ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1198

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA,
Respondents,

HOLTEC DECOMMISSIONING INTERNATIONAL, LLC, *et al.*,
Intervenors.

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

INTERVENORS' RESPONSE TO PETITIONER'S MOTION FOR A STAY PENDING APPEAL, AND AFFIRMATIVE MOTION TO DISMISS PETITIONER'S PETITION FOR REVIEW

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Intervenors Entergy Nuclear Operations, Inc. ("Entergy"), Holtec International, Holtec Decommissioning International, LLC, and Holtec Pilgrim, LLC (the Holtec entities together, "Holtec") respectfully submit this response to Massachusetts' motion for a stay pending appeal ("Stay Motion" or "Mot."), and affirmative motion to dismiss Massachusetts' Petition for Review ("Petition").

INTRODUCTION

The Pilgrim Nuclear Power Station ("Pilgrim") shut down in 2019. Entergy's transfer of Pilgrim to Holtec will enable decommissioning of Pilgrim decades earlier than otherwise would have occurred. Unlike Entergy, whose principal business is operating still-in-service power plants, Holtec's decommissioning business focuses on safely and promptly decommissioning shutdown nuclear plants and managing their inventory of spent nuclear fuel ("SNF"). Ample funding is available: As of August 2019, the $1.03 billion in Pilgrim's decommissioning trust fund ("DTF"), conservatively assumed to grow at a real annual after-tax rate of 1.42%, exceeded the estimated $593 million radiological decommissioning cost and $501 million SNF management cost.

The U.S. Nuclear Regulatory Commission ("NRC") closely regulates the transfer and, even though NRC staff approved the transfer and allowed it to become effective in August, the NRC Commissioners' review is ongoing. Massachusetts'

Petition thus seeks review of non-final agency action, and this Court should dismiss the Petition for lack of jurisdiction. Dismissal would moot the Stay Motion.

But even if this Court has jurisdiction, this Court still should deny the Stay Motion because, among other things, Massachusetts has not demonstrated that it will be irreparably harmed absent a stay. The irreparable harm inquiry requires comparison of the situation where a stay is denied (and Holtec remains the owner/operator of Pilgrim) with the situation where a stay is granted (and Entergy is required to resume its prior ownership/operation of Pilgrim). For purposes of the Stay Motion, that comparison must be made over the 12-18 months during which the Petition, if not dismissed, will be pending on the merits. Massachusetts fails to make the relevant comparison. For example, in complaining (Mot. 17) that Holtec will be able to use an exemption to spend some of the DTF on SNF costs, Massachusetts ignores that Entergy had obtained a similar exemption, 84 Fed. Reg. 36,626, 36,627 (July 29, 2019)—meaning that, even if a stay is granted, Entergy will undertake similar SNF activities and use similar DTF funds to pay for them.

While Massachusetts will not be irreparably harmed if a stay is denied, Holtec and Entergy will be injured if a stay is granted. NRC staff's approvals allowed consummation (subject to continuing review) of a transaction that was more than a year in the making. Transitioning insurance, employment matters, IT systems, and everything else required to maintain continuity at the site involved months of

planning by Holtec and Entergy personnel. To stay NRC staff's approvals now would require a similar level of effort to unwind the transaction and would hinder Holtec's ability fully to implement the early stages of its decommissioning. A stay also would create uncertainty for Pilgrim employees regarding whether Holtec will be permitted to proceed with its decommissioning schedule, which has implications for their employment prospects at the site.

Nor is Massachusetts likely to succeed on the merits. As noted, the Petition must be dismissed because there is no final agency action. Beyond that, Massachusetts' arguments will likely fail. *First*, the Atomic Energy Act ("AEA") does not require a hearing before approval of a license transfer is made effective. While NRC staff did not hold a hearing, they did review hundreds of pages of documents and found that the $1.03 billion DTF was sufficient to demonstrate Holtec's financial qualifications, obviating the need to consider whether to require *additional* resources such as potential recoveries of SNF expenses from the U.S. Department of Entergy ("DOE") or a line of credit from a company affiliate. Having so decided regarding the license transfer, all that remained was to amend the license to conform to what NRC staff had already approved, and no pre-effectiveness hearing was required for that administrative step. *Second*, NRC staff complied with the National Environmental Policy Act ("NEPA") by preparing an environmental assessment regarding the proposed exemption allowing Holtec to spend some of the

DTF to pay for SNF costs. Massachusetts can label (Mot. 15) that assessment "conclusory" only by ignoring its key passages, including that future "annual reports provide a means for the NRC to monitor the adequacy of available funding," Mass.' Addendum ("Add-") 67, and that the NRC can if necessary require "additional financial assurance to cover the cost of completion," *id*. As to the license transfer and license amendment, NRC staff properly relied on its generic finding that such actions have no significant environmental impact if actual operation of the plant is not changed (which it is not here).

Massachusetts' attempts to build sympathy for its cause are misleading. For example, Massachusetts suggests (Mot. 17) that the DTF belongs to Massachusetts ratepayers because they paid electricity rates to former Pilgrim owner Boston Edison that included amounts earmarked for the DTF, before Entergy purchased Pilgrim from Boston Edison in 1999. But Massachusetts' own state agency, in approving that sale to Entergy and releasing the plant and DTF from that agency's rate-regulation jurisdiction, recognized that *the DTF was being transferred to Entergy* (now Holtec) in exchange for Entergy (now Holtec) assuming all liability for decommissioning, thereby eliminating the risk to Massachusetts ratepayers of future

escalation of decommissioning costs (which might require further increases in rates).[1]

The Petition should be dismissed, and in any event, the Stay Motion should be denied.

STATEMENT

A. Decommissioning Of Nuclear Power Plants

"When a power company decides to close a nuclear power plant permanently, the facility must be decommissioned by safely removing it from service and reducing residual radioactivity to a level that permits release of the property and termination of the operating license." NRC, *Backgrounder on Decommissioning Nuclear Power Plants*, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/decommissioning.html (visited Nov. 5, 2019) ("*Backgrounder*"). Pilgrim shut down on May 31, 2019. Add-1.

The NRC allows nuclear plant licensees to choose between several decommissioning methods. "Under SAFSTOR, often considered 'deferred dismantling,' a nuclear facility is maintained and monitored in a condition that allows the radioactivity to decay; afterwards, the plant is dismantled and the property

[1] Add-96-97 ("Entergy will assume all liability for the decommissioning …. Boston Edison has agreed to transfer approximately $466 million at closing to fully fund a trust to provide Entergy with funds to address these decommissioning liabilities."); Add-111 ("For Boston Edison's ratepayers, the divestiture transaction involves the elimination of … the future risk of changes in Pilgrim's decommissioning costs.").

decontaminated." *Backgrounder*. "Under DECON (immediate dismantling), soon after the nuclear facility closes, equipment, structures, and portions of the facility containing radioactive contaminants are removed or decontaminated to a level that permits release of the property and termination of the NRC license." *Id.* Had Entergy not transferred Pilgrim to Holtec, Entergy planned to use SAFSTOR, beginning active decommissioning work in 2073 and completing it in 2079. Add-398 (Tbl. 2.1). Holtec, by contrast, intends to use DECON, beginning active decommissioning work in 2019, and expecting to complete it by 2025 for all of the site except the Independent Spent Fuel Storage Installation ("ISFSI") on which SNF is stored. Add-52.[2] Under either DECON or SAFSTOR, there is significant overlap in the work immediately following shutdown to put Pilgrim in a safe condition for dormancy (SAFSTOR) or active decommissioning (DECON). Declaration of Sanford I. Weisburst filed herewith ("Weisburst Decl."), Ex. 1 (Decl. of Pamela B. Cowan, at ¶¶ 3-4 (CL 142) (https://www.nrc.gov/docs/ML1925/ML19256B960.pdf)).[3]

[2] Holtec cannot decommission the ISFSI until DOE has picked up all SNF, which Holtec assumes to occur between 2060 and 2063 based on the latest DOE information that is available. Add-53.

[3] "CL" refers to the item number on NRC's Certified List of the Record filed with this Court, Doc. No. 1815225.

Pilgrim generated SNF when it operated. At Pilgrim and other plants, SNF is initially stored in pools and eventually is placed in dry casks and safely stored on site. "The NWPA [Nuclear Waste Policy Act] establishes that, in return for a payment of fees by the utilities, DOE will construct repositories for SNF, with the utilities generating the waste bearing the primary responsibility for interim storage of SNF until DOE accepts the SNF 'in accordance with'" the NWPA. *Ind. Mich. Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1273 (D.C. Cir. 1996). DOE failed to begin picking up SNF from plants including Pilgrim. While it was once unsettled whether courts would find DOE in partial breach and require it to pay money damages for the SNF costs that plants have had to incur as a result, the Federal Circuit resolved that issue in plant owners' favor in 2005, *see Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1374-75 (Fed. Cir. 2005), and they have since successfully recovered damages from DOE. For example, of the $66.3 million in Pilgrim SNF costs that Entergy sought for the period 2008 to 2015, *see Entergy Nuclear Generation Co. v. United States*, 138 Fed. Cl. 317, 320 (2018), Entergy recovered $62.0 million pursuant to DOE's offer of judgment, *Entergy Nuclear Generation Co. v. United States*, No. 1:14-cv-01248-CFL, Judgment, Doc. 76 (Fed. Cl. Sept. 11, 2018).

