UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of:	)	
	)	
Holtec International	)	**Docket No. 72-1051**
	)	
(HI-STORE Consolidated Interim	)	
Storage Facility	)	
for Interim Storage of Spent Nuclear Fuel)	)	

PETITION FOR REVIEW BY ALLIANCE FOR ENVIRONMENTAL STRATEGIES

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Comes Now Alliance for Environmental Strategies ("AFES"), by and through undersigned counsel, and petitions for review of the Memorandum and Order filed in this matter on May 7, 2019, by the Administrative Judges.

AFES challenges the ruling by the Administrative Judges ("judges") that AFES's three submitted contentions are inadmissible.

1. Concise Summary of Decision

In their Memorandum and Order, judges were unable to decide whether AFES has standing. The basis of the judges' ruling was that the record is unclear as to the geographic parameters of any ill effect by the proposed site of the nuclear waste dump. *See* Memorandum and Order, filed May 7, 2019 ("Memorandum"), at pages 18-19.

While this non-ruling is not subject to review at this time, the judges' precise statements with regard to AFES's standing are also significant to AFES's arguments with regard to the admissibility of its contentions. AFES will make this point clear, *infra*. Accordingly, AFES sets forth the judges' reasoning as to standing.

Specifically, the judges noted that "the proposed Holtec facility is envisioned *as potentially much larger* than any previous spent fuel storage facility. In this uncharted area, we are reluctant to rule unnecessarily on what geographic distance might or might not be sufficient for a presumption of standing." Memorandum, at pages 18-19 (emphasis added). The judges concluded that they were not required to reach the issue of standing, because they were rejecting the AFES contentions on the merits. Memorandum, at pages 18-19.

AFES submitted three contentions:

(1) As a matter of law, the applicant has not performed a sufficient investigation and has not done a sufficient analysis to support that the Holtec site will not have a disparate impact on the minority and low income population of Lea and Eddy County. AFES Pet. at 11.

(2) As a matter of fact and expert opinion, the siting process will have a disparate impact on the minority and low income population of Lee and Eddy County. AFES Pet. at 22.

(3) There is no factual support for Holtec's primary site selection criterion, which is community support. AFES Pet. at 23.

All three contentions were rejected by the judges as a matter of law.

2 and 3. The Memorandum Addressed All Issues Raised but the Memorandum Is Erroneously Decided

AFES agrees with the judges' summary of AFES's arguments with regard to its Contentions. *See* Memorandum, at pages 125-31. This is sufficient to show that the issues now addressed in this Petition for Review were previously raised. *See* 10 C.F.R. § 2.341.

4. The Nuclear Regulatory Commission Should Review the Memorandum on the Basis that the Memorandum Is Contrary to Law, Raises a Substnatial and Important Question of Law or Policy, and Violates the Public Interest

In determining the admissibility of a contention, all that is required for a contention to be acceptable for litigation is that it be specific and have a basis. Whether or not the contention is true is left to litigation on the merits in the licensing proceeding. *Washington Public Power Supply System (WPPSS Nuclear Project No. 2)*, ALAB-722, 17 NRC 546, 551 N. 5 (1993). Thus a presiding officer should not address the merits of a contention when determining its admissibility. *Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2)*, LBP-82-106, 16 NRC 1649, 1654 (1982).

Moreover, and significantly in this case, whether or not a basis for a contention has been established must be decided by considering the contention in the context of the entire record of the case up to the time the contention is filed. Thus, when an application for a license *is itself incomplete*, the standard for the admission of contentions is lowered, because it is easier for petitioners to have reasons for believing that the application has not demonstrated the safety – or in this case the non-discriminatory impact – of the proposed license. *Wisconsin Electric Power Co. (Point Beach Nuclear plant, Units 1 & 2)*, LBP-81-45, 14 NRC 853 (1981).

