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
Beyond Nuclear Inc. Hearing Request and Petition to Intervene on
Holtec International's HI-STORE Consolidated Interim Storage Facility Application

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Codes

Rules and Regulations

Other Authorities

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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 Beyond Nuclear, Inc. ("Petitioner" or "Beyond Nuclear") on September 14, 2018 in the HI-STORE Consolidated Interim Storage Facility ("CISF") license proceeding. Petitioner seeks to intervene in this proceeding and request that the Nuclear Regulatory Commission ("Commission" or "NRC") conduct a hearing regarding Holtec's application for a CISF license. The Beyond Nuclear Petition should be denied because Petitioner has failed (1) to demonstrate that it has standing in this proceeding, and (2) to propose an admissible contention.

The Commission's regulations and case law clearly set forth the requirements that a petitioner must satisfy in order to obtain standing and to propose an admissible contention. Petitioner bears the burden of establishing standing, and Petitioners fail to meet this standard. And as this Answer describes more fully below, 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. Petitioner's sole Contention fails to reach the required threshold, falling short of a number of the applicable pleading standards. Accordingly, the Board should reject Petitioner's Contention and deny its Petition.

II. PROCEDURAL BACKGROUND

Holtec submitted an application to the NRC for a Consolidated Interim Storage Facility for Spent Nuclear Fuel on March 31, 2017. The Application and this proceeding are governed by 10 C.F.R. Part 72. In particular, Subpart C of Part 72 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 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 CISF in Lea County, New Mexico.[1] 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.[2] Holtec objects to Petitioner's standing in this proceeding. Nor has Petitioner submitted an admissible contention. Therefore, the Petition must be denied.

[1] 83 Fed. Reg. 32,919.

[2] *See* 10 C.F.R. § 2.309(a).

III. 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, LLC* (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 of 1954 and the National Environmental Policy Act of 1969 ("NEPA")); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *Private Fuel Storage, L.L.C.*, LBP-98-7, 47 N.R.C. 142, 168 (1998) (citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 N.R.C. 1, 6 (1996); *see also Northern States Power Co.* (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP-12-24, 76 N.R.C. 503, 507-508 (2012) (citing *EnergySolutions*, CLI-11-3, 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.[3]

"[T]he petitioner bears the burden to provide facts sufficient to establish standing." *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 N.R.C. 133, 139 (2010). To demonstrate a distinct and palpable injury-in-fact sufficient to establish standing, the petitioner must demonstrate that the injury-in-fact is both "(a) concrete and particularized and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 N.R.C. 64, 72 (1994). Where there is no current injury and a party relies wholly on the threat of future injury, the fact that one can imagine circumstances where a party could be affected is not enough. The petitioner must demonstrate that "the injury is certainly impending." *Northwest Airlines, Inc. v. Federal Aviation Admin.*, 795 F.2d 195, 201 (D.C. Cir. 1986) (emphasis in original) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). In the NRC licensing context, "unsupported general references to radiological consequences are insufficient to establish a basis for injury" to establish standing. *Sacramento Mun. Util. Dist.* (Rancho Seco 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

[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, 32,920 (July 16, 2018); 10 C.F.R. § 2.309(d)(1).

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. And the potential risk of offsite consequences will be different for each type of licensing proceeding. Here, the potential radiological risks for the CISF are considerably smaller compared other licensing actions "because an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release." *Big Rock Point ISFSI*, CLI-07-19, 65 N.R.C. at 426.

Further, close proximity to potential radioactive waste transportation routes alone is insufficient to establish standing. *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 N.R.C. 357, 364 n.11 (2004) ("[M]ere geographical proximity to potential transportation routes is insufficient to confer standing; instead, . . . Petitioners must demonstrate a causal connection between the licensing action and the injury alleged."), quoting *Diablo Canyon*, 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., Inc.* (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-01-8, 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 NRC 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.[4]

[4] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

These standards are enforced rigorously. "If any one . . . is not met, a contention must be rejected."[5] A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information.[6] Under these standards, a petitioner "is obligated to provide the [technical] analyses and expert opinion showing why its bases support its contention."[7] Where a petitioner has failed to do so, "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf."[8]

Further, admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[9] 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.[10] The Commission has defined a "material" issue as meaning one where "resolution of the dispute *would make a difference in the outcome* of the licensing proceeding."[11]

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[5] *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)).