B. Statutory And Regulatory Framework

License transfers and conforming license amendments. Both the ownership and use (*i.e.*, operation, or after shutdown, decommissioning) of a nuclear plant requires a license from the NRC. 42 U.S.C. § 2131. A license, once granted, cannot be transferred to another person/entity "unless the [NRC] shall, after securing full information, find that the transfer is in accordance with the provisions of this chapter, and shall give its consent in writing." *Id.* § 2234.[4]

The NRC can approve an "amendment" to a license. *Id.* § 2237. Amendments do not occur only in conjunction with a license transfer. Because NRC licenses include technical requirements related to design and operation of a plant, license amendments are routinely required to reflect changes in those areas. For example, a licensee must obtain the NRC's approval to amend a license to increase a plant's power output. NRC, *Approved Applications for Power Uprates*, https://www.nrc.gov/reactors/operating/licensing/power-uprates/status-power-apps/approved-applications.html (visited Nov. 9, 2019).

In the case of a license transfer, license amendments of a non-technical nature are typically required to reflect, among other things, changed ownership, differences

[4] This requirement also applies where "indirec[t]," 42 U.S.C. § 2234, ownership changes hands, such as where A is the licensed owner of a plant, A is owned in turn by B, and B wishes to sell A to C.

in organizational structures, or changes to financing mechanisms. 63 Fed. Reg. 66,721, 66,727-66,728 (Dec. 3, 1998).

Pre-effectiveness hearings. Section 189 of the AEA, 42 U.S.C. § 2239, addresses which types of NRC approvals require a hearing before the approval is made effective. Regarding a license *transfer*, the NRC has interpreted this provision as "*not* requir[ing] the offer of a prior hearing on an application to transfer control of a license before the transfer is made effective." *In the Matter of: Long Island Lighting Co.*, 35 N.R.C. 69, 77 (Feb. 22, 1992) ("*LILCO*") (emphasis added); *see also* 10 C.F.R. § 2.1316(a) ("During the pendency of any hearing …[,] the staff is expected to promptly issue approval or denial of license transfer requests.").[5]

Concerning a license *amendment*, a pre-effectiveness hearing is required *unless* NRC makes "a determination … that such amendment involves no significant hazards consideration." 42 U.S.C. § 2239(a)(2)(A). For license amendments that involve design or operational changes, NRC staff determines case by case whether a significant hazards consideration exists. 10 C.F.R. § 50.92.

In the category of cases where a license amendment merely conforms the license to reflect a license transfer, however, NRC has made a generic finding that "administrative amendments which do no more than reflect an approved transfer and

[5] NRC still retains discretion to afford such a hearing. *LILCO*, 35 N.R.C. at 78.

do not directly affect actual operating methods and actual operation of the facility do not involve a 'significant hazards consideration' … and do not require that a hearing opportunity be provided prior to issuance." 63 Fed. Reg. at 66,728; *see* 10 C.F.R. § 2.1315(a) (codifying finding).

Permissible uses of DTF funds. Apart from any issue concerning a license transfer, an NRC regulation provides that DTF funds may be used only to pay "expenses for legitimate decommissioning activities consistent with the definition of decommissioning in § 50.2," 10 C.F.R. § 50.82(a)(8)(i)(A), and that definition does *not* include SNF management, *id.* § 50.2. The NRC nonetheless may grant an exemption allowing DTF funds to be used for SNF expenses. *Id.* § 50.12. Unrelated to the license transfer, Entergy applied for and was granted such an exemption as to the Pilgrim DTF. 84 Fed. Reg. 36,626, 36,627 (July 29, 2019). The NRC did not require that Entergy place into the DTF any recoveries it expects to receive from DOE. Massachusetts did not seek review.[6]

NEPA. NEPA "requires the federal government to identify and assess in advance the likely environmental impact of its proposed actions, including its authorization or permitting of private actions." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 36 (D.C. Cir. 2015). An NRC regulation authorizes the agency

[6] NRC staff later granted Holtec a similar exemption as part of the license transfer. That action is among those that Massachusetts challenges.

to identify categories of actions that are "eligible for categorical exclusion" from the need to prepare "an environmental assessment or an environmental impact statement." 10 C.F.R. § 51.22(a)-(b). A category is so eligible if the actions in the category do "not individually or cumulatively have a significant effect on the human environment." *Id.* § 51.22(a). In 1998, following a notice-and-comment rulemaking, the NRC deemed "direct or indirect transfers of any license issued by NRC *and* any associated amendments of license required to reflect the approval of a direct or indirect transfer of an NRC license" to be eligible categories. *Id.* § 51.22(c)(21) (emphasis added). The NRC explained that "transfers of licenses (and associated administrative amendments to licenses) will not in and of themselves permit the licensee to operate the facility in any manner different from that which has previously been permitted under the existing license. Thus, the transfer will usually not raise issues of environmental impact that differ from those considered in the initial licensing of a facility." 63 Fed. Reg. at 66,728.

The NRC has not made such a categorical determination regarding exemptions from 10 C.F.R. § 50.82(a)(8)(i)(A) allowing DTF funds to be used for SNF expenses. Accordingly, the NRC performs an environmental assessment in each case, and "[u]pon completion of [the] environmental assessment, … the appropriate NRC staff director will determine whether to prepare an environmental impact statement or a finding of no significant impact on the proposed action." *Id.*

§ 51.31(a). Regarding the exemption granted to Entergy for the Pilgrim DTF discussed above, the NRC published notice of its environmental assessment of, and finding of no significant impact from, the proposed exemption. 84 Fed. Reg. 31,356 (July 1, 2019).

C. The Underlying Agency Actions

Massachusetts' Petition and Stay Motion arise from several NRC staff actions relating to the transfer of ownership/use of Pilgrim from Entergy to Holtec.

Entergy and Holtec[7] filed a license transfer application ("LTA") on November 16, 2018, which sought (1) approval of the transfer of indirect control regarding the Pilgrim ownership license, and transfer of the Pilgrim use/operating license, from Entergy to Holtec, Add-239; (2) approval of a conforming amendment to the Pilgrim licenses to reflect the transfers, *id.*; and (3) an exemption for Holtec from 10 C.F.R. § 50.82(a)(8)(i)(A), Add-242. The LTA indicated that Holtec intended to rely *solely* on the DTF to meet NRC's financial requirements, and included a redline showing the proposed amendments to the use/operating license, Add-275, among which were

[7] The Entergy entity that operated Pilgrim was Entergy Nuclear Operations, Inc., and the Entergy entity that owned the entity (Entergy Nuclear Generation Company ("ENGC")) that owned Pilgrim was Entergy Nuclear Holding Company #1, LLC. Add-248 (Fig. 1). For ease of reference, we refer in text to these transferor entities collectively as "Entergy." Operation was transferred to Holtec Decommissioning International, LLC, and ownership of ENGC was acquired by a Holtec company named Nuclear Asset Management Company, LLC. Add-249 (Fig. 2). ENGC's name was changed to Holtec Pilgrim, LLC. *Id.* For ease of reference, we refer in text to these transferee entities collectively as "Holtec."

elimination of a requirement imposed at the time of the transfer from Boston Edison to Entergy in 1999 that Entergy have access to $50 million in funding from an affiliate. Add-278, Add-269. The NRC published notice of the application and invited comments, hearing requests, and petitions to intervene. 84 Fed. Reg. 816 (Jan. 31, 2019).

Massachusetts filed with the NRC a petition for leave to intervene and hearing request ("petition" in lowercase, to distinguish from the Petition filed in this Court), advancing two contentions: *first*, that the applicants "have not presented sufficient evidence to the NRC of adequate financial assurance to meet the statutory and regulatory requirements for the proposed LTA, Exemption Request, and Revised PSDAR [post-shutdown decommissioning activities report]," Add-514; and *second*, that the NRC "must conduct, at a minimum, an environmental impact statement or a Supplemental Environmental Impact Statement of the potential direct and indirect environmental consequences of approving the Applicants' LTA, Holtec's Exemption Request, and Holtec's revised PSDAR and Site-Specific Cost Estimate," Add-535. Massachusetts did not challenge Holtec's *technical* ability to decommission Pilgrim. Holtec and Entergy answered, and Massachusetts filed a reply.[8]

[8] Massachusetts later moved to supplement the information supporting its original contentions, invoking Entergy's planned sale of Indian Point to Holtec. CL 70 at 1-

While Massachusetts' petition remains pending before the NRC Commissioners, the NRC has taken several actions based upon NRC staff determinations. Those staff determinations—subject to possible reversal or modification by the NRC Commissioners in connection with the pending petition—approved the license transfer, the conforming license amendment, and the exemption, and made the approvals immediately effective as of August 22, 2019.

License transfer. On August 22, 2019, the NRC staff issued an Order approving the transfer of indirect control regarding the ownership license and transfer of the use/operating license to Holtec. Add-1.[9] In an accompanying Safety Evaluation, NRC staff provided a detailed explanation, Add-19, including an independent cash flow analysis, Add-52-53. NRC staff explained, among other things, that the projected amount in the DTF as of the transaction closing, $1.03 billion, is sufficient to pay for the estimated $593 million in radiological decommissioning costs, as well as SNF management and site restoration costs. Add-

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2 (https://www.nrc.gov/docs/ML1911/ML19114A519.pdf). Entergy and Holtec opposed the motion, explaining that information about the Indian Point sale is not materially different from information previously available regarding Holtec's decommissioning plans and does not demonstrate any genuine material dispute with the Pilgrim LTA, and that Massachusetts could have but did not raise in its petition a concern about Holtec's technical ability to decommission multiple sites. CL 73 at 5-6 (https://www.nrc.gov/docs/ML1912/ML19122A122.pdf). Massachusetts' motion remains pending.

