

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL**

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In the Matter of: )

INTERIM STORAGE PARTNERS LLC )

(Consolidated Interim Storage Facility) )

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Docket No. 72-1050

October 29, 2018

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**INTERIM STORAGE PARTNERS LLC'S ANSWER OPPOSING  
BEYOND NUCLEAR, INC.'S HEARING REQUEST AND PETITION TO INTERVENE**

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Commission has adopted a “proximity-plus” approach that requires petitioners also to demonstrate some “obvious potential for offsite consequences.” BN has not done so. In fact, the Commission has generically determined that such consequences are not merely improbable, but also implausible (because of the lack of a significant offsite dispersal mechanism), so much so, that no offsite emergency planning is required for away-from-reactor dry storage Independent Spent Fuel Storage Installations (“ISFSI”) such as the WCS CISF. Accordingly, the “proximity-plus” approach is unavailable to BN here.

Likewise, BN also has failed to demonstrate standing on traditional grounds. It purports to demonstrate representational standing on the basis of two of its members, each of whom it argues will suffer injuries-in-fact on both radiological and economic grounds. However, as further explained below, as to each, BN’s assertions fail to satisfy all three prongs of traditional standing. Accordingly, the Petition must be rejected for failure to demonstrate standing.

Setting aside BN’s failure to establish standing by any means, BN also has failed to proffer an admissible contention. Its sole contention asserts that the Nuclear Regulatory Commission (“NRC”) must dismiss ISP’s Application and terminate this proceeding because the Application violates the Nuclear Waste Policy Act of 1982, as amended (“NWPA”).<sup>3</sup> BN claims that the Application’s *alleged* “central premise”—that the U.S. Department of Energy (“DOE”) will take title to any spent fuel to be stored at ISP’s proposed CISF—contravenes NWPA provisions that preclude DOE from taking title to spent fuel “unless and until a permanent repository has opened.”<sup>4</sup>

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<sup>3</sup> Petition at 8.

<sup>4</sup> *Id.* at 8-9.

As demonstrated below, BN’s proposed contention is inadmissible under 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi). The contention—by BN’s own admission—is outside the scope of this proceeding and immaterial to the NRC Staff’s findings on the Application. It also lacks either factual or legal basis. The Application states unequivocally that either the owners of the nuclear plants from which the spent nuclear fuel (“SNF”) originated (*i.e.*, the SNF Title Holders) *or* DOE will be the customer(s) for the proposed CISF. Contrary to BN’s unsupported claims, ISP does not presume that DOE will necessarily hold title to any SNF destined for storage at the CISF. BN’s argument that NRC issuance of the ISP license would contravene NHPA and Administrative Procedure Act (“APA”) requirements is legally erroneous as well. As discussed below, both the Commission and the U.S. Court of Appeals have held that the Atomic Energy Act of 1954, as amended (“AEA”) gives the NRC authority to license away-from-reactor spent fuel storage facilities, and that the NHPA does not limit that authority or otherwise preclude the NRC from issuing licenses for such facilities.<sup>5</sup>

## **II. WCS CISF PROCEDURAL HISTORY**

On April 28, 2016, Waste Control Specialists LLC (“WCS”) submitted to the NRC an Application for a specific license pursuant to 10 C.F.R. Part 72 for a CISF on its site located in western Andrews County, Texas. WCS currently operates Low-Level Waste and Mixed Waste facilities on this site.

On January 30, 2017, the NRC published a notice in the *Federal Register* announcing its acceptance of the WCS CISF Application and an opportunity to request a hearing and petition

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<sup>5</sup> Whether the DOE may make use of a private commercial CISF, if licensed by the NRC, is a separate legal question not presented by the Application. BN appears to presume without benefit of either law or fact that this question must be (or even could be) addressed as a prerequisite to consideration of the ISP Application.

for leave to intervene.<sup>6</sup> On April 18, 2017, WCS requested that the NRC temporarily suspend all review activities associated with its Application.<sup>7</sup> Approximately 14 months later, by letters dated June 8, 2018, and July 19, 2018, ISP (a joint venture between WCS and Orano CIS, LLC) submitted a request to the NRC to resume review of the Application for the WCS CISF, and submitted an updated version of the Application (to revise the name of the applicant and make a few other changes).<sup>8</sup>

On August 29, 2018, the NRC published a notice in the *Federal Register* announcing its decision to continue reviewing the Application and providing a new opportunity to request a hearing and petition for leave to intervene.<sup>9</sup> On October 3, 2018, BN submitted the Petition requesting a hearing and proposing its one contention related to the Applicant's compliance with the NWSA. As support, the contention adopts and incorporates by reference parts of a related Motion to Dismiss filed by BN in this proceeding and the Holtec CISF licensing proceeding in September 2018.<sup>10</sup> On October 29, 2018, the Secretary of the Commission denied the Motion to

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<sup>6</sup> See License Application; Docketing and Opportunity to Request a Hearing and to Petition for Leave to Intervene, 82 Fed. Reg. 8773 (Jan. 30, 2017) ("Original Notice of Hearing Opportunity"). On April 4, 2017, and in a corrected notice dated April 10, 2017, the NRC published in the *Federal Register* (82 Fed. Reg. 16,435; 82 Fed. Reg. 17,297) an order granting all petitioners an extension of time until May 31, 2017, to file hearing requests on WCS's Application.

<sup>7</sup> Letter from R. Baltzer, WCS, to NRC Document Control Desk (Apr. 18, 2017) (ML17110A206). On April 19, 2017, WCS and the NRC Staff jointly requested that the Original Notice of Hearing Opportunity be withdrawn, pending possible future resumption of the Application review. Joint Request to Withdraw the Federal Register Notice Providing an Opportunity to Submit Hearing Requests (Apr. 19, 2017) (ML17109A480). On June 22, 2017, the Commission granted that request. *Waste Control Specialists LLC* (Consolidated Interim Storage Facility), CLI-17-10, 85 NRC 221, 222-23 (2017).

<sup>8</sup> Although ISP is the new applicant name, the proposed facility name remains the "WCS CISF."

<sup>9</sup> See Interim Storage Partner's Waste Control Specialists Consolidated Interim Storage Facility; Revised License Application; Opportunity to Request a Hearing and to Petition for Leave to Intervene; Order Imposing Procedures, 83 Fed. Reg. 44,070 (Aug. 29, 2018) ("Notice of Hearing Opportunity").

<sup>10</sup> See Beyond Nuclear, Inc.'s Corrected 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) (errata filed on Sept. 18, 2018) (Exhibit 1 to Petition) ("Motion to Dismiss").

Dismiss on procedural grounds and referred the Petition to the Atomic Safety and Licensing Board Panel for establishment of a Board to consider the Petition.<sup>11</sup>

### **III. BN HAS NOT DEMONSTRATED STANDING**

#### **A. Legal Standards for Standing**

The AEA allows individuals “whose interest may be affected” to intervene in NRC licensing proceedings.<sup>12</sup> The Commission has long applied judicial concepts of standing to determine whether a petitioner’s interest provides a sufficient basis for intervention.<sup>13</sup> “Essential to establishing standing are findings of (1) injury, (2) causation, and (3) redressability.”<sup>14</sup> Both individuals and organizations may assert standing. An organization may assert standing in its own right (*i.e.*, organizational standing), or may assert a right to represent the interests of its members (*i.e.*, representational standing), which requires a showing that: (1) its members would otherwise have standing 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 proceeding.<sup>15</sup> In any event, “the petitioner bears the burden to provide facts sufficient to establish standing.”<sup>16</sup>

#### **1. Proximity-Plus Standing**

In cases involving reactor facilities, the Commission will apply a standing presumption based on proximity to the site.<sup>17</sup> However, no such automatic presumption exists for nuclear

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<sup>11</sup> Order at 2-3 (Oct. 29, 2018).

<sup>12</sup> AEA § 189a (codified at 42 U.S.C. § 2239(a)).

<sup>13</sup> *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30 (1998).

<sup>14</sup> *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-3, 73 NRC 613, 621 (2011).

<sup>15</sup> *PFS*, CLI-98-13, 48 NRC at 30-31.

<sup>16</sup> *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010).

