

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

In the Matter of)	
)	Docket No. 72-1051
Holtec International)	
)	ASLBP No. 18-958-01-ISFSI-BD01
(HI-STORE Consolidated Interim Storage)	
Facility))	

**Holtec International’s Answer Opposing Fasken Land and Minerals and Permian Basin
Land and Royalty Owners’ Motion for Permission to File Supplemental Standing
Declaration of Tommy E. Taylor**

Pursuant to 10 C.F.R. § 2.323(c), Holtec International (“Holtec”) hereby answers and opposes the Motion¹ filed by Fasken Land and Minerals and Permian Basin Land and Royalty Owners (“Petitioner” or “Fasken”) on December 10, 2018, in the HI-STORE Consolidated Interim Storage Facility (“CISF”) license proceeding. Fasken impermissibly seeks to supplement its standing arguments on Reply² with new information (contained in a “Supplemental Declaration” from Tommy E. Taylor appended to the Motion) that exceeds the permissible scope of a reply and without making the required demonstration of good cause under 10 C.F.R. § 2.309(c). Consequently, the Atomic Safety and Licensing Board (the “Board”) should not consider the Supplemental Declaration.

Mr. Taylor’s initial September 14, 2018 “Declaration” attempted to demonstrate standing only by claiming potential radiological impacts and associated economic affects to *property* owned by Fasken near the proposed Holtec site. Mr. Taylor stated that Fasken “owns and/or

¹ Motion for Permission to File Supplemental Standing Declaration of Tommy E. Taylor (Dec. 10, 2018) (“Motion”).

² Reply of Fasken and PBLRO to Holtec’s Answer Opposing Movants’ Motion to Dismiss/Petition to Intervene (Dec. 10, 2018) (“Reply”).

leases property directly related to oil and gas activities that is/are located approximately 2 (two) miles from the proposed Holtec CISF site.”³ Mr. Taylor claimed that an undefined “radiological contamination event” could “potential[ly] [] interrupt or foreclose further oil and gas extraction/production activities” and “*diminish[] or eliminat[e] the economic value* of the oil and gas assets of the Fasken”⁴ Mr. Taylor also expressed a generalized “concern[] that radiological contamination also has potential human health effects,” which potential “*also has economic costs* associated with medical care and treatment of radiation related conditions that affect Fasken”⁵ Nowhere did Mr. Taylor assert in his initial Declaration that he visited the property, or otherwise describe the frequency and duration of any contacts he has with the property. The Reply admits as much: “Mr. Taylor did not describe his contacts with the leased property or how often he visits the property.”⁶ Nor did Mr. Taylor assert in his initial Declaration that Fasken had any employees, let alone employees that visited or worked at the property, or otherwise describe the frequency and duration of any of their contacts with the property.

Now at the eleventh hour, Mr. Taylor states in his Supplemental Declaration that “[a]s part of Fasken’s activities related to its oil and gas properties near the Holtec site, Fasken employees, including myself, routinely go to this area for work related purposes. Fasken employees make routine checks on oil and gas production equipment and inspect and conduct maintenance and/or repairs as needed.”⁷ Mr. Taylor asserts that he is “concerned” that he and

³ Declaration at ¶ 3 (emphasis added).

⁴ *Id.* at ¶ 6 (emphasis added).

⁵ *Id.* at ¶ 7 (emphasis added).

⁶ Reply at 3.

⁷ Supplemental Declaration at ¶ 4.

his employees may be exposed to radiation from the proposed facility,⁸ without explaining how that would occur.

The Board should reject Fasken’s and Mr. Taylor’s attempt to resuscitate the deficient initial Declaration with the Supplemental Declaration because the Supplemental Declaration exceeds the permissible scope of a reply. The permissible scope of a reply might include correcting an “inadvertent omission” to an original declaration to clarify that the declarant authorizes an organization to represent the declarant’s interests in the proceeding.⁹ But the new information in the Supplemental Declaration goes far beyond that. Fasken and Mr. Taylor seek to inject entirely new grounds for standing—potential radiological impact to Mr. Taylor and unnamed employees—that were omitted entirely from Mr. Taylor’s initial Declaration.

