October 9, 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
Alliance Environmental Strategies' Petition to Intervene and
Request for Adjudicatory Hearing on
Holtec International's HI-STORE Consolidated Interim Storage Facility Application

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), Holtec International ("Holtec") hereby answers and opposes the Petition to Intervene and Request for Adjudicatory Hearing ("Petition") filed by Alliance Environmental Strategies[1] ("Petitioner") on September 12, 2018 in the Consolidated Interim Storage Facility ("CISF") license proceeding. Petitioner seeks to intervene in this proceeding and requests that the Nuclear Regulatory Commission ("Commission" or "NRC") conduct a hearing regarding Holtec's application for a CISF license. The Petition should be denied because Petitioner has failed to demonstrate that it has standing and has failed to propose an admissible contention.

The Commission requires that a petitioner must have standing to successfully intervene in a proceeding. The Commission's regulations and case law also clearly set forth the requirements that a petitioner must satisfy in order to propose an admissible contention. As this Answer

[1] The September 12, 2018 Petition was filed in the name of "Alliance for Environmental Solutions." In a September 17, 2018 "Amendment by Interlineation," counsel amended the Petition as follows: "Alliance Environmental Solution should read Alliance Environmental Strategies throughout the Petition."

describes more fully below, Petitioner's contention mischaracterizes Commission law on the scope of environmental justice requirements and fail to allege disparate impacts on specific minority and low-income communities.

The Commission's current pleading standards were designed to raise the threshold for the admission of contentions. The purpose of these intentionally strict admissibility requirements is to ensure that hearings would focus on concrete issues that are relevant to the proceeding and that are supported by some factual and legal foundation. None of Petitioner's Contentions reaches the required threshold, falling short of any number of the applicable pleading standards. Accordingly, the Commission should reject all of Petitioner's Contentions and deny their Petition.

A. Procedural Background

Holtec submitted an application to the NRC for a Consolidated Interim Storage Facility for Spent Nuclear Fuel on March 31, 2017.[2] The Application and this proceeding are governed by 10 C.F.R. Part 72. In particular, Subpart C of the Part 72 rules sets out the procedures and requirements applicable to the issuance and conditions of such a license.

The NRC Staff conducted a sufficiency review and found the Application acceptable for docketing. On July 16, 2018, the NRC published its Notice of Hearing and Opportunity to

[2] The Holtec International HI-STORE CISF License Application ("Application") is available at NRC ADAMS Accession No. ML17115A431. Non-proprietary versions of four reports that were submitted with the original application were provided in a Feb. 23, 2018 submittal (ADAMS Accession ML18058A617) identified in the NRC's Notice of Opportunity for Hearing (*see* 83 Fed. Reg. at 32,922). As reflected in the Notice of Opportunity for Hearing (*id.*), Holtec has also submitted supplemental information in response to several NRC Staff requests, which have included updates to the Environmental Report on the HI-STORM CIS Facility (cited hereinafter as the "ER"). Revision 1 of the ER (Dec. 2017) (ADAMS Accession No. ML18023A904) incorporated the responses to the NRC requests for supplemental information, and Revision 2 of the ER (June 2018) (ADAMS Accession No. ML18255A266) added Appendices F and G. Because ER Revision 2 was only released in ADAMS on September 20, 2018, the citations to the ER in this Answer refer to Revision 1 (though the content and page numbers appear nearly identical).

Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a license to construct and operate the HI–STORE Consolidated Interim Storage (CIS) Facility, in Lea County, New Mexico.[3] Petitioner filed its Petition on September 14, 2018.

To be admitted as a party to this proceeding, Petitioner must demonstrate standing and submit at least one admissible contention.[4] Holtec objects to Petitioner's standing in this proceeding; additionally, Petitioner has not submitted any admissible contentions. Therefore, the Petition must be denied.

II. APPLICABLE LEGAL STANDARDS

A. Standing Requirements

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, L.L.C.* (Radioactive Waste Import/Export Licenses), CLI-11-3, 73 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

[3] 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 (July 16, 2018).

[4] *See* 10 C.F.R. § 2.309(a).

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, 507-08 (2012) (citing *EnergySolutions*, CLI-11-3, 73 N.R.C. at 621). 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.[5]

"[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. & Gen. Atomics* (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

[5] 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 (July 16, 2018); 10 C.F.R. § 2.309(d)(1).

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.*, CLI-94-12, 40 N.R.C. at 72.

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 Holtec CISF are considerably smaller compared to 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 *Diablo Canyon ISFSI*, LBP-02-23, 56 N.R.C. at 433-34; *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. Contention Admissibility Standards

All contentions, including those based on environmental review documents, must meet the admissibility standards that apply to all contentions under 10 C.F.R. § 2.309(f)(1). Specifically, contentions must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
>
> (ii) Provide a brief explanation of the basis for the contention;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
>
> (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and

> safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.[6]

These standards are enforced rigorously. "If any one . . . is not met, a contention must be rejected."[7] A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information.[8] Under these standards, a petitioner "is obligated to provide the [technical] analyses and expert opinion showing why its bases support its contention."[9] Where a petitioner has failed to do so, "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf."[10]

Further, admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[11] In particular, this explanation must demonstrate that the contention is "material" to the NRC's findings and that a genuine dispute on a material issue of law or fact exists.[12] The Commission has defined a "material" issue as

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[6] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[7] *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991) (citation omitted); *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 437 (2006) ("These requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements." (footnotes omitted)).

[8] *See, e.g.*, *Palo Verde,* CLI-91-12, 34 N.R.C. at 155; *AmerGen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 260 (2009) (noting that the contention admissibility rules "require the petitioner (not the board) to supply all of the required elements for a valid intervention petition" (emphasis added) (footnote omitted)).

[9] *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 N.R.C. 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 N.R.C. 1, *aff'd in part*, CLI-95-12, 42 N.R.C. 111 (1995).

