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 BEYOND NUCLEAR'S APPEAL OF LBP-19-4

Erin E. Connolly
Corporate Counsel
HOLTEC INTERNATIONAL
Krishna P. Singh Technology Campus
1 Holtec Boulevard
Camden, NJ 08104
Telephone: (856) 797-0900 x 3712
e.connolly@holtec.com

Jay E. Silberg
Timothy J. V. Walsh
Anne R. Leidich
Sidney L. Fowler
Meghan C. Hammond
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Telephone: 202-663-8707
Facsimile: 202-663-8007
jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com
anne.leidich@pillsburylaw.com
sidney.fowler@pillsburylaw.com
meghan.hammond@pillsburylaw.com

June 28, 2019

Counsel for HOLTEC INTERNATIONAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Administrative Proceedings

Statutes and Codes

Rules and Regulations

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 BEYOND NUCLEAR'S APPEAL OF LBP-19-4

I. Introduction

Pursuant to 10 C.F.R. § 2.311(b), Holtec International ("Holtec") submits this brief in opposition to Beyond Nuclear's Brief on Appeal of LBP-19-4 filed in this proceeding by Beyond Nuclear, Inc. ("Beyond Nuclear") on June 3, 2019 ("Appeal").[1] Beyond Nuclear challenges the Atomic Safety and Licensing Board's (the "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's ("NRC" or "Commission") licensing proceeding for Holtec's proposed HI-STORE Consolidated Interim Storage Facility ("CISF").

As set forth below, the Board properly denied Beyond Nuclear's petition to intervene and request for hearing.[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 Appeal first mischaracterizes the Board's ruling and then merely repeats the claims made in Beyond Nuclear's earlier pleadings and oral

---

1 Beyond Nuclear's Brief on Appeal of LBP-19-4 (June 3, 2019) (NRC ADAMS Accession No. ML19154A205) ("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 34.

argument before the Board. Beyond Nuclear's Appeal lacks substantive explanation or argument as to how the Board erred in its determination that the proposed contention failed to satisfy the admissibility standards set forth in 10 C.F.R. § 2.309(f)(1). In addition, the Board erred in finding that Beyond Nuclear had standing to intervene in this proceeding before the Commission. For the reasons set forth in Section IV.B below, Holtec also requests that the Commission reverse the Board's determination on Beyond Nuclear's standing.

II. Statement of the Case

Holtec submitted its application (the "Application") to construct and operate the CISF on March 30, 2017.[4] The NRC Staff conducted a sufficiency review and found the Application acceptable for docketing.[5] 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.[6] Beyond Nuclear timely filed its Hearing Request and Petition to Intervene ("Petition") on September 14, 2018.[7] On the same date, Beyond Nuclear also filed a motion to dismiss the proceeding.[8] Holtec and NRC Staff filed an answer opposing the motion to dismiss on September 24, 2018,[9] to which Petitioner filed a

---

4 The Holtec International HI-STORE CISF License Application (Mar. 30, 2017) (ADAMS Accession No. ML17115A431) ("Application").

5 Holtec International's HI-STORE CISF for Interim Storage of Spent Nuclear Fuel, Docketing License Application, 83 Fed. Reg. 12,034–35 (Mar. 19, 2018).

6 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. 32,919–24 (July 16, 2018).

7 Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene (Sept. 14, 2018) (NRC ADAMS Accession No. ML18257A324) ("Petition").

8 Beyond Nuclear, Inc.'s Motion to Dismiss Licensing Proceedings for HI-STORE Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act (Sept. 14, 2018) (NRC ADAMS Accession No. ML18257A312) ("Motion to Dismiss").