[6] *See, e.g.*, *Palo Verde,* CLI-91-12, 34 N.R.C. at 155; *AmerGen Energy Co., LLC* (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)).

[7] *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).

[8] *Id*. (citing *Palo Verde*, CLI-91-12, 34 N.R.C. 149). *See also Private Fuel Storage*, LBP-98-7, 47 N.R.C. 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)).

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

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

[11] 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).

As the Commission has observed, this threshold requirement is consistent with judicial decisions, such as *Connecticut Bankers Association 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."[12]

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."[13] As the Commission has emphasized, the contention 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.[14] Therefore, under the Rules of Practice, a statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for a contention.[15] Similarly, a "mere reference to documents does not provide an adequate basis for a contention."[16]

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[12] 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.").

[13] 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.").

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

[15] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 246 (1993), *review declined*, CLI-94-2, 39 N.R.C. 91 (1994).

[16] *Calvert Cliffs*, CLI-98-25, 48 N.R.C. at 348 (citation omitted).

Rather, NRC's pleading standards require a petitioner to read the pertinent portions of the license application, including the safety analysis report and the ER, state the applicant's position and the petitioner's opposing view, and explain why it has a disagreement with the applicant.[17] If the petitioner does not believe these materials address a relevant issue, the petitioner is "to explain why the application is deficient."[18] A contention that does not directly controvert a position taken by the applicant in the license application is subject to dismissal.[19] 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."[20]

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.[21] 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 have some likelihood of occurring."[22] 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

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[17] 54 Fed. Reg. at 33,170-71; *Millstone*, CLI-01-24, 54 N.R.C. at 358.

[18] 54 Fed. Reg. at 33,170. *See also Palo Verde*, CLI-91-12, 34 N.R.C. at 156.

[19] *See Texas Utilities 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).

[20] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 358 (2005) (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)).

[21] *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-09-07, 69 N.R.C. 613, 719 (2009).

[22] *Id.*

speculative" or "inconsequentially small."[23] 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."[24]

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."[25] NEPA does not mandate particular results, but prescribes the necessary process.[26]

Moreover, "an [EIS] is not intended to be 'a research document.'"[27] "NEPA does not call for 'examination of every conceivable aspect of federally licensed projects.'"[28] 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.'"[29] Accordingly, NEPA does not demand virtually infinite study and resources.[30] 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 or omissions in the environmental analysis, "in an NRC adjudication, it is the Intervenors' burden to show their significance and materiality."[31]

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[23] *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)).

[24] *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)).

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

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

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

[28] *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)).

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

[30] *Id.* at 315.

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

At bottom, NEPA "does not require [a] crystal ball inquiry."[32] Nor does it call for certainty or precision. When faced with uncertainty, NEPA requires "reasonable forecasting."[33] 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."[34]

IV. PETITIONER HAS NO STANDING

Beyond Nuclear has failed in its burden to demonstrate that it or its members have suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact as a result of the licensing of the CISF. Nor has Beyond Nuclear demonstrated that that it is entitled to any proximity presumption in this proceeding. For these reasons, Beyond Nuclear has failed to demonstrate standing in this proceeding.

Beyond Nuclear claims that it has demonstrated standing because its members live and travel near transportation routes that Holtec will use to transport spent nuclear fuel, and thus those members will suffer radiological injury, either from exposures during normal operations or accidents, or because they will not know which routes to travel to avoid exposures. Pet. at 3-6. Beyond Nuclear also claims to have standing based on potential, but unspecified, negative impacts to its members' property values. *Id.* at 6-7. Beyond Nuclear further claims to have standing due to the "proximity presumption" based on its members who own property and have frequent and regular contacts near the proposed facility. *Id.* at 7-10. More specifically:

- Daniel Berry states that he lives within 11 miles of, and owns property within 3-15 miles of, the proposed facility; regularly spends time within 15 miles of the proposed facility; regularly travels on roads and highways around the proposed facility; and is "concerned" about radiation risks from the proposed facility and shipments of SNF to the facility, "concerned" about potential impacts to his right to travel near the facility, "concerned" about a potential reduction in his property value from the "real or perceived risks of

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

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

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

exposure to radiation releases", and is "concerned" about potential impacts to the economic prosperity of the local community. Exhibit 02 at ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11.

