

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)

INTERIM STORAGE PARTNERS LLC)

(WCS Consolidated Interim Storage Facility))

) Docket No. 72-1050-ISFSI

) March 22, 2021

**INTERIM STORAGE PARTNERS LLC'S ANSWER OPPOSING
FASKEN'S PETITION FOR REVIEW OF LBP-21-2**

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), Interim Storage Partners LLC (“ISP”) submits this Answer opposing the Fasken Land and Minerals, Ltd.’s and Permian Basin Land and Royalty Owners’ (collectively, “Fasken”) Petition for Review (“Petition for Review”)¹ of the Atomic Safety and Licensing Board’s (“Board”) January 29, 2021 memorandum and order LBP-21-2 denying Fasken’s motions to reopen the record and for leave to file a new contention out-of-time.² As explained more fully below, Fasken fails to satisfy—and, in large part, fails even to address—the legal standards governing petitions for review under 10 C.F.R. § 2.341. Accordingly, the Commission should deny the Petition for Review. Alternatively, if the Commission grants the Petition for Review, it should affirm LBP-21-2 because Fasken identifies no error of law or abuse of discretion in the Board’s well-reasoned decision.

¹ [Fasken]’s Combined Notice of Appeal and Petition for Review of Atomic Safety [and] Licensing Board’s Denial of Motion for Leave to File New Contention No. 5 and Motion to Reopen the Record (Feb. 23, 2021) (ML21054A331) (“Petition for Review”).

² *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-21-2, 93 NRC __ (Jan. 29, 2021) (slip op.) (ML21029A084) (“LBP-21-2”).

II. BACKGROUND

A. Procedural History

This proceeding pertains to ISP's application to construct and operate a consolidated interim storage facility ("CISF") in Andrews County, Texas for a 40-year term ("Application"). On September 28, 2018, Fasken submitted to the NRC a document styled as a "Motion . . . to Dismiss Licensing Proceedings," asking the Commission to "dismiss" ISP's Application ("Extrajudicial Motion").³ On October 29, 2018, the Secretary of the Commission issued an order denying the Extrajudicial Motion on procedural grounds, but nevertheless referring it to the ASLB for consideration under the established hearing procedures in 10 C.F.R. § 2.309.⁴ That same day, Fasken also filed a hearing request and petition to intervene in this proceeding, proffering five contentions ("Hearing Request").⁵

On August 23, 2019, following extensive written briefing and two days of oral argument, the Board issued an 88-page memorandum and order, LBP-19-7, denying the Hearing Request.⁶ More specifically, the Board concluded that none of Fasken's proposed contentions satisfied all six of the admissibility criteria in 10 C.F.R. § 2.309(f)(1).⁷ On September 17, 2019, Fasken appealed to the Commission to overturn portions of that decision.⁸

³ Motion of [Fasken] to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility (Sept. 28, 2018) (ML18271A244).

⁴ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), Order (Denying Motions to Dismiss) at 2 (Oct. 29, 2018) (unpublished) (ML18302A329).

⁵ Petition of [Fasken] for Intervention and Request for Hearing (Oct. 29, 2018) (ML18302A412).

⁶ *See Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC 31, 118 (2019).

⁷ *Id.* at 109-118.

⁸ [Fasken]'s Brief on Appeal of LBP-19-7 (Sept. 17, 2019) (ML19260J386) (appealing the Board's determinations regarding three of its proposed contentions) ("Fasken's Appeal of LBP-19-7").

The Board subsequently terminated the adjudicatory proceeding because no contested issues remained pending before it.⁹ In January 2020, Fasken filed motions before the Commission seeking to reopen the terminated adjudicatory proceeding based on allegedly new information in an ISP response to an NRC Request for Additional Information (“RAI”) (“First Reopening Motions”).¹⁰ In July 2020, Fasken filed another set of motions seeking to reopen the proceeding (“Second Reopening Motions”) to litigate a new contention (“New Contention”)¹¹ challenging the discussion of transportation impacts in the Staff’s draft Environmental Impact Statement (“DEIS”).¹²

On December 17, 2020, the Commission issued an order, CLI-20-14, affirming the Board’s decision in LBP-19-7.¹³ The Commission also denied Fasken’s First Reopening Motions,¹⁴ but referred Fasken’s Second Reopening Motions to the Board for consideration.¹⁵

⁹ See *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-9, 90 NRC 181, 192 (2019).

