

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

HOLTEC INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

NRC STAFF'S SUPPLEMENTAL RESPONSE TO MOTION TO DISMISS BY
PERMIAN BASIN LAND AND ROYALTY ORGANIZATION
AND FASKEN LAND AND MINERALS

Christopher C. Hair

Joe I. Gillespie III

Counsel for NRC Staff

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Introduction

Pursuant to 10 C.F.R. § 2.309, the U.S. Nuclear Regulatory Commission Staff hereby responds to the Motion to Dismiss filed by Permian Basin Land and Royalty Organization and Fasken Land and Minerals (Fasken),¹ supplementing the Staff's previous response to the same motion pursuant to 10 C.F.R. § 2.323. As further discussed below, the Board should deny Fasken's motion as a petition to intervene and request for hearing in this proceeding.

Background

On March 30, 2017, Holtec submitted an application, including a Safety Analysis Report (SAR) and Environmental Report (ER), requesting that the NRC grant a license to Holtec for the construction and operation of a CISF for spent nuclear fuel (SNF).² The proposed CISF would

¹ "Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility" (Sept. 14, 2018) (Fasken Motion to Dismiss); see Order of the Secretary (Oct. 29, 2018) (ML18302A328) (Secretary's Order).

² Holtec's application materials are available at: <https://www.nrc.gov/waste/spent-fuel-storage/cis/holtec-international.html>, also available at <https://go.usa.gov/xP9ry>. Unless otherwise specified, all of the NRC Staff's citations to the ER are to Revision 1 (ADAMS Accession No. ML18023A904) and all citations to the SAR are to Revision 0 (ADAMS Accession No. ML17116A106). Specific references to SAR Revision 0A are designated as such (ADAMS Accession Nos. ML17310A221 and ML17310A221).

be located in Lea County, New Mexico on land owned by an entity designated as the Eddy-Lea Energy Alliance (ELEA), a public body created through a joint powers agreement between the counties of Eddy and Lea and the cities of Carlsbad and Hobbs located in Southeast, New Mexico. Holtec intends to purchase the land from ELEA prior to construction.

In its license application, Holtec requests authorization in the initial phase of the project to store 5,000 metric tons of uranium (MTUs) in approximately 500 canisters for a license period of 40 years. However, because the capacity of individual canisters can vary, the 500 canisters proposed in the Holtec license application have the potential to hold up to 8,680 MTUs. The NRC's review of Holtec's application consists of a safety review and an environmental review to support a final licensing decision. The NRC Staff's Safety Evaluation Report (SER) will document the NRC's evaluation of potential radiological consequences of Holtec's proposed action to determine whether the construction and operation of the CISF can be accomplished safely and securely and in accordance with the Atomic Energy Act of 1954, as amended, (AEA) and the NRC's regulations in, *inter alia*, 10 C.F.R. Part 72. In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), the NRC's Environmental Impact Statement (EIS) will document the NRC's evaluation of the significance of the potential environmental impacts of the proposed action and reasonable alternatives to the proposed action.

On March 19, 2018, the NRC published a notice in the Federal Register regarding the acceptance and docketing of the Holtec CISF license application.³ The NRC subsequently published a notice of opportunity to request a hearing and to petition for leave to intervene in the Federal Register.⁴ In addition to several petitions to intervene, the NRC received two motions

³ Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 12,034 (Mar. 19, 2018).

⁴ Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

to dismiss the proceeding based on a legal challenge under the Nuclear Waste Policy Act (NWPA) related to the NRC's ability to review the Holtec CISF license application, filed by Fasken and Beyond Nuclear respectively.⁵ The Staff opposed both motions pursuant to 10 C.F.R. § 2.323.⁶ The Secretary of the Commission denied the motions to dismiss and referred Fasken's motion to the ASLBP for consideration under § 2.309.⁷ The NRC Staff now supplements its response to Fasken's motion from the perspective of a potential petition to intervene and request for hearing.

Discussion

In order for a petition to intervene and hearing request to be granted, a petitioner must demonstrate that it has standing to intervene in the proceeding and submit at least one admissible contention.⁸

I. Standing to Intervene

A. Applicable Legal Requirements

In accordance with the Atomic Energy Act (AEA), "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."⁹ The Commission will grant a request for hearing if the petitioner meets the standing requirements of 10 C.F.R. § 2.309(d) and submits

⁵ See "Beyond Nuclear, Inc.'s Motion to Dismiss Licensing Proceedings for HI-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act" (Sept. 14, 2018); Fasken Motion to Dismiss.

