

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	Docket No. 72-1051
Holtec International)	
)	
(HI-STORE Consolidated Interim Storage Facility))	ASLBP No. 18-958-01
)	

**HOLTEC INTERNATIONAL'S BRIEF
IN OPPOSITION TO ALLIANCE FOR ENVIRONMENTAL STRATEGIES'
APPEAL OF LBP-19-4**

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I. Introduction

Pursuant to 10 C.F.R. § 2.311(b), Holtec International (“Holtec”) submits this brief in opposition to the May 31, 2019 Petition for Review filed in this proceeding by Alliance for Environmental Strategies (“AFES”) (the “Appeal”).¹ AFES challenges the Atomic Safety and Licensing Board’s (“Board”) May 7, 2019 Memorandum and Order (Ruling on Petitions for Intervention and Requests for Hearing) (“LBP-19-4”)² in the Nuclear Regulatory Commission (“NRC” or “Commission”) licensing proceeding for Holtec’s proposed HI-STORE Consolidated Interim Storage Facility (“CISF”).

As explained below, LBP-19-4 properly denied AFES’ Petition to Intervene and Request for Hearing for failing to set forth an admissible contention.³ Holtec requests that the Commission deny the Appeal because it fails to identify any error or abuse of discretion in the Board’s ruling. The

¹ Petition for Review by Alliance for Environmental Strategies (May 31, 2019) (NRC ADAMS Accession No. ML19151A283) (the “Appeal”).

² *Holtec International* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, __ N.R.C. __, slip op. (May 7, 2019) (NRC ADAMS Accession No. ML19127A026).

³ LBP-19-4 at 135.

Appeal merely repeats the claims made in AFES’s earlier pleadings and the oral argument before the Board and lacks substantive explanation or argument as to how the Board erred in determining that AFES’s contentions failed to satisfy the admissibility standards set forth in 10 C.F.R. § 2.309(f)(1).⁴

II. Statement of the Case

Holtec submitted its application (the “Application”) to construct and operate the CISF on March 30, 2017.⁵ The NRC Staff conducted a sufficiency review and found the Application acceptable for docketing.⁶ On July 16, 2018, the NRC published notice in the Federal Register of an opportunity to request a hearing and petition to intervene by September 14, 2018.⁷ On September 12, 2018, AFES filed its Petition to Intervene and Request for Hearing (“Petition”).⁸

On October 9, 2018, Holtec and the NRC Staff filed answers to the Petition.⁹ Holtec and the NRC Staff both opposed AFES’s standing and opposed the admission of all of AFES’s contentions. AFES filed its reply on October 16, 2018.¹⁰

The Board heard oral argument on January 23 and 24, 2019 in Albuquerque, New Mexico.

⁴ As discussed in Sec. IV.B below, although the ASLB made no determination as to AFES, Holtec submits that AFES’s Petition to Intervene and Request for Hearing should also have been denied for failing to establish AFES’s standing.

⁵ The Holtec International HI-STORE CISF License Application (Mar. 30, 2017) (ADAMS Accession No. ML17115A431) (the “Application”).

⁶ Holtec International’s HI-STORE CISF for Interim Storage of Spent Nuclear Fuel, Docketing License Application, 83 Fed. Reg. 12,034, 12,035 (Mar. 19, 2018).

⁷ Holtec International’s HI-STORE CISF for Interim Storage of Spent Nuclear Fuel, Order for Opportunity to Request a Hearing and to Petition for Leave to Intervene, 83 Fed. Reg. 32,919 (July 16, 2018).

⁸ Alliance for Environmental Strategies’ Petition to Intervene and Request for Hearing (Sept. 12, 2018) (ADAMS Accession No. ML18255A234) (the “Petition”).

⁹ Holtec International’s Answer Opposing Alliance Environmental Strategies’ Petition to Intervene and Request for Adjudicatory Hearing on Holtec International’s HI-STORE Consolidated Interim Storage Facility Application (Oct. 9, 2018) (NRC ADAMS Accession No. ML18282A436) (“Holtec Answer”); NRC Staff’s Consolidated Response to Petitions to Intervene and Requests for Hearing Filed by Alliance for Environmental Strategies, Beyond Nuclear, Inc., Don’t Waste Michigan, et al., NAC International Inc., and the Sierra Club (Oct. 9, 2018) (ADAMS Accession No. ML18282A567) (“Staff Consolidated Response”).