[10] *See* citing *Palo Verde*, CLI-91-12, 34 N.R.C. 149. *See also Private Fuel Storage*, LBP-98-7, 47 N.R.C. 142 at 180 (explaining that a "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient;" rather, "a petitioner must provide documents or other factual information or expert opinion" . . . "to show why the proffered bases support [a] contention" (citations omitted)).

[11] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 359-60 (2001).

[12] 10 C.F.R. § 2.309(f)(1)(iv), (vi).

meaning one where "resolution of the dispute *would make a difference in the outcome* of the licensing proceeding."[13]

As the Commission has observed, this threshold requirement is consistent with judicial decisions, such as *Connecticut Bankers Ass'n v. Board of Governors*, 627 F.2d 245 (D.C. Cir. 1980), which held that:

> [A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that "an 'inquiry in depth' is appropriate."[14]

A contention, therefore, is not to be admitted "where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts."[15] As the Commission has emphasized, the rules bar contentions where petitioners have "what amounts only to generalized suspicions, hoping to substantiate them later," or "simply a desire for more time and more . . . information in order to identify a genuine material dispute for litigation."[16] Therefore, under the Rules of Practice, a statement "that simply alleges that some matter ought to be considered" does

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[13] Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (emphasis added).

[14] 627 F.2d at 251 (citation omitted); *see also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 N.R.C. 39, 41, motion to vacate denied, CLI-98-15, 48 N.R.C. 45, 56 (1998) ("It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions.").

[15] 54 Fed. Reg. at 33,171. *See also Duke Power Co., et al.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 N.R.C. 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 N.R.C. 1041 (1983) ("[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the [Atomic Energy] Act nor Section 2.714 [now 2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.").

[16] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 N.R.C. 419, 424 (2003).

not provide a sufficient basis for a contention.[17] Similarly, a "mere reference to documents does not provide an adequate basis for a contention."[18]

Rather, NRC's pleading standards require a petitioner to read the pertinent portions of the license application, including the safety analysis report and the environmental report, state the applicant's position and the petitioner's opposing view, and explain why it has a disagreement with the applicant.[19] If the petitioner does not believe these materials address a relevant issue, the petitioner is "to explain why the application is deficient."[20] A contention that does not directly controvert a position taken by the applicant in the license application is subject to dismissal.[21] Furthermore, "an allegation that some aspect of a license application is 'inadequate' or 'unacceptable' does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect."[22]

C. NEPA Standards

The National Environmental Policy Act ("NEPA") requires agencies, including the NRC, to take a "hard look" at the environmental impacts of a proposed action and alternatives to that action.[23] This "hard look," however, is subject to a "rule of reason" such that the consideration of environmental impacts must address only those impacts "that are reasonably foreseeable or

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[17] *Sacramento Mun.l Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 246 (1993), *review denied*, CLI-94-2, 39 N.R.C. 91 (1994).

[18] *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 348 (1998) (citation omitted).

[19] 54 Fed. Reg. at 33,170, 33,171; *Millstone*, CLI-01-24, 54 N.R.C. at 358.

[20] 54 Fed. Reg. at 33,170. *See also Palo Verde*, CLI-91-12, 34 N.R.C. at 156.

[21] *See Texas Util. Electric Co*. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 N.R.C. 370, 384 (1992), *vacated as moot and appeal dismissed*, CLI-93-10, 37 N.R.C. 192, *stay denied*, CLI-93-11, 37 N.R.C. 251 (1993).

[22] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 358 (2006) (citing *Florida Power & Light Co*. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 N.R.C. 509, 521 n.12 (1990)).

[23] *Southern Nuclear Operating Co*. (Early Site Permit for Vogtle ESP Site), LBP-09-7, 69 N.R.C. 613, 719 (2009).

have some likelihood of occurring."[24] The agency has broad discretion over the thoroughness of the analysis, and may decline to examine issues the agency in good faith considers "remote and speculative" or "inconsequentially small."[25] Furthermore, NEPA does not call for a "worst-case" inquiry because it "creates a distorted picture of a project's impacts and wastes agency resources."[26]

The Commission has found that NEPA serves a dual purpose: to ensure that "officials fully take into account the environmental consequences of a federal action before reaching major decisions, and to inform the public, Congress, and other agencies of those consequences."[27] NEPA does not mandate particular results, but prescribes the necessary process.[28]

Moreover, "an [EIS] is not intended to be 'a research document.'"[29] "NEPA does not call for 'examination of every conceivable aspect of federally licensed projects.'"[30] Although "there 'will always be more data that could be gathered,' agencies 'must have some discretion to draw the line and move forward with decisionmaking.'"[31] Accordingly, NEPA does not demand virtually infinite study and resources.[32] Therefore, it is insufficient for a petitioner to claim that more study or data should be included in the environmental analysis. If there are alleged errors

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[24] *Id.*

[25] *Id.*; *see also Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 N.R.C. 29, 44 (1989) (citing *Limerick Ecology Action, Inc. v. N.R.C.*, 869 F.2d 719, 739 (3d Cir. 1989)).

[26] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 N.R.C. 340, 352 (2002) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-55) (1989)).

[27] *Private Fuel Storage,* CLI-02-25, 56 N.R.C. at 348.

[28] *Robertson*, 490 U.S. at 350.

[29] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 N.R.C. 202, 208 (2010) (citation omitted).

[30] *Private Fuel Storage*, CLI-02-25, 56 N.R.C. at 349 (quoting *Louisiana Energy Services L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 N.R.C. 77, 102-03 (1998)).

[31] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. 287, 315 (2010) (footnote omitted).

