

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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

BEYOND NUCLEAR’S BRIEF ON APPEAL OF LBP-19-04

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311, Beyond Nuclear, Inc. (“Beyond Nuclear”) hereby appeals a Memorandum and Order by the Atomic Safety and Licensing Board (“ASLB” or “Board”) denying admission of Beyond Nuclear’s single contention in this proceeding. *Holtec International* (HI-STORE Consolidated Interim Storage Facility), LBP-19-04, _ N.R.C. _ (May 7, 2019) (“LBP-19-04”). In its contention, Beyond Nuclear asserts that Holtec International’s (“Holtec’s”) license application must be rejected because it contains provisions that violate the Nuclear Waste Policy Act (“NWPA”). In LBP-19-04, the ASLB found that the license provisions did indeed violate the NWPA; it also found that the Administrative Procedure Act (“APA”) requires the Nuclear Regulatory Commission (“NRC” or “Commission”) to act in accordance with the law. *Id.*, slip op. at 34. Nevertheless, the Board refused to enforce the NWPA and the APA on the ground that it would be “useless” in the circumstances of this case. *Id.*

The ASLB’s decision is legally erroneous because there are no exceptions to the clear mandates of the NWPA and APA. NRC must make its decisions in accordance with the law. 5 U.S.C. §§ 706(2)(A), (C). Beyond Nuclear therefore seeks reversal of LBP-19-04. Because there is no dispute between the parties regarding the facts asserted in Beyond Nuclear’s contention,

Beyond Nuclear also respectfully requests the Commission order immediate denial of Holtec's license application to the extent that it violates the NWPA.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Holtec's License Application, NRC Proceeding, and Motion to Dismiss

This appeal relates to Holtec's application to the NRC for a license to build and operate a consolidated interim storage facility ("CISF") for spent nuclear reactor fuel in Lea County, New Mexico. The NRC docketed the proceeding in March 2018 (83 Fed. Reg. 12,034 (Mar. 19, 2018)) and issued a hearing notice in July 2018 (83 Fed. Reg. 32,919, 32,920 (July 16, 2018)).

The proposed Holtec CISF would initially store 500 canisters or 8,680 metric tons of uranium in the CISF and eventually store up to 10,000 canisters in the CISF. 83 Fed. Reg. at 32,920. *See also* LBP-19-04, slip op. at 4. Ultimately, Holtec proposed to store a total quantity of 173,600 MTUs of spent fuel, over twice the capacity limit of the Yucca Mountain repository. HI-STORE CIS Safety Analysis Report (Report No. HI-2167374) ("SAR"), Table 1.0.1 at 1-4 (Mar. 27, 2017).¹ Holtec proposed to operate the facility for as long as 120 years (40-year license term plus 80 years of extensions). LBP-19-04, slip op. at 4.

In its license application, Holtec proposed to build and manage the Holtec CISF as a private company. Holtec SAR at 1-1. Nevertheless, Holtec's initial Environmental Report revealed that Holtec did not plan to begin construction of the facility until "after Holtec successfully enters into a contract for storage with the U.S. Department of Energy (DOE)." Holtec Environmental Report, Rev. 0 at 1-1 (Report No. HI-2167521) (Dec. 2017). Holtec also

¹ In the oral argument on January 24, 2019, counsel for Holtec stated that the number 173,000 is "wrong" because some canisters are expected to have less fuel than others. Tr. 263 (Silberg). But counsel did not deny the potential that the number of tons of spent fuel stored at the facility could be as high as 173,000 metric tons, nor did Holtec revise its SAR.

assumed that ownership of spent fuel would be transferred to the DOE *before* it is shipped to the CISF. *See* Holtec Environmental Report, Rev. 0 at 3-104 (“DOE would be responsible for transporting SNF from existing commercial nuclear power reactor storage facilities to the CIS Facility.”). Thus, Holtec’s entire operation depended on the assumption that DOE would take responsibility for the spent fuel that is transported to the CISF and stored there.

On September 14, 2018, Beyond Nuclear submitted to the Commission a motion to dismiss the Holtec licensing proceeding. Beyond Nuclear, Inc.’s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act (“Motion to Dismiss”).² Beyond Nuclear argued that the NRC’s conduct of the licensing proceeding violated the NWPA (42 U.S.C. §§ 10222(a)(5)(A) and 10143) and APA (5 U.S.C. §§ 706(2)(A) and (C)) because the license application assumed, as a key condition, that the federal government would take title to the spent fuel during transportation and storage. Under the NWPA, spent fuel may not be transferred to the federal government until after a permanent repository has opened. *See* 42 U.S.C. §§ 10131, 10143, 10222(a)(5)(A); *Indiana Mich. Power Co. v. Dep’t of Energy*, 88 F.3d 1272, 1273 (D.C. Cir. 1996) (holding that the federal obligation to take title to spent fuel does not begin until a repository is opened). By considering an application that required violation of the NWPA, Beyond Nuclear asserted, the NRC violated both the NWPA and the APA.