¹⁰ Consolidated Response by Petitioner Alliance for Environmental Strategies to Answers by Holtec and NRC Staff (Oct. 16, 2018) (ADAMS Accession No. ML18289A533) (“Reply”).

On May 7, 2019, the Board issued LBP-19-4. The Board made no determination on AFES’s standing but found that AFES had failed to proffer any admissible contention meeting the requirements of 10 C.F.R. § 2.309(f)(1).¹¹ Therefore, in accordance with 10 C.F.R. § 2.309(a), the Board denied the AFES’s Petition.¹² AFES now appeals this decision.

III. Standard of Review

As noted in LBP-19-4, 10 C.F.R. § 2.311 provides that a licensing board order wholly denying a petition to intervene or request for hearing is appealable under 10 C.F.R. § 2.311(c):

An order denying a petition to intervene, and/or request for hearing . . . is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.¹³

The NRC “regularly affirm[s] Board decisions on the admissibility of contentions where the appellant points to no error of law or abuse of discretion.”¹⁴ As such, “[p]ointing out the errors in the Board’s decision is a basic requirement for an appeal,”¹⁵ and “[a] mere recitation of an appellant’s prior positions in a proceeding or a statement of his or her general disagreement with a decision’s results ‘is no substitute for a brief that identifies and explains the errors of a Licensing Board in the order below.’”¹⁶

¹¹ LBP-19-4 at 135.

¹² *Id.*

¹³ 10 C.F.R. § 2.311(c).

¹⁴ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 N.R.C. 111, 121 (2006) (internal quotation marks omitted) (quoting *USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 439 n.32 (2006)); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 637 (2004) (“Commission affirms Board rulings on admissibility of contentions if the appellant ‘points to no error of law or abuse of discretion.’” (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 N.R.C. 261, 265 (2000))).

¹⁵ *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 N.R.C. 499, 503 (2007) (regarding appeal of denied intervention petitions under 10 C.F.R. § 2.311) (citing *AmerGen Energy*, CLI-06-24, 64 N.R.C. at 121).

¹⁶ *Texas Utilities Electric Co., et. al.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 N.R.C. 192, 198 (1993) (quoting *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 N.R.C. 63, 66 (1992)). Moreover, “[o]n a petition for review, [a petitioner] must adequately call the Commission’s attention to claimed errors in the Board’s approach. . . . [the Commission] deem[s] waived any arguments not

A petitioner is limited to the contentions as initially filed and may not rectify their deficiencies through an appeal.¹⁷ The NRC has explained that, “absent extreme circumstances, [it] will not consider on appeal ‘either new arguments or new evidence supporting the contention[s], which the Board never had the opportunity to consider.’”¹⁸ Such new claims on appeal are prohibited because “[a]llowing petitioners to file vague, unsupported contentions, and later on appeal change or add contentions at will would defeat the purpose of [the NRC’s] contention-pleading rules.”¹⁹ Moreover, “[t]he purpose of an appeal to the Commission is to point out errors made in the Board’s decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board.”²⁰ Absent an error of law or abuse of discretion, the Commission generally defers to the licensing board’s rulings on contention admissibility.²¹

IV. Argument

A. The Board Correctly Rejected AFES’s Contentions.

1. Contention 1 (Environmental Justice)

AFES’s Contention 1 alleges that Holtec must revise its Environmental Report (“ER”) to perform an environmental justice analysis of alternative sites to enable an NRC Staff investigation into discrimination in site selection, whether intentional or incidental, in its Environmental Impact

raised before the Board or not clearly articulated in the petition for review.” *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 N.R.C. 370, 383 (2001) (internal citations omitted).

¹⁷ See *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 458 (2006); cf. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 225 (2004) (“In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.”) (footnote omitted).

¹⁸ *USEC*, CLI-06-10, 63 N.R.C. at 458 (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 N.R.C. 125, 140 (2004)).

¹⁹ *Id.* (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619, 622–23 (2004)).