9 Holtec International's Answer Opposing Beyond Nuclear Motion to Dismiss Licensing Proceeding for HI-STORE Consolidated Interim Storage Facility (Sept. 24, 2018) (NRC ADAMS Accession No. ML18267A401); NRC Staff's Response to Motions to Dismiss Licensing Proceedings (Sept. 24, 2018) (NRC ADAMS Accession No. ML18267A313).

reply.[10] The Secretary of the Commission denied the motion on procedural grounds but referred the motion to the Board to be considered under 10 C.F.R. § 2.309.[11]

On October 9, 2018, Holtec and the NRC Staff filed answers to the Petition. Holtec opposed Beyond Nuclear's standing to intervene and opposed the admission of its sole contention.[12] The NRC Staff did not oppose Beyond Nuclear's standing and supported admission of Beyond Nuclear's contention to the extent it challenged an inconsistency between Holtec's Environmental Report ("ER") and its Safety Analysis Report ("SAR").[13] Beyond Nuclear filed its reply on October 16, 2018.[14]

Beyond Nuclear's contention alleged that Holtec's Application relied on the U.S. Department of Energy ("DOE") taking title to the spent nuclear fuel to be stored at the CISF, therefore violating the statutory scheme of the Nuclear Waste Policy Act ("NWPA").[15] The contention stated:

> The NRC must dismiss Holtec's license application and terminate this proceeding because the application violates the NWPA. The proceeding must be dismissed because the central premise of Holtec's application – that the U.S. Department of Energy ("DOE") will be responsible for the spent fuel that is transported to and stored at the proposed interim facilities – violates the NWPA. Under the NWPA, the DOE

---

10 Beyond Nuclear's Reply to Holtec International, Interim Storage Partners LLC, and NRC Staff Responses to Beyond Nuclear's Motion to Dismiss (Sept. 28, 2018) (NRC ADAMS Accession No. ML18271A229).

11 Holtec International & Interim Storage Partners LLC, Order of the Secretary (Oct. 29, 2018) (NRC ADAMS Accession No. ML18302A328). On December 27, 2018, Beyond Nuclear filed a Petition for Review of the Order of Secretary before the U.S. Court of Appeals for the District of Columbia Circuit. *Beyond Nuclear, Inc. v. U.S. Nuclear Reg. Comm'n*, No. 18-1340 (D.C. Cir. June 13, 2019). On June 13, 2019, the Court dismissed the case on finality and ripeness grounds.

12 Holtec International's Answer Opposing Beyond Nuclear Inc. Hearing Request and Petition to Intervene on Holtec International's HI-STORE Consolidated Interim Storage Facility Application (Oct. 9, 2019) (NRC ADAMS Accession No. ML18282A447) ("Holtec Answer").

13 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 at 66 (Oct. 9, 2018) (NRC ADAMS Accession No. ML18282A567) ("NRC Staff Consolidated Answer"). The Staff, however, deemed it "premature to take a position on how the applicant will address the inconsistency." *Id.* at n. 296. The Staff further clarified at oral argument that "other than the inconsistency, the Petitioners have not identified how the issue they are raising is material to a finding the NRC must make." Transcript of Oral Argument at 332, Docket No. 72-1051-ISFSI (Jan. 23 & 24, 2019) ("Transcript").

14 Beyond Nuclear's Reply to Oppositions to Hearing Request and Petition to Intervene (Oct. 16, 2018) (NRC ADAMS Accession No. ML18289A496).

15 Appeal at 4. Under the NWPA, title to spent nuclear fuel may not be transferred to the federal government until after a permanent repository begins operating. *See* 42 U.S.C. § 10222(a)(5)(A) (2015).

> is precluded from taking title to spent fuel unless and until a permanent repository has opened. 42 U.S.C. §§ 10222(a)(5)(A), 10143.

Despite Beyond Nuclear's claim, however, the original Application stated that ownership of spent fuel to be stored at the CISF may rest with *either* the nuclear plant owners *or* the DOE.[16] While there were some instances in Holtec's original ER which inadvertently omitted reference to the nuclear plant owners, in November 2018, Holtec submitted Revision 3 of its revised ER to the NRC to correct the inconsistencies between Holtec's ER and the rest of the Application.[17] Revision 3 only became available to Beyond Nuclear on January 17, 2019.[18]

The Board heard oral argument on January 23 and 24, 2019 in Albuquerque, New Mexico. At the hearing, the Holtec discussed the provisions in the original Application that were the subject of Beyond Nuclear's contention and explained that it had amended the Application to remove any inconsistencies.[19] Holtec further stated that, with very limited exceptions, DOE cannot take title to nuclear plant owners' spent fuel under the NWPA as currently written.[20] On February 6, 2019,