Contention Number 1

As a matter of law, the applicant has not performed a sufficient investigation and has not done a sufficient analysis to support that the Holtec site will not have a disparate impact on the minority and low income population of Lea and Eddy County

In terms of the issues raised by AFES before the licensing board, AFES agrees with the judges that AFES's objection to Holtec's site selection process is that "the siting process 'entirely fails to account for alternative sites' for Holtec's proposed fuel storage facility." *See* Memorandum at 126, *citing* AFES Pet. at 17. AFES also agrees that AFES relies for support in part on both the licensing board decision and the Commission decision in *Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, LBP-97-8, 45 NRC 77 (1997)(hereinafter *Louisiana Energy Services 45*), *aff'd in part, rev'd in part*, CLI-98-3, 47 NRC 77 (1998)(hereinafter *Louisiana Energy Services 47*). *Id.*, *citing* AFES Pet. at 11. Finally, AFES agrees with the judges that AFES also relies for support on the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*, and Executive Order 12898. *Id., citing* AFES Pet. at 18-19, therein *citing* Federal Actions to Address Environmental Justice in Minority Populations and Low

income Populations), 59 Fed. Reg. 7629 (Feb. 11, 1994) (hereinafter Exec. Order 12898)(. . . incorporat[ing] the topic of environmental justice into all executive agencies' NEPA reviews).

At this point, however, AFES diverges from the analysis of the judges, because, respectfully, the judges diverge from their own description of applicable law. Specifically, the judges begin with a description of the applicable law, that Holtec must investigate the environmental justice impact of its site selection process, but then the judges beg the question by focusing their remaining analysis on whether a "*more thorough* analysis" is due. The point AFES made in its Petition, however, was that Holtec had failed to do *any* review of the environmental justice impact of its site selection process, other than a statement that the minority population of the impacted area was similar to the minority population of the remaining area of the two counties – Lea and Eddy. This was insufficient as a matter of law.

First, the view adopted by the judges that Holtec was required to review only the impact within a fifty-mile radius of the site runs directly contrary to the statements by the judges regarding AFES's standing, that "the proposed Holtec facility is envisioned *as potentially much larger* than any previous spent fuel storage facility." Memorandum at page 18 (emphasis added). Thus, the judges' reasoning goes, the presumption of standing might exist for persons living and working outside the fifty-mile radius of the site, because the potential effects of the Holtec site might reach beyond fifty miles. What is good for the standing goose, then, is good for the environmental justice gander. Thus if there is evidence – indeed, at this point in the process, if there is any indication – that the effects of the site may go beyond the fifty-mile radius, then Holtec's environmental justice investigation must also go beyond a fifty-mile radius of the proposed site.

Second, the judges ignored that AFES is not seeking to intervene to protest the lack of a "more thorough analysis" – AFES's position is that Holtec did not conduct *any* analysis of environmental impact. Instead, Holtec merely re-hashed a prior investigation by a third party, with regard to a previously abandoned site for a different facility. Thus the judges' statement that "[t]he Environmental Report contains an analysis of location alternatives that explains the methodology of Holtec's selection of the proposed site, *see* Environmental Report at §§ 2.3, 2.4.2. and also shows six other potential sites that were analyzed and considered for suitability of the Holtec HI-STORE consolidated interim storage facility's characteristics, id. at 2-27 (Fig. 2.3.1)," is quite simply wrong.

Thus in the face of literally nothing in the Holtec application supporting a valid environmental justice analysis as to site selection, the judges have found that because Holtec presented superficial comparative demographic information concerning the minority and low income populations in Lea and Eddy County, the burden somehow shifted to community members to show that a sufficient analysis by Holtec would have revealed discriminatory impacts requiring redress. The judges' finding that AFES has failed to show why a "more thorough analysis" is necessary declares the verdict before the trial. By this logic, Holtec is permitted to say only, "We found and selected this site because a group of local officials told us they wanted us to come. Here's some statistics on how many low income and minority persons live in these counties," without any discussion of the particular impact and possible alternative sites in mitigation. Quite simply, this ignores Holtec's affirmative burden and is directly contrary to federal law.

A careful review of the supposed environmental justice investigation conducted by Holtec

and adopted by the judges demonstrates that Holtec based its entire "analysis" of the appropriateness of the site selection on *perceived local political support*, without any real site selection process or consideration of alternatives whatsoever. This is not remotely the analysis required by relevant federal law. In adopting Holtec's view of its mandate, the judges set the NRC licensing application process entirely on its head, by assuming that a petitioner's assertion that an application is entirely deficient is not a sufficient contention.

The NRC has previously held that the contents of an application can, indeed, be held against the applicant, and can therefore form the foundation for a valid contention.

