

CONTENTION 26

Section 186 of the Atomic Energy Act (AEA) (42 U.S.C. § 2236) provides that a license issued by the NRC may be revoked for any material false statement in the license application. Holtec has made a material false statement in its license application in this case by stating repeatedly that title to the waste to be stored at the CIS facility would be held by DOE and/or the nuclear plant owners. This false statement was repeated in Holtec's Answer to Sierra Club's Contention 1 and Don't Waste Michigan et al. Contention 2.

The statement that nuclear plant owners might retain title to the waste is shown to be false by a January 2, 2019, e-mail message from Holtec to the public titled "Reprising 2018," attached as Exhibit 11. "Reprising 2018" states, "While we endeavor to create a national monitored retrievable storage location for aggregating used nuclear fuel at reactor sites across the U.S. into one (HI-STORE CISF) to maximize safety and security, its deployment will ultimately depend on the DOE and the U.S. Congress."

Thus, if a false statement such as Holtec has made in its filings in this case is grounds for revoking a license, it is grounds for not issuing the license in the first instance.

Basis for Contention

Section 186 of the Atomic Energy Act (AEA) (42 U.S.C. § 2236) provides that a license issued by the NRC may be revoked for any material false statement in the license application. Holtec has repeatedly made material false statements in its license application in this case by stating to the Sierra Club and to the Don't Waste Michigan intervenors¹ that title to the waste to be stored at the CIS

¹Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, San Luis Obispo Mothers for Peace, and Nuclear Issues Study Group) (collectively, "DWM et al.").

facility would be held by DOE and/or the nuclear plant owners. This false statement appears in Holtec's Answer to Sierra Club's Contention 1 and in Holtec's Answer to DWM et al.'s Contention 2. The particulars of Sierra Club's and DWM et al.'s contentions and Holtec's answering statements to them are detailed at pp. 5 to 11 of the "Motion by Petitioners Beyond Nuclear, Fasken, the Sierra Club and Don't Waste Michigan, et al. to Amend Their Contentions to Address New Information Confirming that Holtec's License Application Contains False or Misleading Statements," which information is incorporated herein by reference.

Holtec's recurring insistence that completely private ownership of the CISF and its spent fuel inventory was one possible scenario for operation of the CISF is belied by a January 2, 2019, e-mail message from Holtec to the public titled "Reprising 2018," attached as Exhibit 11. "Reprising 2018" states, "While we endeavor to create a national monitored retrievable storage location for aggregating used nuclear fuel at reactor sites across the U.S. into one (HI-STORE CISF) to maximize safety and security, *its deployment will ultimately depend on the DOE and the U.S. Congress.*" (Emphasis added).

Thus, if a false statement such as Holtec has made in its filings in this case is grounds for revoking a license,

it is grounds for not issuing the license in the first instance.

Facts Upon Which Petitioner Intends to Rely In Support of This Contention

As explained in Sierra Club Contention 1, Holtec stated in the ER 1.0, "Phase 1 construction would begin after issuance of the license and after Holtec successfully enters into a contract for storage with the U.S. Department of Energy (DOE)." There is no mention in the ER that nuclear plant owners might retain title to the radioactive waste.

Contention 1 also quotes statements made by Holtec officials stating clearly that Holtec would require a contractual arrangement with DOE. These statements, along with the statement in the ER show that Holtec's intention has always been to rely on DOE, not the nuclear plant owners, taking title to the waste.

In its Answer Opposing Sierra Club's Petition to Intervene, with respect to Contention 1, Holtec claimed that its intent was for either DOE or nuclear plant owners to take title to the waste. In an effort to support that assertion, Holtec's Answer cited references to nuclear plant owners retaining title to the waste in Holtec's proposed license, the SAR, the Financial Assurance and Project Life Cycle Report, and the land purchase option agreement between

Holtec and ELEA. Holtec's Answer also asserted that the statement in the ER as to DOE taking title was incorrect and that the ER would be revised accordingly. But even now, four months after Sierra Club filed its Petition to Intervene and submitted Contention 1, the ER still remains unchanged as to the statement that DOE, not nuclear plant owners, would take title to the waste.

In responding to *Don't Waste Michigan, et al.'s* Contention 2, Holtec asserts:

The crux of Contention 2 is Petitioners' claim that Holtec 'will not construct the CISF without financial guarantees from the U.S. Department of Energy.' As the Application makes clear, this is not true.

Holtec's Answer Opposing the *Don't Waste Michigan, et al.*

Petition to Intervene and Request for an Adjudicatory

Hearing (Oct. 9, 2018) ("Holtec Response to DWM").