9 This Order was published at 84 Fed. Reg. 45,176 (Aug. 28, 2019).

30, Add-32. Concerning NEPA, NRC staff explained that a license transfer qualifies for the categorical exclusion in 10 C.F.R. § 51.22(c)(21), and therefore no environmental assessment or impact statement need be prepared. Add-51.

Conforming license amendment. The same Order and Safety Evaluation, after approving transfer of the licenses, approved an amendment to the licenses to conform to the approval of the transfer of the licenses. Add-5, Add-8, Add-42. The Safety Evaluation explained that, because the license amendment simply conforms the licenses to reflect the transfer action, and does not involve physical or operational changes to the facility, it involves no significant hazards consideration and obviates the need for a pre-effectiveness hearing. Add-43 (citing 10 C.F.R. § 2.1315). Regarding NEPA, NRC staff again relied on the categorical exclusion in 10 C.F.R. § 51.22(c)(21). Add-51.

Exemption from 10 C.F.R. § 50.82(a)(8)(i)(A). NRC staff granted Holtec's proposed exemption in a document titled "Exemption." Add-54.[10] In the Exemption, NRC staff compared the "opening DTF balance of $1.030 billion," Add-60, to the estimated "$593 million for radiological decommissioning costs," Add-61, a surplus of hundreds of millions of dollars. Given this surplus, NRC staff found that Holtec "has provided reasonable assurance that adequate funds will be available

[10] NRC published this document at 84 Fed. Reg. 45,178 (Aug. 28, 2019).

for the radiological decommissioning of Pilgrim, even with the disbursement of funds from the DTF for spent fuel management and site restoration activities." Add-62. In particular, NRC staff found that the DTF contains a sufficient amount to pay for radiological decommissioning costs of $593 million, SNF costs of $501 million, and site restoration costs of $40 million, with $3.6 million still remaining in the DTF at the end of the process. Add-52-53.[11] The Exemption also relied on NRC staff's environmental assessment, which had been published earlier. *See* Add-64 (citing 84 Fed. Reg. 43,186 (Aug. 20, 2019) (reproduced at Add-66)).

D. Massachusetts' Application To The NRC For A Stay

As noted, the NRC staff approvals became effective on August 22, 2019. Before issuing these approvals, the NRC staff had provided, on August 13, 2019, more than a week's notice to all participants of staff's intent to issue the approvals. CL 90 (https://www.nrc.gov/docs/ML1922/ML19225D006.pdf). Rather than using this time to prepare a stay motion to submit to the NRC Commissioners, Massachusetts sought an extension of time to permit it to file a stay motion within ten days *after* issuance after the NRC staff approvals, CL 100 at 3 (https://www.nrc.gov/docs/ML1922/ML19227A398.pdf), which extension the NRC

[11] NRC Staff used a 1.42% post-tax annual real rate of return to escalate the opening balance, which is more conservative than the NRC's usual 2% rate. Add-61. Using the 2% rate, there would be sufficient funds to cover an additional $40 million in costs while leaving over $11 million remaining at the end of the process. CL 83 at Attachment 1 (https://www.nrc.gov/docs/ML1921/ML19210E470.pdf).

Commissioners granted, CL 108 (https://www.nrc.gov/docs/ML1923/ML19233A289.pdf).

On August 22, 2019, the NRC staff served its approvals on all parties, authorizing the transfer to occur upon two business days' notice. CL 117 (https://www.nrc.gov/docs/ML1923/ML19234A359.html). That same day, Entergy and Holtec made a public notification to the NRC that they intended to close on the transfer transaction on August 26, 2019. Add-641. Despite knowing that Entergy and Holtec would close the transaction imminently, Massachusetts neither accelerated the filing of its stay motion nor sought a temporary stay as is permissible under NRC rules and practice. *See* 10 C.F.R. § 2.342(f). On August 26, 2019, Entergy and Holtec notified NRC staff that the closing had occurred, CL 124 (https://www.nrc.gov/docs/ML1923/ML19239A037.pdf), and on August 27, 2019, the NRC notified Massachusetts of the closing and formally implemented the conforming license amendment NRC staff had approved, CL 126 (https://www.nrc.gov/docs/ML1923/ML19239A410.pdf).

On September 4, 2019, Massachusetts applied to the NRC Commissioners for a stay of the effectiveness of NRC staff's approvals of the license transfer, conforming license amendment, and exemption. Add-653. Entergy and Holtec opposed the stay. Weisburst Decl. Ex. 2 (CL 142). Massachusetts' stay application remains pending.

E. Proceedings In This Court

On September 25, 2019, Massachusetts filed its Petition. Doc. No. 1808410. On October 28, 2019, Massachusetts filed its Stay Motion. Doc. No. 1812979.

ARGUMENT

I. MASSACHUSETTS' PETITION SHOULD BE DISMISSED BECAUSE IT SEEKS REVIEW OF NON-FINAL AGENCY ACTION

This Court has jurisdiction to review "all *final* orders of the Atomic Energy Commission [now the NRC] made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4) (emphasis added). NRC staff's actions here are not final because they are explicitly "subject to the Commission's authority to rescind, modify, or condition the approved transfer based on the outcome of any post-effectiveness hearing on the license transfer application." Add-6. Accordingly, they do not "mark the 'consummation' of the agency's decisionmaking process," which is a prerequisite to finality. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citation omitted in original). Review of NRC staff's actions by this Court at this stage would duplicate the review of the NRC Commissioners, whose expertise, once applied, will aid any judicial review. Accordingly, the Petition should be dismissed for lack of jurisdiction. If this Court dismisses Massachusetts' Petition, this Court should deny the Stay Motion as moot.[12]

[12] To be sure, this Court has held that non-final agency actions may be reviewable

II. EVEN IF THE PETITION FOR REVIEW IS NOT DISMISSED, MASSACHUSETTS' STAY MOTION SHOULD BE DENIED

Massachusetts "fails every prong of the showing required to obtain the extraordinary relief of a stay pending appeal." *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 904 F.3d 1014, 1017 (D.C. Cir. 2018). Those prongs are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009); *accord*, *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (denying stay).[13]

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where necessary to protect this Court's jurisdiction to review a (future) final agency action. *See Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 78 (D.C. Cir. 1984) ("*TRAC*"). But this is a narrow doctrine with a high threshold that Massachusetts neither acknowledges nor attempts to meet. In *TRAC*, this Court denied relief despite more than four years' delay by the agency. *Id.* at 80. Massachusetts' petition to the NRC Commissioners has been pending for only nine months, and its stay application to the NRC Commissioners has been pending for less than three months.

[13] Massachusetts suggests that a stay will "preserve the status quo." Mot. 9 (internal quotation marks and citation omitted). But the status quo is Holtec's ownership/operation of Pilgrim, since the transfer was consummated on August 26, 2019. Massachusetts' Stay Motion is effectively seeking a *change in the status quo* by requiring a reversion of ownership/operation to Entergy. Additionally, because Massachusetts' application for a stay remains pending before the NRC Commissioners, Massachusetts has not exhausted its remedies concerning a stay.

A. Massachusetts Has Not Shown That It Will Be Irreparably Harmed Absent A Stay

Massachusetts has not shown that, absent a stay, it will suffer injury that is "both certain and great," "actual and not theoretical," "beyond remediation," and "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2011) (internal quotation marks and citations omitted; emphasis in original). The purported "harms" Massachusetts claims are equivalent under Holtec's ownership/operation to what they would be under Entergy's ownership/operation during the 2019-2020 period during which Massachusetts' Petition, if not dismissed, will be pending before this Court on the merits. That is because the asserted "harms" are part and parcel of the post-shutdown work that will occur regardless of who owns the plant and which decommissioning approach is pursued.

First, as to Massachusetts' suggestion (Mot. 18) of irreparable harm from expenditure of DTF funds on SNF costs, the ability to spend DTF on SNF costs is the same whether Pilgrim is in Holtec's or Entergy's hands. Massachusetts disregards that, before the transfer, Entergy had obtained its own exemption to use DTF funds for SNF management without any obligation to return DOE recoveries to the DTF, 84 Fed. Reg. at 36,627, and Massachusetts did not challenge that exemption. Holtec later obtained its own similar exemption in connection with the license transfer. Add-54. Accordingly, even if there were a concern that DTF funds

will be dissipated using the exemption, a stay would not resolve that concern because Entergy has the same ability to expend DTF funds on SNF costs.

Moreover, even though Holtec intends to make slightly greater use of the DTF for SNF costs than Entergy would have made during the 2019-2020 period,[14] such harm is quintessentially economic and therefore not irreparable. Massachusetts suggests (Mot. 18) that this economic harm is "irreparable" by arguing that "Holtec's only asset" is the DTF. But Massachusetts ignores the comprehensive NRC oversight of funding adequacy, including annual review of remaining costs compared to remaining funds, and NRC's authority to order Holtec to provide additional financial assurance to address any shortfall. 10 C.F.R. § 50.82(a)(8)(vi). Additionally, as discussed above, Pilgrim recovered over $60 million from DOE regarding the 2008-2015 period, and there is no reason to doubt that such recoveries will continue for as long as DOE remains in partial breach of its contract. Should the NRC ever find that additional funding assurance is required, DOE recoveries provide Holtec with a means of financing such additional assurance. Thus, even were Massachusetts' concern legitimate, "adequate compensatory or other

[14] Holtec's intended SNF expenditures are only approximately $24 million more than what Entergy had planned to spend over the 2019-2020 time period. *Compare* Add-491, *with* Add-380; *see also* Weisburst Decl. Ex. 1 at ¶ 3. This does not reflect any fundamental difference between Holtec's and Entergy's SNF cost estimates, but rather slightly divergent assumptions regarding timing of expenditures. Over the 2019-2023 time period, Holtec's and Entergy's SNF cost estimates are only about $2 million apart. *Compare* Add-52, *with* Add-380.

corrective relief will be available at a later date in the ordinary course of litigation," which "weighs heavily against a claim of irreparable harm." *Wisc. Gas. Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*per curiam*)).