<sup>17</sup> *See Fla. Power & Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

materials proceedings, such as this one.<sup>18</sup> To show standing based on geographic proximity to a materials facility, a petitioner bears an affirmative burden to demonstrate that “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”<sup>19</sup> As the Commission has made clear, “conclusory allegations about potential radiological harm” are insufficient to satisfy this burden.<sup>20</sup>

Assuming the petitioner meets its burden to demonstrate an obvious potential for offsite consequences, the presiding officer then must determine the appropriate presumptive distance. This distance corresponds to the radius within which persons may “face a *realistic* threat of harm” from a release of radioactive material.<sup>21</sup> In reactor proceedings, the Commission has adopted a 50-mile presumptive distance; however, it has “required far closer proximity in other licensing proceedings.”<sup>22</sup> The presumptive radius for ISFSI proceedings is particularly small, “because an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release.”<sup>23</sup> Nevertheless, in each materials proceeding, the appropriate distance must be evaluated on a “case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”<sup>24</sup>

Where a petitioner is unable to demonstrate “proximity-plus” standing to intervene, traditional standing principles will apply.<sup>25</sup>

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<sup>18</sup> See *Nuclear Fuel Servs., Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

<sup>19</sup> *Ga. Inst. of Tech.* (Ga. Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995).

<sup>20</sup> *NFS*, CLI-04-13, 59 NRC at 248.

<sup>21</sup> *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 917 (2009) (emphasis added).

<sup>22</sup> *Consumers Energy Co.* (Big Rock Point ISFSI), CLI-07-19, 65 NRC 423, 426 (2007) (quotation omitted).

<sup>23</sup> *Id.*

<sup>24</sup> *Ga. Tech.*, CLI-95-12, 42 NRC at 116-17. See also *Big Rock Point ISFSI*, CLI-07-19, 65 NRC at 426.

<sup>25</sup> See *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC at 188; *USEC Inc.* (American Centrifuge Plant), CLI-05-

## 2. Traditional Standing

For traditional standing, 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 AEA or the National Environmental Policy Act of 1969, as amended (“NEPA”)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision.<sup>26</sup> 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.’”<sup>27</sup> The mere ability to *imagine* circumstances where a party could be affected is not enough—the petitioner must demonstrate that “the injury is certainly impending.”<sup>28</sup> In the NRC licensing context, “unsupported general references to radiological consequences are insufficient to establish a basis for injury” to establish standing.<sup>29</sup> Accordingly, standing will be “denied when the threat of injury is too speculative.”<sup>30</sup>

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11, 61 NRC 309, 311-12 (2005) (quoting *NFS*, CLI-04-13, 59 NRC at 248) (If “there is no ‘obvious’ potential for radiological harm at a particular distance frequented by the petitioner, it becomes the petitioner’s burden to show a specific and plausible means of how the challenged action may harm him or her.”).

<sup>26</sup> *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 168 (1998) (citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)); *see also N. States Power Co.* (Prairie Island Nuclear Generating Plant Indep. Spent Fuel Storage Installation), LBP-12-24, 76 NRC 503, 507-08 (2012) (citing *EnergySolutions*, CLI-11-3, 73 NRC at 621). Both the Commission’s Notice of Hearing Opportunity for this proceeding and its Rules of Practice require a petitioner to set forth: (1) the nature of its right under the 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. Notice of Hearing Opportunity, 83 Fed. Reg. at 44,071; 10 C.F.R. § 2.309(d)(1).

<sup>27</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

<sup>28</sup> *Nw. Airlines, Inc. v. Fed. 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)).

<sup>29</sup> *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 130 (1992).

<sup>30</sup> *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72 (citing *Whitmore v. Ark.*, 495 U.S. 488, 494 (1974); *L.A. v. Lyons*, 461 U.S. 95, 105 (1983)) (finding an assertion of offsite injury was not too speculative to establish

**B. BN Has Not Demonstrated Proximity-Plus Standing**

BN asserts that it has standing pursuant to the proximity presumption.<sup>31</sup> However, as explained below, BN has not demonstrated an “obvious” potential for offsite consequences from the WCS CISF. Indeed, the Commission has generically determined that potential offsite consequences at away-from-reactor ISFSIs are so remote and speculative that no offsite emergency planning is even warranted. As the Commission noted, even in the highly improbable event of a rupture of a cask, in which the canister and cladding also fail, “[t]here exists *no significant dispersal mechanism* for the radioactive material contained within a storage cask.”<sup>32</sup> BN offers nothing to contradict this generic determination. Moreover, even assuming *arguendo* that, contrary to the Commission’s generic determination, BN had demonstrated some “obvious” potential for offsite consequences from the WCS CISF the NRC had not previously conceived of, it still has failed to demonstrate that any of its members own property or have frequent contacts within the radius of potential harm. Accordingly, BN has not demonstrated standing on the basis of the proximity-plus presumption.

1. BN Has Not Demonstrated an Obvious Potential for Offsite Consequences

BN claims that “[t]he potential for offsite consequences from the WCS CISF is ‘obvious’ due to the characteristics and quantity of spent fuel ISP plans to consolidate at the CISF.”<sup>33</sup> BN cites the possibility of up to “40,000 MTU of spent nuclear fuel at the WCS CISF.”<sup>34</sup> But the

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standing where the petitioner submitted expert affidavits directly challenging information in the application regarding groundwater flow paths).

<sup>31</sup> Petition at 6.

<sup>32</sup> Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSI) and Monitored Retrievable Storage Facilities (MRS); Final Rule, 60 Fed. Reg. 32,430, 32,439 (June 22, 1995) (“ISFSI EP Rule”).

<sup>33</sup> Petition at 7.

<sup>34</sup> *Id.*

Commission has explained that the mere existence of a source of radiation—even a significant one—does not, itself, demonstrate an “obvious potential for offsite consequences.”<sup>35</sup> Petitioners bear the further burden of demonstrating “a plausible mechanism through which those materials could harm” them.<sup>36</sup> BN simply has not done so here.<sup>37</sup>

Citing a portion of the Safety Analysis Report (“SAR”) submitted with the Application, BN incorrectly asserts that ISP “acknowledges at least one plausible scenario that would result in off-site consequences from storage of spent nuclear fuel at the WCS CISF.”<sup>38</sup> However, BN simply misconstrues the Application. The quoted language merely confirms that analyses required by 10 C.F.R. § 72.106 (to confirm the adequacy of area boundaries) have, in fact, been performed. Nowhere does the Application “acknowledge[]” any “plausible scenario” of offsite consequences from the WCS CISF—because there is none. BN’s misreading of the Application does not demonstrate an “obvious” potential for offsite consequences. And the Petition offers no other legitimate bases for its assertion that such consequences exist.<sup>39</sup>

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<sup>35</sup> *Schofield Barracks*, CLI-10-20, 72 NRC 185, 189 (2010).

<sup>36</sup> *Id.*

<sup>37</sup> BN cites the Blue Ribbon Commission’s Report for the proposition that “deep geologic disposal is the scientifically preferred approach” for “long-term” disposal, Petition at 8, but offers no explanation for how that conclusion demonstrates some obvious potential for offsite consequences from the limited action at issue in this proceeding.

<sup>38</sup> Petition at 8 (quoting SAR at 12-3) (“Analyses are provided for a range of hypothetical accidents, including those with the potential to result in a total effective dose equivalent of greater than 5 Rem outside the owner controlled area or the sum of the deep-dose equivalent specified in 10 CFR 72.106”).

<sup>39</sup> BN does assert, Petition at 7, that the court’s holding in *Nuclear Energy Inst. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1257 (D.C. Cir. 2004) demonstrates that spent fuel storage presents an “obvious” potential for offsite consequences. However, the court determined that a licensing action for *permanent* placement of spent fuel could eventually—thousands of years down the road—present offsite radiological consequences due to anticipated degradation of natural and engineered barriers. *Id.* But that holding is entirely inapplicable to the instant case involving a request to *temporarily* store spent fuel for a limited duration (far shorter than “thousands of years”) and in which the Commission has generically determined offsite radiological releases are not plausible, *see infra*.

In fact, in promulgating its Part 72 emergency planning rule—declining to impose any offsite emergency planning requirements whatsoever on away-from-reactor ISFSIs—the Commission determined there is no plausible possibility of offsite consequences.<sup>40</sup> The Commission’s determination that only *onsite* emergency planning is required at away-from-reactor ISFSIs is directly relevant to proximity-based standing because the proximity presumption in reactor proceedings is *based* on the offsite emergency planning zone (“EPZ”).<sup>41</sup>

As the Commission explained:

To be a potential radiological hazard to the general public, radioactive materials must be released from a facility and dispersed offsite. For this to happen:

- The radioactive material must be in a dispersible form,
- There must be a mechanism available for the release of such materials from the facility, and
- There must be a mechanism available for offsite dispersion of such released material.

