UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 72-1050
INTERIM STORAGE PARTNERS LLC	)	October 5, 2018
(Consolidated Interim Storage Facility)	)	

INTERIM STORAGE PARTNERS LLC'S ANSWER OPPOSING MOTIONS FOR LEAVE TO REPLY SUBMITTED BY BEYOND NUCLEAR, FASKEN, AND PBLRO

I. INTRODUCTION

On September 14, 2018, Beyond Nuclear, Inc. ("BN") filed what was styled as a "Motion to Dismiss" ("BN Filing") on the above-captioned docket and a docket for Holtec International ("Holtec"), generally seeking a separate proceeding to challenge the two projects related to Consolidated Interim Storage Facilities as contrary to the Nuclear Waste Policy Act of 1982, as amended ("NWPA").[1] On that same day, Fasken Land and Minerals and Permian Basin Land and Royalty Owners ("Fasken/PBLRO") filed a similar "Motion to Dismiss" ("Fasken/PBLRO Filing") (collectively with the BN Filing, the "Initial Filings"), but only on the Holtec docket, and generally making a request similar to the BN Filing.[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, ISP docket; ML18257A318, Holtec docket). *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, ISP docket; ML18261A108, Holtec docket).

[2] *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). The Fasken/PBLRO Filing "incorporate[s] by reference the arguments and authorities" in the BN Filing, *id.* at 7, but was not filed on the ISP docket or served upon the parties thereto until September 28, 2018 (ML18271A244). ISP is responding to the new September 28, 2018 filing separately.

Interim Storage Partners LLC ("ISP"), Holtec, and the U.S. Nuclear Regulatory Commission ("NRC") Staff each submitted a response on September 24, 2018 (collectively, "Response Pleadings") opposing the Initial Filings and citing multiple procedural and substantive deficiencies.[3]

BN[4] and Fasken/PBLRO[5] each subsequently submitted a "Motion for Leave to Reply" on September 28, 2018, seeking to expand upon their earlier arguments. In accordance with 10 C.F.R. § 2.323(c), ISP submits this Answer opposing both the BN Motion and the Fasken/PBLRO Motion for failing to demonstrate the "compelling circumstances" required under 10 C.F.R. § 2.323(c) to warrant the proposed Replies. BN and Fasken/PBLRO seek to reiterate the defective arguments already proffered in the Initial Filings and to respond to arguments from the Response Pleadings that they could have reasonably anticipated, but failed to address, in their Initial Filings. Accordingly, for all of the many reasons discussed below, the BN Motion and the Fasken/PBLRO Motion should be summarily rejected and the proposed Replies should be ignored.

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3 Interim Storage Partners LLC's Response Opposing Beyond Nuclear, Inc.'s Unauthorized September 14, 2018 Filing (Sept. 24, 2018) (ML18267A299); Holtec International's Answer Opposing Beyond Nuclear motion to Dismiss Licensing Proceeding for HI-STORE Consolidated Interim Storage Facility (Sept. 24, 2018) (ML18267A401); NRC Staff's Response to Motions to Dismiss Licensing Proceedings (Sept. 24, 2018) (ML18267A313).

4 Beyond Nuclear's Motion for Leave to Reply to Holtec International, Interim Storage Partners LLC, and NRC Staff Responses to Beyond Nuclear's Motion to Dismiss (Sept. 28, 2018) (ML18271A233, ISP docket; ML18271A230, Holtec docket) ("BN Motion"). The filing also included a proposed reply. Beyond Nuclear's Reply to Holtec International, Interim Storage Partners LLC, and NRC Staff Responses to Beyond Nuclear's Motion to Dismiss (Sept. 28, 2018) (ML18271A232, ISP docket; ML18271A229, Holtec docket) ("Proposed BN Reply").