Second, as to waste shipments, Massachusetts again fails to demonstrate that such shipments will be materially different under Holtec's watch than they would be under Entergy's over the 2019-2020 time period. In fact, the waste volumes will be approximately the same. *See* Weisburst Decl. Ex. 1 at ¶ 4. The increase in waste shipments under Holtec's approach relative to Entergy's will occur no earlier than 2021, by which time this Court will have decided the merits of the Petition. *See id.* at ¶ 3; Add-423.

Third, Massachusetts fails to show irreparable harm based on a supposed NEPA violation. As explained in Point II.B below, NRC staff has not violated NEPA, but even if it had, irreparable harm cannot be presumed from a NEPA violation. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010) (courts should not "presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances"); *Town of Huntington v. Marsh*, 884 F.2d 648, 651 (2d Cir. 1989) ("[T]he Supreme Court has explicitly rejected the notion that an injunction follows as a matter of course upon a finding of statutory violation."); *Nat'l Parks Conservation Ass'n v. Semonite*, 282 F. Supp. 3d 284, 290

(D.D.C. 2017) ("[E]ven if the Court were to assume a NEPA violation, that procedural harm standing alone is insufficient to constitute irreparable harm."). Similarly, in *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018) (cited at Mot. 13, 19), even though the NRC had "determine[d] there [was] a significant deficiency in its [own] NEPA compliance," *id.* at 538,[15] this Court held that the petitioner failed to show irreparable harm, *id.*

B. Massachusetts Has Not Demonstrated That It Is Likely To Succeed On The Merits

As explained in Point I above, Massachusetts' Petition seeks review of non-final agency action and should be dismissed for lack of jurisdiction. But in any event, the Petition is not likely to succeed on the merits.

1. The NRC Was Not Required To Provide A Hearing Before Making NRC Staff's Approvals Effective

Massachusetts unpersuasively argues that the "NRC unlawfully deprived [Massachusetts] of its right to a pre-effectiveness hearing." Mot. 9 (capitalization omitted). Massachusetts' threshold error is to conflate "a license transfer" with an "amend[ment] [of] the license." *Id.*[16] The AEA distinguishes these two actions: for a *license transfer* the AEA never requires a pre-effectiveness hearing, *LILCO*, 35

[15] NRC has made no such determination here, which also distinguishes *Oglala*.

[16] Massachusetts focuses only on the license transfer and license amendment (not the exemption) in this portion of its motion, and does not otherwise argue that the exemption required a pre-effectiveness hearing.

N.R.C. at 76-77, whereas for a *license amendment* the AEA sometimes requires a pre-effectiveness hearing, but does not so require when "the amendment involves no significant hazards consideration," 42 U.S.C. § 2239(a)(1)(A).

License transfer. Accordingly, there is no question that NRC acted appropriately in making the license transfer effective even though no hearing had yet been held. Moreover, even in the absence of a hearing, NRC staff reviewed hundreds of pages of documents and thoroughly analyzed the transfer. The NRC found "reasonable assurance … that adequate funds will be available in the DTF to complete radiological decommissioning," as well as "spent fuel management and site restoration." Add-31. Specifically, NRC found that the $1.03 billion DTF, assumed to grow at a 1.42% annual after-tax real rate of return (which is more conservative than the NRC's usual 2%), is sufficient to fund not only the $593 million cost of radiological decommissioning, but also the $501 million cost of SNF management and the $40 million cost of non-radiological site restoration. Add-30-31; Add-52-53 (NRC staff's independent cash flow analysis). NRC staff also noted "that Holtec Pilgrim expects to recover spent fuel management costs it will incur from the DOE through litigation or settlement of its claims." Add-32. Although NRC staff did not factor Holtec's expected future recoveries from DOE into staff's independent cash flow analysis, Add-33, the NRC has ample means to require further funding assurance should a shortfall occur in the future. Add-63 (Holtec

must provide annual reports to the NRC on "the status of the DTF and the licensee's funding for managing spent fuel, [which] provide the NRC staff with awareness of, and the ability to take action on, any actual or potential funding deficiencies.").

Having found the $1.03 billion DTF to be an adequate funding source even without considering recoveries from DOE, the NRC did not need to require additional funding assurance, making the $50 million line of credit previously required from an Entergy affiliate irrelevant upon transfer of the license to Holtec.[17]

Conforming license amendment. In declining to provide a pre-effectiveness hearing for the license amendment here, NRC staff relied on the generic finding in 10 C.F.R. § 2.1315 that any license amendment "which does no more than conform the license to reflect the transfer action involves no significant hazards consideration." Add-43. The rationale for this approach is that the NRC's substantive review of the appropriateness of the transfer itself, which does *not* require a pre-effectiveness hearing, has already taken place; accordingly, it would

[17] The $50 million line of credit that NRC in 1999 required from an Entergy affiliate when Entergy bought Pilgrim from Boston Edison—which Massachusetts mistakenly describes as a pre-paid "fund" (Mot. 3), when in fact it was only a line of credit—was required principally to cover *operating* costs, Add-195, and there was never any assurance that such funds would remain, after shutdown, for decommissioning. Additionally, unlike in 1999, when it was unclear whether DOE would have to pay money damages to plant licensees for breach of the contracts to pick up SNF, court decisions have since resolved that uncertainty in licensees' favor (as discussed above), and recoveries from DOE are now a potential funding resource that could not be assumed when the license condition requiring a line of credit from the Entergy affiliate was imposed.

be strange to have the tail of a conforming license amendment wag the dog of a license transfer in terms of injecting a pre-effectiveness hearing requirement.

Still, the NRC is careful not to place all changes that occur at the same time as (but are not necessarily germane to) a license transfer under the umbrella of NRC's generic finding of no significant hazards consideration. Thus, the NRC distinguishes "associated administrative amendments to reflect transfers" (which are within 10 C.F.R. § 2.1315's scope), from amendments that "directly affect actual operating methods and actual operation of the facility" (which are not). 63 Fed. Reg. at 66,728. Here, NRC staff found the matter within 10 C.F.R. § 2.1315's scope because "the Applicants requested no physical or operational changes to the facility." Add-43.

In asserting that "name substitutions" (Mot. 11) are the only types of amendments within 10 C.F.R. § 2.1315's scope, Massachusetts disregards the NRC's focus on changes "that would directly affect the actual operation of a facility," 63 Fed. Reg. at 66,728, as the dividing line. An amendment to conform with NRC staff's financial analysis supporting a license transfer approval, like a name substitution, does not "directly affect the actual operation of a facility" and hence does not remove the matter from 10 C.F.R. § 2.1315's scope.[18] At a minimum,

[18] Massachusetts unpersuasively relies (Mot. 12 n.6) on *Entergy Nuclear Vermont Yankee, LLC*, CLI 16-17, 2016 WL 8729987, at *16 (N.R.C. Oct. 27, 2016). As an

NRC staff is entitled to deference in interpreting 10 C.F.R. § 2.1315 in this way. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019).

2. The NRC Staff Complied With NEPA

Alleged segmentation of analysis. Massachusetts unpersuasively argues (Mot. 12) that "the NRC violated NEPA's anti-segmentation rule when it treated its review of the license transfer and amendment request, Trust Fund exemption request, and revised PSDAR and site-specific cost estimate as discrete, unrelated actions."

As an initial matter, NEPA does not apply to the last two items: the "revised PSDAR and site-specific cost estimate." Those are not agency actions or approvals, but informational documents prepared by Holtec and submitted to NRC requiring no NRC approval; accordingly, they are not federal actions subject to NEPA. *See Sierra Club*, 803 F.3d at 36 ("NEPA requires the federal government to identify and assess in advance the likely environmental impact of *its* proposed actions, including its authorization or permitting of private actions.") (emphasis added). In any event, NRC staff considered the PSDAR and site-specific cost estimate in the context of

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initial matter, the passage quoted by Massachusetts appears at *18, not *16. More importantly, it does not support Massachusetts because that case did not involve a license transfer (or conforming license amendment), but rather a proposed exemption under 10 C.F.R. § 50.82(a)(8)(i)(A) for the existing licensee. As noted above, Massachusetts does not argue that the NRC was required to afford a pre-effectiveness hearing concerning the corresponding exemption here.

the license transfer, conforming license amendment, and exemption from 10 C.F.R. § 50.82(a)(8)(i)(A), *see, e.g.*, Add-30; Add-60, and as discussed presently, NRC staff complied with NEPA in issuing those approvals.

NRC staff considered the license transfer and conforming license amendment in connection with—*not segmented from*—NRC staff's environmental assessment of the exemption published in the Federal Register, and thus subjected all three issues to the NEPA framework. The environmental assessment specifically discussed both radiological decommissioning and SNF management in the context of determining that there are adequate funds in the DTF to accomplish both without any significant impact on the environment:

> The proposed exemption would allow [Holtec] to use [DTF] funds to support *spent fuel management* and site restoration activities not associated with radiological decontamination. … [Holtec] has provided detailed, site-specific, cost-estimates for radiological decommissioning that the NRC staff finds sufficiently demonstrate that the [DTF] funds dedicated to *radiological decommissioning* are adequate.

Add-67 (emphasis added).