¹⁰ [Fasken] Motion to Reopen the Record for Purposes of Considering and Admitting an Amended Contention Based on New Information Provided by [ISP] in Response to NRC Requests for Additional Information (Jan. 21, 2020) (ML20021A384); [Fasken] Motion for Leave to Amend Contention Four Regarding [ISP]’s New Description of Groundwater Located below the Site and the Potential Impact the Site Will Have on the Groundwater (Jan. 21, 2020) (ML20021A385). See also NRC Staff’s Answer in Opposition to [Fasken]’s Amended Contention 4 and Accompanying Motion to Reopen the Record (Feb. 13, 2020) (ML20049A577); [ISP]’s Answer Opposing [Fasken]’s Motion to Reopen the Record and Motion for Leave to Amend Contention Four (Feb. 18, 2020) (ML20049A373).

¹¹ [Fasken]’s Motion to Reopen the Record (July 6, 2020) (ML20188A390) (“Second Motion to Reopen”); [Fasken]’s Motion for Leave to File New and/or Amended Contention (July 7, 2020) (ML20189A000) (“Second Motion for Leave”). See also NRC Staff’s Answer in Opposition to [Fasken]’s Motions to Reopen the Record and File New Contention 5 (July 31, 2020) (ML20213C523); [ISP]’s Answer Opposing [Fasken]’s Second Motion to Reopen the Record and Motion for Leave to File New Contention “5” (July 31, 2020) (ML20213C708) (“ISP Answer to Second Reopening Motions”).

¹² NUREG-2239, “Environmental Impact Statement for Interim Storage Partners LLC’s License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas” (Draft Report for Comment) (May 2020) (ML20122A220).

¹³ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), CLI-20-14, 92 NRC ___, __ (Dec. 17, 2020) (slip op. at 7-19) (ML20352A359) (holding that Fasken failed to demonstrate any error of law or abuse of discretion in LBP-19-7).

¹⁴ *Id.* at ___ (slip op. at 19) (holding that Fasken failed to satisfy the requisite criteria).

¹⁵ *Id.* at ___ (slip op. at 34-35).

On January 29, 2021, the Board issued memorandum and order LBP-21-2, denying the Second Reopening Motions on multiple grounds.¹⁶ Fasken filed the instant Petition for Review of LBP-21-2 on February 23, 2021. ISP hereby submits a timely answer to that Petition for Review.

B. Factual Misrepresentations in the Petition for Review

As explained below, Fasken’s arguments lack merit and are unpersuasive for multiple overlapping reasons. But, as an initial matter, and in the interest of maintaining a complete and accurate record on appeal, ISP addresses two factual errors in Fasken’s Petition for Review.

First, in Fasken’s discussion of the procedural history of this proceeding, it asserts that the Board “deni[ed] [] each and every contention raised by any and all parties relating to ISP’s proposed CISF project,”¹⁷ and that the Board “denied all petitioners’ hearing requests, finding each and every contention filed at the time to be inadmissible.”¹⁸ This statement is incorrect. The Board, in fact, granted Sierra Club’s hearing request and petition to intervene, and ruled that its proposed contention 13 was admissible in part.¹⁹

Second, Fasken asserts that “[t]he Board initially found Fasken’s Contention No. 2 admissible . . . but later deemed it moot in light of ISP’s subsequent responses to NRC issued requests for additional information (“RAIs”).”²⁰ This too is incorrect. Rather, it was the NRC Staff (a party to this proceeding)—not the Board (the presiding officer)—that argued in its

¹⁶ See generally LBP-21-2.

¹⁷ Petition for Review at 1.

¹⁸ *Id.* at 5.

¹⁹ *ISP*, LBP-19-7, 90 NRC at 118.

²⁰ Petition for Review at 5 (citing “ISP Order at 99 fn 549,” likely referring to *ISP*, LBP-19-7, 90 NRC at 113 n.549).

opening brief that Fasken’s Contention 2 was admissible in part, and subsequently agreed that the challenge was mooted by an RAI response.²¹

III. LEGAL STANDARDS

A. Petitions for Review Under 10 C.F.R. § 2.341

The Commission has full discretion to grant or deny a petition for review of a licensing board decision, giving due weight to the existence of a “substantial question” with respect to the following considerations:

- (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) a substantial and important question of law, policy, or discretion has been raised;
- (iv) the conduct of the proceeding involved a prejudicial procedural error;
or
- (v) any other consideration which the Commission may deem to be in the public interest.²²

