

October 26, 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 MOTION TO STRIKE PORTIONS OF REPLIES OF  
ALLIANCE FOR ENVIRONMENTAL STRATEGIES,  
DON’T WASTE MICHIGAN ET AL.,  
NAC INTERNATIONAL INC., AND SIERRA CLUB**

**I. INTRODUCTION**

On September 12, 2018 and September 14, 2018, pursuant to 10 C.F.R. § 2.309(c), Alliance for Environmental Strategies (“Alliance”); Don’t Waste Michigan, Citizen’s Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace and Nuclear Issues Study Group (collectively “Don’t Waste Michigan”); NAC International Inc. (“NAC International”); and Sierra Club (collectively, “Petitioners”) filed Petitions to Intervene and Requests for Adjudicatory Hearing on Holtec International’s HI-STORE Consolidated Interim Storage Facility (“CISF”) Application.

On October 9, 2018, Holtec International (“Holtec”) filed Answers to the Petitions requesting that the Nuclear Regulatory Commission (“Commission”) reject the proposed contentions and petitions to intervene. The NRC Staff also filed Answers to the Petitions on the

same day. On October 16, 2018, Alliance, Don't Waste Michigan, NAC International, and Sierra Club filed Replies to the NRC Staff and Holtec Answers (collectively, "the Replies").<sup>1</sup>

In accordance with 10 C.F.R. § 2.323, Holtec hereby moves to strike portions of the Replies, including:

- Alliance's new argument in Contentions 1 and 2 alleging the need for a cumulative impacts analysis<sup>2</sup>;
- Don't Waste Michigan's new arguments in Contention 4 (Continued Storage Rule) that the Continued Storage Rule does not apply because Holtec is relying on DOE for funding and because of repackaging requirements<sup>3</sup>;
- Don't Waste Michigan's new factual support in Contention 5 (Fracking) on earthquakes<sup>4</sup>;
- Don't Waste Michigan's new argument in Contention 7 (Start Clean/Stay Clean) on impacts from the "Repackaging Juggernaut"<sup>5</sup>;
- NAC International's new argument regarding an alleged "universal CISF license"<sup>6</sup>; and
- Sierra Club's new challenge in Contention 8 (Decommissioning Funding) to the rate of return of decommissioning funds and the surety mechanism.<sup>7</sup>

These portions of the Petitioners' Replies clearly violate the Commission's Rules of Practice ("Rules") with respect to reply briefs at the contention admissibility stage. Contrary to those Rules, and as explained in detail below, the Replies impermissibly introduce new

---

<sup>1</sup> Beyond Nuclear, Inc. ("Beyond Nuclear") also filed a Petition to Intervene and a Reply to Holtec's Answer to that Petition. A description of Beyond Nuclear's Petition and Reply is not included in this Motion because Holtec is not asking the Commission to strike any portion of Beyond Nuclear's Reply.

<sup>2</sup> See Alliance Reply at 18-19, 22.

<sup>3</sup> See Don't Waste Michigan Reply at 35-36, 38.

<sup>4</sup> See *id.* at 40-41.

<sup>5</sup> See *id.* at 47-50.

<sup>6</sup> See NAC International Reply at 1-5.

<sup>7</sup> See Sierra Club Reply at 28-30.

information and raise entirely new factual allegations or arguments that should have been included in the original petitions.

In the event the Commission does not grant this Motion to Strike, Holtec requests leave to answer each Reply because they introduce new information and arguments to which Holtec has not had an opportunity to respond and which do not support an admissible contention.

## **II. LEGAL STANDARDS**

As the last filing in the contention admissibility proceeding, the reply is inherently limited in its scope. According to the Commission, contention admissibility and timeliness requirements

demand a level of discipline and preparedness on the part of petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The Petitioners' reply brief should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer....<sup>8</sup>

The Commission has long held that a reply may not contain new information that was not raised in either the petition or the answers and may not provide new arguments (which in essence amend the contention). "The Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had the opportunity to address."<sup>9</sup> At a minimum, petitioners must explain why new arguments could not have been made in the original Petition. "For any new arguments or new support for a contention, a petitioner must, among other things, explain why it could not have raised the argument or introduced the factual support earlier."<sup>10</sup> Petitioners are required to show good cause for the late filing of these facts or

---

<sup>8</sup> *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (internal quotation marks omitted).

<sup>9</sup> *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006).

