

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
Before the Atomic Safety and Licensing Board**

In the Matter of	)	Docket No. 72-1051
Holtec International	)	
(HI-STORE Consolidated Interim Storage Facility)	)	November 5, 2018
	)	

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**OPPOSITION OF DON'T WASTE MICHIGAN, CITIZENS' ENVIRONMENTAL COALITION, CITIZENS FOR ALTERNATIVES TO CHEMICAL CONTAMINATION, NUCLEAR ENERGY INFORMATION SERVICE, PUBLIC CITIZEN, INC., SAN LUIS OBISPO MOTHERS FOR PEACE AND NUCLEAR ISSUES STUDY GROUP TO HOLTEC MOTION TO STRIKE**

Pursuant to 10 C.F.R. § 2.323( c), Joint Petitioners Don't Waste Michigan, Citizens for Alternatives to Chemical Contamination, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Nuclear Energy Information Service, Citizens' Environmental Coalition, and Nuclear Issues Study Group ("Joint Petitioners"), by and through counsel, respond in opposition to Holtec International's October 26, 2018 "Motion to Strike Portions of the Replies of Alliance for Environmental Strategies, Don't Waste Michigan *et al.*, NAC International Inc., and Sierra Club."

**I. Parameters For Reply Memoranda**

Before an intervenor's contention may be denied admission into this licensing case for trial, its proponent must be given a chance to be heard in response. This is because proponents may not have anticipated the possible arguments their opponents might raise as grounds for dismissing them. Contentions and challenges to contentions in NRC licensing proceedings are

analogous to complaints and motions to dismiss in federal court. *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

The NRC’s contention admissibility rules “do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission.” *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *recons. denied LES*, CLI-04-35, 60 NRC 619 (2004). Replies may appropriately “respond to the legal, logical, and factual arguments presented in the answers. . . .” *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 301-302 (2007). A reply memorandum may be used to provide “legitimate amplification” to a contention. *Id.*

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 (p. 43 of .pdf) (unpublished) (July 6, 2011).

In *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), ASLBP No. 11-907-01-LR-BD01 (October 11, 2012) (unpublished), the Atomic Safety and Licensing Board, ruling on a motion to strike, said:

While FENOC is correct that Intervenors cite new legal authority and raise certain new

arguments in their reply, we believe that these citations and arguments are fairly responsive to arguments proffered by FENOC in its answer. While a party may not raise new arguments in a reply that are outside the scope of the initial contention, it may “legitimately amplify” arguments presented in its initial contention in order to fairly respond to arguments raised in the answers. (Citing *Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 329 (2006)).

*Id.* at 3. See also *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), 65 NRC at 301-302 (“It is appropriate, however, for a reply to respond to the legal, logical, and factual arguments presented in the answers, so long as new issues are not raised.”).

Joint Petitioners’ due process rights could be curtailed if they are not accorded some flexibility in shaping their responsive arguments. The D.C. Circuit interprets §189(a) of the Atomic Energy Act [42 U.S.C. §2239(a)] substantively, holding that “once a hearing on a licensing proceeding is begun, it must encompass all material factors bearing on the licensing decision raised by the requester.” *Union of Concerned Scientists v. United States Nuclear Regulatory Com'n*, 735 F.2d 1437, 1443 (D.C. Cir. 1984). Indeed, the stringency of the NRC's Part 2 rules “may approach the outer bounds of what is permissible under the [Administrative Procedure Act],” *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 355 (1st Cir. 2004). Thus Joint Petitioners’ substantive and procedural due process rights must be considered in the determination of Holtec’s Motion to Strike.

## **II. Joint Petitioners’ Replies To Itemized Requests To Strike**

### ***A. Response to Proposed Strikes Of Contention No. 4 Arguments***

Holtec objects that Joint Petitioners improperly raised two new matters in reply to Holtec’s Answer: 1) “that the Continued Storage Rule does not apply because Holtec is relying on DOE for funding” and 2) DOE policy will require the repackaging of spent nuclear fuel shipments. Motion to Strike (“Holtec Motion”) at 6. Petitioners oppose both motions.