⁶ See "NRC Staff's Response to Motions to Dismiss Licensing Proceedings" (Sept. 24, 2018).

⁷ See Secretary's Order at 2–3.

⁸ 10 C.F.R. § 2.309(a).

⁹ 42 U.S.C. § 2239(a)(1)(A).

at least one admissible contention pursuant to 10 C.F.R. § 2.309(f).¹⁰ The petitioner's hearing request must contain:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.¹¹

1. Traditional Standing Principles

In addition to fulfilling the general standing requirements of 10 C.F.R. § 2.309(d)(1), a petitioner "must demonstrate that it has an interest that may be affected by the proceeding."¹² The Commission applies contemporaneous judicial concepts of standing to evaluate whether the petitioner has demonstrated the requisite interest.¹³ To this end, "a petitioner must (1) allege an injury in fact that is (2) fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision."¹⁴ The injury claimed by the petitioner must be actual or threatened and both concrete and particularized.¹⁵ Further, the injury alleged must be "to an interest arguably within the zone of interests protected by the governing statute"—here, the AEA

¹⁰ See 10 C.F.R. § 2.309(a).

¹¹ 10 C.F.R. § 2.309(d).

¹² See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015).

¹³ See *id.*; see also *Calvert Cliffs 3 Nuclear Project, LLC, & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

¹⁴ *Turkey Point*, CLI-15-25, 82 NRC at 394; see also *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71–72 (1994); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹⁵ *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001); see also *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 71 (stating that "standing has been denied when the threat of injury is too speculative").

or NEPA.¹⁶ The causation element of standing requires a petitioner to show “that the injury is fairly traceable to the proposed action.”¹⁷ The redressability element of standing “requires the intervenor to show that its actual or threatened injuries can be cured by some action of the tribunal.”¹⁸ The petitioner has the burden to demonstrate standing requirements are met.¹⁹ However, a licensing board will “construe the [intervention] petition in favor of the petitioner” when making a standing determination.²⁰

2. Proximity Plus Standing

In cases involving reactor facilities, the Commission will apply a standing presumption based on proximity to the site.²¹ No such automatic presumption exists for nuclear materials proceedings.²² In such cases, to obtain standing based on geographic proximity to a facility, a petitioner must demonstrate that “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”²³ This “proximity-plus” standard is applied on a “case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”²⁴ If “there is no ‘obvious’ potential for radiological harm at a particular distance frequented by the petitioner, it becomes the petitioner’s

¹⁶ *Calvert Cliffs*, CLI-09-20, 70 NRC at 915 (citing *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (internal quotations omitted)).

¹⁷ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

¹⁸ *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 15 (2001).

¹⁹ See *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000).

²⁰ *Turkey Point*, CLI-15-25, 82 NRC at 394 (quoting *Ga. Institute of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995) (internal quotations omitted)).

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

²² See *Nuclear Fuel Servs., Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

²³ *Georgia Tech Research Reactor*, CLI-95-12, 42 NRC at 116.

²⁴ *Id.* at 116–17.

burden to show a specific and plausible means of how the challenged action may harm him or her.”²⁵ “[C]onclusory allegations about potential radiological harm” are insufficient for this showing.²⁶ Where a petitioner is unable to demonstrate “proximity-plus” standing to intervene, traditional standing principles will apply.²⁷

3. Organizational and Representational Standing

When an organization requests a hearing, it must demonstrate either organizational or representational standing. To demonstrate organizational standing, the petitioner must show an “injury-in-fact” to the interests of the organization itself.²⁸ Where an organization seeks to establish representational standing, it must demonstrate that at least one of its members would be affected by the proceeding and identify any such members by name and address. Also, the organization must show that the identified members would have standing to intervene in their own right, and that these members have authorized the organization to request a hearing on their behalf.²⁹ In addition, the interests that the representative organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the required relief must require an individual member to participate in the organization's legal action.³⁰

²⁵ *USEC Inc. (American Centrifuge Plant)*, CLI-05-11, 61 NRC 309, 311–12 (2005) (quoting *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248 (internal quotations omitted)).

²⁶ *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248.

²⁷ See *U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii)*, CLI-10-20, 72 NRC 185, 189 (2010).

²⁸ See *EnergySolutions, LLC (Radioactive Waste Import/Export Licenses)*, CLI-11-3, 73 NRC 613, 621 (2011).

