UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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

In the Matter of:	)	
	)	
Interim Storage Partners	)	Docket No. 72-1050
	)	
(WCS Consolidated Interim Storage Facility)	)	
	)	

BEYOND NUCLEAR'S REPLY TO HOLTEC INTERNATIONAL, INTERIM STORAGE PARTNERS LLC, AND NRC STAFF RESPONSES TO BEYOND NUCLEAR'S MOTION TO DISMISS

Beyond Nuclear submits this Reply in response to Holtec International's Answer Opposing Beyond Nuclear Motion to Dismiss Licensing Proceeding for HI-STORE Consolidated Interim Storage Facility ("Holtec Response"), Interim Storage Partner LLC's Response Opposing Beyond Nuclear, Inc's Unauthorized September 14, 2018 Filing ("ISP Response"), and NRC Staff's Response to Motions to Dismiss Licensing Proceedings ("NRC Response"), each filed on September 24, 2018 (collectively, the "Responses"). Beyond Nuclear provided sufficient (and virtually uncontested) support for its Motion to Dismiss (the "Motion"), followed all relevant procedural requirements, and established standing. Accordingly, the Nuclear Regulatory Commission ("NRC" or "Commission") should dismiss the Holtec and Interim Storage Partner ("ISP") licensing applications and terminate the licensing proceedings.

I. HOLTEC, ISP, AND THE NRC STAFF HAVE EFFECTIVELY CONCEDED THE MERITS OF BEYOND NUCLEAR'S CLAIMS BY IGNORING THEM.

The merits of Beyond Nuclear's Motion are almost entirely uncontested in the Responses. Only the Holtec Response makes passing reference to the merits in the final sentence ("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"). Holtec Response at 13 and n.7 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 N.R.C. 390 (2002) ("CLI-02-29") and *Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536 (D.C. Cir. 2004) (affirming CLI-02-29)). Not only does Holtec fail to explain its assertion that the Commission and the courts have already disposed of Beyond Nuclear's claims, but the assertion is patently incorrect. The cases on which Holtec relies, CLI-02-29 and *Bullcreek*, concern provisions of the Nuclear Waste Policy Act ("NWPA") that are entirely irrelevant to Beyond Nuclear's claims and facts that are entirely distinct from the facts at issue in this case.

In CLI-02-29, the NRC found that Section 135(h) of the NWPA, 42 U.S.C. § 1015(h), does not prohibit the NRC from issuing a license for a privately-owned, away-from-reactor storage facility. 56 N.R.C. at 405-406. Beyond Nuclear does not challenge that holding, nor does it contest that Holtec and ISP could own and operate away from reactor storage facilities. Rather, Beyond Nuclear asserts that Sections 111, 123, and 302(a)(5)(A) of the NWPA (42 U.S.C. §§ 10131, 10143, and 10222(a)(5)(A)), expressly prohibit Holtec's and ISP's plans to have the Department of Energy ("DOE") take title to the spent fuel before a permanent repository has opened. Motion at 19-20. CLI-02-29's holding that the NWPA contains no prohibition against private away-from-reactor storage of spent fuel (56 N.R.C. at 397) has no bearing on the entirely

different question of whether the NWPA precludes Holtec and ISP from assuming DOE ownership of the spent fuel.

In fact, CLI-02-29 *supports* Beyond Nuclear's Motion by clarifying that in passing the NWPA, Congress "belie[ved] that interim storage was the generator's responsibility." 56 N.R.C. at 404. As the Commission explained:

> In debates before the full House [of Representatives] in November 1982, [Rep. Stanley N. Lundine of New York] argued that federal interim storage would detract from efforts to develop a permanent repository, would lead to increased transportation of fuel, and would lead to utilities' avoiding taking initiative to solve their own spent fuel storage problems.