Joint Petitioners' reference (pp. 35-36 of "Combined Reply to Holtec and NRC Staff Answers" aka "Combined Reply") to the Holtec scheme's dependence on DOE subsidies is in reply to Holtec's assertion that "it is proper for the NRC to license an off-site ISFSI under 10 C.F.R. Part 72, and the NWPAA neither implicitly repeals nor supersedes this authority." It is neither proper nor lawful for the NRC to license an offsite ISFSI wherein the U.S. Department of Energy has taken title and assumed liability for the spent nuclear fuel ("SNF").

Respecting Joint Petitioners' argument at Combined Reply p. 38 that the GEIS does not encompass the reality that DOE policy will require mass repackaging of fuel bundles in 80,000 smaller containers, either at the Holtec site, or before the SNF leaves the reactor sites, Joint Petitioners have legitimately amplified their original Contention 4. The "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel," (NUREG-2157) (2014) ("Continued Storage GEIS") does not contemplate or discuss the current DOE plan for repackaging of SNF in advance of delivery to a permanent repository. It is an expectation of the DOE that has been promulgated since 2014, when the GEIS was finalized.

The Joint Petitioners criticized the lack of DTS capability at Holtec in their original Petition to Intervene, when they pinpointed the planned nonavailability of a DTS as preventing Holtec from possessing the means of repackaging SNF in the event of deteriorated or damaged canisters. Joint Petitioners asserted DOE's plan to dispose of perhaps 80,000 storage canisters at the geological repository to depict the inevitable need for a DTS up front. Smaller storage canisters pose an indisputable logistical problem within the SNF disposal stream, of which Holtec would serve as a way station for storage of the waste. The greatly expanded repackaging obligation that would result is neither acknowledged by the GEIS nor by the Holtec ER. Holtec

can object only procedurally to Petitioners' mention of this very substantial impediment.

The quotations and facts attributed to Robert Alvarez in the Combined Reply first appeared, *verbatim*, in Joint Petitioners' original Contention No. 3 (addressing low-level radioactive waste aspects of Holtec). *See* their Petition to Intervene at pp. 41-42. By mention of Alvarez's writings in support of Contention No. 3, Joint Petitioners brought the entirety of his opinions before the ASLB. "A document put forth by an intervenor as supporting the basis for a contention is subject to scrutiny, both for what it does and does not show." *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996); *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). When a report is the central support for a contention's basis, the contents of that report in its entirety is before the Board and, as such, is subject to Board scrutiny, both as to those portions of the report that support an intervenor's assertions and those portions that do not. *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 254<sup>1</sup> (2007); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 24 (2007)).

But it is Holtec, itself, that opened the door to the Joint Petitioners' reply argument about repackaging. Joint Petitioners asserted in their Petition to Intervene that a Dry Transfer System would be needed, as opposed to Holtec's dangerous "return to sender" policy:

The transportation procedures for the project exclude access to or availability of a dry transfer system in the event of SNF cask damage, fuel damage or leakage, or external contamination. Holtec intends to implement a "return to sender" policy in the event a leaky, damaged or externally contaminated cask arrives at the CISF. These represent serious departures from presumed operational practices that are the foundation of the GEIS, especially considering the possibility that known leaky, damaged or externally

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<sup>1</sup>"[A]ny supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)."

contaminated casks will be returned to their points of origin, potentially inviting or causing serious accident scenarios or other health impacts or environmental contamination.

In answer, Holtec said:

Moreover, NUREG-2157 assumed that an away-from-reactor ISFSI would include a DTS because there is a “*potential* need for a DTS” at away from reactor ISFSIs, which need “will increase as the duration and quantity of fuel in dry storage increases.” NUREG-2157 at 2-20 (emphasis added). NUREG-2157 at 2-20 (emphasis added). NUREG-2157 does not require that a DTS be built.

