ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1187
(Consolidated with Nos. 21-1225, 21-1104, and 21-1147)

In the United States Court of Appeals
For the District of Columbia Circuit

BEYOND NUCLEAR, INC., ET AL.

Petitioners

v.

U.S. NUCLEAR REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,

Respondents

HOLTEC INTERNATIONAL,

Intervenor for Respondents

On Petition for Review of Action by the U.S. Nuclear Regulatory Commission

INITIAL BRIEF OF INTERVENOR HOLTEC INTERNATIONAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies the following:

(A) Parties and Amici

Except for amicus curiae Nuclear Energy Institute, Inc. ("NEI"), all parties, intervenors, and amici appearing in this Court are listed in the Brief for Federal Respondents.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Federal Respondents.

(C) Related Cases

A list of related cases appears in the Brief for Federal Respondents.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and D.C. Circuit Rule 26.1, Holtec International ("Holtec") submits the following corporate disclosure statement. Holtec is a corporation organized and existing under the laws of the State of New Jersey with its headquarters in the State of Florida. Holtec has received a U.S. Nuclear Regulatory Commission license to construct and operate an away-from-reactor spent

fuel storage site in Lea County, New Mexico. Holtec is not a publicly held company, and no other publicly held company has a 10 percent or more equity interest in Holtec.

s/ Anne Leidich
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GLOSSARY OF ABBREVIATIONS

AEA	Atomic Energy Act
AFR	Away-From-Reactor
APA	Administrative Procedure Act
DEIS	Draft Environmental Impact Statement
DOE	U.S. Department of Energy
DTS	Dry Transfer System
DWM	Don't Waste Michigan
FEIS	Final Environmental Impact Statement
GEIS	Generic Environmental Impact Statement
NEI	Nuclear Energy Institute
NEPA	National Environmental Policy Act
NRC	U.S. Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act
SAR	Safety Analysis Report

INTRODUCTION

This proceeding involves the issuance of a spent nuclear fuel storage license (the "License") by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") under the Atomic Energy Act of 1954, as amended ("AEA"), and NRC regulations at 10 C.F.R. Part 72. The License authorizes a private company, Holtec International ("Holtec"), to temporarily store spent fuel for up to forty years at a site in southeastern New Mexico.

The AEA establishes the use of an adjudicatory hearing process in which any member of the public may challenge Commission licensing actions once they establish judicial standing and present an adequate challenge to the application for the Commission license. The Petitioners[1] proposed numerous challenges (i.e., "contentions") to Holtec's License Application under this process.

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[1] Petitioners are (1) Beyond Nuclear; (2) Don't Waste Michigan ("DWM") (which also includes Citizens' Environmental Coalition; Citizens for Alternatives to Chemical Contamination; Nuclear Energy Information Service; Public Citizen, Inc.; San Luis Obispo Mothers for Peace; Sustainable Energy and Economic Development Coalition; and Leona Morgan); and Sierra Club (together with DWM, the "Environmental Petitioners"); and (3) Fasken Land and Minerals, Ltd., and Permian Basin Land and Royalty Owners (together "Fasken").

The contentions were initially considered by the NRC's Atomic Safety and Licensing Board ("Board"), an independent tribunal of three administrative law judges. The Board found that all the Petitioners had judicial standing, except for DWM, who has since joined with Sierra Club to pursue its appeal. The Board also considered all but one of the contentions brought in this case, and, after many rounds of briefing and several oral arguments, ultimately rejected all of the proposed contentions for failing to meet the Commission's well-established contention admissibility standards in 10 C.F.R. § 2.309 and its procedural requirements in 10 C.F.R. § 2.326. Petitioners appealed the Board decisions, and the Commission affirmed those decisions in three orders: CLI-20-4 (Apr. 23, 2020), CLI-21-4 (Feb. 1, 2021), and CLI-21-7 (Apr. 28, 2021). The Commission also considered and rejected the one contention not yet dealt with by the Board, Fasken Contention 3. In its decisions, the Commission reviewed the Board's detailed justification for rejecting the contentions and ultimately affirmed the Board decisions under its established policy of deferring to the Board unless an appeal points to an "error of law or abuse of discretion." *Beyond Nuclear v. N.R.C.*, 704 F.3d 12, 18 (1st Cir. 2013). These Commission decisions,

CLI-20-4, CLI-21-4, and CLI-21-7, are what Petitioners must appeal under the Hobbs Act.

Petitioners pay lip service to these orders, often referring to them summarily without addressing the reasoning behind the Commission decisions. This is not enough. Under the Administrative Procedure Act ("APA"), this court can only reverse the Commission decisions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); *see also Blue Ridge Env'tl Def. League v. N.R.C.*, 716 F. 3d 183, 195 (D.C. Cir. 2013), and this Court defers to decisions rejecting contentions as long as the Commission "reasonably" applies its contention admissibility rules. *Blue Ridge*, 716 F. 3d at 196.

Petitioners' failure to challenge the reasoning behind the Commission decisions does not meet these high standards on review. For this reason, the Petitions for Review should be denied.

STATEMENT OF JURISDICTION

Holtec does not dispute that this Court has subject matter jurisdiction to consider these Petitions. Holtec also does not dispute the Petitioners' standing.

STATEMENT OF THE ISSUES

1. Whether Petitioners have established an APA violation with regard to the Commission's "final orders," when Petitioners misrepresent or disregard the rationale behind the Commission's findings in those orders.
2. Whether the Court should follow the demonstrably erroneous Fifth Circuit panel decision in Texas, *Texas v. N.R.C.*, 78 F.4th 827 (5th Cir. 2023), and ignore its own controlling precedent in *Bullcreek v. N.R.C.*, 359 F. 3d 536 (D.C. Cir. 2004).

STATUTES AND REGULATIONS

All applicable statutes and regulations are provided in the addenda provided by the Petitioners and Federal Respondents.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

The primary statute governing NRC authority in this matter is the AEA, in which the "[NRC] was given broad regulatory authority over the development of nuclear energy," *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 525-26 (1978), and the "production, possession, and use of three types of radioactive materials—source

material, special nuclear material, and byproduct material." *Train v. Colo. Pub. Int. Rsch. Grp.*, 426 U.S. 1, 5 (1976). This statute also "confers on the NRC authority to license and regulate the storage and disposal of [spent nuclear] fuel." *Bullcreek*, 359 F. 3d at 538.

Second is the National Environmental Policy Act ("NEPA"), which requires the NRC to consider environmental impacts, unavoidable adverse environmental effects, and reasonable alternatives to major Federal actions significantly affecting the quality of the human environment. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). NEPA "does not require [a] crystal ball inquiry." *Nat. Res. Def. Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (internal quotations omitted). Nor does it call for certainty or precision. When faced with uncertainty, NEPA requires "[r]easonable forecasting." *Scientists' Inst. for Pub. Info., Inc. v. A.E.C.*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). An agency is obligated to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

While Beyond Nuclear and Environmental Petitioners also assert that a third statute—the Nuclear Waste Policy Act ("NWPA")—has relevance here, Holtec disagrees. The NWPA establishes the Federal Government's responsibility for disposing of spent fuel and authorizes temporary storage of spent fuel by the *Federal Government*. It does not govern storage of privately-owned spent fuel. *See Bullcreek*, 359 F. 3d at 543.