²⁰ *USEC*, CLI-06-10, 63 N.R.C. at 458.

²¹ See *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 N.R.C. 377, 379–80 (2012).

Statement (“EIS”).²² Contention 1 alleges that Holtec cannot rely on the GNEP project review of alternative sites, and must consider environmental justice as a site selection factor with a detailed investigation of environmental justice and requirement for community outreach.²³ AFES argues that the Board erred in rejecting Contention 1 because the Board found Holtec’s existing environmental justice and site-selection analyses to be sufficient while AFES argued that the appropriate analysis (i.e., whether the siting process in effect targeted minority communities) was omitted altogether.²⁴ However, in making this argument, AFES fails to demonstrate that the Board made an error of law or abused its discretion. Instead, AFES merely restates its prior position and makes only general policy arguments in assertedly disputing the Board’s decision.

The Board rejected Contention 1 because AFES failed to point to any legal requirement for a site selection or environmental justice analysis more detailed than that already included in the ER.²⁵ Indeed, Contention 1 essentially ignored the ER’s full environmental justice analysis²⁶ and failed to cite to any NRC requirement mandating that Holtec perform a further analysis.²⁷ As such, the Board found that the Holtec ER’s environmental justice analysis was adequate and performed in accordance with the NRC Environmental Justice Policy Statement.²⁸ The Board also found that AFES’s contention of omission regarding alternative site selection should be rejected, as AFES failed to

²² See Petition at 11, 13 (arguing that “[A]pplicant must support and the NRC must consider whether the siting process so precipitously narrowed the selection of the site that the process in effect targeted minority communities . . .”).

²³ Petition at 19-21.

²⁴ Appeal at 8 (alleging that Holtec failed to do any review of the environmental impact of its site selection process).

²⁵ LBP-19-4 at 127-28.

²⁶ AFES’s single reference to the ER’s environmental justice analysis is the incorrect claim that Holtec “[did] not even compare” the local minority population against that of New Mexico or the United States. Petition at 20. On the contrary, Holtec did compare the local population against that of New Mexico (and Texas) in the ER. ER at 3-100. And there is no requirement Holtec compare the local population against the entire United States.

²⁷ See generally Petition at 11-22.

²⁸ LBP-19-4 at 127-28.

challenge or address relevant portions of the Application.²⁹ In summary, the Board found that AFES's Contention 1 failed to raise a genuine dispute with the application on a material issue of law or fact.³⁰

To properly challenge this determination on appeal, AFES must demonstrate that the Board's decision included a clear error of law or an abuse of discretion based on its analysis of AFES's initial pleadings. AFES fails to meet this burden on appeal. As discussed in more detail below, the AFES Appeal cites to neither regulations nor caselaw that would require Holtec to perform an environmental justice analysis in greater detail than that suggested by the NRC Environmental Justice Policy Statement. Moreover, AFES fails to reference any NRC regulations or caselaw requiring that Holtec perform an environmental justice review of its site-selection process. AFES also does not explain how the Board abused its discretion in determining that AFES's contention of omission was in error.

Moreover, AFES cannot show an error of law or an abuse of discretion because there were none. AFES's Petition argued that Holtec must revise its ER to perform an environmental justice analysis of alternative sites, including an analysis of "alternative sites nationwide."³¹ But there is no requirement for Holtec to perform such an analysis. Holtec is required to perform a NEPA alternatives analysis,³² but AFES points to no authority that environmental justice must be included in the analysis of alternative sites. The NRC Staff considers environmental justice in its NEPA reviews, in accordance with the NRC Environmental Justice Policy Statement, and considers

²⁹ *Id.* at 128.

³⁰ *Id.* at 127-28.

³¹ See Petition at 21 ("Petitioner's argument is 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.").

³² See 10 C.F.R. § 51.45(b)(3).

alternative sites. But there is no requirement to combine the two into an environmental justice review of alternative sites, either in the ER or in the NRC Staff’s NEPA review.

