UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	Docket No. 50-255 NRC–2021–0036
Entergy Nuclear Operations, Inc., Entergy Nuclear Palisades, LLC, Holtec International, and Holtec Decommissioning International, LLC	)	April 14, 2021
(Palisades Nuclear Plant and Big Rock Point)	)	

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REPLY OF BEYOND NUCLEAR, MICHIGAN SAFE ENERGY FUTURE AND DON'T WASTE MICHIGAN IN OPPOSITION TO APPLICANTS' 'MOTION TO STRIKE PORTIONS OF BEYOND NUCLEAR *ET AL.'S* REPLY AND SECOND DECLARATION OF ROBERT ALVAREZ'

Pursuant to 10 C.F.R. § 2.323(c), Petitioners Don't Waste Michigan (DWM), Michigan Safe Energy Future (MSEF) and Beyond Nuclear (BN) (Petitioners), by and through counsel, respond in opposition to "Applicants' Motion to Strike Portions of Beyond Nuclear *et al.'s* Reply and Second Declaration of Robert Alvarez." In their "Answer Opposing Beyond Nuclear *et al.*'s Petition to Intervene and Hearing Request" (Answer), Applicants Entergy Nuclear Operations, Inc. (ENOI), Entergy Nuclear Palisades, LLC, Holtec International, and Holtec Decommissioning International, LLC (HDI) (collectively, Holtec) allege that Petitioners have brought in new factual averments and arguments in their Reply in Support of Petition for Leave to Intervene and Request for an Adjudicatory Hearing.[1] Any resulting victimization asserted by Holtec is imaginary. Petitioners have violated no principles of pleading or argument, and the Motion to Strike should be disregarded, if not sanctioned.

[1]https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML21088A440

I. STANDARDS GOVERNING REPLY PLEADING

Contentions and challenges to contentions in NRC licensing proceedings are analogous to complaints and motions to dismiss in federal court. *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979). The NRC's contention admissibility rules "do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission." *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *recons. denied LES*, CLI-04-35, 60 NRC 619 (2004). Replies may appropriately "respond to the legal, logical, and factual arguments presented in the answers. . . ." *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 301-302 (2007). A reply memorandum may be used to provide "legitimate amplification" to a contention. *Id.*

"A party may not use the device of a motion to strike to categorically prohibit all new arguments. Although 'principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised by the Applicant's or the NRC Staff's Answers,' such a limitation falls well short of prohibiting a petitioner from raising all new arguments. *As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answers, fairness is achieved through the consideration of these newly expressed arguments." Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 at 41 (p. 43 of .pdf) (unpublished) (July 6, 2011) (Emphasis added).

In *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), ASLBP No. 11-907-01-LR-BD01 (October 11, 2012) (unpublished), the Atomic Safety and

Licensing Board made clear that new authority and arguments may be raised in reply where "fairly responsive:"

> While FENOC is correct that Intervenors cite new legal authority and raise certain new arguments in their reply, we believe that these citations and arguments are fairly responsive to arguments proffered by FENOC in its answer. While a party may not raise new arguments in a reply that are outside the scope of the initial contention, it may "legitimately amplify" arguments presented in its initial contention in order to fairly respond to arguments raised in the answers. (Citing *Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 329 (2006)).

Id. at 3. See also *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), 65 NRC at 301-302 ("It is appropriate, however, for a reply to respond to the legal, logical, and factual arguments presented in the answers, so long as new issues are not raised").

Petitioners' due process rights require accommodation in the form of some flexibility in shaping their responsive arguments. According to the D.C. Circuit Court of Appeals, §189(a) of the Atomic Energy Act [42 U.S.C. §2239(a)] requires that "once a hearing on a licensing proceeding is begun, it must encompass all material factors bearing on the licensing decision raised by the requester." *Union of Concerned Scientists v. United States Nuclear Regulatory Com'n*, 735 F.2d 1437, 1443 (D.C. Cir. 1984). Indeed, the stringency of the NRC's Part 2 rules "may approach the outer bounds of what is permissible under the [Administrative Procedure Act]," *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 355 (1st Cir. 2004). Thus Petitioners' substantive and procedural due process rights must be considered in the determination of Holtec's Motion to Strike.

