

ORAL ARGUMENT NOT SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

BEYOND NUCLEAR, INC., *et al.*
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents,

HOLTEC INTERNATIONAL,
Intervenor

Petition for Review of Final Administrative Action of the
United States Nuclear Regulatory Commission

PETITIONER BEYOND NUCLEAR'S FINAL REPLY BRIEF

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GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

| | |
|------------|------------------------------------|
| Act | Nuclear Waste Policy Act of 1982 |
| APA | Administrative Procedure Act |
| Board | Atomic Safety and Licensing Board |
| Holtec | Holtec International |
| JA | Joint Appendix |
| NRC | U.S. Nuclear Regulatory Commission |
| Petitioner | Beyond Nuclear, Inc. |

INTRODUCTION

The Nuclear Regulatory Commission (“NRC”) argues that it lawfully refused to dismiss Holtec International’s (“Holtec’s”) license application at the outset of the adjudicatory proceeding below, in spite of concededly unlawful provisions authorizing the private company to store federally-owned spent fuel in violation of the Nuclear Waste Policy Act (“Act”). NRC Br. 32. According to NRC, it was permissible to consider these patently unlawful provisions because they were accompanied by a lawful option for private storage of privately-owned spent fuel and because the unlawful provisions could be “cured” during the administrative proceeding. *Id.* NRC also contends that during that adjudication, a complete cure was achieved through Holtec’s promises not to violate the current law. As a result, according to NRC, the licensing process “accomplished” a lawful NRC decision. *Id.* (emphasis in original).

But the Administrative Procedure Act (“APA”) contains no exception to its requirement that agencies must act in accordance with the law. 5 U.S.C. § 706(2). NRC had no discretion or lawful authority to use its licensing process to entertain or approve a license application so patently and concededly inconsistent with federal law. And the so-called “cure[s]” for the unlawful provisions are disingenuous and unlawful.

By using its licensing proceeding to give Holtec legal license rights based only on Holtec’s “hope[s]” of legislative change rather than actual law (NRC Br. 29), NRC also violated the Constitutional separation of powers doctrine. *In re Aiken County*, 725 F.3d 255, 267 (D.C. Cir. 2013) (“our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law”).

Therefore, the Court should declare NRC’s decisions to entertain and approve Holtec’s license application unlawful and reverse and vacate those decisions. In the alternative the Court should sever the unlawful provisions.

ARGUMENT

I. THE APA PROHIBITED NRC FROM CONSIDERING OR APPROVING A PATENTLY UNLAWFUL LICENSE APPLICATION.

On one issue all parties agree – the provisions in Holtec’s license application allowing Holtec to store federally-owned spent fuel violated the Nuclear Waste Policy Act. *See* NRC Br. 29-31; Holtec Br. 12; NEI Amicus Br. 31. Petitioner maintains that should be the end of the matter – the language of the Act must be given effect by declaring NRC’s decisions to entertain and approve the application unlawful and by reversing and vacating them. *Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1274 (D.C. Cir. 1996); 5 U.S.C. § 706(2). In the alternative, the unlawful provisions must be set aside. *See* Petitioner’s Opening Brief (“Pet. Br.”)

19-20 (citing *Barr v. American Association of Political Consultants*, 140 S.Ct. 2335, 2350 (2020); *K-Mart Corp. v. Cartier*, 486 U.S. 281, 294 (1988); and Restatement (Second) of Contracts 184(1) (1981)).

II. NRC HAS OFFERED NO LEGITIMATE REMEDIES FOR ITS UNLAWFUL CONSIDERATION AND APPROVAL OF HOLTEC'S LICENSE APPLICATION.

Despite the APA's plain prohibition against unlawful agency action, NRC argues that it was not required to dismiss Holtec's licensing proceeding at the outset because the application included a lawful provision; and further, that the legal "deficiency" in the license application could be "cured" by NRC's acceptance of Holtec's "on-the-record" promise during the licensing proceeding that it will not "seek to store fuel to which DOE holds title" without "a change in governing law". NRC Br. 32; *see also* Holtec Br. 12. But these arguments lack merit.

A. The Inclusion of Lawful Provisions in Holtec's License Application Did Not Justify Consideration or Approval of the Unlawful Provisions.

NRC claims that at the outset of the proceeding below, it lawfully undertook to consider Holtec's license application because the application included provisions for private storage of privately-owned spent fuel "that can be exercised legally." NRC Br. 32; *see also* Holtec Br. 12. But NRC provides no citation for the proposition that the lawful provisions in the license application legitimized or

excused the unlawful provisions. Nor can any such exception to the APA be found.¹ *See* Pet. Br. 19-20.

B. NRC May Not Read Unlawful Language Out of Holtec’s Application.

In defense of its decision to consider and approve Holtec’s license application, NRC tries an alternative strategy of reading the unlawful language out of the application and dismissing the time period in which the unlawful language could apply as irrelevant. According to NRC, by approving Holtec’s license application, it “*merely* determined that there is a valid path under *existing law* for Holtec to exercise a license to store privately held spent fuel.” NRC Br. 33 (emphasis added).² NRC’s strategy fails in two key respects.

