

**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
Beyond Nuclear Motion to Dismiss Licensing Proceeding for
HI-STORE Consolidated Interim Storage Facility**

On March 30, 2017, Holtec International (“Holtec”) filed with the Nuclear Regulatory Commission (“NRC”) an application to construct and operate a centralized interim storage facility to be located in Lea County, New Mexico. The NRC Staff accepted the application for review on March 19, 2018.¹ A notice of opportunity to request a hearing and to petition for leave to intervene was published on July 16, 2018.² The notice required that requests for hearings and petitions for leave to intervene be submitted by September 14, 2018. *Id.* at 32,919.

On September 14, 2018, Beyond Nuclear, Inc. (“Beyond Nuclear”) filed a motion to dismiss the licensing proceedings for the HI-STORE Consolidated Interim Storage Facility (“HI-STORE CIS”) claiming that “the central premise of . . . Holtec’s . . . application[] - that the U.S. Department of Energy (“DOE”) will be responsible for the spent fuel that is transported to and

¹ License Application; Docketing; Holtec International’s HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 12,034 (Mar. 19, 2018).

² License Application; Opportunity to Request a Hearing and to Petition for Leave to Intervene; Order; Holtec International’s HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919, 32,920 (Jul. 16, 2018).

stored at the proposed interim facilit[y] – violates the [Nuclear Waste Policy Act].”³ At the same time, Beyond Nuclear “in an abundance of caution,” filed a Hearing Request and Petition to Intervene whose single contention seeks to raise the same issue. *See* Beyond Nuclear’s Hearing Request and Petition to Intervene (Sept. 14, 2018) (Accession Number ML18257A324).

The Commission should dismiss the Motion because Beyond Nuclear has failed to demonstrate its standing, because the Motion is grossly out of time, and because the Commission has already ruled that this issue can and should be raised as a contention, rather than through a motion to dismiss.

I. Beyond Nuclear Has Failed to Demonstrate Standing

A. Applicable Legal Standards for Standing

The Atomic Energy Act (“AEA”) allows individuals “whose interest may be affected by the proceeding” to intervene in NRC licensing proceedings. 42 U.S.C. § 2239(a). The Commission has long applied judicial concepts of standing to determine whether a petitioner’s interest provides a sufficient basis for intervention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 N.R.C. 26, 30 (1998). “Essential to establishing standing are findings of (1) injury, (2) causation, and (3) redressability.” *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-3, 76 N.R.C. 613, 621 (2011). In other words, a petitioner must establish that (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., AEA and the National Environmental Policy Act of 1969 (“NEPA”));

³ Beyond Nuclear, Inc.’s Motion to Dismiss Licensing Proceedings for the HI-STORE Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act (“Motion”) at p. 1 (Accession Number ML18257A318). Beyond Nuclear filed an Errata to the Motion on September 18, 2018. The Motion also moved to dismiss the WCS Consolidated Interim Storage Facility, a separate application for a centralized interim storage facility also pending before the NRC. *See* 83 Fed. Reg. 44,070 (Aug. 29, 2018).

(2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *Private Fuel Storage, L.L.C.*, LBP-98-7, 47 N.R.C. 142, 168 (1998) (citing *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-1, 43 N.R.C. 1, 6 (1996); see also *Northern States Power Co. (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation)*, LBP-12-24, 76 N.R.C. 503, 507-508 (2012) (citing *EnergySolutions*, CLI-11-3, 76 N.R.C. 613, 621 (2011)). Both the Commission's Hearing Notice for this proceeding and its Rules of Practice require a petitioner to set forth: (1) the nature of its right under the Atomic Energy Act (AEA) to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest.⁴

“[T]he petitioner bears the burden to provide facts sufficient to establish standing.” *PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant)*, CLI-10-7, 71 N.R.C. 133, 139 (2010). To demonstrate a distinct and palpable injury-in-fact sufficient to establish standing, the petitioner must demonstrate that the injury-in-fact is both “(a) concrete and particularized and (b) ‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-94-12, 40 N.R.C. 64, 72 (1994). Where there is no current injury and a party relies wholly on the threat of future injury, the fact that one can imagine circumstances where a party could be affected is not enough. The petitioner must demonstrate that “the injury is certainly impending.” *Northwest Airlines, Inc. v. Federal Aviation Admin.*, 795 F.2d 195, 201 (D.C. Cir. 1986) (emphasis in original) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). In the NRC licensing

⁴ License Application; Opportunity to Request a Hearing and to Petition for Leave to Intervene; Order; Holtec International’s HI–STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919, 32,920 (Jul. 16, 2018); 10 C.F.R. § 2.309(d)(1).

context, “unsupported general references to radiological consequences are insufficient to establish a basis for injury” to establish standing. *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 N.R.C. 120, 130 (1992). The alleged injury, which may be either actual or threatened, must be both concrete and particularized, not “conjectural” or “hypothetical,” and standing will be denied when the threat or injury is too speculative. *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 N.R.C. 64, 72 (1994).