II. PETITIONERS' OPPOSITION TO APPLICABILITY OF A CATEGORICAL EXCLUSION WAS TIMELY EXPRESSED AND FALLS WITHIN THE PERMISSIBLE SCOPE OF REPLY AS LEGITIMATE AMPLIFICATION

Holtec states in its Motion to Strike that "The Petition made no mention of NRC's

categorical exclusion applicable to license transfers, the PSDAR section specifically relying on that categorical exclusion, or the PSDAR sections explaining why Palisades decommissioning activities are bounded by prior environmental reviews."[2] Petitioners justifiably made no mention of the NRC's categorical exclusion in their initial Petition filing: they had no obligation to rebut it *a priori*. Notably, Holtec falsely claims in the Motion to Strike that there is a "PSDAR section specifically relying on that categorical exclusion" according to correspondence from their counsel.[3] Adding to Holtec's error quotient, contrary to Holtec's assertions, Petitioners did mention, and solidly repudiated, PSDAR mentions of prior NEPA bounding in the initial Petition to Intervene.

A. Invocation of Categorical Exclusion creates a rebuttable presumption

Procedurally, at this point Holtec, as Applicant, has stated its intention of relying on the license transfer categorical exclusion (CE) in their application.[4] But the NRC, as regulator, has yet to rule to apply the CE to the circumstances. In the Federal Register notice of the instant proceeding,[5] the NRC Staff made no mention of an intention to invoke the categorical exclusion; literally, the words "categorical exclusion" or "CE" do not appear in the notice. Also according to the Federal Register notice, the Commission had only tentatively held that the generic findings in the 1998 regulations creating the license transfer CE were applicable here to foreclose

[2]Motion to Strike at 7.

[3]In an April 6, 2021 email exchange between Petitioners' counsel and Holtec's counsel (attached as Exhibit A), Petitioners' counsel inquired as to where in the PSDAR the CE was invoked. Holtec's counsel provided a citation to an entirely different location in Holtec's application that was not in the PSDAR.

[4]Albeit not in the PSDAR, as Holtec agrees, *supra* n. 3.

[5]"Palisades Nuclear Plant and Big Rock Point Plant Consideration of Approval of Transfer of Control of Licenses and Conforming Amendments," 86 Fed. Reg. 8225 (February 4, 2021).

consideration of significant hazards:

> As provided in 10 CFR 2.1315, unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the license of a utilization facility or to the license of an ISFSI, which does no more than conform the license to reflect the transfer action, involves no significant hazards consideration and no genuine issue as to whether the health and safety of the public will be significantly affected. No contrary determination has been made with respect to this specific license amendment application.[6]

As explained *infra*, the National Environmental Policy Act (NEPA) and the Atomic Energy Act (AEA) require the NRC to provide a reasoned explanation of the applicability of the CE if and when the NRC applies the CE to this license transfer request. Petitioners had no obligation to argue CE inapplicability at the outset, because as of the date they initially filed, it had not been applied by the regulator; it was a mere Holtec aspiration.

Petitioners' Contention 1 alleged that supplementation of prior Environmental Impact Statements is required, owing to new information and circumstances detailed in the PSDAR. Petitioners cited extensively in their initial filing[7] to facts and omissions from prior NEPA documents that compel additional, new NEPA scrutiny of the considerably-revised Holtec decommissioning scheme that would be formally adopted as part of the license transfer.

In keeping with the civil pleading analogy of NRC petition filings,[8] Holtec responded in its Answer that the CE is applicable, and it fell to Petitioners to rebut Holtec's insistence that the CE precludes Petitioners' Contention 1. In reply, Petitioners pointed out that invocation of the

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[6] 86 Fed. Reg. 8226.