²⁹ See *Detroit Edison Company (Fermi Power Plant Independent Spent Fuel Storage Installation)*, CLI-10-3, 71 NRC 49, 51–52 (2010); see also *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 72 (citing *Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-535, 9 NRC 377, 389–400 (1979)) (“An organization seeking representational standing on behalf of its members may meet the ‘injury-in-fact’ requirement by demonstrating that at least one of its members, who has authorized the organization to represent his or her interest, will be injured by the possible outcome of the proceeding.”).

³⁰ *Consumers Energy Co. (Palisades Nuclear Power Plant)*, CLI-07-18, 65 NRC 399, 409 (2007).

B. Fasken has not demonstrated standing.

Fasken seeks representational standing on behalf of its members.³¹ Fasken’s sole support is the declaration of Tommy E. Taylor, Vice President of Fasken Management LLC.³² Mr. Taylor states that his company has authorized him to submit his declaration on behalf of the Permian Basin Land and Royalty Organization (PBLRO), of which Fasken Land and Minerals is a member.³³ Mr. Taylor states that his organization owns and leases property located nearby the proposed Holtec facility and that “a radiation release from the Holtec facility . . . or during transportation of spent nuclear fuel through or near the Permian Basin may contaminate the areas in which Fasken and other members of PBLRO have oil and gas property interests and/or extraction and production facilities.”³⁴ Mr. Taylor also states that any such contamination could “interrupt or foreclose further oil and gas extraction/production activities thereby diminishing or eliminating the economic value of the oil and gas assets of the Fasken and other members of PBLRO.”³⁵ In addition, Mr. Taylor cites “potential human health effects” from any potential contamination.³⁶

Here, Fasken’s allegations of harm are too generalized to establish standing. Notably, other than D.K. Boyd, Mr. Taylor does not identify any specific individuals (*i.e.*, Fasken employees, PBLRO members, etc.) who will be harmed as a result of the licensing of the Holtec facility. And Mr. Boyd owns property adjacent to the proposed site of a different proposed CISF in Andrews County, Texas—not the Holtec site.³⁷ Also, Mr. Taylor himself resides more than 100

³¹ Fasken Motion to Dismiss at 3.

³² See Declaration of Tommy E. Taylor.

³³ *Id.* ¶ 1.

³⁴ *Id.* ¶ 5.

³⁵ *Id.* ¶ 6.

³⁶ *Id.* ¶ 7.

³⁷ *Id.* ¶ 3.

miles away from the proposed Holtec facility.³⁸ In light of Fasken's failure to identify any specific members near the proposed Holtec facility, a presumption of standing based on proximity is unavailing here.

Further, Fasken's general allegations of potential contamination and "potential human health effects" are conclusory.³⁹ A petitioner cannot simply rely on "conclusory allegations about potential radiological harm," but must show "*how* these various harms might result from the [proposed action]."⁴⁰ Fasken's general allegations are especially inadequate given the passive nature of the CISF as opposed to a reactor.⁴¹ Indeed, it is well-settled that a petitioner must allege that he or she "will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action."⁴²

In addition, Fasken's claim that the proposed Holtec facility will "diminish[] or eliminat[e] the economic value of the oil and gas assets" of its members is also inadequate to establish standing here. To establish standing based on an economic loss, a petitioner must show that "the purported economic loss has some objective fundament, rather than being based solely on the petitioner's (or declarant's) perception of the economic loss in light of the proposed licensing action."⁴³ Fasken offers no specific information regarding the alleged economic harm that would

³⁸ *Id.* ¶ 1 (noting residence in Midland, Texas).

³⁹ See *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 191-93 (1999) (conclusory allegations about potential radiological harm insufficient basis for standing); *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (injury to others not a basis for standing).

⁴⁰ *Detroit Edison Co.* (Fermi Power Plant ISFSI), LBP-09-20, 70 NRC 565 (2009), citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999) (emphasis added).

⁴¹ *But see Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 117 (1995) ("driving by" a nuclear reactor daily sufficient for standing).

⁴² *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004), citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973).

⁴³ *Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-02-23, 56 NRC 413, 432 (2002) (generic, unsubstantiated claims regarding health,

befall its members; therefore, Fasken has not demonstrated standing based on the potential for such harm.

In light of the above, Fasken has not satisfied its burden to establish standing in this proceeding.

II. Admissibility of the Petitioners' Proffered Contentions

A. Legal Requirements for Contentions

10 C.F.R. § 2.309(f)(1) establishes the “basic criteria that all contentions must meet in order to be admissible.”⁴⁴ Pursuant to that section, a contention must:

- (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 in the contention is within the scope of the proceeding;
- (iv) demonstrate that the issue raised in the contention 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 specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and
- (vi) provide information sufficient to show that a genuine dispute with the applicant/licensee exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case of an application that is asserted to be deficient, the identification of such deficiencies and supporting reasons for this belief.⁴⁵

safety, and property devaluation impacts are insufficient to establish standing), *aff'd*, CLI-03-1, 57 NRC 1 (2003).