[32] *Id.* at 315.

or omissions in the environmental analysis, "in an NRC adjudication it is the Intervenors' burden to show their significance and materiality."[33]

At bottom, NEPA "does not require [a] crystal ball inquiry."[34] Nor does it call for certainty or precision. When faced with uncertainty, NEPA requires "reasonable forecasting."[35] An agency is obligated to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'"[36]

III. PETITIONER HAS NO STANDING

AFES has failed to demonstrate that it meets the Commission's injury-in-fact requirement or proximity presumption and therefore has no standing to intervene in this proceeding. AFES bases its standing claim on several of its members who live and/or work "within at most 50 miles" of the Holtec site, and travel the main road that, at its closest point, is approximately a half a mile from the Holtec site. AFES Pet. at 10. More specifically:

- AFES member Rose Gardner lives and works within 37 miles of the Holtec site, and uses the main road between Hobbs and Carlsbad "on an occasional basis";[37]
- AFES member Lorraine Villegas lives within 39 miles and is employed by a company located 10 miles from the site, and uses the main road (US 62-180) "on a regular basis, often several times a day";[38]

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[33] *Exelon Generating Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 N.R.C. 801, 811 (2005).

[34] *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (internal quotations omitted).

[35] *Scientists' Inst. For Pub. Info., Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

[36] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

[37] AFES Exhibit 2, ¶¶ 5, 7, 9.

[38] AFES Exhibit 3, ¶¶ 5, 7.

- AFES member Noel V. Marquez resides and works within 48 miles of the site and uses the main road "on a regular basis";[39] and
- AFES member Nicholas R. Maxwell lives approximately 35 miles from the site and uses the main road "on a regular basis".[40]

As for their claims of injury-in-fact, each member asserts in their (essentially identical) affidavits that he or she

- "will or reasonably may be injured by the ill effects of the impact of the cumulative location of industrial sites in Lea County and Eddy County, including the future Holtec site and Waste Isolation Pilot Project ("WIPP")";[41]
- "will or reasonably may be injured by the ill effects of the location of the Holtec site";[42] and
- "will or reasonably may be injured by the lack of an adequate emergency response plan" because he or she "may be injured by the spread of any fire sparked at the site and/or the release of toxic matter into the air, land, or water, and the limited alerts or notice to the community provided by the emergency response plan."[43]

AFES has failed to demonstrate the required injury-in-fact, and has otherwise failed to show that any proximity presumption should apply in this case. AFES offers only conclusory statements of potential harm. As previously noted, the potential radiological risks for the Holtec

[39] AFES Exhibit 4, ¶¶ 5, 7, 9.
[40] AFES Exhibit 5, ¶¶ 5, 6.
[41] *E.g.*, AFES Exhibit 5, ¶ 7.
[42] *E.g.*, AFES Exhibit 5, ¶ 8.
[43] *E.g.*, AFES Exhibit 5, ¶ 11.

CISF are considerably smaller compared to 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."[44] Nowhere does AFES 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 any of its members or prove harmful 10, 17, or 25 miles away from the site."[45] Nor does AFES specify what "ill effects" might occur, or how any fire might be sparked at the site, how such a fire would even reach any one of its members, or how such a fire could lead to the release of "toxic matter into the air, land, or water," or indeed what that toxic material might be.

Furthermore, AFES's claims that its members occasionally or regularly travel on a road near the site do not establish a presence sufficient for standing. Commission precedent holds that a petitioner's transportation-based standing claim will be denied where petitioner only alleges "mere potential exposure to minute doses of radiation within regulatory limits" because such exposure "does not constitute a 'distinct and palpable' injury on which standing can be founded."[46] Here, AFES provides no plausible explanation of how the radionuclides or radiation contained within below ground steel and concrete storage systems would ever reach offsite, let alone an individual occasionally (or even regularly) driving by the site on a road a half mile away.[47]

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[44] *Big Rock Point ISFSI*, CLI-07-19, 65 N.R.C. at 426.

[45] *EnergySolutions*, CLI-11-3, 73 N.R.C. at 622-23.

[46] *Id.* at 623.

[47] *Private Fuel Storage*, CLI-98-13, 48 N.R.C. at 32 ("standing does not depend on the precise number of the [petitioner's member's] visits. It is the visits' length (up to 2 weeks) and nature . . . that establish . . . the likelihood of an ongoing connection and presence sufficient for standing.").

IV. NONE OF THE SUBMITTED CONTENTIONS IS ADMISSIBLE

The Petition advances three contentions that challenge various environmental justice aspects of the ER submitted by Holtec International as part of the Application. Petitioner's contentions suffer from the same fundamental defects, which are present to some extent or another in all of the contentions: (1) the failure to review the ER carefully, with the result that Petitioner fails to challenge the analysis actually present in the ER; (2) an incorrect recitation of the governing law and a mischaracterization of the proper scope of NRC proceedings; and (3) a failure to provide facts or expert opinion in support of the claims. These overarching deficiencies render all of Petitioner's contentions inadmissible and warrant that its Petition be rejected.

A. Contention 1 is inadmissible because it relies on an incorrect recitation of the law, lacks supporting facts or expert opinions, and fails to raise a material dispute with the analysis contained in the application.

Contention 1 alleges that "[a]s a matter of law, the Applicant has not performed a sufficient investigation and has not done a sufficient analysis to support that the Holtec site will not have a disparate impact on the minority and low income population of Lea and Eddy County." Pet. at 11. Petitioner argues that Holtec failed to sufficiently investigate enough sites as alternatives "to support a finding by the NRC that the selected site will not have a disparate impact on the minority population of Lea and Eddy County." *Id.* In support of this claim, Petitioner relies heavily on the *Louisiana Energy Services ("LES")* cases to demonstrate that there can be "several problematic facts in the site selection process that could result in a site that targeted minority communities." Pet. at 15. Petitioner claims that the site-selection process used by Holtec suffers from the same faults as did the site selection process in the *LES* case. Petitioner then compares Executive Order 12989 and the EPA NEPA guidance with the Holtec ER in an effort to argue that Holtec's "site selection *per se* was inadequate to carry Holtec's

burden, thereby mandating the preparation of a new environmental report that both *studies* and *addresses* alternative sites nationwide, why such sites are rejected, and what impact the selected site will have on minority and low income local populations." Pet. at 21.

