

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF)
) Docket No. 72-1051
HOLTEC INTERNATIONAL)
)
(Consolidated Interim Storage) November 5, 2018
Facility Project))

**SIERRA CLUB'S ANSWER TO HOLTEC INTERNATIONAL'S MOTION TO
STRIKE PORTIONS OF SIERRA CLUB'S REPLY**

Sierra Club hereby submits the following Answer to Holtec International's Motion to Strike Portions of Sierra Club's Reply:

INTRODUCTION

On September 14, 2018, Sierra Club filed herein a Petition to Intervene and Request for Adjudicatory Hearing regarding Holtec's application for a license to construct and operate a centralized interim storage facility in Lea County, New Mexico. On October 9, 2018, Holtec filed an Answer to Sierra Club's Petition. On October 16, 2018, Sierra Club filed a Reply to Holtec's Answer.

One of Sierra Club's contentions in its Petition to Intervene was:

10 C.F.R. § 72.30 establishes requirements for decommissioning interim storage facilities. An application for licensing a CIS facility must contain a decommissioning plan explaining how the plan will satisfy the requirements in the regulation. The application for the Holtec CIS facility does not comply

with these requirements because the amount of funds Holtec says it will collect over the anticipated life of the project fall way short of what Holtec says are necessary for decommissioning.

In support of this contention, Sierra Club referred to Holtec's Safety Analysis Report, 13.3. Section 13.3 referenced three other documents:

- CIS Decommissioning Plan - HI-2177558 (Accession No. ML18058A606)

- CIS Decommissioning Cost Estimate and Funding Plan - HI-2177565 (Accession No. ML18058A607)

- CIS Facility Financial Assurance & Project Life Cycle Cost Estimates - HI-2177593 (Accession No. ML18058A608)

Using the information in those documents, Sierra Club demonstrated that the amount of funds Holtec proposed to set aside for decommissioning would not be sufficient to fund the decommissioning costs that Holtec itself estimated would be incurred.

In its Answer Holtec did not disagree with Sierra Club's calculations, but claimed that the funds set aside would earn interest at 3%. This interest income, according to Holtec, would make up the difference between the funds to be set aside and the estimated costs of decommissioning.

Holtec's Answer also claimed that a surety bond would be obtained to be used for decommissioning costs.

Sierra Club's Reply demonstrated that even with a 3% interest rate on the deposited funds, there would not be enough money to fund the decommissioning of the CIS facility at the end of its license period. Sierra Club further demonstrated that if Holtec was not able to obtain 3% interest (Holtec's documentation said up to 3% interest) there would not be enough money to fund even the decommissioning of the first phase of the project.

Sierra Club's Reply noted that there was nothing in the Financial Assurance and Project Life Cycle Cost Estimates, 2.2, that mentions a surety bond. Sierra Club further addressed Holtec's Answer by explaining that it is doubtful that a surety company would issue a bond for a project with the magnitude of risk inherent in a nuclear waste facility.

Sierra Club's Reply simply reaffirmed the contention that Holtec had provided no assurance that there would be sufficient funds for decommissioning.

STANDARDS FOR REPLIES TO ANSWERS

A motion to strike is the mechanism for seeking the removal of information from a pleading or other submission that is "irrelevant." Private Fuel Storage L.L.C.

(Independent Spent Fuel Storage Installation), 62 NRC 187, 228 (2003). Nowhere in the Motion to Strike does Holtec address the relevance of Sierra Club's arguments. The words "relevant," "relevance", "irrelevant" and "irrelevance" literally do not appear in the motion.

A Reply may provide "legitimate amplification" to a contention." PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 & 2), 65 N.R.C. 281, 299-302 (2007). A party may not use the device of a motion to strike to categorically prohibit all new arguments. Although "principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised by the Applicant's or the NRC Staff's Answers," such a limitation:

. . . falls well short of prohibiting a petitioner from raising all new arguments. As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answers, fairness is achieved through the consideration of these newly expressed arguments.

(emphasis added). Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 at 41 (2011).

See also, Louisiana Energy Services LP, (National Enrichment Facility), 60 N.R.C. 223, 225 (2004) (The

Petitioners' reply brief should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer").

Sierra Club's Reply regarding Contention 8 falls well within the parameters of an appropriate Reply.

SIERRA CLUB'S REPLY SIMPLY RESPONDED WITHIN THE CONTEXT OF
THE CONTENTION TO HOLTEC'S ANSWER

Sierra Club's Contention 8 and the basis and facts supporting the contention clearly presented the issue of the inadequacy of the decommissioning funding, citing to the relevant NRC regulations and the relevant sections of the Holtec documentation supporting the license application. That is all that is required. U.S. Dept. of Energy (High Level Waste Repository), LBP-09-06 (May 11, 2009) (Contentions must have "'at least some minimal factual and legal foundation in support.' That is all.").

Holtec's decommissioning information simply said that \$840/MTU of waste would be set aside for decommissioning funding. Holtec further estimated what the decommissioning costs would be for the first phase of the project. As shown by Sierra Club's Reply, these numbers did not add up.

Holtec made only a passing reference to interest earned on the decommissioning fund being used to supplement the

principle amount. Holtec made no effort to calculate how much that interest would be. Nor did Holtec's documentation mention a surety bond. Holtec claimed in its Answer that the reference to 10 C.F.R. § 30(e)(3) included a surety bond. But that section includes the fund from the \$840/MTU set aside as well. So Sierra Club had no indication that a surety bond was contemplated.

So, based on the foregoing, Sierra Club had no reason to give consideration to the interest payments or a surety bond as materially challenging Sierra Club's contention. Thus, rather than Sierra Club bringing up new information in its Reply, it was Holtec that brought up new information in its Answer that had not been clearly set forth in the application documents. Confronted with this new information in the Answer, Sierra Club properly responded to that new information. So Sierra Club restricted its Reply to "issues raised by the Applicant's Answer[]." Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 (2011).

In its Motion to Strike, Holtec argues that it should have the right to reply to Sierra Club's Answer to the Motion to Strike. What would that reply be? It would just be

at most disputing facts. It must be remembered that this is the contention admission stage of the proceedings, not the adjudicatory hearing. The ASLB should not address the merits of a contention when determining its admissibility. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), 28 NRC 440, 446 (1988); Sierra Club v. NRC, 862 F.2d 222, 228 (9th Cir. 1988). This is not the appropriate stage of the proceedings in which to argue factual issues.

However, if Holtec is allowed to file a reply, Sierra Club should be allowed to file a surreply.

CONCLUSION

For all of the reasons stated herein, Holtec's Motion to Strike should be denied in its entirety.

/s/ *Wallace L. Taylor*

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of Sierra Club's Answer to Holtec International's Motion to Strike Portions of Sierra Club's Reply were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above captioned proceeding.

/s/ Wallace L. Taylor

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