Similarly, Holtec states:

Use of the term "and/or" makes it clear that, contrary to Petitioners' claims in Contention 2, Holtec is not relying on DOE contracts to demonstrate its financial qualifications.

Id. at 31. And:

The Commission should reject [*Don't Waste Michigan, et al.'s*] arguments. They are all based on Petitioners' incorrect conclusion that Holtec's financial qualification demonstration is dependent upon contracts under which DOE takes title to spent nuclear fuel for interim storage. As shown above, the Application makes it clear that the project's financing will be provided from the Company's resources and is *not dependent on DOE contracts*. Accordingly, Petitioners' arguments

regarding whether the NWPA authorizes DOE to enter into agreements to take title to spent nuclear fuel for purposes of interim storage are irrelevant to whether Holtec has demonstrated its financial qualifications.

Id. at 32 (emphasis added). Holtec also asserts that "Nothing in the Financial Assurance Plan - or in any part of the Application - indicates that Holtec considers DOE to be the CISF's "sponsoring party." *Id.* at 33. And Holtec insists that DOE will not necessarily be the "user/payer for storing the used fuel" under License Condition 17 (See Section II.A above) because "[i]t says that prospective users/payers for spent fuel storage at the CIS would be "USDOE and/or a nuclear plant owner." *Id.* at 34.

In sharp contrast to this portrayal, on January 2, 2019, Holtec distributed a newsletter entitled "Holtec Highlights." The lead article in that newsletter is entitled "Reprising 2018." That article contains the following quote, "While we endeavor to create a national monitored retrievable storage location for aggregating used nuclear fuel at reactor sites across the U.S. into one (HI-STORE CISF) to maximize safety and security, its deployment will ultimately depend on the DOE and the U.S. Congress." That statement reaffirms two important points. First, that Holtec knows DOE taking title violates the Nuclear Waste Policy Act (NWPA) and that it would take Congressional action to make

it legal. Second, and central to this contention, is that Holtec made a material false statement in its application documentation and in its Answers to Sierra Club's and DWM et al.'s Petitions to Intervene, by stating that its intent was for nuclear plant owners to possibly retain title to the waste.

The most recent statement in "Reprising 2018," quoted above, confirms Holtec's real and longstanding intent that DOE must take title to the waste in order for the CIS project to even begin to be constructed. Holtec's statements to the contrary in its application documents and its Answer to the Petitions to Intervene were materially false statements.

Section 186(a) of the AEA, 42 U.S.C. § 2236(a), states, "Any license may be revoked for any material false statement in the application . . . or other means which would warrant the Commission to refuse to grant a license on an original application" This makes it clear that a material false statement is a basis for denying a license. The Commission depends on licensees and applicants for accurate information to assist the Commission in carrying out its regulatory responsibilities and expects nothing less than full candor from licensees and applicants. Randall C. Orem, D.O., 37 NRC 423 (1993).

The above facts appear to indicate that Holtec's statements claiming that nuclear plant owners might retain title to the waste was a calculated effort to mislead the Commission and the ASLB and to cloud Holtec's true intention for DOE to take title to the waste, knowing that an arrangement with DOE would violate the NWPA and cannot be blessed by a license from the NRC.

In *Virginia Electric & Power Co.* (North Anna Power Station, Units 1 & 2), ALAB-324, 3 NRC 347 (1976), rev'd in part on other grounds, 4 NRC 480 (1976), the Appeal Board held that (1) A statement may be "false" within the meaning of § 186 even if it is made without knowledge of its falsity - *i.e., scienter* is not a necessary element of a false statement under Section 186; and (2) Information is material under § 186 if it would have a natural tendency or capability to influence the decision of the person or body to whom it is to be submitted - *i.e.,* the information is material if a reasonable Staff member would consider it in reaching a conclusion. The information need not be relied upon in fact.

Liability of an applicant or licensee for a material false statement in violation of § 186(a) of the Atomic Energy Act does not depend on whether the applicant or licensee knew of the falsity. *Consumers Power Co.* (Midland

Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 910 (1982), citing *Virginia Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976), *aff'd sub nom. Virginia Elec. & Power Co. v. NRC*, 571 F.2d 1289 (4th Cir. 1978).

Holtec, by its managers and owners, knew or should have known that its original and continuing intention and business plan has been for DOE to take title to the spent nuclear fuel prior to its removal from reactor sites. Holtec's material false statements to the effect that there might be any other SNF titleholder are calculated to mislead the Commission and the public in order to obtain a license to construct and operate the proposed CISF for profit. The statements permeate critical areas of the license application addressing waste management, offsite liability, and financing and should wholly disqualify Holtec from being granted an NRC license and cause dismissal of this proceeding and termination of the docket.