[7] See "Petition for Leave to Intervene," pp. 19-41, https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML21088A440

[8] Contentions and challenges to contentions in NRC licensing proceedings are analogous to complaints and motions to dismiss in federal court. *Houston Lighting & Power Co., supra*, 10 NRC at 525.

license transfer CE can be rebutted by a showing of "special circumstances:"

> (b) Except in *special circumstances*, as determined by the Commission upon its own initiative or *upon request of any interested person*, an environmental assessment or an environmental impact statement is not required for any action within a category of actions included in the list of categorical exclusions set out in paragraph (C) of this section.[9]

The Petitioners claimed at that point in the pleading that they are "interested persons" who are "requesting" that "special circumstances" of multiple new decommissioning activities that had never been subjected to NEPA scrutiny demolish any serious claim that the license transfer could be categorically excluded. When it amended 10 CFR § 51.22 to add license transfers as a CE in 1998,[10] the Commission explicitly acknowledged that the CE could not be mechanically applied, counseling that "*In general*, license transfers do not involve any technical changes to plant operations."[11] (Emphasis added). This notion that CE's are rebuttable presumptions is echoed in Council on Environmental Quality (CEQ) NEPA regulations, where 40 CFR §1508.1(d) defines "categorical exclusion" as "a category of actions that the agency has determined, in its agency NEPA procedures (§1507.3 of this chapter), *normally do not have* a significant effect on the human environment." (Emphasis added). Thus a showing that an activity *will have a significant effect on the environment* removes the protection of the CE; the activity is not an excluded action because it will not beget a benign result.

NRC regulations define "special circumstances" to "include the circumstance where the proposed action involves unresolved conflicts concerning alternative uses of available resources

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[9] 10 CFR § 51.22(b) (Emphasis added).

[10] "Streamlined Hearing Process for NRC Approval of License Transfers," Final Rule, 63 Fed. Reg. 66721 (December 3, 1998) (Streamlined).

[11] *Id.*

within the meaning of section 102(2)(E) of NEPA." The CEQ NEPA regulations allow imposition of the exclusion *only when the agency can mitigate the environmental harm*, which is a determination the NRC has yet to make in this proceeding. If no mitigation of the harms claimed by Petitioners can be made, an Environmental Assessment or Environmental Impact Statement must be written. According to 40 CFR § 1504.4(b), if an agency determines that a categorical exclusion identified in its agency NEPA procedures covers a proposed action, the agency must evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect, and:

> (1) If an extraordinary circumstance is present, the agency nevertheless may categorically exclude the proposed action *if the agency determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects.* (Emphasis supplied).
>
> (2) If the agency cannot categorically exclude the proposed action, the agency shall prepare an environmental assessment or environmental impact statement, as appropriate.

Id. Again, these determinations have yet to be made by the NRC in this proceeding. Petitioners aver that EIS supplementation is mandated; only Holtec – not the NRC[12] – maintains that it need not do so. *See, Pa'ina Hawaii, LLC*, LBP-06-4, 63 NRC 99, 108-112 & 108 n.36 (2006) ("An agency must affirmatively provide a reasoned explanation of the applicability of a categorical exclusion when special circumstances are alleged."[13]).

B. Petitioners explicitly alleged in the Petition that proposed Holtec decommissioning activities were not bounded by prior NEPA documents

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[12]The NRC Staff has not even entered an appearance as a party in this proceeding, underscoring the NRC's agnosticism as to whether the CE applies.

[13]*Pa'ina* at 63 NRC 108-112 & 108 n.36 (2006), (citing *Alaska Center for the Environment v. U.S. Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999); *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986); *Steamboaters v. Fed. Energy Reg. Comm'n*, 759 F.2d 1382 (9th Cir. 1985); *Wilderness Watch & Public Employees for Env. Responsibility v. Mainella*, 375 F.3d 1085, 1096.

Petitioners alleged in their Petition considerable evidence of environmental threats and harms that are not mentioned in the Applicants' license transfer request. They asserted that Applicants must meet the requirement of 10 CFR § 50.82(a)(4)(i) that the PSDAR include, ". . . a discussion that provides the reasons for concluding that the environmental impacts associated with site-specific decommissioning activities *will be bounded* by appropriate previously issued environmental impact statements."[14] (Emphasis added). At Petition p. 23, Petitioners asserted:

> There is zero mention or discussion in the 2006 SEIS of steam generator radioactivity or ultimate disposition. In the PSDAR, the Applicants state that it is likely that the generators will be transported offsite by barge, and that a boat slip may have to be constructed at Palisades for this purpose.[15] Applicants conclude that this aspect of decommissioning would be ***bounded*** *by the 2006 SEIS*, as there "would be no impacts on water quality associated with Palisades decommissioning beyond those discussed in the GEIS."[16] The implications of loading and hauling steam generators on the Great Lakes are not mentioned in the 2006 SEIS or the PSDAR.