Indeed, the Commission has previously rejected such a “free-ranging inquiry into the site selection process” in the NRC Staff NEPA review.³³ As the Commission determined, an investigation into discrimination in site selection, whether institutional or intentional, would go beyond NEPA requirements.³⁴ Thus, the Commission held that NEPA *only* requires an investigation into disparate impacts, not into the site selection process or the possibility of an intentional or unintentional bias in siting.³⁵ AFES points to no subsequent NRC caselaw or regulation requiring a greater analysis of environmental justice in this proceeding.

AFES also attempts to re-argue its prior submittals, including its Petition and a number of the new arguments added in its Reply. Perhaps AFES’s only direct dispute with the Board decision is its argument that the Board cannot limit the environmental justice analysis to a 50-mile radius if it is willing to extend proximity-plus standing beyond that zone.³⁶ Even this argument is based on a misunderstanding of the Board’s order. The Board did not determine that standing might exist beyond a 50-mile radius, as alleged by AFES.³⁷ On the contrary, the Board declined to determine the distance needed to support proximity-plus standing but acknowledged that “the relevant distance from a consolidated interim storage facility is likely *less than* 50 miles.”³⁸

The remainder of AFES’ Contention 1 arguments on appeal repeat prior arguments that AFES made before the Board and attempt to remedy the original contention by supplementing it on appeal.

³³ *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 N.R.C. 77, 103 (1998).

³⁴ *Id.* at 104.

³⁵ *Id.* at 100 (“We reverse the Board’s requirement of an inquiry into racial discrimination in siting . . .”).

³⁶ *See Appeal* at 4.

³⁷ *Id.* at 8-10.

³⁸ LBP-19-4 at 9 (emphasis added).

For example, pages 8-10 of the Appeal repeats the arguments on pages 16-18 of the Reply on the NRC's Policy Statement on Environmental Justice.³⁹ AFES then includes the cumulative impacts analysis as an argument on Appeal,⁴⁰ even though cumulative impacts analysis was never mentioned in the initial contentions.⁴¹ Similarly, pages 11-13 repeat the arguments on the geographic area of assessment and scoping made on pages 19-21 of its Reply (though never mentioned in its original Petition). AFES then repeats at pages 13-17 of the Appeal arguments from pages 17-21 of its Petition. In all of this, AFES adds only a few conclusory statements regarding the Board's order.⁴² This patchwork of prior arguments is "[a] mere recitation of [AFES's] prior positions in [the] proceeding"⁴³ and does not fulfill the basic requirements for an appeal.

Finally, AFES's claim that the Board improperly shifted the burden to AFES is equally specious. While Holtec has the ultimate burden of proof once a contention is admitted, AFES has the burden of putting forward contentions that meet the Commission's admissibility requirements,⁴⁴

³⁹ As later acknowledged by AFES, Reply at 14, its Petition never addressed the Environmental Justice Policy Statement. An intervenor must provide sufficient alleged factual or legal bases to support its contentions from the outset, not on reply or in an appeal. *See USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 N.R.C. 451, 458 (2006). Thus, AFES' attempts to remediate its Petition with late claims based on the Environmental Justice Policy Statement are improper and cannot support a litigable contention.

⁴⁰ Appeal at 8, 10.

⁴¹ *See* Petition at 11-24. AFES first attempted to add cumulative impacts as a topic on Reply. *See* Reply at 18-19, 22. Holtec promptly moved to strike this new argument as an improper addition on Reply. Holtec International's Motion to Strike Portions of Replies of Alliance for Environmental Strategies, Don't Waste Michigan et al., NAC International Inc., and Sierra Club (Oct. 26, 2018) (ADAMS Accession No. ML18299A316). The Board did not decide Holtec's Motion to Strike because the Contentions were denied. LBP-19-4 at 129.

⁴² For example, AFES asserts that "[c]ontrary 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." Appeal at 13 (emphasis in original). This is no more a challenge to the Board's decision than it is a set up for AFES to reiterate its prior arguments.

⁴³ *Texas Util. Elec. Co., et al. (Comanche Peak Steam Electric Station, Unit 2)*, CLI-93-10, 37 N.R.C. 192, 198 (1993) (quoting *Georgia Power Co. (Vogle Electric Generating Plant, Units 1 and 2)*, CLI-92-3, 35 N.R.C. 63, 66 (1992)).