> The question this presented to us was: could an allegation, based solely on an admission of Applicant, that some of its technical specifications are being " relaxed" — while others are being made more rigorous —, form the basis of a contention which should be admitted under the newly applicable rules? We have concluded that there is no simple answer to this question but that we must look further and examine Applicant's explanations for why a particular relaxation is not hazardous. If Applicant provides a clear explanation that is not directly challenged by Petitioner — through evidence or citations to sources or reasoning — then Applicant's admission of a " relaxation" is not by itself sufficient to admit a contention. *If, however, Applicant's "analysis" is merely conclusional and therefore fails to provide any assurance that its "relaxation" is safe, then we accept Petitioner's reliance on Applicant's admission as sufficient grounds for the admission of a contention.*

In the Matter of Fla. Power & Light Co. Turkey Point Plant (Unit Nos. 3 & 4), 31 N.R.C. 509, 1990 WL 324451 * 5 (June 15, 1990)(emphasis added); *see also Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2)*, LBP-79-6, 9 NRC 291, 303 (1979)(a petitioner for intervention may look to the applicant's environmental report for factual material in support of a proposed contention). Just as affirmative statements in an application can be "held against" the applicant, so, too, can the *absence* of necessary and critical information be "held against" an applicant. *See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station,*

Unit 1), LBP-82-75 (16 NRC 986, 993 (1982)(it is a sufficient contention to specify in some way each portion of the plan alleged to be inadequate).

Nothing in federal law suggests that a deficient analysis of potential discriminatory impact shifts the burden to the affected community to affirmatively prove discriminatory impact. Instead, in seeking a license, Holtec bears the burden of proof. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-697*, 16 NRC 1265, 1271 (1982). Petitioners therefore need do nothing more than "give *some basis for further inquiry*." *Id.* (emphasis added), *citing cf. Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2)*, ALAB–613, 12 NRC 317, 340 (1980). By the same token, at the allegation stage, Holtec must present a sufficient analysis of the environmental justice issues to demonstrate its application is complete.

> Once BCOC crossed the admissibility threshold relative to its accident sequence contention, the ultimate burden in this . . . proceeding then rested with the proponent of the NEPA document — the Staff (and the Applicant to the degree it becomes a proponent of the Staff's EIS-related action) – to establish the validity of that determination on the question whether the accident sequence is an EIS-preparation trigger.

In the Matter of Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), 53 N.R.C. 239, 249 (Mar. 1, 2001)(footnote omitted).

Here, Holtec prepared what it *calls* an environmental justice analysis, but the reasoning in *Carolina Power & Light* applies by analogy to the gaping deficiencies in Holtec's EIS.

> Although it might be asserted that the . . . burden imposed [the intervener] on BCOC as the party seeking an evidentiary hearing to establish there are appropriate factual or legal disputes is the equivalent of the "burden to go forward" that is normally ascribed to an intervener challenging a license application, *see Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-262, 1 NRC 163, 191 (1975), this does not account for the fact that

> an intervener generally is accorded the opportunity to build its case on the basis of witness cross-examination alone, *see Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B)*, ALAB-463, 7 NRC 341, 356 (1978).

In the Matter of Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), 53 N.R.C. 239, 272 n. 3 (Mar. 1, 2001).

Holtec, as the applicant, has the burden to demonstrate that it has sufficiently investigated enough sites, as alternatives to the present site in Lea and Eddy County, to support a finding by the Nuclear Regulatory Commission that the selected site will not have a disparate impact on the minority population of Lea and Eddy County. *As a matter of law*, Holtec has not carried its burden. Therefore, Holtec must conduct an investigation of alternative sites and amend its application to comply with federal law, prior to any shifting of the burden to AFES to demonstrate that the site selection process impermissibly burdens the local minority and low income population.

Holtec rejected this burden, both in its Application and in its Answer to the AFES Petition. The judges adopted Holtec's analysis, concluding that Holtec was required to do nothing more than cite the census numbers for minority and low income populations, and refer the reader to the invitation by Eddy Lea Energy Alliance LLC for Holtec to choose these two counties in New Mexico for its new dumpsite.