---

16 *See, e.g.*, Holtec International & Eddy Lea Energy Alliance (ELEA) Underground CISF - Financial Assurance and Project Life Cycle Cost Estimates, Rev. 0 at 3 (Feb. 23, 2018) (NRC ADAMS Accession No. ML18058A608) ("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); Holtec International's License for Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste at 2 (NRC ADAMS Accession No. ML17310A223) ("[T]he 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); Licensing Report on the HI-STORE CIS Facility, Rev. 0C at 26 (May 2018) (NRC ADAMS Accession No. ML18254A413) ("In accordance with 10CFR72.22, 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).

17 Environmental Report on the HI-STORE CIS Facility, Rev. 3 (Nov. 2018) (NRC ADAMS Accession No. ML19016A493); *see also* Holtec International HI-STORE CIS (Consolidated Interim Storage Facility) License Application Responses to Requests for Supplemental Information (Nov. 30, 2018) (NRC ADAMS Accession No. ML18345A151).

18 Motion by Petitioners Beyond Nuclear and Fasken to Amend their Contentions Regarding Federal Ownership of Spent Fuel to Address Holtec International's Revised License Application at 12 (Feb. 6, 2019) (NRC ADAMS Accession No. ML19037A127) ("Motion to Amend").

19 Transcript at 247 ("The environmental report has been amended.").

20 Transcript at 250. As Holtec established during the oral argument, the DOE already holds title to some civilian spent nuclear fuel, under authority other than the NWPA. Transcript 249–250.

Beyond Nuclear filed a motion to amend its contention to add a second paragraph.[21] Beyond Nuclear's amended contention thus states in full:

> The NRC must dismiss Holtec's license application and terminate this proceeding because the application violates the NWPA. The proceeding must be dismissed because the central premise of Holtec's application – that the U.S. Department of Energy ("DOE") will be responsible for the spent fuel that is transported to and stored at the proposed interim facilities – violates the NWPA. Under the NWPA, the DOE is precluded from taking title to spent fuel unless and until a permanent repository has opened. 42 U.S.C. §§ 10222(a)(5)(A), 10143.
>
> 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.[22]

On May 7, 2019, the Board issued LBP-19-4. The Board found that Beyond Nuclear demonstrated standing in accordance with 10 C.F.R. § 2.309(d) and granted its Motion to Amend its contention, but ultimately found that Beyond Nuclear had failed to proffer an admissible contention meeting the requirements of 10 C.F.R. § 2.309(f)(1).[23] Therefore, in accordance with 10 C.F.R. § 2.309(a), the Board denied Beyond Nuclear's request for hearing and petition for leave to intervene.[24]

III. Standard of Review

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.[25]

---

21 Motion to Amend at 7.

22 Motion to Amend at 7–8.

23 LBP-19-4 at 135.

24 *Id.*

25 10 C.F.R. § 2.311(c).

The Commission "regularly affirm[s] Board decisions on the admissibility of contentions where the appellant points to no error of law or abuse of discretion."[26] As such, "[p]ointing out the errors in the Board's decision is a basic requirement for an appeal,"[27] 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.'"[28]

A petitioner is limited to the contentions as initially filed and may not rectify its deficiencies through an appeal.[29] The Commission 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.'"[30] 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."[31] Moreover, "[t]he purpose of an appeal to the Commission is to point out errors made in the Board's

---

26 *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) ("[T]he 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)).

27 *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 *Oyster Creek*, CLI-06-24, 64 N.R.C. at 121).

28 *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 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).

29 *See USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 458 (2006); *cf. Louisiana Energy Servs., 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.").

30 *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)).