Holtec Answer at 45-46 (Emphasis in original).

Joint Petitioners responded to Holtec’s minimization of the need for a DTS by pointing out the sizeable but unacknowledged repackaging dilemma, which may entail many tens of thousands more of SNF shipments than are disclosed in the ER. This information demonstrates a material issue of fact which should disqualify the vaunted GEIS: the demonstrated need to have a DTS at the Holtec site from the outset of storage is not merely a “potential need,” but a real one. The sheer number of fuel transfers from large, unuseable transport casks into smaller waste disposal canisters will require a DTS onsite; construction of such a facility simply cannot be deferred until the end of Holtec’s first century.

In *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), ASLBP No. 09-880 05-BD01, LBP 10-09 (June 15, 2010) (slip op.), the intervenors sought to file a late-filed quality assurance (“QA”) contention based on an NRC Notice of Violation that cited QA deficiencies. The NRC Staff answered that the intervenors had exaggerated the seriousness of the NRC enforcement action. With their reply memo, the intervenors provided an expert affidavit which cited and analyzed the significance of certain NRC staff emails pertaining to the QA deficiencies. The ASLB found that the expert affidavit and intervenors’ reliance on the emails comprised

legitimate responses because they did not alter the basis for the original contention:

By citing this and other NRC Staff e-mails, Intervenors have not attempted to amend or provide a different basis for Contention 15. Instead, they have responded to NRC Staff's argument that they significantly overstated the extent of DTE's QA violations, and they have provided additional factual support for Contention 15's assertion that DTE 'appears to be serially in violation of NRC regulations requiring the implementation of a Quality Assurance program . . . .' Although Intervenors did not cite the June 2009 e-mails in Contention 15, *our contention admissibility rules do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission. When the NRC Staff's Answer accused Intervenors of overstating the extent of the violations identified in the NOV [Notice of Violation], it was appropriate for Intervenors to respond by citing statements of NRC Staff that appear consistent with Intervenors' position.*

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*At bottom, NRC Staff's argument concerns the interpretation of debatable evidence and is therefore inappropriate in the context of a contention admissibility ruling, where we do not decide the merits or draw factual inferences in favor of the party opposing the admission of a contention. We therefore are not persuaded by NRC Staff's argument that we should ignore its June 2009 e-mails. Such arguments belong at the evidentiary stage of this proceeding. We therefore conclude that Contentions 15A and 15B satisfy 10 C.F.R. § 2.309(f)(1)(v).*

*Id.* at 23, 25.

Similarly, here, Holtec contradicts Joint Petitioners' contention that the GEIS cannot be used to shield certain aspects of the Holtec CISF proposal. Holtec claims that its "return to sender" policy and a slowly-developing need for a DTS by the end of a century of operations fall within GEIS expectations. Holtec, notably, is treating the controversy over permissible arguments to support a filed contention as a means of arguing summary disposition. Holtec argues that there simply won't be a need for a DTS for many decades after Holtec commences operations. Responding to the dispute about the degree of necessity that will exist, Joint Petitioners properly asserted that DOE repackaging pressures will force DTS availability to become a high priority from the beginning.

When Holtec accused the Petitioners of overstating the imminent need for a DTS, Petitioners were entirely within their rights to respond with legitimate amplification.

***B. Response to Proposed Strike Of Contention No. 7  
'Repackaging Juggernaut' Argument***

Joint Petitioners' mention in the Combined Reply of the significant repackaging effort imposed by DOE repository requirements underscores the central failing of the "start clean/stay clean" premise, namely, that it is wholly unreasonable because it contradicts the supposed aims of the CISF proposal. The CISF role is more than passive interim storage; it portends intrusive intervention into management of leaking or damaged canisters, and also, a very large repackaging mission.