These statutes, corresponding NRC regulations, and their respective relationships to this proceeding are further described in Federal Respondents' Brief at 4-8.

II. Commission Adjudicatory Proceeding on Holtec's Application

The NRC's adjudicatory process is the method by which interested parties have an opportunity to participate in a contested hearing on a proposed license, subject to the NRC's procedural requirements. *See* AEA § 189(a), 42 U.S.C. § 2239(a). *Blue Ridge*, 716 F.3d at 187 (D.C. 2013). For the Holtec License, this process started on July 16, 2018, when the NRC published a notice in the *Federal Register* providing the public an opportunity to participate in the Holtec licensing proceeding by (1) requesting a formal evidentiary hearing to challenge the Application and

(2) petitioning for leave to intervene in that proceeding. *See* Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

In September 2018, Petitioners Beyond Nuclear and Fasken filed motions to dismiss Holtec's Application, while other Petitioners submitted hearing requests and petitions to intervene in the adjudicatory proceeding, seeking to challenge Holtec's license application. LBP-19-4, 89 N.R.C. 353, 361 (JA___).

In October 2018, the Secretary of the Commission referred the petitions to intervene to the Board for consideration under the NRC's regulations governing petitions to intervene and contention admissibility in 10 C.F.R. § 2.309, along with Beyond Nuclear and Fasken's motions to dismiss the Application. *Id.* at 362 (JA___). A three-judge Board was then established to adjudicate these filings.

The NRC's regulations also permit the late filing of new or amended contentions *after* the initial intervention deadline provided that they are based on materially different information that was not previously available, 10 C.F.R. § 2.309(c), and parties may seek to reopen the

hearing record subject to additional requirements. 10 C.F.R. § 2.326(a). Of particular relevance here, Fasken proposed additional late-filed contentions that would have required reopening the record. *See* CLI-21-7, 93 N.R.C.215, 219-20 (JA___-___).

Following several rounds of briefing between 2018 and 2020, and two oral arguments, the Board ultimately issued orders denying or dismissing all challenges filed by the Petitioners and terminating the adjudicatory proceeding. *See, e.g.,* LBP-19-4, 89 N.R.C. 353 (JA___); LBP-20-6, 91 N.R.C. 239 (JA___); LBP-20-10, 92 N.R.C. 235 (JA___).

Petitioners appealed certain aspects of the Board's orders to the Commission. On April 23, 2020, the Commission affirmed the Board's orders, except for Sierra Club's Contentions 15, 16, 17, and 19 which were remanded to the Board for additional consideration. CLI-20-4, 91 N.R.C. 167, 191 (JA__, JA___). The Board considered those contentions and rejected them in LBP-20-6, 91 N.R.C. 239, 241 (JA__, JA___). The Board also rejected late-filed contentions from Fasken in LBP-20-10, 92 N.R.C. 235, 237 (JA___, JA___). The Commission subsequently affirmed these Board orders because Sierra Club and Fasken failed to demonstrate any

error of law or abuse of discretion by the Board. CLI-21-4, 93 N.R.C. 119, 120 (JA___, JA___); CLI-21-7, 93 N.R.C. 215, 217 (JA___, JA___).

III. NRC Staff Review of Holtec's Application

In parallel with the adjudicatory process, the NRC Staff performed its safety and environmental reviews of Holtec's application.

On March 20, 2020, the NRC Staff issued a Draft Environmental Impact Statement ("DEIS") and requested public comment. Holtec International HI-STORE Consolidated Interim Storage Facility Project. 85 Fed. Reg. 16,150 (Mar. 20, 2020). The DEIS comment period was extended until September 22, 2020, resulting in a 180-day comment period. Holtec International HI-STORE Consolidated Interim Storage Facility Project, 85 Fed. Reg. 37,965 (Jul. 22, 2020). The NRC Staff accepted all public comments (approximately 4,800) and published its responses in the Final Environmental Impact Statement ("FEIS"), made available to the public on July 13, 2022. Holtec International HI-STORE Consolidated Interim Storage Facility Project, 87 Fed. Reg. 43,905 (Jul. 22, 2022).

On May 9, 2023, the NRC published its Final Safety Evaluation Report, documenting the agency's technical, scientific, and engineering

analyses on public health and safety issues, and its conclusion that the proposed facility satisfied all regulatory requirements and adequately protected public health and safety. The NRC Staff then issued Materials License No. SNM-2516 to Holtec.

SUMMARY OF ARGUMENT

Petitioners fail to demonstrate any arbitrary or capricious action by the Commission, largely because Petitioners on appeal fail to directly challenge the reasoning in the Commission's decisions. In each of its decisions, the Commission set forth detailed reasons for affirming the underlying Board decisions and finding each contention inadmissible. Yet, these detailed reasons are disregarded and Petitioners instead repeat their prior claims and misrepresent the Commission's decisions on appeal. By not challenging the agency's decisions, Petitioners fail to demonstrate that they are arbitrary or capricious.

Even if Petitioners had addressed the Commission decisions, they would not have been able to establish any arbitrary or capricious agency action, because there was none. The Commission followed its contention admissibility standards and adjudicatory rules and correctly found that all of the Petitioners' contentions were inadmissible, untimely, or

procedurally inadequate. These decisions were neither arbitrary nor capricious.

For these and all of the other reasons explained below, Petitioners have no valid complaint under the APA.

STANDARD OF REVIEW

This Court reviews NRC decisions under the APA, and will affirm decisions that are not otherwise "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Blue Ridge*, 716 F. 3d at 195. On environmental issues, the Court must "find that [Commission] committed a clear error of judgment," *Blue Ridge*, 716 F. 3d at 195, and on technical issues the Court is "obligated to defer to the wisdom of the agency, provided its decision is reasoned and rational." *Id.* (internal quotations omitted).

On the Commission's interpretations of its own rules, including contention admissibility and the reopening standards, the burden is even higher: the court "give[s] 'controlling weight' to the agency's constructions" unless "plainly erroneous or inconsistent with the regulation." *Id.* (internal quotations and citation omitted), Because this Court has held that the NRC's contention admissibility rules "do not

facially violate the [AEA] or the APA" and are "consistent with NEPA," the Court should defer to the Commission's decision rejecting contentions as long as the NRC reasonably applied those rules. *Id.* at 196. This Court has also previously endorsed the Commission's "high standards for reopening closed hearings and the stringency of those criteria." *Id.* at 195-96. (internal quotations omitted).