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

decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board."[32] Absent an error of law or abuse of discretion, the Commission generally defers to the licensing board's rulings on contention admissibility.[33]

IV. Argument

A. The Board Correctly Rejected Beyond Nuclear's Contention Contention 1 (NRC Authority to License HI-STORE CISF)

Beyond Nuclear's contention, as amended, claims that because the Application states that ownership of spent nuclear fuel may rest with *either* the nuclear plant owners *or* the DOE, it violates sections 10222(a)(5)(A) and 10143 of the NWPA. Specifically, Beyond Nuclear's contention states that "[a]s long as the federal government is listed as a *potential* owner of the spent fuel, the application violates the NWPA."[34] According to Beyond Nuclear, the mere inclusion of the "illegal" DOE option requires the Application to be rejected in total. This is not the case. As the Board correctly ruled, Beyond Nuclear's arguments did not raise a genuine dispute on a material issue of law or fact.[35] Beyond Nuclear's Appeal merely recites its prior position in this proceeding and does not substantively challenge the Board's conclusion. That alone is sufficient to deny the Appeal. Equally important is the fact that Beyond Nuclear's legal assertion is fatally flawed. Inclusion in the Application of a "potential" route to facility operation which is currently not available does not call into question the legality of the Application itself, particularly where the Application includes an alternative, currently available, and unchallenged pathway to facility operation. The Appeal should therefore be denied.

---

32 *USEC*, CLI-06-10, 63 N.R.C. at 458 (footnote omitted).

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

34 Motion to Amend at 8 (emphasis added).

35 LBP-19-4 at 32.

As an initial matter, the Appeal significantly mischaracterizes the Board's decision and then uses this mischaracterization to claim the Board made a legal error. This argument is without merit. Beyond Nuclear states that "the ASLB found that the license provisions did indeed violate the NWPA."[36] Similarly, Beyond Nuclear quotes LBP-19-4 as saying that "the ASLB noted that Holtec itself had acknowledged that its application violates the NWPA."[37] The Board and Holtec made no such statements and no such acknowledgements. Indeed, the Board made the exact opposite finding: "Beyond Nuclear claims that the mere mention of DOE renders Holtec's license application unlawful. *But that is not so.*"[38] Beyond Nuclear's statements are a clear mischaracterization of the Board's decision.

The Appeal then uses these mischaracterizations to claim the Board's decision was "legally erroneous."[39] Beyond Nuclear alleges the Board "refused to enforce the NWPA and the [Administrative Procedure Act ("APA")] on the ground that it would be 'useless' in the circumstances of this case."[40] Petitioner is presumably referencing the Board's statement that it would "not interpret either the APA or the NWPA to require the NRC to perform a useless act."[41] This statement was in the context of requiring Holtec to file a new or amended application if Congress, in the future, granted DOE authority to take title to spent nuclear fuel in the absence of a permanent repository.[42] The subject of the sentence—the "useless act"—is the filing of a new or amended application, not the legal enforcement of the NWPA or the APA. Nothing in LBP-19-4

---

36 Appeal at 1.
37 *Id.* at 6 (citing LBP-19-4 at 27).
38 LBP-19-4 at 32 (emphasis added).
39 Appeal at 1.
40 *Id.* at 1.
41 LBP-19-4 at 34.
42 *Id.* at 34.

demonstrates that the Board found the Application to be unlawful. To the contrary, the plain text of the decision unequivocally shows the opposite.[43]

Beyond Nuclear's allegations that the Application violates NWPA fundamentally misunderstands the Application, the NRC licensing process, and DOE contracting. First, the Application contemplates throughout that Holtec would contract *either* with private utilities *or* with DOE for spent nuclear fuel to be stored at the CISF.[44] The Application states that ownership may rest with *either* the utilities *or* the DOE, including the references in the HI-STORE CIS Facility Financial Assurance and Project Life Cycle Cost Estimates, License Condition 17 of the Proposed License, and the Licensing Report (a/k/a the SAR). Beyond Nuclear points to nothing in the Application stating that only DOE would hold title to spent fuel stored at the CISF. Second, all parties agree that the current statutory scheme (with limited exceptions) does not authorize DOE to take title to commercial spent fuel, because no permanent repository exists.[45] Thus, in order to allege the Application is unlawful, Beyond Nuclear must assume that both the DOE and Holtec will violate existing law by contracting to store spent nuclear fuel at the CISF prior to operation of a permanent repository. This assumption that the parties will proceed in direct violation of the law is the same misunderstanding that undergirded Beyond Nuclear's contention and that the Board correctly rejected. Beyond Nuclear relies on the same arguments in its Appeal.