Beyond Nuclear also 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 an application satisfies the Atomic Energy Act (“AEA”), the National Environmental Policy Act

² The Motion to Dismiss included a request to dismiss a similar proceeding for review of a CISF application by Interim Storage Partners (“ISP”) for a site in Andrews, Texas. Like Holtec, ISP assumed federal ownership of spent fuel during transportation and storage.

(“NEPA”), and NRC’s regulations for implementing those statutes. 10 C.F.R. §§ 72.40, 51.101.

Questions regarding compliance with the NWPA and APA are not considered licensing issues by the Commission and therefore are beyond the ASLB’s regulatory purview. Accordingly, Beyond Nuclear requested a proceeding before the Commission (separate from the licensing proceedings) to consider its Motion to Dismiss. Motion to Dismiss at 2.

In an abundance of caution, and to preserve its claims, Beyond Nuclear also filed a hearing request and petition to intervene in the Holtec licensing proceeding. Beyond Nuclear, Inc.’s Hearing Request and Petition to Intervene (Sept. 14, 2018) (“Hearing Request”) (ML18257A324). The Hearing Request contained a single contention, incorporating by reference the Motion to Dismiss.

On October 29, 2018, in an unpublished order, the Commission denied the Motion to Dismiss on the “procedural grounds” that NRC regulations for consideration of hearing requests and petitions to intervene “do not . . . provide for the filing of threshold ‘motions to dismiss’ a license application; instead, interested persons must file petitions to intervene and be granted a hearing.” Order at 2. Without reaching the merits of Beyond Nuclear’s claims, the Commission referred the matter to the Holtec licensing proceeding.

B. Beyond Nuclear’s Initial Hearing Request and Amended Hearing Request

Beyond Nuclear’s initial contention, submitted September 14, 2018, asserted that:

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

Hearing Request at 10.

In late 2018, Holtec amended its application to state, in the alternative, that either the DOE *or* private licensees would own the fuel during transportation and storage. Environmental Report on the Hi-Store CIS Facility, Rev. 3 (Nov. 2018) (ML19016A266).

On January 23 and 24, 2019, the ASLB held an oral argument on the issues of standing and contention admissibility. During the oral argument, counsel for Holtec conceded that DOE ownership of spent fuel generated by commercial nuclear power plants violates the NWP:

I will agree with you that, on their current legislation, DOE cannot take title to spent nuclear fuel from commercial nuclear power plants, under the current statement of facts, but that could change, depending on what Congress does.

Tr. 250 (Silberg); *see also* Tr. 251-252 (exchange between Ryerson and Silberg).

Based on Rev. 3 of the Environmental Report and counsel's statements at the oral argument, Beyond Nuclear amended its contention to include an additional statement:

Language in Rev. 3 of Holtec's Environmental Report, which presents federal ownership as a possible alternative to private ownership of spent fuel, does not render the application lawful. As long as the federal government is listed as a potential owner of the spent fuel, the application violates the NWP.

Motion by Petitioners Beyond Nuclear and Fasken to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address Holtec International's Revised License Application at 8 (Feb. 6, 2019) ("Motion to Amend Contentions").

C. LBP-19-04

On May 7, 2019, the ASLB issued LBP-19-04. The ASLB held that Beyond Nuclear had standing and granted Beyond Nuclear's motion to amend its contention, but it denied admission of the amended contention on the ground that Beyond Nuclear had failed to raise a "genuine dispute" with Holtec. *Id.*, slip op. at 2. The ASLB reviewed the current circumstances surrounding spent reactor fuel disposal: the federal government's failure to license or build a repository, accumulation of spent fuel at reactor sites, and the resultant "commonplace" awards

of contract damages to nuclear reactor licensees for DOE's failure to dispose of the spent fuel.

As a result, the ASLB concluded:

[B]oth DOE and the nuclear power plant owners potentially have an interest in contracting to use Holtec's proposed interim storage facility. DOE might want to take responsibility for the nuclear plants' spent fuel, pay Holtec to store it, and stop paying out damages. The nuclear plant owners, on the other hand, might be willing to apply their ongoing damage payments toward paying Holtec to store their spent fuel, so that it would be off their sites and no longer their responsibility to keep secure.