ARGUMENT

I. Beyond Nuclear's Claims Should Be Rejected

With respect to Beyond Nuclear's claims, Holtec agrees with the responses set forth by Federal Respondents and Amicus Curiae Nuclear Energy Institute ("NEI"). Fed-Br. at 41-48; NEI-Br. at 22-24. Even if the U.S. Department of Energy ("DOE") cannot currently take ownership of fuel stored at Holtec's facility, Holtec can (and will) store spent fuel owned by private parties. This is indisputably a legally authorized pathway for Holtec to use the license. Moreover, there is no bar against Holtec contemplating a future where DOE is permitted to store spent fuel at the facility.

II. The Commission's Rejection of Environmental Petitioners' Claims Was Neither Arbitrary Nor Capricious

Environmental Petitioners submitted multiple contentions in their hearing requests and petitions to intervene. In its lengthy decision, the Board rejected these contentions as inadmissible for failing to satisfy one or more of the admissibility criteria in 10 C.F.R. § 2.309(f)(1). LBP-19-4, 89 N.R.C. at 358 (JA__). Environmental Petitioners appealed part of this decision to the Commission. While the Commission substantially affirmed most of the Board's rulings, it reversed in part and remanded for further consideration four contentions (Sierra Club Contentions 15, 16, 17, and 19), and remanded two late-filed contentions to the Board for initial consideration. CLI-20-4, 91 N.R.C. at 171, 191 (JA__, JA___).

After further consideration, the Board determined that these remanded contentions were not admissible. LBP-20-6, 91 N.R.C. at 241 (JA__). Sierra Club appealed this decision, and the Commission affirmed the Board's decision, finding that Sierra Club failed to point to any error of law or abuse of discretion by the Board. CLI-21-4, 93 N.R.C. at 119 (JA__).

According to the Environmental Petitioners' "Certificate as to Parties, Rulings, and Related Cases," they are seeking review of

Commission order CLI-20-4 (but not CLI-21-4). Env'tl-Br. at 5. However, to properly challenge the Commission decisions on the remanded contentions, Environmental Petitioners must also challenge the Commission's ultimate decision on those contentions in CLI-21-4. Yet, Environmental Petitioners hardly mention CLI-21-4. With regards to its other contentions, Environmental Petitioners also repeatedly mischaracterize and ignore much of the Commission's rationale in CLI-20-4. As a result, Environmental Petitioners neither demonstrate that Commission decision was arbitrary or capricious, nor that the Commission erred in applying its adjudicatory procedures or rules.

A. The AEA Allows the NRC to License the Proposed Facility, and the NWPA Does Not Revoke that Authority.

Environmental Petitioners claim that this Court should follow the Fifth Circuit panel decision in *Texas v. N.R.C.*, 78 F.4th 827 (5th Cir. 2023), and find that the AEA does not authorize the NRC to license spent fuel storage and that the NWPA prohibits licensing of private away-from-reactor ("AFR") storage facilities. The Court should reject this claim for the two reasons already set forth by Government Respondents: (1) this Court has already rejected this argument in *Bullcreek*, 359 F.3d at 538-

43, after performing a detailed analysis of the AEA and NWPA; and (2) Environmental Petitioners never appealed this issue to the Commission. Fed-Br. 64-69. *See also* NEI-Br. 16-21.

The Court, however, should also reject this claim for a third reason: the panel decision in *Texas* misreads and misunderstands key provisions of the AEA to reach a demonstrably erroneous conclusion that the AEA does not provide the NRC with authority over spent fuel.

First, the panel narrows the NRC's exclusive authority over special nuclear material by claiming that the AEA § 53, 42 U.S.C. § 2073, does not confer "a broad grant of authority to issue licenses for any type of possession of special nuclear material." *Texas*, 78 F.4th at 841. On the contrary, the AEA does exactly that. In AEA § 53(a)(4), 42 U.S.C. § 2073(a)(4), Congress clearly provided a broad grant of authority for the NRC to issue licenses for the possession of special nuclear material for "such other uses as the Commission determines to be appropriate." The panel treats this provision as statutory surplusage limited by the preceding clauses (AEA § 53(a)(1)-(4), 42 U.S.C. § 2073(a)(1)-(3)). *Texas,* 78 F.4th at 841. But Congress added subsection (a)(4) in 1958 specifically "to authorize the Commission to issue licenses for the possession of

special nuclear material within the United States for uses which do not fall expressly within the present provisions of subsection 53a [42 U.S.C. § 2073(a)(1)-(3)]," including "licenses for incipient new [i]ndustrial uses." Joint Committee on Atomic Energy, Amending the AEA of 1954, as Amended, S. Rep. No. 85-1944, at 1 (2d Sess. 1958).

Second, the *Texas* panel narrows the NRC's authority over byproduct material by turning the definition of byproduct material on its head. The panel posits that the definition of byproduct material should be interpreted in light of the example byproduct material in AEA § 11(e)(3)-(4), 42 U.S.C. § 2014(e)(3)-(4), radium-226, and, thus, would limit the Commission in the types of byproduct materials covered under the AEA to those like radium-226 that "emit radiation for significantly less time than spent nuclear fuel." *Texas*, 78 F.4th at 841. This ignores the plain text of the AEA which has always, since 1954, defined byproduct material as "any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material," Pub. L. No. 83-703, 68 Stat. 919, 923 (Aug. 30, 1954) (defining byproduct material in the same terms as currently used in 42 U.S.C. § 2014(e)(1)). Once

again, the Texas panel would read a significant provision of the AEA into statutory surplusage.

The panel also ignores the purpose of including radium-226 in the AEA: to define the bounds of the NRC's authority over *naturally occurring* radioactive material. 42 U.S.C. § 2014(e)(4). Indeed, the provisions regarding radium-226 were added to that AEA *in 2005* to close a gap in the NRC's authority over such materials, Pub. L. No. 109-58, 119 Stat. 594, 806, 807 (Aug. 8, 2005), not to modify the NRC's longstanding authority over materials made radioactive in a nuclear power reactor. 42 U.S.C. § 2014(e)(1).

The panel in Texas also erroneously found that the NWPA would take away any NRC's authority over AFR spent fuel storage. On the contrary, while the AEA gives the Commission authority to license AFR spent fuel storage, the NWPA never takes it away. The NWPA only establishes a mechanism for the DOE to provide a limited amount of interim spent fuel storage. 42 U.S.C. § 10155(h). While "nothing in [the NWPA] shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition" of AFR facilities, *id.*, neither this provision, nor any other provision in the NWPA explicitly

repeals the Commission's existing statutory authority over licensing AFR facilities.

In fact, during consideration of the NWPA, Congress explicitly recognized the existence and licensing of privately-owned AFR facilities. As the NRC Executive Director for Operations testified during the development of the NWPA:

> The Commission has stated with the issuance of its regulation, 10 C.F.R. Part 72, which provides the licensing criteria for independent spent fuel storage installations, that there are no compelling safety or environmental reasons generally favoring either reactor sites or away from reactor sites. Thus, Part 72 establishes the licensing framework for such storage either at reactor sites or *away-from- reactors* using either wet or dry storage technologies.