To the contrary, in its Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01 ("Policy Statement"), the NRC relied on the analysis in *Louisiana Energy Services (Claiborne Enrichment Center)*, CLI-98-3, 47 NRC 77 (1998) (referred to as *LES* in the Policy Statement), to reiterate that the burden is on the applicant to gather information and analyze the disparate impact of the site

selection on local minority and low income populations.

> In 1998, the Commission, for the first time in an adjudicatory licensing proceeding, analyzed [President Clinton's Executive Order] in *Louisiana Energy Services (LES). See Louisiana Energy Services (Claiborne Enrichment Center)*, CLI-98-3, 47 NRC 77 (1998). In *LES*, the applicant was seeking an NRC license to construct and operate a privately owned uranium enrichment facility on 70 acres between two African American communities, Center Springs and Forest Grove. *See id.* at 83. One of the impacts of constructing and operating the facility entailed closing and relocating a parish road bisecting the proposed enrichment facility site. *See id.* The intervenor's contention alleged that the discussion of impacts in the applicant's environmental report was inadequate *because it failed to fully assess the disproportionate socioeconomic impacts of the proposal on the adjacent African American communities*. *See id.* at 86.
>
> In *LES*, the Commission held that "[d]isparate impact analysis is our principal tool for advancing environmental justice under NEPA. The NRC's goal is *to identify and adequately weigh, or mitigate, effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities*." *Id.* at 100. The Commission emphasized that the [Executive Order] did not establish any new rights or remedies; instead, the Commission based its decision on NEPA, stating that "[t]he only "existing law" conceivably pertinent here is NEPA, a statute that centers on environmental impacts." *Id.* at 102.
>
> [E]nvironmental justice, as applied at the NRC, means that *the agency will make an effort* under NEPA to become aware of the demographic and economic circumstances of local communities where nuclear facilities are to be sited, and take care to mitigate or avoid special impacts attributable to the special character of the community."

Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01 (emphasis added; some internal punctuation and and citations omitted).

Nothing in this language remotely suggests that the burden is on the local community "to fully assess the disproportionate socioeconomic impacts of the proposal" on the local minority population. Instead, "[w]hile the policy statement clarifies that EJ per se is not a litigable issue in our proceedings, it does not de-emphasize the importance of adequately weighing or

mitigating the effects of a proposed action on low-income and minority communities by assessing impacts peculiar to those communities." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-0. Thus "[i]n the licensing context, the NRC's focus is on *full disclosure, as required by NEPA*, of the environmental impacts associated with a proposed action *and to take care to mitigate or avoid special impacts attributable to the special character of the community.*" Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, Response to Comment C.2, *52041 (emphasis added; internal punctuation and citation omitted).

> Importantly, one factor that *must be addressed* in the EIS is cumulative impact.
>
> The Commission considers cumulative impacts when preparing an environmental impact statement for a proposed action. With regard to environmental justice matters, applicants are asked to provide NRC staff with a description of cumulative impacts to low-income and minority populations and socioeconomic resources, if applicable, in their environmental report (ER) submitted with any license application. NUREG-1748, 6.4.11.

Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, Response to Comment A.8, 52042-52043. Thus while the Executive Order creates no new substantive or procedural rights,

> NEPA requires Federal agencies to take a "hard look" at the environmental impacts of major Federal actions significantly affecting the quality of the human environment. *Therefore, an EIS must appropriately assess disproportionately high and adverse impacts of a proposed action that fall heavily on a particular community.*

Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, Response to Comment B.1, *52044 (emphasis added).

Here, both Holtec and the judges entirely forgot about cumulative impact – there is nothing in the Holtec EIS that even identifies cumulative impact as an issue to be addressed; must less has Holtec addressed the issue on the merits. Similarly, in rejecting the need for a "more thorough analysis," the judges ignored that Holtec has not submitted *any* analysis of the cumulative impact of a new dumping site on the already overburdened community near the Holtec site.

In the interest of NRC's focus on full disclosure, environmental justice "is a tool, within the normal NEPA context, to identify communities that might otherwise be overlooked and identify impacts due to their uniqueness as part of the NRC's NEPA review process." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01,*52047. In this context, a petitioner may assert an admissible contention "that the proposed action will have significant adverse impacts on the physical or *human environment* that were not considered because the impacts to the community were not adequately evaluated." *Id.*

> It is the Commission's view that *the obligation to consider and assess disproportionately high and adverse impacts on low-income and minority populations* as part of its NEPA review was not created by the [Executive Order]. Rather, it is the Commission's view that the E.O. reminded agencies that such an analysis is appropriate in its normal and traditional NEPA review process.

Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, *52044. All that is necessary to trigger this review is a "clear potential for offsite impacts." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, *52045.

In performing the required environmental justice analysis, the "numeric criteria" of the comparative proportion of minority and low income residents, is intended as "guidance" and "a

starting point." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, *52046. "[T]he geographic scale should be commensurate with the potential impact area and should include a sample of the surrounding population because the goal is to evaluate the communities, neighborhoods, and areas that may be disproportionately impacted." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, *52047.

> The methods used to define the geographic area for assessment and to identify low-income and minority communities should be clear, yet allow for enough flexibility that communities or transient populations that will bear significant adverse effects are not overlooked during the NEPA review. Therefore, in determining the geographic area for assessment and in identifying minority and low-income communities in the impacted area, standard distances and population percentages should be used as guidance, *supplemented by the EIS scoping process*, to determine the presence of a minority or low-income population.

Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, Response to G-1, *52046.

Notably, to properly support a sufficient environmental justice analysis as part of its EIS, Holtec was required to engage in an effective scoping process pursuant to 10 CFR 51.29. "In performing a NEPA analysis for an EIS, published demographic data, community interviews and public input through well-noticed public scoping meetings should be used in identifying minority and low-income communities that may be subject to adverse environmental impacts." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, * 52048.

> The NRC will emphasize scoping, the process identified in 10 CFR 51.29, and public participation in those instances where an EIS will be prepared. Reliance on traditional scoping is consistent with the E.O. and CEQ guidance. *See* E.O. 12898, 59 FR at 7632 (Section 5-5); CEQ Guidance at 10-13. CEQ guidance reminds us

> that "the participation of diverse groups in the scoping process is necessary for full consideration of the potential environmental impacts of a proposed agency action and any alternatives. By discussing and informing the public of the emerging issues related to the proposed action, agencies may reduce misunderstandings, build cooperative working relationships, educate the public and decisionmakers, and avoid potential conflicts." CEQ Guidance at 12. Thus, it is expected that in addition to reviewing available demographic data, a scoping process will be utilized preceding the preparation of a draft EIS. This will assist the NRC in ensuring that minority and low-income communities, including transient populations, affected by the proposed action are not overlooked in assessing the potential for significant impacts unique to those communities.

Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01a, *52048.

Here, AFES objects to Holtec's site selection process, which entirely fails to account for *alternative sites* for the Holtec dump site. This precipitous narrowing of potential alternatives to a single site in southeastern New Mexico, a border state, is directly contrary the NRC's Policy Statements. Thus in *Louisiana Energy 47*, the NRC indicated that while the federal government "may accord substantial weight to the preferences of the applicant . . . in the siting . . . of the project," the applicant's environmental impact statement must nonetheless "*'[r]igorously explore . . . all reasonable alternatives.'*" *Louisiana Energy Services 47,* 47 N.R.C. at 103–04 40 (emphasis in original), *quoting* C.F.R. § 1502.14(a). Contrary to the judges' determination that Holtec has completed all necessary steps for a valid analysis of the potential disparate impact of Holtec dump site, Holtec in fact provided absolutely no allegation, much less evidence, that it ever considered *any* alternative sites.

Here, Holtec's site selection process is described in Section 2.3 of its Environmental Report, Rev. 0, beginning on page 42 of its March 2017 Report (ADAMS Accession No. ML17139C535), which is not changed in Rev. 1 of December 2017 (ADAMS Accession No.

ML18023A904). In Section 2.3, Holtec candidly admits that there was, in fact, *no site selection process for the Holtec site*, other than a cursory review of a report on a different site selection process, by a cabal of county officials, known as Eddy Lea Energy Alliance ("ELEA"). The precipitous and premature "narrowing" of the selection site decried in *Louisiana Energy Services 45* and *Louisiana Energy Services 47* is therefore even worse in this case. Thus instead of an effective scoping process, following an independent review of several potential sites for radioactive dumping, Holtec relied entirely on a report by unidentified "county officials" for Eddy and Lea County, submitted twelve years earlier, in support of a different project involving "evaluation study contracts." March 2017 report, Section 2.3, page 42. "In considering the most appropriate site for the proposed CIS Facility, Holtec reviewed the site selection process and outcome described above for the GNEP nuclear facilities and determined that the selected site in the process (Site 1) *would also be the best site for the CIS Facility*." March 2017 report, Section 2.3 page 43. This is *ipse dixit* logic inside *ipse dixit* logic – the site is best for GNEP because ELEA said so; it is best for Holtec because ELEA said so for GNEP. In other words, Holtec looked at the ELEA report *on a different project*, and agreed with ELEA's self-serving assessment that locating a different project in Eddy and Lea County was a good idea.

