

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of:)
)
INTERIM STORAGE PARTNERS LLC) Docket No. 72-1050-ISFSI
)
(WCS Consolidated Interim Storage Facility))
)

BEYOND NUCLEAR'S BRIEF ON APPEAL OF LBP-19-07

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

I. INTRODUCTION 1

II. FACTUAL AND PROCEDURAL BACKGROUND..... 3

 A. License Applications by WCS, ISP, and Holtec..... 3

 1. WCS application 3

 2. ISP application..... 4

 3. Holtec application 6

 B. Beyond Nuclear’s Motion to Dismiss the ISP and Holtec Licensing Proceedings 6

 C. Beyond Nuclear’s Hearing Request on ISP Application 7

 D. LBP-19-07..... 9

III. ARGUMENT 10

 A. LBP-19-07 is Based on an Erroneous Application of NRC’s Admissibility Standards 11

 B. LBP-19-07 Violates the APA 13

 1. The APA prohibits the NRC from exceeding its statutory authority in a licensing decision 13

 2. The APA makes no exception for “hope” of statutory changes 13

 3. APA violations are not excused by agreements not to implement unlawful provisions..... 15

 C. Protecting License Applications from Challenges to Speculative License Terms is Inconsistent with both the APA and NRC Regulations for Contention Admissibility 16

IV. CONCLUSION AND REQUEST FOR RELIEF 18

TABLE OF AUTHORITIES

Judicial Decisions

United States v. Armstrong, 517 U.S. 456 (1996).....15

Motor Vehicle Mfrs. Ass’n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....13, 16

United States v. Chem. Found., Inc, 272 U.S. 1 (1926).....15

In re Aiken Cty., 725 F.3d 255 (D.C. Cir. 2013).....13-14

Nat’l Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy,
736 F.3d 517 (D.C. Cir. 2013).....14, 15, 17

Natural Resources Defense Council, Inc. v. U.S. E.P.A.,
822 F.2d 104 (D.C. Cir. 1987).....16

Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir 1984).....17

Administrative Decisions

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3),
CLI-99-11, 49 N.R.C. 328 (1999).....17

Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.
(Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. 287 (2010).....11

Curators of the University of Missouri, CLI-95-1, 41 N.R.C. 71 (1995).....12

Waste Control Specialists LLC (Consolidated Interim Storage Facility),

CLI-17-10, 85 N.R.C. 221, 223 (2017).....2, 4

Statutes

Administrative Procedure Act.....1, 2, 3, 6, 7, 10, 11, 13, 14, 15, 16

5 U.S.C. § 706(2)(A)(C).....1, 13

Nuclear Waste Policy Act.....1, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

42 U.S.C. § 10143.....1, 7

42 U.S.C. § 10222(a)(5)(A).....1, 7

Regulations

10 C.F.R. § 2.311.....1

10 C.F.R. § 2.309(f)(1)(vi).....1, 12, 16

10 C.F.R. § 72.40.....7

10 C.F.R. § 51.101.....7

Miscellaneous

WCS Application Docketing Notice, 82 Fed. Reg. 8,773 (Jan. 30, 2017).....3

Holtec Application Docketing Notice, 83 Fed. Reg. 32,919 (July 16, 2018).....6

ISP Application Docketing Notice, 83 Fed. Reg. 44,070 (Aug. 29, 2018).....4

Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes
in the Hearing Process, 54 Fed. Reg. 33,168 (Aug. 11, 1989).....17

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311, Beyond Nuclear, Inc. (“Beyond Nuclear”) hereby appeals LBP-19-07, a Memorandum and Order by the Atomic Safety and Licensing Board (“ASLB” or “Board”) denying admission of Beyond Nuclear’s single contention in this licensing proceeding for a consolidated interim storage facility (“CISF”) for spent reactor fuel in Andrews County, Texas. *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-07, _ N.R.C. _ (August 23, 2019) (“LBP-19-07”). Beyond Nuclear respectfully submits that the ASLB’s refusal to admit Beyond Nuclear’s contention is inconsistent with the Nuclear Regulatory Commission’s (“NRC’s” or “Commission’s”) admissibility standard in 10 C.F.R. § 2.309(f)(1)(vi). In addition, by denying admission of Beyond Nuclear’s contention, the ASLB effectively approved a license provision that allows the U.S. Department of Energy (“DOE”) to own spent fuel during transport to and storage at the CISF, in violation of the Nuclear Waste Policy Act (“NWPA”), 42 U.S.C. §§ 10222(a)(5)(A), 10143, and in contravention of the Administrative Procedure Act’s (“APA’s”) prohibition against unlawful agency action, 5 U.S.C. § 706(2)(A)(C). Beyond Nuclear therefore seeks reversal of LBP-19-07.