Id. (citing 128 Cong. Rec. 28,032-33 (1983)). Federal interim storage could "only be a 'safety valve' if the generators' self-help efforts failed." *Id.* (citing comments of Rep. Lujan, 128 Cong. Rec. at 28,034 (1982)). And these "safety valves" were established by specific terms in the NWPA, not by *ad hoc* measures. *Id.* As declared by the Commission, "[t]he NWPA's statutory limits were clearly imposed . . . to limit federal involvement in an area that was seen as private industry's responsibility." *Id.* Thus, rather than barring consideration of Beyond Nuclear's Motion, CLI-02-29 supports and is fully consistent with Beyond Nuclear's claims.

II. BEYOND NUCLEAR'S MOTION TO DISMISS IS NOT BARRED BY CLI-17-10 AND IS CONSISTENT WITH CLI-02-11.

The NRC Staff Response, Holtec Response, and ISP Response argue that the Commission should decline to review Beyond Nuclear's Motion because it seeks the same relief that was denied by the Commission in *Waste Control Specialists, L.L.C.* (Consolidated Interim Storage Facility), CLI-17-10, 85 N.R.C. 221 (2017) ("CLI-17-10"). NRC Staff Response at 3-4, Holtec Response at 13, ISP Response at 8-9. But CLI-17-10 does not apply here; no motion to dismiss or otherwise terminate the Waste Control Specialists LLC ("WCS") licensing proceeding was before the Commission when it issued its decision. Instead, CLI-17-10 granted a request by

WCS and the NRC Staff to suspend the WCS licensing proceeding and responded to a set of procedural requests made by petitioners in the event the WCS proceeding were to resume. One of petitioners' requests was:

> that the NRC not publish a new notice of opportunity to request a hearing on WCS's license application until after [the Commissioners] have provided a separate opportunity for, and have ruled on, motions to dismiss the application for lack of jurisdiction.

85 N.R.C. at 222. The Commission refused to delay re-noticing the hearing opportunity "to add an extra process that is not contemplated under our procedural regulations," and held that petitioners could raise their NWPA-related claims "after the hearing is re-noticed; 10 C.F.R. § 2.309(f)(1) specifically permits petitioners to present contentions that raise issues of law." *Id.*

In accordance with CLI-17-10, Beyond Nuclear waited until after the posting of hearing notices for both the Holtec and ISP proceedings before filing their Motion. As also instructed by CLI-17-10, Beyond Nuclear filed a contention in the Holtec proceeding asserting its NWPA claims, and intends to do so in the ISP proceeding. Thus, Beyond Nuclear has either complied or will shortly comply with all of the requirements of CLI-17-10.[1]

Beyond Nuclear respectfully submits, however, that under a previous Commission ruling, the appropriate vehicle for raising Beyond Nuclear's NWPA claims is a motion to dismiss the proceeding, filed before the Commissioners. In *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 N.R.C. 260 (2002) ("CLI-02-11") (the decision giving rise to CLI-02-29), the Commission ruled that claims of NWPA noncompliance raised "a fundamental issue going to the very heart" of the proceeding, therefore warranting "immediate merits consideration" by the Commission. 55 N.R.C. at 264. The Commission reasoned that "if

[1] Consistent with CLI-02-29, Beyond Nuclear also did not seek a stay of the proceeding.

in fact NRC has no authority to issue PFS a license, completion of the licensing process would be a waste of resources for all parties as well as the Commission." *Id.* Thus, the Commission conducted a legal briefing on the question of whether licensing of the Private Fuel Storage facility was prohibited by the NWPA. *Id.* at 265.

While the NWPA-related issues were different in the *Private Fuel Storage* proceeding (CLI-02-11 and CLI-02-29) from the issues raised here, the two cases are very similar in the respect that they challenge NRC's authority to consider license applications that may violate the NWPA. Given the fundamental importance of the issue, a briefing before the Commission is the more appropriate, sensible, and resource-conserving way to resolve Beyond Nuclear's concerns.