Id., slip op. at 26. But the ASLB recognized that "[b]ecause the NWPA was drafted on the assumption that DOE would not accept title to spent nuclear fuel until a permanent repository becomes operational, however, it appears . . . that in general only the second possibility would be consistent with the terms of the statute." *Id.*, slip op. at 26-7. And the ASLB noted that Holtec itself had acknowledged that its application violates the NWPA. *Id.*, slip op. at 27. Thus, the ASLB conceded that Holtec's application violated the NWPA.

Nevertheless, the ASLB concluded that the issue of NWPA compliance raised by Beyond Nuclear's contention was not admissible because it did not raise a genuine dispute with Holtec:

Beyond Nuclear's contention now raises this fundamental question: May the NRC license Holtec's storage facility to enter into lawful contracts with potential customers, including those that may later become lawful? Or, if Congress were to expand the category of lawful contracts (specifically, to include most contracts with DOE), would it be necessary (as Beyond Nuclear claims) for Holtec to re-submit its license application and for the NRC to re-notice a new opportunity for a hearing? We conclude that, to implement the will of Congress in such circumstances, the NRC need not require Holtec to begin the licensing process all over again.

Id., slip op. at 28. As the ASLB further explained:

If Congress decides to amend the NWPA to allow DOE to take title to spent nuclear fuel before a national nuclear waste repository becomes operational, the only difference would be that DOE could then lawfully contract with Holtec to store the same spent fuel that presently belongs to the nuclear power plant owners.

Id., slip op. at 34. In the meantime, the ASLB concluded, both Holtec and the DOE could be relied on not to violate the NWPA. *Id.*, slip op. at 32, 33. As a result, the ASLB concluded that

“no discernable purpose . . . would be served, in such circumstances, by requiring Holtec to file a new or amended license application for its storage facility or by the NRC entertaining a fresh opportunity to request a hearing.” *Id.*, slip op. at 34. For these reasons, the ASLB denied admission of Beyond Nuclear’s amended contention for failure to satisfy 10 C.F.R. §2.309(f)(1)(vi).

III. ARGUMENT

The Administrative Procedure Act prohibits, and requires reviewing courts to hold unlawful and set aside, federal agency action that is “not in accordance with law,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. §§ 706(2)(A), (C). This appeal poses a purely legal question regarding the proper interpretation of the APA and NWPA: whether, under the APA, the NRC may approve a license application containing provisions that would violate the NWPA if implemented.³ As conceded by the ASLB, “[n]either the facts nor the law . . . remain in dispute.” LBP-19-04, slip op. at 34. Holtec’s application must be rejected for the simple reason that approving it would be “in excess” of the NRC’s “statutory jurisdiction, or limitations,” “short of statutory right,” and “not in accordance with law.” 5 U.S.C. § 706(2)(C). While the ASLB claims authority to disregard the NWPA and the APA if requiring compliance would be “useless” (LBP-19-04, slip op. at 34), neither statute creates such an exception. And, even assuming for purposes of argument that an exception could be found, the ASLB’s rationalization of the unlawful license provisions requires such speculation as to be unreasonable, arbitrary, and capricious. 5 U.S.C. § 706(2)(A).

³ 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 from even *entertaining* an application that violates the NWPA on its face.

A. LBP-19-04 Exceeds the NRC's Statutory Authority and Limitations, Lacks Statutory Right, and is Not in Accordance with Law.

Under the APA, the NRC may not exceed the statutory authority or limits granted to it by the NWPA. The most the NRC can do 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 no dispute that Holtec'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.” 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.* Here, the ASLB is flouting the same mandates and obvious design of the NWPA, by accepting a license application that is based on the unlawful assumption that the DOE will take title to spent fuel before a repository is licensed and operating. 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. And as in *Nat'l Ass'n of Regulatory Util. Comm'rs*, the APA prohibits such conduct.

B. Even Assuming for Purposes of Argument the Existence of an Exception to 5 U.S.C. §706(2)(C), the ASLB’s Rationalization for the Unlawful License Provision is So Speculative as to Constitute Arbitrary and Capricious Decision-Making.

As discussed above, the APA precludes the NRC from accepting license provisions that violate the NWPA, because such license provisions exceed the NRC’s statutory authority to grant. Even assuming for purposes of argument that the APA would countenance the ASLB’s disregard of the NWPA, the ASLB’s rationalization that Congress may change the NWPA in the future is unreasonable, unfair, arbitrary, and capricious, and therefore fails to satisfy 5 U.S.C. § 706(2)(A).