(Emphasis added).

Petitioners clearly alleged facts showing that the PSDAR and the license transfer application exceed the "bounding" of previous environmental impacts analyses:

> NRC regulations at 10 CFR § 50.82(a)(4)(i) require that the PSDAR include ". . . a discussion that provides the reasons for concluding that the environmental impacts associated with site-specific decommissioning activities will be ***bounded*** by appropriate previously issued environmental impact statements." There is no factual discussion of the environmental effects from the unrealistic SNF transport dates, nor confrontation of the harsh realities that high burnup fuel, discussed further below, may not be movable until near the end of the century. There is no discussion of repackaging of all SNF at Palisades, not just that in VSC-24 casks, for purposes of transport to a permanent repository. Indeed, DOE has stated and it is commonly accepted, that there will be no repository before 2048 and that date is suspect. Current federal law does not allow for the existence of consolidated interim storage facilities such as Holtec International proposes to construct in New Mexico unless there is an open and operating repository. NRC regulations require

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[14]Petition at 20-21, quoting from p. 18 of Applicants' PSDAR.
[15]PSDAR at 11, 19.
[16]PSDAR at 21.

> licensees to "submit written notification to the Commission for its review and preliminary approval of the program by which the licensee intends to manage and provide funding for the management of all irradiated fuel at the reactor following permanent cessation of operation of the reactor *until title to the irradiated fuel and possession of the fuel is transferred to the Secretary of Energy for its ultimate disposal in a repository.*"[17] There is no mention of DOE taking title to SNF for consolidated interim storage facilities because they cannot legally exist.
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> Applicants' citing of 2030 or 2041 as the dates that SNF will begin to depart Palisades are fantastical, based on laws that don't exist and facilities that don't exist or will not be brought online within the timeline they postulate despite knowing better.[18]

(Emphasis added).

Petitioners have claimed consistently since the inception of their intervention that NEPA obligates supplementation, and at the point where Holtec interjected that a categorical exclusion should apply, Petitioners demolished the objection. Holtec is not the regulator here, and its assertion that the CE should have been treated as a *fait accompli* from the outset of this proceeding is entirely misplaced. Holtec says the CE erects a substantive obstacle; Petitioners maintain the CE is a procedural hurdle, easily crossed with Petitioners' extensive showing that the CE has no justification because of the multiple significant new activities which have environmental consequences never before considered in the Palisades docket.

Holtec's suggestion that parts of Petitioners' reply argument should be stricken are procedurally illogical. Petitioners legitimately amplified their initial position on reply. Petitioners' "new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answer." *Entergy Nuclear Operations, Inc.*, ASLBP No. 07-858-03-LR-BD01, *supra* at 41 (p. 43 of .pdf) (unpublished). And to ensure Petitioners' due process rights are respected, this licensing proceeding "must encompass all

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[17] 10 CFR § 50.54(bb).

[18] Petition for Leave to Intervene (ML21088A440) at 36.

material factors bearing on the licensing decision raised by the requester." *Union of Concerned Scientists v. United States Nuclear Regulatory Com'n*, *supra,* 735 F.2d at 1443. Holtec's motion to strike Petitioners' CE arguments should not be countenanced by the ASLB.

III. THE SECOND ALVAREZ DECLARATION WAS PROPER REBUTTAL OF HOLTEC'S ACCUSATIONS OF MISREPRESENTATION; HAVING OPENED THE DOOR, HOLTEC CANNOT PRECLUDE PETITIONERS FROM DEFENDING AND EXPLAINING THEIR EVIDENTIARY SOURCES AND POSITION

Holtec impugned the credibility of declaration statements made by Petitioners' expert witness, Robert Alvarez in his initial expert report,[19] and now tries via its Motion to Strike to staunch the bleeding it caused itself by improperly and irrelevantly haggling over evidence at this preliminary stage.