Petitioner's Contention 1 suffers from a number of critical flaws. First, the Petitioner improperly cites the descriptions of cases rather than their holdings and mischaracterizes the relevant caselaw, while omitting governing policy statements. Second, the Contention fails to establish that a genuine dispute exists with the application on a material issue and lacks sufficient factual support for the claim at issue.

1. Contention 1 egregiously mischaracterizes the relevant NRC policy and law.

Petitioner relies primarily on an Atomic Safety and Licensing Board decision in the *LES* proceeding,[48] to support their contentions regarding the NRC requirements for environmental justice and site selection. *See* Pet. at 11-22. However, Petitioner's use of the *LES* Board Decision throughout the Petition is flawed. First, the facts underlying the *LES* case are in no way analogous to the facts involved in the Holtec CISF application or to Petitioner's characterization of the facts in that application. In *LES*, the facility was going to be sited directly between two small communities that were 1.1 miles apart and were approximately 97% African American. *LES* Board Decision at 370-71. These communities were very disadvantaged; for example, some residents had to carry their water due to the lack of a potable water supply. *Id*. at 371. The parish African American community was also impoverished and deprived, with 58% of the population living below the poverty line, 31% living in a household with no vehicles, and 10% living in a household with incomplete plumbing. *Id*. Most importantly, the local disadvantaged

[48] *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 N.R.C. 367 (1997) (hereinafter "*LES* Board Decision"), *aff'd in part, rev'd in part, Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 N.R.C. 77 (1998) (hereinafter "*LES* Commission Decision").

communities were disparately impacted by the facility: it would relocate or close the single road connecting the two communities. *Id*.

Second, Petitioner completely mischaracterizes the *LES* decisions. The Petitioner (Pet. at 12) quotes part of *LES* Contention J.9 as if it were precedent, calling it "important guidance as to the proper analytical framework to decide environmental justice issues that arise in nuclear licensing proceedings . . . "[49] The Petitioner (Pet. at 15) also relies on the Board's recitation of the intervenor's underlying position and expert testimony as "problematic factors in the site selection process that could result in a site that targeted minority communities" "cited" by the Board.[50] Of course, a Board's recitation of the underlying contention and one party's position in a case can hardly be considered controlling precedent.[51]

When Petitioner finally addresses the Board's holding, it improperly relies on statements that were subsequently overturned by the Commission. Petitioner cites the Board's determination that "a thorough and in-depth investigation of the Applicant's siting process by the Staff is essential to ensure compliance with the President's nondiscrimination directive [Executive Order 12898] if that directive is to have any real meaning." Pet. at 15. However, the Commission determined that the Board's attempts to "give meaning" to the Executive Order and to enforce a "'nondiscrimination directive' in the executive order was misplaced." *LES* Commission Decision at 20. Rather, the Commission determined that the Executive Order's

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[49] *Compare LES* Board Decision at 372-73 (quoting the intervenor's Contention J.9), *with* Pet. at 12 (quoting the same provision as though it is Board guidance).

[50] *Compare LES* Board Decision at 386-88 (explaining the intervenor's position), *with* Pet. at 15 (quoting this as where the board "cited several problematic factors in the site selection process").

[51] While the Board would later cite some of these factors in its ultimate determination, particularly the "eyeball assessment," it focused more on statistical evidence of the population surrounding the site, finding some of the factors to be "only indirectly indicative" of racial considerations. *See LES* Board Decision at 390-97. Regardless, all of these "factors" were overturned by the Commission decision, which focused on disparate impacts and not siting decisions. *See LES* Commission Decision at 101-03.

only purpose was to underscore certain provisions of existing NEPA law. *LES* Commission Decision at 102.[52]

Petitioner also cites the Board's determination that the NRC Staff pursue a further inquiry into the applicant's site-selection process. Pet. at 15-16 (citing *LES* Board Decision at 391 ("Racial discrimination in the facility site selection process cannot be uncovered with only a cursory review of the description of that process appearing in [the] applicant's [ER]."")). However, the Commission rejected this ruling by the Board. As the Commission stated, this "proposed racial discrimination inquiry goes well beyond what NEPA has traditionally been interpreted to required," as NEPA is a law never invoked "to consider a claim of racial discrimination." *LES* Commission Decision at 102.

In fact, the Commission not only barred an inquiry into "actual racial bias," but it also barred a further inquiry into the site-selection process itself, including "supposed discriminatory motives *or acts*." *LES* Commission Decision at 102 (emphasis added). As the Commission held, "[t]he Board's contemplated free-ranging inquiry into the site selection process would go well beyond what the CEQ has stated is required of an agency considering a license application." *LES* Commission Decision at 103. The CEQ guidance only requires an exploration of reasonable alternatives, and it is "not uncommon" for only one site to be deemed reasonable. *LES* Commission Decision at 104. If that is the case, the Staff only need "briefly discuss" why alternative sites were not chosen. *LES* Commission Decision at 104. Ultimately, the Commission decided that the NRC Staff analysis should focus on "adequately assessing the

[52] Petitioner also generally relies on the LES Board's interpretation of Executive Order 12898. *See* Pet. at 14-15. While the Board's background description of the Executive Order (used by Petitioner) was not overturned directly, it is necessarily suspect given that the Commission overturned a significant part of the Board's application of the Order.

impacts of the proposed actions on minority-populations, low-income populations, and Indian Tribes." *LES* Commission Decision at 102 (emphasis in original).

This policy of focusing on disparate impacts was later affirmed and elaborated on in 1) subsequent cases,[53] and 2) the NRC Policy Statement on the Treatment of Environmental Justice in NRC Regulatory and Licensing Actions (hereinafter "NRC Environmental Justice Policy"),[54] which "essentially restates doctrines emerging from a series of [Commission] adjudicatory decisions."[55] Both the subsequent cases and the NRC Policy Statement are notably absent from Petitioner's arguments.

2. Contention 1 is inadmissible as it lacks the necessary supporting facts or expert opinions and fails to raise a genuine dispute with the application.