1. NRC was required to review the lawfulness of Holtec’s *entire* application under existing law.

As NRC itself aptly notes, “the entire point of a licensing proceeding is to ensure that any license is consistent with applicable law.” NRC Br. 32. The law that applied to NRC’s decision on Holtec’s application is the law today, not some

¹ NRC tries to cast Petitioner’s appeal as a controversy over Holtec’s “business judgment” to include provisions for private storage of both privately-owned fuel and federally-owned fuel in its license application. NRC Br. 29. Petitioner, however, does not dispute the privately-owned fuel storage option included in Holtec’s license application. This appeal concerns only the unlawfulness of the federally-owned fuel storage option.

² *See also id.* 31 (emphasis added) (claiming “there is *no evidence* of illegality here.”). The obvious “illegality” is the inclusion of the unlawful license provisions.

unknown iteration of the law in the future. By considering and then approving Holtec’s unlawful license application provisions, NRC permitted conduct that is inconsistent with “applicable law.” In doing so, it failed to “properly discharge[]” its “official duties.” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)).

2. NRC has failed to acknowledge that by approving Holtec’s unlawful license application provisions, it gave Holtec significant legal rights.

Nowhere in its brief does NRC acknowledge that in addition to granting Holtec a “valid path” under “current law” to store privately-owned spent fuel, it also granted Holtec a separate “path” that is *not* “valid” under “current law.” That separate path will allow Holtec to store federally-owned spent fuel if Congress changes the “current law” to permit it. *See Holtec International*, 91 N.R.C. 167, 176 (2020) (“*Holtec Decision*”) (JA0685) (holding that NRC decision approving Holtec’s license application “will allow it to enter into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future.”).

While Holtec may not currently exercise the rights granted by NRC under this separate “path,” they will become significant if and when Congress changes the law to allow private storage of federally-owned spent fuel. As an existing license holder, Holtec will not be required to demonstrate that its license terms are sufficient to comply with any amended law. Instead, Holtec’s licensed activities

will be legally enforceable and virtually immune from challenge. *See Safe Energy Coalition v. U.S. Nuclear Reg. Comm'n*, 866 F.2d 1473, 1479 (D.C. Cir. 1989) (citing *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that NRC's denial of an enforcement petition for revocation or modification of an existing license constitutes an unreviewable exercise of agency discretion); *Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983) (holding that affected members of the public lack standing to seek more stringent changes to an existing NRC license than those proposed by the agency).³

By contrast, if this Court severs the unlawful provisions in Holtec's license application and holds that Holtec must re-apply if and when the law changes, Petitioner would have an opportunity to challenge the application's "consistency with applicable law" in a licensing proceeding. NRC Br. 32. Petitioner could also seek license conditions to "eliminate ambiguity" regarding Holtec's compliance with the amended law. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), 52 N.R.C. 23, 32 (2000). Thus, requiring Holtec to file for a new or amended license if the law changes is far more than a "useless act."

³ NRC's suggestion that Holtec would have to "seek" to store federally-owned spent fuel if and when the law changes is misleading. NRC Br. 32. Holtec is not required to get permission from NRC before taking action already authorized in its license.

See Holtec Int'l, LBP-19-4, 89 N.R.C. 353, 382 (2019) (“*Holtec Board Decision*” (JA0465)).

By retaining the unlawful language in Holtec’s license application, NRC authorized conduct that violates *current* law, based on assumptions about possible laws that may be passed in the *future*. NRC may not have it both ways: rendering the unlawful provisions invisible to the Court on this review and yet retaining them so they can be treated as enforceable licensed rights in the future. To the contrary, NRC must “take the bitter with the sweet.” *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984). This Court should declare unlawful the NRC’s approval of Holtec’s license application and either reverse and vacate it or sever all unlawful language.

C. NRC’s Acceptance of Holtec’s Promises Is Irrelevant.

NRC also seeks judicial deference for “credit[ing] Holtec’s representations” that it will not store federally-owned spent fuel unless the law changes. NRC Br. 3-4. *See also* NRC Br. 30, 32. But the claim is irrelevant to the issue on appeal, *i.e.*, whether NRC may approve a license application proposing conduct that is currently unlawful on the assumption that it may later become lawful under unknown future law.⁴

⁴ The APA governs the conduct of government agencies, not private parties. No matter how sincerely and vehemently Holtec promises not to take the illegal action authorized in its license, or whether it makes that promise “on-the-record” of the

In any event, as NRC itself recognizes, any deference owed by this Court is based on the presumption that agencies act in accordance with the law. NRC Br. 30 (citing *United States v. Armstrong*, 517 U.S. at 464. Having approved unlawful provisions in Holtec’s license application in violation of the Nuclear Waste Policy Act, NRC is simply not entitled to the deference it seeks. *Armstrong*, 517 U.S. at 464 (citing *Bordenkircher v. Hayes*, 434 U. S. 357, 364 (1978) (deference to agency action is inappropriate where the agency’s conduct is demonstrably unlawful)).⁵