⁴⁴ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571–72 (2006); *see also USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 436–437 (2006) (stating that the Commission “will reject any contention that does not satisfy the requirements”).

⁴⁵ *See* 10 C.F.R. § 2.309(f)(1).

The failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for the dismissal of a contention.⁴⁶

The contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁴⁷ The Commission has stated 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” as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.⁴⁸ The Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) requirements are “strict by design.”⁴⁹ Attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”⁵⁰ A contention must be rejected where, rather than raising an issue that is concrete or litigable, it reflects nothing more than a generalization regarding the petitioner’s view of what the applicable policies ought to be.⁵¹

Pursuant to 10 C.F.R. § 2.309(f)(1)(iii), a proposed contention must be rejected if it raises issues beyond the scope of the proceeding as dictated by the Commission’s hearing notice.⁵² Thus, a proposed contention that challenges a license amendment must confine itself

⁴⁶ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁴⁷ Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

⁴⁸ *Id.*

⁴⁹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

⁵⁰ *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (quoting *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

⁵¹ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004) (citing *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20–21 (1974)).

⁵² See *Pub. Serv. Co. of Ind., Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170–71 (1976).

to “health, safety or environmental issues fairly raised by [the license amendment].”⁵³ The adequacy of the Staff’s review, as opposed to the adequacy of the application, cannot be challenged.⁵⁴ Also, to show that a dispute is “material” pursuant to 10 C.F.R. § 2.309(f)(1)(iv) a petitioner must show that its resolution would make a difference in the outcome of the proceeding.⁵⁵

Further, pursuant to 10 C.F.R. § 2.309(f)(1)(v), a proposed contention must be rejected if it does not provide a concise statement of the facts or expert opinions that support the proposed contention together with references to specific sources and documents. Neither mere speculation nor bare or conclusory assertions, even by an expert, suffices to allow the admission of a proposed contention.⁵⁶ While a Board may view a petitioner’s supporting information in a light favorable to the petitioner, if a petitioner neglects to provide the requisite support for its contentions, it is not within the Board’s power to make assumptions or draw inferences that favor the petitioner, nor may the Board supply the information that a contention is lacking.⁵⁷ Additionally, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information’s significance, is inadequate to support

⁵³ *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981).

⁵⁴ *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493 n.56 (2010) (“The contention . . . inappropriately focused on the Staffs [sic] review of the application rather than upon the errors and omissions of the application itself. Such challenges are not permitted in our adjudications.”); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 123 n.39 (2009); 69 Fed. Reg. at 2202.

⁵⁵ *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3) CLI-99-11, 49 NRC 328, 333–34 (1999).

⁵⁶ *See USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006); *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

⁵⁷ *See Crow Butte Res., Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553–54 (2009); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

the admission of the contention.⁵⁸ The Board is not expected to sift through attached material and documents in search of factual support.⁵⁹

Finally, pursuant to 10 C.F.R. § 2.309(f)(1)(vi), a proposed contention must be rejected if it does not present a genuine dispute with the applicant on a material issue of law or fact.

The Commission has emphasized that “contentions shall not be admitted if at the *outset* they are not described with reasonable specificity or are not supported by some alleged fact or facts *demonstrating* a genuine material dispute” with the applicant.⁶⁰ The hearing process is reserved “for genuine, material controversies between knowledgeable litigants.”⁶¹

B. Analysis of Fasken’s Proposed Contentions

1. Fasken’s Motion to Dismiss

*[The NRC] must dismiss the application of Holtec International (“Holtec”) to build and operate a centralized interim spent fuel (“CISF”) storage facilit[y] in New Mexico[.] The NRC lacks jurisdiction over the application[] because [it is] premised on the proposition that the U.S. Department of Energy (“DOE”) will be responsible for the spent fuel that would be transported to and stored at the proposed facilit[y]. This premise is prohibited under the NWPA because the DOE is precluded from taking title to spent fuel unless and until a permanent repository is available. 42 U.S.C. §§ 10222(a)(5)(A), 42 USC § 10143.*⁶²

As a threshold matter, it is not clear that Fasken even seeks to litigate the statement above as a contention. Based on Fasken’s recent filing in the Interim Storage Partners CISF

⁵⁸ See *Fansteel*, CLI-03-13, 58 NRC at 204–05.

