

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) February 6, 2019
Facility Project))

SIERRA CLUB'S MOTION TO AMEND CONTENTION 1

Comes now Sierra Club and in support of this Motion to Amend Contention 1, states as follows:

INTRODUCTION

This Motion is presented pursuant to 10 C.F.R. § 2.309(c)(1). Sierra Club has filed a Petition to Intervene in this proceeding and propounded Contention 1, which states:

The NRC has no authority to license the Holtec CIS facility under the NWPA nor the AEA. Holtec has said that DOE must take title to the waste, but the NWPA does not authorize DOE to take title to spent fuel in an interim storage facility. The AEA has no provision for licensing a CISF.

Sierra Club now seeks to amend Contention 1 to address a recently submitted revision to Holtec's Environmental Report, filed on January 17, 2019. In addition, the amended Contention 1 addresses a recent report by Holtec to its investors, entitled *Reprising 2018*, dated January 2, 2019, and attached as Exhibit 1.

Based on the new information described herein Sierra Club withdraws its participation in the previously filed Joint Motion to Amend Contentions filed on January 15, 2019. Also based on the new information, Sierra Club withdraws its participation in the Joint Motion to Strike filed on January 15, 2019.

BACKGROUND

A. Development of Holtec's License Application in 2015-2016

While Holtec formally submitted its license application to the Nuclear Regulatory Commission (NRC) in 2017, see 83 Fed. Reg. 32,918 (July 16, 2018), it began developing the project several years earlier. During that development period, statements by Holtec officials in press interviews and industry presentations demonstrated that Holtec envisioned DOE ownership of spent fuel in order to go forward with the project. For instance, as reported in the August 7, 2015 edition of *Spent Fuel*, Holtec Vice President Pierre Oneid responded to a question about who would hold title to the spent fuel at the CISF by stating that:

the title issue needs to be worked out but Holtec's vision is that DOE would sign a contract with Holtec to be the customer, and thus DOE would take title to the fuel at the reactor site and be responsible for transporting it to the storage facility, just as it would if DOE were sending the spent fuel to a permanent repository. Holtec is working with DOE, in parallel to

its licensing work, to start discussions with DOE about this issue.

See, Exhibit 1 to Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Sept. 14, 2018), cited at page 12 of the Petition. Similarly, in the July 30, 2015 issue of *World Nuclear News*, Mr. Oneid was quoted as saying, "We will surely soon have official talks with them [DOE] on a contract whereby the DOE will hold title to the fuel." See Sierra Club Petition at 12 and Exhibit 2 to Sierra Club Petition. And a January 2016 Power Point presentation by Holtec Vice President Joy Russell unequivocally represented that Holtec "[r]equires federal funding to construct and operate CISF." See Sierra Club Petition at 12 and Exhibit 3 to Sierra Club Petition.

B. Holtec's 2017 License Application

Holtec applied for a license for the CISF on March 30, 2017. 83 Fed. Reg. at 32,919. This original license application, designated "Revision 0," included a Safety Analysis Report, License Conditions, Financial Assurance and Project Life Cycle Cost Estimates, and an Environmental Report.

Holtec's original license application made representations about the ownership of the spent fuel that

were internally contradictory. Consistent with the representations described in Section A above, Holtec's Environmental Report (Rev. 0) stated that Holtec does not plan to begin construction of the proposed CISF until "after Holtec successfully enters into a contract for storage with the U.S. Department of Energy (DOE)." ER (Rev. 0) at 1-1. The Environmental Report (Rev. 0) also stated that "DOE would be responsible for transporting SNF from existing commercial nuclear reactor storage facilities for the CIS Facility." ER (Rev. 0) at 3-104. These parts of Holtec's original Environmental Report thus assumed that DOE would take responsibility for the spent fuel to be stored at the CISF, beginning with transfer of ownership to DOE at reactor sites before shipment.

In contrast, in other parts of Holtec's license application, Holtec hedged the assumption that DOE will own the spent fuel, instead asserting that ownership or liability may rest with *either* licensees or DOE. See, e.g.:

- HI-STORE CIS Facility Financial Assurance and Project Life Cycle Cost Estimates, Rev. 0 (Report No. HI-2177593) at 3 ("Additionally, as a matter of financial prudence, Holtec will require the

necessary user agreements in place from the *USDOE and/or the nuclear plant owners*") (Emphasis added).