<sup>10</sup> *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 147 (2015).

arguments.<sup>11</sup> The good cause factors, set forth in 10 C.F.R. § 2.309(c), require, in part, a showing that (i) the information was not previously available and (ii) the information is materially different from information previously available.<sup>12</sup>

In addition, it is not appropriate for a reply to introduce new evidence to rehabilitate a contention that lacked appropriate support at the time of the initial petition. As the Commission has stated, “if the contention as originally pled did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions.”<sup>13</sup> Further, “our rules do not allow ... using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions.”<sup>14</sup>

### **III. DISCUSSION**

The Petitioners’ Replies impermissibly raise new facts and arguments in an attempt to rehabilitate inadmissible contentions. The Replies provide no justification for why these facts and arguments were not provided with the original petitions, including no showing of good cause as required by 10 C.F.R. § 2.309(c).

#### **A. Alliance’s New Argument in Contentions 1 and 2 Alleging the Need for a Cumulative Impacts Analysis**

Alliance’s Reply includes (for the first time) arguments related to cumulative impacts (or “cumulative dumping”) as a basis for Contentions 1 and 2. *See* Alliance Reply at 18-19, 22. On the other hand, Alliance’s Petition contains no reference to cumulative impacts as a basis for

---

<sup>11</sup> *Id.*

<sup>12</sup> *See* 10 C.F.R. § 2.309(c)(i-ii).

<sup>13</sup> *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

<sup>14</sup> *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004).

Contentions 1 or 2 (nor for Contention 3 for that matter). *See* Alliance Petition at 11-24. Instead of focusing on, or even mentioning, cumulative impacts as a basis for Contentions 1 and 2, Alliance instead focused on the site-selection process and allegations of “*de facto* discrimination.” *Id.* at 17-22. Alliance’s attempt to modify Contentions 1 and 2 at the reply stage by including a new basis in reply is improper. The Commission does not permit “the filing of new arguments or new legal theories” in a reply “that opposing parties have not had the opportunity to address.”<sup>15</sup> Alliance’s attempt to include cumulative impacts in the Reply for Contentions 1 and 2 constitutes an untimely attempt to raise a new contention, deprives Holtec of an opportunity to answer, and otherwise attempts to bypass Commission Rules.

For these reasons, Alliance’s new arguments related to cumulative impacts on pages 18-19 and 22 should be stricken from Alliance’s Reply.

**B. Don’t Waste Michigan’s New Arguments in Contention 4 (Continued Storage Rule) that the Continued Storage Rule Does Not Apply Because Holtec Is Relying on DOE for Funding and Because of Repackaging Requirements**

In its Petition, Don’t Waste Michigan argued that the Continued Storage Rule does not apply to the Holtec CISF because: 1) the CISF is not legally authorized; 2) the CISF departs from assumptions in the NRC’s Generic Environmental Impact Statement (“GEIS”) supporting the Continued Storage Rule due to the Start Clean/Stay Clean policy and the volume of the CISF; 3) the project is site-specific, again due to the Start Clean/Stay Clean policy; and 4) the CISF falls outside of NRC regulations extending the GEIS exemption because the CISF is not an Independent Spent Fuel Storage Installation (“ISFSI”). *See* Don’t Waste Michigan Petition at 46-49.

---

<sup>15</sup> *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006).

In its Reply, Don't Waste Michigan adds two new arguments: that the Continued Storage Rule does not apply because 1) Holtec is relying on the Department of Energy ("DOE") for funding and 2) DOE policy will require the repackaging of spent nuclear fuel shipments. Don't Waste Michigan Reply at 35-36, 38. Neither of these arguments appears (or is alluded to) as a basis for Contention 4 in the Petition. Because Don't Waste Michigan is introducing these new arguments on reply, Holtec has been deprived of an opportunity to answer these claims, particularly regarding the application of the Continued Storage Rule.

For this reason, Don't Waste Michigan's new arguments related to the impact of DOE funding and repackaging on application of the Continued Storage Rule on pages 35-36 and 38 should be stricken from the Don't Waste Michigan Reply.

**C. Don't Waste Michigan's New Factual Support in Contention 5 (Fracking) on Earthquakes**

In its Petition, Don't Waste Michigan provided very limited factual support for Contention 5 regarding Fracking. This limited support (in itself inadequate to support the admission of the contention) consisted of a mineral lease map, a reference to a Southern Methodist study on subsidence, and a handful of citations to documents on fracking. *See* Don't Waste Michigan Petition at 54-55. Don't Waste Michigan provided *no* factual support at all for any of its claims regarding earthquakes, instead seemingly alleging a contention of omission with references to and quotes from NRC regulations. *See id.* at 54-55 ("No such [earthquake] investigations are described in the ER.>").