As an initial matter, Petitioner makes a variety of immaterial assertions in support of Contention 1 regarding the Holtec site selection process, including allegations of "the targeting of rural, impoverished, low income communities," and alleged differences of opinion between the local population and a "cabal of county officials" supporting the project. Pet. at 18-19. None of this is relevant to a NEPA environmental justice analysis. As described in detail above, the Commission has already determined that an investigation into the site selection process is outside the scope of NEPA. The Commission has also declined to engage in claims of "financial and political corruption," as it is outside the NRC's mission "to protect the public health and safety and the environment." *Private Fuel Storage*, CLI-02-20, 56 N.R.C. at 150.

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[53] *See e.g.*, *Private Fuel Storage*, CLI-98-13, 48 N.R.C. 26; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 N.R.C. 147 (2002); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 N.R.C. 10 (2005).

[54] NRC Final Environmental Justice Policy, Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004).

[55] *Grand Gulf ESP*, CLI-05-4, 61 N.R.C. at 13 n.5 (citing *Private Fuel Storage*, CLI-02-20, 56 N.R.C. 147 and the *LES* Commission decision as the precedent underlying the NRC Environmental Justice Policy).

Petitioner then claims that the population analysis ("Section 3.8.5 of [Holtec's] Environmental Report") is flawed because it lacks a comparison between minority and low-income populations (percentages) against those in New Mexico "much less with the populations inside the United States." Pet. at 20. First, the NRC Environmental Justice Policy only requires a comparison against the State, not a comparison against the population of the entire United States. *See* NRC Final Environmental Justice Policy, 69 Fed. Reg. 52,048. The Commission has gone even further, holding that the ER need only be "sufficiently accurate to inform the public as to the socioeconomic makeup of the affected community." *System Energy Resources, Inc.*, CLI-05-4, 61 N.R.C. at 19 (affirming an ER with a comparison of the local population against the State).

Second, Petitioner's claim that there is no comparison against the population of New Mexico is simply incorrect. The tables appended to ER Section 3.8 include this comparison, as well as a comparison against the population of Texas. *See* ER Table 3.8.4 (comparing local minority populations against the New Mexico and Texas state averages); ER Table 3.8.5 (comparing local poverty levels against the New Mexico and Texas state averages). Petitioner has specified no deficiency in this analysis performed by Holtec. This mischaracterization of the ER is sufficient reason to reject Contention 1; a contention should be rejected if it inaccurately describes an applicant's proposed actions or ignores or misstates the content of the licensing documents.[56]

[56] *See, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 N.R.C. 2069, 2076 (1982) (rejecting a contention for not accurately addressing the applicant's proposal); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 N.R.C. 1791, 1804 (1982) (rejecting a contention for mischaracterizing the licensing document); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 N.R.C. 1423, 1504-05 (1982) (rejecting a contention for incorrectly characterizing the plant design).

Finally, Contention 1 lacks the factual and expert support necessary under 10 CFR 2.309(f)(1)(v) to establish a cognizable claim of disparate impact.[57] Petitioner states that this Contention is "an objection as a matter of law," and that Holtec's site selection was "per se" inadequate from an environmental justice perspective. However, as the NRC Environmental Justice Policy and NRC precedent makes clear,

> "EJ per se" is not a litigable issue in NRC proceedings. Rather the NRC's obligation is to assess the proposed action for significant impacts to the physical or human environment. Contentions must be made in the NEPA context, must focus on compliance with NEPA, *and must be adequately supported as required by 10 C.F.R. Part 2 to be admitted for litigation*.[58]

Petitioner's "per se" environmental justice claim fails to meet the contention admissibility requirements, and therefore is inadmissible in this proceeding.

Although Petitioner frames Contention 1 as "a matter of law," Pet. at 21, it adds at the end the allegation that the statements of its four named members and a resolution from the City of Jal (some 20 miles from the site) "refute the implication that there is 'community support for the Holtec site." *Id.* These factual assertions are put into context by the Petitions to Participate As Interested Local Government Bodies submitted in this docket in support of the application by the City of Carlsbad (dated August 28, 2018), the Eddy-Lea Energy Alliance (dated August 30, 2018), Lea County (dated September 11, 2018), Eddy County (dated September 13, 2018), and

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[57] Petitioner includes unsupported claims that minority populations will suffer reduced property values from the Holtec CISF. These unsupported claims are insufficient support an admissible contention, as there is no support to establish a disparate impact (that is, an impact that would uniquely affect the minority population). *See Systems Energy Resources, Inc.*, CLI-05-4, 61 N.R.C. at 20. Nor is there support for a disproportionate adverse human health or environmental effects as required under Commission precedent. *Private Fuel Storage,* CLI-02-20, 56 N.R.C. at 154 ("In our view, the executive order, and NEPA generally, do not call for an investigation into disparate economic benefits as a matter of environmental justice.").

[58] NRC Final Environmental Justice Policy, 69 Fed. Reg. 52,048 (emphasis added). *See also Southern Nuclear Operating Company, Inc.* (Vogtle Electric Generating Plant Units 3 and 4), LBP-16-5, 83 N.R.C. 259, 289 (2016); *System Energy Resources, Inc.* (Grand Gulf ESP Site), LBP-04-19, 60 N.R.C. 277, 294 (2004).

the City of Hobbs (dated September 14, 2018), and by the Resolution of the Town of Tatum (attached hereto as Exhibit 1).

B. Contention 2 is inadmissible because it fails to raise a genuine dispute with application on a material issue.

Petitioner's Contention 2 is also inadmissible for many of the same reasons as Contention 1. Specifically, Petitioner's allegations are outside the proper scope of an NRC proceeding. As the Commission has decided, a broad "inquiry into questions of motivation and social equity in siting" is "outside NEPA's purview." *Private Fuel Storage*, CLI-98-13, 48 N.R.C. at 36.