Holtec challenged Mr. Alvarez's conclusion that repackaging of spent nuclear fuel will cost between $40,000 and $87,000 per assembly, claiming that Alvarez's source did not provide any per-assembly cost data.[20] In his second, March 29, 2021 Declaration, Mr. Alvarez provided the explicit citation to the Nuclear Waste Technical Review Board per-assembly cost data he used.[21] Holtec apparently didn't read closely enough; Alvarez has cleared himself of that false accusation.

Holtec also claimed that Mr. Alvarez "misrepresents" the minimum cooling times needed

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[19]Declaration of Robert Alvarez, Exh. B (ADAMS No. ML 21055A593).

[20]At Answer p. 20, Holtec states, "Alvarez arrived at this conclusion by assuming that repackaging will cost between $40,000 and $87,000 per assembly; however, the source he cites for this proposition (a presentation given to the Nuclear Waste Technical Review Board in 2016) does not include any per-assembly cost data."

[21]Declaration of Robert Alvarez, Exh. B at 1 (March 29, 2021) (ML 21088A440): "The citation I provided by Jarrell to the NWTRB (U.S. Nuclear Waste Technical Review Board) does indeed provide per-assembly cost data on p. 16 of the presentation. Moreover, the presentation given to the NWTRB was given in 2015 not 2016, as stated in the reply by Holtec. https://www.nwtrb.gov/docs/default-source/meetings/2015/june/jarrell.pdf?sfvrsn=7."

before high burnup SNF could be moved into a dry cask, asserting that a 2013 slide presentation he cited "actually says, '[t]ransfer from pool to cask within 5 years after reactor discharge is possible for smaller cask sizes, even for high burnup fuels. . . .'"[22] In answer, Mr. Alvarez directed Holtec to a Sandia National Laboratory analysis stating that "Full loadings of high burnup fuels in very large casks may require decades of aging in pools," and depending on storage medium, up to 300 years.[23] Because Palisades is using large-volume casks, Mr. Alvarez provided a chart to support his point that "cooling times for high burnup SNF that is preferentially loaded into MPC (Multi-Purpose Canister) casks can be far greater than 5 years."[24]

Alvarez then rubbished Holtec's critique:

> With respect to high burnup SNF, the reply falsely asserts that I have no data with respect to the burnups at Palisades. As of 12/31/2013 based on 23 fuel discharge cycles, about 20% of the Palisades SNF is high burnup (308 assemblies). Since then, Palisades has had 4 additional fuel discharge cycles, which are mostly high burnup.
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> Spent fuel data I rely upon are from those reported to the U.S. Department of Energy in its Nuclear Fuel Survey (U.S. Energy Information Administration, Form GC-859, "Nuclear Fuel Data Survey," 2013). The DOE GC-859 database is used by the NRC (NUREG-7227). According to NUREG-7227, "The GC-859 database, which is maintained by the US Energy Information Administration (EIA), documents information on every SNF assembly discharged from US commercial reactors from 1968 to 2013." This includes the burnup for each individual SNF assembly.
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> As for cost, Holtec assumes that all SNF from the two sites will be removed by

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[22] Answer at 24-25: "On his first point, the sole source cited by Alvarez is a 2013 presentation that appears to be a statistical analysis of fuel cooling properties by varying cask design.(96) But Alvarez misrepresents the presentation, which he cites for the proposition that 'minimal cooling times prior to emplacement of high burnup SNF into a dry cask range from 25 to 30 years.' The presentation actually says, '[t]ransfer from pool to cask within 5 years after reactor discharge is possible for smaller cask sizes, even for high burnup fuels,' and '[i]ndividual assemblies could be cool enough, in principle, to load into dry storage at very early times, within days to weeks of reactor shutdown.' The 'Minimum Cooling Time' table shows a minimum period prior to dry storage for assemblies with burnup of 45,000 MWd/MTU (generally considered 'high burnup fuel') of approximately 3 years. Alvarez provides no support for his order-of-magnitude greater time period, nor does he provide any support for his guesses about the volume of high burnup fuel present at Palisades."

[23] Alvarez, Exh. B pp. 1-2.

[24] *Id.* at 2.