Although the inventory of radioactive material contained in 1000 MTHM of aged spent fuel may be on the order of a billion curies or more, *very little is available in a dispersible form*; there is *no mechanism* available for the release of radioactive materials in significant quantities from [the] facility; and the *only* mechanism available for offsite dispersion is atmosphere dispersion.<sup>42</sup>

Because the Commission generically concluded that: (1) “[t]here exists *no significant dispersal mechanism* for the radioactive material contained within a storage cask”;<sup>43</sup> and (2) “the postulated *worst-case* accident involving an ISFSI has *insignificant consequences to the public*

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<sup>40</sup> See, e.g., ISFSI EP Rule, 60 Fed. Reg. at 32,439.

<sup>41</sup> *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC 603, 610 n.32 (2012) (explaining the presumptive distance “corresponds roughly to the emergency planning zone for ingestion pathways”).

<sup>42</sup> ISFSI EP Rule, 60 Fed. Reg. at 32,431 (citing NUREG-0575, Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel, Vol. 1 § 4.2.2, “Safety and Accident Considerations” (Aug. 1979) (ML022550127)) (emphasis added).

<sup>43</sup> *Id.* at 32,439.

*health and safety*,”<sup>44</sup> the final rule imposed onsite-only emergency planning requirements on away-from-reactor ISFSI licensees limited to dry storage of aged fuel, such as the WCS CISF. In other words, the required EPZ limit is the site boundary. Notably, the Commission’s conclusion does not rest simply on a finding that the possibility of offsite consequences is improbable (*e.g.*, would require the simultaneous failure of multiple independent safety systems); rather, it is based on the Commission’s well-considered conclusion that there simply is no *plausible* offsite dispersal mechanism.<sup>45</sup> Ultimately, BN offers nothing to contradict the Commission’s generic conclusions in this regard.

Because BN has failed to carry its burden to demonstrate some “obvious” potential for offsite consequences (and because the Commission generically determined such potential does not exist), BN has not demonstrated its entitlement to proximity-plus standing.

2. BN Has Not Identified Any Members with Contacts Within the Radius of Obvious Potential for Offsite Consequences

Even assuming *arguendo* BN had demonstrated some “obvious” potential for offsite consequences, it still has failed to demonstrate that any of its members own property or have frequent contacts within the radius of potential harm. Specifically, BN asserts proximity-based standing through members “Rose Gardner, whose home and work are located within seven miles of the WCS CISF [and who] . . . visits family who live approximately five miles from the WCS

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<sup>44</sup> *Id.* at 32,431 (citing NUREG-1140, A Regulatory Analysis on Emergency Preparedness for Fuel Cycle and Other Radioactive Material Licensees (Jan. 1988) (ML12174A320)).

<sup>45</sup> *Compare Ga. Tech.*, CLI-95-12, 42 NRC at 116 (finding a scenario in which “three independent redundant safety systems [] fail” did not “altogether strain[] credibility” and thus was enough to invoke the proximity presumption) *and CFC Logistics, Inc.* (Materials License), LBP-03-20, 58 NRC 311, 320 (2003) (finding that a “very strained accident scenario” was enough to invoke the proximity presumption because the scenario “*could* result in the dispersion of radioactive material into the air” (emphasis added)) *with* ISFSI EP Rule, 60 Fed. Reg. at 32,439 (noting that design basis events were “unlikely,” and that “[n]o credible dynamic events have been identified that could” cause a cask rupture, but declining to impose offsite EPZ requirements on away-from-reactor ISFSIs for the *second and additional* reason that “[t]here exists no significant dispersal mechanism for the radioactive material contained within a storage cask”).

CISF,” and “D.K. Boyd, whose property is four miles from the WCS CISF at the nearest point.”<sup>46</sup> But, despite its explicit recognition that the presumptive radius must be determined on a “case-by-case basis,”<sup>47</sup> BN offers no explanation, specific to the WCS CISF, as to why these distances purportedly are within the radius of potential harm. Rather, BN merely points to case law that is incompatible with the facts at issue in this proceeding.

For example, BN notes that, in proceedings involving spent fuel pool expansions and *at-reactor* ISFSIs, presiding officers have used a presumptive distance of 17 miles.<sup>48</sup> These proceedings, however, are fundamentally different than *away-from-reactor* ISFSI proceedings. Spent fuel pools and at-reactor ISFSIs entail wet storage, “fresh” spent fuel, and cask-loading or fuel-handling operations. These features present distinct radiological hazards not found at away-from-reactor ISFSIs limited to dry storage of aged fuel. The Commission explicitly considered these differences in declining to impose offsite emergency planning requirements on dry away-from-reactor ISFSIs:

In the case of an operating nuclear power plant, the dispersal mechanism for radioactive material in the spent fuel is either derived from the heat produced during the fission process or the decay heat which exists in the short period immediately following shutdown. During these times, the potential exists for an accident that could cause the fuel cladding to fail. . . . On the other hand, spent fuel stored in an ISFSI is required to be cooled for at least one year. . . . At this age, spent fuel has a heat generation rate that is too low to cause significant particulate dispersal in the unlikely event of a cask confinement boundary failure.<sup>49</sup>

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<sup>46</sup> Petition at 8.

<sup>47</sup> *Id.* at 7 (citing *Exelon Generation Co. LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580-81 (2005)).

<sup>48</sup> *See, e.g.*, Petition at 7 (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 428-29 (2002) (adopting a 17-mile presumptive distance for an at-reactor ISFSI proceeding and, in turn, citing the 17-mile presumptive distance for a spent fuel pool expansion proceeding in *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29-31 (1999))).

<sup>49</sup> *See, e.g.*, ISFSI EP Rule, 60 Fed. Reg. at 32,439.

Ultimately, neither the presumptive distance determinations in cases involving at-reactor ISFSIs, which entail vastly different potential radiological harms, nor any other case cited by BN,<sup>50</sup> are at all relevant to the “case-by-case” analysis at issue here.

Rather, the Commission should look to the presumptive zone of harm codified in the relevant emergency planning regulations. By way of example, the 50-mile proximity presumption in reactor proceedings is based on the 50-mile offsite EPZ for reactors.<sup>51</sup> For Part 72 ISFSI licensing actions (based on the important differences in potential radiological harm noted above), the Commission determined that the zone of potential harm from “the consequences of worst-case accidents involving an ISFSI located on a reactor site” were bounded by the reactor EPZ; but, that no offsite EPZ was necessary for away-from-reactor ISFSIs.<sup>52</sup> Thus, even assuming proximity-plus standing exists here, the radius of potential harm nonetheless is limited to the site boundary.

Notably, the Commission *explicitly rejected* the possibility of even a small, 1-mile offsite EPZ for such licensees, concluding it was unwarranted.<sup>53</sup> In other words, the Commission has generically concluded that away-from-reactor ISFSIs do not pose a “realistic threat” of offsite

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<sup>50</sup> BN cites two other cases in this regard. Petition at 6-7 (citing *PFS*, LBP-98-7, 47 NRC at 142 and *Armed Forces Radiobiology Research Inst.* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982)). Both are inapposite here. In *PFS*, the Board evaluated standing on traditional grounds, not on the basis of the proximity-plus presumption. Moreover, that decision articulates no basis—technical or otherwise—for its conclusions about the distance at which a plausible harm could accrue offsite, and therefore appears arbitrary to the extent it could be interpreted to establish some “presumptive” radius of harm. And the *AFRRRI* proceeding involved an operating irradiation facility—wholly dissimilar from the “passive structure” at issue here. See *Big Rock Point ISFSI*, CLI-07-19, 65 NRC at 426.

<sup>51</sup> *Ross ISR*, CLI-12-12, 75 NRC at 610 (explaining the presumptive distance “corresponds roughly to the emergency planning zone for ingestion pathways”); see also 10 C.F.R. § 50.47(c)(2) (establishing a 50-mile radius as the presumptive offsite EPZ for ingestion pathways).

<sup>52</sup> ISFSI EP Rule, 60 Fed. Reg. at 32,439.

<sup>53</sup> *Id.* at 32,435.

harm.<sup>54</sup> Nevertheless, even assuming *some* speculative radiological harm (not identified by BN) could accrue at the site boundary, BN offers no explanation for how this harm could travel even four (much less, seven) miles from the site in a form that could cause harm. This omission is particularly conspicuous where the Commission has generically determined that, at facilities such as the WCS CISF, “*very little* [radioactive material] is available in a dispersible form; [and] there is *no mechanism available* for the release of radioactive materials in significant quantities from the facility.”<sup>55</sup> Ultimately, BN’s “conclusory allegations about potential radiological harm” are insufficient to satisfy its affirmative burden to demonstrate that a zone of potential harm extends beyond the site boundary—much less, that it extends at least four miles.<sup>56</sup> Accordingly, BN’s members’ alleged contacts four to seven miles away from the WCS CISF are insufficient to demonstrate proximity-plus standing.

