

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE NUCLEAR REGULATORY COMMISSION**

In the Matter of:)	
)	Docket No. 72-1051
Holtec International)	
)	June 3, 2019
(HI-STORE Consolidated)	
Interim Storage Facility))	

FASKEN AND PBLRO NOTICE OF APPEAL AND PETITION FOR REVIEW

Pursuant to 10 C.F.R. § 2.301, Fasken Land and Minerals, Ltd. (Fasken) and Permian Basin Land and Royalty Owners (PBLRO) (hereinafter “Petitioners”) submit this notice of appeal and petition for review urging the Nuclear Regulatory Commission (“NRC”) to review, and reverse, in-part, the decision of the Atomic Safety and Licensing Board (“ASLB”).¹

I. Petitioners’ Petition to Intervene Should Have Been Granted

1. Standing

Petitioners have pled, and the ASLB has agreed, that Petitioners have established standing based on the proximity presumption and Mr. Taylor’s Supplemental Declaration.² In this regard, the NRC should uphold the ASLB’s stance on Petitioners’ standing.

2. Motion to Dismiss

On September 14, 2018, Petitioners filed a Motion to Dismiss the licensing proceedings for the HI-STORE Consolidated Interim Storage Facility (CISF) proposed by Holtec International (“Holtec”) in Southeast New Mexico.³ Petitioners’ Motion to Dismiss urged the

¹ See ASLB “Ruling on Petitions for Intervention and Requests for Hearing” LBP-19-4 (May 7,2019) (hereinafter “ASLB Decision”).

² See ASLB Decision at 16 (citing Petitioners’ “Motion for Permission to File Supplemental Standing Declaration of Tommy E. Taylor, Suppl. Decl. of Tommy Taylor ¶ 1 (Dec. 10, 2018)).

³ Motion of [Petitioners] to Dismiss Licensing Proceedings for Hi-Store [CISF] and WCS [CISF] (Sept. 14, 2018) (hereinafter “Petitioners’ Motion to Dismiss”).

NRC to dismiss Holtec’s licensing application because the application was predicated on the Department of Energy (“DOE”) taking title to spent nuclear fuel in transit from privately-owned nuclear facilities to the proposed Holtec site—a direct violation of the Nuclear Waste Policy Act (“NWPA”).⁴ Upon review of Petitioners’ Motion to Dismiss, the Secretary of the NRC denied the motion on procedural grounds and refused to consider the claim that the NRC’s very conduct of the licensing proceedings violated the NWPA and 5 U.S.C. § 702(2)(A) and § 702(2)(C) of the Administrative Procedure Act (“APA”).⁵ The Secretary then referred Petitioners’ motion to the ASLB to be considered as a contention pursuant to 10 C.F.R. § 2.309.⁶

After being referred to the ASLB, Petitioners’ Motion to Dismiss was analyzed as a contention, wherein both Holtec and the NRC Staff (“Staff”) opposed it.⁷ Petitioners made clear in their response to Holtec and Staff that Petitioners never intended for their Motion to Dismiss to be analyzed as a contention under 10 C.F.R. § 2.309, but rather, that the Motion to Dismiss should have been “presented to the Commission and analyzed under the APA and NWPA.”⁸ Furthermore, Petitioners argued that “it [was] unprecedented for the Secretary to refer a Motion to Dismiss for consideration as a petition under 10 C.F.R. § 2.309.”⁹ In the past, the Secretary

⁴ The DOE is precluded from taking title to spent fuel until a permanent repository is available. 42 U.S.C. §§ 10222(a)(5)(A), 42 U.S.C. § 10143.

⁵ Order of the Secretary, [Holtec] (HI-STORE [CISF]) [and] Interim Storage Partners LLC (WCS [CISF]) Docket Nos. 72-1051 & 72-1050 at 2 (Oct. 29, 2018) (unpublished) (hereinafter “Secretary’s Order”).

⁶ *Id.* at 2-3.

⁷ See NRC Staff’s Supplemental Response to Motion to Dismiss by Permian Basin Land and Royalty Organization and Fasken Land and Minerals at 12 (Dec. 3, 2018) (ML18337A415) & Holtec International’s Answer Opposing Fasken Land and Minerals and Permian Basin Land and Royalty Owners’ Motion to Dismiss / Petition to Intervene at 1 (Dec. 3, 2018) (ML18337A443).

⁸ See Reply of [Petitioners] to Holtec’s Answer Opposing Petitioners’ Motion to Dismiss/Petition to Intervene (Dec. 10, 2018) [hereinafter “Petitioner’s Reply to Holtec”]; Reply of [Petitioners] to NRC Staff’s Supplemental Response and Opposition to Motion to Dismiss (Dec. 10, 2018) [hereinafter “Petitioner’s Reply to NRC Staff”].

⁹ Petitioner’s Reply to NRC Staff at 1; Petitioner’s Reply to Holtec at 1.

has used its referral power to reopen the ASLB,¹⁰ grant extensions,¹¹ file new contentions,¹² and file additional briefs,¹³ but the Secretary has never used its power, nor has it had the authority pursuant to 10 C.F.R. § 2.346(i), to refer a Motion to Dismiss to the ASLB *and* have it analyzed as a contention pursuant to 10 C.F.R. § 2.309.