- License Condition #17, Proposed License for Independent Storage of Spent Nuclear Fuel at 2 (ADAMS Accession No. ML17310A223) ("the construction program will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel (*USDOE and/or a nuclear plant owner*) at the HI-STORE CIS has been established.") (emphasis added); and
- Safety Analysis Report, Table 1.0.2 at 26 (ADAMS Accession No. ML18254A413) ("In accordance with 10 CFR 72.22, the construction program will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel (*USDOE and/or a nuclear plant owner*) at HI-STORE CIS has been established.") (emphasis added).

C. Sierra Club's Hearing Request

Sierra Club submitted a Petition to Intervene and Request for Hearing challenging in contention 1 Holtec's license application on the ground that it impermissibly relies on federal ownership of spent fuel to be transported to and stored at the proposed CISF.

Sierra Club charged that Holtec's assumption of federal ownership of spent fuel violated the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10222(a)(5)(A). Under the NWPA, DOE is precluded from taking title to spent fuel unless and until a permanent repository has opened. See, Sierra Club Petition, Contention 1, at 10-16. Sierra Club Contention 1 relied in part on statements in Holtec's Environmental Report and statements made in 2015 and 2016 by Holtec officials that Holtec assumes DOE will take title to the spent fuel during transportation to the CISF and storage at the CISF.

D. Holtec's Response to Sierra Club's Contention 1

In responding to Sierra Club's Contention 1, Holtec disavowed the statements in the Environmental Report and other statements by Holtec officials to the effect that Holtec assumes DOE will take title to the spent fuel to be transported to and stored at the proposed CISF. Holtec asserted that it would be *either* DOE *or* private licensees.

Holtec's Answer, p. 17-19, asserted that "the Contention ignores or misconstrues provisions in the Application that make clear that title and ownership of the spent fuel to be stored at the CISF will be held either by DOE or the nuclear plant owner." The Answer then points to

the references quoted above from the HI-STORE CIS Facility Financial Assurance and Project Life Cycle Cost Estimates, the proposed license conditions, and the Safety Analysis Report.

Holtec's Answer, p. 19, then admits that the Environmental Report refers only to DOE taking title to the spent fuel. But Holtec asserts that the Environmental Report is being revised to include both DOE and nuclear plant owners as possible owners of the spent fuel. However, the Environmental Report was not revised until January 17, 2019.

Finally, Holtec's Answer, p. 19-20, stated:

The Contention also cites to several public statements which Petitioner asserts "show[] Holtec's intention that DOE must take title to the radioactive waste before Holtec will begin to construct the proposed CIS facility." Pet. at 12. It should first be noted that each of the statements cited by the Contention predate that Application. Second, none of the statements talk about a Holtec requirement that DOE take title for the project to go forward. For example, the 2015 SpentFuel article summarized a Holtec statement that a contract with DOE including its taking title was "Holtec's vision," id. and Pet. Ex. 1; the 2016 PowerPoint presentation says the project "requires federal funding," which could occur the same way the on-site ISFSI's are typically funded, i.e., by DOE settlement payments or final judgments to the utilities from their breach of contract lawsuits against the Government; the 2015 World Nuclear News article that Holtec "will [] soon have official talks with [the DOE] on a contract whereby the DOE will hold title to the fuel.," Pet. at 12, and Ex. 3

As demonstrated, the Contention's assumption that DOE taking title is central to the CISF Application is in error.

E. Holtec's January 2, 2019 Report "Reprising 2018"

On January 2, 2019, Holtec issued the Reprising 2018 Report. The report makes clear that DOE involvement in the CISF project is a prerequisite for operation of the proposed CISF. In particular, the Report 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.

Id. at 1 (emphasis added). This statement demonstrates that Holtec assumes that DOE will, in fact, take the role of spent fuel owner assumed in certain parts of the Environmental Report. This statement also effectively acknowledges that DOE ownership of spent fuel prior to the opening of a repository is unlawful under the NWPA, and therefore that Congressional action will be required before DOE can take title to the spent fuel.