An NRC license cannot authorize DOE to enter into a contract that would violate the NWPA. Nor does Beyond Nuclear claim that the NRC licensing process can authorize DOE to perform what

---

43 *Id.* at 32 ("Beyond Nuclear claims that the mere mention of DOE renders Holtec's license application unlawful. *But that is not so*." (emphasis added)).

44 Beyond Nuclear contends that the Application as originally filed solely "assumed, as a key condition, that the federal government would take title to the spent fuel." Appeal at 3. This ignores the fact that a most of the references in the original Application were written in consideration of *either* the DOE or the utilities taking title to spent nuclear fuel and that the Application was amended in November 2018 so that all references are to either the DOE or the utilities having title to the spent fuel.

45 As Holtec established during the oral argument, the DOE already holds title to some civilian spent nuclear fuel, under authority other than the NWPA. Transcript at 249–250; *see also* LBP-19-4 at 32.

the NWPA may prohibit. Identifying DOE as one potential owner of spent nuclear fuel in an application for an NRC license does not violate the NWPA. Beyond Nuclear itself recognizes this, stating that "Holtec's license application contains provisions which, *if implemented*, would violate the NWPA."[46] The necessary implication of that admission is that those same license provisions, *if not implemented*, would not violate the NWPA.

Beyond Nuclear contends that because the application includes the possibility that DOE would be the owner of spent nuclear fuel to be stored at the CISF and that such ownership is currently not permitted, the Application must be dismissed. This is directly contrary to unchallenged practices in NRC licensing. For example, at the time the NRC issues a license, permits from other agencies are often yet to be issued. Thus, carrying out the licensed activities absent such permits would violate other laws. For example, in the Private Fuel Storage ("PFS") proceeding, Bureau of Land Management ("BLM") approval was required for either of two alternative rights-of-way and neither of those were approved as of the time the license was issued.[47] Had PFS proceeded to build on either of the rights-of-way without the requisite BLM permission, PFS would have been in violation of BLM requirements. Similarly, because approval from the Bureau of Indian Affairs was required before the lease between the Skull Valley Band of Goshute Indians and PFS could take effect, the facility, if constructed, would have been in violation of the laws governing that agency if construction had started without lease approval. Despite this, the NRC licensed the PFS facility notwithstanding the fact that neither the rights-of-way nor the lease had been authorized.[48]

---

46 Appeal at 8 (emphasis added).

47 In the PFS proceeding, the Environmental Impact Statement acknowledged that BLM would approve of only one of the PFS right-of-way applications, leaving at least one potential right-of-way illegal. Yet, both right-of-way options were analyzed in detail in the EIS. *See* NUREG-1714 at 1-17, 2-40.

48 *See, generally, Skull Valley Band of Goshute Indians v. Davis*, 728 F. Supp. 2d 1287 (D. Utah 2010); *Ohngo Gaudedah Devia v. Nuclear Regulatory Commission*, 492 F.3d 421 (D.C. Cir. 2007); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 N.R.C. 232, 235 (2001) ("[I]n the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises.").

In yet another similar case, the Commission held that a petitioner's assertions that a licensee may violate the law are unavailing.[49] In *U.S. Army Installation Command*, the NRC declined a petitioner's request for a hearing with respect to the U.S. Army's application for a license to possess depleted uranium at a training facility where the petitioner claimed the Army may use high-explosive emissions on-site in contravention of Department of Defense Directive 4715.11.[50] In so holding, the Commission stated, "[w]e decline to assume that the Army will act contrary to applicable law, guidance, or the strictures of its license in the future."[51]

Indeed, the Commission typically issues facility operating licenses even though the projects at the time lacked the necessary permits from other agencies. The Commission explicitly recognized this practice, holding that:

> Whether non-NRC permits are required is the responsibility of bodies that issue such permits, such as the Federal Environmental Protection Agency, the Navajo nation, or state and local authorities. To find otherwise would result in duplicate regulation as both the NRC and the permitting authority would be resolving the same question, *i.e.*, whether a permit is required. Such a regulatory scheme runs the risk of Commission interference or oversight in areas outside its domain. Nothing in our statute or rules contemplates such a role for the Commission.[52]

Thus, granting Beyond Nuclear's requested relief would be directly inconsistent with NRC precedent.[53]

---

49 *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 N.R.C. 185 (2010).