In Contention 2, Petitioner alleges that "[a]s a matter of fact and expert opinion, the siting process will have a disparate impact on the minority and low impact population of Eddy and Lea County." However, this bare statement is not followed by factual (or expert) claims regarding an actual disparate impact with "significant adverse impacts on the physical or human environment that were not considered because the impacts to the community were not adequately evaluated." NRC Final Environmental Justice Policy, 69 Fed. Reg. 52,047; *Vogtle Units 3 and 4*, LBP-16-5, 83 N.R.C. at 289.[59] Instead, the basis of the Contention contains allegations of "*de facto* discrimination,"[60] a "*per se* discriminatory impact,"[61] "nuclear colonialism,"[62] a "lack of representation,"[63] and "environmental racism"[64] including the "deliberate targeting of

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[59] "The NRC's obligation is to assess the proposed action for significant impacts to the physical or human environment. Thus, admissible contentions in this area are those which allege, with the requisite documentary basis and support as required by 10 C.F.R. Part 2, that the proposed action will have significant adverse impacts on the physical or human environment that were not considered because the impacts to the community were not adequately evaluated." NRC Environmental Justice Policy, 69 Fed. Reg. 52,047.

[60] Pet. at 22.

[61] *Id.*

[62] M. Gomez, "*Environmental Racism an Active Factor in the Siting and White Privilege Associated with the Holtec International HI-STORE Consolidated Interim Storage Facility Project*," at 1 (hereinafter Petitioner's Ex. 7).

[63] *Id.* at 4.

[64] *Id.* at 1, 3, 4, 5, 7, 8.

communities of color."[65] While Contention 2 and the associated expert report contains a wealth of flowery language, they lack facts. Petitioner's expert, Dr. Myrriah Gomez, briefly describes the ethnic makeup of neighboring communities (information that is already included in ER Section 3.8), before briefly describing the environmental justice information included in the initial paragraphs of ER Section 4.8 and Section 4.8.1. Dr. Gomez does not dispute the information included in the ER and does not allege any missing impacts that should have been considered. Indeed, Dr. Gomez does not address or even acknowledge the full environmental justice analysis, as it continues in ER Sections 4.8.4-4.8.6, with related information on impacts to local residents in subsequent sections.

In summary, Contention 2 suffers from the same fatal flaws as Contention 1. It attempts to raise issues that are outside the purview of the NRC. It does not even challenge the ER or even discuss the relevant sections in any detail, let alone raise a genuine dispute with the application. Ultimately, the Contention does not support a demonstrable adverse impact on a disadvantaged community,[66] and it fails to establish any credible claims of disparate impact.

C. Contention 3 is inadmissible because it is outside the scope of this proceeding.

Petitioner's Contention 3 is inadmissible as it raises issues beyond the scope of this NRC proceeding, is vague and unspecific and lacks basis. It appears that "community support" is the primary issue in this contention, though the contention also throws in apparently unrelated allegations about Holtec's control of the site. At the start of Contention 3, Petitioner concedes

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[65] *Id.* at 3.

[66] Petitioner's expert does quote a document from the City of Jal that alleges "potential health impacts," though no further details are provided. *See* Petitioner's Ex. 7 at 9. The City of Jal is identified as "small," "rural," with "few resources" and "aging populations." *Id.* Environmental justice contentions must focus on minority and low-income populations, and contentions focusing on the elderly are not admissible. *PPL Bell Bend, L.L.C.* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 N.R.C. 385, 414 (2009). Thus, there is no evidence that the City of Jal would qualify as a disadvantaged community for the purpose of a disparate impact analysis. The City of Jal is also 20 miles from the site, unlike the minority populations in the *LES* case, which were within a mile or two of the LES site.

that "community support *per se* is not material to the findings the NRC must make to issue a license." Pet. at 23. That in itself is sufficient basis to reject the Contention, as the opportunity for hearing is only for issues that are material to the findings the NRC must make to issue the license. Even if an applicant were to include information in its application that extended beyond "the findings that the NRC must make to issue a license," the applicant cannot expand the issues that are material to license issuance.

The Contention asserts that "Holtec's primary site selection criterion . . . is community support." Pet. at 23. Petitioner next asserts that "there is no factual support" for this "primary site selection criterion." *Id.* Petitioner then asserts that "Holtec attempts in Section 2.4.2 [of the ER] to substitute 'community support' for any site selection project that actually takes environmental justice concerns into account. Holtec cannot have it both ways." *Id*. Petitioner then alleges that four specific individuals were not consulted about the site, thus allegedly undermining statements of support for the site. Finally, Petitioner adds in a claim that the site is not controlled by Holtec because of certain meetings allegedly held in violation of the New Mexico Open Meetings Act. *See id.* at 23-24.

It is unclear if Petitioner intended for this Contention to be based solely on a dispute with the language of the ER on community support, if the Contention is based on an environmental justice claim, and/or if the "community support" Contention is related somehow to control over the site. For that reason alone, this Contention must be denied. Contentions must provide "a specific statement of the issue of law or fact to be raised or controverted," 10 C.F.R. § 2.309(f)(1)(i), and to be admissible, a "contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." *Millstone*, CLI-01-24, 54 N.R.C. at 359-60 (emphasis added). The Commission has explained that Petitioners "must

articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 338 (1999). Furthermore, it is Petitioner's burden to submit a contention that meets the contention admissibility requirements, and the Licensing Board may not supply missing information or draw inferences on behalf of the petitioner in order to cure a deficient contention. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 N.R.C. 403, 422 (2001).

Even if these procedural deficiencies were not enough to warrant rejection of Contention 3, Petitioner's scattershot allegations also either have no support or are well outside the scope of this proceeding. Holtec has not claimed that "community support" was Holtec's "primary site selection criterion."[67] Certainly, as set forth in ER 2.4.2 which the Contention quotes, Holtec's site selection process was "geared to identify a [region of influence] focused upon states and communities that have expressed their willingness to host nuclear facilities." ER at 2-17. But nowhere has Holtec (or any entity favoring community support for selecting a site) said that unanimity was required for community support. There is no doubt that the four individuals relied upon by Petitioners are not in favor of the project. Nevertheless, the support of the relevant local elected officials provides the evidence of strong community support that Holtec was referring to in its application. *See, e.g.*, Petitions to participate in this proceeding as interested local governmental bodies by Lea County, Eddy County, City of Hobbs, City of Carlsbad, and the Eddy-Lea Energy Alliance. Other than gratuitously casting aspersions on the Eddy-Lea Energy Alliance ("[A]n elite group of non-minority residents who seek a business

[67] As alleged in Pet. at 23.

opportunity regardless of the effect on the quality of life of local residents."[68]), Petitioner has advanced no basis to support the argument that the affidavits of four individuals are more representative of community support than the support of local governmental bodies composed of elected representatives and their designated representatives on the Eddy-Lea Energy Alliance.