### C. **BN Has Not Demonstrated Traditional Standing**

BN further asserts that it has standing “through traditional means by virtue of the injuries to its members who live and travel on or along routes that ISP plans to transport spent nuclear fuel.”<sup>57</sup> BN points to two members who purportedly would incur these alleged injuries: “Rose Gardner, whose home and property are located within seven miles of the WCS CISF,” and “D.K. Boyd, whose property is four miles from the WCS CISF at the nearest point.”<sup>58</sup> BN alleges both radiological and economic injuries as demonstrating injury-in-fact. However, the cursory and

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<sup>54</sup> Cf. *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 917 (2009).

<sup>55</sup> ISFSI EP Rule, 60 Fed. Reg. at 32,431 (citing NUREG-0575, Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel, Vol. 1 § 4.2.2, “Safety and Accident Considerations” (Aug. 1979) (ML022550127)) (emphasis added).

<sup>56</sup> *NFS*, CLI-04-13, 59 NRC at 248.

<sup>57</sup> Petition at 4.

<sup>58</sup> *Id.* at 6.

generalized allegations of harm in the Petition, and its accompanying affidavits,<sup>59</sup> fall short of demonstrating any concrete and particularized injury, and thus fail to establish traditional standing.

1. BN's Transportation Safety-Related Harms Are Outside the Scope of This Proceeding

BN asserts that its “members are largely concerned with radiological injury.”<sup>60</sup> BN argues that the alleged injury stems “primarily from radiologic exposure received during normal transportation operations,” as well as “from an accident involving shipments of spent nuclear fuel.”<sup>61</sup> However, BN’s transportation safety-related concerns are not within the scope of this proceeding, and therefore cannot provide a basis for standing.

ISP’s Application seeks a specific-license for an ISFSI under 10 C.F.R. Part 72; it does not request approval of a new transportation package design or approval of any specific transportation route. On the other hand, the safety and security of spent fuel transportation is governed by the standards in 10 C.F.R. Parts 71 and 73 and through regulations issued by the Department of Transportation.<sup>62</sup> For example, an *entirely separate application and approval process* are required for any planned road or rail routes over which spent fuel may be transported.<sup>63</sup> The appropriateness of the route selection—including whether spent fuel should

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<sup>59</sup> See, e.g., Petition, Attach. 02 at ¶¶ 8-9, Attach. 03 at ¶¶ 9-10 (expressing vague “concern[s]” about unspecified “risks” from “operation and construction of” and unspecified “radiation risks” from some unstipulated “accident . . . at” the WCS CISF, located several miles away from property owned by affiants).

<sup>60</sup> Petition at 3.

<sup>61</sup> *Id.* at 4.

<sup>62</sup> See 10 C.F.R. § 71.0, “Purpose and scope.” See also *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-99-34, 50 NRC 168, 176-77 (1999) (noting that “shipment of spent nuclear fuel [is] governed by Part 71 and do[es] not require a specific license under Part 72”).

<sup>63</sup> See 10 C.F.R. § 73.37(b)(1)(vi); see also NUREG-0561, Rev. 2, Physical Protection of Shipments of Irradiated Reactor Fuel §§ 2.1, “NRC Approval of SNF Shipment Routes,” 2.1.1, “Route Selection Criteria” (Apr. 2013) (ML13120A230).

(or should not) travel along the routes identified in the Petition and accompanying affidavits— simply is not at issue in this proceeding. The Commission has recognized that alleged harms from activities separately authorized and regulated by transportation licensing and regulatory oversight regimes are insufficient to establish AEA-based standing in non-transportation licensing proceedings.<sup>64</sup> Ultimately, BN’s claims in this regard fail to identify an interest that may be affected by *this* ISFSI licensing proceeding.

2. BN’s Allegations of Potential Exposure to Minute Doses of Radiation and Geographic Proximity to Transportation Routes Are Insufficient to Establish Standing

Nevertheless, even if transportation safety issues outside the scope of this proceeding somehow could provide a basis for standing here, BN’s purported threat of injury—*de minimis* radiological exposures from chance encounters along possible transportation routes—is conjectural or hypothetical at best, and certainly is not “concrete and particularized.”<sup>65</sup> Accordingly, these claims are insufficient to establish traditional standing.

BN asserts standing on the basis that its “members who live or travel on [certain] roads . . . will be exposed to . . . a higher likelihood of an accident involving spent nuclear fuel.”<sup>66</sup> To the extent they assert that physical presence or property ownership on or near potential transportation routes establishes standing, their claims are contrary to settled law. For example, in 2004, the Commission explained that “mere geographical proximity to potential transportation

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<sup>64</sup> Cf., e.g., *EnergySolutions*, CLI-11-3, 73 NRC at 625 (finding radioactive materials transportation challenges outside the scope of an import/export proceeding); *UniTech Services Group, Inc.* (Export of Low-Level Waste), CLI-18-2, 87 NRC 78, 81-82 (2018) (finding claims of “chance highway encounters” and other transportation-related allegations of injury lacked a “sufficient nexus” to an export license proceeding to establish standing because transportation is “separately authorized . . . by transportation licensing” requirements).

<sup>65</sup> *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72.

<sup>66</sup> Petition at 5. *But compare* Petition, Attach. 03 ¶ 14 (asserting concerns about a transportation “accident”), *with id.*, Attach 02 (making no analogous assertion).

routes is insufficient to confer standing.”<sup>67</sup> Moreover, “tenuous assumptions” that a transportation accident “might occur” are “entirely speculative in nature,” and therefore fail to establish standing.<sup>68</sup> Likewise, “[t]he mere fact that additional radioactive waste will be transported” does not, *per se*, demonstrate an injury-in-fact *vis-à-vis* a higher likelihood of an accident; any asserted injury on this basis is “purely speculative and legally insufficient to demonstrate standing.”<sup>69</sup> BN’s nearly identical arguments in this regard also fail for these reasons.

Moreover, to the extent BN believes its claims go *beyond* “mere geographic proximity” and somehow establish a clear causal nexus to radiological injury, its arguments still miss the mark. Specifically, BN claims that “even minor radiological exposures” from proximity to a shipment of spent nuclear fuel constitute a sufficient injury-in-fact to establish standing.<sup>70</sup> For this proposition, BN cites an unreviewed standing discussion from a 2001 licensing board decision in the *MOX* proceeding.<sup>71</sup> However, its proposition is unpersuasive in light of more recent—and controlling—precedent to the contrary. In 2011, the Commission categorically held that “[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.*”<sup>72</sup>

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<sup>67</sup> *U.S. Dep’t of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 364 n.11 (2004).

<sup>68</sup> *Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 NRC 518 (1977).

<sup>69</sup> *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40 (1990).

<sup>70</sup> Petition at 3.

<sup>71</sup> *Id.* at 3, 5 (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 417 (2001), *rev’d on contention admissibility grounds without reviewing standing*, CLI-02-24, 56 NRC 335 (2002)).

<sup>72</sup> *EnergySolutions*, CLI-11-3, 73 NRC at 623 (emphasis added).

Indeed, the *Diablo Canyon* case cited by BN confirms this standing limitation.<sup>73</sup> There, the Board observed that “simply showing the potential for any radiological impact, no matter how trivial, is not sufficient to meet the requirement of a showing of a ‘distinct and palpable harm’ under standing element one.”<sup>74</sup> The Board concluded that an alleged radiological exposure “four or five orders of magnitude below average natural background radiation levels . . . clearly falls below the level that can be considered substantial enough for standing purposes.”<sup>75</sup> Here, the injury alleged by BN—from “radiologic exposure received during normal transportation operations”<sup>76</sup>—presents this identical factual scenario. The NRC has generically concluded that the potential radiological exposures to members of the public from routine transportation of spent fuel “are approximately four to five orders of magnitude less than the collective background radiation dose.”<sup>77</sup>

Thus, as a matter of law, the hypothetical and minute radiological exposures upon which BN seeks to establish traditional standing fall short of demonstrating an injury-in-fact.