In reply, Don't Waste Michigan attempts to cure this deficiency in the inadmissible Contention 5 by providing, for the first time, some purported factual support for the frequency and size of earthquakes. *See* Don't Waste Michigan Reply at 40-41. Don't Waste Michigan for the first time references a U.S. Geological Survey on earthquakes in the Central United States

and points towards a map with the “the heaviest new quake areas, in central Oklahoma and west Texas.” *Id.* at 41. Don’t Waste Michigan then discusses a Stanford University map, that is not even provided with the Reply,<sup>16</sup> of the stresses in the Permian Basin. *Id.*

Don’t Waste Michigan’s original Contention 5 was wholly without factual or expert support with respect to the frequency or size of earthquakes. Because Don’t Waste Michigan has introduced this new factual information for the first time on reply, Holtec has been deprived of an opportunity to address this late-submitted information which purports to support Contention 5. Don’t Waste Michigan is not allowed to remedy this deficiency on reply “by introducing in the reply documents that were available to it during the time frame for initially filing contentions.”<sup>17</sup> If Don’t Waste Michigan wanted this information to form the basis of its Contention, then this information should have been included in the original Petition, as the Commission “rules do not allow ... using reply briefs to provide, for the first time, the necessary threshold support for contentions.”<sup>18</sup>

For these reasons, Don’t Waste Michigan’s new factual support related to earthquakes on pages 40-41 should be stricken from the Don’t Waste Michigan Reply.

**D. Don’t Waste Michigan’s New Argument in Contention 7 (Start Clean/Stay Clean) on Impacts from the “Repackaging Juggernaut”**

Don’t Waste Michigan’s Contention 7 as originally submitted is related to the legality of the Start Clean/Stay Clean policy, and whether or not that policy would result in the transportation of “[l]eaking or otherwise compromised shipping containers” travelling back to

---

<sup>16</sup> Don’t Waste Michigan refers to the “following link,” but no link appears in the subsequent text. Don’t Waste Michigan Reply at 41.

<sup>17</sup> *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

<sup>18</sup> *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004).

sites and “likely violating” regulations and “present[ing] an immediate danger.” Petition at 61.

Don’t Waste Michigan sums up Contention 7 by alleging that

The “return to sender” policy of Holtec does not protect public health or adequately minimize danger to life or property. There is no reasonable assurance that the management of SNF and GTCC once delivered to the Holtec CISF and found to be in leaking, externally contaminated or damaged casks, followed by the return transport of leaking, contaminated or damaged casks to the point of origin, can be conducted without endangering the health and safety of the public.

*Id.* at 64.

After replying to Holtec’s response to Contention 7, Don’t Waste Michigan launches into an entirely new argument about the “Repackaging Juggernaut” on pages 47-50. *See* Don’t Waste Michigan Reply at 45-50. Don’t Waste Michigan’s new argument seems to be that the DOE’s anticipated use of “multipurpose transport, aging and disposal canisters”<sup>19</sup> for geologic spent nuclear fuel disposal (aka the “Repackaging Juggernaut”) will generate additional waste from that repackaging, which is not considered in the Application, will create additional physical dangers of repackaging and an elevated risk of exposure, and must be paid for. *See id.* at 47-50. Don’t Waste Michigan even raises the “specter” of Holtec “refusing to repack the waste.” *Id.* at 49.

This attempt to raise a new set of issues arising from the “Repacking Juggernaut” constitutes an untimely attempt to raise a new contention, deprives Holtec of an opportunity to answer, and otherwise attempts to bypass Commission Rules. For these reasons, the new arguments related to the “Repacking Juggernaut” on pages 47-50 should be stricken from the Don’t Waste Michigan Reply.

---

<sup>19</sup> Don’t Waste Michigan Reply at 47.



**E. NAC International’s New Argument Regarding an Alleged “Universal CISF License”**

As originally submitted, NAC International’s first two contentions attempt to raise safety-related issues (based on Holtec’s alleged lack of design and safety information), *see* NAC International Petition at 10-14, while the third contention is an environmental contention based on the alleged lack of an alternative design analysis, *see id.* at 14-15. The NAC International Petition assumes throughout that licensing the CISF involves or somehow conveys approval to store NAC canisters at the proposed Holtec CISF. *See id.* at 9 (“The fact is that under the Holtec CISF licensing approach, NAC-designed canisters—a core of NAC’s business—would become assimilated into the CISF with no voice as to the matter by NAC.”). In its answer, Holtec showed that this assumption is incorrect—the proposed CISF license does not include storage of NAC canisters—thus NAC International’s related Contentions are inadmissible. *See* Holtec Answer to NAC International at 16-18.