III. BEYOND NUCLEAR'S MOTION TO DISMISS IS NOT PROCEDURALLY DEFECTIVE UNDER 10 C.F.R. PART 2 PROCEDURAL RULES BECAUSE THOSE RULES DO NOT APPLY HERE.

Surprisingly, although Beyond Nuclear clearly stated that its Motion was filed under the Administrative Procedure Act and the NWPA and did not invoke the Atomic Energy Act or its procedures (Motion at 2), Holtec, ISP, and the NRC Staff fault Beyond Nuclear for failing to consult opposing counsel or file their Motion within 10 days of the precipitating event (*i.e.*, the filing of the license applications) as required by 10 C.F.R. § 2.323(b). Holtec Response at 12, ISP Response at 6-8, NRC Staff Response at 4-5. By their own terms, however, the NRC's Part 2 regulations govern only proceedings conducted under the Atomic Energy Act of 1954 and the Energy Reorganization and Development Act of 1974. 10 C.F.R. § 2.1. Thus, 10 C.F.R. § 2.323(b) does not apply to Beyond Nuclear's Motion.

Even assuming for purposes of argument that the Part 2 regulations *do* apply to Beyond Nuclear's Motion, it would not be appropriate to apply § 2.323 to the timing of filing or consultation of opposing counsel in these circumstances, for three reasons. First, if Beyond

Nuclear had filed its Motion within ten days of the filing of the license applications, that timing would have violated CLI-17-10's requirement that any new claims of noncompliance by the WCS application (now the ISP application) with the NWPA should be raised *after* the publication of the hearing notice. 85 N.R.C. at 222.[2]

Second, as the Commission has previously ruled, a motion that raises a "fundamental issue that goes to the very heart of [a] proceeding" should be considered, whether or not it is timely filed in compliance with Part 2 procedural rules. CLI-02-11, 55 N.R.C. at 264. In CLI-02-11, the Commission overruled timeliness objections to a petition challenging its jurisdiction to conduct the Private Fuel Storage licensing proceeding under the NWPA. *Id.* Acknowledging the "reasonableness" of the objections that the State of Utah was late by four years, the Commission found "countervailing concerns that make immediate merits consideration appropriate." *Id.* Here, Beyond Nuclear has reasonably raised its NWPA-based concerns early in each proceeding, within the time provided for responding to the NRC's Hearing Notice.[3]

Finally, Beyond Nuclear is not required to consult when filing new contentions. Because the content of the Motion is substantively identical to the contentions, petitioners should not be required to consult here.

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[2] By requiring that objections to NRC's jurisdiction under the NWPA must be filed after the issuance of a hearing notice, the Commission effectively precluded a challenge to the NRC Staff's decision to docket either application. In any event, contrary to ISP's claim (ISP Response at 7), Beyond Nuclear's Motion does *not* challenge the docketing of either the Holtec or ISP application. The Motion is more "fundamental" (CLI-02-11, 55 N.R.C. at 264), challenging the NRC's jurisdiction as a federal agency to consider Holtec's and ISP's applications or to make proposed licensing decisions that would violate the NWPA.

[3] Beyond Nuclear has filed a hearing request and a contention in the Holtec case. Beyond Nuclear has filed its Motion in the ISP case and intends to file its contention for the ISP case within the time frame provided by the NRC's hearing notice. 83 Fed. Reg. 44,070 (Aug. 29, 2018).

IV. BEYOND NUCLEAR HAS STANDING.

The NRC Staff does not challenge Beyond Nuclear's standing. ISP, however, contends that Beyond Nuclear has not established its standing to bring the Motion because the mere act of reviewing ISP's application, which Beyond Nuclear seeks to terminate, will not cause Beyond Nuclear any actual harm. ISP Response at 15-17. For its part, Holtec claims that Beyond Nuclear has failed to show that its members would be injured by their contacts with the proposed Holtec centralized interim spent fuel storage facility ("CISF") or associated transportation routes if the facility is built and operated. Holtec also disputes the sufficiency of potentially depressed property values to confer standing on Beyond Nuclear. None of these arguments has merit, as discussed below.