B. Standard of Review on Appeal from Licensing Board Decisions

If the Commission determines that a “substantial question” has been raised under 10 C.F.R. § 2.341, and therefore grants a petition for review, the standard of review for the underlying decision is identical to the standard for appeals as of right under 10 C.F.R. § 2.311.²³ More specifically, the Commission affords licensing board rulings on contention admissibility

²¹ *ISP*, LBP-19-7, 90 NRC at 113 n.549 (“For its part, initially the NRC Staff would have had us admit Fasken Contention 2 At oral argument, however, the Staff announced that its position has changed . . . [i]n light of ISP’s response to RAI-2.2-2 . . . [and] the Staff now considers Fasken Contention 2 to be moot and inadmissible in its entirety.”).

²² 10 C.F.R. § 2.341(b)(4)(i)-(v).

²³ *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), CLI-12-7, 75 NRC 379, 386 (2012).

“substantial deference,”²⁴ absent an error of law or abuse of discretion.²⁵ Likewise, the Commission “will defer to licensing board determinations on threshold matters, including rulings on motions to reopen, absent error of law or abuse of discretion.”²⁶ The Commission reviews questions of law *de novo*, and will “reverse a licensing board’s legal rulings if they are ‘a departure from[,] or contrary to[,] established law.’”²⁷ Under the abuse of discretion standard, the appellant must persuade the Commission “that a reasonable mind could reach no other result” to prevail.²⁸

An appeal that does not point to an error of law or an abuse of discretion, but simply restates the petitioner’s arguments, does not constitute a valid appeal.²⁹ When a licensing board holds that a contention is inadmissible for failing to meet more than one of the requirements specified in 10 C.F.R. § 2.309(f)(1)(i)-(vi), a petitioner’s failure to acknowledge and rebut each ground for the Board’s ruling is sufficient justification for the Commission to reject the petitioner’s appeal.³⁰ As the Commission explained, it will not consider new arguments raised for the first time on appeal that the Board never had an opportunity to consider.³¹

²⁴ *Crow Butte Res., Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 26 (2014).

²⁵ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), CLI-20-15, 92 NRC __, __ (slip op. at 4) (Dec. 17, 2020) (ML20352A360) (citing *Crow Butte*, CLI-14-2, 79 NRC at 26).

²⁶ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-17-7, 85 NRC 111, 115 (2017) (citation omitted).

²⁷ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009) (citation omitted).

²⁸ *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-952, 33 NRC 521, 532 (1991), *aff’d*, CLI-91-13, 34 NRC 185 (1991) (internal citation omitted).

²⁹ *Shieldalloy Metallurgical Corp.* (Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007).

³⁰ *See, e.g., Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638 (2004).

³¹ *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006) (quotations and citation omitted). The purpose of an appeal “is to point out errors made in the Board’s decision,” not to present “arguments and evidence never provided to the Board.” *Id.* (quotations and citation omitted).

IV. THE COMMISSION SHOULD DENY THE PETITION FOR REVIEW BECAUSE FASKEN HAS NOT IDENTIFIED A “SUBSTANTIAL QUESTION”

The Petition for Review correctly recites the “substantial question” standard applicable to petitions for review under 10 C.F.R. § 2.341.³² Nevertheless, Fasken presents no further discussion of the codified considerations, nor any argument as to which of these considerations allegedly is implicated here—much less, how that unspecified consideration is somehow satisfied. Additionally, as explained further below, Fasken’s conclusory assertions and mere repetition of earlier arguments fail to identify any error of law or abuse of discretion in LBP-21-2. Simply put, the Petition for Review, on its face, fails to identify a “substantial question” warranting discretionary Commission review. Thus, it should be denied accordingly.

V. THE COMMISSION SHOULD AFFIRM LBP-21-2 BECAUSE FASKEN FAILS TO IDENTIFY ANY ERROR OF LAW OR ABUSE OF DISCRETION

Assuming *arguendo* the Commission grants Fasken’s Petition for Review, it should nevertheless affirm the Board’s well-reasoned ruling in LBP-21-2. As explained below, neither Fasken’s discussion of the Second Reopening Motions (Section V.A), the New Contention (Section V.B), nor its other miscellaneous arguments (Section V.C) identifies any error of law or abuse of discretion by the Board. Instead, Fasken largely repeats arguments from its earlier pleadings before the Board and makes conclusory assertions that the Board’s decision is wrong. This approach is insufficient to satisfy the standard of review on appeal, and wholly fails to justify abandoning the “substantial deference” the Commission typically affords licensing board decisions. Accordingly, the Commission should affirm LBP-21-2.