Petitioner's subsequent claim that Holtec attempts "to substitute 'community support' for *any site selection project that actually takes environmental justice concerns into account*," Pet. at 23 (emphasis added), again seems to reflect Petitioner's continued efforts to resurrect overruled precedent from the *LES* Board Decision. This argument is inadmissible for the reasons stated in response to Contention 1. A proper challenge to Holtec's environmental justice analysis would evaluate all of the relevant sections of the ER (including the detailed population analysis in Section 3 and the impact analysis in Section 4) in comparison to NRC requirements, while identifying actual disparate impacts. Petitioner has taken none of these steps, instead attempting to create its own requirements based on an overruled decision. This is impermissible and an insufficient basis for an admissible contention.

Petitioner then alleges a variety of claims (incorporating the Maxwell affidavits and exhibits by reference) culminating in two miscellaneous allegations, that 1) residents were never consulted about the site, and 2) Holtec does not control the site, due to an asserted deficiency under the New Mexico Open Meetings Act. *See* Pet. at 24. Of note, Petitioner's attempt to incorporate affidavits and exhibits by reference without specifying the claims at issue is improper and cannot be used as support for the contention. Petitioner may not simply reference a large number of documents as the basis for a contention without clearly identifying and

[68] Pet. at 24; *see also* Petitioner's Ex. 7 at 5 ("[A]ll eight voting members of the Eddy-Lea Energy Alliance (ELEA) in addition to its three administrative staff member are all ethnically White.").

summarizing the incidents being relied upon, and identifying and appending the specific portions of the documents at issue.[69]

Regardless, none of these claims are within the proper scope of these proceedings. First, Petitioner fails to establish how either of these claims is related to NEPA, environmental justice issues, or any other matter that is proper for adjudication before the NRC. Additionally, the NRC's mandate is to protect the public health and safety, and the Commission has decided that claims of financial or political corruption do not belong in the NRC hearing process under the rubric of environmental justice or NEPA. *Private Fuel Storage*, CLI-02-20, 56 N.R.C. at 156-57, *rev'g*, LBP-02-8, 55 N.R.C. 171 (2002) ("[W]e decline today to use NEPA as authority for (in effect) a corruption investigation, a major undertaking 'far afield from the NRC's experience and expertise.'"). Petitioner advances no argument as to why established Commission precedent should be set aside to pursue Mr. Maxwell's claims in a Commission proceeding. Petitioner also advances no argument as to why an asserted matter of New Mexico State law should be a matter of Commission proceedings. As the Commission has decided,

> An NRC adjudicatory proceeding is simply not the appropriate forum for examining a contractual agreement's legality under state law. . . . NRC's charge is to protect the health and safety of the nuclear workforce and the general population by ensuring the safe use of nuclear power. We depend on the [state] to handle any issues . . . which are not in conflict with our jurisdiction and which are properly contested under that state's laws.

Consol. Edison Co. of New York (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 140 (2001). If Petitioner or Mr. Maxwell have a complaint as to how local jurisdictions have

[69] *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 N.R.C. 1732, 1741 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 N.R.C. 241 (1986), *citing Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 N.R.C. 209, 216 (1976); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-03, 29 N.R.C. 234, 240-41 (1989).

complied with State law, the appropriate forum is not the NRC. Instead, their remedy is to pursue relief under State law.

In summary, Petitioner's Contention 3 should be denied as outside the proper scope of an NRC proceeding, and as vague, unspecific and lacking a proper basis.

V. CONCLUSION

For the foregoing reasons, AFES has failed to demonstrate its standing and to proffer an admissible contention. Consequently, its Petition should be denied.

Respectfully submitted,

/signed electronically by Jay E. Silberg/

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October 9, 2018

Counsel for HOLTEC INTERNATIONAL

EXHIBIT 1

TOWN OF TATUM
RESOLUTION NO. 2018-0019 1819

A RESOLUTION SUPPORTING HOLTEC INTERNATIONAL EFFORT TO BUILD AN INTERIM STORAGE FACILITY FOR SPENT NUCLEAR FUEL IN SOUTHEASTERN NEW MEXICO

WHEREAS, the 2013 report from the President's Blue-Ribbon Commission on America's Nuclear Future strongly recommended that one or more consolidated interim storage facilities be established to temporarily store the spent nuclear fuel generated by America's nuclear fleet, which generates approximately twenty percent of the electricity in the United States; and

WHEREAS, Holtec international's sub-surface system, known as UMAX, is already certified by the nuclear regulatory commission; and

WHEREAS, design, construction, safety, security, financial assurance and technical control, as well as the complete process for storage, must be overseen and approved by the nuclear regulatory commission; and

WHEREAS, the nuclear regulatory commission has licensed the Holtec 190 Transportation Cask through rigorous testing that would simulate the worst possible conceived crash. This Cask is the most robust cask developed and has four layers of containment to prevent any possible release of nuclear material; and

WHEREAS, hundreds of shipments of spent fuel have occurred in America over the past thirty years without incident; and

WHEREAS, the Eddy-Lea Energy Alliance (ELEA) believes the Holtec international consolidated interim storage facility will create approximately two hundred highly paid jobs and will provide a two-billion-four-hundred-million-dollar ($2,400,000,000) capital investment in southeastern New Mexico; and

WHEREAS, the Town of Tatum located in the Permian Basin, America's most productive oil/gas producing region and home to New Mexico's thriving energy industry understands that safety is the number one priority; and

WHEREAS, the dry, remote southeastern corner of New Mexico is ideal for such temporary storage. A pre-existing scientific and nuclear operations workforce exists in the area, as does a community that is open-minded about possible nuclear expansion. ELEA's property, located between Carlsbad and Hobbs, is an excellent location for an interim storage facility.