F. Environmental Report, Rev. 3

On January 17, 2019, Sierra Club counsel received an e-mail from NRC Staff counsel Alana Wase, notifying him that a revision to Holtec's license amendment application had been

posted on ADAMS. The revisions included Rev. 3 to the Environmental Report, which removed the previous unequivocal assumption of DOE ownership of spent fuel and replaced them with statements that the spent fuel would be owned by either the DOE or private licensees. See, Environmental Report, Rev. 3, at 1-1 (now stating that "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) or utility.").

G. Oral Argument on Contention Admissibility

On January 23 and 24, 2019, the Atomic Safety and Licensing Board held an oral argument on the issues of standing and contention admissibility. During the oral argument, counsel for Holtec and all Petitioners were questioned on the issue of federal ownership of spent fuel, and also made opening and closing statements that addressed the issue. The oral argument was transcribed.

REQUEST FOR LEAVE TO AMEND CONTENTIONS

A. Applicable Standards

NRC regulation 10 C.F.R. § 2.309(c) allows a petitioner to amend its contentions if the presiding officer finds that the petitioner "has demonstrated good cause" by satisfying the following factors: (i) the information on which the

filing is based was not previously available; (ii) the information upon which the filing is based is materially different from information previously available; and (iii) the filing has been submitted in a timely fashion based on the availability of the subsequent information. An amended contention generally is considered timely if it is filed within 30 days of the date upon which the new information became available. *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), 67 N.R.C. 460, 493 (2008) ("Many times, boards have selected 30 days as [the] specific presumptive time period" for timeliness of contentions filed after the initial deadline).

Sierra Club respectfully submits that permitting the amendment of a contention is appropriate where new information shows that material statements in a license application are false or incorrect, given the "importance" placed by the Commission on "completeness and accuracy of information submitted by applicants and licensees" and the Commission's demand for "[n]othing less than candor." *Randall C. Orem, D.O.*, 37 N.R.C. 423, 427 (1993) (citing *Petition for Emergency and Remedial Action*, 7 N.R.C. 400, 418 (1978); *Hamlin Testing Laboratories, Inc.*, 4 N.R.C. 480 (1976), *aff'd*, 571 F.2d 1289 (4th Cir. 1978)).

B. Request for Leave to Amend Contentions

Sierra Club seeks to amend its Contention 1 as follows:

1. Amendment to Contention 1

Sierra Club Contention 1 asserts:

The NRC has no authority to license the Holtec CIS facility under the NWPA nor the AEA. Holtec has said DOE must take title to the waste, but the NWPA does not authorize DOE to take title to spent fuel in an interim storage facility. The AEA has no provision for licensing a CISF.

Sierra Club Petition at 10. Sierra Club seeks leave to amend its Contention 1 to add the following language:

Language in Rev. 3 of Holtec's Environmental Report, which presents federal ownership as a possible alternative to private ownership of spent fuel, does not render the application lawful. As long as the federal government is listed as a potential owner of the spent fuel, the application violates the NWPA.

2. Amendment to Statement of Facts for Contention
1

Holtec attempts to defend the language of its application presenting DOE ownership of spent fuel as a possible alternative to private ownership on the ground that the "DOE may have the ability to take title" to spent fuel in the future "if Congress passes legislation" allowing it. Tr. p. 247-248 (Silberg). Holtec's counsel then tried to explain away the obvious meaning of the *Reprising 2018* statement about reliance on DOE or Congress as follows:

The phrase in question, its deployment will ultimately depend on the DOE and the U.S. Congress, does not say that we need DOE approval to go ahead. It does not say that we need DOE to hold title to spent fuel. It does not say we need DOE to take over any aspect of this project.

What it says is that if DOE and the Congress make decisions, particularly with spent fuel storage and permanent storage, that will have an impact on this project, and its deployment will depend on that.

If, for instance, Congress and DOE decide to go ahead with Yucca Mountain, we pray that will happen -- and it's ironic that people would criticize this facility as, perhaps, reducing the incentive for a permanent disposal are among those who have fought toughest to keep us from Yucca Mountain.

