

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

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

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| <hr/> In the Matter of: |) | |
| |) | |
| Interim Storage Partners |) | Docket No. 72-1050 |
| |) | |
| (WCS Consolidated Interim Storage Facility) |) | |
| |) | |

Reply of Movants Fasken and PBLRO to Staff's Response to Motions to Dismiss

Movants Fasken Land and Minerals and Permian Basin Land and Royalty Owners
(Movants) hereby submit their Reply to the Staff's Response to the Movants' Motion to Dismiss.

CLI-02-11 is dispositive

The Movants' basis for their motions to dismiss addresses the Applicants' failure to meet the requirement of the NWPA that a functioning geologic repository be available as a prerequisite for licensing a

Staff's Response to the subject Motion to Dismiss¹ is premised on the argument that Fasken and PBLRO (Movants) must pursue their legal arguments through a contention in the license proceeding. (Staff Response, pp. 3-6). Staff's argument centers on the decision in CLI-

¹ The Motion to Dismiss of Fasken and PBLRO addresses both the Holtec and ISP CISF applications but was filed in the Holtec docket only. The subject motion to dismiss of Fasken & PBLRO will be filed in the ISP/WCS docket with this reply.

17-10. In that case the Commission recognized that legal issues regarding the proposed Consolidated Interim Storage Facilities (CISF) should be anticipated. The Commission's decision did not require that such be raised only through a contention under 10 C.F.R. Pt. 2.² The Commission's use of "may" rather than "shall" or "must" leaves open the means Movants invoke, i.e., a motion to dismiss based on the APA³. Because Movants have questioned the jurisdiction of the Commission to consider CISF applications raising the matter under the APA is proper.

In CLI-02-11 the Commission recognized jurisdictional issues under the NWPA that question the authority to issue a CISF license require resolution before expenditure of resources necessary in a licensing proceeding. The Commission rejected the Staff and applicant's arguments based on timeliness in order to address the threshold questions regarding jurisdiction. "The issue presented here raises a fundamental issue going to the very heart of this proceeding. If 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."⁴ This Commission decision also extended an invitation to interested parties to file amicus curie briefs and did not specify that these parties participate through the 10 C.F.R. Pt. 2 process.⁵ This decision implicitly recognizes that the procedural means to resolve a jurisdictional issue that goes "to the very heart" of whether a CISF license may issue is secondary to the substance of the issue. Otherwise, the Commission

² The Commission decision states "[T]his argument [regarding predicate legal requirements of the NWPA] may be raised in an intervention petition after the hearing opportunity is re-noticed; 10 C.F.R. § 2.309(f)(1) specifically permits petitioners to present contentions that raise issues of law." (Emphasis added).

³ 5 U.S.C. 558(b) states "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."

⁴ 67 FR 18254

⁵ Id.

would not have extended an invitation for amici briefs; rather, it would have specified that the threshold jurisdictional issues be raised as contentions under 10 C.F.R. Pt. 2.

Staff argues that there is no reason to resolve the motions to dismiss outside the 10 C.F.R. Pt. 2 process.⁶ But this overlooks the reasoning that the Commission adopted in CLI-02-11 that expenditure of resources necessary to adjudicate 10 C.F.R. pt. 2 contentions may be avoided if the Commission has no legal authority to issue a CISF license.

The Commission should adopt the wisdom of the decision in CLI-02-11 in resolving the motions to dismiss. The compelling necessity to resolve fundamental questions regarding the Commission's jurisdiction to issue CISF licenses to avoid unnecessary expenditures of resources should weigh in favor of resolution of the motions to dismiss before adjudication of contentions under 10 C.F.R. Pt. 2.

Accordingly, Movants respectfully pray that their Motions to Dismiss be accepted by the Commission for adjudication.

Respectfully submitted,

/electronically signed by/
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⁶ Staff Response, p. 4

Certificate of Service

Undersigned certifies that a true and correct copy of the above and foregoing was submitted to the NRC's Electronic Information System for filing and service on participants in the above-captioned dockets.

/signed electronically by/
Robert V. Eye