Although NRC's environmental assessment was therefore sufficient as to all three agency actions, in fact, as to the license transfer and conforming license amendment (unlike for the exemption), NRC was not even required to perform an environmental assessment. As discussed above, NRC by notice-and-comment rulemaking has found that "approvals of direct or indirect transfers of any license

issued by NRC and any associated amendments of license," 10 C.F.R. § 51.22(c)(21), are categories of actions that "d[o] not individually or cumulatively have a significant effect on the human environment," *id.* § 51.22(a), and therefore an "environmental assessment or an environmental impact statement is not required," *id.* § 51.22(b). This regulation, which NRC staff invoked here, Add-51, was adopted at the same time as the similar regulation, 10 C.F.R. § 2.1315, generically finding that license amendments that merely conform to an approved license transfer and do not "directly affect the actual operation of a facility," 63 Fed. Reg. at 66,728, may be made effective prior to a hearing. Massachusetts simply rehashes (Mot. 14) its unpersuasive assertion that only "name substitutions" qualify, ignoring the "directly affect the operation standard" as well as the deference due to NRC staff in interpreting its regulation.

Allegedly "deficient" analysis. Massachusetts can disparage NRC staff's environmental assessment as "a series of baseless, repetitive, and wholly conclusory statements" (Mot. 15) only by ignoring what NRC staff actually examined and wrote. *First*, NRC staff "completed its evaluation [including its independent cash flow analysis, Add-52-53] of the proposed action and conclude[d] that there is reasonable assurance that adequate funds are available to complete all activities associated with radiological decommissioning," as well as "activities associated with spent fuel management site restoration." Add-67. *Second*, in another key sentence

Massachusetts omits, NRC staff explained that it could impose *additional requirements* in the future if circumstances were to change and the DTF no longer proved to be an adequate funding source. *See* Add-67 ("[A]nnual reports [by the licensee to NRC] provide a means for the NRC to monitor the adequacy of available funding."); *see also* Add-63 ("10 CFR 50.82(a)(8)(vi) requires that the annual financial assurance status report must include additional financial assurance to cover the estimated cost of completion if the sum of the balance of any remaining decommissioning funds, plus earnings on such funds calculated at not greater than a 2% real rate of return, together with the amount provided by other financial assurance methods being relied upon, does not cover the estimated cost to complete the decommissioning.").[19]

The remainder of Massachusetts' argument (Mot. 15-16) relies on the same erroneous logic, already addressed above, that ignores NRC's authority to regulate licensees' funding assurance and presumes that Holtec would be unable to satisfy an NRC mandate, should one ever be issued, notwithstanding the hundreds of millions of dollars of conservatism in Holtec's decommissioning cost estimate in the form of

[19] Again, *Entergy Nuclear Vermont Yankee*, 2016 WL 8729987, at *18-19, is inapposite. There, the question was whether NRC staff had to perform any environmental assessment in connection with a proposed exemption from 10 C.F.R. § 50.82(a)(8)(i)(A). Here, NRC staff did perform an environmental assessment.

un-credited DOE recoveries. Massachusetts indeed recognizes (Mot. 17, citing 83 Fed. Reg. 50,966, 50,967 (Oct. 10, 2018)) that the NRC in the case of a similar plant with a much smaller DTF ($488 million,[20] compared to the $1.03 billion here) required deposit of some recoveries from the DOE into the DTF, as the transferee there itself had proposed to satisfy the NRC's financial assurance requirements in that manner. Massachusetts does not provide any meaningful argument to support its erroneous premise that the NRC cannot require additional financial assurance for Pilgrim in the future if circumstances warrant.[21]

C. Intervenors May Be Injured If A Stay Is Granted

While Holtec and Entergy, in choosing to close on the transfer transaction based upon the NRC staff order, took the risk of having to unwind the transaction if the NRC Commissioners (or a reviewing court) ultimately disagreed with NRC staff, Massachusetts has not shown a likelihood of such a merits outcome, as discussed in

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[20] *See* NRC, No. 50-271, Safety Evaluation at 12, Attachment 1 (Oct. 11, 2018), https://www.nrc.gov/docs/ML1824/ML18242A639.pdf. Moreover, in the Vermont Yankee proceeding to which Massachusetts refers, the transferee's financial qualification relied on maintaining a $20 million revolver in the DTF, replenished from DOE recoveries, to pay for SNF costs incurred between such recoveries. Here, the DTF has been determined capable of funding over $500 million in SNF costs without replenishment.

[21] Massachusetts' footnoted (Mot. 8 n.4) suggestion that NEPA required the Commission to give notice of the environmental assessment and receive comments *before* finalizing the assessment is waived. *See Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 39 (D.C. Cir. 1997). In any event, the Commission's notice satisfied NEPA. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 519 (D.C. Cir. 2010).

Point II.B above. Additionally, the notion that Holtec and Entergy should have waited to close on the transfer transaction until completion of the NRC Commissioners' review disregards an employee retention concern that such an approach would have raised. Because Entergy's SAFSTOR approach provides fewer on-site employment opportunities once the plant is prepared for dormancy, waiting until the NRC Commissioners' decision would have created and/or prolonged employees' job uncertainty. To the extent that uncertainty prompts existing employees to seek employment elsewhere, the project would lose valuable institutional knowledge. This risk explains why Holtec and Entergy exercised their right to close on the transaction based on NRC staff's approvals, and also provides another reason why this Court should not grant a stay.

D. The Public Interest Does Not Favor A Stay

Finally, Massachusetts' contention (Mot. 20) that the public interest favors a stay is based on incorrect premise that NRC did not follow the law, which is untrue, as discussed above. In fact, because decommissioning activities would be delayed if NRC staff's approvals were stayed, the public interest weighs against issuance of a stay so that prompt decommissioning can continue. Additionally, while employee concerns were discussed above in the context of harm to Holtec and Entergy from granting a stay, those concerns are also relevant to the public interest because the employees are members of the public. As discussed above, with decommissioning

plans in limbo, employees may be concerned about how long they will have secure employment. Finally, the public interest strongly favors allowing the NRC the opportunity to apply its expertise in the first instance in deciding the stay motion currently pending before it.

CONCLUSION

The Petition should be dismissed and the Stay Motion should be denied as moot. Even if the Petition is not dismissed, the Stay Motion should be denied.

Dated: Nov. 22, 2019

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

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ADDENDUM--CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, counsel for Entergy Nuclear Operations, Inc. certifies as follows:

Entergy Nuclear Operations, Inc. is a Delaware corporation engaged principally in the business of operating nuclear power facilities owned by its affiliates in the northeastern United States. Entergy Nuclear Operations, Inc. is a direct, wholly-owned subsidiary of Entergy Nuclear Holding Company #2. Entergy Nuclear Holding Company #2 is an indirect wholly-owned subsidiary of Entergy Corporation (NYSE: ETR). No other publicly-held company directly or indirectly holds a 10 percent or more equity interest in Entergy Nuclear Operations, Inc.

ADDENDUM--CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, counsel for Holtec International, Holtec Decommissioning International, LLC, and Holtec Pilgrim, LLC certifies as follows:

Holtec International is a Delaware corporation engaged principally in the business of providing equipment, systems, and services to the nuclear industry throughout the world. Holtec International has no parent company, and no publicly-held company directly or indirectly holds a 10 percent or more equity interest in Holtec International.

Holtec Decommissioning International, LLC is a Delaware limited liability company engaged principally in the business of operating and decommissioning shutdown nuclear power plants. Holtec Decommissioning International, LLC is a direct, wholly-owned subsidiary of Holtec Power, Inc., which in turn is a direct, wholly-owned subsidiary of Holtec International.

Holtec Pilgrim, LLC (f/k/a Entergy Nuclear Generation Company, LLC), is a Massachusetts limited liability company engaged principally in the business of owning the shutdown Pilgrim Nuclear Power Station in Plymouth, Massachusetts. Holtec Pilgrim, LLC is a direct, wholly-owned subsidiary of Nuclear Asset

Management Company, LLC, which in turn is a indirect, wholly-owned subsidiary of Holtec International.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of D.C. Cir. R. 27(c) because it contains 7652 words, excluding the parts of the filing exempted under Fed. R. App. P. 27(a)(2)(B), Fed. R. App. P. 32(f), and D.C. Cir. R. 32(e)(1), according to the count of Microsoft Word.

/s/ Sanford I. Weisburst
Sanford I. Weisburst

Counsel for Intervenor Entergy Nuclear Operations, Inc.

CERTIFICATE OF SERVICE

I, Sanford I. Weisburst, a member of the Bar of this Court, hereby certify that on November 22, 2019, I electronically filed the foregoing "INTERVENORS' RESPONSE TO PETITIONER'S MOTION FOR A STAY PENDING APPEAL, AND AFFIRMATIVE MOTION TO DISMISS PETITIONER'S PETITION FOR REVIEW" and the accompanying "DECLARATION OF SANFORD I. WEISBURST IN SUPPORT OF INTERVENORS' RESPONSE TO PETITIONER'S MOTION FOR A STAY PENDING APPEAL, AND AFFIRMATIVE MOTION TO DISMISS PETITIONER'S PETITION FOR REVIEW" with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate ECF system.

I further certify that pursuant to Circuit Rule 27(b), the original and four paper copies of this submission will be sent to the Court on November 22, 2019 via overnight FedEx delivery.