Radioactive Waste Legislation: Hearings on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2881, and H.R. 3809 Before the Subcomm. On Energy and the Environment of the House Comm. On Interior and Insular Affairs, 97th Cong. 326 (1981) (emphasis added).

Nowhere do the debates suggest that these licenses would become invalid after the NWPA was enacted. In fact, Rep. Corcoran of Illinois recognized that the Morris, Ill. AFR storage facility would continue to operate and delays in permanent disposal would "put[] even greater pressure on the AFR facility at Morris." 128 Cong. Rec. 32,945 (1982).

Nor is there any hint that after the NWPA became law, the Morris facility would become the last of its kind.

In fact, the Morris facility was repeatedly discussed in the Congressional debates for other reasons, as Rep. Corcoran worked to prevent Federal Government ownership of the facility. *See* 128 Cong. Rec. 32,560 (1982) (expressing pleasure that "the compromise bill prohibits the Federal Government from taking over the interim spent fuel storage facility in Morris, Ill."). This debate led to the NWPA's limitation on the "use, purchase, lease, or other acquisition" of AFR storage facilities not already owned by the Federal Government. 42 U.S.C. § 10155(h). A Senate bill preceding the NWPA would have "grant[ed] the Secretary of Energy the authority to 'construct, acquire or lease one or more [AFR] facilities.'" 128 Cong. Rec. 32,946 (1982). Rep. Corcoran objected, and Section 10155(h) was added to address "the heart of the problem that many of us have, that is, the concern about whether or not private AFR storage facilities would be vulnerable to a federal takeover under [the NWPA]." 97 Cong. Rec. 28,033 (1982). Thus, 42 U.S.C. 10155(h) would "prohibit the Secretary [of Energy] from providing

capacity for the storage of spent nuclear fuel from civilian nuclear power reactors at [Morris, Ill.]." *See* 128 Cong. Rec. 32,560, 32,946 (1982).

Section 10155(h) did not explicitly repeal the Commission's authority to license AFR facilities. Nor was it an implied repeal, since the NWPA and the AEA can co-exist and both be given effect. *Branch v. Smith*, 538 U.S. 254, 273 (2003) (finding implied repeal when provisions in two statutes are in "irreconcilable conflict," or a new act "covers the whole subject of the earlier one and 'is clearly intended as a substitute.'"). There is no inconsistency for private industry to license at-reactor or AFR spent fuel storage pursuant to the AEA, while the Federal Government also provides some interim spent fuel storage, if needed. 42 U.S.C. § 10155(b)(l)(B).

In short, in enacting the NWPA, Congress neither repealed, nor intended to repeal, the Commission's authority for the licensing of off-site spent fuel storage under the AEA. That authority remains wholly intact. These significant flaws in the panel decision in *Texas* are yet another reason for this Court to reject Environmental Petitioners' request to adopt that decision.

B. The Commission Properly Rejected Environmental Petitioner's False Statements Claims.

In an attempt to revive Sierra Club Contention 26 and Joint Petitioners Contention 14, Environmental Petitioners claim that the Application contains false statements because references to spent fuel ownership by reactor owners are "just a fig leaf." Env'tl-Br at 24. Petitioners' support for this claim comes from an alleged "Freudian slip" in the Holtec Application and a comment from Holtec in 2018 that the spent fuel storage facility's "deployment will ultimately depend on the DOE and the U.S. Congress." *Id.* From this sentence, Petitioners invent the claim that "[t]he purpose of including nuclear plant owners [in the Application] was to provide a distraction and a cover up of Holtec's true intent to have the [DOE] own the waste." *Id.* at 13.

The Commission rejected Sierra Club Contention 26 and Joint Petitioners Contention 14 both because there was no actual "willful misrepresentation" in the Holtec Application and because the contentions did not raise an issue material to the licensing proceeding. CLI-20-4, 91 N.R.C. at 169-70 (JA ___). As correctly recognized by the Board, and agreed upon by the Commission, Holtec has made no misrepresentations, willful or not. Holtec openly "acknowledges that it

hopes Congress will change the law to allow DOE to contract directly with Holtec." *Id.* at 192 (JA____). In addition, "Holtec itself pointed out that the need for the project could be reduced or eliminated if DOE were to build a permanent waste repository." *Id.* Thus, "Holtec has been transparent that deployment of this project may depend to some extent on actions of DOE and Congress," and Holtec's statements are all consistent with the Application which would allow for either privately-owned and/or DOE-owned spent fuel at the Holtec facility. *Id.* Environmental Petitioners do nothing to challenge this explanation.

Nor do Environmental Petitioners challenge the Commission finding that, even if false statements were to exist in this case—they do not—the statements would be irrelevant to the licensing proceeding, as the material issue here is "whether Holtec has shown that it can safely operate the facility." *Id.* at 193. Aside from summarily pointing to Beyond Nuclear's separate brief, which should be rejected for the reasons set forth in Federal Respondents' brief, Fed-Br. at 41-48, Environmental Petitioners do nothing to challenge this finding. Env'tl-Br. at 27-28.

In sum, Environmental Petitioners have done nothing to demonstrate that the Commission's decision on this matter is arbitrary or capricious.

C. The Commission Properly Rejected Sierra Club's Geologic Impacts Claims.

Environmental Petitioners further claim that the Commission mistakenly rejected a number of contentions challenging the treatment of geological impacts in the License Application, including Sierra Club Contentions 11, 15, 16, 17, and 19. Env'tl-Br. at 28-34. Environmental Petitioners fail to establish that the Commission acted in an arbitrary or capricious manner in dismissing each of these contentions for the reasons set forth below.

1. The Commission Properly Rejected Sierra Club's Contention 11.

In Contention 11, Sierra Club alleged that the Application inadequately discussed earthquake risks to the facility (including seismic activity induced by oil and gas recovery operations), largely based on a 2018 Stanford study, which purportedly "documented the existence of prior earthquakes in southeast New Mexico and the existence of numerous faults in the area in and around the proposed Holtec site." CLI-20-4, 91 N.R.C. at 185 (JA____) (internal quotations omitted).

Environmental Petitioners now allege that the Commission mistakenly rejected this contention by "ignor[ing] the 2018 Stanford study." Env'tl-Br. at 29. Environmental Petitioners also dispute the Commission finding that their argument about "new geologic faults" was first raised on appeal. *Id.*

This claim, however, cannot be reconciled with the Commission's actual decision. The Commission found, and Environmental Petitioners do not dispute, that Sierra Club "provided no evidence of recent seismic activity near the site," and "that the maps included in the Stanford Report seemed to confirm, rather than contradict, the [Safety Analysis Report's ("SAR's")] statements that there were no Quaternary faults within the immediate area of the Holtec site." CLI-20-4, 91 N.R.C. at 186 (JA____). Moreover, the Commission found that while the Stanford Report discussed recent earthquakes, it did not establish stronger earthquakes or place them closer to the Holtec facility. *Id.* (JA____). The Commission also found that the Stanford Report did not demonstrate that "oil and gas activities are inducing new geologic faults" or "that new faults or earthquakes are getting closer to the Holtec site." *Id.* at 187. (JA____) (internal quotations omitted). As a result, the Commission

found that Sierra Club failed to raise a genuine dispute with the Application.