This appeal culminates three separate proceedings in which license applicants Waste Control Specialists (“WCS”), Holtec International (“Holtec”), and ISP have sought approval of virtually identical license terms that would allow DOE to be an owner of spent fuel during transportation to and storage at an interim spent fuel storage facility. In each case, Beyond Nuclear asked the Commission to take initial jurisdiction over the question of whether the NRC’s very consideration of the applications violated the NWSA and the APA; and in each case, the Commission refused, instead electing to refer the question to the ASLB for resolution in the adjudicatory process for hearings on license applications.¹

As a result of those directives, the Commission now has before it two ASLB decisions, LBP-19-07 and LBP-19-04,² which together reach the absurd result that Beyond Nuclear’s challenges to the ISP and Holtec license applications may not go forward *because* the applicants have conceded the illegality of DOE ownership of spent fuel at a private storage facility, and therefore there is no dispute between the parties that would give rise to the admission of a contention. LBP-19-07, slip op. at 26; LBP-19-04, slip op. at 32. Furthermore, these decisions flout the APA by concluding that the NRC need take no action in any event, because of a “hope” for or “possibility” of new legislation. LBP-19-07, slip op. at 27; LBP-19-04, slip op. at 33.

Beyond Nuclear respectfully submits that in both decisions, the ASLB has misinterpreted the NRC’s admissibility standards and ignored the APA’s prohibition against illegal action by

¹ See *Waste Control Specialists LLC* (Consolidated Interim Storage Facility), CLI-17-10, 85 N.R.C. 221, 223 (2017) (“CLI-17-10”); *Holtec International* (HI-STORE Consolidated Interim Storage Facility) and *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility) (Unpublished order in Docket Nos. 72-1051 and 72-1050) (Oct. 29, 2018) (“10/29/18 Commission Order”). See also descriptions of WCS, Holtec, and ISP applications in Section II.A below.

² *Holtec International* (HI-STORE Consolidated Interim Storage Facility), LBP-19-04, __ N.R.C. __ (May 7, 2019) (appealed by Beyond Nuclear on June 3, 2019 in Beyond Nuclear’s Notice of Appeal and Brief on Appeal of LBP-19-04 (June 3, 2019) (ML19154A205)).

federal agencies. Therefore, Beyond Nuclear makes the same request in this proceeding that it made in the Holtec proceeding: the Commission should reverse the Board's decision; and furthermore, because there is no dispute among the parties or the ASLB regarding the unlawfulness of DOE ownership of spent fuel at the CISF, the Commission should order immediate denial of ISP's license application. If the application is not completely denied, it should be denied with respect to all license terms that contemplate or permit violations of the NWPA.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. License Applications by WCS, ISP, and Holtec.

1. WCS application.

The license application at issue in this case constitutes the second application for a CISF at the Andrews County site. The first application was filed in April 2016 by WCS. Waste Control Specialists LLC, Application for a License for a Consolidated Interim Spent Fuel Storage Facility (Apr. 28, 2016) (ADAMS Accession No. ML16133A100) Rev. 0 ("WCS License Application"). The WCS License Application stated that DOE "will be contractually responsible for taking title of the spent fuel at the commercial reactor sites and transporting the spent fuel to the CISF," and that "WCS shall not receive [spent nuclear fuel] until such a contract with the DOE is provided to the NRC as a condition of the license." *Id.* at 1-1 and 1-6. Additionally, WCS sought an exemption from the NRC's financial assurance regulations regarding decommissioning in the event that DOE took title to the spent fuel. WCS License Application at 1-7 to 1-8.