- Keli Hatley states that she lives one mile from the proposed facility; regularly spends time within five miles of the facility, including at her sister's house 2 miles away; will ranch cattle along the fence line of the proposed facility; regularly travels on roads near the proposed facility; and is "concerned" about risks to her and her family's health; is "concerned" about radiation risks from living near the proposed facility; is "concerned" about potential harm to herself, her family, and cattle from traffic accidents involving SNF; is "concerned" about being unable to avoid potential radiation exposures from SNF transportation and from the proposed facility; and is "concerned" about potential impacts to her right to travel near the proposed facility. Exhibit 03 at ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

- Margo Smith states that she lives, works, and recreates with her family within 7 miles of the proposed Holtec facility; will ranch cattle along the fence line of the proposed facility; regularly travels on Highway 62/180 where it parallels the Burlington Northern Santa Fe Carlsbad Subdivision railroad and other roads near the proposed facility; is "concerned" about potential radiation exposure risks to herself and her family from the proposed facility and from SNF transportation; is "concerned" that the "real or perceived risks of exposure to radiation releases" can impact to the value of her home and ranch; is "concerned" about potential harm to herself and her family from additional traffic; and is "concerned" about potential impacts to her right to travel near her home. Exhibit 04 at ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

- Nick King states that he lives within 450 yards of one Burlington Northern Santa Fe Carlsbad Subdivision railroad, 800 yards of a second Burlington Northern Santa Fe Carlsbad Subdivision railroad, and within one mile of a railyard, which he understands may be used to ship SNF; is "concerned" about risks from normal and accidental radiation releases during transport of SNF; and is "concerned" that the "real or perceived risks" from transportation can reduce property values along SNF transportation routes. Exhibit 05 at ¶¶ 3, 4, 5, 6, 7.

- Gene Harbaugh states that he lives within 250 yards of a Burlington Northern Santa Fe Carlsbad Subdivision railroad and within 500 yards of another railyard through which SNF may be transported; is "concerned" about potential radiation risks to his health and safety posed by normal and accidental radiation releases from SNF transportation due to his regular travel in the area; and is "concerned" about the impact to his property value from the "real or perceived risk from transportation" SNF on these railroads. Exhibit 06 at ¶¶ 3, 4, 5, 6, 7.

- Jimi Gadzia, states that she lives within 900 yards of the Burlington Northern Santa Fe Carlsbad Subdivision railroad (and owns a farm 6 miles from it) and regularly travels on roads near or crossing the rail routes nearby; is a partial owner of mineral leases within 10-16 miles of the proposed facility; is "concerned" about risks to her health and safety and property rights; is "concerned" about a consequences from a potential SNF accident; is "concerned" about the impact to her property value from the transport of SNF nearby

due to "real or perceived risks"; and is "concerned' about her health and safety and her right to travel from potential unwanted doses of radiation from SNF shipments. Exhibit 07 at ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11.

Beyond Nuclear has failed to demonstrate any one of its members would have standing in this proceeding. Beyond Nuclear's members' statements that they live near and regularly travel on as-of-yet unidentified and unspecified transportation routes that may (or may not) be used to ship SNF to the facility are insufficient to demonstrate that they have standing. Beyond Nuclear purports to rely on a 2001 licensing board decision in the *MOX Fabrication Facility* proceeding,[35] (*see* Pet. at 3) but controlling Commission precedent issued since that decision holds that "'mere geographical proximity to potential transportation routes is insufficient to confer standing.'" *Plutonium Export License*, CLI-04-17, 59 N.R.C. at 364 n.11; quoting *Diablo Canyon*, LBP-02-23, 56 N.R.C. at 433-34; *see also Pathfinder Atomic Plant*, LBP-90-3, 31 N.R.C. at 43-44. It is not enough to demonstrate standing by asserting 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. Also since the licensing board decision in *MOX Fabrication Facility,* the Commission has ruled that, with respect to normal SNF transportation operations, "[m]ere potential exposure to minute doses of radiation within regulatory limits does not constitute a 'distinct and palpable' injury on which standing can be founded." *EnergySolutions,* CLI-11-3, 73 N.R.C. at 623. With respect to potential transportation accidents, such assertions are "entirely speculative." *Nuclear Fuel Recovery and Recycling Center*, LBP-77-59, 6 N.R.C. at 520. Indeed, the Commission has rejected such speculative claims with the petitioner resided within one block of the transportation route. *Int'l Uranium (USA) Corp.*, LBP-01-8, 53 N.R.C. at 219.