³² Petition for Review at 7.

A. Fasken Fails to Identify Any Error of Law or Abuse of Discretion in the Board’s Well-Reasoned Decision to Deny the Second Reopening Motions

The NRC’s “rules of practice require contentions to be raised at the earliest possible opportunity.”³³ As the Commission has explained, there would be “no end to NRC licensing proceedings” if petitioners could belatedly raise challenges that “simply did not occur to [them] at the outset.”³⁴ Accordingly, the burden on a participant seeking to reopen a closed adjudicatory record for purposes of raising new challenges is deliberately “heavy.”³⁵ More specifically, a movant for reopening must affirmatively demonstrate the existence of “new” information concerning a “significant” safety or environmental issue that would have “materially” altered the outcome of the proceeding had it been considered initially.³⁶ Similarly, leave to file a contention after the initial hearing request deadline requires the movant’s affirmative demonstration that the contention is based on information that was “not previously available” and is “materially” different from previously-available information.³⁷

In the Second Reopening Motions, Fasken argued that certain statements in the DEIS regarding transportation impacts and other various issues satisfied these requirements. However, in LBP-21-2, the Board correctly concluded that Fasken failed to carry its affirmative burden to demonstrate that the cited statements “differ materially from information that was publicly available in ISP’s application materials much earlier.”³⁸ Accordingly, the Board denied the Second Reopening Motions. In its Petition for Review, Fasken argues that “[t]he ASLB decision

³³ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 7 (2015) (citation omitted).

³⁴ *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *recons. denied*, CLI-04-35, 60 NRC 619 (2004) (quotations and citation omitted).

³⁵ *Oyster Creek*, CLI-09-7, 69 NRC at 287 (citation omitted).

³⁶ 10 C.F.R. § 2.326(a).

³⁷ 10 C.F.R. § 2.309(c)(1).

³⁸ *ISP*, LBP-21-2, 93 NRC __ (slip op. at 6).

improperly conflates and glosses over Fasken’s nuanced challenges to inadequate transportation analyses and constitutes an abuse of discretion.”³⁹ As alleged support, Fasken supplies a bullet list of block quotes from various documents, and briefly discusses the topic of “responsibility for emergency equipment and training.” As discussed below, however, neither of these identifies an error of law or abuse of discretion in the Board’s ruling, which is amply supported by the record.

1. Fasken’s Bullet List of Block Quotes Fails to Demonstrate Any Error of Law or Abuse of Discretion

In its Petition for Review, Fasken asserts that the Board abused its discretion by overlooking “novel assertions” in the Second Reopening Motions.⁴⁰ In support of this argument, the Petition for Review provides a bullet list of twelve block quotes from the ER, the DEIS, and attachments submitted with the Second Reopening Motions.⁴¹ Fasken claims these block quotes prove its Second Reopening Motions were “based on new and materially different conclusions and/or sources of information” in the DEIS.⁴² However, Fasken offers no further support for this conclusory assertion; no discussion of how the bullets allegedly demonstrate “new” and “materially” different information; and no indication of whether (or where) any specific arguments comparing these specific statements to the criteria in 10 C.F.R. § 2.326 (governing motions to reopen) or 10 C.F.R. § 2.309(c) (governing motions for leave) were presented to the Board at any point in this proceeding.

Fasken apparently believes the Commission and the other parties are somehow obligated to comb through this list (and prior pleadings and transcripts) to identify potential support, and to

³⁹ Petition for Review at 14.

⁴⁰ *Id.* at 15.

⁴¹ *Id.* at 15-17. The Second Motion for Leave and its attachments were “replete with incorrect citations, misrepresentations of allegedly-quoted materials, and untrue assertions of controlling law.” ISP Answer to Second Reopening Motions at 2-3 & n.8-10 (providing specific examples).

⁴² Petition for Review at 15.

speculate about potential legal arguments, in furtherance of Fasken’s abuse-of-discretion claim. However, far more is required for an appeal.⁴³ Submitting a list of block quotes and declaring victory is not enough—the *proponent* is responsible for presenting and advocating factual and legal arguments.⁴⁴ Fasken used this same approach, unsuccessfully, in the proceedings before the Board.⁴⁵ And it fails here, again, for the same reasons. Ultimately, “[t]he Commission cannot be faulted for not having searched for a needle that may be in a haystack.”⁴⁶ To prevail on an abuse of discretion claim, the appellant must persuade the Commission “that a reasonable mind could reach no other result.”⁴⁷ Fasken’s unexplained bullet list fails to carry that burden here.

