

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

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| In the Matter of |) | Docket No. 72-1051 |
| Holtec International |) | |
| (HI-STORE Consolidated Interim Storage Facility) |) | February 20, 2019 |
| |) | |

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**REPLY OF DON'T WASTE MICHIGAN, ET AL. TO HOLTEC AND NRC STAFF
OPPOSITION FILINGS TO DWM PROPOSED CONTENTION 14**

Now come Petitioners Don't Waste Michigan, Citizens for Alternatives to Chemical Contamination, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Nuclear Energy Information Service, Citizens' Environmental Coalition, and Nuclear Issues Study Group ("Joint Petitioners"), by and through counsel, and reply to the "Holtec Opposition to Late-Filed Sierra Club Contention 26 and Don't Waste Michigan Contention 14" and "NRC Staff's Consolidated Response to Don't Waste Michigan, *et al.*, and the Sierra Club's Motions to File New Contentions."

The sum and substance of Holtec's and the NRC Staff's arguments depend on perpetuation of the ruse that Holtec hasn't changed its financing story over time and in light of the audience for each respective story. To the industry and investment class, Holtec consistently maintained through the early stages of its licensing application that the U.S. Department of Energy would have to take title in order for the project to get off the ground. When Holtec encountered opposition from Beyond Nuclear, Fasken Oil, the Sierra Club and DWM *et al.*

respecting the inauthenticity and illegality of that scheme, the story changed such that *either* DOE *or* private utility customers would be the wellspring of remuneration. That was Holtec's posture as of October 2018 when it filed its answer to DWM *et al.*'s Petition to Intervene, *viz.*, when Holtec was responding through counsel in this litigation.

But then, on January 2, 2019 in "Reprising 2018," the old, original DOE-take-title theme re-emerged and was transmitted to investors and the industry, when Holtec ended an optimistic paragraph assuring that the application for its Consolidated Interim Storage Facility ("CISF") was "on track for licensing in 2020" with the declaration that whether it is built "will ultimately depend on the DOE and the U.S. Congress":

Holtec's effort to establish the HI-STORE CISF (consolidated interim storage facility) in New Mexico remains on track for licensing in 2020 with the NRC acceptance of the license application early in 2018. Numerous meetings across New Mexico were held by Holtec throughout the year to inform the citizens and solicit their opinions. Local public sentiment remains in favor of the Project in the nuclear savvy region of New Mexico. In accordance with the NRC licensing process, an Atomic Safety Licensing Board (ASLB) was established to preside over the HI-STORE CISF licensing process. 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.

Then, as Holtec points out in its opposition memorandum (at 5), on January 24, 2019, its lead counsel changed direction yet again:

But I will agree with you that, on their current legislation, DOE cannot take title to spent nuclear fuel from commercial nuclear power plants, under the current statement of facts, but that could change, *depending on what Congress does.*

Transcript of Proceedings ("Tr."), 1/24/2019, p. 250 (Silberg) (Emphasis added). At the Albuquerque hearing, the recurring statements of Holtec's dependency on DOE's taking title to spent nuclear fuel ("SNF") was finally run to earth as a "contingent option" instead of a real one.

Yet Holtec persists in arguing that the Joint Petitioners are months late because they should have comprehended that at some point the company would finally own up to having run a longstanding fiction:

Petitioners have failed to show that the Holtec article contains new or materially different information for another reason: the statement that deployment of the Holtec CISF ‘will ultimately depend on the DOE and the U.S. Congress’ is *consistent* with information that has been available to Petitioners since the opportunity for hearing was announced (if not before then).

Holtec Opposition at 5 (Emphasis in original).

But this argument by Holtec is heteroclitic; while Joint Petitioners (and several other intervening parties) have been utterly consistent in arguing that Holtec requires DOE to take title to SNF, *it is Holtec that has vacillated*. The “new information” is Holtec’s latest waffling undulation.

Disappointingly, the Staff joins in fostering the ruse that DWM *et al.* should have realized all along that Holtec was only kidding that DOE has the power right now to take title to commercial SNF, even though Holtec’s counsel argued as recently as January 24, 2019 that the Department of Energy has jurisdiction over it.¹ The NRC Staff argues:

Indeed, Petitioners themselves acknowledge that the information in *Reprising 2018* merely “confirms [previous] statements by Holtec officials,” statements on which

¹“I would note that DOE has taken the position that it has authority under the Atomic Energy Act, under its research and development authority, to take spent fuel to study. And they have done that.

DOE has the core from Three Mile Island Unit 2 facility, sitting up in Idaho, they studied them. They have occasional assemblies, I believe they have one from North Anna. I think they may have one from Point Beach, that has been moved to Idaho and is being studied.

The high burnup fuel program that's being developed, already in effect, that's a DOE EPRI program. DOE is going to take fuel, I believe, from North Anna, in a cask.

Eventually, that cask will be moved up to Idaho. They'll open it and confirm the high burnup fuel is not being destroyed, because it's high burnup fuel.

So, there are cases where DOE has title.”

Tr. 1/24/2019, pp. 249-250 (Silberg).

Petitioners relied to support their previously-filed contentions. As such, the statement in *Reprising 2018* is, at most, additional evidence in support of the same fundamental premise of Petitioners' previous contentions. Because Petitioners have not shown how this is "materially different" information from what was previously available, Petitioners have not met 10 C.F.R. § 2.309(c)(1)(ii).

NRC Staff Consolidated Response at 8. Indeed, as the Staff concedes, the reaffirmation in *Reprising 2018* is additional evidence in support of DWM *et al.*'s fundamental premise. But it only became additional evidence in support of that premise in retrospect, when Holtec finally was left with no option but to admit the truth about the DOE "contingent option" on January 24, 2019. The Staff, along with Holtec, are berating DWM *et al.* and the Sierra Club for being right. Time finally ran out on Holtec's long-running evasion that day.

/s/ Terry J. Lodge

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NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2019, the foregoing REPLY OF DON'T WASTE MICHIGAN, *ET AL.* TO HOLTEC AND NRC STAFF OPPOSITION FILINGS TO DWM PROPOSED CONTENTION 14 was deposited by me in the NRC's Electronic Information Exchange System.

____/signed electronically by/____
Terry J. Lodge
Counsel for DWM *et al.*, Petitioners