⁴⁴ *Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, LBP-01-35, 54 N.R.C. 403, 422 (2001).

as acknowledged in the cases cited by AFES.⁴⁵ The Board found that AFES failed to meet these requirements and thus properly rejected AFES’s Petition. AFES’s Appeal fails to establish that the Board erred and therefore the Commission should reject AFES’s Appeal of the Board’s ruling dismissing Contention 1.

2. Contention 2 (Disparate Impact)

Contention 2 claims that the Holtec site will have a disparate impact on the minority and low-income population of Eddy and Lee counties.⁴⁶ To support this claim, AFES relies on a report from Professor Myrriah Gomez, Ph.D.⁴⁷ However, the Gomez report itself does not support a showing of specific disparate impacts and instead makes unsupported and vague claims of racism.⁴⁸ AFES argues that the Board erred in rejecting Contention 2 for the same reasons that it allegedly erred in rejecting Contention 1.⁴⁹ However, there was no error. The Board properly determined that AFES failed to address the environmental justice analysis in the ER, resulting in a failure to show a genuine dispute with the application on a material issue of law or fact.⁵⁰

AFES does not specifically challenge this analysis. Instead it references back to the prior arguments in the Appeal, (“As AFES has argued with regard to its Contention 1, the ‘process’ described by Holtec in its Application is deficient, having been based, as Dr. Gomez also stated, ‘on

⁴⁵ Appeal at 7-8 (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-09, 53 N.R.C. 239, 249 (2001) (“Once BCOC crossed the admissibility threshold . . . the ultimate burden in this . . . proceeding then rested with the proponent of the NEPA document.”)); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 N.R.C. 1265, 1271 (1982) (explaining that while the Applicant bears the *ultimate* burden of proof (i.e. at the hearing), Intervenors must give some basis for further inquiry at the contention admissibility stage).

⁴⁶ Petition at 22.

⁴⁷ *Id.*

⁴⁸ See generally M. Gomez, Ph.D., *Environmental Racism an Active Factor in the Siting and White Privilege Associated with the Holtec International HI-STORE Consolidated Interim Storage Facility Project* (Sept. 7, 2018).

⁴⁹ Appeal at 18.

⁵⁰ LBP-19-4 at 129.

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.”) as well reiterating its prior claims.⁵¹ As a result, AFES fails to demonstrate that the Board made an error of law or abused its discretion and the Commission should reject AFES’s Appeal of the Board’s ruling dismissing Contention 2.

3. Contention 3 (Community Support)

AFES’s Contention 3 claims there is no factual support for Holtec’s “primary site selection criterion,” i.e. community support, even though AFES admits that “community support *per se* is not material to the findings [that] NRC must make.”⁵² Moreover, AFES admitted at oral argument that there is no NRC rule requiring that Holtec provide support for such statements (i.e. that there is community support).⁵³ As the Board recognized, these admissions are fatal to the admissibility of the Contention.⁵⁴

Yet on Appeal, AFES argues that the Board erred in rejecting Contention 3 by deciding that community support is not material to the findings that the NRC must make in this licensing proceeding.⁵⁵ AFES argues that Holtec has made community support the center of its environmental justice analysis by making it a part of the site selection process.⁵⁶ While community support is mentioned in the ER’s alternative siting section, AFES wholly ignores the environmental justice analysis, which makes no reference to community support.⁵⁷ As discussed previously, the Commission has held that the NRC’s environmental justice analysis is focused on identifying

⁵¹ Appeal at 18.

⁵² Petition at 23.

⁵³ Transcript of Oral Argument at 115-116, Docket No. 72-1051 (Jan. 24, 2019).

⁵⁴ LBP-19-4 at 130.

⁵⁵ Appeal at 18-19.

⁵⁶ Petition at 23-24 (referencing ER Section 2.4.2).

⁵⁷ See ER Section 3.8.5.

disparate impacts.⁵⁸ And there is no requirement in the NRC caselaw nor reference in the NRC Staff’s Policy Statement on Environmental Justice to include an environmental justice analysis as part of the site selection process.⁵⁹ AFES also fails to reference any regulation or caselaw that would require an NRC finding of community support in this proceeding.⁶⁰ Nor could it, as there is no such requirement. Thus, AFES fails to demonstrate that the Board made an error of law or abused its discretion and the Commission should therefore reject AFES’s Appeal of the Board’s ruling dismissing Contention 3.