> 2041. If this date is missed, which is a chronic problem for the nuclear industry, Sandia researchers conclude that: "Stranded storage costs are large because the annual maintenance costs of storing SNF ranges from $0.2 million/yr to $1 million/yr when the reactor is operating but increase to between $4.5 million/yr and $10 million/yr when the reactor is decommissioned and storage costs can no longer be shared (*i.e.,* up to 20 times the cost at an operating site)." This cost could effectively double, given the M&O (Management and Operations) of spent nuclear fuel at the two sites.
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> Finally, repackaging of the 432 assemblies in the 18 VSC-24 casks is on a scale that has yet to be undertaken in the Unites States. It will involve transport, opening, removal and emplacement into several new canisters. It will require the continued operation of the reactor pool and all that entails, especially since dry hot cells to handle commercial SNF remain yet-to-be deployed. It appears that not a single power reactor spent nuclear fuel cask in the U.S. has been repackaged. Given the lack of actual experience in repackaging, cost projections contain elements of speculation that cannot be penciled way. For instance, the estimated cost of managing low-level radioactive waste from removing spent fuel to new canisters is estimated by the DOE at $9,500 per assembly and could be more than the cost to load the assembly in any canister.
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> The costs I estimated provide a layer of uncertainty that provide some conservatism based on respected sources. If they match up with Holtec's assertions, then the costs allocated for SNF management to be drawn from the D&D (Decommissioning and Decontamination) fund are excessive.[25]

The NRC's contention admissibility rules "do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission." *Louisiana Energy Servs., L.P., supra,* 60 NRC at 225. Replies may appropriately "respond to the legal, logical, and factual arguments presented in the answers. . . ." *PPL Susquehanna, LLC, supra,* 65 NRC at 301-302. A reply memorandum may be used to provide "legitimate amplification" to a contention. *Id. See also, FirstEnergy Nuclear Operating Company, supra,* ASLBP No. 11-907-01-LR-BD01 (October 11, 2012) (unpublished) ("While a party may not raise new arguments in a reply that are outside the scope of the initial contention, it may 'legitimately amplify' arguments presented in its initial contention in order to fairly respond to arguments raised in the answers.").

[25]Declaration of Robert Alvarez, Exh. B at 2-3 (March 29, 2021) (ML 21088A440).

"Although 'principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised by the Applicant's or the NRC Staff's Answers,' such a limitation falls well short of prohibiting a petitioner from raising all new arguments. As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answers, fairness is achieved through the consideration of these newly expressed arguments." *Entergy Nuclear Operations, Inc., supra*, ASLBP No. 07-858-03-LR-BD01 at 41 (p. 43 of .pdf) (unpublished) (Emphasis added).

"A document put forth by an intervenor as supporting the basis for a contention is subject to scrutiny, both for what it does and does not show." *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996); *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). When a report is the central support for a contention's basis, the contents of that report in its entirety is before the Board and, as such, is subject to Board scrutiny, both as to those portions of the report that support an intervenor's assertions and those portions that do not. *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 254 (2007); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 24 (2007).

Holtec accused Alvarez of "speculation," of "no support for his order-of-magnitude greater time period" and of lacking support for "his guesses about the volume of high burnup fuel present at Palisades," and of "misrepresentation."[26] It is fatuous to insist that Alvarez (and

[26]From Answer p. 24: "Finally, Alvarez speculates that the presence of high burnup fuel at Palisades will require additional cooling time, beyond the time periods assumed by HDI, both in the spent fuel pool and in dry storage prior to transport.

On his first point, the sole source cited by Alvarez is a 2013 presentation that appears to be a statistical analysis of fuel cooling properties by varying cask design. But Alvarez misrepresents the

Petitioners) are prohibited from replying to such taunts and accompanying distortions.