Environmental Petitioners do not challenge any of these findings and therefore fail to establish that the Commission's reasoned decision is arbitrary or capricious.

2. The Commission Properly Rejected Sierra Club's Contention 15.

In Contention 15, Sierra Club argued that Holtec failed to establish that "shallow alluvium is likely non-water bearing at the Site." CLI-21-4, 93 N.R.C. at 122 (JA___). The Board ultimately rejected this claim for failing to raise a genuine dispute with the Application, and that decision was upheld by the Commission in CLI-21-4. CLI-21-4, 93 N.R.C. at 122 (JA___); LBP-20-6, 91 N.R.C. at 242-244 (JA___-____).

Now on appeal, Environmental Petitioners largely repeat their prior assertions. Environmental Petitioners also allege the Commission "erred in claiming that Sierra Club's expert was incorrect in saying there was only one monitoring well at the interface of the alluvium and the Dockum formation," because while the Commission identified "four additional wells," their expert "was clear in his report that the only relevant well would be at the interface." Env'tl-Br. at 31.

This misrepresents the reasoning behind the Commission's decision. The Commission's concern was not the number of wells, it was that Petitioners "*did not address* the Environmental Report's discussion of [these] groundwater monitoring wells." CLI-21-4, 93 N.R.C. at 122 (JA___) (emphasis added). Sierra Club's assertion that Holtec's conclusion was "based entirely on the absence of water in a single monitoring well observed in 2007," incorrectly reads the Application. *Id.* (JA___). Moreover, while Sierra Club dismisses the other wells as irrelevant, it never addressed those wells or the fact that they "were monitored for groundwater throughout the drilling," and "showed that no groundwater was encountered in the shallow alluvium." *Id.* (JA___). Thus, Sierra Club "did not address the Environmental Report's discussion of the groundwater monitoring wells that Holtec drilled to investigate the presence of groundwater." *Id.* (JA___).

Environmental Petitioners do not challenge the Commission's finding that Sierra Club failed to address the content of Holtec's Application as required under the Commission's contention admissibility standards. As a result, Environmental Petitioners failed to establish that the Commission's decision is arbitrary or capricious.

3. The Commission Properly Rejected Sierra Club's Contention 16.

In Contention 16, Sierra Club argued that the Application "does not contain any information as to whether brine continues to flow in the subsurface under the site." CLI-21-4, 93 N.R.C. at 123 (JA___). On appeal, Environmental Petitioners argue that the Commission should not have rejected their expert's mere recitation of questions, as their Contention only needed to point out "deficiencies in the environmental documents." Env'tl-Br. at 32-33.

Environmental Petitioners, however, do not dispute the Commission's detailed findings that "[t]he application acknowledges brine in the shallow groundwater." CLI-21-4, 93 N.R.C. at 123 (JA___). Particularly finding "that the water table [where brine would occur] is below the excavation depth of the facility," and "brine disposal facilities, and the site where brine was located, are on the far side of the site and downgradient of the proposed CISF." *Id.* (JA___). Because Sierra Club, and its expert, failed to dispute this analysis in the Application, the Commission correctly rejected the Contention for lacking factual support to establish a genuine dispute, as required under the contention admissibility standards. *Id.* (JA___). Environmental Petitioners failed

to challenge this reasoning, and thus, fail to establish that the Commission's decision is arbitrary or capricious.

4. The Commission Properly Rejected Sierra Club's Contention 17.

In Contention 17, Sierra Club alleged that neither the Environmental Report nor the SAR discussed the presence of fractured rock. Env'tl-Br. at 33. Environmental Petitioners repeat this claim on appeal. CLI-21-4, 93 N.R.C. at 124 (JA___); Env'tl-Br. at 33. To the contrary, the Commission correctly affirmed the Board's finding that both documents explicitly discuss the presence of "either fractures or tight sandy zones between the depths of 85 and 100 feet" at the site. LBP-20-6, 91 N.R.C. at 245 (JA___); *see* CLI-21-4, 93 N.R.C. at 124 (JA___). Moreover, as recognized in Environmental Petitioners' appeal, Env'tl-Br. at 33, Sierra Club's own expert acknowledged that Holtec's Geotechnical Data Report explicitly documents the presence of fractured rock. CLI-21-4, 93 N.R.C. at 124 (JA___). In light of this, Environmental Petitioners cannot credibly claim it was arbitrary or capricious for the Commission to find that Holtec discussed the presence of fractured rock.

5. The Commission Reasonably Rejected Sierra Club's Contention 19.

In Contention 19, "Sierra Club argued that the Environmental Report did not contain sufficient information to determine whether packer tests were performed correctly." CLI-21-4, 93 N.R.C. at 124 (JA___). The Board and the Commission rejected Contention 19. *Id.* at 125 (JA___). On appeal, Petitioners claim that the Commission rejected their contention "on the grounds that [the expert's] statement was mere speculation." Env'tl-Br. at 34. On the contrary, the Commission rejected Contention 19 not because the expert's statement was "mere speculation," but because Sierra Club did not explain "how the asserted departures [in performing the packer tests] would ultimately have any significance for any analysis or conclusion in the Environmental Report." CLI-21-4, 93 N.R.C. at 125 (JA___). Having failed to even address this finding, Environmental Petitioners fail to establish that the Commission decision is arbitrary or capricious.

D. The Commission Properly Rejected DWM's Volume of Low-Level Radioactive Waste Claims.

Environmental Petitioners next resurrect assertions from DWM's Contention 3, claiming that Holtec underestimates the amount of low-level radioactive waste ("LLRW") to be generated from operations at the

facility. *See* Env'tl-Br. at 34-41. Environmental Petitioners further challenge the Commission decision as finding "that DWM impermissibly challenged the adequacy of [spent fuel facility] decommissioning analyses in the Continued Storage [Generic Environmental Impact Statement ("GEIS")]." *Id.* at 39.

The Commission did reject Petitioners' claims regarding the environmental impacts after the life of the facility (including the repackaging of spent fuel and disposal of spent fuel casks) as an impermissible attack on an existing NRC rule incorporating an already-existing NRC Staff analysis of impacts. CLI-20-4, 91 N.R.C. at 205 (JA____). The Commission, however, also affirmed the Board's decision rejecting Contention 3 as to the environmental impacts over the life of the facility for failing "to include support for its assertions of inadequacy regarding Holtec's evaluation of LLRW impacts." CLI-20-4, 91 N.R.C. at 205 (JA____). For example, "the Board found that [DWM] had not proffered any evidentiary support for their claim that the concrete pads and casks will become contaminated or for their claim that the canisters will need to be replaced during the operating life of the facility." *Id.* (JA____). In addition, while Petitioners claimed that "evidence of

significant volumes of unremediable concrete, soil and canisters" exists, they did not point to any such evidence. *Id.* at 204 (JA____). Nor could Petitioners point to "any factual support for their assertions that concrete at the CISF would become activated or that concrete decontamination would not be possible," except self-proclaimed "common sense." *Id.* at 204-05 (JA____).