A. Beyond Nuclear Alleges Injuries That are Fairly Traceable to the Underlying Agency Action.

ISP's argument that Beyond Nuclear's members have no standing because they cannot suffer injury from the "benign administration action" of the NRC's review of ISP's license application is absurd. ISP Response at 16. Standing must be based upon an injury that is "fairly traceable to the challenged action of the defendant … Petitioners must therefore demonstrate a plausible chain of causation between the licensed activity and the alleged injury." *Cogema Mining, Inc.* (Irigaray and Christensen Ranch Facilities), LBP-09-13, 70 N.R.C. 168, 176-177 (2009), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Beyond Nuclear challenges NRC's jurisdiction to review and approve license applications. If the NRC moves forward with the licensing of these facilities, they could be built, leading to real injuries to Beyond Nuclear members. *See* Motion at 2-11 and below.[4] But for NRC violating the NWPA

[4] Moreover, Beyond Nuclear's members also allege that the license review itself, even before license issuance, may cause property values to decline. See Motion at 7-8 and infra at IV.D.

and reviewing the license applications, Beyond Nuclear members would not be concerned that a nuclear waste storage facility may be constructed in their midst and cause injuries to their health, safety, environment, and property. Thus, the radiological injuries Beyond Nuclear members will suffer from the Holtec and WCS CISFs are fairly traceable to the NRC's challenged action of reviewing the license applications.

B. Beyond Nuclear Members Qualify for Standing Under the Proximity Presumption.

Holtec and ISP incorrectly claim Beyond Nuclear was required but failed to show plausible offsite harm from the proposed CISFs and thus has not established standing under the proximity presumption. Holtec Response at 11-12, ISP Response at 17. Holtec dismissively asserts that "because an ISFSI is essentially a passive structure," there is not sufficient harm to Beyond Nuclear members living between seven miles and on the fence line of these enormous CISFs. Holtec Response at 5 (citing *Consumers Energy Co.* (Big Rock Point ISFSI), CLI-07-19, 65 N.R.C. 423, 426 (2007)). Contrary to that assertion, the enormous quantity of spent nuclear fuel proposed to be stored at the CISFs, by itself, establishes a sufficiently "obvious" potential for offsite harm. *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 N.R.C. 413, 427 (2002) (explaining that whether the proximity presumption applies depends on whether there is an "obvious potential for offsite consequences").

A primary underpinning of proximity standing is the basic idea that the Commission should presume standing for those petitioners who will be closest to a large source of radioactive material. *See e.g., Armed Forces Radiobiology Research Inst.* (Combalt-60 Storage Facility), ALAB-682, 16 N.R.C. 150, 154 (1982) (finding standing due to proximity to the largest radioactive cobalt supplies in the United States). If the Holtec and WCS CISFs are built, they

will ultimately house an astronomical amount of waste—up to 173,600 metric tons at the Holtec CISF and 40,000 metric tons at the WCS CISF. Together, this is more than three times the amount anticipated to be stored at the proposed federal repository at Yucca Mountain. In reviewing Yucca Mountain, the D.C. Circuit had no problem finding an environmental organization had standing simply because one of its members "lives adjacent to the land where the Government plans to bury 70,000 metric tons of radioactive waste – a sufficient harm in and of itself." *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004). The court found the petitioner organization had standing even though the organization's member lived 18 miles from the proposed facility and it could take thousands of years for the actual harm to reach him. *Id.* If the D.C. Circuit found standing for an individual living at that distance from a proposed final underground repository – an arguably safer nuclear facility than an interim surface storage facility, and definitely smaller than the proposed Holtec CISF – the NRC should also recognize standing for Beyond Nuclear members living and frequenting land adjacent to these larger and riskier CISFs. Consistent with that reasoning, Licensing Boards have found proximity standing for individuals within 17 miles of spent nuclear fuel storage installations. *Pac. Gas & Elec. Co.*, LBP-02-23, 56 N.R.C. at 428.