Where a petition seeks to base its claim to standing on economic loss, “what is necessary is a showing from the petitioner (or the individual it seeks to represent) that the purported economic loss has some objective fundament, rather than being based solely on the petitioner's (or affiant's) perception of the economic loss in light of the proposed licensing action.” *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 N.R.C. 164, 184 (2012), citing *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 N.R.C. 413, 432 (generic, unsubstantiated claims regarding health, safety, and property devaluation impacts are insufficient to establish standing), *aff'd*, CLI-03-1, 57 N.R.C. 1 (2003).

Under NRC case law, a petitioner may in some cases be presumed to have fulfilled the judicial standards for standing based on his or her geographic proximity to a facility or a source of radiation. For example, the NRC has held that the proximity presumption is sufficient to confer standing on an individual or group in proceedings under 10 C.F.R. Part 50 for reactor construction permits, operating license, or significant license amendments. *Florida Power and Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 N.R.C. 325, 329 (1989).

But the Commission has “required far closer proximity in other [(i.e., non-reactor)] licensing proceedings” and “determine[s] on a case-by-case basis whether the proximity presumption should apply, considering the obvious potential for offsite radiological consequences, or lack thereof, from the application at issue, and specifically taking into account the nature of the proposed action and the significance of the radioactive source.” *Consumers Energy Co.* (Big Rock Point ISFSI), CLI-07-19, 65 N.R.C. 423, 426 (2007) (quotation omitted); *see also Georgia Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 N.R.C. 111, 116-17 (1995) (whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source). In other words, the smaller the risk of offsite consequences, the closer one must reside to be realistically threatened by radiological consequences. The potential radiological risks for the HI-STORE CIS are considerably smaller compared other licensing actions “because an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release.” *Big Rock Point ISFSI*, CLI-07-19, 65 N.R.C. at 426.

Further, close proximity to potential radioactive waste transportation routes alone is insufficient to establish standing. *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 N.R.C. 357, 364 n.11 (2004) (“[M]ere geographical proximity to potential transportation routes is insufficient to confer standing; instead, . . . Petitioners must demonstrate a causal connection between the licensing action and the injury alleged.”), quoting *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 N.R.C. 413, 433-34 (2002), *aff’d*, CLI-03-1, 57 N.R.C. 1 (2003); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 N.R.C. 40, 43-44 (1990) (standing denied to

petitioner who resided 1 mile from likely transportation route and merely claimed that an accident along that route would cause an increased radiological dose); *accord Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 N.R.C. 518, 520 (1977) (assertion of injury because spent fuel would travel on railway track very near property was insufficient to establish standing). Nor is it enough to assert that additional spent nuclear fuel will be transported by rail or road, or that an accident may occur along a transportation route near which the petitioner resides. This is because

Nuclear waste safely and regularly moves via truck and rail throughout the nation under regulations of the NRC and Department of Transportation (49 C.F.R. Parts 100–179). The mere fact that additional radioactive waste will be transported if decommissioning is authorized does not ipso facto establish that there is a reasonable opportunity for an accident to occur at [any location], or for the radioactive materials to escape because of accident or the nature of the substance being transported.

Pathfinder, LBP-90-3, 31 N.R.C. at 43. Consequently, standing will be denied where petitioners’

allegations of possible physical and/or economic injury are entirely speculative in nature, being predicated on the tenuous assumptions that the spent fuel will be shipped by the named carrier and that an accident might occur in the area proximate either to her residence or to her rental property.

Exxon Nuclear Co., LBP-77-59, 6 N.R.C. at 520. Indeed, standing will be denied even where petitioner resides within one block of the route over which radioactive materials will be transported and claims that “any accident of or spill from a truck carrying this material that occurred near [petitioner’s] home or workplace could result in some impact, even if minor.”