The NRC issued a hearing notice regarding WCS' application, 82 Fed. Reg. 8,773 (Jan. 30, 2017), but several months later WCS asked the NRC to suspend its review. Joint Request to

Withdraw the Federal Register Notice Providing an Opportunity to Submit Hearing Requests (Apr. 19, 2017) (ML17109A480). In response, Beyond Nuclear and several other organizations requested that when the proceeding was re-noticed, the NRC give the public an opportunity to seek dismissal of the application for its inconsistency with the NWPA. Response by Beyond Nuclear, Seed Coalition, and Sierra Club to Joint Request to Withdraw the Federal Register Notice Providing an Opportunity to Submit Hearing Requests (Apr. 28, 2017) (ML17118A268). In CLI-17-10, the Commission refused to add an “extra process,” concluding that the hearing process on the license application would be sufficient to consider the parties’ NWPA-related claims. 85 N.R.C. at 223.

2. ISP application.

In 2018, ISP formed as a new joint venture between WCS and Orano CIS, L.L.C., and submitted a revised license application for the proposed CISF in Andrews County. 83 Fed. Reg. 44,070-71 (Aug. 29, 2018) (citing WCS CISF License Application, Revision 2 with Safety Analysis Report and Environmental Report (July 18, 2018) (ML18206A595) (“License Application”). In all aspects where WCS’ application had previously referred to DOE as the entity responsible for spent fuel transported to and stored at the proposed facility, ISP now added the phrase “*or other holders of the title to SNF at commercial nuclear power facilities (SNF Title Holder(s)).*”³ In addition, the proposed license itself stated that:

³ Thus, for instance, ISP’s the License Application states:

The U.S. Department of Energy (DOE) *or other holders of the title to SNF at commercial nuclear power facilities (SNF Title Holder(s)) will hold title to the SNF during transportation to and from and while in storage at the CISF.*

Id. at 1-1 – 1-2 (emphasis in original).

Similarly, the License Application states:

Prior to commencement of operations, the Licensee shall have an executed contract with the U.S. Department of Energy (DOE) *or other SNF Title Holder(s)* stipulating that the DOE *or the other SNF Title Holder(s)* is/are responsible for funding operations required for storing the material identified in 6.A, 6.B, 7.A or 7.B at the CISF as licensed by the U.S. Nuclear Regulatory Commission.

License Application, Attachment A, Proposed License Conditions, par. 23 (emphasis in original).

ISP also sought an exemption from the NRC's regulations for financial assurance for decommissioning "for the case where the DOE will be contractually responsible for taking title of [spent fuel] prior to transport and while it is placed in interim storage at the CISF." License Application at 1-9. ISP later withdrew the exemption request, but did not change language in the application providing that:

A fully executed written contract between ISP and the United States Government, Department of Energy (DOE) or the other SNF Title Holder(s), will be established prior to receipt of SNF or reactor-related GTCC LLW at the CISF. *Pursuant to this contract, if the DOE shall take legal title of the SNF and reactor-related GTCC LLW prior to receipt, DOE shall also be responsible for all costs associated with the decommissioning of the CISF allowing for its unrestricted release pursuant to 10 CFR 20 Subpart E at the time of license termination.*

License Application, Interim Rev. 3 at 2-1, enclosed in Letter from Timothy P. Matthews to Paul S. Ryerson, et al. re: ASLB Notification Regarding ISP Letter E-54257 (June 3, 2019) (ML19154A586) (emphasis added). Thus, ISP's withdrawal of the exemption request did not

"The funding for constructing the CISF is expected to be primarily through future contracts for storage of SNF with the DOE *or other SNF Title Holder(s)*."

Id. at 1-6 (emphasis in original).

And:

ISP will obtain funds to operate the CISF pursuant to future contracts with the DOE or other SNF Title Holder(s). ISP shall not receive SNF until such a contract with the DOE or other SNF Title Holder(s) is provided to the NRC as a condition of the license.

Id. at 1-7 (emphasis in original).

See also, Environmental Report at 3-5 ("The DOE *or the SNF Title Holder(s)* would be responsible for transporting spent nuclear fuel (SNF) from existing commercial nuclear power reactors to the CISF.") (emphasis in original).

change the application’s assumption that if DOE became a “title holder” to spent fuel at the CISF, it would be responsible for decommissioning costs; the only thing that changed was ISP apparently no longer considered it necessary to get a regulatory exemption from the NRC’s decommissioning funding requirements.