Putting that aside, if Congress were to take steps to put in place permanent disposal or federal interim storage on a schedule that made the CISF, the Holtec HI-STORE project unnecessary, obviously that would have an impact on the Holtec HI STORE project.

So, its deployment would ultimately depend on what DOE and Congress does. If we build Phases 1, 2, 3, 4, 5, and Yucca Mountain becomes available, we won't build Phases 6, 7, 8, 9, and 10.

So, the obvious connection between the state of the DOE nuclear waste program and interim storage is clear in every way, because if we had interim storage in operation today, we wouldn't be here. We would be most pleased to be sending fuel directly to Yucca Mountain.

Unfortunately, we're not in that position. Utilities, after having contributed \$35 billion to the Federal Treasury to pay for Yucca Mountain, find that their money has dissipated.

\$7 billion has been spent on Yucca Mountain and there are people in Congress and in the outside community who would like that money to be thrown away, for Yucca Mountain to disappear forever.

If Yucca Mountain proceeds on a schedule which makes this facility unnecessary, in whole or in part, if some other permanent disposal facility were developed on a schedule which makes this facility not usable, in whole or in part, that would have an effect on the deployment of this facility.

That's what that statement means, nothing more, nothing less. The environmental report has been amended.

Tr. p. 245-247 (Silberg).

What that effort at obfuscation ignores is that the *Reprising 2018* statement used the term "deployment" in saying that deployment of the Holtec project would depend on DOE or Congressional action. According to Webster's Unabridged Dictionary, 2nd Ed. (2001), "deploy" means "to come into a position ready for use." So, applying that definition to Holtec's statement, it means that the CIS facility will not be ready for use without action by DOE or Congress. There is no basis for Holtec counsel's claims to the contrary.

Furthermore, it is important to recognize that by seeking approval of an operational scheme that *could* include DOE ownership of spent fuel, and therefore *could* result in NWPA violations if carried out, Holtec violates the NWPA. And by entertaining a license application containing provisions that would *approve and allow* Holtec to violate

the NWPA, the NRC would also violate the NWPA. *Arizona Public Service Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), 16 N.R.C. 1964, 1991 (1964) (“[I]t would be improper for the Board to entertain a collateral attack upon any action or inaction of sister federal agencies on a matter over which the Commission is totally devoid of any jurisdiction.”) (emphasis added). See also, *U.S. Department of Energy* (High-Level Waste Repository), 69 N.R.C. 580, 605-06) (refusing to admit a contention challenging DOE’s integrity as an applicant for a repository license where “Congress has already determined DOE as the appropriate license applicant, indeed the *only* appropriate applicant.”). The fact that Holtec *might not* violate the NWPA does not sanction an NRC licensing decision that would give Holtec the unchecked opportunity. To rule otherwise would violate not only the NWPA, but basic principles of “comity” between federal agencies. *Arizona Public Service Co.*, 16 N.R.C. at 1991.

DEMONSTRATION OF GOOD CAUSE FOR LATE FILING

Sierra Club satisfies the three-prong test for good cause to file amended contentions based on new information, as follows:

A. The information upon which the filing is based was not previously available.

The Environmental Report (Rev. 3) was not available until January 17, 2019. The Reprising 2018 Report became available on January 2, 2019. Its relevance is related to the January 17, 2019 revisions to the Environmental Report, and therefore Sierra Club's reliance is timely.

B. The information upon which the filing is based is materially different than information previously available.

The text of the Environmental Report (Rev. 3) is materially different from Holtec's original license application, because it replaces unequivocal language regarding DOE ownership of spent fuel with alternative language suggesting that either DOE or private licensees will own the spent fuel.

C. The amended contention has been submitted in a timely fashion based on the availability of the subsequent information.

The amended contention is being filed within 30 days of Sierra Club having learned of the issuance of the Environmental Report (Rev. 3) and therefore the amended contention is timely. *Shaw AREVA MOX Services*, 67 N.R.C. at 493.

CONCLUSION

For all of the reasons stated herein this Motion should be granted.

/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 Sierra Club's Motion to Amend Contention 1 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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