3. BN’s Claims of Economic Injury Are Speculative and Not Supported by Any Objective Fundament

Finally, BN alleges standing based on speculative assertions of “adverse impacts to its members’ property values . . . [b]ecause of public perception and anticipation [whereby] individuals are hesitant to move close to a nuclear facility.”<sup>78</sup> Here, BN’s members *already* live

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<sup>73</sup> Petition at 7, 9.

<sup>74</sup> *Diablo Canyon ISFSI*, LBP-02-23, 56 NRC at 428.

<sup>75</sup> *Id.* at 429.

<sup>76</sup> Petition at 4.

<sup>77</sup> NUREG-2125, Spent Fuel Transportation Risk Assessment at xxiv (Jan. 2014) (ML14031A323). *See also* ER at 4-14 to -15 (“All of the NRC’s assessments have concluded that the risk from radiation emitted from a transportation cask during routine, incident-free transportation is a small fraction of the radiation dose received from the natural background”).

<sup>78</sup> Petition at 5-6.

close to *multiple* existing nuclear facilities. Thus, its assertion in this regard is simply bizarre. Nevertheless, where a petition seeks to base its claim to standing on economic loss, “what is necessary is a showing . . . 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.”<sup>79</sup>

BN fails to provide any objective basis, whatsoever, for its speculative concern. Importantly, the presiding officer “need not uncritically accept” BN’s “contested, untenable, conjectural, [and] conclusory” standing claims.<sup>80</sup> Rather, it must “weigh” those claims “and exercise its judgment about whether the standing element at issue has been satisfied.”<sup>81</sup>

In essence, BN asks the Commission to hold that proximity to a nuclear materials facility, *per se*, results in property devaluation (and thus, demonstrates standing). But such a holding would eviscerate the Commission’s prior ruling that a pure proximity presumption is not appropriate in materials proceedings.<sup>82</sup> Furthermore, the blanket determination requested by BN is entirely inappropriate given the Commission’s recognition that the precise opposite effect also is possible—*i.e.*, that property values near a nuclear installation “may actually *increase*.”<sup>83</sup> For example:

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<sup>79</sup> *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 184 (2012) (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 432 (generic, unsubstantiated claims regarding health, safety, and property devaluation impacts are insufficient to establish standing), *aff’d*, CLI-03-1, 57 NRC 1 (2003)).

<sup>80</sup> *Ross ISR*, LBP-12-3, 75 NRC at 177.

<sup>81</sup> *Id.*

<sup>82</sup> *Ross ISR*, CLI-12-12, 75 NRC at 610 n.32 (“we do not see a sound basis for departing from our current practice of basing standing [in materials proceedings] on the circumstances specific to the particular license application”).

<sup>83</sup> *La. Energy Servs., LP* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 108 (1998) (emphasis in original).

- “parcels of property near the [facility] may increase in value, as possible sites for new business ventures supporting [the licensee] (e.g., food service and equipment vendors)”;<sup>84</sup>
- “increased demand for homes by migrating employees” also may “tend to increase the value of property near nuclear facilities”;<sup>85</sup> and
- the “influx of new tax money,”<sup>86</sup> may result in improved schools, infrastructure, and other government amenities which, in turn, could boost property values.

As these examples demonstrate, BN’s conclusory and speculative claims of economic loss are conjectural or hypothetical at best, and, without some objective fundament, certainly do not demonstrate a “concrete and particularized” injury capable of demonstrating standing.<sup>87</sup>

Additionally, the CISF would be co-located with WCS’s *existing* low-level waste and mixed waste facilities. BN offers no explanation of how the addition of passive spent fuel storage capabilities to the existing industrial activities in this area—including “a stone quarry, a hazardous waste and low-level radioactive waste landfill, a large power transmission substation, a county landfill, a uranium enrichment plant, and an aboveground oilfield waste disposal land farm”<sup>88</sup>—purportedly would introduce some incremental effect on property values.<sup>89</sup> Whereas, in the context of an existing facility, if the likelihood of an alleged injury is “just as high with or

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 109.

<sup>86</sup> *Id.* at 108.

<sup>87</sup> *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72.

<sup>88</sup> ER at 3-62.

<sup>89</sup> BN cites *Kelly v. Selin*, 42 F.3d 1501, 1509-10 (6th Cir. 1995), for the proposition that assertions of diminished property values, alone, can demonstrate standing. However, the court in *Kelly* did not find standing on that basis alone. Rather, the court considered the property value claims in conjunction with a bundle of other claims, including “aesthetic interests” and “physical health,” and the potential disruption of “enjoyment of [] lakefront property.” *Id.* The court said nothing to suggest that unsubstantiated assertions of property devaluation, alone, would have demonstrated Article III standing. Moreover, that case also is factually distinguishable in that the action proposed was to *begin* storing waste, for the first time, at a lakefront location; here, WCS seeks to *continue* storing waste, albeit of a different type, at an *existing nuclear waste facility*. By any objective measure, BN’s alleged economic harm is far more speculative and attenuated than that in *Kelly*.

without the proposed” licensing action, there is no injury-in-fact, fairly traceable to the proposed licensing action, that could be remedied therein.<sup>90</sup> Here, we simply do not know—because BN provides no benchmark or other objective indicator of potential (positive, negative, or neutral) property value impact.

BN could have attempted to make the required “nonsubjective showing” 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.<sup>91</sup>

BN failed to do so here. More importantly, it failed to provide *any* objective basis for its speculative—and quite likely wrong—claim. Given that “the petitioner bears the burden to provide facts sufficient to establish standing,”<sup>92</sup> and BN has not done so here, these claims are insufficient to demonstrate traditional standing.

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In summary, BN has failed to demonstrate that it has representative standing because it has not shown that any of its members would satisfy the requirements for proximity-plus or traditional standing in their own right. Accordingly, the Petition must be denied.

#### **IV. BN HAS NOT SUBMITTED AN ADMISSIBLE CONTENTION**

##### **A. Legal Standards for Contention Admissibility**

Under 10 C.F.R. § 2.309(f)(1), a hearing request “must set forth with particularity the contentions sought to be raised.” In addition, Section 2.309(f)(1) states that each contention must:

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<sup>90</sup> *Tenn. Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 27 (2002).

<sup>91</sup> *Id.*

<sup>92</sup> *Bell Bend*, CLI-10-7, 71 NRC at 139.

- (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 is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised 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, including references to the specific sources and documents that support the petitioner’s position and upon which the petitioner intends to rely; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.<sup>93</sup>

Failure to comply with any one of these six admissibility requirements is grounds for rejecting a proposed contention.<sup>94</sup> These requirements are “strict by design.”<sup>95</sup> The rules were “toughened . . . in 1989 because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’”<sup>96</sup> The purpose of the six criteria is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”<sup>97</sup> The Commission has explained that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”<sup>98</sup>

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<sup>93</sup> 10 C.F.R. §§ 2.309(f)(1)(i)-(vi). *See also* *Susquehanna Nuclear, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-17-4, 85 NRC 59, 74 (2017) (reciting the six Section 2.309(f)(1) admissibility factors).

<sup>94</sup> *See* Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also* *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

<sup>95</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

<sup>96</sup> *Id.* (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

<sup>97</sup> Changes to Adjudicatory Process, 69 Fed. Reg. at 2202; *see also* *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 61 (2008).

<sup>98</sup> Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

The petitioner alone bears the burden to meet the standards of contention admissibility.<sup>99</sup> Thus, where a petitioner neglects to provide the requisite support for its contentions, the presiding officer may not cure the deficiency by supplying the information that is lacking or making factual assumptions that favor the petitioner to fill the gap.<sup>100</sup> A contention that merely states a conclusion, without reasonably explaining why the application is inadequate, cannot provide a basis for the contention.<sup>101</sup> A “material issue” is one that would “make a difference in the outcome of the licensing proceeding.”<sup>102</sup> The petitioner must demonstrate that the subject matter of the contention would impact the grant or denial of a pending license application.<sup>103</sup>

A contention that challenges an NRC rule is outside the scope of the proceeding because, absent a waiver, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.”<sup>104</sup> This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking.<sup>105</sup> Similarly, any contention that collaterally attacks applicable statutory requirements or the basic structure of the NRC regulatory process must be rejected as

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<sup>99</sup> See *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 325, 329 (2015) (“[I]t is Petitioners’ responsibility, not the Board’s, to formulate contentions and to provide ‘the necessary information to satisfy the basis requirement’ for admission”); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 149 (2015) (“[T]he Board may not substitute its own support for a contention.”).

<sup>100</sup> See *Palisades*, CLI-15-23, 82 NRC at 329; *Fermi*, CLI-15-18, 82 NRC at 149; *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991).