The ASLB determined that while Petitioners demonstrated standing, they “did not proffer a contention of [their] own....”¹⁴ Considering Petitioners filed a Motion to Dismiss and not a contention, Petitioners agree with this determination. However, Petitioners ultimately disagree with the ASLB’s decision because it did not consider the substantive aspects of Petitioners’ arguments under the NWPA and the APA. Although the ASLB ultimately decided that Holtec has fixed the application’s inconsistency regarding title ownership between the DOE and/or the nuclear power plant owners,¹⁵ as Petitioners’ Motion to Dismiss explains,¹⁶ the consideration of the Holtec application is outside of the ASLB’s and the NRC’s subject-matter jurisdiction. Moreover, Applicant’s concession that its proposal to establish a CISF cannot advance absent an

¹⁰ See e.g., *Southern Nuclear Operating Company* (Vogtle Electric Generating Plant, Units 3 and 4), Order (Aug. 30, 2011) (Order of the Secretary referring motions to reopen the *Vogtle, Comanche Peak*, and *Bell Bend* combined license application proceedings to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel); *Southern Nuclear Operating Company* (Vogtle Electric Generating Plant, Units 3 and 4), Order (Aug. 25, 2010) (Order of the Secretary referring motion to reopen to Board); *Amergen Energy Company, LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Order (May 9, 2008) (Order of the Secretary referring motion to reopen to Board).

¹¹ See e.g., *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), Order (Dec. 7, 2009);

¹² See e.g., *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3) 69 N.R.C. 115, 118 (Mar. 2009)

¹³ See e.g., *AmerGen Energy Company, LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Order (Aug. 21, 2008).

¹⁴ ASLB Decision at 125.

¹⁵ *Id.* at 32 (ASLB found that Beyond Nuclear and Petitioners no longer identified genuine disputes with Holtec’s license application. Unlike the original application which inconsistently gave title to either DOE and nuclear power plant owners, Holtec’s amended application now “consistently says that its customers will be either DOE or the nuclear power plant owners”).

¹⁶ Petitioner’s Motion to Dismiss at 1.

amendment to the NWPA¹⁷ further buttresses Petitioners' theory that the NRC lacks jurisdiction to consider the Holtec application.

Given that the Secretary of the NRC refused to consider Petitioners' claim that the agency's very conduct of the licensing proceedings violated the NWPA and the APA, and given that the Secretary of the NRC did not support its referral of Petitioners' Motion to Dismiss as a contention with any authority or precedent, the NRC should reverse the ASLB's decision and sustain the Petitioners' Motion to Dismiss for want of jurisdiction pursuant to 5 U.S.C. § 706(2)(C) of the APA.¹⁸

3. ASLB's Business Advice to Holtec

Petitioners also contend that the NRC's stance that it does not "...determin[e] whether market strategies warrant commencing operations,"¹⁹ conflicts with the ASLB's gratuitous advice to Holtec regarding how Holtec might spark interest in the CISF from potential power plant owners and the DOE.²⁰ In this regard, while Holtec may or may not have eliminated the inconsistencies found in its own application, the ASLB, by offering strategic business tactics and advice to Holtec in the LBP-19-4 decision, has ultimately created a new inconsistency by

¹⁷ See Hearing transcript p. 250 (Statement of Holtec Counsel conceding the need for an act of Congress: "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."); See also, ASLB Decision at 30 (ASLB recognizing Holtec's concession).

¹⁸ 5 U.S.C. § 706(2)(C) states that "The reviewing court shall...set aside agency action, findings, and conclusions found to be...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

¹⁹ *Id.* at 33.

²⁰ *Id.* at 26 ("DOE might want to take responsibility for the nuclear plants' spent fuel, pay Holtec to store it, and stop paying out damages. The nuclear plant owners, on the other hand, might be willing to apply their ongoing damage payments towards paying Holtec to store their spent fuel, so that it would be off their sites and no longer their responsibility to keep secure.").

running afoul of NRC precedent.²¹ Rather than discuss the means that Holtec might achieve its objective of establishing a CISF, the ASLB should have limited its evaluation to whether the NRC's jurisdiction should permit consideration of an application that even Holtec concedes requires an act of Congress to be viable.²²

II. Conclusion

For the foregoing reasons, Petitioners respectfully request that their Notice of Appeal and Petition for Review be granted.

Respectfully submitted,

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June 3, 2019

²¹ See ASLB Decision at 33 (citing *La. Energy Servs.* (Nat'l Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005) (quoting *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, N.M. 87174), CLI-01-4, 53 NRC 31, 48-49 (2001) (“[t]he NRC is not in the business of regulating the market strategies of licensees or determining whether market strategies warrant commencing operations.”)).

²² Hearing transcript p. 250 and fn. 17, *supra*.

Certificate of Service

Undersigned certifies that a true and correct copy of the above and foregoing was submitted to the NRC's Electronic Information System for filing and service on participants in the above-captioned dockets.

/electronically signed by/
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