Moreover, Beyond Nuclear provides examples of plausible, even if unlikely, offsite consequences of both the Holtec CISF and WCS CISF. *See* Motion at 10. These concerns of Beyond Nuclear's members should be taken at face value. *See, Armed Forces Radiobiology Research Inst*, 16 N.R.C. at 154.[5] Indeed, unlikey bases have supported standing in other

[5] In *Armed Forces,* the Commission noted that it has:

> never required a petitioner in such geographical proximity to the facility in question to establish, as a precondition to intervention, that his concerns are well-founded in fact. . . . Rather, close proximity has always been deemed to be enough, standing alone, to

proceedings. For example, the Commission has previously upheld as plausible a potential for offsite consequences that was described as "simply 'incredible' because they would first require three independent redundant safety systems to fail." *Ga. Inst. of Tech.* (Georgia Tech Research Reactor) CLI-95-12, 42 N.R.C. 111 (1995). Even though the scenario for offsite consequences was "highly unlikely," it was sufficient to provide proximity standing. *Cfc Logistics, Inc.*, LBP-03-20, 58 N.R.C. 311, 320 (2003).

C. Transportation of Spent Nuclear Fuel to the CISFs Will Cause Beyond Nuclear Members Injury.

Holtec mischaracterizes Beyond Nuclear's legal and factual arguments regarding injuries from transportation of spent fuel that may be shipped to and from the proposed Holtec CISF. Holtec Response at 9-10. In doing so, Holtec ignores the clear distinction in NRC case law between transportation related injuries based on mere geographic proximity and transportation related injuries based on a clear causal nexus with the proceeding. *See Pac. Gas & Elec. Co.,* LBP-02-23, 56 N.R.C. at 434 (comparing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 N.R.C. 403 (2001) with *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 N.R.C. 40 (1990) and *Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 N.R.C. 518 (1977)). In *Duke Cogema Stone & Webster,* the Licensing Board found that the petitioner had standing because it established the alleged threatened injury of exposure to small doses of radiation from transportation of waste would be caused by the licensing of the nuclear facility. In contrast, in *Northern States Power Co.* and *Exxon Nuclear Co.,* the Board found that the petitioners did not

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> establish the requisite interest. Whether the petitioner's concern was in fact justified, we held, must be left for consideration when the merits of the controversy are reached.

16 N.R.C. at 154 (internal citations omitted).

have proximity standing based on only an increase in the amount of radioactive waste transported or speculative allegations that an accident might occur in the proximity of the petitioner.

Holtec incorrectly frames Beyond Nuclear's transportation injuries as similar to those the Commission previously denied in *Northern States Power Co*. and *Exxon Nuclear Co.*, Holtec Response at 5-6 and 9-10, when in fact Beyond Nuclear's members' transportation-related injuries exactly mirror those that the Commission recognized as sufficient to establish standing in *Duke Cogema Stone & Webster*. 54 N.R.C. at 403 (expressly distinguishing the injury from those alleged in *Northern States Power Co.* and *Exxon Nuclear Co.*). Like the petitioner in *Duke Cogema Stone & Webster*, Beyond Nuclear asserts that its members "regularly used the same roads as the shipments likely would travel, that a person traveling on the road next to the truck shipment would receive an unwanted dose, albeit small, of ionizing radiation, and that the harm could not be avoided." *Id*.; see Motion at 4-5. As the Licensing Board found in *Duke Cogema Stone & Webster*, these assertions create a sufficient "critical causal link between the asserted injury and the licensing activity," and are sufficiently "specific in detailing a real, threatened injury and neither so conjectural nor problematic as to be speculative." *Id*. Thus, Beyond Nuclear's claims of injury from the transportation of spent nuclear fuel to the spent nuclear fuel storage facilities are sufficient to establish standing.