Holtec claimed in its Answer to have regulatory cover to return rejected SNF canisters to originating sites, but denied that it will ever have to invoke "start clean/stay clean" because of the claimed unflagging competence in sealing and maintaining stability of canisters shipped to Holtec from reactor sites. Holtec Answer at 65 ("Petitioners have not provided any factual or expert support positing a plausible scenario through which leaking canisters would be received."). The Joint Petitioners refuted Holtec's wishful thinking by showing that enforcement of "start clean/stay clean" will be sorely challenged by dramatically increased repackaging obligations, either at reactor sites or at Holtec's CISF. Combined Reply at pp. 49-50. The addition of thousands of shipments to Holtec of SNF in smaller, repository-ready canisters poses additional prospects for leakage, contamination and accidental release during transport, and alters the odds of a mishap.

Mention of the potential repackaging fiasco was first made by Joint Petitioners in Contention No. 3 (addressing low-level radioactive waste aspects of Holtec). *See* Petition to

Intervene at pp. 41-42. Hence Robert Alvarez's factual allegations themselves are not a surprise. Joint Petitioners' new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in Holtec's Answer. Fairness is achieved by considering these newly expressed arguments. *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 (p. 43 of .pdf) (unpublished) (July 6, 2011).

It is Holtec's "start clean/stay clean" premise that is on trial here, not Petitioners' skills at contention writing. Due process considerations at this threshold stage militate in favor of admission of Contention No. 7.

***C. Response to Proposed Strike of Seismic Argument in Contention No. 5***

In mounting this objection, Holtec resorts to treating threshold contention admission as a substitute trial via summary disposition. Holtec sets up a straw argument to strike (Motion to Strike at pp. 6-7), claiming that "Don't Waste Michigan provided *no* factual support at all for any of its claims regarding earthquakes, instead seemingly alleging a contention of omission" and that "Don't Waste Michigan attempts to cure this deficiency in the inadmissible Contention 5 by providing, for the first time, some purported factual support for the frequency and size of earthquakes."

Joint Petitioners' evidence of seismicity problems in their initial Petition consisted of proofs of likely hydraulic fracturing immediately beneath the Holtec site, and hard by the boundaries of the site. Suggestions of seismicity were coupled with mention of groundwater presence beneath the shallow-storage area of the site. Joint Petitioners mentioned the lack of analysis of fracking-related and other oil and gas chemical contaminants present in water at and

beneath the surface. Petitioners additionally cited Southern Methodist University's 2018 study showing subsidence averaging more than a yard of the ground surface across some 4,000 square miles of the Permian Basin in a mere 30 years (the Holtec site is within the Permian Basin). In conjunction with this evidence of fracking and probable widespread, human-induced geological disturbance, Petitioners specified NRC regulations emphasizing preferences for sites with stable geologic characteristics (10 C.F.R. § 72.103(e)), and respecting § 72.103(f)(2)(iv)'s directive that "Each applicant shall evaluation all siting factors and potential causes of failure, such as, the physical properties of the materials underlying the site, ground disruption, and the effects of vibratory ground motion that may affect the design and operation of the proposed ISFSI or MRS." Petitioners suggested that this analysis had not been undertaken despite the proximity of much fracking activity to the waste storage area of Holtec. Joint Petitioners asserted that the ER did not comply with 10 C.F.R. § 72.90(b), and that "Proposed sites for the ISFSI or MRS must be examined with respect to the frequency and the severity of external natural and man-induced events that could affect the safe operation of the ISFSI or MRS." Hydraulic fracturing is a "man-induced event" that could affect safe operation of the Holtec SNF site. Petitioners also pointed out 10 C.F.R. § 72.94, which requires (a) examination for "both past and present man-made facilities and activities that might endanger the proposed ISFSI or MRS. The important potential man-induced events that affect the ISFSI or MRS design must be identified;" and .

"(b) Information concerning the potential occurrence and severity of such events must be collected and evaluated for reliability, accuracy, and completeness."