In *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), ASLBP No. 09-880 05-BD01, LBP 10-09 (June 15, 2010) (slip op.), the intervenors sought to late-file a quality assurance (QA) contention based on an NRC Notice of Violation that cited QA deficiencies. The NRC Staff answered that the intervenors had exaggerated the seriousness of the NRC enforcement action. Along with their reply memo, the intervenors submitted an expert affidavit which cited and analyzed the significance of certain NRC staff emails pertaining to the QA deficiencies. The ASLB ruled that the expert affidavit and intervenors' reliance on the emails comprised legitimate responses because they did not alter the basis for the original contention:

> By citing this and other NRC Staff e-mails, Intervenors have not attempted to amend or provide a different basis for Contention 15. Instead, they have responded to NRC Staff's argument that they significantly overstated the extent of DTE's QA violations, and they have provided additional factual support for Contention 15's assertion that DTE 'appears to be serially in violation of NRC regulations requiring the implementation of a Quality Assurance program . . . .' Although Intervenors did not cite the June 2009 e-mails in Contention 15, *our contention admissibility rules do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission. When the NRC Staff's Answer accused Intervenors of overstating the extent of the violations identified in the NOV [Notice of Violation], it was appropriate for Intervenors to respond by citing statements of NRC Staff that appear consistent with Intervenors' position.*
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> *At bottom, NRC Staff's argument concerns the interpretation of debatable evidence and*

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presentation, which he cites for the proposition that "minimal cooling times prior to emplacement of high burnup SNF into a dry cask range from 25 to 30 years." The presentation actually says, "[t]ransfer from pool to cask within 5 years after reactor discharge is possible for smaller cask sizes, even for high burnup fuels," and "[i]ndividual assemblies could be cool enough, in principle, to load into dry storage at very early times, within days to weeks of reactor shutdown." The "Minimum Cooling Time" table shows a minimum period prior to dry storage for assemblies with burnup of 45,000 MWd/MTU (generally considered "high burnup fuel") of approximately 3 years. Alvarez provides no support for his order-of-magnitude greater time period, nor does he provide any support for his guesses about the volume of high burnup fuel present at Palisades."

> *is therefore inappropriate in the context of a contention admissibility ruling, where we do not decide the merits or draw factual inferences in favor of the party opposing the admission of a contention.* We therefore are not persuaded by NRC Staff's argument that we should ignore its June 2009 e-mails. Such arguments belong at the evidentiary stage of this proceeding. We therefore conclude that Contentions 15A and 1,,5B satisfy 10 C.F.R. § 2.309(f)(1)(v).

Id. at 23, 25. (Emphasis added).

Similarly, here, Holtec decided to haggle over the interpretation of the evidence Alvarez provided. Holtec did so at its own risk, because such argument "is inappropriate in the context of a contention admissibility ruling, where we do not decide the merits or draw factual inferences in favor of the party opposing the admission of a contention."[27] Because at its essence, an acceptable contention need only be specific and have a basis, the standard for admitting a contention is not meant to be equivalent to the standard of evidence at a trial on the merits; the truth or falsity of the contention is reserved for adjudication. *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 n. 5 (1983). Petitioners met and surpassed the essential components of contention pleading, and while they were not required to even respond to the excessive critique delivered by Holtec, for prudent reasons Petitioners did answer Holtec's hollow haggles. Holtec's objections can be ignored, as they go to the substance of the contention and are improper at this stage.

IV. CONCLUSION

The Motion to Strike is wholly unsupported. Petitioners replied at the proper procedural juncture when Holtec attempted to cloak its proposed license transfer in the categorical exclusion. In the regulatory history of the "special circumstances" exception to CEs expressed in

[27] *Detroit Edison Company, supra,* ASLBP No. 09-880 05-BD01, LBP 10-09 at 25.

10 C.F.R. § 51.22(b), the Commission made clear "that it intended the term to be flexible, stating that '[a] major purpose of proposed section 51.22(b) is to preserve this necessary flexibility. In addition, it is impossible to identify in advance the precise situations which might move the Commission in the future to determine special circumstances exist. Therefore, the term 'special circumstances' has not been further defined.'"[28]

When Holtec attacked Petitioners' expert witness for failing to draw proper inferences from sources, for having no support for conclusions, and for misrepresenting evidence, Petitioners were entirely within their rights to respond to the accusations by having their expert amplify his initial statements.

The Licensing Board should leave Holtec precisely where they are, in a peck of self-made trouble. The Motion to Strike should be denied.