On appeal, AFES also tries to argue that “if [] NRC rejects the notion that alleged community support is not relevant to the environmental justice analysis, then it must accept Contention [] 1.”⁶¹ However, as set forth above, the Board’s rejection of Contention 1 stands on its own.

B. AFES Lacks Standing

Both Holtec and the NRC Staff opposed the admission of AFES as a party based on its failure to establish that it had the requisite standing to intervene. The Board questioned whether the contacts presented by AFES were sufficient to establish standing.⁶² On the other hand, the Board said that it was “reluctant to rule unnecessarily on what geographic distance might or might not be sufficient for a presumption of standing” because the CISF was “potentially much larger than any previous spent fuel storage facility.”⁶³ As a result, it decided to “make no determination of [AFES’s] standing.”⁶⁴

⁵⁸ *Louisiana Energy Services*, CLI-98-3, 47 N.R.C. at 101. *See also* NRC Environmental Justice Policy Statement at 29.

⁵⁹ *See generally* NRC Environmental Justice Policy Statement.

⁶⁰ *See Appeal* at 18-19.

⁶¹ *Id.* at 19.

⁶² LBP-19-4 at 18.

⁶³ *Id.* at 18-19.

⁶⁴ *Id.* at 19.

Although the Board correctly rejected intervenor status to AFES based on its failure to submit an admissible contention, we believe that the Commission should nevertheless address AFES's standing. For one thing, the Commission should clarify for this Board and other Atomic Safety and Licensing Boards what the standing ground rules are for ISFSIs such as the CISF. For another, we submit that the Commission should assure that all aspects of AFES's Petition have been ruled upon.

"Although parties not adversely affected by the ultimate outcome of a licensing board decision may not appeal that decision, they may 'defend a result in their favor on any ground presented in the record, including one rejected below.'"⁶⁵ Holtec urges the Commission to make a finding that AFES failed to demonstrate standing.

AFES asserted standing under the Commission's "proximity-plus presumption,"⁶⁶ based on having members who live between 35 and 50 miles from the CISF and who are occasionally within the vicinity of the site for work or recreation.⁶⁷ In reactor licensing cases, the Commission has established a 50-mile radius to which the proximity-plus presumption applies; but in non-reactor cases the Commission determines the necessary proximity "on a case-by-case basis . . . considering the obvious potential for offsite radiological consequences . . . and specifically taking into account

⁶⁵ *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-691, 16 N.R.C. 897, 908 n.8 (1982) (quoting *Pub. Serv. Co. of Okla.* (Black Fox Station, Units 1 and 2), ALAB-573, 10 N.R.C. 775, 789 (1979)); see also *Black Fox*, ALAB-573, 10 N.R.C. at 789 (1979), *vacated in part on other grounds*, CLI-80-8, 11 N.R.C. 433 (1980) ("It is correct that parties satisfied with the result on an issue may not themselves appeal. But if the other side appeals they are free to defend a result in their favor on any ground presented in the record, including one rejected below.").

⁶⁶ While Holtec generally herein refers to this as the Commission's "proximity-plus presumption," Petitioners and others at times refer to this same concept as the Commission's "proximity presumption" or "proximity standing." However, both terms refer to the same theory of standing – e.g. a petitioner demonstrating standing by showing their proximity to a source of radiation plus an "obvious potential for offsite consequences." *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 N.R.C. 64, 75 n.22 (1994). See also *CFC Logistics, Inc.*, LBP-03-20, 58 N.R.C. 311, 318 (2003) ("How close a petitioner must live to the source for this 'proximity plus' presumption to come into play 'depends on the danger posed by the source at issue.'" (quoting *Sequoyia Fuels*, CLI-94-12, 40 N.R.C. at 75 n.22))

⁶⁷ See Petition at 3-10.

the nature of the proposed action and the significance of the radioactive source.”⁶⁸ No prior ISFSI licensing proceeding has granted a proximity-plus presumption greater than 17 miles.⁶⁹ AFES provided no argument as to why the proximity-plus standing radius should be more than doubled in the case of the CISF.