Holtec reports in its Application that county officials, acting under the acronym ELEA, "educat[ed] local leaders and gain[ed] community support" for the project, but there is absolutely no support in the Holtec Application for this bald-faced assertion – either with regard to alleged "community outreach" or alleged "community support." Neither does any support for either assertion appear in ELEA 2007, Appendix 2C to Holtec's Environmental Report, even though Holtec assures the NRC that Appendix C will provide all details concerning the site selection.

ELEA 2007, Appendix 2C actually documents a report done *twelve years ago*, for a different project. In ELEA 2007, there is no discussion of *any* environmental justice concerns. And no wonder – environmental justice was assigned a"a low weighting factor" in site selection. Indeed, as to "environmental justice," all six alternative sites are listed and described identically, as having "low population density," as though "low population density" translated as "nothing to see here" for purposes of taking environmental justice factors into concern in the site selection process. Appendix 2C ELEA GNEP Screening Criteria and Process, at page 6 (ADAMS Accession No. ML17310A230). Most egregiously, all six sites are located in Lea and Eddy County.

Holtec has thus failed to conduct even the most minimal environmental justice investigation, relying instead on the unsupported opinions of unidentified local politicians. There are several problems with this approach.

First, the *only* site considered by Holtec was Lea and Eddy County. Outside of these isolated, low income communities, there has been absolutely no review of other sites, even in New Mexico, much less outside of New Mexico. The very factor that was treated as "positive" by Holtec in terms of environmental justice – that unnamed local officials had already asked to be considered as a possible site – is, in fact, negative. Thus Holtec appears to believe that because this geographic area was previously targeted for industrial and nuclear dumping, this provides an "all clear" for additional dumping, when, in fact, the reverse is true – the targeting of rural, impoverished, low income communities in a border state is precisely the sort of *de facto* result of the institutional racism embedded in prevailing dump site selection processes nationwide that was decried over thirty years ago in the United Church of Christ study cited by

the Licensing Board in *Louisiana Energy 45. See Toxic Wastes and Race In the United States, A National Report on the Racial and Socio–Economic Characteristics of Communities With Hazardous Waste Sites," cited with approval in Louisiana Energy 45,* 45 N.R.C. at 372–73.

Rather than a careful study of potential alternative sites, Holtec relies entirely on the study by ELEA, which in turn failed to address any sites but Lea and Eddy County. Within Lea and Eddy County, the sole criterion for ELEA, in terms of the "environmental justice" factor, was low population density, a factor which also targets rural impoverished communities, as the Licensing Board pointed out in *Louisiana Energy 45* when it noted that a purposeful "selection out" of populated and popular areas has the *de facto* result of dumping waste on minority, low income, isolated rural communities. *Louisiana Energy 45,* 45 N.R.C. at 387-88.

In this contention, AFEs' argument is not, as construed by the judges, that the site selection process should have been "more thorough." It is instead that the site selection process *per se* was inadequate to carry Holtec's burden, thereby mandating the preparation of a new environmental report that both *studies* and *addresses* alternative sites nationwide, why such sites are rejected, and what impact the selected site will have on minority and low income local populations, including but not limited to an effective scoping process. As part of its studies, Holtec should be required to reach out to minority and low income communities, rather than relying on unnamed politicians who purportedly speak for the community.