2. Fasken’s Brief Discussion of “Responsibility for Emergency Equipment and Training” Fails to Identify Any Error of Law or Abuse of Discretion

In its Second Motion for Leave, Fasken argued that the DEIS analysis of transportation impacts was deficient because it improperly omitted a discussion of the “responsibility” and “costs” that may be associated with infrastructure improvements and emergency response

⁴³ Even if the Commission were required to undertake such an analysis, a brief review of the bullet list reveals the baseless nature of Fasken’s appeal. For example, the list cites to the Taylor Decl. at ¶¶ 12 and 17. Petition for Review at 16-17. However, these paragraphs were not mentioned in Fasken’s pleadings before the Board. See generally Second Motion for Leave; Second Motion to Reopen. Thus, even if Fasken had *attempted* to marshal arguments here based on this information (which it has not done), such arguments would have been raised for the first time on appeal, which is impermissible. See *USEC*, CLI-06-10, 63 NRC at 458 (quotations and citation omitted).

⁴⁴ See *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 337 (2002) (The Commission refuses to “sift through the parties’ pleadings to uncover and resolve arguments not advanced by the litigants themselves.”) (quoting *Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2)*, CLI-99-4, 49 NRC 185, 194 (1999)).

⁴⁵ See, e.g., *ISP*, LBP-21-2, 93 NRC at ___ n.28 (slip op. at 6 n.28) (“In Exhibit 2 to its [Second] Motion for Leave, Fasken lists excerpts from the Environmental Report and the DEIS but *fails to explain* how they support any of the claims raised in New Contention 5.” (emphasis added)).

⁴⁶ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 241 (1989).

⁴⁷ *Turkey Point*, ALAB-952, 33 NRC at 532.

activities along (unknown) routes for future SNF transportation campaigns.⁴⁸ Fasken’s challenge was based on the following:

- ISP’s statement in the ER that, if DOE is the SNF shipper, the federal government would be responsible for emergency training,⁴⁹ and
- NRC Staff’s statement in the DEIS—for the inverse proposition—that, if DOE is *not* the shipper, some state, tribal, and local governments may incur costs for emergency response activities.⁵⁰

Fasken argued that its new claim of omission, therefore, was based on “new and significant” information revealed for the first time in the DEIS. However, the Board disagreed.

In LBP-21-2, the Board correctly noted that ISP’s ER *also* did not contain the analysis of “responsibility” and “costs” that Fasken claims was improperly omitted from the DEIS. Fasken does not dispute this finding in its Petition for Review. In fact, Fasken *confirms* the Board’s observation: “Nowhere in any prior ISP licensing documents did ISP state that the responsibility for emergency equipment and training would be the responsibility of local communities.”⁵¹

Furthermore, the Board reasoned that “Fasken may not seize upon publication of the NRC staff’s DEIS as an excuse to raise challenges to ISP’s license application that Fasken could have timely raised in 2018, but did not.”⁵² This, too, is an objectively correct recitation of applicable law,⁵³ which Fasken does not challenge. Nor does Fasken offer any explanation as to why it could not have challenged the omission of this analysis at the outset of this proceeding.

⁴⁸ Second Motion for Leave at 14-17.

⁴⁹ *Id.* at 15.

⁵⁰ *Id.*

⁵¹ Petition for Review at 17.

⁵² *ISP*, LBP-21-2, 93 NRC at __ (slip op. at 6).

⁵³ *See, e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1050 (1983) (petitioners must raise contentions at the earliest possible time); 10 C.F.R. § 2.309(f)(2) (participants must file environmental contentions based on the environmental report); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 338 (1999) (this obligation is “ironclad”).

Instead, Fasken asserts that the DEIS statement regarding “responsibility for emergency equipment and training” represents a “significant[] change[]” from the ER.⁵⁴ But this merely repeats Fasken’s argument in the Second Reopening Motions, which the Board found to be conclusory and unsupported.⁵⁵ Here, again, Fasken offers no explanation for its claim: it discusses neither the purported “change,” nor its alleged “significance,” nor any reason this information somehow might be “material” to this proceeding.⁵⁶ Furthermore, Fasken fails to address the Board’s finding that Fasken *also* failed to address or satisfy the relevant criteria in 10 C.F.R. §§ 2.326 and 2.309(c). An appeal that merely restates the petitioner’s arguments, as Fasken has done here, does not constitute a valid appeal.⁵⁷

* * *

Ultimately, Fasken simply fails to engage with or dispute each of the bases on which the Board denied the Second Reopening Motions, including Fasken’s failure to address or satisfy the relevant legal standards. Accordingly, Fasken has not carried its burden to demonstrate an error of law or abuse of discretion in LBP-21-2.