Int’l Uranium (USA) Corp. (Source Material License Amendment), LBP-01-08, 53 N.R.C. 204, 218, *aff’d* CLI-01-18, 54 N.R.C. 27, 31-32 (2001) (“the potential radiological consequences to [petitioner] from the transportation of the [radioactive] material, even in the case of an accident on the highway, are negligible”; “Presiding Officers in the past have declined to find that the

mere increase in the traffic of low-level radioactive material on a highway near the petitioner's residence, without more, constitutes an injury traceable to a license amendment that primarily affects a site hundreds of miles away”). “Mere potential exposure to minute doses of radiation within regulatory limits does not constitute a ‘distinct and palpable’ injury on which standing can be founded.” *EnergySolutions*, CLI-11-3, 73 N.R.C. at 623 (denying petitioner’s standing claim for failing to show there would be any impact from the transport of radioactive materials to be imported) (quotation omitted).

Where an organization asserts a right to represent the interests of its members, judicial concepts of standing require that the petitioner show that (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization’s lawsuit. *Private Fuel Storage*, CLI-98-13, 48 N.R.C. at 30-31.

B. Beyond Nuclear Has Failed to Demonstrate Standing

Beyond Nuclear has failed in its burden to demonstrate that it or its members have suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact as a result of the licensing of the HI-STORE CIS. Nor has Beyond Nuclear demonstrated that that it is entitled to any proximity presumption in this proceeding. For these reasons, Beyond Nuclear has failed to demonstrate standing in this proceeding.

Beyond Nuclear claims that it has demonstrated standing because its members live and travel near transportation routes that Holtec will use to transport spent nuclear fuel, and thus those members will suffer radiological injury, either from exposures during normal operations or accidents, or because they will not know which routes to travel to avoid exposures. Motion at 4-6. Beyond Nuclear also claims to have standing based on potential, but unspecified, negative

impacts to its members' property values. Motion at 7-8. Beyond Nuclear further claims to have standing due to the "proximity presumption" based on its members who own property and have frequent and regular contacts near the proposed facility. Motion at 9-11. More specifically:

- Danny Berry states that he owns property within 3-15 miles of the proposed facility; regularly spends time within 15 miles of the proposed facility; regularly travels on roads and highways around the proposed facility; and is "concerned" about radiation risks from the proposed facility and shipments of SNF to the facility, "concerned" about potential impacts to his right to travel near the facility, "concerned" about a potential reduction in his property value from the "real or perceived risks of exposure to radiation releases", and is "concerned" about potential impacts to the economic prosperity of the local community. Exhibit 01 at ¶¶ 4, 5, 6, 7, 8, 9, 10, 11.
- Jimi Gadzia, states that she lives within 900 yards of the Burlington Northern Santa Fe Carlsbad Subdivision railroad (and owns a farm 6 miles from it) and regularly travels on roads near or crossing the rail routes nearby; is a partial owner of mineral leases within 10-16 miles of the proposed facility; is "concerned" about risks to her health and safety and property rights; is "concerned" about a consequences from a potential SNF accident; is "concerned" about the impact to her property value from the transport of SNF nearby due to "real or perceived risks of exposure to radiation releases"; and is "concerned" about her health and safety and her right to travel from potential unwanted doses of radiation from SNF shipments. Exhibit 02 at ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11.
- Keli Hatley states that she lives one mile from the proposed facility; regularly spends time within five miles of the facility, including at her sister's house 2 miles away; will ranch cattle along the fence line of the proposed facility; regularly travels on roads near the proposed facility; and is "concerned" about risks to her and her family's health; is "concerned" about radiation risks from living near the proposed facility; is "concerned" about potential harm to herself, her family, and cattle from traffic accidents involving SNF; is "concerned" about being unable to avoid potential radiation exposures from SNF transportation and from the proposed facility; and is "concerned" about potential impacts to her right to travel near the proposed facility. Exhibit 03 at ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.
- Nick King states that he lives within 450 yards of one Burlington Northern Santa Fe Carlsbad Subdivision railroad, 800 yards of a second Burlington Northern Santa Fe Carlsbad Subdivision railroad, and within one mile of a railyard, which he understands may be used to ship SNF; is "concerned" about risks from normal and accidental radiation releases during transport of SNF; and is "concerned" that the "real or perceived risks" from transportation can reduce property values along SNF transportation routes. Exhibit 04 at ¶¶ 3, 4, 5, 6, 7.
- Margo Smith states that she lives, works, and recreates with her family within 7 miles of the proposed Holtec facility; will ranch cattle along the fence line of the proposed facility; regularly travels on Highway 62/180 where it parallels the Burlington Northern

Santa Fe Carlsbad Subdivision railroad and other roads near the proposed facility; is “concerned” about potential radiation exposure risks to herself and her family from the proposed facility and from SNF transportation; is “concerned” that the “real or perceived risks of exposure to radiation releases” can impact to the value of her home and ranch; is “concerned” about potential harm to herself and her family from additional traffic; and is “concerned” about potential impacts to her right to travel near her home. Exhibit 05 at ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