/s/ Sanford I. Weisburst
Sanford I. Weisburst

Dated: November 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, Petitioner, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, Respondents. HOLTEC DECOMMISSIONING INTERNATIONAL, LLC, et al., Intervenors.	**No. 19-1198**

DECLARATION OF SANFORD I. WEISBURST IN SUPPORT OF INTERVENORS' RESPONSE TO PETITIONER'S MOTION FOR A STAY PENDING APPEAL, AND AFFIRMATIVE MOTION TO DISMISS PETITIONER'S PETITION FOR REVIEW

I, Sanford I. Weisburst, declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a partner in Quinn Emanuel Urquhart & Sullivan, LLP, counsel for Entergy Nuclear Operations, Inc. in the above-captioned proceeding pending before the U.S. Court of Appeals for the District of Columbia. I respectfully submit this declaration in support of Intervenors' Response to Petitioner's Motion for a Stay Pending Appeal, and Affirmative Motion to Dismiss Petitioner's Petition for Review.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Declaration of Pamela B. Cowan, dated Sept. 13, 2019. This document was originally included as an attachment to "Applicants' Answer Opposing the Application of the Commonwealth of Massachusetts for a Stay," dated Sept. 13, 2019, which was filed in the NRC proceeding below and is identified as Item 142 in the NRC's Certified List filed with this Court, *see* Doc. No. 1815225.

3. Attached hereto as Exhibit 2 is a true and correct copy of the body of the aforementioned Applicants' Answer Opposing the Application of the Commonwealth of Massachusetts for a Stay.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 22, 2019

/s/ Sanford I. Weisburst
Sanford I. Weisburst

EXHIBIT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Entergy Nuclear Operations, Inc,	)	
Entergy Nuclear Generation Company,	)	Docket Nos. 50-293-LT
Holtec International, and	)	72-1044-LT
Holtec Decommissioning International, LLC	)	
	)	
(Pilgrim Nuclear Power Station)	)	

Declaration of Pamela B. Cowan

I, Pamela B. Cowan, declare and state as follows:

1. I am the Senior Vice President and Chief Operating Officer of Holtec Decommissioning International, LLC ("HDI"). HDI is the NRC-licensed operator for the Pilgrim Nuclear Power Station ("Pilgrim"). HDI has overall supervision for the licensing activities at Pilgrim, including the submittal of NRC filings and decommissioning cost estimates. HDI is also responsible for the overall supervision of the decommissioning activity at Pilgrim and is the conduit by which decommissioning costs are collected and submitted for reimbursement to the trustee of the Pilgrim nuclear decommissioning trust fund. In my role, I am directly involved with and help manage the afore-mentioned activities, including supervising the Pilgrim Site Vice President and closely coordinating with Pilgrim's decommissioning general contractor, Comprehensive Decommissioning International, LLC ("CDI").

2. I am providing this declaration in support of Applicants' Answer Opposing the Application of the Commonwealth of Massachusetts for a Stay, and Applicants' Answer Opposing Pilgrim Watch's Stay Motions.

3. The Commonwealth and its declarant, Mr. Brewer, assert that initial decommissioning work in the next seventeen months may alter Pilgrim's systems, structures and components in a manner leaving the facility in a state (such as openings in containment) that would preclude returning it to SAFSTOR if necessary, or reduce the decommissioning trust fund below an amount that would permit another vendor to complete the decommissioning work or change the decommissioning approach. These assertions are incorrect. First, there is no activity between now and the end of the campaign to transfer the spent fuel to the ISFSI (mid-2021 earliest), which would prevent the plant from returning to SAFSTOR, or require significant additional expenditure to do so. Second, the decommissioning trust fund contains sufficient funds that would allow placing and maintaining Pilgrim in SAFSTOR at the end of 2021 (including spent fuel management and the completion of decommissioning and site restoration), if that were necessary. In this regard, the projected expenditure of $303 million by HDI through 2020 is not markedly greater than the $276 million in expenditures that were projected through this same period under Entergy's SAFSTOR plan, which is a difference of only nine percent and one that would not alter the sufficiency of the cash flow analysis that Entergy provided when it was the licensee to demonstrate the adequacy of the decommissioning trust fund.

4. The Commonwealth asserts that it and its citizens are likely to suffer irreparable harm due to immediate start of decommissioning activities, including health, safety, and infrastructure harm inflicted by, among other things, frequent waste shipments over local roads, which will cause noise, dust, and air pollution emissions, increase the risk of accidents on local roads, and damage local transportation infrastructure. This assertion is incorrect. Shipments of significant volumes of waste will not start prior to the removal of large components, currently scheduled after the conclusion of the spent fuel campaign, and Holtec plans to use a combination of

approaches that will include road, rail, and barge to best meet the needs of the project and minimize impacts to local communities. Shipments of legacy waste removed during earlier stages of plan shutdown and "cold and dark" efforts would occur irrespective of the license transfer. Further, shipments of legacy waste, or other waste generated prior to the removal of large components, are not materially different from regular shipments of waste from Pilgrim, which have occurred over the life of the plant with no harm to persons or damage to infrastructure. Such shipments are subject to packaging, labeling and transportation requirements that protect against harm to the public health and safety.

5. The Commonwealth and Mr. Brewer suggest that HDI may not be able to execute simultaneous decommissioning projects, including acquiring the staffing particularly for specialized tasks such as reactor vessel and internal segmentation. This is incorrect. First, Holtec's acquisitions of Indian Point and Palisades will not occur until after those plants cease operation in April 2021 and Spring 2022, respectively. Further, a separate site organization and dedicated leadership has been established for Pilgrim, allowing its decommissioning to proceed without being materially affected by other projects. In addition, there is no apparent difficulty in scheduling the segmentation of the Pilgrim reactor vessel and internals. In fact, there are benefits to a multi-plant approach. For example, CDI has scheduled reactor segmentation at Pilgrim to follow shortly after Oyster Creek. This will enable Pilgrim to avoid repurchasing some tooling, but also enable CDI to implement lessons learned, all of which may reduce cost and risk.

6. Pilgrim Watch alleges that Holtec does not know what contamination is on the site. As part of its due diligence, Holtec reviewed the records required by 10 C.F.R. 50.75(g), annual radiological environmental operating reports, several other ecological impact studies, and other

inspection reports and plant records. In addition, in December 2018, a comprehensive Historical Site Assessment was completed, accounting for both radiological and non-radiological contamination.

7. Both the Commonwealth and Pilgrim Watch argue that there would be no harm to Holtec or Entergy if the license transfer is stayed. This argument is incorrect. Staying the transfer would raise numerous commercial, administrative and logistical challenges, particularly if the stay were to require that the license transfer be reversed—unwinding a complex commercial transaction and handoff that took months of preparation. Among other impacts:

- Certain incumbent employees transferred or seconded back to Entergy's site operator (which also impacts collective bargaining agreements, payroll systems, employment laws, and benefit plans); Entergy may also have to reassign personnel back to Pilgrim.
- Entergy's information technology would have to be reestablished,
- Insurance replaced,
- New notifications and consent requests issued to regulators,
- Contracts with site support vendors amended and decommissioning procurement activities halted,
- The trust agreement (re)amended,
- Further rulings requested from the IRS,
- Real property filings and title commitments modified.

I hereby declare under penalty of perjury that my statements in this declaration are true and correct to the best of my knowledge and belief.

/Executed in Accord with 10 CFR 2.304(d)/

Pamela B. Cowan
Senior Vice President & Chief Operating Officer
Holtec Decommissioning International, LLC
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P.Cowan@holtec.com

Dated at Camden, New Jersey
this 13th day of September 2019

EXHIBIT 2

September 13, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)		
	)		
Entergy Nuclear Operations, Inc,	)		
Entergy Nuclear Generation Company,	)	Docket Nos.	50-293-LT
Holtec International, and	)		72-1044-LT
Holtec Decommissioning International, LLC	)		
	)		
(Pilgrim Nuclear Power Station)	)		

Applicants' Answer Opposing the Application of the Commonwealth of Massachusetts for a Stay

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1327(c), Entergy Nuclear Operations, Inc. ("ENOI"), Entergy Nuclear Generation Company (now Holtec Pilgrim, LLC), Holtec International ("Holtec"), and Holtec Decommissioning International, LLC ("HDI"), ("Applicants"), hereby oppose the Application of the Commonwealth of Massachusetts for a Stay of the Effectiveness of the Nuclear Regulatory Commission Staff's Actions Approving the License Transfer Application and Request for an Exemption to Use The Decommissioning Trust Fund for Non-Decommissioning Purposes (Sept. 3, 2019) ("App."). The Commission should deny the stay request because it is unjustified under the governing factors.

II. BACKGROUND

This proceeding involves the application for approval of the transfer of ENOI's authority under the Pilgrim licenses to HDI, and the indirect transfer of control of the Pilgrim licenses to Holtec,[1] following Pilgrim's permanent cessation of operations. The Application included a request for an exemption to allow use of the decommissioning trust fund ("DTF") for spent fuel management and site restoration activities. LTA, Encl. 2. The Commonwealth and Pilgrim Watch each requested a hearing, and their requests are pending before the Commission. The Commonwealth's hearing request seeks a

[1] Application for Order Approving Direct and Indirect Transfers of Control of Licenses and Approving Conforming License Amendment, and Request for Exemption from 10 CFR 50.82(a)(8)(i)(A) (Nov. 16, 2018) (ML18320A031) ("Application" or "LTA").

hearing on two contentions – the first challenging HDI's financial qualifications and the second challenging the NRC's categorical exclusion of license transfer actions from environmental review.[2]

On August 22, 2019, after a nine-month review, the NRC Staff concluded that HDI and Holtec Pilgrim are financially qualified and HDI is technically qualified to hold the Pilgrim licenses.[3] Therefore, the Staff issued its order approving the license transfer, subject to "the Commission's authority to rescind, modify, or condition the approved transfer based on the outcome of any post-effectiveness hearing on the license transfer application,"[4] and issued the associated exemption.[5] Thereafter, on August 26, 2019, the Applicants completed their transaction transferring the licenses.