B. Fasken Fails to Identify Any Error of Law or Abuse of Discretion in the Board’s Well-Reasoned Contention Admissibility Analysis

Because Fasken has not demonstrated any error of law or abuse of discretion in the Board’s ruling as to the Second Reopening Motions, the Commission need go no further in its review of LBP-21-2. That conclusion, alone, is sufficient to affirm the Board’s decision.

Nevertheless, as detailed below, the Petition for Review likewise fails to identify any error of

⁵⁴ Petition for Review at 17.

⁵⁵ *ISP*, LBP-21-2, 93 NRC at __ (slip op. at 9, 13).

⁵⁶ Fasken’s assertion is dubious on its face, given the Commission’s clear acknowledgement that SNF transportation is not within the scope of this proceeding, and the actual routes are objectively unknowable at this time. *See ISP*, CLI-20-14, 92 NRC at __ (slip op. at 33-34).

⁵⁷ *Shieldalloy*, CLI-07-20, 65 NRC at 503-05.

law in the Board’s contention admissibility analysis. Accordingly, LBP-21-2 should be affirmed for this second and additional reason.

1. Fasken Fails to Acknowledge and Rebut the Board’s Multiple Grounds for Rejecting the Principal Argument In the New Contention

In LBP-21-2, the Board concluded that Fasken’s proposed New Contention was inadmissible.⁵⁸ More specifically, the Board found that “[t]he various claims set forth in Fasken[’s] New Contention [] fail to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).”⁵⁹ As to Fasken’s “principal and overarching claim”⁶⁰—that the DEIS allegedly is deficient because it does not identify “specific” transportation routes—the Board concluded, on multiple grounds, that it was immaterial to the NRC Staff’s review and failed to raise a genuine material dispute with the Application.⁶¹

Conspicuously, Fasken’s Petition for Review discusses neither the scope of the proceeding, nor the findings the NRC Staff must make in this proceeding, nor the materiality of its primary argument vis-à-vis disputing the Application. In other words, as to the primary argument in the New Contention, the Board’s conclusions on the admissibility criteria in 10 C.F.R. § 2.309(f)(1) remain unchallenged here. As the Commission has explained, a petitioner’s failure to acknowledge and rebut *each* ground for the Board’s ruling is sufficient justification for the Commission to reject an appeal.⁶² Here, Fasken does not rebut *any* of the grounds for the Board’s contention admissibility decision as to Fasken’s primary argument. Thus, the Commission should summarily affirm this aspect of LBP-21-2.

⁵⁸ *ISP*, LBP-21-2, 93 NRC at __ (slip op. at 10-15).

⁵⁹ *Id.* at __ (slip op. at 15).

⁶⁰ *Id.* at __ (slip op. at 12).

⁶¹ *Id.* at __ (slip op. at 12-13, 15).

⁶² *Millstone*, CLI-04-36, 60 NRC at 638.

2. Fasken’s Claim that the Board Failed to Consider Its Other Arguments Is Unsupported and Demonstrably Incorrect

Instead of challenging the Board’s analysis of the admissibility criteria, Fasken suggests that the Board “improperly narrow[ed]” the New Contention by failing to address “any” of Fasken’s other arguments.⁶³ This assertion, however, is demonstrably incorrect. The Petition for Review selectively quotes the Board’s acknowledgement of these other arguments.⁶⁴ However, Fasken disregards the Board’s analysis of these issues in the contention admissibility discussion. More specifically, the Board squarely considered Fasken’s other arguments related to infrastructure improvement and emergency training costs,⁶⁵ “terrorist attacks” and “sabotage”,⁶⁶ and site selection.⁶⁷ Fasken’s contrary claim is plainly mistaken and offers no support for its appeal.