50 *Id.* at 193.

51 *Id.* at 194.

52 *Hydro Resources, Inc.* (2929 Coors Road, Suite 1010, Albuquerque, NM 87120), CLI-98-16, 48 N.R.C. 119, 120 (1998).

53 In terms of its requested relief, Beyond Nuclear is also inconsistent. At first, it is requesting the NRC to reject or dismiss the Application. Appeal at 1. However, elsewhere in the Appeal, Beyond Nuclear asks that the NRC rule not that the Application be dismissed, but that all provisions in the Application that allegedly violate the NWPA "must be removed from the application." Appeal at 12.

Beyond Nuclear's reliance on *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy* provides them no support.[54] In that case, DOE was being challenged as to whether it had met its obligation under the NWPA to prepare a fee adequacy analysis. In the instant case, DOE is not being challenged as to its ability, at this time, to take title to spent nuclear fuel; to the contrary all parties agree that it does not at this time have that authority. Whatever current restrictions and obligations apply to the DOE, they are not relevant to this proceeding. If DOE should receive authorization to take title to utilities' spent fuel, either by a change in the law,[55] or as a result of the operation of a repository, the reference to DOE in the application would be appropriate. If DOE never receives such authority, the references to DOE are moot. But in neither case, do the references to DOE violate any law or authorize NRC, DOE, or Holtec to violate any law. In *NARUC v. DOE*, the DOE's attempt at a fee adequacy report was fatally flawed by its glaring inconsistencies with the NWPA that violated the Secretary's statutorily required obligations.[56] In the current case, the application does not depend on a change in the NWPA. If there is no legislative change allowing DOE to take title to spent nuclear fuel prior to the existence of repository, the default position (that the utilities will continue to own the spent fuel) remains fully viable. This is contrary to Beyond

---

54 Appeal at 8 (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy*, 736 F.3d 517, 519–20 (D.C. Cir. 2013) ("*NARUC v. DOE*")).

55 A number of bills introduced in recent Congressional sessions, if passed, would allow privately-owned interim spent fuel storage facilities to store spent fuel for DOE in the absence of a repository. *See, e.g.*, H.R. 3136, 116th Cong. (1st Sess. 2019); H.R. 2699, 116th Cong. (1st Sess. 2019) (introduced by Cong. McNerney (D. CA) for himself and 13 others); S. 1234, 116th Cong. (1st Sess. 2019); S. _____, Nuclear Waste Policy Amendments Act of 2019, 116th Cong. (1st Sess. 2019) (discussion draft introduced by Sen. Barrasso (R. WY)); H.R. 3053, 115 Cong. (1st Sess. 2017) (passed in the House of Representatives by recorded vote of 340-72 and reported to the Senate Committee on Environment and Public Works on May 14, 2018). Hearings on some of these bills have also recently been held. *See, e.g.*, *Options for the Interim and Long-Term Storage of Nuclear Waste and to Consider S. 1234, the "Nuclear Waste Administration Act of 2019*," *Before the S. Energy and Natural Resources Comm*., 116th Cong. (June 27, 2019); *Cleaning Up Communities: Ensuring Safe Storage and Disposal of Spent Nuclear Fuel Before the H. Subcomm. on Env. and Climate Change*, 116th Cong. (June 13, 2019*); Legislative Hearing on a Discussion Draft Bill, S. __, Nuclear Waste Policy Amendments Act of 2019 Before the S. Comm. On Env. and Public Works*, 116th Cong. (May 1, 2019).

56 736 F.3d 517, 519-20 (D.C. Cir. 2013) (noting the DOE's position was "predicated on a policy that so palpably rejects current law cannot be in accordance with the Secretary's obligation.").