[35] *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 N.R.C. 403, 417 (2001), *reversed on other grounds*, CLI-02-24, 56 N.R.C. 335 (2002).

Beyond Nuclear's speculative concerns with respect to potential property value impacts also miss the mark. Beyond Nuclear's members merely are "concerned" with potential impacts to their property values because they "can be reduced" when a facility is proposed to be licensed, but have provided no objective basis for this concern. *Ross In Situ Recovery Uranium Project*, LBP-12-3, 75 N.R.C. at 184 (citing *Diablo Canyon*, LBP-02-23, 56 N.R.C. at 432 (generic, unsubstantiated claims regarding health, safety, and property devaluation impacts are insufficient to establish standing)). Beyond Nuclear's members have neither asserted nor shown that their property values *will be decreased* due to their proximity to the CISF. Beyond Nuclear's members have not made any "nonsubjective showing" such as by "demonstrating the value of property at a comparable distance from [the proposed] facility had dropped from what it was prior to the submission of [the] license application," or "actual sales/offers before and after the licensing proposal at issue in the proceeding, or by providing the declaration of a local realtor or property appraiser who furnishes an independent assessment of the property's value before and after the licensing action was proposed before the agency." *Ross In Situ Recovery Uranium Project*, LBP-12-3, 75 N.R.C. at 184. Absent such a showing, these speculative property value claims are insufficient to confer standing.

Finally, Beyond Nuclear's Members are not entitled to any proximity presumption to confer standing. As previously noted, the potential radiological risks for the CISF are considerably smaller compared other licensing actions "because an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release." *Big Rock Point ISFSI*, CLI-07-19, 65 N.R.C. at 426. This is not the case of

an operating research test reactor[36] or an operating irradiation facility[37] or any other facility that will be utilizing radiological material. Beyond Nuclear's members provide only conclusory statements of potential harm. Nowhere do they 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 them from the CISF "passive structure." Beyond Nuclear claims that Holtec has "acknowledge[d] at least one plausible scenario that would result in off-site consequences from storage of spent nuclear fuel . . . a criticality accident is possible due to a flooded canister." Pet. at 9 (citing SAR). This statement grossly mischaracterizes the application and therefore cannot be a basis for standing. Nowhere does the SAR state that there is a "plausible" criticality scenario. NRC rules require the design must assure that before a nuclear criticality is "possible," at least two unlikely, independent, and concurrent or sequential changes have occurred. 10 C.F.R. § 72.124(a). The SAR complies with this requirement by showing that "at least three unlikely (or non-credible) events would be required before accidental criticality could be possible at the HI-STORE facility," i.e. one step more remote than required by the regulation. SAR at Section 8.3.2, p. 415 of 651. These three unlikely/non-credible events are

- A flood greater than the 100,000 year flood, which is estimated to be only 4.8 inches, which level is lower than the air inlets or outlets of the storage modules;
- Even if a storage module were flooded, the internal cavity of the canister with the basket of fuel would remain dry, and thus reactivity would remain low, because the canister is sealed and its integrity is verified upon receipt. The aging management program is applied to ensure that canister leaks do not occur, thus making water in leakage very unlikely; and

[36] *See Ga. Inst. Of Tech.*, CLI-95-12, 42 N.R.C. 111.

[37] *See Armed Forces Radiobiology Research Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 N.R.C. 150 (1982) and *CFC Logistics, Inc.*, LBP-03-20, 58 N.R.C. 311 (2003).

- Canisters are not loaded on site, but always delivered in a 10 C.F.R. Part 71 approved transportation cask, further reducing the possibility of accidental criticality.

Id. at Section 8.3.2, p. 414-415. *See also id.* at p. 417 ("no wet fuel operations are performed, and fuel will always be in the dry and sealed canisters"). A potential criticality is not a credible scenario, and cannot be a basis to confer standing. Beyond Nuclear has provided nothing to the contrary.

For these reasons, Beyond Nuclear has failed to demonstrate standing.