3. Fasken Fails to Acknowledge and Rebut the Board’s Multiple Grounds for Rejecting Fasken’s Other Arguments

Furthermore, the Petition for Review lacks any discussion of the Board’s conclusions on the admissibility criteria in 10 C.F.R. § 2.309(f)(1) as to Fasken’s other arguments. Indeed, in the context of contention admissibility, the only other argument Fasken even mentions is its site selection argument. However, that brief discussion fails to identify any error of law or abuse of discretion in LBP-21-2.

⁶³ Petition for Review at 14-15.

⁶⁴ *Id.* at 15 (“Although the ASLB concedes that ‘Fasken makes some related (and some perhaps marginally related) additional claims,’ it fails to adequately articulate or address any of them in its ruling.”) (quoting *ISP*, LBP-21-2, 93 NRC at __ (slip op. at 8)).

⁶⁵ *ISP*, LBP-21-2, 93 NRC at __ (slip op. at 14-15).

⁶⁶ *Id.* at __ (slip op. at 15).

⁶⁷ *Id.*

In its Petition for Review, Fasken makes a vague assertion that the Board “superficially compar[ed] [the New Contention] to Sierra Club’s Contention No. 11.”⁶⁸ This statement ostensibly refers to the Board’s observation that “Fasken’s belated claims concerning ISP’s site selection process ignore [the Board’s] discussion in LBP-19-07 of similar claims that were made in Sierra Club Contention 11.”⁶⁹ Fasken argues, in a footnote, that the Board “repeats the generic basis for denial of Sierra Club’s assertions and concludes without adequate discussion or analysis that Fasken’s claims are one in the same.”⁷⁰ However, Fasken offers no explanation as to how LBP-21-2 allegedly is inadequate in this regard. Fasken neither compares its site selection argument with the admissibility criteria in 10 C.F.R. § 2.309(f)(1), nor advances any argument that these criteria have been satisfied, nor contrasts its site selection arguments with Sierra Club’s, nor offers any explanation as to how the Board’s citation to LBP-19-7 allegedly is inapt. Ultimately, vague and conclusory assertions such as this are insufficient to demonstrate an error of law or abuse of discretion.

* * *

In LBP-21-2, the Board held that Fasken’s arguments in the New Contention were inadmissible because they failed to satisfy multiple criteria in 10 C.F.R. § 2.309(f)(1). Here, Fasken fails to rebut any part of the Board’s application of these criteria to the New Contention. Fasken’s vague and factually incorrect arguments do not remotely satisfy its affirmative burden on appeal.

⁶⁸ Petition for Review at 14 (citing *ISP*, LBP-21-2, 93 NRC at __ (slip op. at 15)).

⁶⁹ *ISP*, LBP-21-2, 93 NRC at __ (slip op. at 15).

⁷⁰ Petition for Review at 14 n.57.

C. Fasken’s Other Miscellaneous Arguments Identify No Error of Law or Abuse of Discretion In LBP-21-2

Three subsections of Fasken’s Petition for Review present assertions of a vague or general nature, or otherwise discuss topics with no obvious connection to the ruling Fasken seeks to appeal here: LBP-21-2. As explained further below, these miscellaneous arguments fail to identify any error of law or abuse of discretion in LBP-21-2.

1. General Discussion of NEPA and the DEIS

Section IV.a.ii of Fasken’s Petition for Review purports to recite certain general tenets of the National Environmental Policy Act of 1969 (“NEPA”),⁷¹ including an agency’s obligation to take a “hard look” at the consequences of a proposed action.⁷² Fasken then makes vague assertions that the DEIS “negligently omits” or “insufficiently considers” certain information.⁷³ However, this section of Fasken’s brief does not—even once—mention the Board’s decision in LBP-21-2. It is unclear how these statements purportedly relate to the instant appeal, and Fasken offers no explanation. This ambiguous discussion fails to identify any error of law or abuse of discretion in LBP-21-2.

2. Previously-Rejected NWPA Arguments

In Section IV.a.iii.1 of the Petition for Review, Fasken discusses the Nuclear Waste Policy Act of 1982 (“NWPA”).⁷⁴ More specifically, Fasken quotes portions of the Board’s original contention admissibility ruling, LBP-19-7,⁷⁵ and notes its disagreement with the Board’s

⁷¹ Pub. L. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321 *et seq.*).

⁷² Petition for Review at 18-19.

⁷³ *Id.*

⁷⁴ Pub. L. 97-425, 96 Stat. 2201 (1983) (codified at 42 U.S.C. §§ 10101 *et seq.*).