- Rose Gardner states that she lives within 7 miles of the proposed Holtec facility; regularly spends time with her family at their home within 5 miles of the proposed facility; owns a shop and raises horses and chickens, both within 6 miles of the proposed facility; uses roads that parallel potential railroad SNF transportation routes; is “concerned” about potential radiation risks to herself and her family from living near the facility; is “concerned” that the “real or perceived risks of exposure to radiation releases” can reduce the value of her home; is “concerned” about potential doses of radiation from the transportation of SNF; is “concerned” about potential impacts to her right to travel near her home. Exhibit 06 at ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.
- Gene Harbaugh states that he lives within 250 yards of a Burlington Northern Santa Fe Carlsbad Subdivision railroad and within 500 yards of another railyard through which SNF may be transported; is “concerned” about potential radiation risks to his health and safety posed by normal and accidental radiation releases from SNF transportation due to his regular travel in the area; and is “concerned” about the impact to his property value from the “real or perceived risk from transportation SNF on these railroads. Exhibit 08 at ¶¶ 3, 4, 5, 6, 7.

Beyond Nuclear has failed to demonstrate any one of its members would have standing in this proceeding.⁵ Beyond Nuclear’s members’ statements that they live near and regularly travel on transportation routes that may be used to ship SNF to the facility are insufficient to demonstrate that they have standing. Controlling Commission precedent holds that ““mere geographical proximity to potential transportation routes is insufficient to confer standing.”” *Plutonium Export License*, CLI-04-17, 59 N.R.C. at 364 n.11; quoting *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), 56 N.R.C. 413, 433-34 (2002), *aff’d*, CLI-03-1, 57 N.R.C. 1 (2003); *see also Pathfinder Atomic Plant*, LBP-90-

⁵ The Motion identifies an additional individual, D.K. Boyd, but his claim of standing applies only to the Waste Control Specialist facility, and not to Holtec’s. Motion at 11. Mr. Boyd’s asserted standing is therefore not discussed herein.

3, 31 N.R.C. at 43-44. It is not enough to demonstrate standing by asserting that additional spent nuclear fuel will be transported by rail or road, or that an accident may occur along a transportation route near which the petitioner resides. With respect to normal SNF transportation operations, “[m]ere potential exposure to minute doses of radiation within regulatory limits does not constitute a ‘distinct and palpable’ injury on which standing can be founded.”

EnergySolutions, CLI-11-3, 73 N.R.C. at 623. With respect to potential transportation accidents, such assertions are “entirely speculative.” *Nuclear Fuel Recovery and Recycling Center*, LBP-77-59, 6 N.R.C. at 520. Indeed, the Commission has rejected such speculative claims with the petitioner resided within one block of the transportation route. *Int’l Uranium (USA) Corp.*, LBP-01-08, 53 N.R.C. 204, 219, *aff’d* CLI-01-18, 54 N.R.C. 27, 31-32 (2001).

Beyond Nuclear’s speculative concerns with respect to potential property value impacts also miss the mark. Beyond Nuclear’s members merely are “concerned” with potential impacts to their property values and have provided no objective basis for this concern. *Ross In Situ Recovery Uranium Project*, LBP-12-3, 75 N.R.C. at 184 (citing *Diablo Canyon*, LBP-02-23, 56 N.R.C. at 432 (generic, unsubstantiated claims regarding health, safety, and property devaluation impacts are insufficient to establish standing), *aff’d*, CLI-03-1, 57 N.R.C. 1 (2003)). Beyond Nuclear’s members have not made any “nonsubjective showing” such as by “demonstrating the value of property at a comparable distance from [the proposed] facility had dropped from what it was prior to the submission of [the] license application,” or “actual sales/offers before and after the licensing proposal at issue in the proceeding, or by providing the declaration of a local realtor or property appraiser who furnishes an independent assessment of the property's value before and after the licensing action was proposed before the agency.” *Ross In Situ Recovery Uranium*

Project, LBP-12-3, 75 N.R.C. at 184. Absent such a showing, these speculative property value claims are insufficient to confer standing.