The Commission also rejected Contention 3 for improperly challenging a rule (including an existing analysis of environmental impacts after the life of the spent fuel storage facility) and lacking evidentiary support for unaddressed environmental impacts during facility's life. *Id.* at 205 (JA____). On appeal, Environmental Petitioners ignore the Commission's finding that it lacked evidentiary support for its claims regarding the life of the facility. As such, Environmental Petitioners fail to establish that the Commission decision is arbitrary or capricious.

E. The Commission Properly Rejected DWM's Continued Storage GEIS Claims.

In Contention 4, DWM argued that Holtec "cannot rely on the Continued Storage [GEIS's] generic environmental analysis of transportation and operational accidents because the proposed [Holtec

facility] differs from the type of facilities contemplated by the Continued Storage GEIS, particularly with respect to its lack of a [Dry Transfer System ("DTS")]." CLI-20-4, 91 N.R.C. at 205 (JA ____). On appeal, Environmental Petitioners continue to allege that "Holtec's uniqueness requires a site-specific NEPA analysis," Env'tl-Br. at 42, and the Holtec facility "cannot be excluded from scrutiny under NEPA by virtue of the [GEIS], which is codified at 10 C.F.R. § 51.23." *Id.* at 41.

The Commission did not reject Contention 4 for that reason. There is no dispute that Holtec's facility requires a site-specific NEPA analysis. The Commission rejected this contention because Holtec *did* perform a site-specific NEPA analysis, and the contention ignored that analysis. As the Board found, and the Commission affirmed, Holtec's Environmental Report "contains a site-specific impact analysis," CLI-20-4, 91 N.R.C. at 206 (JA ____) and Holtec "evaluated the site-specific environmental effects associated with the construction and operation of the proposed CISF." *Id.* at 207 (JA____). It was DWM that failed to properly challenge this facility- and site-specific analysis on appeal to the Commission. *Id.* (JA____).

Environmental Petitioners again do not challenge the Commission's finding. Instead, Environmental Petitioners allege Holtec was excused from performing the detailed site-specific analysis that Holtec did perform that is in the Environmental Report that DWM failed to challenge. *Id.* (JA____). Environmental Petitioners do not demonstrate that the Commission's finding that a site-specific analysis exists was arbitrary and capricious.

To the extent that Environmental Petitioners are arguing that Holtec's site-specific analysis was inadequate because it did not include the impacts of a DTS facility, Env'tl-Br. 44-45, the Commission correctly found that Holtec is not required to build a DTS. CLI-20-4, 91 N.R.C. at 207 (JA____). Moreover, even if "Holtec later decides to construct and operate a DTS, a separate licensing action would be required, which would entail additional environmental review." CLI-20-4, 91 N.R.C. at 207 (JA ___). Environmental Petitioners do not say how it is arbitrary or capricious for the Commission to wait to perform an environmental review when a facility is actually planned and licensed.

F. The Commission Properly Rejected DWM's Start Clean/Stay Clean Claims.

DWM Contention 7 decried Holtec's "start clean/stay clean" policy, because it calls for the return of defective canisters to their original destination in approved transportation casks, therefore purportedly "effectively *intend[ing]* radiation exposure (even excessive radiation exposure) on return routes." Env'tl-Br. at 49 (emphasis supplied). Environmental Petitioners further protest the Commission decision that the "[m]ere existence of Holtec's start clean/stay clean policy" does not "undermine the requirements and safety analyses that have generically established the integrity of approved spent fuel canister designs." *Id.* (quoting CLI-20-4, 91 N.R.C. at 208 (JA____)).

While Environmental Petitioners correctly quote the Commission's ultimate decision, they ignore the reasoning behind it. The mere existence of the start clean/stay clean policy does not undermine the Commission's requirements and existing safety analyses because the Licensing Board found that DWM *failed to contest* "those very programs that provide that a transportation accident or breach of canister is not credible." CLI-20-4, 91 N.R.C. at 208 (JA____). In particular, the Commission affirmed a Board finding that:

> Petitioners had not shown: (1) how the spent fuel, when packaged at the reactor site, would leave the site leaking or damaged notwithstanding NRC-approved quality assurance programs; (2) how the spent fuel canister, within its transport overpack cask, would become credibly damaged in an accident scenario that results in an exceedance of dose rates while in transit; and (3) how the sequestration sleeve, as outlined in Holtec's SAR at the time the petitions were due in this proceeding, is an inadequate remedy should the cask and canister somehow become damaged.

Id. at 207-08 (JA____-____). Since DWM failed to even attempt such a showing, the Board's found, and the Commission affirmed, that the contention lacked the required factual or expert support. *Id.* at 208 (JA____). Environmental Petitioners do not challenge this finding or otherwise establish that it is arbitrary or capricious.

G. The Commission Properly Rejected DWM's Transportation Claims.

In Contention 9, DWM alleged that Holtec should have included all of the potential transportation routes for spent fuel in the Application to support its NEPA analysis. Env'tl-Br. at 54-55-. However, the Commission found that:

> [D]etermining exact transportation routes is an issue outside the scope of this licensing proceeding. Furthermore, the use of representative routes in an environmental-impacts analysis to address the uncertainty of actual, future spent fuel transportation routes is a well-established regulatory approach, the foundations of which Joint Petitioners have not challenged.

CLI-20-4, 91 N.R.C. at 209 (JA____).

It would be both premature and unduly burdensome—at the very least a crystal ball exercise—for Holtec to identify all of the potential transportation routes at this point in time and then attempt to evaluate their environmental impacts. Instead, as the Commission recognized, Holtec evaluated the environmental impact of three representative routes. *Id.* (JA____). Holtec then included that impact analysis in ER Section 4.9, which Petitioners did not challenge. *Id.* at 209, n.262 (JA____). Moreover, once actual transportation routes are set in the future, the Commission "reviews and approves" those routes "in conjunction with the Department of Transportation, including consultation with applicable States or Tribes, and coordination with local law enforcement and emergency responders." *Id.* at 209 (JA____).

On appeal, Environmental Petitioners merely restate their initial arguments before the Commission and do not challenge the Commission's ultimate finding that using representative routes is an established regulatory approach. Env'tl-Br. at 55-56. Environmental Petitioners do not point to any regulation or statute requiring more than the use of representative routes.

Environmental Petitioners also argue that Holtec's approach to analyzing transportation impacts is an inappropriate "segmentation" of the NEPA analysis. *Id.* at 55-56. However, the Commission previously rejected this argument as an improper attempt to raise a new argument for the first time on appeal. CLI-204, 91 N.R.C. at 209, n.262 (JA____).