Holtec argued that AFES offered only conclusory statements of harm and failed to plausibly explain any “obvious potential for offsite radiological consequences,” at the distance at which its members claimed contacts.⁷⁰ Holtec further argued that AFES must specify how its hypothetical “ill effects” might actually occur, especially given its members’ distance from the CISF. For example, AFES mentioned fires or spills, but failed to explain how such events might happen at the CISF and, if they did happen, why AFES’ members might actually be affected at over thirty-five miles from the site.⁷¹

The NRC Staff similarly argued that Petitioner’s members resided too far from the site to qualify for proximity-plus standing. NRC Staff argued that AFES’s allegations of environmental, social, and procedural harms were generalized, conclusory allegations which “failed to allege any concrete and particularized injury-in-fact” necessary for traditional standing.⁷²

The Board declined to rule on this issue, noting that AFES’s closest member lived more than twice as far from the CISF as the 17 mile proximity previously applied in any ISFSI licensing proceeding, and that its members’ “fleeting contacts” or temporary employment closer to the site

⁶⁸ *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 N.R.C. 423, 426 (2007) (quotation omitted); *see also Georgia Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 N.R.C. 111, 116-17 (1995) (“Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”).

⁶⁹ *See Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 N.R.C. 413, 428 (2002).

⁷⁰ Holtec Answer at 5-6.

⁷¹ *Id.* at 14-15.

⁷² Staff Consolidated Response at 10.

were not necessarily sufficient either.⁷³ However, because the CISF may potentially hold more fuel than previous spent fuel storage installations, the Board stated that it was “reluctant to rule unnecessarily on what geographic distance might or might not be sufficient for a presumption of standing.”⁷⁴

Holtec urges the Commission to find that AFES has failed to demonstrate standing. First, the Commission’s decision to not extend to ISFSIs the 50 mile proximity-plus standing radius granted in reactor proceedings is based not on the amount of SNF stored at the ISFSI, but rather on the “nature of the proposed [activity]” – in other words, the Commission has limited the proximity-plus standing radius because “an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release.”⁷⁵ AFES failed to provide any explanation for why the activity at the CISF would differ from other ISFSIs and why a larger proximity radius should therefore apply. AFES also provided no basis for relying on the “potential” that the CISF might hold more spent fuel than any other ISFSI when the Application is only seeking authority for some five percent of the potential total capacity and increases in that capacity would require license amendments.⁷⁶

Second, the Commission’s proximity-plus presumption is an alternate method for establishing standing but does not obviate a petitioner’s burden of showing why the presumption applies, especially in the absence of supporting precedent. AFES must, at least to some degree, articulate the “obvious potential” in this case for the CISF to affect its members at their respective distance from the site. Instead, AFES merely listed hypothetical accidents and provided wholly

⁷³ LBP-19-4 at 18-19.

⁷⁴ *Id.*

⁷⁵ *Big Rock Point*, CLI-07-19, 65 N.R.C. at 423-424 (2007).

⁷⁶ Holtec International Proposed License for Independent Storage of Spent Nuclear Fuel at 1 (ADAMS Accession No. ML17310A223).

unspecific statements such as “SNF is inherently very deadly radiotoxic material.”⁷⁷ Third, AFES’ claims, absent the proximity-plus presumption, entirely fail to meet the requirements for traditional standing. Accordingly, the Commission’s order should conclude that AFES failed to meet its burden and demonstrate standing as an independent basis for rejecting the Petition.

V. Conclusion

For the foregoing reasons, Holtec requests that the Commission deny AFES’s Appeal and also determine that AFES lacked standing.

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

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June 25, 2019

⁷⁷ Reply at 4.

June 25, 2019

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	Docket No. 72-1051
Holtec International)	
)	
(HI-STORE Consolidated Interim Storage)	ASLBP No. 18-958-01
Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Holtec International's Brief in Opposition to Alliance for Environmental Strategies' Appeal of LBP-19-4 has been served through the EFiled system on the participants in the above-captioned proceeding this 25th day of June, 2019.

/signed electronically by Timothy J. V. Walsh/

Timothy J. V. Walsh