Holtec's circular reasoning is perfectly illustrated by Section 3.8.5 of its Environmental Report, which compares the percentage of minority and low income populations inside the Holtec site with the population of surrounding counties. Holtec does not even compare the proposed site with the percentage of minority and low income populations in New Mexico, much

less with the populations inside the United States. Holtec's failure to compare the population of Lea and Eddy County with the population of the United States – choosing instead basically to compare the narrow geographic area of both counties *with itself* – is directly contrary to the detailed scoping comments provided by the Environmental Protection Agency, which specifically incorporated the Promising Practice Report in its recommendations. *See* Promising Practices for EJ Methodologies in NEPA Reviews (March 2016). The Promising Practice Report specifically rejects Holtec's method of identifying environmental justice populations by comparing the area of the site with the immediately surrounding area, rather than casting a wider comparative net.

By the same token, once the site is selected, the applicant must also study and report, and the NRC must review, unique impacts on the local minority population.

Contention Number 2

As a matter of fact and expert opinion, the siting process will have a disparate impact on the minority and low income population of Lee and Eddy County

Contention Number 2 appears at AFES Petition at 22.

To support Contention Number 2, AFES submitted an affidavit from Professor Myrriah Gómez, Ph.D., that is entitled "Environmental Racism an Active Factor in the Siting and White Privilege Associated with the Holtec International HI-STORE Consolidated Interim Storage Facility Project." *See* Memorandum at page 128, citing . Dr. Gómez stated that the proposed site "'is an example of environmental racism based on studies defining and documenting environmental racism across . . . the United States,' and alleges that the proposed Holtec facility meets African-American civil rights leader Benjamin Chavis's {sic} definition of environmental racism." *See* Memorandum at page 129, citing AFES Pet. at Exhibit 7, pp. 2-3. AFES relied on Dr. Gomez' affidavit to bolster its legal argument that "Holtec's reliance on an invitation for

siting by a small group of government officials is a deficient process from the outset." *Id., citing* AFES Reply at 22.

The judges rejected this factual support submitted by AFES, in the form of an affidavit by Dr. Gomez, because "Holtec addressed environmental justice matters to the depth recommended by NRC guidance, *see* ER at 3-113 (Tbl. 3.8.13), and neither AFES's petition nor Dr. Gómez's affidavit challenge the information in Holtec's Environmental Report." Memorandum at page 129. As AFES has argued with regard to AFES Contention 1, the "process" described by Holtec in its Application is deficient, having been based, as Dr. Gomez also stated, "on an invitation for siting by a small group of government officials," rather than an effective scoping process and an independent review of the impact – including the cumulative impact – of the site on minority and low income populations along the border.

AFES Contention 3

There is no factual support for Holtec's primary site selection criterion, which is community support

Contention Number 2 appears at AFES Petition at 23 and is addressed by the judges at Memorandum at 129-130..

AFES agrees with the judges' summary of the two bases for AFES's challenge to Holtec's reliance on ELEA's support for the proposed facility. Memorandum at pages 129-30.

There is some irony in the judges' rejection of AFES's challenge to Holtec's assertion of community support for the Holtec site, in the form of ELEA's invitation to Holtec to locate its site in Lea and Eddy County. Specifically, Holtec relied almost entirely on ELEA's support for Holtec's site selection in Holtec's environmental justice analysis. Therefore, as a factual matter,

AFES asserted a challenge to the implication that ELEA speaks for the low income minority population of Lea and Eddy County. The judges responded by declaring that community support is not material to an environmental justice analysis. This conclusion, of course, makes AFES's case with regarding to Contention Number 1.

In other words, neither Holtec nor, respectfully, the judges, can have it both ways. Having hung its entire environmental justice hat on its claim that the community supports its chosen site, Holtec cannot turn around and say that the falsity of its own narrative that ELEA speaks for the community is somehow immaterial to the environmental justice analysis. Thus, if the NRC rejects the notion that alleged community support is not relevant to the environmental justice analysis, then it must accept Contention Number 1. If, in contrast, community support *is* material as a matter of law, as Holtec submits in its Application, then AFES must be permitted to contend, as a matter of fact, that ELEA does not speak for the community.

5. Conclusion

For the foregoing reasons, Petitioner requests that the Commission grant this Petition for Review, reverse the Memorandum, grant Petitioner's contentions, and admit Petitioner AFES as a party to this proceeding.

/signed electronically by/

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May 31, 2019

CERTIFICATE OF SERVICE

I certify that on May 31, 2019, a true and correct copy of the foregoing was served via electronic submission to all counsel of record.

/signed electronically by/
Nancy L. Simmons