<sup>101</sup> *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006).

<sup>102</sup> *Oconee*, CLI-99-11, 49 NRC at 333-34.

<sup>103</sup> See *Indian Point*, LBP-08-13, 68 NRC at 62.

<sup>104</sup> 10 C.F.R. § 2.335(a).

<sup>105</sup> See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159-60, *aff’d*, CLI-01-17, 54 NRC 3 (2001) (rejecting the petitioner’s contention that a license renewal applicant was required to prepare a probabilistic risk assessment, where NRC regulations did not require such an analysis).

outside the scope of the proceeding.<sup>106</sup> Accordingly, a contention that simply states the petitioner’s views about regulatory policy—or takes issue with the nature of existing regulations—does not present a litigable issue.<sup>107</sup>

Equally important, the Commission has stated further that the petitioner must “read the pertinent portions of the license application . . . state the applicant’s position and the petitioner’s opposing view,” and explain why it disagrees with the applicant.<sup>108</sup> If a petitioner believes the license application fails to adequately address a relevant issue, then the petitioner is to “explain why the application is deficient.”<sup>109</sup> A contention that does not *directly controvert* a position taken by the applicant in the application is subject to dismissal.<sup>110</sup> For example, if a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine dispute.<sup>111</sup>

## **B. Overview of BN’s Proposed Contention**

BN’s sole contention asserts that the NRC must dismiss ISP’s Application and terminate this proceeding because the Application violates the NWPA.<sup>112</sup> Specifically, BN claims that the Application’s “central premise” is that DOE will take title to the spent fuel that would be stored

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<sup>106</sup> *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 57-58 (2007) (stating that a contention that attacks applicable statutory requirements “must be rejected by a licensing board as outside the scope of the proceeding”) (citing *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20 (1974)).

<sup>107</sup> *See Peach Bottom*, ALAB-216, 8 AEC at 20-21.

<sup>108</sup> Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process; Final Rule, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *see also Millstone*, CLI-01-24, 54 NRC at 358.

<sup>109</sup> Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Palo Verde*, CLI-91-12, 34 NRC at 156.

<sup>110</sup> *See S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC 1, 21-22 (2010); *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992), *vacated as moot*, CLI-93-10, 37 NRC 192 (1993).

<sup>111</sup> *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 95 (2004); *see also Summer*, CLI-10-1, 71 NRC at 21-22.

<sup>112</sup> Petition at 8.

at the CISF before a permanent repository for the spent fuel has opened.<sup>113</sup> According to BN, this assumption contravenes various NWPA provisions that preclude DOE from taking title to spent fuel “unless and until a permanent repository has opened.”<sup>114</sup>

As support, the contention adopts and incorporates by reference Sections IV and V of a related Motion to Dismiss filed by BN in this proceeding and the Holtec CISF licensing proceeding in September 2018.<sup>115</sup> In short, BN argues that NWPA Section 111 provides that the federal government will not take title to spent fuel until it has opened a permanent repository,<sup>116</sup> and the APA prohibits federal agency action that is “not in accordance with law,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>117</sup> BN acknowledges that both ISP’s Application and ER refer to DOE *or* other “SNF Title Holders.”<sup>118</sup> However, it claims that ISP’s references to private ownership of spent fuel are “pro forma” references that “serve as nothing more than fig leaves over [its] essential premise . . . that [the facility] will be built only if DOE owns the waste.”<sup>119</sup>

**C. The Proposed Contention Is Not Admissible Because It Raises Issues That Are Neither Within the Scope of This Proceeding, Nor Material to the NRC Staff’s Findings on the ISP Application**

Significantly, BN concedes that its contention is not admissible under 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv).<sup>120</sup> It states that “Beyond Nuclear does not believe its contention is

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 8-9.

<sup>115</sup> *See* Motion to Dismiss.

<sup>116</sup> *Id.* at 12 (citing 42 U.S.C. § 10131(a)(5)).

<sup>117</sup> *Id.* (quoting 5 U.S.C. §§ 706(2)(A), (C)).

<sup>118</sup> *See id.* at 17-19 (quoting Application at 1-1 to 1-2, 1-7, 1-9; ER at 3-5, 7-15)

<sup>119</sup> *Id.* at 18-19.

<sup>120</sup> Beyond Nuclear claims that it nevertheless filed its proposed contention in this adjudicatory proceeding “in an abundance of caution, to preserve its claims in the event that the Commission and/or a reviewing court

within the scope of this proceeding, because NRC regulations establishing the scope of the proceeding do not include the NWPA.”<sup>121</sup> It further admits that “this contention is not material to the findings that NRC must make in order to issue a license to ISP.”<sup>122</sup>

BN’s observations regarding the irrelevance and immateriality of its contention are correct. As defined by the Notice of Hearing Opportunity, the scope of this proceeding concerns ISP’s request for a specific license under 10 C.F.R. Part 72 to construct and operate a CISF.<sup>123</sup> The NRC therefore must “make the findings required by the Atomic Energy Act of 1954, as amended (AEA), and the NRC’s regulations.”<sup>124</sup> Accordingly, this proceeding is *not* concerned with DOE’s authority under the NWPA to use a privately-owned, NRC-licensed CISF prior to the availability of a permanent geologic repository.<sup>125</sup> Indeed, BN provides no basis to conclude that the NRC has *any* authority to decide whether DOE can take title to spent fuel prior to the availability of a permanent repository—whether within the context of this proceeding or otherwise.<sup>126</sup> That is a determination to be made by DOE—not the NRC.<sup>127</sup> In any event, based on BN’s explicit concessions that its proposed contention raises issues that are outside the

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holds that the licensing proceeding for consideration of the ISP application . . . constitutes the only venue in which the NRC will consider whether the application violates the NWPA.” *Id.* at 2.

<sup>121</sup> *Id.* at 9 (citing 10 C.F.R. §§ 72.40, 51.101).

<sup>122</sup> *Id.*

<sup>123</sup> Notice of Hearing Opportunity, 83 Fed. Reg. at 44,070.

<sup>124</sup> *Id.* at 44,071.

<sup>125</sup> In the context of this proceeding, DOE is another governmental agency and a potential ISP customer. It is *not* an NRC license applicant in this proceeding.

<sup>126</sup> *Cf. PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 107 (2007) (denying an appeal claiming “that [the] NRC ought to concern itself with . . . matters within the jurisdiction of other state and federal agencies”); *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-16-17, 84 NRC 99, 109 n.35 (2016) (noting that the NRC “lack[s] jurisdiction” to consider a licensee’s compliance with FERC regulations).

<sup>127</sup> *Cf. Hydro Res., Inc.* (Albuquerque, NM), CLI-98-16, 48 NRC 119, 121-22 (1998) (“Congress granted us authority merely to regulate radiological and related environmental concerns. It gave our agency no roving mandate to determine other agencies’ permit authority. Our regulation . . . show[s] due respect to our sister agencies’ responsibilities but do not add to our own regulatory jurisdiction.”).

proceeding’s scope and immaterial to the NRC Staff’s findings, the contention should be rejected as inadmissible, as the failure to meet any one of the six admissibility criteria in Section 2.309(f)(1) is grounds for dismissal of a proposed contention.<sup>128</sup>

**D. The Proposed Contention Is Not Admissible Because It Also Lacks Adequate Factual or Legal Support and Fails to Establish a Genuine Dispute with ISP on a Material Issue of Law or Fact**

BN’s proposed contention also should be rejected because it fails to satisfy the contention admissibility requirements in 10 C.F.R. §§ 2.309(f)(1)(v) and (vi). The contention lacks a factual foundation because it incorrectly characterizes the Application as being based on the “central” or “essential” premise that DOE must hold title to the spent fuel to be stored at the facility before the facility can be licensed and built.<sup>129</sup> The contention lacks a legal basis because it claims that the NRC lacks the necessary statutory authority to license the proposed ISP CISF, and that issuance of a license to ISP would violate NWPA and APA requirements.

1. **BN Incorrectly Claims that ISP Assumes in Its Application That DOE Necessarily Will Hold Title to the Spent Fuel Stored at the Proposed CISF**

BN’s own “central premise” is factually unfounded. The Application clearly and consistently states that *either* the owners of the nuclear plants from which the spent fuel originated (*i.e.*, the SNF Title Holders) *or* the DOE will be the customer(s) for the proposed CISF. For example, the Application states that “[DOE] or other holders of the title to SNF at commercial nuclear power facilities (SNF Title Holder(s)) will hold title to the SNF during transportation to and from and while in storage at the CISF.”<sup>130</sup> It further provides that “ISP will obtain funds to operate the CISF pursuant to future contracts with the DOE or other SNF Title

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<sup>128</sup> PFS, CLI-99-10, 49 NRC at 325; *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 567-68 (2005).