April 14, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2021, I deposited the foregoing Reply in Opposition to Motion to Strike in the NRC's electronic docket of this proceeding, and that according to the protocols of that system, it was to be automatically transmitted to all parties of record registered

[28] 49 Fed. Reg. 9352, 9366 (Mar. 12, 1984), quoted in *Pa'ina Hawaii* at 110.

to receive electronic service.

/s/ Terry J. Lodge
Terry J. Lodge, Esq.
Counsel for Petitioners

Exhibit A

RE: NRC Proceeding "Palisades & Big Rock Point-LT-2"

From: Lovett, Alan (alovett@balch.com)

To: tjlodge50@yahoo.com; lodgelaw@yahoo.com

Cc: david.lewis@pillsburylaw.com; anne.leidich@pillsburylaw.com

Date: Tuesday, April 6, 2021, 3:40 PM EDT

Mr. Lodge - please see the Environmental Review section of the Application, p.21, excerpted below.

9. ENVIRONMENTAL REVIEW

The requested consent to transfers of licensed owner and operator authority for Palisades and Big Rock Point is exempt from environmental review, because it falls within the categorical exclusion contained in 10 CFR 51.22(c)(21) for which neither an Environmental Assessment nor an Environmental Impact Statement is required. Moreover, the proposed transfers do not directly affect the actual maintenance or decommissioning of the shutdown facility in any substantive way, other than facilitating a change in the timeframe for conducting certain activities. The proposed transfers do not involve an increase in the amounts, or a change in the types, of any radiological effluents that may be allowed to be released off-site and involves no increase in the amounts or change in the types of non-radiological effluents that may be released off-site. Further, there is no increase in the individual or cumulative occupational radiation exposure other than that associated with the timing of the decommissioning activities, and the proposed transfers have no environmental impact. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the proposed change.

From: Terry Lodge <tjlodge50@yahoo.com>
Sent: Tuesday, April 6, 2021 2:26 PM
To: 'lodgelaw@yahoo.com' <lodgelaw@yahoo.com>; Lovett, Alan <alovett@balch.com>
Cc: 'Lewis, David R.' <david.lewis@pillsburylaw.com>; Leidich, Anne <anne.leidich@pillsburylaw.com>
Subject: Re: NRC Proceeding "Palisades & Big Rock Point-LT-2"

[External Email] Please use caution.

Mr. Lovett, I wonder if you would give me the specific citation to the referenced "PSDAR section specifically relying on that categorical exclusion," please?

Many thanks.

Terry Lodge

The Petition made no mention of NRC's categorical exclusion applicable to license transfers, the PSDAR section specifically relying on that categorical exclusion, or the PSDAR sections explaining why Palisades decommissioning activities are bounded by prior environmental reviews.

On Monday, April 5, 2021, 11:30:23 AM EDT, Lovett, Alan <alovett@balch.com> wrote:

Mr. Lodge,

Following up on my voicemail – Applicants in the Palisades license transfer proceeding intend to file a motion to strike portions of Beyond Nuclear et al.'s reply brief and accompanying declaration that contain new information and arguments not presented in the original filings.

Please let me know if you intend to object.

Thank you,

Alan Lovett

BALCH
& BINGHAM LLP

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-----Original Message-----
From: Hearingdocket@nrc.gov <Hearingdocket@nrc.gov>
Sent: Monday, March 29, 2021 10:38 PM
To: Emily.Krause@nrc.gov; Tison.Campbell@nrc.gov; Krupskaya.Castellon@nrc.gov; ccox@elpc.org; hearing.docket@nrc.gov; mkearney@elpc.org; anne.leidich@pillsburylaw.com; david.lewis@pillsburylaw.com; tjlodge50@yahoo.com; Lovett, Alan <alovett@balch.com>; moodym2@michigan.gov; anita.ghoshnaber@nrc.gov; Brian.Newell@nrc.gov; ocaamail.resource@nrc.gov; sraimo@entergy.com; David.Roth@nrc.gov; clara.sola@nrc.gov; herald.speiser@nrc.gov; Theodore, Nick <ntheodore@balch.com>; Jeremy.Wachutka@nrc.gov; Mary.Woods@nrc.gov
Subject: Re: NRC Proceeding "Palisades & Big Rock Point-LT-2"