Nuclear's assertion that license approval would "allow federal ownership of [] all of the massive tonnage of spent fuel to be stored at the CISF."[57] If no such amendments occur, DOE will not be authorized to take title, and there will be no violation of the NWPA. On the other hand, if the NWPA were amended to allow DOE to take title, there will also be no violation of the NWPA.[58]

To the extent Beyond Nuclear argues the Application violates the APA, the argument is also without merit. Beyond Nuclear argues that the NRC may not rely on "factors which Congress has not intended it to consider."[59] While correct, Beyond Nuclear's statement is irrelevant. Under current legislation, the DOE may not take title to spent nuclear fuel until there is a permanent repository in place. However, by stating in the Application that either a private owner or the DOE will have title, Holtec is not asking that NRC consider a factor Congress did not intend it to consider. Nowhere has Congress prohibited or discouraged NRC from assuming that at some point in the future DOE might be able to take title.

Thus, the Application does not violate the NWPA because nothing in the application mandates, authorizes or even suggests that Holtec would enter into a contract with DOE that involved DOE having title to spent nuclear fuel to be stored at the CISF absent authority to do so. Beyond Nuclear has no basis to claim that DOE could enter into a contract that would violate the NWPA and

---

57 Appeal at 8.

58 To the extent Beyond Nuclear argues the Board's decision is arbitrary and capricious, the argument is unfounded. As demonstrated above, the decision does not "rest[] on a 'possibility:' that Congress may one day change the NWPA," (Appeal at 9), rather the Application is lawful as written. As Judge Kavanaugh set out in *In re Aiken County*, the task for the courts is to ensure that "agencies comply with the law as it has been set by Congress." 725 F.3d 255, 257 (D.C. Cir. 2013). Unlike the case in *In re Aiken County*, where the NRC was in direct violation of its statutory obligation to issue a decision regarding DOE's license application for a permanent repository at Yucca Mountain, no action has been taken by any entity—the NRC, Holtec, or the DOE—that is in violation of the law. *Id.* at 258. Indeed, in that case the D.C. Circuit noted that, "by its own admission, the [NRC] has no current intention of complying with the law." *Id.* This is inapposite to the instant case where the parties have unequivocally stated their intent to comply with the law as written.

59 Appeal at 11 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

certainly has provided nothing to suggest that DOE would do so. For these reasons, the Commission should reject the Beyond Nuclear's Appeal regarding Contention 1.

B. The Board Incorrectly Found that Petitioners Have Standing

Holtec opposed the admission of Beyond Nuclear as a party based on its failure to establish that it had the requisite standing to intervene. As Holtec argued, in order to avail itself of standing under the Commission's "proximity-plus presumption,"[60] Beyond Nuclear was required to demonstrate some "plausible explanation" for how the CISF presented a risk to its members.[61] Beyond Nuclear failed to present any such explanation relying instead on conclusory statements of harm, despite Commission precedent establishing that in a materials licensing case a petitioner who wishes to invoke proximity-plus presumption standing must show how those materials might affect them or their members.[62] While the Board correctly rejected intervenor status for Beyond Nuclear based on its failure to submit an admissible contention, the Board erred in holding that Beyond Nuclear was not required to articulate any means by which the CISF presented a risk for offsite radiological consequences.

Holtec believes that the Commission should find that the Board erred in granting Beyond Nuclear standing in this proceeding and find (as Holtec argued below)[63] that Beyond Nuclear's Petition should have been denied because Beyond Nuclear failed to demonstrate standing. "Although parties not adversely affected by the ultimate outcome of a licensing board decision may not appeal

---

60 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 *Sequoya Fuels*, CLI-94-12, 40 N.R.C. at 75 n.22)).

61 Holtec Answer at 16–17.

62 *Id.*

63 *Id.* at 13–18.

that decision, they may "defend a result in their favor on any ground presented in the record, including one rejected below."[64]

Beyond Nuclear asserted standing on a variety of grounds, but the only one the Board ruled upon was Beyond Nuclear's claim for proximity-plus presumption standing. Beyond Nuclear noted at least one of its members lived within a mile of the CISF site, and discussed the amount of radioactive material to be stored at the site.[65] However, Beyond Nuclear's pleadings lacked meaningful explanation as to how the activities at the CISF might lead to a release which could affect this (or any other) member.

