

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)

) Docket No. 72-1050

INTERIM STORAGE PARTNERS LLC)

) October 19, 2018

(Consolidated Interim Storage Facility))

**INTERIM STORAGE PARTNERS LLC’S ANSWER OPPOSING
MOTION FOR LEAVE TO REPLY SUBMITTED BY FASKEN AND PBLRO**

I. INTRODUCTION

On September 28, 2018, Fasken Land and Minerals and Permian Basin Land and Royalty Owners (“Fasken/PBLRO”) filed what was styled as a “Motion to Dismiss” (“Fasken/PBLRO Filing”) on this docket, generally seeking a separate proceeding to challenge the Interim Storage Partners LLC (“ISP”) Consolidated Interim Storage Facility (“CISF”) in Texas and the Holtec CISF in New Mexico on a separate docket, as contrary to the Nuclear Waste Policy Act (“NWPA”).¹ The Fasken/PBLRO Filing included standing arguments, but otherwise incorporated by reference arguments from a similar earlier filing by Beyond Nuclear (“BN Filing”).² ISP opposed the Fasken/PBLRO Filing on October 5, 2018 (“ISP Response”).³ ISP

¹ Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility (Sept. 28, 2018).

² *Id.* at 7 (incorporating by reference Beyond Nuclear Inc.’s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act (Sept. 14, 2018) (“BN Filing”).

³ Interim Storage Partners LLC’s Response Opposing Fasken Land and Minerals’ and Permian Basin Land and Royalty Owners’ Unauthorized September 28, 2018 Filing (Oct. 5, 2018).

addressed the Fasken/PBLRO standing arguments briefly, and incorporated by reference its response to the earlier BN Filing (“Incorporated Response”).⁴

Fasken/PBLRO subsequently submitted this Motion seeking leave to reply to the ISP Response.⁵ In accordance with 10 C.F.R. § 2.323(c), ISP submits this Answer opposing the Motion. As explained below, the Motion does not demonstrate the “compelling circumstances” required under 10 C.F.R. § 2.323(c) to permit a reply. Accordingly, the Motion should be denied and the reply arguments ignored.

II. THE MOTION HAS NOT DEMONSTRATED “COMPELLING CIRCUMSTANCES” AND MUST BE DENIED

NRC regulations at 10 C.F.R. § 2.323(c) provide that a moving party “has no right to reply” to an answer to a motion absent a finding by the presiding officer that “compelling circumstances” exist. Section 2.323(c) explains that “compelling circumstances” include a demonstration by the moving party “that it could not reasonably have anticipated the arguments to which it seeks leave to reply.” Fasken/PBLRO raise two bases they claim provide compelling circumstances. Neither does.

A. Claims Regarding Incorporation by Reference Do Not Present Compelling Circumstances

The first alleged basis for compelling circumstances raised by Fasken/PBLRO is that they could not have anticipated that ISP would incorporate by reference the standing arguments ISP

⁴ *Id.* at 2-3 (incorporating by reference Interim Storage Partners LLC’s Response Opposing Beyond Nuclear, Inc.’s Unauthorized September 14, 2018 Filing (Sept. 24, 2018) (“Incorporated Response”)).

⁵ Motion of Movants Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners for Leave to Reply to Interim Storage Partner LLC’s Answer and Opposition to Movant’s Motions to Dismiss (Oct. 11, 2018) (“Motion”).

submitted regarding BN in the Incorporated Response, and that this somehow improper incorporation resulted in two mistaken arguments.⁶

Whether ISP’s arguments are repeated or incorporated by reference is irrelevant. Further, ISP’s approach to incorporate by reference should have been well anticipated because Fasken/PBLRO and BN raise very similar standing arguments, including arguments related to traditional standing and the proximity presumption.⁷ Indeed, the referenced legal standards for the proximity presumption are nearly identical in both filings.⁸ And ISP’s response to both—that the alleged risk of radiological harm for the requested proceeding to solely consider the NRC’s organic statutory authority is insufficient to demonstrate standing—is identical for both filings. To the extent Fasken/PBLRO are claiming that they could not have anticipated the ISP response to their standing arguments, then they are simply repeating their earlier arguments.

The alleged mistakes likewise do not present compelling circumstances because they rest on a fundamental misunderstanding of ISP’s pleadings. Fasken/PBLRO first argue that, contrary to a statement in the Incorporated Response, they cited precedent for the proximity presumption.⁹ For support, they quote the following statement from the Incorporated Response and argue that it does not apply to Fasken/PBLRO: “BN point[ed] to no precedent for granting standing based on the proximity presumption ...[,]”¹⁰ But they misquote from the Incorporated Response. The full quotation states: “But BN points to no precedent for granting standing based on the proximity presumption *in a proceeding to challenge the NRC Staff’s docketing decision*—nor is

⁶ See *id.* at 2-7.