V. PETITIONER'S SOLE CONTENTION IS NOT ADMISSIBLE

The Petition proposes a single contention. The contention asserts that the "central premise" of the HI-STORE CIS application is that "the U.S. Department of Energy ('DOE') will be responsible for the spent fuel that is transported to and stored at the proposed interim facilities" and that this "central premise" violates the Nuclear Waste Policy Act ("NWPA"). It is apparently Beyond Nuclear's view that various provisions of the NWPA prohibit the NRC from licensing the CISF because, in Petitioner's view, the CISF application is premised upon the DOE taking title to the spent fuel that would be stored at the CISF before a permanent repository for the spent fuel has opened. As a result, Petitioner asserts that the NRC may not license the facility because such action would violate the NWPA. Petition at 10. Holtec respectfully submits that the contention should be denied for mischaracterizing both the facts and the law, and therefore as lacking the required basis and also because the contention is outside the scope of this proceeding. As Petitioner concedes, "Beyond Nuclear does not believe its contention is within the scope of this proceeding, because NRC regulations establishing the scope of the proceeding do not include the NWPA." *Id.* Furthermore, Petitioner admits that "this contention is not material to the findings that NRC must make in order to issue a license to Holtec." *Id.* at 11. Based on these concessions alone, the contention should be rejected as inadmissible.

A. The Contention Misconstrues the DOE's Role

The contention's factual predicate – its "central premise" – is that the DOE **"**will be responsible for the spent fuel that is transported to and stored at the proposed interim facilities." *Id.* at 10. This "central predicate," that DOE will hold title to the spent fuel that will be stored at the CISF, is incorrect. While the Petition itself does not explain the basis for this conclusion, it references the more detailed discussion of this issue in the Beyond Nuclear, Inc. Motion to Dismiss Licensing Proceedings for HI-STORE Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility of Violating of the Nuclear Waste Policy Act, dated September 14, 2018 ("Motion").[38] The Motion's selective analysis of the HI-STORE CISF application mischaracterizes the role that DOE might play with respect to the HI-STORE CISF and as a result erases Beyond Nuclear's claim of a "central premise" that bars NRC from licensing the facility.

The application clearly states that either the nuclear plant owners from where the spent fuel originated *or* the DOE will be the customer for the HI-STORE CIS Facility. For example, proposed License Condition #17 states that "the construction program will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel (*USDOE and/or a nuclear plant owner*) at [the] HI-STORE CIS has been established."[39] Similarly, License Condition #18 states that "[t]he licensee [i.e., Holtec] shall: (1) include in its service contracts provisions requiring customers to retain title to the spent fuel stored, and allocating

[38] Both Holtec and the NRC Staff opposed the Motion on the procedural grounds that it was untimely filed and the relief it sought was not appropriate to be filed as a motion to dismiss. *See* Holtec International's Answer Opposing Beyond Nuclear Motion to Dismiss Licensing Proceeding for HI-STORE Consolidated Interim Storage Facility (Sept. 24, 2018) at pp.12-13; NRC Staff's Response to Motions to Dismiss Licensing Proceedings (Sept. 24, 2018) at pp. 3-6. Although Holtec continues to object to the Motion on procedural grounds, we assume that Beyond Nuclear would continue to assert the arguments that it sets forth therein.

[39] Proposed Licenses and Tech Specs at 2 (ADAMS Accession No. ML17310A223) (emphasis added).

legal and financial liability among the licensee and the customers; (2) include in its service contracts provisions requiring customers to provide periodically credit information, and where necessary, additional financial assurances such as guarantees, prepayment, or payment bond; [and] (3) include in its service contracts a provision requiring the licensee not to terminate its license prior to furnishing the spent fuel storage services covered by the service contract." Proposed Licenses and Tech Specs at 2. In addition, the note to SAR Table 1.0.2 states: "in accordance with 10CFR72.22, the construction program will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel (*USDOE and/or a nuclear plant owner*) at HI-STORE CIS has been established."[40] And the Financial Assurance & Project Life Cycle Report (HI-2177593 rev. 0), which is a part of the Application, states in Sec. 1.0 (at 3), "[a]dditionally, as a matter of financial prudence, Holtec will require the necessary user agreements in place (*from the USDOE and/or the nuclear plant owners*) that will justify the required capital expenditures by the Company."[41]

The Motion to Dismiss cites to a few references in the Environmental Report that suggest a broader DOE role by omitting the nuclear plant owner portion of the "USDOE and/or a nuclear plant owner" allocation of responsibility.[42] These references are inconsistent with Holtec's intent and are in the process of being revised to eliminate any confusion and make clear that the

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[40] Safety Analysis Report Rev. 0C at 26 (ADAMS Accession No. ML18254A413) (emphasis added).

[41] Financial Assurance & Project Life Cycle Report at 3 (ADAMS Accession No. ML18058A608) (emphasis added).