As the Commission has succinctly stated, it “is not acceptable in NRC practice for a petitioner to claim standing based on vague assertions, and when that fails, to attempt to repair the defective pleading with fresh details offered for the first time . . . [in] authorization affidavits filed with replies.”¹⁰ This is because consideration of the impermissibly new information in the Supplemental Declaration would “deprive [Holtec] of the opportunity to challenge the substantive sufficiency of the [Supplemental Declaration] — an opportunity [Holtec] could have exercised” had Mr. Taylor described information readily available to him in his initial Declaration.¹¹ In addition, the Commission “seek[s] wherever possible to avoid delays (such as an additional round of pleadings) caused by a petitioner’s attempt to backstop elemental

⁸ *Id.* at ¶ 5.

⁹ *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 N.R.C. 1, 7 (2010) (quotation omitted).

¹⁰ *Entergy Nuclear Operations Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 N.R.C. 251, 261-62 (2008) (quotation omitted).

¹¹ *Id.* at 261.

deficiencies in its original petition to intervene.”¹² Otherwise, “[t]here simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new bases or new issues that simply did not occur to them at the outset.”¹³

The cases on which Fasken relies¹⁴ to support its late filing do not support consideration of the new information proffered by Fasken. None of the cases cited is a Commission decision, and all but one of the cases cited by Fasken long predate both the *Palisades* and *Summer* Commission decisions relied on here by Holtec.¹⁵ Other cases relied on by Fasken suggest that leniency from the Commission’s procedural requirements may be afforded where the petitioner is *pro se* or where petitioner’s counsel is new to NRC proceedings,¹⁶ circumstances not present here.¹⁷ In another case, the licensing board permitted petitioners to amend their intervention petitions to “take into account the recent Commission decisions” that had “stripped away Petitioners’ main arguments for standing,”¹⁸ circumstances which Fasken does not allege here. In yet another case cited, the licensing board allowed petitioner leave to file a reply to further

¹² *Id.* at 262 (quotation omitted).

¹³ *Id.* (quotations omitted).

¹⁴ Motion at 1-2.

¹⁵ *See, e.g., Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 N.R.C. 644 (1979).

¹⁶ *Virginia Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 A.E.C. 631 (1973) (*pro se* petitioner); *Arizona Public Service Co.* (Palo Verde Nuclear Station, Unit Nos. 1, 2, and 3), LBP-91-19, 33 N.R.C. 397, 401 (1991) (“We do no discredit to counsel for the Mitchell Petitioners in observing that he is new to NRC practice and should not be held to the same drafting standards as experienced counsel”); *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 N.R.C. 385, 396 (2009) (“[I]icensing boards have been lenient in permitting *pro se* petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing”).

¹⁷ A brief review of publicly available submissions indicates that Fasken’s counsel has been practicing before the NRC in licensing proceedings and their associated adjudicatory hearings since at least 2009. *See, e.g.,* the Petition for Intervention and Request for Hearing (Apr. 6, 2009) (NRC ADAMS Accession No. ML090970373) submitted in the Comanche Peak Nuclear Power Plant Units 3 and 4 Combined License Proceeding (Docket Nos. 52-034 and 52-035); and the Petition for Intervention and Request for Hearing (Apr. 21, 2009) (NRC ADAMS Accession No. ML091110736) submitted in the South Texas Project Units 3 and 4 Combined License Proceeding (Docket Nos. 52-012 and 52-013).

¹⁸ *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 N.R.C. 179, 195 (1991).

explain the bases for a contention where the petitioner used “somewhat imperfect phraseology.”¹⁹ Mr. Taylor’s initial Declaration did not use “imperfect phraseology” in describing the basis for his standing; rather, the initial Declaration completely omitted any mention of his or his employees’ alleged contacts with Fasken’s property near the Holtec site.