3. Holtec application.

In 2017, Holtec filed an application to the NRC for construction and operation of the proposed Holtec CISF in Lea County, New Mexico. 83 Fed. Reg. 32,919 (July 16, 2018). Like ISP, Holtec proposed to store a large quantity of spent fuel (up to 173,600 MTUs) at its CISF. And like ISP, Holtec provided for potential ownership of spent fuel by DOE in its license application. *See* LBP-19-04, slip op. at 32.

B. Beyond Nuclear’s Motion to Dismiss the ISP and Holtec Licensing Proceedings.

On September 14, 2018, Beyond Nuclear submitted a motion to the Commission to dismiss both the ISP and Holtec licensing proceedings. 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 (“Motion to Dismiss”). Beyond Nuclear argued that the NRC’s consideration of the ISP and Holtec license applications violated the NWPA and APA because each of the applications contained the same central premise – that the federal government “will be responsible for the spent fuel that is transported to and stored at the proposed interim facilities.” Motion to Dismiss at 1. Beyond Nuclear requested a proceeding before the Commission (separate from the licensing proceedings) to consider its Motion to Dismiss. *Id.*⁴

⁴ Additionally, Beyond Nuclear argued that its NWPA and APA claims could not be resolved in the licensing proceeding because the scope of such proceedings is limited to considering whether

On October 29, 2018, in an unpublished order, the Commission denied the Motion to Dismiss on “procedural grounds.” 10/29/18 Commission Order at 2. Without reaching the merits of Beyond Nuclear’s claims or addressing Beyond Nuclear’s argument that the ASLB did not have jurisdiction over NWPA and APA-based claims (*see* note 4), the Commission referred the matter to the ISP and Holtec licensing proceedings. *Id.*

C. Beyond Nuclear’s Hearing Request on ISP Application.

At the same time Beyond Nuclear filed the Motion to Dismiss, in an abundance of caution, it also filed a hearing request and petition to intervene in the ISP licensing proceeding.⁵ Beyond Nuclear’s Hearing Request and Petition to Intervene (Oct. 3, 2018) (“Hearing Request”). Beyond Nuclear presented a single contention asserting that:

The NRC must dismiss ISP’s license application and terminate this proceeding because the application violates the NWPA. The proceeding must be dismissed because the central premise of ISP’s application – that the [DOE] will be responsible for the spent fuel that is transported to and stored at the proposed interim facility – 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.

Hearing Request at 8-9. As a statement of factual and legal basis, the contention incorporated by reference the Motion to Dismiss.

ISP opposed Beyond Nuclear’s Hearing Request, arguing that “as a factual matter, the issue raised by [Beyond Nuclear] in its contention has no bearing on the licensability of the WCS CISF” because the license application and license conditions “make clear that either DOE or [spent fuel] title holders could be WCS’ customers.” Interim Storage Partners LLC’s Answer

an application satisfies the Atomic Energy Act (“AEA”), the National Environmental Policy Act (“NEPA”), and NRC’s regulations for implementing those statutes. Motion to Dismiss at 2; *see also* 10 C.F.R. §§ 72.40, 51.101.

⁵ Beyond Nuclear also filed a similar Hearing Request in the Holtec proceeding. Beyond Nuclear Hearing Request and Petition to Intervene (Oct. 3, 2018) (Docket No. 72-1051).

Opposing Beyond Nuclear’s Hearing Request and Petition to Intervene at 31 (Oct. 29, 2019) (“ISP Opposition to Hearing Request”). ISP reasoned that as long as the license application contained a lawful alternative, the inclusion of an unlawful alternative was not a material consideration. “If ISP does not have an executed contract with DOE, then it must have executed contracts with commercial entities holding title to [spent nuclear fuel], as well as an NRC-accepted decommissioning financial assurance instrument, before it can commence facility operations and receive licensed material for interim storage.” *Id.* ISP did not address the question of whether the NWPA prohibited federal ownership of spent fuel during transportation to and storage at the CISF.

In its initial written response to Beyond Nuclear’s Hearing Request, the Staff took the position that Beyond Nuclear’s contention was admissible to the extent that it challenged the adequacy of the basis for ISP’s exemption from financial assurance requirements. NRC Staff’s Response to Beyond Nuclear’s Hearing Request and Petition to Intervene at 12 (Oct. 29, 2018). During oral argument on July 10, 2019, after ISP had withdrawn its exemption request, the Staff took the position that Beyond Nuclear’s contention was admissible “narrow (sic) to whether it is legally permissible to include DOE as a potential customer.” Tr. at 53 (Kirkwood).