[42] *See, e.g.*, Environmental Report at 1-1 (construction of facility not planned to start until "after Holtec successfully enters into a contract for storage with the" DOE) and Environmental Report at 3-104 ("DOE would be responsible for transporting SNF from existing commercial nuclear power reactor storage facilities to the CIS Facility," both cited in Motion at 16). Although Beyond Nuclear interprets these provisions as contemplating that DOE will take title to the spent fuel, Motion at 16 n.4, the cited provisions in the ER do not support that reading. Instead, the current provisions refer to Holtec "enter[ing] into a contract for storage" (which could include revised standard contracts and settlement agreements) and "be[ing] responsible for transporting SNF" (which could include funding through settlement agreements). Putting aside that these provisions are being revised to make completely clear that DOE taking title is not "the central premise," the current language does not support Petitioner's "central premise" argument.

Application is *not* based on DOE taking or holding title to the spent fuel which would be stored at the CISF. In any case, a contention based on an erroneous factual premise should not be admitted.

It is worth noting that Petitioner's claims of current NWPA restrictions may well be superseded by Congress. Whether the NWPA only authorizes DOE to take title to spent nuclear fuel and only for a repository, legislation passed by the House of Representative on May 10, 2018 by a vote of 340-79 authorizes DOE to enter into agreements with a "non-Federal entity" for an interim spent fuel storage facility. H.R. 3053, Nuclear Waste Policy Amendments Act of 2018. But regardless of the status of this or other legislation, proposed License Conditions 17 and 18 discussed above, and not otherwise challenged in this contention, would provide that either DOE or a nuclear plant owner could be the customer for HI-STORE. If DOE is not authorized to be the customer, the nuclear plant owner is the default party to comply with License Conditions 17 and 18. Thus, the issue raised by the contention is ultimately irrelevant to the licensability of the HI-STORE-CIS facility.

B. NRC Is Authorized to License the CISF

Beyond Nuclear does not challenge the NRC's authority to license away-from-reactor centralized interim spent fuel storage facilities. Motion at 2. Nor could it, as the Commission and the judiciary have explicitly upheld that authority. As the Commission held in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 N.R.C. 390 (2002), "We conclude that Congress, in enacting the Atomic Energy Act (AEA), gave the NRC authority to license privately owned, away-from-reactor (AFR) facilities." This same conclusion was reached by the U.S. Court of Appeals for the D. C. Circuit in *Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536 (D.C. Cir. 2004). In that case, the State of Utah and others sought to review an NRC order denying a petition for rulemaking contending that NRC's rules for

licensing a privately owned, away-from-reactor spent fuel storage installation were superceded by provisions in the NWPA. In the process of rejecting Utah's arguments, the Court cited to "the NRC's authority under the Atomic Energy Act to license private away-from-reactor storage facilities." *Id.* at 537-38. In addition, the NRC has previously licensed privately owned, away-from-reactor facilities such as the HI-STORE CISF under the provisions of 10 C.F.R. Part 72. *See, e.g.*, NRC License No. SNM-2513 (Private Fuel Storage); NRC License No. SNM-2500 (GE-Morris); NRC License No. SNM-2504 (Ft. St. Vrain); NRC License No. SNM-2508 (TMI-2 ISFSI); NRC License No. SNM-2512 (Idaho Spent Fuel Facility).

VI. CONCLUSION

For the foregoing reasons, the Commission should determine that Petitioner lacks standing in this proceeding, should reject Petitioner's Contention, and should therefore deny the Beyond Nuclear, Inc. Hearing Request and Petition to Intervene.

Respectfully submitted,

/signed electronically by Jay e. Silberg/

Erin E. Connolly
Corporate Counsel
Holtec International
Krishna P. Singh Technology Campus
1 Holtec Boulevard
Camden, NJ 08104
Telephone: (856) 797-0900 x 3712
e-mail: e.connolly@holtec.com

Jay E. Silberg
Timothy J. V. Walsh
Anne R. Leidich
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Telephone: 202-663-8063
Facsimile: 202-663-8007
jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com
anne.leidich@pillsburylaw.com

October 9, 2018

Counsel for HOLTEC INTERNATIONAL

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 Holtec International's Answer Opposing Beyond Nuclear Inc. Hearing Request and Petition to Intervene on Holtec International's HI-STORE Consolidated Interim Storage Facility Application has been served through the E-Filing 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