5 Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners for Leave to Reply to NRC Staff's Response and Holtec International's Answer and Opposition to Motions to Dismiss (Sept. 28, 2018) (ML18271A244, ISP docket; ML18271A237, Holtec docket) ("Fasken/PBLRO Motion"). The filing also included a proposed reply. Reply of Movants Fasken and PBLRO to Staff's Response to Motions to Dismiss (Sept. 28, 2018) (ML18271A245, ISP docket; ML18271A238, Holtec docket) ("Proposed Fasken/PBLRO Reply").

II. THE MOTIONS HAVE NOT DEMONSTRATED "COMPELLING CIRCUMSTANCES" TO ALLOW THE PROPOSED REPLIES

NRC regulations at 10 C.F.R. § 2.323(c) provide that a moving party "has no right to reply" to an answer to a motion absent a finding by the presiding officer that "compelling circumstances" exist. BN and Fasken/PBLRO cite this standard,[6] which also explains that "compelling circumstances" include a demonstration by the moving party "that it could not reasonably have anticipated the arguments to which it seeks leave to reply." As explained below, such is not the case here.[7] BN and Fasken/PBLRO offer no "compelling circumstances" justifying leave to file a reply.

A. BN and Fasken/PBLRO Reasonably Could Have Anticipated the Arguments Presented in the Response Pleadings

BN and Fasken/PBLRO argue that they should be granted leave to file an extraordinary reply because they "could not have reasonably anticipated arguments based on the 10 C.F.R. Part 2 regulations."[8] This assertion strains credibility. BN is an experienced litigant in NRC proceedings; Fasken/PBLRO repeat BN's arguments about Part 2; both movants are represented by experienced NRC adjudicatory counsel; and the Commission's "Rules of Practice and Procedure" (*i.e.*, 10 C.F.R. Part 2) are the agency's *only* rules for adjudication.

Nevertheless, even assuming *arguendo* that neither movant, in fact, actually anticipated arguments that NRC's Rules of Practice and Procedure might apply to a motion requesting an adjudicatory proceeding before the Commission, the "compelling circumstances" standard

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6 BN Motion at 1 n.1 (citing 10 C.F.R. § 2.323(c)); Fasken/PBLRO Motion at 1 (citing 10 C.F.R. § 2.323(c)).

7 *See generally Waste Control Specialists LLC* (Consolidated Interim Storage Facility), CLI-17-10, 85 NRC 221, 222-23 (2017).

8 BN Motion at 2; Fasken/PBLRO Motion at 2.

queries not whether they did anticipate, but rather only whether they *could* have anticipated. Here, the answer, unquestionably, is yes.

BN and Fasken/PBLRO assert that they could not have anticipated challenges related to 10 C.F.R. Part 2 because the Initial Filings rely on the NWPA, rather than the Atomic Energy Act of 1954, as amended ("AEA"), a circumstance which they argue liberates their pleadings from the orderly, established standards of Part 2.[9] Because the Commission itself previously provided direction on this very issue, they *in fact* had notice that Part 2 applies. In CLI-17-10, in response to a materially-identical request from BN in 2017 to submit a motion to dismiss—which likewise rested on claimed NWPA-based arguments—the Commission rejected the request as an "extra process" that was "not contemplated under [NRC] procedural regulations."[10] Indeed, the Commission further explained that BN's arguments could be raised in a legal contention under 10 C.F.R. § 2.309(f)(1), a regulation that falls squarely within Part 2.[11]

Moreover, the only NRC adjudicatory hearings contemplated by the NWPA are those conducted under the AEA.[12] Further, Part 2 identifies the NWPA as one of the authorities for that Part.[13] For these reasons, BN and Fasken/PBLRO lack any colorable basis to claim that they were not on notice that those responding to the Initial Filings would raise this obvious noncompliance with 10 C.F.R. Part 2.

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9 BN Motion at 2; Fasken/PBLRO Motion at 2.

10 *WCS*, CLI-17-10, 85 NRC at 223.