D. Beyond Nuclear Members are Threatened with the Actual, Concrete Injury of Decreased Property Values.

In its Response, Holtec argues that the assertions of Beyond Nuclear's members concerning their diminished property values are too subjective to establish standing. Holtec Response at 10. In making this claim, Holtec relies entirely on the Licensing Board decision in *Strata Energy, Inc.* (Ross in Situ Recovery Uranium Project), LBP-12-3, 75 N.R.C. 164, 183-184

(2012). While the Board in *Strata Energy* did find standing for the petitioners, it declined to do so based on diminished property values. *Id*. The Board found unpersuasive the petitioner's claim, based on her "perception," that property values would be impacted from the presence of a uranium *in situ* leach mine miles downstream from her property, and it set forth examples of additional information the petitioner could have provided to persuade the Board otherwise. *Id*. at 184. But, contrary to Holtec's framing, the Board did not purport to establish a new requirement that all future petitioners must meet to establish standing based on property value decline caused by all types of proposed nuclear facilities, or even simply for the type of mining facility relevant in its decision. Instead, the Board made a much more limited finding that, "*in this instance*," it could not afford standing based on property value decline alone. *Id.* The Board's reluctance in *Strata Energy* to create a new standing requirement is unsurprising; to do so would run counter to decisions from courts and other Licensing Boards.

Beyond Nuclear's members have provided factual support for their concerns about depressed property values by asserting that their property values will decrease due to proximity to the Holtec and WCS facilities, which may collectively store *hundreds of thousands of metric tons* of spent nuclear fuel. Similar assertions of diminished property values were found sufficient to confer standing in *Kelly v. Selin*, 42 F.3d 1501, 1509–10 (6th Cir. 1995), where the license applicant proposed to store much smaller quantities of spent fuel than Holtec and ISP.[6] NRC

[6] The Court also found in *Kelley* that the petitioner's allegations of standing must be "accepted as true" and construed in the petitioner's favor. 42 F.3d at 1508. *See also U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, & Pohakuloa Training Area, Island of Hawaii, Hawaii), LBP-10-4, 71 N.R.C. 216, 229 (2010) citing *Lujan v. Defenders of Wildlife*, 504 *U.S.* 555, 561 (1992) *(*"It is generally sufficient if the petitioner provides plausible factual allegations.")*;but see Strata Energy, Inc.*, 75 N.R.C. at 177–78 ("if a petitioner's factual claims in support of its standing are contested, untenable, conjectural, or conclusory, a board need not uncritically accept such assertions, but may weigh those informational claims and exercise its judgment about whether the standing element at issue has been satisfied."). In light of these well-

Licensing Board decisions have also found assertions of property value decline sufficient to establish standing. *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-21, 54 N.R.C. 33, 44 (2001) (in a challenge to a license termination plan, the Licensing Board found an organization established standing to when its members alleged in affidavits that, among other injuries, their "property values would be affected"); *see also Louisiana Energy Servs., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 N.R.C. 77, 108-109 n.26 (1998) (in a challenge to an Environmental Impact Statement, the Commission recognized that property values near an enrichment facility may be negatively impacted). Accordingly, Beyond Nuclear has provided sufficient support for its standing based on diminished property values for its members.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant Beyond Nuclear's Motion.

Respectfully submitted,

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established precedents, it is not necessary for Beyond Nuclear to obtain expert declarations confirming how proximity to a nuclear facility injures property values when the NRC and courts already accept it as a likely injury.

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CERTIFICATE OF SERVICE

I certify that on September 28, 2018, I posted BEYOND NUCLEAR'S REPLY TO HOLTEC INTERNATIONAL, INTERIM STORAGE PARTNERS LLC, AND NRC STAFF RESPONSES TO BEYOND NUCLEAR'S MOTION TO DISMISS on the NRC's Electronic Information Exchange.

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