Having failed to address the Commission's reasons for rejecting this Contention, Petitioners fail to establish that it is arbitrary or capricious.

III. The Commission's Rejection of Fasken's Claims Was Not Arbitrary and Capricious.

A. The Commission Properly Found that Fasken's Contentions 2 and 3 Were Procedurally Deficient and Inadequate Under NRC Requirements.

Untangling Fasken claims on appeal necessitates a brief lesson in Fasken's filings before the Board and Commission. On May 7, 2019, the Board issued LBP-19-4 rejecting *inter alia* the initial intervention petition filed by Fasken (with its first contention), terminating the Holtec proceeding. LBP-19-4, 89 N.R.C. at 358 (JA___). While various appeals were pending before the Commission, and the record remained closed, Fasken on August 1, 2019 (ten and a half months after the deadline for filing contentions and more than twelve weeks after the record closed),

raised Contention 2 relating to oil, gas, and mineral extraction at the site. LBP-20-6, 91 N.R.C. at 254 (JA___).

Fasken's proposed late-filed Contention 2 alleged that the Application made "[s]tatements … regarding 'control' over mineral rights below the site" that were "materially misleading and inaccurate" and that relying on these statements "nullifies Holtec's ability to satisfy the NRC's siting evaluation factors." *Id.* (JA___). To support these allegations, Fasken relied on a June 19, 2019, letter from the New Mexico Commissioner of Public Lands to Holtec. *Id.* (JA___).

Fasken failed to accompany this filing with a motion to reopen the record, as required by 10 C.F.R. § 2.326. Weeks later, on September 3, 2019, Fasken filed a motion to reopen, then nine days later (and without explanation) withdrew the motion, essentially refusing to move to reopen the record. *Id.* at 254-55 (JA___). On June 18, 2020, the Board nevertheless considered—and rejected—Fasken's late-filed Contention 2, finding that Fasken failed to address the requirements for reopening the record and failed to show how it met the requirements for filing out of time. *Id.* at 255 (JA___). Fasken did not appeal this decision.

In May 2020, Fasken submitted its Amended Contention 2 along with a second motion to reopen the record. LBP-20-10, 92 N.R.C. at 240 (JA___). On September 3, 2020, following oral argument, the Board rejected Fasken's Amended Contention 2. *Id.* at 253 (JA___). The Board found that Fasken failed to meet its burden to reopen the record because its Amended Contention 2 was not based on information that was unavailable prior to publication of the DEIS but rather was based on "information that was publicly available in Holtec's application materials much earlier." *Id.* at 242 (JA___). In fact, as the Board noted, Fasken's Amended Contention 2 "[b]y its terms … alleges deficiencies in Holtec's application and does not even mention the DEIS." *Id.* at 243 (JA___) (internal quotations omitted). As a result, the Board found, and the Commission later agreed, that Amended Contention 2 "claimed 'material omissions, inadequacies and inconsistencies contained in Holtec's licensing application documents' and thus by its own terms claimed deficiencies in the application, rather than in the DEIS." CLI-21-7, 93 N.R.C. at 223 (JA___) (citing LBP-20-10, 92 N.R.C. at 243 (JA___)).

The Board also rejected, and the Commission subsequently affirmed, Fasken's claim (raised for the first time at oral argument) that

its Amended Contention 2 raised an "exceptionally grave issue." CLI-21-7, 93 N.R.C. at 225-26 (JA___-____). Finally, the Board found, and the Commission affirmed, that apart from these deficiencies, Fasken's Amended Contention 2 did not meet the admissibility requirements in 10 C.F.R. § 2.309(f)(1). *Id.* at 226-28 (JA___-____). Fasken subsequently appealed the Board's decision to the Commission. *Id.* at 220 (JA___).

In November 2020, Fasken filed its Motion for Leave and Motion to Reopen for Contention 3, reiterating its claims regarding the control of subsurface mineral rights, the oil, gas and mineral extraction operations beneath and in the vicinity of the CISF site, the accuracy of information in the Application incorporated into the DEIS, and the adequacy of the Staff's DEIS consultation. *Id.* at 220, 229 (JA___,____).

The Commission in the same decision considered and rejected both the appeal regarding Amended Contention 2 and Fasken's Contention 3. *Id.* at 217 (JA___). The Commission affirmed the Board's findings on Amended Contention 2 and rightly noted that "Fasken's appeal point[ed] to no Board error in its finding that the motion to reopen and amended [C]ontention [2] were untimely." *Id.* at 224 (JA___). Instead, "Fasken reiterate[d] its timeliness claims without confronting the Board's

rulings." *Id.* at 225 (JA___). The Commission also rejected Fasken's attempt to comply with the good cause requirement for late-filed contentions, pointing out that Fasken was relying on a standard that had been replaced nine years earlier in a 2012 rulemaking. *Id.* at 224 (JA___). The Commission further rejected Fasken's attempt to allege an "exceptionally grave issue," noting that the "exception is a narrow one, to be granted rarely and only in truly extraordinary circumstances." *Id.* at 226 (JA___). As the Commission rightly found, while Fasken summarily asserted "that its contention comprises exceptionally grave issues of national economics and security, regional employment, sinkholes[,] subsidence, and seismicity," *id.* at 225 (JA ___) (internal quotations omitted), it did not explain *how* the facility could have such an exceptionally grave impact. *Id.* at 225-26 (JA___-___). Nor did Fasken even attempt to rebut the NRC Staff's detailed findings on the threat of sinkholes, subsidence, or seismicity. *Id.* at 226 (JA___).

The Commission also found that Fasken never raised a material dispute with the DEIS in Amended Contention 2, because it failed to actually cite to any portion of the DEIS in dispute. *Id.* at 227 (JA___) ("First, Fasken argues that its Amended Contention 2 disputed the

DEIS's supposed reliance on a proposed but not-yet-accepted land use restriction of condition at the Holtec site. Although Fasken made such an argument in Amended Contention 2, neither Fasken's appeal nor the contention cites to where the DEIS relied on such an agreement.") (internal quotations omitted). Moreover, the Commission further affirmed the Board's right to reject expert testimony offered during oral argument on contention admissibility, based on long-standing NRC practice that "oral argument is an opportunity for the Board to ensure it understands the participants' legal positions, and participants do not have a right to oral argument on contention admissibility." *Id.* at 228 (JA___).

The Commission likewise rejected Fasken's Contention 3 claims about mineral rights and mineral development as "not based on or supported by any previously unavailable information that is materially different from information available in the application and DEIS." *Id.* at 230 (JA___). Similarly, the Commission rejected Fasken's claims based on public comments and Holtec's responses to the NRC Staff's Request for Additional Information as not containing any new information beyond that previously available to Fasken. *Id.* at 231-33 (JA___-___). Finally,

the Commission found that Fasken failed to raise any significant safety or environmental issue in Contention 3, and specifically, Fasken did not show that "drilling presents any hazard to the facility (or vice versa) that has not been analyzed in the Safety Evaluation Report or the DEIS." *Id.* at 233 (JA___). Fasken's brief does nothing to demonstrate that these Commission decisions are arbitrary or capricious.