In its Answer, Holtec maintained that it had addressed local seismic events induced by mining and fracking in the Environmental Report by reviewing seismic monitoring records from

the Waste Isolation Pilot Plant (WIPP) located 50 miles from Holtec. Holtec concluded in the ER that “This seismic activity is suspected to be induced by injection of waste water from natural gas production into deep well or wells (ELEA 2007, Section 2.3.4.1.4). ER at 3-13.” In the ER, Holtec addressed the risk of a magnitude 5.0 or greater earthquake at the site in the coming 50 years, citing U.S. Geological Survey projections from 2009 and 2014. But Holtec was using predictions that are likely obsolescent because of the rapid profusion of fracking in the region.

To counter Holtec’s attempted conversion of a its opposition to a threshold contention statement into a summary disposition motion, Joint Petitioners referenced a USGS map and supporting information, along with a Stanford University map highlighting areas of the West Texas oil-rich region that could be at greater risk for future earthquakes induced by production operations.<sup>2</sup> (Combined Reply at 41). The Petitioners further asserted, for clarity’s sake, that they were “seeking an analysis of the reasonably foreseeable ‘proximate cause’ of long-term human-induced seismicity in the immediate vicinity of the Holtec CISF, and its implications for the stability of the Holtec site.”

Joint Petitioners’ Combined Reply argument classically “respond[ed] to the legal, logical, and factual arguments presented in the answers. . . .” *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 301-302 (2007). Their Combined Reply provided “legitimate amplification” to Contention No. 5. *Id.*; *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), ASLBP No. 11-907-01-LR-BD01 (October 11, 2012) (unpublished). Moreover, Petitioners’ “new statements

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<sup>2</sup>The citation was erroneously omitted. It is <https://news.stanford.edu/2018/02/08/seismic-stress-map-profiles-induced-earthquake-risk-west-texas-new-mexico/>

are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the 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 at 41 (p. 43 of .pdf) (unpublished) (July 6, 2011).

### **III. Conclusion**

As Joint Petitioners noted at the outset of this memorandum, the NRC’s contention admissibility rules “do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission.” *Louisiana Energy Servs., L.P.*, 60 NRC at 225. Licensing boards should be reluctant to deny intervention on the basis of skill of pleading where it appears that the petitioner has identified interests which may be affected by a proceeding. *Houston Lighting and Power Co.*, 9 NRC at 650. “It is neither congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities.” *Id.*, 9 NRC at 649; *Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 116-17 (1979); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 860 (1987), *aff’d in part on other grounds*, ALAB-869, 26 NRC 13 (1987), *reconsid. denied on other grounds*, ALAB-876, 26 NRC 277 (1987).

Holtec has marshaled facts and legal arguments in a transparent attempt to summarily defeat Joint Petitioners’ contentions by adjudicating the license application even before an adjudication date can be set. That is an inappropriate means of determining whether the proffered contentions should be put on an adjudicatory track. A motion to strike cannot be invoked to

block all responsive arguments by the proponent of a contention. That appears to be the aim of Holtec's Motion to Strike, and it is justification for denying the Motion *in toto*.

**Wherefore**, Joint Petitioners pray the Atomic Safety and Licensing Board deny Holtec's Motion to Strike.

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#### **CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I hereby certify that, on this 5th day of November, 2018, the "OPPOSITION OF DON'T WASTE MICHIGAN, CITIZENS' ENVIRONMENTAL COALITION, CITIZENS FOR ALTERNATIVES TO CHEMICAL CONTAMINATION, NUCLEAR ENERGY INFORMATION SERVICE, PUBLIC CITIZEN, INC., SAN LUIS OBISPO MOTHERS FOR PEACE AND NUCLEAR ISSUES STUDY GROUP TO HOLTEC MOTION TO STRIKE" was filed in the Electronic Information Exchange (the NRC's E-Filing System) in the above captioned proceeding for service via automated distribution to all registered counsel and parties.

/s/ Terry J. Lodge  
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Counsel for Petitioners