III. NRC’S APPROVAL OF HOLTEC’S APPLICATION VIOLATED THE SEPARATION OF POWERS DOCTRINE.

Citing *In re Aiken County*, 725 F.3d at 255, NRC argues that it did not violate the separation of powers doctrine because it did “not make any determination . . . based upon an assessment or a ‘hope’ about legislation that might be enacted in the future.” NRC Br. 33. But this argument disregards the agency’s own statement that it intended to give Holtec the right to take action under future law that is currently unknown, without having to demonstrate the

licensing proceeding, the APA prohibits NRC from authorizing such action in the first place. 5 U.S.C. § 706(2) (prohibiting agency action “not in accordance with law”).

⁵ NRC also argues that it lawfully relied on the U.S. Department of Energy not to implement the unlawful provisions in Holtec’s license application. NRC Br. 30. But the presumption of regularity may not be applied selectively to one agency over another. *See* Pet. Br. 19. Rather, it applies across the government, including to the NRC. *United States Dep’t of State v. Ray*, 502 U.S. 162, 179 (1991).

consistency of its actions with either current law or the unknown future law. *Holtec Board Decision*, 89 N.R.C. at 382 (JA0685). See also discussion above in Section II.B.

By granting Holtec the legal protections of a license for future activities under laws not yet passed by Congress, NRC engaged in “political guesswork” to position Holtec’s activities ahead of Congress. If allowed to stand, NRC’s decisions would undermine Congressional intent and “gravely upset the balance of powers.” *Aiken*, 725 F. 3d at 260. See also *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 357 (1986) (“An agency literally has no power to act ... unless and until Congress confers power upon it.”).

NRC also incorrectly disputes Petitioner’s assertion that the agency transferred a “significant set of property rights” to Holtec through its license, thereby weakening Congressional authority and altering our constitutional structure. NRC Br. 33 (citing Pet. Br. 21). According to NRC, rather than transferring property rights to Holtec, it “merely determined that there is a valid path under existing law for Holtec to exercise a license to store privately held spent fuel.” *Id.* But NRC did much more than that – it gave Holtec, as a licensee, a legally-protected right to store federally-owned spent fuel under “future” iterations of the law. See *Holtec Decision*, 91 N.R.C. at 176 (JA0685). Licenses that authorize the licensee to act and limit the agency’s discretion to revoke or suspend

the license establish property rights, even if the licensee’s action is “preliminary.” 3883 *Connecticut LLC v. District of Columbia*, 336 F.3d 1068, 1072 (D.C. Cir. 2003).⁶ NRC may not ignore the implications of transferring property rights to Holtec – rights that Congress, if it amends the Nuclear Waste Policy Act, will have to either affirm or negate. The separation of powers doctrine requires NRC to respond to Congressional decisions, not the other way around. *See* Pet. Br. 21.

CONCLUSION

For the foregoing reasons, and as required by the APA, the Nuclear Waste Policy Act, and the U.S. Constitution, the Court should hold unlawful and set aside NRC’s decisions in the administrative proceeding below, reversing and vacating them or severing the unlawful portions of Holtec’s license application from the approved application. The Court should also declare that – unless and until Congress amends the Act – NRC cannot approve a license application that allows for the private storage of federally-owned waste.

⁶ NRC’s authority to revoke or terminate Holtec’s license is substantially limited by 10 C.F.R. § 2.202(a)(1), requiring that any NRC order to “modify, suspend, or revoke a license” must allege “violations,” “potentially hazardous conditions,” or “other facts deemed to be sufficient ground for the proposed action.”

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C) and Circuit Rule 32(a)(2)(C), I certify that the attached Final Reply Brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 2,316 words. This figure includes footnotes and citations, but excludes the Cover Page, Table of Contents, Table of Authorities, signature blocks, Certificate of Compliance, Certificate as to Parties, Rulings, and Related Cases, Addendum of Statutes, Rules, and Regulations, and Standing Addendum. I have relied on Microsoft Word's calculation feature for this calculation.

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NRC Regulation 10 C.F.R. § 202(a):

(a) The Commission may institute a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper by serving on the licensee or other person subject to the jurisdiction of the Commission an order that will:

(1) Allege the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action, and specify the action proposed;

(2) Provide that the licensee or other person must file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3)(i) Inform the licensee or any other person to whom the order was issued of their right, within twenty (20) days of the date of the order, or within such other time as may be specified in the order, to demand a hearing on all or part of the order, except in a case where the licensee or other person to whom the order was issued has consented in writing to the order;

(ii) State that a request for a hearing by any other person who may be adversely affected by the order must be made within twenty (20) days of the date of the order, or within such other time as may be specified in the order, and must meet the requirements of § 2.309;

(4) Specify the issues for hearing; and

(5) State the effective date of the order; if the Commission finds that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful, the order may provide, for stated reasons, that the proposed action be immediately effective pending further order.