B. Fasken Does Not Challenge the Commission Decision on Appeal.

Fasken is required to challenge the Commission's reasoning on appeal and demonstrate that the Commission's decision is arbitrary or capricious. Fasken cannot ignore the Commission's justification for rejecting Contentions 2 and 3 and simply reiterate its prior claims anew. Yet, that is exactly what Fasken has done on appeal.

Fasken first ignores the many reasons that the Commission rejected its purportedly "new" information. For example, Fasken claims that the Commission wrongly denied Contention 2 and the allegedly new information contained in the letter from the New Mexico Land Commissioner. Fasken-Br. at 20-21, 29-30. Fasken, however, ignores that its August 2019 filing based on that letter was rejected as *procedurally* defective, lacking a motion to reopen and any attempt to

address the Commission's well-established contention timeliness requirements. CLI-21-7, 93 N.R.C. at 219 (JA___); LBP-20-6, 91 N.R.C. at 255 (JA___). Fasken also ignores the Board's findings that the Land Commissioner's letter did not contain new information beyond that included in Holtec's response to an NRC Staff Request for Additional Information from months earlier and the Application itself, which always acknowledged that New Mexico owned mineral rights at the site. CLI-21-7, 93 N.R.C. at 219 (JA___); LBP-20-6, 91 N.R.C. at 255-56 (JA___-___). Most importantly, Fasken ignores that it did not challenge this Board decision in its appeal to the Commission, thereby abandoning its claims based on the Land Commissioner's letter. CLI-21-7, 93 N.R.C. at 220, n.21 (JA___,___).

Fasken also claims that the "NRC wrongly discarded 'the [DEIS's] supposed reliance on 'a proposed but not-yet-accepted 'land use restriction' at the Holtec site,'" which Fasken alleges contradicts other portions of the DEIS. Fasken-Br. at 21 (quoting CLI-21-7, 93 N.R.C. at 227 (JA___)). However, the Commission rejected Fasken's claims about a "supposed reliance" on an unnamed agreement in Amended Contention 2 because "neither Fasken's appeal nor the contention cites to where the

DEIS relied on such an agreement." CLI-21-7, 93 N.R.C. at 227 (JA___). The Commission's well-established rules require petitioners to "include references to specific portions of the [licensing documents] … that the petitioner disputes," 10 CFR § 2.309(f)(vi), which Fasken failed to do. Fasken's attempt to remedy its claim *now* by adding a citation for the first time on appeal before this Court is not an adequate substitute for demonstrating how the Commission erred in applying this fundamental rule. *Sims v. Apfel*, 530 U.S. 103, 112 (2000) (O'Connor, J., concurring in part and concurring in the judgment) ("In most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court.").

Fasken also repeats its claims made below that the "dominant subsurface mineral estate … cannot be encumbered by an after-the-fact approval of a surface use like Holtec seeks here." Fasken-Br. at 31. However, aside from summarily alleging that this is a "novel" disclosure, *id.*, Fasken does not address why the Commission rejected this claim: "the right of subsurface-estate leaseholders to use the surface estate is not new information, it is a general principle of New Mexico oil and gas law" and "the terms of New Mexico Land Office leases are established by

statute." CLI-21-7, 93 N.R.C. at 231-32 (JA___-___). Thus, "[t]he principles of New Mexico oil and gas law are not new information" and there is nothing unusual in the oil leases that was not previously available. *Id.* at 232 (JA___). Having ignored the Commission's rationale on appeal, Fasken has not established an arbitrary or capricious decision.

Fasken also wholly ignores why the Commission rejected its claims as immaterial. Fasken claims that it "could not have discerned the lack of any private agreement between XTO Energy, Inc. [(an oil drilling company)] and Holtec proscribing mineral activities beneath and surrounding the site." Fasken-Br. at 21. But aside from summarily listing Commission safety regulations that involve the evaluation of external events, *id.* at 26, Fasken fails to challenge the Commission's ultimate determination that such a private agreement prohibiting oil drilling (whether it existed or not) would not have a material effect on the existing NRC Staff analysis in the DEIS.

As the Commission explained, "the DEIS acknowledges that New Mexico owns the mineral rights under the site and the DEIS accounts for the effects of future development." CLI-21-7, 93 N.R.C. at 230 (JA___). Moreover, "the DEIS considers that future mineral development will take

place in the strata where the minerals are known to exist." *Id.* at 233 (JA___). Given that the licensing documents assume drilling will occur, an agreement prohibiting drilling would not change any NRC Staff analysis.

The same is true of Fasken's challenge to differences between the DEIS and application documents. Fasken-Br. at 23. Fasken purports that differences between the DEIS and Holtec's initial Environmental Report regarding the anticipated depth of oil and gas exploration has a "potential to impact design bases, mitigation efforts, and geological stability in a region riddled with subsidence and susceptible to sinkholes." *Id.* at 28. This conclusory assertion, however, is the extent of Fasken's attempt to demonstrate a material dispute. This does not rebut the Commission's finding that "Fasken does not show such [shallower] drilling presents any hazard to the facility (or vice versa) that has not been analyzed in the Safety Evaluation Report or the DEIS," or, as the Board phrased it, that "Fasken's expert did not explain how the existence of wells at any depth is material to the NRC Staff's assessment of environmental and cumulative impacts." CLI-21-7, 93 N.R.C. at 227 (JA___) (internal quotations omitted). Fasken also does not challenge

Holtec's explanation for why drilling would not create a hazard, which the Commission found "supports the Staff's findings that potential future mineral development does not present a hazard to the facility." *Id.* at 234 (JA___).

By disregarding the Commission's decision on immateriality, Fasken fails to demonstrate that the Commission's decision was an arbitrary or capricious action on appeal.

C. Fasken Improperly Raises New Arguments on Appeal.

Beyond ignoring the Commission's decision below, Fasken also introduces new arguments for the first time in this appeal. Specifically, Fasken argues, for the first time, that "NRC's failure to conduct an independent investigation into the reliability and accuracy of applicable land use rights and land uses for the affected environment while eliminating each and every other alternative location violated its NEPA implementing and siting evaluation regulations." Fasken-Br. at 30. Fasken did not raise the NEPA alternatives analysis before the Commission. As noted previously, "[i]n most cases, an issue not presented to an administrative decisionmaker cannot be argued for the

first time in federal court." *Sims*, 530 U.S. at 112. As such, this claim should be barred.

CONCLUSION

For the reasons set forth above, the Petitions for Review should be denied.

Respectfully submitted,

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December 1, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. R. 32(e)(2)(B)(1) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), this brief contains 9,005 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2023, I caused the foregoing document to be electronically filed through this Court's CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

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