III. ARGUMENT

Each of the stay factors specified in the NRC rules compels denial of the stay request. The factors governing a stay of the Order are: (1) whether the requestor will be irreparably injured unless a stay is granted; (2) whether the requestor has made a strong showing that it is likely to prevail on the merits; (3) whether the granting of a stay would harm other participants; and (4) where the public interest lies.[6] A stay is "an extraordinary equitable remedy,"[7] and as the proponent, the Commonwealth has the burden of persuasion.[8] The Commonwealth does not meet this burden.

A. The Commonwealth Will Not Be Irreparably Injured

Irreparable injury is "the most crucial factor"[9] – the *sine qua non* of obtaining a stay.[10] A party seeking a stay must show that it faces irreparable injury that is not only "imminent" but also "certain and

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2 Commonwealth of Massachusetts' Petition for Leave to Intervene and Hearing Request (Feb. 20, 2019). Applicants have opposed this hearing request. Applicants' Answer Opposing the Commonwealth of Massachusetts' Petition for Leave to Intervene and Hearing Request (Mar. 18, 2019).

3 Safety Evaluation (ML19234A364) at 15, 24 ("SE").

4 Order Approving Direct and Indirect Transfer of License and Conforming Amendment (Aug. 22, 2019) (ML19234A362) ("Order") at 5-6.

5 Exemption (Aug. 22, 2019) (ML19192A086) ("Exemption").

6 10 C.F.R. § 2.1327(d)(1)-(4).

7 *U.S. Department of Energy* (High-Level Waste Repository), CLI-05-27, 62 N.R.C. 715, 718 (2005).

8 10 C.F.R. § 2.325; *Alabama Power Co.* (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 N.R.C. 795, 797 (1981).

9 *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 N.R.C. 79, 83 (2000).

10 *Vermont Yankee*, CLI-06-8, 63 N.R.C. at 237.

great."[11] Unproven speculation does not suffice.[12] Moreover, a claim of irreparable injury based on alleged harm unrelated to the petitioner's underlying contentions will not justify a stay.[13]

The Commonwealth does not demonstrate any injury, let alone one that is irreparable, imminent, certain and great. Citing its declarant, Mr. Brewer,[14] the Commonwealth argues that "Staff's actions are likely to make it impossible to complete decommissioning successfully or lead to irreversible consequences if regulatory or financial concerns . . . require a modified decommissioning approach." App. at 7. Mr. Brewster in turn speculates that "if Holtec . . . is not able to manage and execute six simultaneous decommissioning projects," "it is possible" that the drawdown from the DTF over the first 17 months (2019 and 2020) may leave insufficient funds to permit another vendor to complete the work or switch to SAFSTOR, because the initial work "may have" altered SSCs (e.g. openings in containment). Brewer Decl., ¶ 15. This speculation about what "is possible" 17 months from now does not demonstrate harm that is certain, great, or imminent.

Moreover, the speculative scenario posited by Mr. Brewer is heaped with infirmities. First, the acquisitions of Indian Point and Palisades are expected to occur after the plants cease operation in April 2021 and Spring 2022 respectively.[15] Therefore, decommissioning activities at these plants will not be simultaneous with Pilgrim, will not occur in the next 17 months, and are not imminent. With respect to activities underway at Pilgrim and Oyster Creek, the NRC Staff examined HDI's ability to manage these two projects simultaneously (SE at 20), and the Commonwealth does not challenge this ability. Second, there is no activity before the completion of the transfer of spent fuel to the ISFSI, in mid-2021 at the

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[11] *Southern Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 and 4), CLI-12-11, 75 N.R.C. 523, 529 (2012); *Vermont Yankee*, CLI-06-8, 63 N.R.C. at 237. A party must reasonably demonstrate, and not merely allege, irreparable harm. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 N.R.C. 191, 196 (1985) (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 N.R.C. 1630, 1633-35 (1984)).

[12] *Vermont Yankee*, CLI-06-8, 63 N.R.C. at 237.

[13] *Vogtle*, CLI-12-11, 75 N.R.C. at 530-32 ("To qualify as irreparable harm justifying a stay, the asserted harm must be related to the underlying claim. . . . We . . . see no basis for a claim of irreparable harm . . . unrelated to any contention proposed by Petitioners.") (internal quotation marks and citations omitted).

[14] Second Declaration of Warren K. Brewer (Sept. 4, 2019) ("Brewer Decl.").

[15] *See* attached Declaration of Pamela B. Cowan (Sept. 13, 2019), ¶ 5 ("Cowan Decl.").

earliest, that would prevent the plant from being returned to SAFSTOR or require significant additional expenditure to do so. Cowan Decl. ¶ 3. Third, Mr. Brewer's speculation is inconsistent with the NRC rules at 10 C.F.R. § 50.82(a)(8)(i)(B)-(C), which prohibit a DTF drawdown below an amount necessary to place and maintain the reactor in SAFSTOR or inhibiting the funding of any shortfalls needed to ultimately release the site and terminate the license. Fourth, HDI's projected expenditures in 2019-2020 are not markedly different from Entergy's projected SAFSTOR expenditures for this period[16] ($303 million versus $276 million – a difference of only 9 percent) – belying any assertion that the "substantial drawdown" would preclude SAFSTOR at that juncture. Cowan Decl. ¶ 3.

The Commonwealth's claim also ignores the conservatism in the Application's cash flow analysis, which takes no credit for hundreds of millions of dollars from expected recoveries of spent fuel management costs from the Department of Energy ("DOE"). Additionally, the Commonwealth ignores the comprehensive NRC oversight, which includes annual review and adjustment of funding assurance.[17] Consequently, the NRC could direct additional funding assurance at any time, and HDI and Holtec Pilgrim have the means to comply. In short, the Commonwealth's concern about the adequacy of funding and expenditures over the next 17 months does not represent any imminent, certain or irreparable harm.

Finally, the Commonwealth ignores the Commission's ability to require additional assurance if warranted by the outcome of a post-effectiveness hearing.[18] Irreparable harm cannot be found where, as here, it is possible for the Commission to address the Commonwealth's concerns at a later point in time.[19]

The Commonwealth's allegation that "Holtec is technically unsuited to perform the work as

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[16] *See* Request for Exemption from 10 CFR 50.82(a)(8)(i)(A) (Nov. 16, 2018), Att. 1 at 7 (ML18320A037).

[17] *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-16-17, 84 N.R.C. 99, 118 (2016).

[18] Applicants who proceed with license transfer before hearings are complete do so at the risk that the subsequent hearing process could result in additional conditions or rescission of the license transfer. *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-19-08, slip op. at 3 n.6 (Aug. 14, 2019). Indeed, the Order is conditioned on the Commission's authority to address the outcome of the post-effectiveness hearing. Order at 6.

[19] *See Shieldalloy Metallurgical Corp.*, (Decommissioning of the Newfield, N.J. Site), CLI-10-8, 71 N.R.C. 142, 153 n.56 (2010) (quoting *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1959)) ("The possibility that adequate compensatory or other corrective relief will be available at a later date…weighs heavily against a claim of irreparable harm.").

planned," resulting in "local Massachusetts residents [being] exposed to increased safety and health hazards" (App. at 8), also fails to demonstrate irreparable harm. The Commonwealth has raised no contention challenging HDI's technical qualifications, so the Commonwealth cannot claim irreparable injury on this basis. Further, the allegation is unsupported. Paragraph 7 of Mr. Brewer's declaration cited by the Commonwealth (*see id.*) does not address Holtec's technical suitability. While Mr. Brewer states elsewhere that Holtec has not provided information for the NRC to evaluate its ability to decommission six reactors (Brewer Decl. ¶ 12), this statement does not demonstrate that HDI is technically unsuited to decommission Pilgrim; and as discussed previously, there is no imminent overlap in the decommissioning of the six reactors as Mr. Brewer supposes. In any event, irreparable injury is not shown "against something merely feared as liable to incur at some indefinite time in the future."[20]

Likewise, the Commonwealth's claim of harm from shipments of waste, allegedly causing pollution, risk of accidents, and damage to infrastructure (App. at 8), does not constitute irreparable injury. As an initial matter, the Commonwealth raised no such claim in its hearing request. Further, shipments of large volumes of waste will not start prior to the removal of large components, scheduled after all fuel has been moved to the ISFSI (Cowan Decl. ¶ 4), and therefore are not imminent. In addition, such shipments, particularly of operational waste that the Commonwealth believes "will begin . . . immediately" (App. at 8), will occur irrespective of the license transfer, and therefore are not causally related to it. Moreover, shipments of waste occur regularly without any of the alleged irreparable harms to local infrastructure or safety. *See* Cowan Decl. ¶ 4. Merely raising the specter of accidents does not demonstrate irreparable harm,[21] and any possible impact on infrastructure is certainly not irreparable.

Finally, the alleged failure to prepare an environmental impact statement ("EIS") (App. at 8) does not constitute or demonstrate any irreparable injury. As a threshold matter, the assertion that an EIS is necessary impermissibly challenges the categorical exclusion in 10 C.F.R. § 51.22(c)(21). In addition, to

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[20] *Eastern Greyhound Line v. Fusco*, 310 F.2d 632, 634 (6th Cir. 1962) (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)).