<sup>129</sup> Petition at 8; Motion to Dismiss at 1, 8, 19.

<sup>130</sup> Application at 1-1 to 1-2.

Holder(s),” and that ISP shall not receive SNF until such a contract with the DOE or other SNF Title Holder(s) is provided to the NRC as a condition of the license.”<sup>131</sup> These representations are embedded in two proposed license conditions.<sup>132</sup> Proposed License Condition 23 provides that:

Prior to commencement of operations, the Licensee shall have an executed contract with the U.S. Department of Energy (DOE) *or* other SNF Title Holder(s) stipulating that the DOE *or* the other SNF Title Holder(s) is/are responsible for funding operations required for storing the material identified in 6.A, 6.B, 7.A or 7.B at the CISF as licensed by the U.S. Nuclear Regulatory Commission.<sup>133</sup>

Proposed License Condition 24 provides that:

Prior to receipt of the material identified in 6.A, 6.B, 7.A or 7.B, the Licensee shall have a financial assurance instrument required pursuant to 10 CFR 72.30 acceptable to the U.S. Nuclear Regulatory Commission *or* an executed contract with DOE guaranteeing decommissioning funds will be provided for use by the Licensee.<sup>134</sup>

BN does not (and cannot) point to any statements in the Application or ER that support its claim that approval of the Application is predicated on the assumption that DOE must hold title to any spent fuel that is transported to and stored at the proposed CISF. Instead, it falsely accuses ISP of “hedging” that purportedly “essential” assumption through “meaningless and unsupported” references to private ownership of the SNF.<sup>135</sup> However, BN fails to provide *any*

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<sup>131</sup> *Id.* at 1-7.

<sup>132</sup> The use of such license conditions by the NRC is a well-established legal or regulatory practice. *See, e.g., Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000); *PFS*, CLI-98-13, 48 NRC at 36; *La. Enrichment Servs.* (Claiborne Enrichment Ctr.), CLI-97-15, 46 NRC 294 (1997).

<sup>133</sup> Application, Attachment A (Proposed License Conditions) at 3 (emphasis added).

<sup>134</sup> *Id.* (emphasis added). To the extent the ER mentions potential ISP customers and funding sources, the ER statements are consistent with those in the Application. For instance, the ER notes that “[t]he DOE or the SNF Title Holder(s) would be responsible for transporting spent nuclear fuel (SNF) from existing commercial nuclear power reactors to the CISF.” ER at 3-5. It further states that “ISP expects to enter into a contract(s) with DOE or the SNF Title Holder(s) that will provide the funding for facility construction, operation, and decommissioning.” *Id.* at 7-15.

<sup>135</sup> Motion to Dismiss at 19.

information even suggesting that private ownership of the spent fuel to be received and stored at the CISF—as specifically provided for in Revision 2 of the Application—is impracticable for legal, commercial, or other reasons.

Similarly, BN notes that in Section 1.7 of the Application, ISP seeks an exemption from the NRC’s decommissioning financial assurance regulations “based on federal ownership of the spent fuel.”<sup>136</sup> BN expressly acknowledges that “[t]he application asserts that if it fails to have a contract with DOE, [ISP] will obtain a surety bond for private owners.”<sup>137</sup> However, BN seeks to dismiss this key statement—which undercuts the central thesis of its contention—as another purportedly “pro forma” assertion by ISP.<sup>138</sup>

Review of the Application makes clear that it is BN—not ISP—that relies on perfunctory assertions. Section 1.7.1 explains that ISP is seeking a contract with DOE that guarantees decommissioning funds will be provided for use by ISP as “an *alternative* method of financial assurance that will guarantee the necessary funding for decommissioning the CISF authorized to store the material defined in . . . the license that is equivalent to the provisions of 10 CFR 72.30(e).”<sup>139</sup> Notably, just two paragraphs later Section 1.7.1 presents a second alternative, one which ISP must pursue if it is not able to execute such a contract with DOE:

In the event that the DOE does not enter into a contract to specifically guarantee that the funds shall be available for use by ISP to decommission said facilities, equipment, and land, then ISP *shall* have one of the financial assurance instruments, specified in 10 CFR 72.30(e), as specifically approved by the NRC, prior to receipt of SNF at the CISF, *as a condition of the license*.<sup>140</sup>

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<sup>136</sup> Motion to Dismiss at 18.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Application at 1-8 (emphasis added). The contract with DOE would “require the DOE to pay the actual costs of decommissioning the facilities, equipment, storage systems, and land used to store the material at the CISF.” *Id.*

<sup>140</sup> *Id.* (emphasis added).

In the preceding excerpt from the Application—which BN ignores—ISP explicitly commits to comply with the requirements of Section 72.30(e) by providing (before receipt of any SNF at the CISF) an NRC-approved decommissioning financial assurance instrument, in the event it does not execute a contract with DOE. Moreover, ISP has sought to incorporate that commitment into a legally-binding license condition (see proposed License Condition 24, quoted above).<sup>141</sup> As explained in Section 1.6.3 of the Application, ISP could implement the second alternative by using a surety bond combined with a conformity external sinking fund, as permitted by 10 C.F.R. § 72.30(e)(3).<sup>142</sup>

Thus, contrary to BN’s claim, ISP does not rely on a “pro forma” assertion. The Application specifically explains how ISP intends to meet its decommissioning financial assurance obligations—prior to receiving SNF—in the event that it is unable to meet those obligations through a contract with DOE. Significantly, because ISP provides the above alternative paths for satisfying the NRC’s decommissioning financial assurance requirements, *Staff does not need to find that ISP could obtain a contract with DOE in order to approve the Application or the associated exemption request.* Additionally, BN does not contest the viability of ISP’s proposed alternative financial assurance method (*i.e.*, surety bond with external sinking fund) under NRC regulations, or challenge ISP’s ability to implement that method.<sup>143</sup>

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<sup>141</sup> As noted above, the Commission has approved the use of financial assurance-related license conditions in multiple materials licensing proceedings. *See* note 132, *supra*.

<sup>142</sup> Application at 1-7. Payments from storage operations would be deposited into the external sinking fund as waste is received. A surety bond would be used to assure the difference in the decommissioning cost estimate and the value of the sinking fund until the sinking fund is fully funded by SNF Title Holder(s). *Id.*

<sup>143</sup> 10 C.F.R. § 72.30(e) allows applicants/licensees to use a number of different financial assurance methods, including: (1) prepayment; (2) a surety, insurance, or guarantee; or (3) an *external sinking fund* in which deposits are made at least annually, *coupled with a surety method*, insurance, or other guarantee method, the value of which may decrease by the amount being accumulated in the sinking fund.

In view of the above, BN plainly has failed to meet its obligation under 10 C.F.R. § 2.309(f)(1)(vi) “to develop a fact-based argument that actually and specifically challenges the application.”<sup>144</sup> In the same vein, BN does not provide any information to cast doubt on the veracity of ISP’s statements in the ER and Application (including its proposed license conditions), which, by regulation, must be complete and accurate in all material respects.<sup>145</sup> Importantly, the Commission has “long declined to assume that licensees will refuse to meet their obligations,”<sup>146</sup> and refused to impute “ulterior motive[s]” to licensees. There is no reason to do so here, or to otherwise question ISP’s stated intention in the Application to rely on DOE *or* private sector ownership and transport of the spent fuel to be stored at the CISF, as necessary and appropriate.

In summary, the Application, including the proposed license conditions described above—which BN does not challenge in its contention—make clear that either DOE or SNF title holders could be ISP’s customers. If ISP does not have an executed contract with DOE, then it must have executed contracts with commercial entities holding title to SNF, as well as an NRC-accepted decommissioning financial assurance instrument, before it can commence facility operations and receive licensed material for interim storage. Thus, as a factual matter, the issue raised by BN in its contention has no bearing on the licensability of the WCS CISF.

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<sup>144</sup> *Oconee*, CLI-99-11, 49 NRC at 341; *see also id.* at 342 (quoting *PFS*, LBP-98-7, 47 NRC at 181 (noting that “a contention ‘that fails directly to controvert the license application . . . is subject to dismissal’”).

<sup>145</sup> *See* 10 C.F.R. § 72.11.