Under the Commission's proximity-plus presumption, Beyond Nuclear had the burden to demonstrate why it was entitled to proximity standing.[66] In a materials licensing case, proximity-plus standing must be determined "on a case-by-case basis . . . considering the obvious potential for offsite radiological consequences . . . and specifically taking into account *the nature of the proposed action* and the significance of the radioactive source."[67] Beyond Nuclear's pleadings below lacked any plausible explanation supporting this case-by-case analysis and did not meaningfully address

---

64 *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., et al.* (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.").

65 Petition at 7.

66 Holtec Answer at 13. As the Board correctly noted, it is the "petitioner's burden to demonstrate that standing requirements are met." LBP-19-4 at 8 (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 N.R.C. 90, 98 (2000)). Standing will be denied "when the threat of injury is too speculative." *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 N.R.C. 64, 72 (1994).

67 *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 N.R.C. 423, 426 (2007) (quotation omitted) (emphasis added); *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.").

how the "nature of the activity" being conducted at the CISF created to an "obvious potential" for consequences to its members.[68] Therefore, Holtec argued standing should be denied.

The Board granted standing, holding that Beyond Nuclear's member's proximity to the site was in itself enough to grant Beyond Nuclear standing.[69] The Board ruled that Beyond Nuclear did not need to provide a "plausible explanation" for how its members might be affected by the CISF based on the Board's belief that the proximity-plus presumption "eliminate[d] the need for such factual demonstrations."[70] This holding was clear error. Controlling Commission precedent holds that, "[i]n a materials licensing case . . . , a petitioner must show *more* than that he lives or works within a certain distance of the site where materials will be located—*he must show a plausible mechanism through which those materials could harm him.*"[71] Accordingly, Beyond Nuclear was obligated to explain how radionuclides or radiation from the CISF might affect its members,[72] which it failed to do. The Board's grant of standing was clear error and should be reversed.

The Board's decision also erred by contravening the Commission's requirement that it is the petitioner's burden to demonstrate standing under the proximity-plus presumption.[73] The question before the Board was not "whether *anyone* might have standing,"[74] but instead whether Beyond Nuclear sufficiently demonstrated that it had standing. As Beyond Nuclear fell short of this standard, the Board erred in granting standing.

---

68 Holtec Answer at 16–17.

69 LBP-19-4 at 12 ("If Ms. Hatley lacks standing to challenge the storage of much of the nation's spent nuclear fuel (potentially up to 100,000 metric tons) one mile from her home, one has difficulty imagining who would have standing.").

70 LBP-19-4 at 11–12.

71 *U.S. Army Installation Command*, CLI-10-20, 72 N.R.C. at 188–89 (emphasis added) (footnote omitted).

72 Holtec Answer at 17.

73 *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 N.R.C. 90, 98 (2000) ("The [p]etitioners bear the burden to allege facts sufficient to establish standing").

74 LBP-19-4 at 12 (emphasis in original).

V. Conclusion

For the foregoing reasons, Holtec respectfully quests that the Commission deny Beyond Nuclear's Appeal.

Respectfully submitted,

Erin E. Connolly
Corporate Counsel
HOLTEC INTERNATIONAL
Krishna P. Singh Technology Campus
1 Holtec Boulevard
Camden, NJ 08104
Telephone: (856) 797-0900 x 3712
e.connolly@holtec.com

/Signed electronically by Timothy J. V. Walsh/
Jay E. Silberg
Timothy J. V. Walsh
Anne R. Leidich
Sidney L. Fowler
Meghan C. Hammond
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Telephone: 202-663-8707
Facsimile: 202-663-8007
jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com
anne.leidich@pillsburylaw.com
sidney.fowler@pillsburylaw.com
meghan.hammond@pillsburylaw.com

Counsel for HOLTEC INTERNATIONAL

June 28, 2019

June 28, 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 Facility)	)	ASLBP No. 18-958-01
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Opposition to Beyond Nuclear's Appeal of LBP-19-4 has been served through the EFiling system on the participants in the above-captioned proceeding this 28th day of June, 2019.

/signed electronically by Timothy J. V. Walsh/

Timothy J. V. Walsh