September 24, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

Holtec International's Answer Opposing
Fasken Land and Minerals and Permian Basis Land and Royalty Owners
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, Fasken Land and Minerals and Permian Basis Land and Royalty Owners (collectively "Movants") filed a motion to dismiss the licensing proceedings for the HI-STORE Consolidated Interim Storage Facility ("HI-STORE CIS") claiming that the application is premised on the U.S. Department of Energy ("DOE") being responsible for the spent fuel that

[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).

would be transported to and stored at the proposed interim facility and that this alleged "premise" violates the Nuclear Waste Policy Act.[3]

The Commission should dismiss the Motion because Movants have failed to demonstrate their 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 in a licensing proceeding, rather than through a motion to dismiss.

I. Movants Have 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")); (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

[3] Fasken Motion to Dismiss Licensing Proceedings for HI-STORE Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility, dated September 14, 2018 ("Motion"). In addition to seeking to dismiss the HI-STORE CIS facility, the Motion also moved to dismiss the application for the WCS Consolidated Interim Storage Facility, another application for a centralized interim storage facility also pending before the NRC. *See* 83 Fed. Reg. 44070.

(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 context, "unsupported general references to radiological consequences are insufficient to establish a basis for injury" to establish standing. *Sacramento Mun. Util. Dist.* (Rancho Seco

[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).

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, L.L.C.*, CLI-98-13, 48 N.R.C. at 30-31.

B. Movants Have Failed to Demonstrate Standing

Movants have failed in its burden to demonstrate that they or their 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 have Movants demonstrated that that they are entitled to any proximity presumption in this proceeding. For these reasons, Movants have failed to demonstrate standing in this proceeding.

Movants claim that they have demonstrated standing because they have unnamed members and employees who live, work, and travel on or along transportation routes that Holtec will use to transport spent nuclear fuel, and thus those members and employees will suffer radiological injury, either from exposures during normal operations or accidents, or because they may not be able to avoid exposures. Motion at 3-4. Movants also claim to have standing based on potential, but unspecified, negative impacts to members' property values. Motion at 4-5. Movants further claim to have standing due to the "proximity presumption" because the company, Fasken Land and Minerals, owns property near the proposed facility. Motion at 5-6.

To support their standing claims, Movants have attached the Declaration of Tommy E. Taylor, Vice President of Fasken Management, LLC (the General Partner of Fasken Land and Minerals). Mr. Taylor states that he lives in Midland, Texas, and that Fasken Land and Minerals ("Fasken") is a member of the Permian Basin Land, Royalty and Operators Organization ("PBLRO"), and that Fasken "owns and/or leases property directly related to oil and gas activities that is/are located approximately 2 (two) miles from the proposed Holtec site." Taylor Decl. at ¶¶ 1, 3. Additionally, Mr. Taylor asserts that he "understands" that a radiation release from the Holtec facility or from transportation of spent nuclear fuel through or near the Permian Basin "may contaminate" areas with Movants' property interests; a contamination event has "the potential" to interrupt or foreclose oil and gas production impacting the value of oil and gas assets; a radiological contamination has "potential" health effects and may have economic costs associated with medical care that affect Movants; and "is concerned" that the proposed Holtec facility will become a de facto permanent storage facility with more radiation hazards over time. Taylor Decl. at ¶¶ 5, 6, 7, 8.

Movants have failed to demonstrate they have standing in this proceeding. First, the statements in the Motion concerning potential impacts to Movants' members or employees are not supported by Mr. Taylor's Declaration. Mr. Taylor states that he lives in Midland, Texas, which is over 100 miles away from Lea County, New Mexico, where the Holtec facility will be located. Mr. Taylor does not identify any specific individuals (i.e., Fasken employees, PBLRO members, or otherwise) who have agreed to be represented by him or Movants in this proceeding, and who will purportedly suffer any specific harm as a result of the licensing of the

Holtec facility.[5] These unsubstantiated and general claims of harm to individuals are therefore unsupported and insufficient to demonstrate standing vis-à-vis the proposed Holtec facility.

Movants' claims to standing boil down to mere assertions that a "radiation release" from the Holtec facility, or during transportation of spent nuclear fuel "through or near the Permian Basin," may contaminate areas where Movants' have oil and gas or property interests or production facilities. Taylor Decl. at ¶ 5. Such vague claims are insufficient to establish a distinct and palpable injury-in-fact to individuals, let alone "areas" of land. With respect to proximity to transportation routes, 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-90-3, 31 N.R.C. at 43-44. This is true 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) and for "entirely speculative" transportation accidents. *Nuclear Fuel Recovery and Recycling Center*, LBP-77-59, 6 N.R.C. at 520. Indeed, the Commission has rejected such speculative claims where an individual 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).

[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 6. Mr. Boyd's asserted standing is therefore not discussed herein.

Movants are not entitled to any proximity presumption to confer standing either. 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. Mr. Taylor provides only conclusory statements of potential harm. Nowhere does he 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 a site two miles away, or that that any "radiological contamination event" at the Holtec site could interrupt production activities at a site two miles away. Absent such a showing, these speculative claims are insufficient to confer standing.

Finally, the Motion's claim to standing based on potential, but unspecified, negative impacts to individuals' property values, Motion at 4-5, is insufficiently supported. Again, Movants have not identified any individuals whose property interests may be affected. To the extent that Movants claim their property values may be affected, generic, unsubstantiated claims regarding health, safety, and property devaluation impacts are insufficient to establish standing. *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, *aff'd*, CLI-03-1, 57 N.R.C. 1 (2003). Movants 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.

For these reasons, Movants have failed to demonstrate standing.

II. The 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 Movants claim is illegal. Underlying Movants' claim is that the Nuclear Waste Policy Act prohibits the NRC from licensing the HI-STORE CIS. Since Movants do 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 stretch, 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, Inc. 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.

For these reasons, we respectfully request that the Commission deny the 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.[6]

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

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[6] *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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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer Opposing Fasken Land and Minerals and Permian Basis Land and Royalty Owners Motion to Dismiss Licensing Proceeding for HI-STORE Consolidated Interim Storage Facility has been served through the EFiling system on the participants in the above-captioned proceeding this 24th day of September, 2018.

/signed electronically by Anne R. Leidich/

Anne R. Leidich