⁷ Compare BN Filing at 2-11, with Fasken/PBLRO Filing at 3-7.

⁸ Compare BN Filing at 8-10, with Fasken/PBLRO Filing at 5-6.

⁹ Motion at 3-4.

¹⁰ *Id.* at 3.

there any such precedent.”¹¹ ISP clearly was referring to the lack of precedent regarding proximity presumption *in a proceeding challenging a docketing decision*, not just proximity presumption generally. Fasken/PBLRO still have not identified any such precedent, and their deficient challenge to the above statement does not present compelling circumstances.

Fasken/PBLRO further challenge the applicability of the Incorporated Response statement that BN did not affirmatively demonstrate an “obvious potential for offsite consequences.”¹² Fasken/PBLRO’s only support for inapplicability is their claim that “contrary to ISP’s arguments, [Fasken/PBLRO] have made a very compelling and obvious argument that other ISFSI facilities, namely Holtec, recognized at least one plausible scenario that would cause off-site radiological consequences.”¹³ But the cited “obvious potential” arguments pertain to licensing proceedings—whereas Fasken/PBLRO explicitly requested their Motion to Dismiss “be resolved *outside* [the] pending CISF licensing proceeding[.]”¹⁴ In other words, they again misconstrue ISP’s critique.¹⁵ Moreover, this claim acknowledges that it only addresses “other ISFSI facilities” and points only to a single scenario related to the *Holtec CISF*, not the ISP CISF.¹⁶ Fasken/PBLRO’s claims of standing based on other projects cannot support compelling circumstances in this ISP proceeding.

¹¹ Incorporated Response at 17 (emphasis added).

¹² Motion at 3-4; *see also id.* at 5-7.

¹³ *Id.* at 6.

¹⁴ Fasken/PBLRO Filing at 2 (emphasis added).

¹⁵ *See, e.g.*, ISP Response at 2 (highlighting the absence of any demonstration of possible (much less, “obvious”) offsite radiological consequences from “a limited proceeding—solely to consider the NRC’s organic statutory authority to review license applications under 10 C.F.R. Part 72”).

¹⁶ *See* Motion at 6-7. Fasken/PBLRO claim as a plausible scenario Holtec’s assumption of flooding of one of its sub-surface modules, not any suggestion by Holtec that such an event is remotely plausible. Further, Fasken/PBLRO fail to suggest how such a “scenario” could apply to ISP’s surface modules.

B. Claims Regarding the Nature of ISP’s Standing Arguments Do Not Present Compelling Circumstances

The second alleged basis for compelling circumstances is that Fasken/PBLRO could not have anticipated ISP’s “narrow framing” of standing, including applying standing to a proceeding that would “solely consider the NRC’s organic statutory authority to *review* license applications under 10 C.F.R. Part 72.”¹⁷

ISP’s consideration of standing, however, is a product of Fasken/PBLRO’s own request for an entirely new proceeding to challenge NWPAs, and thus should have been fully anticipated. Fasken/PBLRO seek to apply the proximity presumption for standing from NRC’s *licensing* adjudications to a request they claim *is not a licensing action*. They explicitly requested that their NWPAs claims “be resolved *outside* [the] pending CISF licensing proceeding[.]”¹⁸ and then allege surprise when ISP questions their attempt to base standing on cases under the very 10 C.F.R. Part 2 Rules of Practice and Procedure that they reject. These are not compelling circumstances to reargue their standing.

Furthermore, ISP’s standing arguments were fully known to Fasken/PBLRO prior to their submittal of the Fasken/PBLRO Filing. Specifically, ISP made similar standing arguments in the Incorporated Response, which was served on Fasken/PBLRO on September 24, 2018—four days before they filed the Fasken/PBLRO Filing.¹⁹ In fact, the Incorporated Response already challenged an earlier, identical filing made by Fasken/PBLRO in the Holtec proceeding, but not filed in the ISP proceeding.²⁰ The Incorporated Response directly stated that “[t]he standing assertions in the Fasken and PBLRO Filing also fail to establish standing for the same reasons

¹⁷ *Id.* at 7-9 (quoting ISP Response at 2) (emphasis added by Fasken/PBLRO).

¹⁸ Fasken/PBLRO Filing at 2 (emphasis added).

¹⁹ *See* Incorporated Response at 3, 15-17.

²⁰ *See id.* at 1 n.1, 16 n.56.

stated herein.”²¹ To now claim that they could not have foreseen ISP’s standing arguments that they already possessed is remarkable, but cannot demonstrate compelling circumstances.

III. CONCLUSION

The Motion falls far short of demonstrating “compelling circumstances” that would warrant leave to file a reply. For the many reasons discussed above, the Motion should be summarily rejected, and the new arguments should be ignored.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.
this 19th day of October 2018

²¹ *Id.* at 16 n.56.

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CERTIFICATE OF SERVICE

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

Signed (electronically) by Ryan K. Lighty
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