NOW, THEREFORE BE IT RESOLVED BY THE GOVERNING BODY OF THE TOWN OF TATUM, that having carefully evaluated interim storage, do strongly endorse and support the efforts of Holtec International to secure a license to construct and operate an interim storage facility for spent nuclear fuel in southeastern New Mexico; and, furthermore, direct the City Clerk to distribute this resolution to the legislature, governor, Nuclear Regulatory Commission, and all members of Congress.

INTRODUCED, PASSED, ADOPTED AND APPROVED this 14 day of August, 2018.

Lynn Stevens
CITY CLERK

Marilyn J. Burns
MAYOR

EXHIBIT 1

TOWN OF TATUM
RESOLUTION NO. 2018-0003 1819
A RESOLUTION SUPPORTING HOLTEC INTERNATIONAL EFFORT TO BUILD AN INTERIM STORAGE FACILITY FOR SPENT NUCLEAR FUEL IN SOUTHEASTERN NEW MEXICO AND BECOMING A PARTY TO THE NRC ADJUDICATORY HEARING

WHEREAS, the 2013 report from the President's Blue-Ribbon Commission on America's Nuclear Future strongly recommended that one or more consolidated interim storage facilities be established to temporarily store the spent nuclear fuel generated by America's nuclear fleet, which generates approximately twenty percent of the electricity in the United States; and,

WHEREAS, Holtec international's sub-surface system, known as UMAX, is already certified by the nuclear regulatory commission; and,

WHEREAS, design, construction, safety, security, financial assurance and technical control, as well as the complete process for storage, must be overseen and approved by the nuclear regulatory commission; and,

WHEREAS, the nuclear regulatory commission has licensed the Holtec HI-STAR 190 Transportation Cask through rigorous testing that would simulate the worst possible conceived crash. This Cask is the most robust cask developed and has four layers of containment to prevent any possible release of nuclear material; and,

WHEREAS, more than 2,000 shipments of spent fuel have occurred in America over the past thirty years without incident; and,

WHEREAS, the Eddy-Lea Energy Alliance (ELEA) believes the Holtec International's consolidated interim storage facility will create approximately two hundred highly paid jobs and will provide a two-billion-four-hundred-million-dollar ($2,400,000,000) capital investment in southeastern New Mexico; and,

WHEREAS, Southeastern New Mexico is home to the URENCO USA facility and the WASTE ISOLATION PILOT PLANT and benefits from a positive relationship with the first enrichment facility to be built in the United States in 30 years, as well as the only licensed Nuclear Repository in the United States; and,

WHEREAS, the dry, remote southeastern corner of New Mexico is ideal for such temporary storage. A pre-existing scientific and nuclear operations workforce exists in the area, and a community that is open-minded and supportive of safe, secure nuclear projects. ELEA's property, located between Carlsbad and Hobbs, is a well characterized excellent location for an interim storage facility; and,

FURTHERMORE, Holtec filed its application for a license to construct and operate the HI-STORE Consolidated Interim Storage Facility in Lea County, New Mexico on March 30, 2017. On July 16, 2018 the Nuclear Regulatory Commission published a notice of opportunity to request a hearing and petition for leave to intervene; and,

WHEREAS, section 2.315(c), calls for the presiding officer in an adjudicatory proceeding to "afford an interested State, local governmental body (county, municipality, or other subdivision), and Federally recognized Indian Tribe that has not been admitted as a party under P 2.309, a reasonable opportunity to participate in a hearing."

EXHIBIT 1

TOWN OF TATUM
RESOLUTION NO. 2018-0003 1819
A RESOLUTION SUPPORTING HOLTEC INTERNATIONAL EFFORT TO BUILD AN INTERIM STORAGE FACILITY FOR SPENT NUCLEAR FUEL IN SOUTHEASTERN NEW MEXICO AND BECOMING A PARTY TO THE NRC ADJUDICATORY HEARING

THEREFORE BE IT RESOLVED, pursuant to 10 C.F.R. P 2.315(c), The Town of Tatum, New Mexico hereby requests permission to participate in these proceedings as an interested party as a local governmental body 78 miles from the site, a member of the JPA forming the Eddy-Lea Energy Alliance, an investor in the property for the proposed Holtec International Interim Storage Facility, has expectation for a large capital expenditure to build and develop the facility, provides economic development that will employ our citizens and for future nuclear development, science and research activities; and,

FURTHERMORE, the Town of Tatum designates Guy Payne as its single representative for the hearing, and directs the Mayor on behalf of the City to execute the petition to participate as an interested city governmental body as an interested party in the proceeding on the HI-STORE application, if one is initiated; and,

THEREFORE, NOW BE IT FURTHER RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF TATUM, that our experience with the safe practices by the nuclear industry in our community, do strongly endorse and support the efforts of Holtec International to secure a license to construct and operate an interim storage facility for spent nuclear fuel in southeastern New Mexico; and, furthermore, direct the Town Clerk to distribute this resolution to the legislature, governor, Nuclear Regulatory Commission, and all members of Congress.

INTRODUCED, PASSED, ADOPTED AND APPROVED this 28th day of August, 2018.

Lynn J. Stevens
TOWN CLERK

Marilyn J. Burns
MAYOR

October 9, 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	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer Opposing Alliance Environmental Strategies' Petition to Intervene and Request for Adjudicatory Hearing on Holtec International's HI-STORE Consolidated Interim Storage Facility Application has been served through the EFiling system on the participants in the above-captioned proceeding this 9th day of October, 2018.

/signed electronically by Timothy J. V. Walsh/
Timothy J. V. Walsh