In reply to ISP, Beyond Nuclear asserted that by including the option to unlawfully contract with DOE, ISP’s application violated the NWPA. Beyond Nuclear’s Reply to Oppositions to Hearing Request and Petition to Intervene at 14 (November 5, 2018) (“Reply”) (“[B]y seeking approval of an operational scheme that *could* include DOE ownership of spent fuel, and therefore *could* result in NWPA violations if carried out, ISP violates the NWPA. And by entertaining a license application containing provisions that would approve and allow ISP to violate the NWPA, the NRC would also violate the NWPA.”). And, moreover, the NRC was

prohibited from sanctioning such an unlawful option. *Id.* at 15 (“The fact that ISP *might not* violate the NWPA does not sanction an NRC licensing decision that would give ISP the unchecked opportunity.”).

On June 7, 2019, the ASLB issued an order posing questions to ISP regarding the DOE’s authority under the NWPA. In response, ISP acknowledged for the first time that “absent new legislation, the DOE could not lawfully assume ownership of the spent nuclear fuel in the proposed interim storage facility.” Interim Storage Partners LLC’s Response to the Atomic Safety and Licensing Board’s Questions Regarding the U.S. Department of Energy’s Authority Under the Nuclear Waste Policy Act at 1 (June 28, 2019). ISP made the same concession during the oral argument held by the ASLB on July 10, 2019. Tr. 44 (Matthews).

D. LBP-19-07.

On August 23, 2019, the ASLB issued LBP-19-07, concluding that Beyond Nuclear had standing but denying admission of Beyond Nuclear’s contention on the ground that it failed to raise a “genuine dispute with ISP’s application.” LBP-19-07, slip op. at 27. According to the ASLB, because ISP conceded that the provision in the license application providing for DOE ownership of spent fuel violated the NWPA, any dispute was now moot. *Id.*

The Board also dismissed Beyond Nuclear’s argument that “mere mention of the possibility of contracting with DOE renders ISP’s license application unlawful.” *Id.* at 27.⁶ Despite the acknowledged illegality of DOE’s ownership of spent fuel at the CISF, the ASLB reasoned that the license application was lawful because “ISP may hope that Congress changes the law to allow it the option of contracting directly with DOE.” LBP-19-07, slip op. at 27. In the

⁶ While the Board found that Beyond Nuclear had made this argument “for the first time” during oral argument, in fact Beyond Nuclear had made the argument in its written reply to ISP’s opposition to Beyond Nuclear’s Hearing Request. *See* Reply at 15.

meantime, the ASLB was “confident” that neither ISP nor DOE would not violate the NWPA, even if ISP’s license allowed it. *Id.* at 27-29. In reaching this decision, the Board failed to mention the APA.

III. ARGUMENT

While this appeal concerns the admissibility of Beyond Nuclear’s contention, the underlying law and facts are not in dispute. Beyond Nuclear, ISP, and the ASLB agree that the NWPA prohibits ISP from contracting with DOE to take ownership of spent fuel at the proposed CISF, absent the opening of a federal spent fuel repository or a change in federal law. LBP-19-07, slip op. at 28-29. All also agree that ISP’s license application contains provisions that would allow violations of the NWPA if they were carried out, *i.e.*, provisions authorizing ISP to contract with DOE as owner of spent fuel transported to and stored at the CISF. *Id.* at 26.

The dispute between the parties concerns whether the NRC can issue a license that contains these unlawful provisions. Beyond Nuclear respectfully contends that the Board erred in dismissing its contention regarding NWPA violations in the license application – and, in doing so, misconstrued both the NRC’s contention admissibility standard and the APA.⁷

⁷ On one other related legal issue, Beyond Nuclear and ISP are in agreement with each other but not the ASLB. Beyond Nuclear and ISP agree that the issues of NWPA and APA compliance raised by Beyond Nuclear are immaterial to and beyond the scope of issues that may be addressed by the ASLB in a licensing proceeding. Beyond Nuclear’s Hearing Request at 9, ISP’s Opposition to Hearing Request at 25-26.