⁷⁵ *See, e.g.*, Petition for Review at 19 (citing “ISP Order at 4,” but likely referring to *ISP*, LBP-19-7, 90 NRC at 40).

conclusion that Fasken’s NWPAs challenge was inadmissible.⁷⁶ Although Fasken filed an appeal of LBP-19-7 as to certain contentions, it did *not* seek Commission review of the Board’s rejection of its NWPAs challenge.⁷⁷ To the extent Fasken’s discussion of the NWPAs in Section IV.a.iii.1 of its instant Petition for Review is intended as an appeal of LBP-19-7, or a motion for reconsideration of CLI-20-14 (which affirmed the Board’s rejection of an essentially identical NWPAs contention),⁷⁸ it is woefully untimely on both counts.⁷⁹ Moreover, Fasken fails to explain how this discussion is, in any way, related to LBP-21-2. Nor is there any obvious connection. This arbitrary discussion fails to demonstrate an error of law or abuse of discretion in LBP-21-2, which does not even mention the NWPAs.

3. Procedure for Filing Contentions Out-of-Time

Finally, in Section IV.a.iii.2 of its brief, Fasken asserts that, after a contention is proposed in an adjudicatory proceeding, the applicant’s ability to respond to NRC Requests for Additional Information (“RAIs”) somehow “prejudice[s]” petitioners and creates a “wall” to reasonable adjudication of the issues.⁸⁰ However, Fasken appears to be unfamiliar with NRC licensing processes. There is nothing novel about the iterative process of significant licensing actions. The ongoing exchange of NRC RAIs and applicant responses is a normal and unremarkable part of the NRC’s longstanding application review process. Moreover, the NRC’s adjudicatory regulations explicitly contemplate this reality and prescribe corresponding

⁷⁶ *ISP*, LBP-19-7, 90 NRC at 110.

⁷⁷ *See* Fasken’s Appeal of LBP-19-7 (appealing only the Board’s denial of its contentions 2 (Oil and Gas), 3 (Airplane Crash), and 4 (Groundwater and Aquifers). *See also* *ISP*, CLI-20-14, 92 NRC at ___ (slip op. at 7) (noting that Fasken only appealed the Board’s determinations regarding “three of its six proposed contentions.”).

⁷⁸ *ISP*, CLI-20-14, 92 NRC at ___ (slip op. at 4-7) (affirming the Board’s rejection of Beyond Nuclear’s essentially identical NWPAs contention).

⁷⁹ 10 C.F.R. §§ 2.341, 2.345.

⁸⁰ Petition for Review at 20-21.

adjudicatory procedures.⁸¹ In other words, the Commission already considered this subject and codified appropriate procedural rules.⁸² To the extent Fasken seeks to challenge those rules, its argument is raised for the first time on appeal and therefore fails to demonstrate any error of law or abuse of discretion by the Board.⁸³ Even if such arguments had been raised in the proceedings before the Board, they would have been rejected as impermissible.⁸⁴ Accordingly, this section offers no support for an appeal of LBP-21-2.

* * *

In sum, the Board's denial of the Second Reopening Motions, and conclusion that the New Contention is inadmissible, are sound as a matter of law and well supported by the record. Fasken's Petition for Review provides no basis for overturning those rulings. Therefore, even if the Commission grants the Petition for Review, it should affirm the Board's decision in LBP-21-2.

VI. CONCLUSION

For the reasons set forth above, the Commission should deny the Petition for Review. In the alternative, if the Commission grants the Petition for Review as a matter of discretion, it should affirm LBP-21-2.

⁸¹ 10 C.F.R. § 2.309(c) (procedure for filing new or amended contentions after the initial deadline for petitions to intervene).

⁸² See *Oklo Power, LLC* (Aurora Reactor), CLI-20-17, 92 NRC __, __ (Dec. 22, 2020) (ML20357A099) (slip op. at 8) (rejecting similar challenges to the NRC's procedural rules for filing new contentions out-of-time).

⁸³ *USEC*, CLI-06-10, 63 NRC at 458 (quotations and citation omitted).

⁸⁴ See 10 C.F.R. § 2.335 (barring challenges to NRC regulations in individual adjudicatory proceedings, with certain exceptions that are inapplicable here).

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, DC
this 22nd day of March 2021

**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))	March 22, 2021
)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing “Interim Storage Partners LLC’s Answer Opposing Fasken’s Petition for Review of LBP-21-2” was served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned docket.

Signed (electronically) by Ryan K. Lighty
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