⁵⁹ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012).

⁶⁰ *Id.* (quoting *Oconee*, CLI-99-11, 49 NRC at 335).

⁶¹ *Id.* (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003)).

⁶² See Fasken Motion to Dismiss at 1–2.

proceeding, it would appear not.⁶³ Fasken did not file this as a contention as part of a Petition to Intervene, but solely as a separate Motion to Dismiss. The Secretary of the Commission denied the motion to dismiss and referred the motion to the ASLBP for consideration under 10 C.F.R. § 2.309.⁶⁴ Because the Motion does not purport to be a contention, by definition it does not comply with Section 2.309 since it does not set forth with particularity the contention sought to be raised.⁶⁵ The contention rule is strict by design and does not permit a petitioner to file vague, unparticularized, unsupported contentions.⁶⁶ Since Fasken has failed to define the claim as a contention, let alone pled with particularity how it meets the contention standards, the Board should not admit it.

Moreover, the Board should not admit this issue because Fasken failed to independently support its argument, and has instead simply stated that it incorporated “by reference the arguments and authorities in the Beyond Nuclear Inc. Motion to Dismiss at sections IV, V, and VI.”⁶⁷ In the Indian Point license transfer proceeding, the Commission specifically stated that it would not permit incorporation of contentions by reference when a petitioner “merely establishes standing and attempts, without more to incorporate the issues of other petitioners.”⁶⁸ For the claim in its Motion, Fasken’s exclusive reliance on another petitioner’s pleading fails to demonstrate that Fasken has supplied “at least some minimal factual and legal foundation” in

⁶³ See *Reply of Fasken and PBLRO to Interim Storage Partners, LLC’s and Staff’s Oppositions to Motions to Dismiss* (Nov. 30, 2018) at 1 (noting that Fasken “did not intend for their Motion to Dismiss to be analyzed under 10 C.F.R. § 2.309” and that the motion “clearly will not comply” with those requirements).

⁶⁴ See Secretary’s Order at 2–3.

⁶⁵ See 10 C.F.R. § 2.309(f).

⁶⁶ *Shieldalloy Metallurgical Corp.* (Licensing Amendment Request for Decommissioning of the Newfield, New Jersey Facility), LBP-07-5, 65 NRC 341, 352 (2007).

⁶⁷ Fasken Motion to Dismiss at 7.

⁶⁸ *Consolidated Edison Co. of New York and Entergy Nuclear* (Indian Point Units 1 & 2), CLI-01-19, 54 NRC 109, 132–133 (2001).

support of its argument.⁶⁹ Furthermore, to the extent Fasken is seeking to co-sponsor such a challenge, Fasken did not comply with 10 C.F.R. § 2.309(f)(3) in that it did not identify whether Beyond Nuclear or Fasken has the authority to act for the petitioners with respect to it.⁷⁰ In the absence of a joint submittal, a Board has previously required a petitioner to file at least one admissible contention of its own in order to intervene and co-sponsor contentions of other parties.⁷¹

For all of these reasons, the issue presented by Fasken in its motion is not admissible as a contention in this proceeding.

⁶⁹ *Id.* at 133 (citing *Oconee*, CLI-99-11, 49 NRC at 334).

⁷⁰ 10 C.F.R. § 2.309(f)(3).

⁷¹ *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station Units 1 & 2) 15 NRC 1423, 1543 (1982).

Conclusion

For the foregoing reasons, the NRC Staff respectfully requests the Board to deny the Motion to Dismiss that was referred to the Panel as a petition.

Respectfully submitted,

/Signed (electronically) by/

Christopher C. Hair
Counsel to the Staff
Mail Stop: O-14-A44
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Telephone: (301) 287-9152
E-mail: Christopher.Hair@nrc.gov
Signed December 3, 2018

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

Joe I. Gillespie III
Counsel to the Staff
Mail Stop: O-14-A44
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Telephone: (301) 287-9184
E-mail: Joe.Gillespie@nrc.gov
Signed December 3, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

HOLTEC INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing “NRC Staff’s Supplemental Response to Motion to Dismiss by Permian Basin Land and Royalty Organization and Fasken Land and Minerals” have been served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding, this 3rd day of December, 2018.

Respectfully submitted,

/Signed (electronically) by/

Christopher C. Hair
Counsel to the Staff
Mail Stop: O-14-A44
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Telephone: (301) 287-9152
E-mail: Christopher.Hair@nrc.gov

Dated in Rockville, MD
This 3rd day of December 2018