In its Reply, NAC International attempts to remediate its incorrect assumption by introducing new arguments relating to a “universal CISF license.” NAC International Reply at 1. NAC International sets forth three and a half pages of new material on “a preemptive ‘universal’ CISF license,” *id.*, arguing that the Application “will lay the foundation for Holtec’s future amendments, and can be referenced in the later license amendment proceedings to incorporate other canisters.” *Id.* at 4. In NAC’s view, “Holtec is essentially incorporating material parts of future license amendments for a ‘universal’ cask system now instead of at the proper future time.” *Id.* The reply goes on to state that “NAC’s petition raises a genuine dispute with these material aspects of the current Holtec CISF license application as written, which improperly preempt and lay the foundation for Holtec’s “universal” cask approach sought for the New

Mexico CISF in the long-term, yet without the type of technical analyses described in NAC's contentions and supported by the Carver Affidavit." *Id.*

These arguments are a late attempt to remedy a fatal deficiency in the NAC International Petition—NAC International's incorrect view of the licensing proceeding at issue. As noted previously, petitioners are not allowed to remedy inadequate contentions on reply. Nor are petitioners permitted to add new arguments on reply, ultimately short-circuiting the NRC process and preventing the applicant and NRC Staff from answering.

NAC International's new arguments in reply on the "universal license," pages 1-5, run afoul of these Commission standards. For these reasons, the new arguments should be stricken from the NAC International Reply.

**F. Sierra Club's New Challenge in Contention 8 (Decommissioning Funding) to the Rate of Return of Decommissioning Funds and the Surety Mechanism**

In its Petition, Sierra Club argued that Holtec's decommissioning funds for the site will fall short because 1) there is no assurance that \$840/MTU will be saved, and 2) decommissioning costs are based on only the first phase of the project. *See* Sierra Club Petition at 35-37. In its Reply, Sierra Club adds two entirely new arguments: that the decommissioning funds will fall short because 1) there is no assurance that the fund will earn 3% interest, and 2) the absence of a specific surety mechanism. *See* Sierra Club Reply at 28-30.

Sierra Club could have (and should have) raised these arguments in its Petition. Holtec identified a 3% rate of return and the use of 10 C.F.R. § 72.30(e)(2) (a surety method) in its Application.<sup>20</sup> Petitioners had sufficient opportunity to raise these arguments in the first instance

---

<sup>20</sup> Holtec International & Eddy Lea Energy Alliance (ELEA) Underground CISF - Financial Assurance & Project Life Cycle Cost Estimates at 5 (ADAMS Accession No. ML18058A608).

and cannot raise them for the first time when Applicant and NRC Staff have no opportunity to respond.

For this reason, Sierra Club's new arguments regarding decommissioning funding should be stricken from pages 28-30 of the Sierra Club Reply.

#### **IV. CONCLUSION**

For the foregoing reasons, the new facts and arguments on pages 18-19, 22 of the Alliance Reply; 35-36, 38, 40-41, 47-50 of the Don't Waste Michigan Reply; 1-5 of the NAC International Reply; and 28-30 of the Sierra Club Reply should be stricken from the record as outside the scope of a proper reply.

In the event the Commission does not grant this Motion to Strike, Holtec requests that the Commission permit Holtec to file a substantive answer to the Replies. As set forth above, the Replies clearly introduce new arguments and documents. At a minimum, if this information is to be included in the record, Holtec should be afforded an opportunity to demonstrate why none of the new facts or arguments in the Replies render the original contentions admissible. Otherwise, by allowing new claims in a reply without a response, the Commission "not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims."<sup>21</sup>

#### **V. CERTIFICATION**

As required by 10 C.F.R. § 2.323(b), Holtec has consulted with the NRC Staff, Alliance, Don't Waste Michigan, NAC International, and Sierra Club. The NRC Staff is unopposed to this Motion. Alliance, Don't Waste Michigan, and Sierra Club all oppose this Motion, while NAC International disagrees with this Motion as it concerns NAC International's Reply.

---

<sup>21</sup> *Palisades*, CLI-06-17, 63 NRC at 732.

Beyond Nuclear and Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (“Fasken & PBLRO”) were also extended the opportunity to consult. Fasken & PBLRO does not support this Motion, while Beyond Nuclear takes no position.

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

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. 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 26, 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 Motion to Strike Portions of the Replies of Alliance for Environmental Strategies, Don't Waste Michigan et al., NAC International Inc., and Sierra Club has been served through the EFiling system on the participants in the above-captioned proceeding this 26th day of October 2018.

/signed electronically by Anne R. Leidich/

Anne R. Leidich