policy should take.")

55 *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 605 (2009).

requested by those Applications. At bottom, BN simply has not articulated any cognizable injury to itself or its members from this benign administrative action.[56]

The Commission's regulations in 10 C.F.R. § 2.309(d)(1) require a petitioner to demonstrate standing before a hearing request may be granted. To do so, a petitioner must show: (1) an actual or threatened, concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.[57] The Commission has further explained that an asserted injury must be associated with *the challenged action*, "not simply a general objection to the facility."[58]

The BN Filing and its attachments assert traditional standing on the basis of various speculative and attenuated claims of purported "radiological injury" from the activity proposed in the Applications.[59] However, BN asserts no such radiological injury from the Staff's ministerial act of reviewing a license application at NRC headquarters in Rockville, Maryland—the action it seeks to challenge in its contemplated new "proceeding." Moreover, BN's conclusory claim that the NRC's ongoing review "unfairly subjects [BN] and its members to the costly and unnecessary expenses of challenging the [A]pplications,"[60] it has not identified a cognizable "injury" for standing purposes.[61] Nor do the affidavits of its members raise any

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56 The standing assertions in the Fasken and PBLRO Filing also fail to establish standing for the same reasons stated herein.

57 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Under some limited circumstances, such as a proceeding under the AEA to evaluate the radiological safety aspects of an application for a power reactor operating license, a petitioner may be presumed to have fulfilled the standing requirement based on his or her geographic proximity to the proposed action. *See Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 579-83 (2005).

58 *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-04, 49 NRC 185, 188 (1999).

59 BN Filing at 2-8 & Exhibits 6-7 (as to the WCS CISF Application).

60 BN Filing at 1.

61 *See, e.g.*, *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (holding that something more than mere litigation expense must be incurred to establish standing; "otherwise any litigant could create injury in

concerns related to litigation costs, whatsoever.[62] Accordingly, BN has not established traditional standing for the proceeding it demands.

Likewise, BN has not established standing under the proximity presumption. As a preliminary matter, the proximity presumption applies only to a limited subset of NRC proceedings, such as a proceeding under the AEA to evaluate the radiological safety aspects of an application for a power reactor operating license.[63] But BN points to no precedent for granting standing based on the proximity presumption in a proceeding to challenge the NRC Staff's docketing decision—nor is there any such precedent. And furthermore, although some adjudicatory decisions have permitted application of the proximity presumption in certain proceedings in which the petitioner has made an affirmative demonstration of an "obvious potential for offsite consequences," BN makes no such demonstration here. Nor could they. The Staff's ministerial act of *reviewing* the Applications involves no radioactive material, and no potential for offsite consequences therefrom.

IV. CONCLUSION

In CLI-17-10, the Commission logically identified to BN the appropriate adjudicatory form to raise legal contentions on the issue specified in the BN Filing. BN has filed this same issue as a proposed contention in the Holtec CISF proceeding and stated a plan to file one in this proceeding. For all of the many reasons discussed above, the BN Filing requesting an unprecedented separate and superseding adjudicatory proceeding should be summarily rejected.

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fact by bringing a case," effectively eviscerating the standing requirement); *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("An organization cannot . . . manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit.") (quoting *Spann*, 899 F.2d at 27). This position "would enable every litigant automatically to create an injury in fact by filing a lawsuit," and "has been expressly rejected by the Supreme Court." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 n.2 (D.C. Cir. 1987) (citing *Diamond v. Charles*, 476 U.S. 54, 55 (1986)).

62 *See* BN Filing, Exhibits 6-7 (as to the WCS CISF application).

63 *See Peach Bottom*, CLI-05-26, 62 NRC at 579-83.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.
this 24th day of September 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 72-1050
INTERIM STORAGE PARTNERS LLC	)	
	)	
(Consolidated Interim Storage Facility)	)	September 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "Interim Storage Partners LLC's Response Opposing Beyond Nuclear, Inc.'s Unauthorized September 14, 2018 Filing" was filed through the E-Filing system.

Signed (electronically) by Ryan K. Lighty

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