While Beyond Nuclear raised this issue initially in its Motion to Dismiss (at page 2), the Commission did not explicitly address it in its 10/29/18 Order; nor did the ASLB explicitly address it in LBP-19-07 or LBP-19-04. Beyond Nuclear infers from these silences that both the Commission and the ASLB have implicitly determined that the issue of NWPA and APA compliance was, in fact, within the ASLB’s jurisdiction. In arguing for the admissibility of its contention, Beyond Nuclear therefore assumes the contention meets NRC requirements for scope and materiality. If the Commission does not agree, the appropriate remedy is not to dismiss the contention but to take up the issue itself, as argued in Beyond Nuclear’s Motion to Dismiss.

A. LBP-19-07 is Based on an Erroneous Application of NRC’s Admissibility Standards.

The admissibility of a contention must be judged on the contention’s terms and basis. *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. 287, 308-09 (2010). At the outset, the ASLB violated this principle by reading Beyond Nuclear’s central claim out of its contention. That claim is: “The proceeding must be dismissed because the central premise of ISP’s application – that the [DOE] will be responsible for the spent fuel that is transported to and stored at the proposed interim facility – violates the NWP.A.” Hearing Request at 8-9. Instead, the ASLB re-framed the contention as consisting solely of the following three other claims:

First, as the law now stands, DOE cannot, consistent with the NWP.A, presently take title to private power companies’ spent nuclear fuel. Second, ISP therefore cannot properly seek an exemption from NRC regulations based on the possibility of DOE’s taking title. Third, references in ISP’s application to the option of private ownership are allegedly “meaningless and unsupported,” serving as “nothing more than fig leaves” over the essential premise of ISP’s proposal—that its storage facility “will be built only if DOE owns the waste.”

LBP-19-07, slip op. at 26. Based on this framing, the ASLB went on to dismiss the first two claims as moot and the third as an issue not properly before the Board. *Id.*, slip op. at 26-28. By re-framing Beyond Nuclear’s contention to eliminate its central claim (*i.e.* that ISP’s license application was unlawful because its central provision for ownership of spent fuel by the DOE violated the NWP.A), the ASLB failed to judge the contention by its own terms. CLI-10-11, 71 N.R.C. at 308-09.

Moreover, none of the ASLB’s rationalizations for rebuffing Beyond Nuclear’s challenge to the application have merit. The unlawfulness of the license provisions for DOE ownership of spent fuel is not resolved or avoided, for example, by ISP’s concession that assumption by DOE of legal responsibility for spent fuel stored at the CISF would indeed be unlawful. *See* LBP-19-

07, slip op. at 26. Nothing about that concession resolves Beyond Nuclear’s claim that ISP’s application must be denied because it contains an unlawful provision.⁸

Nor can the contention’s assertion that ISP’s application violates the NWPA be resolved or avoided by including in the license application an “alternative” of private ownership. LBP-19-07, slip op. at 27. If ISP is issued a license that contains a provision allowing for federal ownership of spent fuel, that provision becomes an enforceable part of the license under the NRC’s regulations. *Curators of the University of Missouri* CLI-95-1, 41 N.R.C. 71, 98 (1995) (“Only statutes, regulations, orders, and license conditions can impose requirements upon applicants and licensees.”). The unlawful alternative of DOE ownership of spent fuel at the CISF does not become ineffective simply because a lawful alternative (of private ownership) is also included. If the license provides that *either* alternative could be implemented, that means the NRC has approved *both* for implementation without restriction. While restrictions might be imposed or forbearance undertaken by another party – *i.e.*, ISP and/or DOE may refrain from exercising their rights under the license, the fact remains that NRC has afforded them the right to carry out the license provisions. By challenging the lawfulness of ISP’s application, Beyond Nuclear has raised a “genuine dispute” with ISP regarding a “material issue of law.” 10 C.F.R. § 2.309(f)(1)(vi).⁹

⁸ The ASLB’s observation that Beyond Nuclear did not amend its contention after ISP acknowledged that DOE ownership of spent fuel at the CISF therefore has no relevance. LBP-19-07, slip op. at 29.

⁹ As discussed above in note 7, however, neither the ASLB nor the Commission has explicitly addressed the question of whether NWPA compliance lies within the realm of legal issues that may be considered a “material issue of law” under 10 C.F.R. § 2.309(f)(1)(vi).