11 *Id.*

12 BN points to no provision in the NWPA that purportedly provides the NRC with additional authority, beyond the AEA, to hold hearings; the only NRC hearings contemplated in the NWPA are explicitly conducted "under section 189 of the Atomic Energy Act of 1954." NWPA § 134(a).

13 The authority citation for 10 C.F.R. Part 2 explicitly lists the Nuclear Waste Policy Act of 1982, secs. 114(f), 134, 135, 141 (42 U.S.C. 10134(f), 10154, 10155, 10161) and the Administrative Procedure Act (5 U.S.C. 552, 553, 554, 557, 558) as sources of statutory authority for its promulgation.

Furthermore, BN seeks, for the first time, to argue that the Commission's decision in CLI-17-10 purportedly "does not apply here."[14] Fasken/PBLRO likewise references CLI-17-10 for the first time.[15] But given that CLI-17-10 ruled on a materially-identical request from BN in this very proceeding, they cannot legitimately argue that it was unreasonable or impossible to anticipate challenges asserting the applicability of that ruling here. Such challenges could have—and indeed should have—been anticipated. Indeed, participants in an NRC adjudicatory proceeding have an obligation to "call attention to facts of record which, at the very least, cast a quite different light on the substance of arguments being advanced."[16] Movants' failure to anticipate and respond to such challenges does not now give rise to "compelling circumstances."

B. <u>The Proposed Replies Are Unnecessary for a Complete and Accurate Record</u>

BN also argues that it should be granted leave to reply because the Commission otherwise would not have a "complete and accurate record."[17] BN further makes the conclusory assertion that "[a] substantial number" of arguments in the Response Pleadings purportedly are "incorrect and misleading on significant issues,"[18] but does not support these claims. A brief review of its proposed Reply demonstrates that the information it claims is necessary for a "complete and accurate record" amounts to nothing more than a reiteration of its earlier arguments, and the addition of new untimely arguments that, as noted above, BN could have but did not raise in the initial filing. These arguments do not present the "compelling circumstances" required by 10 C.F.R. § 2.323(c).

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14 Proposed BN Reply at 3.

15 Proposed Fasken/PBLRO Reply at 1-2.

16 *Pub. Serv. Co. of Okla.* (Black Fox Station, Units 1 & 2), ALAB-505, 8 NRC 527, 532 (1978).

17 BN Motion at 2.

18 *Id.*

For example, BN raises new arguments related to the Commission's decision in CLI-02-29,[19] but BN argued CLI-02-29 in its original filing, and its failure to present all relevant arguments earlier cannot give rise to compelling circumstances now.

BN further seeks, for the first time, to argue the Commission's decision in CLI-02-11 in *Private Fuel Storage* purportedly supports its demand for a separate proceeding.[20] BN argues that the Commission in that proceeding found that consideration of NWPA-based jurisdictional arguments warranted "immediate merits consideration."[21] Notably, BN omits the fact that the "immediate" consideration contemplated in CLI-02-11 was raised five years into the proceeding.[22] Fasken/PBLRO likewise raise CLI-02-11 for the first time, claiming that "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."[23] But the Commission in its superseding decision CLI-17-10 has directed the process under which it has elected to consider this issue. Neither BN, nor Fasken/PBLRO, points to any reason these lines of argument are essential for a "complete and accurate record," nor any reason they could not have raised such arguments—based on the Commission's only prior consolidated interim storage adjudication—in their Initial Filings.

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19 Proposed BN Reply at 2-3.

20 *Id.* at 4-5, 6.

21 *Id.* at 4 (quoting *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 264 (2002)).

22 *Compare* Private Fuel Storage, Limited Liability Company; Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing, 62 Fed. Reg. 41,099 (July 21, 1997) (opening the proceeding in 1997) *with PFS*, CLI-02-11, 55 NRC at 264 (finding the need for "immediate" consideration of this issue in 2002, long after contentions were initially admitted in 1998, and following the issuance of over 60 published ASLB and Commission decisions in the proceeding). Also interesting in the context of Movant's argument, but not surprising, is that the issue was considered within the 10 C.F.R. Part 2 framework.