<sup>146</sup> *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003); *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000) (“Absent [documentary] support, this agency has declined to assume that licensees will contravene our regulations.”); *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 400 (1995).

2. The NRC Has the Legal Authority to License the Proposed CISF, Irrespective of Alleged NWPA Constraints on the Timing of DOE’s Ability to Use the Facility

Contrary to BN’s claims, the NWPA in no way limits or affects the NRC’s authority to license away-from-reactor centralized interim spent fuel storage facilities. In fact, the Commission and the judiciary have explicitly upheld that authority. In the *Private Fuel Storage* proceeding—in which the NRC issued a Part 72 license for a proposed CISF—the Commission “conclude[d] that Congress, in enacting the [AEA], gave the NRC authority to license privately owned, away-from-reactor (AFR) facilities.”<sup>147</sup> The Commission held that “[n]othing in the text or legislative history of the NWPA suggests that Congress intended to alter this authority when it enacted the NWPA, which is primarily concerned with the responsibilities and duties of *federal agencies* [not private companies] with respect to spent fuel storage and disposal.”<sup>148</sup> On this point, the Commission emphasized that the AEA does not specifically direct the NRC to regulate spent fuel storage and disposal, but instead “gives the Commission regulatory jurisdiction over the constituent materials of spent nuclear fuel.”<sup>149</sup>

The U.S. Court of Appeals for the D.C. Circuit reached the same conclusion in *Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536 (D.C. Cir. 2004). In that case, the State of Utah and others sought review of an NRC order denying a petition for rulemaking contending

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<sup>147</sup> PFS, CLI-02-29, 56 NRC at 392.

<sup>148</sup> *Id.* at 411 (emphasis added). Thus, BN’s argument that CLI-02-29 “concerned only privately-owned waste” (Motion to Dismiss at 21) is irrelevant, as this proceeding is not concerned with DOE’s responsibilities and duties under the NWPA. Furthermore, by licensing the proposed ISP CISF, the NRC would not be “ignor[ing] the NWPA’s prohibition against transfer of title of spent fuel to the federal government in the absence of a repository.” *Id.* As the Commission noted in CLI-02-29, “[t]here is no irreconcilable conflict between a law imposing one set of restrictions on federal facilities (the NWPA), and another law imposing a different set of restrictions on private facilities (Part 72).” *Id.* at 403.

<sup>149</sup> *Id.* at 395. As the Commission noted in CLI-02-29, “[v]arious courts have recognized [its] authority under the AEA to license and regulate the storage of spent nuclear fuel.” *Id.* at 396. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 207 (1983); *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1111 (3d Cir. 1985); *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995), cert. denied, 515 U.S. 1159 (1995); *Illinois v. General Electric Co.*, 683 F.2d 206, 214-15 (7th Cir. 1982); *Maine Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47, 53 (D. Me. 2000).

that NRC’s rules for licensing a privately-owned, away-from-reactor spent fuel storage installation were superseded by provisions in the NWPA. In the process of rejecting Utah’s arguments, the Court cited “the NRC’s authority under the [AEA] to license private away-from-reactor storage facilities.”<sup>150</sup> It also explained that because “[t]he NRC’s authority . . . to license *private generators* to store spent nuclear fuel originated with the AEA, . . . the NWPA’s failure to ‘authorize’ storage at private facilities had *no effect* on this *preexisting* authority.”<sup>151</sup> The D.C. Circuit’s decision further underscores the erroneous nature of BN’s argument that the NRC’s issuance of a Part 72 license to ISP would somehow violate the NWPA and APA.

Thus, even assuming for argument’s sake that the Application presumed that DOE would hold title to any spent fuel stored at the proposed CISF, BN still fails to explain how that presumption *ipso facto* would preclude the NRC from licensing the facility pursuant to its AEA authority. The Commission’s actions in the *Private Fuel Storage* facility proceeding are instructive on this point. The NRC issued a license to PFS on February 26, 2006 to build and operate the proposed ISFSI, notwithstanding the failure of the Bureau of Indian Affairs (“BIA”) and Bureau of Land Management (“BLM”) to issue certain approvals necessary for facility construction. In a September 2005 press release announcing the conclusion of the *Private Fuel Storage* contested adjudication and the Commission’s decision to authorize license issuance, the

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<sup>150</sup> *Bullcreek*, 359 F.3d at 537-38.

<sup>151</sup> *Id.* at 539 (emphasis added). Indeed, the NRC promulgated its Part 72 regulations governing the licensing of ISFSIs (both at-reactor and away-from-reactor) two years before Congress enacted the NWPA. *Id.* at 538, 543 (“Utah ignores that private away-from-reactor storage was already regulated by the NRC under the AEA prior to the NWPA.”). Moreover, the NRC already has licensed several privately owned, away-from-reactor facilities—both before and after the NWPA’s enactment. *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).

NRC noted that BIA and BLM approvals were “[s]eparate from the NRC’s actions.”<sup>152</sup> Further, in a May 2006 letter to BLM, the NRC Staff stated:

The NRC’s authority to license an away-from-reactor ISFSI is derived from the AEA. *While the NWPA addresses interim storage at other sites, it does not reduce or limit the authority granted to the NRC by the AEA to license an away-from-reactor ISFSI, and it does not preclude the NRC from issuing a license for the proposed PFS facility.* This issue was raised by the State of Utah in the NRC adjudicatory proceeding, and has been resolved. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390 (2002). Moreover, the State of Utah’s arguments challenging the NRC’s continued authority to license an away-from-reactor ISFSI have been considered and rejected by the U.S. Court of Appeals. *See Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536 (D.C. Cir. 2004).<sup>153</sup>

The NRC’s action in the *Private Fuel Storage* proceeding confirms that the alleged inability of DOE to take title to the spent fuel to be stored at the proposed CISF is not an insurmountable legal impediment to the agency’s issuance of a license to ISP, particularly in light of ISP’s identification of a viable alternative (utility ownership of the spent fuel) and associated license conditions. Indeed, the NRC has long held that it need not “stay its hand” on a requested licensing action merely because other agencies have not taken (or may not take) actions necessary for the planned activity.<sup>154</sup>

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<sup>152</sup> NRC News Release No. 05-126, “NRC Denies Utah’s Final Appeals, Authorizes Staff to Issue License for PFS Facility” (Sept. 9, 2005) (ML052520163).

<sup>153</sup> Letter from E. William Brach, NRC, to Pam Schuller, BLM, “NRC Staff’s Comments in Response to the Bureau of Land Management’s February 7, 2006, Request for Comments Related to Private Fuel Storage’s Applications for Rights-of-Way,” encl. at 3 (May 8, 2006) (emphasis added).

<sup>154</sup> *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 334 (2002) (“[I]t would be productive of little more than untoward delay were each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval.”); *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 748 (1977) (citing *S. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-171, 7 AEC 37, 39 (1974)). Also, the fact that an applicant may face commercial or political uncertainties does not preclude issuance of a license where the NRC finds that the applicant has met all applicable safety and environmental requirements. It is the applicant’s prerogative to accept such risks. *See, e.g., Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC 31, 48-49, 55 (2001) (noting that the NRC “is not in the business of regulating the market strategies of licensees” or of “crafting broad energy policy involving other agencies,” and that “[i]t remains nonetheless within [the applicant’s] business discretion to determine whether market conditions warrant commencing [] operations”).

\* \* \*

In conclusion, the presiding officer should reject BN's proposed contention as inadmissible under 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi). By BN's own admission, the contention is outside the scope of this proceeding and immaterial to the NRC Staff's findings on the Application. The contention also lacks any factual or legal basis. BN's claim that the Application is premised on the assumption that DOE necessarily will take title to any spent fuel to be stored at the proposed CISF is factually incorrect. The Application clearly indicates otherwise. Additionally, BN's argument that NRC issuance of the license would contravene the NWPA and APA is contrary to law, including controlling decisions issued by the Commission and the D.C. Circuit.

#### V. CONCLUSION

The presiding officer should deny the Petition because BN has failed to satisfy its affirmative burden to demonstrate standing, and has failed to submit an admissible contention.

Respectfully submitted,

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

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Dated in Washington, D.C.  
this 29th day of October 2018

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL**

In the Matter of:	)	Docket No. 72-1050
INTERIM STORAGE PARTNERS LLC	)	
(Consolidated Interim Storage Facility)	)	October 29, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that, on this date, a copy of “Interim Storage Partners LLC’s Answer Opposing Beyond Nuclear, Inc.’s Hearing Request and Petition to Intervene” was filed through the E-Filing system.

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