

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF)
) Docket No. 72-1051
HOLTEC INTERNATIONAL)
)
(Consolidated Interim Storage) January 3, 2019
Facility Project))

**JOINT MOTION TO ESTABLISH HEARING PROCEDURES BY SIERRA CLUB,
DON'T WASTE MICHIGAN, CITIZENS ENVIRONMENTAL COALITION,
CITIZENS FOR ALTERNATIVES TO CHEMICAL CONTAMINATION, NUCLEAR
ENERGY INFORMATION SERVICE, NUCLEAR ISSUES STUDY GROUP, SAN
LUIS OBISPO MOTHERS FOR PEACE, AND PUBLIC CITIZEN**

Come now the above-named parties and in support of this Motion to Establish Hearing Procedures, state as follows:

1. The above parties are Intervenors in this proceeding for a license to construct and operate a centralized interim storage facility in Lea County, New Mexico.

2. This is a case that presents complex legal and factual issues. Several of the intervening parties, Beyond Nuclear, Sierra Club, Don't Waste Michigan, et al., and Fasken Land and Minerals, et al., have raised the issue of whether the Commission has jurisdiction or authority to grant a license if Holtec plans for the Department of Energy to take title to the waste intended to be stored at the Holtec CIS facility.

3. Sierra Club has submitted 24 substantive contentions and has included an additional contention adopting all of

the contentions submitted by Don't Waste Michigan, et al. The substantive contentions raise technical issues involving expert testimony and environmental issues involving the review of scientific literature and expert testimony.

4. Don't Waste Michigan, et al. has submitted 12 substantive contentions and has also included an additional contention adopting all of the contentions submitted by Sierra Club. The substantive contentions raise technical issues involving expert testimony and environmental issues involving the review of scientific literature and expert testimony.

5. Alliance for Environmental Strategies has submitted 3 contentions relating to environmental justice.

6. NAC International has submitted 3 contentions. Two of these are safety contentions which present technical issues and the third contention raises environmental issues.

7. The movants herein are concerned that if the evidentiary hearing in this case is conducted pursuant to Subpart L of 10 C.F.R. Part 2, the Subpart L procedure will not be adequate for the parties to properly litigate the contentions or to allow the ASLB to make an informed decision. With Subpart L, discovery cannot be initiated or guided by the intervenors, who instead would only be given notice of irrelevant, as well as potentially relevant,

additions to the NRC's ADAMS data base. The intervenors would have no opportunity to develop systematic or targeted evidence to support their contentions. Intervenors' attorneys are forbidden from conducting the examination and cross-examination of witnesses at the adjudication of contentions, which greatly hinders the search for truth.

8. 10 C.F.R. Part 2, Subpart G sets forth the rules for formal adjudication. Pursuant to Subpart G, parties can conduct formal discovery procedures, including interrogatories, requests for production of documents, and depositions. In addition, pursuant to Subpart G, parties can conduct cross-examination of witnesses for the other parties at the evidentiary hearing. Subpart L does not allow for such discovery procedures or cross-examination.

9. Given the complex and technical nature of the numerous contentions in this case, the procedures under Subpart L will be inadequate to allow the parties to present and the ASLB to properly consider all the factual and legal issues in this case. The only previous consideration of a nuclear waste storage facility was in the licensing proceeding for the Private Fuel Storage (PFS) facility in Utah. Although that case was litigated before the amendments to the rules giving preference to Subpart L procedures for waste storage cases, the PFS case demonstrates how a case of

this nature requires formal procedures involving discovery and cross-examination.

10. As the ASLB said in the PFS case:

Given the role it plays in our decision today, we need address only briefly the standards applicable to the next phase of the proceedings, the discovery process. From an intervenor's point of view, discovery provides the opportunity to put more flesh on the bones of its contentions and the bases that it was able to state at the outset. Just as during the entire course of the proceeding an applicant is permitted to adjust its filings in response to Staff inquiries and to additional information it obtains (as has often been done here, . . .), an intervenor will be utilizing the discovery process to adjust the strategic approach it is taking to the prosecution of its contention.

That is to say, providing "a brief explanation" (10 C.F.R. § 2.714(b)(2)(i)) of the bases for contentions plays an important function in determining whether that contention is a substantial one that can be admitted into the proceeding. But once the stated bases demonstrate that a contention is to be taken seriously, any number of later developments will also guide and control just how that contention does or does not move into the actual hearing process. For example, much might be learned by an intervenor that would lend further support to its view about the issues after contentions are filed. This mirrors what happens when, in response to NRC Staff scrutiny or other developments, much is often added by the applicant to support the application's documentation and reasoning after a matter is first noticed for hearing.

Private Fuel Storage LLC (Independent Spent Fuel Storage Installation), 54 NRC 497, 508 (2001).

The Commission itself has said that an intervenor may "use the discovery process to develop his case and help prove an admitted contention." Duke Energy Corp. (Oconee Nuclear Station Units 1, 2, and 3), 49 NRC 328, 335 (1999).

Cross-examination is equally as important as discovery in developing the facts of a case. The prepared written testimony of witnesses introduced in a hearing is basically a narrative with questions and answers prepared in advance by the witness with the assistance of legal counsel and others. The only way to test the validity of such written testimony is through vigorous cross-examination by the parties most interested in and knowledgeable about the facts and issues in the case. As the Supreme Court said in California v. Green, 399 U.S. 149, 158 (1970), "Cross-examination is the 'greatest legal engine ever invented for the discovery of truth.'" (quoting Wigmore on Evidence).

11. The 2004 amendment to Subpart L, 69 Fed. Reg. 2182, 2213, explains that Subpart L was amended to accommodate NRC hearings that do not involve factual disputes that require full discovery procedures or cross-examination. Proceedings such as reactor license renewals, transfer of a license, or licensing an ISFSI at a reactor site that would accept only waste from that reactor fit the description of proceedings that may not require full discovery or cross-examination. But this case, involving the licensing of a facility that would store over 100,000 MTU of radioactive waste transported from across the country does not fall into that category.

12. In order to address the occurrence of a case where Subpart L may not be appropriate because of the nature of the facts and issues involved, 10 C.F.R. § 2.700, provides that the Commission may order that the procedures set forth in Subpart G of Part 2 be used in the proceeding. Such an order from the Commission would be appropriate in this case for the reasons stated above.

13. Pursuant to 10 C.F.R. § 2.323(b), counsel for the Movants certifies that a sincere effort has been made to confer with other parties to resolve the issues raised in this Motion. Holtec and NRC Staff both oppose the Motion. Other parties have taken no position on the Motion.

WHEREFORE, the above-named parties request that the Commission enter an order providing that the procedures, especially the discovery and cross-examination procedures, set forth in Subpart G of 10 C.F.R. Part 2 be used in this case.

/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 Joint Motion to Establish Hearing Procedures 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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