23 Proposed Fasken/PBLRO Reply at 2.

Additionally, more than half of BN's proposed Reply and much of the Fasken/PBLRO Motion are devoted to reiterating their original standing arguments.[24] Those fact-based standing arguments will be addressed in the appropriate forum as part of hearing requests; further discussion in these proposed Replies is neither necessary nor compelling.

Finally, BN expresses concern, but does not explain how the Commission without the benefit of BN's proposed Reply may reach some "indefensible and manifestly unjust conclusion" on the merits of its NWPA-based arguments.[25] Fasken/PBLRO similarly argues that its Reply is necessary to prevent Commission decisions that conflict with the NWPA.[26] Both assertions are without basis. The Commission already has explained that the exact legal issues identified in the Initial Filings "may be raised in an intervention petition" under 10 C.F.R. § 2.309(f)(1), which "specifically permits petitioners to present contentions that raise issues of law."[27] BN already has raised this very issue as a contention in both proceedings.[28] BN offers no explanation for its empty assertion that the NRC might "jump[] the gun" and license the contemplated facilities without "full ventilation" of these issues through the existing adjudicatory processes.[29] Nor is there one.

BN and Fasken/PBLRO will have opportunities to offer their arguments in the existing proceedings; but additional pleadings to reiterate their desire is entirely unnecessary for a

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24 Proposed BN Reply at 7-13; Fasken/PBLRO Motion at 2-3.

25 BN Motion at 2.

26 Fasken/PBLRO Motion at 2.

27 *WCS*, CLI-17-10, 85 NRC at 223.

28 Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene (Oct. 3, 2018) (filed on the ISP docket, but not yet available in ADAMS); *Holtec, Int'l* (Consolidated Interim Storage Facility), Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene (Sept. 14, 2018) (ML18257A324).

29 BN Motion at 3.

complete and accurate record, and do not demonstrate compelling circumstances for the proposed Replies.

C. Fundamental Principles of Fairness Do Not Compel a Reply Opportunity Here; Rather, They Demand Rejection of the Proposed Replies

In general, the NRC "permit[s] filings not otherwise authorized by [its] rules only where 'necessity or fairness dictates.'"[30] BN argues that it should be afforded leave to file a reply to "[e]nsure[] the fairness of this proceeding."[31] Fasken/PBLRO similarly claim that their Reply is necessary to ensure an incorrect decision does not burden them.[32] But they do not otherwise explain how an opportunity to present these issues in the established proceedings is somehow less fair than a new proceeding. Nor could they.

In CLI-17-10, the Commission directly instructed BN that its request amounted to an "extra process that is not contemplated by our procedural regulations."[33] Yet, BN and Fasken/PBLRO each elected to expend resources now, contrary to the Commission's clear direction—in turn compelling ISP, Holtec, and the NRC Staff to devote resources to respond—and now argue they must ignore the Commission's prior direction in the interest of preserving their litigation resources. This is meritless. The interests of "necessity and fairness" would be better served by withdrawing the Initial Filings and proceeding with the established Part 2 process as previously directed.

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30 *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 807 (2011) (citing *U.S. Dep't of Energy* (High Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677 (2008)).

31 BN Motion at 2.

32 Fasken/PBLRO Motion at 3.

33 *WCS*, CLI-17-10, 85 NRC at 223 (referring to procedural regulations at 10 C.F.R. Part 2).

III. CONCLUSION

The BN Motion and Fasken/PBLRO Motion fall far short of demonstrating "compelling circumstances" that would warrant leave to file the Replies. For the many reasons discussed above, the Motions should be summarily rejected, and the proposed Replies should be ignored.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)
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Dated in Washington, D.C.
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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "Interim Storage Partners LLC's Answer Opposing Motions for Leave to Reply Submitted by Beyond Nuclear, Fasken, and PBLRO" was filed through the E-Filing system.

Signed (electronically) by Ryan K. Lighty

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