Because the Supplemental Declaration exceeds the permissible scope of reply, it must be evaluated against the late filing factors in 10 C.F.R. § 2.309(c)(1)(i)-(iii), which require a demonstration of good cause for the late filing. Here, Fasken makes no attempt to address the late filing factors. Nor could Fasken meet them. To demonstrate good cause, Fasken must show that the information in the new Supplemental Declaration “was not previously available” and “is materially different from information previously available.”²⁰ Obviously, information on Mr. Taylor’s own visits to Fasken’s property was previously available to him. Presumably, such information concerning Fasken employee visits was previously available to him too. Nothing in the Supplemental Declaration indicates that information on these visits is in any way materially different from any visits occurring at the time Mr. Taylor executed his September 14, 2018 Declaration.

Finally, even if the Board were to consider the Supplemental Declaration (which it should not do), the Supplemental Declaration fails to demonstrate that Fasken or Mr. Taylor have standing. The Supplemental Declaration contains only (1) speculative claims regarding potential radiation exposure to himself and unnamed employees²¹ and (2) vague assertions concerning

¹⁹ *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 N.R.C. 116, 118 (1994).

²⁰ 10 C.F.R. § 2.309(c)(1)(i)-(ii).

²¹ None of Fasken’s filings in this proceeding has attempted to identify any purportedly affected Fasken employee, or made any demonstration that any such employee has authorized Fasken or Mr. Taylor to represent the employee’s interests in this proceeding. *Palisades*, CLI-08-19, 68 N.R.C. at 258-59 (requiring a “demonstrat[ion]

contacts with the property near the proposed Holtec site, neither of which is sufficient to demonstrate standing. It is, after all, Petitioner’s “burden to provide facts sufficient to establish standing.”²²

Using any proximity presumption to demonstrate standing in non-reactor licensing proceedings requires a showing that “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences” “at a particular distance *frequented* by a petitioner.”²³ Contrary to this requirement, Mr. Taylor merely states that he is concerned about potential radiation exposure to himself and unidentified employees.²⁴ Nowhere does Mr. Taylor provide any specific or plausible explanation of how radionuclides or radiation from inside sealed metal canisters emplaced below ground in steel and concrete storage vaults would reach him or anyone else. Furthermore, Mr. Taylor fails to describe how often he or his employees visit the Fasken property. Mr. Taylor states that he and his employees “routinely go to this area for work related purposes.”²⁵ But “routine” visits are not necessarily frequent ones, particularly considering that Mr. Taylor lives over 100 miles away from the Holtec site in Midland, Texas.²⁶ Also absent from the Supplemental Declaration is any description of where on Fasken’s property Mr. Taylor’s and the unidentified employees’ contacts occur, and the distance of that location (or those locations) from the proposed location of the spent nuclear fuel storage vaults within the CISF.

that the member has (preferably by affidavit) authorized the organization to represent him or her and to request a hearing on his or her behalf”).

²² *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 N.R.C. 133, 139 (2010).

²³ *USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 N.R.C. 309, 311-12 (2005) (emphasis added).

²⁴ Supplemental Declaration at ¶ 5.

²⁵ Supplemental Declaration at ¶ 4.

²⁶ Declaration at ¶ 1. No information is provided concerning the whereabouts of Fasken’s employees.

For all of the foregoing reasons, the Board should reject Fasken's Motion.

Respectfully submitted,

/signed electronically by Timothy J. V. Walsh/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Holtec International's Answer Opposing Fasken Land and Minerals and Permian Basin Land and Royalty Owners' Motion for Permission to File Supplemental Standing Declaration of Tommy E. Taylor has been served through the E-Filing system on the participants in the above-captioned proceeding this 17th day of December, 2018.

/signed electronically by Timothy J. V. Walsh/
Timothy J. V. Walsh