The ASLB’s denial of Beyond Nuclear’s contention rests on a “possibilit[y]:” that Congress may one day change the NWPA to allow the now-unlawful license provisions proposed by Holtec. LBP-19-04, slip op. at 27. NRC’s previous attempts to speculate about future congressional action, however, have been firmly rejected by the courts. For example, when the NRC 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 D.C. Circuit Court of Appeals warned:

A judicial green light for such a step—allowing agencies to ignore statutory mandates and prohibitions based on agency speculation about future congressional action—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.

In re Aiken Cty., 725 F.3d 255, 260 (D.C. Cir. 2013); *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.”). The court refused to allow the NRC to ignore the “statutory mandates or prohibitions” of the NWPA as it was currently drafted. *Id.* at

260. By the same token, it is arbitrary, capricious, and unreasonable to assume the NRC can ignore the mandates of the NWPA now.

Moreover, allowing the NRC to rely on speculative changes to the law would lead to unpredictable and unreasonable outcomes. There would be no limit to the fantasies that license applicants could spin based on hypothetical scenarios. This would not only be wasteful of the government's time in reviewing applications, but would be unfair to the public. The NRC's regulations for contention admissibility 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." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). *See also* 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). 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, with no basis in 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-19-04, slip op. at 32-33.

Finally, agency decisions must 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. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining when an agency rule violates the APA). Here, the ASLB is speculating as to the changes Congress may make to the NWPA, and approving the issuance of a license based on that speculation. In particular, the ASLB presumes that the NWPA will be amended to allow for DOE ownership of nuclear fuel at the CISF, but will not contain any additional requirements. Thus, the ASLB views private licensees and the DOE as easily swappable as owners of the spent fuel:

If Congress decides to amend the NWPA to allow DOE to take title to spent nuclear fuel before a national nuclear waste repository becomes operational, the only difference would be that DOE could then lawfully contract with Holtec to store the same spent fuel that presently belongs to the nuclear power plant owners. The NRC Staff assures us that it is reviewing Holtec’s application in light of both possibilities: “[T]he Staff bases its safety and environmental reviews on the application as presented, which seeks a license on the basis that either DOE or private entities may hold title to the waste.’

LBP-19-04, slip op. at 34. Without a crystal ball, however, the ASLB cannot predict how Congress may amend the NWPA and what factors it may require the NRC to consider before issuing a license. If these “relevant factors” are unknown, the NRC has no way of making a rational determination now. *See, Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43.⁴

For these reasons, the ASLB grossly erred in concluding there would be “no discernable purpose” in requiring Holtec to remove portions of its application that refer to federal ownership of spent fuel during transportation and storage. LBP-19-04, slip op. at 34.

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 Holtec’s license application. However, Beyond Nuclear does not seek a remand of its contention to the ASLB; instead, Beyond Nuclear requests the Commission to rule that all provisions in Holtec’s license application that violate the NWPA must be removed from the application. This relief is appropriate because there is no dispute between the parties on the facts underlying Beyond Nuclear’s contention, and thus no purpose would be served by a remand.⁵

⁴ For example, the NRC Staff’s “environmental review,” referred to in LBP-19-04, slip op. at 34, could change significantly if the DOE were the owner of the spent fuel. Instead of an NRC environmental review to support a single private business proposal, the DOE – as the federal agency with ultimate responsibility for disposal of spent fuel – would be required to conduct a broad and comprehensive environmental review that covered the entire U.S. strategy for storage and disposal of spent fuel. There is simply no comparison between the scale of environmental analysis and range of alternatives for an EIS prepared by the NRC for a single private spent fuel storage facility, and an EIS for a government proposal to carry out a nation-wide scheme for storage and disposal of spent fuel.

⁵ Beyond Nuclear also contends that the issue of Holtec’s non-compliance with the NWPA and the APA is inappropriate for consideration by the ASLB because it is beyond the scope of the ASLB’s adjudicatory proceeding and is not material to the findings the NRC must make to issue a license to Holtec. *See* Hearing Request 10-11, Motion to Dismiss at 2. Neither the ASLB nor the Commission has addressed the issue, however.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2019, I posted a copy of BEYOND NUCLEAR'S NOTICE OF APPEAL OF LBP-19-04 and BEYOND NUCLEAR'S BRIEF ON APPEAL OF LBP-19-04 on the NRC's Electronic Information Exchange System.

___/signed electronically by/___

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