B. LBP-19-07 Violates the APA.

In LBP-19-07, the ASLB violates the APA by excusing ISP's conceded violations of federal law based both on the "hope" or "possibility" of changes to that law and the presumption that unlawful license provisions will not be implemented. LBP-19-07, slip op. at 27.

1. The APA prohibits the NRC from exceeding its statutory authority in a licensing decision.

The APA prohibits agencies from acting "in excess of statutory jurisdiction, authority, or limitations," "short of statutory right," and "not in accordance with law." 5 U.S.C. §§ 706(2)(A), (C). In LBP-19-07, the ASLB ignored Beyond Nuclear's argument that by approving ISP's application despite its inclusion of provisions that violate the NWPA, the NRC would violate the APA. *See* Hearing Request at 8-9 (citing 5 U.S.C. §§ 706(2)(A), (C) and incorporating by reference Motion to Dismiss, Sections IV and V).¹⁰ The Board erred in disregarding the APA's mandates. The NRC may not circumvent Congress and issue a license that violates clear statutory directives. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (a decision is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.").

2. The APA makes no exception for "hope" of statutory changes.

Moreover, "speculation" about a future change in the law – whether in the form of "hope" or "possibility" (LBP-19-07, slip op. at 27) – has been ruled insufficient to justify "ignor[ing] statutory mandates and prohibitions." *In re Aiken Cty.*, 725 F.3d 255, 260 (D.C. Cir.

¹⁰ This question is related to, but distinct from, the central question raised in Beyond Nuclear's Motion to Dismiss: whether the APA prohibits the NRC, as a federal agency, from even *entertaining* an application that violates the NWPA on its face.

2013).¹¹ The most any agency can do, in relying on future legislation, is to “anticipate minor statutory additions to fill gaps.” *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). Here, there is complete agreement that ISP’s license application contains provisions which, if implemented, would violate the NWPA. By permitting license provisions that would allow federal ownership of potentially all of the massive tonnage of spent fuel to be stored at the CISF, the ASLB is not proposing “minor statutory additions” or the filling of “gaps,” but rather the “wholesale reversal of a statutory scheme.” *Id.* at 520. Such a determination is “flatly unreasonable.” *Id.*

Nat’l Ass’n of Regulatory Util. Comm’rs is particularly instructive. There, DOE made a determination about spent nuclear fuel contract fees, and based its determination on the assumption that DOE could construct a temporary spent fuel storage facility before the NRC issued a license for a permanent repository. *Id.* The court found that DOE acted “contrary to law” by making an assumption inconsistent with the “obvious[] design” of the NWPA, which requires an operating repository before DOE builds a temporary spent fuel storage facility. *Id.* at 519. In fact, the Court specifically noted the purpose of the relevant provision of the NWPA: “The statute is obviously designed to prevent the Department from delaying the construction of Yucca Mountain as the permanent facility while using temporary facilities.” *Id.* Here, the ASLB is

¹¹ In *Aiken County*, the NRC had refused to process DOE’s license application for Yucca Mountain as required by the NWPA because it speculated that “Congress, in the future, will not appropriate the additional funds necessary for the Commission to complete the licensing process.” The Court of Appeals reversed the agency, noting that to allow it to proceed based on speculation about future changes in the law “would gravely upset the balance of powers between the Branches and represent a major and unwarranted expansion of the Executive’s power at the expense of Congress.” *Id.* See also *id.* at 267 (“It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by the Nuclear Regulatory Commission.”).

flouting the same mandates and obvious design of the NWPA, by accepting a license application that includes the unlawful assumption that the DOE will take title to spent fuel for storage in a temporary facility before a repository is licensed and operating. Here, as in *Nat'l Ass'n of Regulatory Util. Comm'rs*, the ASLB has proceeded on “the premise of a wholesale reversal” of the NWPA. 736 F.3d at 519-20. Just as in *Nat'l Ass'n of Regulatory Util. Comm'rs*, the APA prohibits such conduct.

3. APA violations are not excused by agreements not to implement unlawful provisions.

Nor does the APA contain any exception that would allow the NRC to wink at an illegal license provision because ISP and DOE could be trusted not to implement it. With regard to ISP, the ASLB noted that it was “confident” the company would not try to enter into unlawful contracts with DOE, and dismissed the possibility as not being “credible.” LBP-19-07, slip op. at 27, 28-29. But confidence cannot remove the NRC from the APA’s purview. Thus, it is unsurprising that the Board cited to no statute, regulation, or case that allowed it to entirely ignore APA’s mandates; the APA places the initial burden on federal agencies, not private parties, to act in accordance with the law.