Finally, Beyond Nuclear's Members are not entitled to any proximity presumption to confer standing. As previously noted, the potential radiological risks for the HI-STORE CIS are considerably smaller compared other licensing actions "because an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release." *Big Rock Point ISFSI*, CLI-07-19, 65 N.R.C. at 426. Beyond Nuclear's members provide only conclusory statements of potential harm. Nowhere do they provide any plausible explanation of how radionuclides or radiation from inside sealed metal canisters emplaced below ground in steel and concrete storage vaults would reach them from the site. Beyond Nuclear claims that Holtec has "acknowledge[d] at least one plausible scenario that would result in off-site consequences from storage of spent nuclear fuel . . . a criticality accident is possible due to a flooded canister." Motion at 10 (citing SAR). This statement grossly mischaracterizes the application and therefore cannot be a basis for standing. Nowhere does the SAR state that there is a "plausible" criticality scenario. NRC rules require the design must assure that before a nuclear criticality is "possible," at least two unlikely, independent, and concurrent or sequential changes have occurred. 10 C.F.R. § 72.124(a). The SAR complies with this requirement by showing that "at least three unlikely (or non-credible) events would be required before accidental criticality could be possible at the HI-STORE facility," i.e. one step more remote than required by the regulation. SAR at Section 8.3.2, p. 415 of 651. These three unlikely/non-credible events are

- A flood greater than the 100,000 year flood, which is estimated to be only 4.8 inches, which level is lower than the air inlets or outlets of the storage modules;

- Even if a storage module were flooded, the internal cavity of the canister with the basket of fuel would remain dry, and thus reactivity would remain low, because the canister is sealed and its integrity is verified upon receipt. The aging management program is applied to ensure that canister leaks do not occur, thus making water in leakage very unlikely; and
- Canisters are not loaded on site, but always delivered in a 10 C.F.R. Part 71 approved transportation cask, further reducing the possibility of accidental criticality.

Id. at Section 8.3.2, p. 414-415. *See also id.* at p. 417 (“no wet fuel operations are performed, and fuel will always be in the dry and sealed canisters”). A potential criticality is not a credible scenario, and cannot be a basis to confer standing. Beyond Nuclear has provided nothing to the contrary.

For these reasons, Beyond Nuclear has failed to demonstrate standing.

II. Beyond Nuclear’s Motion to Dismiss Should be Dismissed

The first reason for the Commission to reject the Motion is that it was filed wholly out of time. As set forth above, the application for the Holtec HI-STORE CIS was filed in March 2017; a Federal Register notice of the NRC Staff’s docketing of the application was published in March 2018; and the notice of opportunity for hearing was published in July 2018. Public awareness of the project occurred earlier still. The NRC’s Rules of Practice require that “[a]ll motions must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.” 10 C.F.R. 2.323(a)(2). The circumstance from which the Motion arises is Holtec’s filing of the application which Beyond Nuclear claims is prohibited by the Nuclear Waste Policy Act. Since Beyond Nuclear does not suggest that there has been any recent change in applicable law, the occurrence or circumstance from which the Motion arises at the very latest occurred in July 2018, but more likely a year or more earlier. By any count, the occurrence or circumstance from which the motion arises is orders of magnitude beyond the 10-day limit. The Motion should therefore be dismissed as impermissibly tardy.

The second reason for the Commission to reject the Motion is that the Commission has already ruled that essentially the same motion to dismiss an application for a centralized interim storage facility on essentially the same grounds should be raised in an intervention petition, rather than by means of a motion to dismiss. In *Waste Control Specialists LLC* (Consolidated Interim Storage Facility), CLI-17-10, 85 N.R.C. 221 (2017), the Commission was faced with a request from Beyond Nuclear that the Commission not publish a new notice of opportunity for hearing on that facility until the Commission provided Beyond Nuclear “a separate opportunity for, and had ruled on, motions to dismiss the application for lack of jurisdiction because the application ‘is inconsistent with the licensing scheme set forth by the Nuclear Waste Policy Act (NWPA).’” 85 N.R.C. at 222-223. The Commission declined to afford the relief requested by Beyond Nuclear in that case because the issue could be raised as an issue of law in a contention. *Id.* at 223. The same principle applies here.⁶

For these reasons, we respectfully request that the Commission deny Beyond Nuclear’s motion. In light of these clear procedural deficiencies in the Motion, there is no need at this time to address the merits, though we note that both the Commission and the courts have rejected the arguments presented by the Motion to Dismiss.⁷

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

⁶ We question Beyond Nuclear’s failure to call attention to this Commission decision in its Motion.

⁷ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 N.R.C. 390 (2002); *Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536 (D.C. Cir. 2004).

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September 24, 2018

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NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer Opposing Beyond Nuclear's Motion to Dismiss Licensing Proceeding for HI-STORE Consolidated Interim Storage Facility has been served through the EFiled system on the participants in the above-captioned proceeding this 24th day of September, 2018.

/signed electronically by Anne R. Leidich/

Anne R. Leidich