The Board also relied upon the “presumption of regularity” owed to federal agencies to support its assumption that “DOE would not be complicit in violating the NWPA.” *See id.* at 27 n.158 (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (holding that a defendant claiming he was being prosecuted due to his race must overcome the presumption of regularity applicable to the federal prosecutor); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (applying the presumption of regularity to the transfer of German-owned patents seized by the United States during the First World War to private industry)). But those cases stand for the unremarkable proposition that federal agencies are presumed to follow the law. Neither

address the more remarkable proposition here: a federal agency may permit an unlawful action, and rely on its sister agency not to take the action permitted. There is no dispute about the unlawfulness of license provisions that would allow DOE to take title to spent fuel while it is transported to or stored at the proposed CISF. And, a presumption that other parties will act lawfully may not be relied on to excuse NRC's action that is unlawful in the first place. *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 822 F.2d 104, 111 (D.C. Cir. 1987), citing 5 U.S.C. § 706 (holding that an agency action is not entitled to a presumption of regularity if such action is “arbitrary and capricious, unsupported by the record, outside the scope of authority delegated to the agency by the operative statute, or not in accordance with law.”).

Accordingly, the Commission should reverse LBP-19-07 for its violations of the APA.

C. Protecting License Applications from Challenges to Speculative License Terms is Inconsistent with both the APA and NRC Regulations for Contention Admissibility.

Moreover, to allow and approve license applications that rely on speculative changes to the law would be inconsistent with both the APA and NRC's regulations for contention admissibility. The APA requires agency decisions to be based on “relevant factors.” A decision is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43 (explaining when an agency rule violates the APA). By speculating as to the changes Congress may make to the NWPA, and approving a license provision based on that speculation – instead of the actual requirements of the NWPA, as Congress currently enacted it – the ASLB runs directly afoul of the APA's prohibition against arbitrary and capricious decision making.

In addition, NRC regulations also prohibit speculation. These regulations require petitioners to show the existence of a “genuine dispute” with the license applicant on a “material issue of fact or law.” 10 C.F.R. § 2.309(f)(1)(vi). It is a hallmark of NRC procedural rules that in

order to participate in agency licensing proceedings, members of the public have an “ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention.” Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *see also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 338 (1999). As the Commission held in *Duke Energy Corp.*, the NRC’s procedural rules “work to bar ill-defined ‘anticipatory’ contentions.” *Id.* The NRC’s strict requirement for petitioners to base their hearing requests in actual fact rather than supposition presupposes an application that is based on actual “fact” rather than supposition.

The NRC must “take the bitter with the sweet” in interpreting the hearing requirements of the Atomic Energy Act. *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984) (“If [Atomic Energy Act] section 189(a)’s precise language controls when intervenors attempt to obtain a hearing on a proposed amendment or to expand a proceeding to cover alternatives to the NRC’s proposed amendment, it also controls when the NRC or an intervenor tries to limit the hearing requirement to *less* than the issues the NRC has itself defined as part of the “licensing proceeding” specified in 189(a).”) (emphasis in original). Otherwise, to allow licensees to file hypothetical applications, based on potential future changes to the law instead of actual fact, while simultaneously requiring the public to limit its responses to supportable, real-time facts, would place a grossly unfair and arbitrary burden on public participation. *See also Nat’l Ass’n of Regulatory Util. Comm’rs*, 736 F.3d at 520 (finding it “quite unfair to force petitioners to pay fees for a hypothetical option”). This unfairness cannot be cured by an

assumption that the unlawful provisions will not be acted upon. *See* LBP-19-07, slip op. at 28-29.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the Commission should reverse the ASLB's decision refusing to apply the NWPA and APA to ISP's license application. However, Beyond Nuclear does not seek a remand of its contention to the ASLB; instead, Beyond Nuclear requests the Commission either deny the application in its entirety or rule that all provisions in ISP's license application that violate the NWPA must be removed. This relief is appropriate because there is no dispute between the parties on the law or facts underlying Beyond Nuclear's contention, and thus no purpose would be served by a remand.

Respectfully submitted,

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