[21] *Vermont Yankee*, CLI-06-8, 63 N.R.C. at 237-238 (citing *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 75 (1st Cir. 1981)).

the extent that this assertion is based on the Commonwealth's new-found concern with the impacts of waste shipments, it is unrelated to the license transfer and instead challenges the post-shutdown decommissioning activities report ("PSDAR"), which is beyond the scope of this proceeding. In any event, the Commission has held "[i]mmediate, irreparable harm is not presumed by a NEPA violation, even assuming such a violation has occurred . . ."[22]

B. The Commonwealth Is Not Likely to Prevail on the Merits.

Given its clear failure to show that it will be irreparably injured unless a stay is granted, the Commonwealth must show that success on the merits is a "virtual certainty to warrant issuance of a stay."[23] It is not enough simply to state confidence or an expectation of success.[24] The Commonwealth makes no showing that it is likely to prevail on its contentions (which to date have not even been admitted), let alone any showing that its likelihood of prevailing is a virtual certainty.

The Commonwealth argues that it is likely to prevail on the merits of its contentions because Holtec's cash flow analysis assumes that spent fuel will be removed by 2062. App. at 3. As the NRC Staff reviewed and accepted this assumption (SE at 13), which is based on the best information available regarding DOE's strategy, it is unclear why the Commonwealth believes its assumption of a 120-year or an indefinite storage period (see App. at 3) has greater merit. In any event, any further delay in DOE acceptance would simply result in further recovery from DOE of the added storage costs. [25]

The Commonwealth argues that Holtec's cash flow analysis does not comply with 10 C.F.R.

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[22] *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-15-17, 82 N.R.C. 33, 40 (2015). *See also Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120) CLI-98-8, 47 N.R.C. 314, 322-23 (1998) (a "holding that a statutory violation equates to a showing of irreparable injury cannot be squared with the current state of the law as reflected in two Supreme Court environmental law decisions, *Weinberger v. Romeo-Berkeley*, 456 U.S. 305 (1982), and *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987).").

[23] *Shieldalloy Metallurgical Corp.,* CLI-10-8, 71 N.R.C. at 154 (2010) (internal quotation marks omitted).

[24] *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 N.R.C. 191, 196 (1985) (*Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 N.R.C. 801, 804-05 (1984)).

[25] The Commonwealth and Mr. Brewer point out that the license application for Holtec's Centralized Interim Storage Facility ("CISF") in New Mexico assumes that it might take DOE 120 years to pick up spent fuel. Brewer Decl. ¶ 14; App. at 7. How long waste received from multiple plants might be stored at the CISF before a permanent repository is available says nothing about the length of expected storage at Pilgrim, particularly as the DOE strategy is currently based on moving spent nuclear fuel from reactor sites to an interim storage facility.

§ 50.75(b)(1) because it uses a decommissioning cost estimate ("DCE") that is less than the NRC formula amount. App. at 3. The Commonwealth has not raised this claim as a contention, and therefore cannot claim that it will prevail on it. Further, as Applicants discussed to the apparent satisfaction of the NRC Staff,[26] the formula amount in 10 C.F.R. § 50.75 is a reference level that applies to plants that are operating, while 10 C.F.R. § 50.82 applies after a plant permanently ceases operation and contains no provision requiring that cost estimates remain above the formula amount, and the annual reporting requirements in 10 C.F.R. § 50.82 clearly show that required funding assurance decreases as decommissioning proceeds.

The Commonwealth also argues that the further cash flow analysis provided in the RAI Response, showing that the DTF would be sufficient even if the formula amount applied, is "as misleading as it is wrong" because it treated the 2-percent earnings rate as an after-tax real rate of return rather than a pre-tax rate as was conservatively done in the original analysis. App. at 4; Brewer Decl. ¶ 7. Again, the Commonwealth raised no such claim in its hearing request. In addition, the RAI Response explained this change, so there was nothing misleading about it (RAI Response at E-5); and the after-tax rate used in the RAI response is consistent with the NRC's rules,[27] so there was nothing wrong about it.

In addition, the Commonwealth argues that Holtec did not justify its DCE, because it did not provide detail on the waste disposal costs and or include inventory tables. App. at 4; Brewer Decl. ¶ 9. The Commonwealth, however, could have raised the same allegation regarding HDI's original DCE in its hearing request; having failed to do so, it cannot now claim likelihood of success on the merits based on that allegation. Further, the Commonwealth ignores the NRC Staff's evaluation, which determined the reasonableness of HDI's DCE by comparing it with the site-specific costs of comparable decommissioning projects, as well with NUREG/CR-6174, "Revised Analyses of Decommissioning for the Reference Boiling Water Reactor Power Station." SE at 11; Exemption at 8.

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[26] Response to Request for Additional Information (July 29, 2019), Encl. at E-2 to E-3 (ML19210E470) ("RAI Response").

[27] *See* Regulatory Guide 1.159 at 18 (NRC regulations "allow "a credit for projected earnings of up to a 2-percent annual real rate of return (i.e., nominal rate less inflation *and taxes*) . . ."). Emphasis added.

In any event, the Commonwealth's new-found concerns with the DCE and real rate of return raise no material dispute with the LTA. The Commonwealth has failed to dispute the substantial conservatism in the LTA, in that DOE recoveries will provide hundreds of millions of dollars of additional cash flow over the life of the project and ample means to adjust funding assurance if needed.

The Commonwealth assertion that "Holtec has failed to demonstrate that it has the requisite technical qualifications" based on alleged character concerns (App. at 4) similarly demonstrates no likelihood that the Commonwealth will prevail on the merits of its contentions, because this claim too was not raised in its contentions. Further, the Commonwealth has not connected any allegations to HDI as the licensee, as is required to demonstrate a genuine dispute.[28]

The Commonwealth argues that the NRC violated NEPA's anti-segmentation rules by treating the LTA, Exemption, PSDAR and DCE as discrete actions (App. at 5), but this claim fails because the PSDAR (including the DCE) is not an NRC action as no NRC approval is required. Nor is there merit to the Commonwealth's argument that the categorical exclusion is inapplicable to the deletion of a license condition, imposed when Entergy acquired Pilgrim, relating to $50 million of support provided by an Entergy affiliate. As the license transfer extinguished Entergy's obligations and HDI's financial qualifications do not rely on any parental support, deletion of the condition was clearly an amendment "required to reflect the approval" of the transfer and therefore subject to the categorical exclusion. The assertion that waste shipments may exceed the number evaluated in the Decommissioning GEIS (App. 6) was not raised in the Commonwealth's hearing request, precluding the Commonwealth from prevailing on it, and is also a challenge to the PSDAR, which is beyond the scope of this proceeding.

Last, the Commonwealth argues that because the NRC has never denied an exemption request allowing use of decommissioning funds for non-decommissioning purposes, the exemption is a *de facto* regulation contravening the Administrative Procedure Act. App. at 6. The Commonwealth provides no

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[28] *See Exelon Generation Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-19-06, slip. op. at 14 (June 18, 2019). The Commonwealth incorrectly states that Dr. Singh is on the Board of Directors and is President and Chief Executive Office of HDI. App. at 2. Dr Singh holds no HDI positions. *See* LTA, Encl. 1, Att. C, 5th page.

support for this new argument. The Commonwealth also asserts that the finding of no decrease in safety in the Environmental Assessment supporting that the exemption violates NEPA because there will be no committed funds for spent fuel storage as of 2063. *Id.* at 7. As previously discussed, DOE will be liable for any such spent fuel storage costs. Further, Entergy's spent fuel management plan committed no funds for storage past 2062,[29] so the exemption granted to HDI reflects no change.

In sum, the likelihood that the Commonwealth will prevail on the merits is far from a "virtual certainty." To the contrary, most of the Commonwealth's arguments are based on claims that it has not raised in its hearing request, and all are devoid of merit.

C. A Stay Would Harm Applicants

The Commonwealth observes that a stay is a device to maintain the status quo, but here, the status quo is a completed license transfer. App. at 9. To now stay the transfer would raise numerous commercial, administrative and logistical concerns, particularly if the stay were to require that the license transfer be reversed – in the process reversing a commercial transaction and site transition that was more than a year in the making – and therefore would significantly harm Applicants. Cowan Decl. ¶ 7. The Commonwealth argues that because Applicants promptly closed the deal, any such harm is self-inflicted. App. at 10. The Commonwealth was aware that the Order (served on it) authorized the transfer upon two business-days notice, and Applicants' notice[30] was made publicly available in ADAMS the same day. Further, the Commonwealth knew from Applicants' earlier opposition to the Commonwealth's extension request that Applicants wanted no delay in closing and urged the Commonwealth to file any stay motion as promptly as possible. Despite this awareness, and despite having received the NRC Staff's Notification of Significant Licensing Action on August 13, 2019, providing ample time for preparation of any stay motion, the Commonwealth sought no temporary stay, as it could under the NRC rules and practice (*see* 10 C.F.R. § 2.342(f)). The idea that Applicants manufactured harm to themselves by closing

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[29] Update to Spent Fuel Management Plan Pursuant to 10 CFR 54.54(bb) (Nov. 16, 2018), Att. 1 at 3, 9-10 (ML18320A036).

[30] Letter from B. Sullivan to NRC (Aug. 22, 2019) (ML19234A357).

a mutually-beneficial transaction they had been working toward for over a year, for which they had obtained long-sought regulatory approval, and for which no stay request was pending, ignores the realities of the business world and the Applicants' shared goal of promptly decommissioning Pilgrim.

Staying the license transfer would also create considerable uncertainty for Pilgrim site employees regarding the likelihood that HDI and CDI will be permitted to proceed with the DECON method of decommissioning Pilgrim, and associated longer-term prospects of employment, potentially prompting employees to seek employment elsewhere. The Commonwealth dismisses this concern as rooted in Holtec's lack of confidence in the ability to attract and retain qualified replacements (App. at 9), but the Commonwealth's disregard for the current employees ignores the loss of institutional plant knowledge that would occur if site employees must be replaced, the disruption that would be caused in decommissioning activities, and the impact on the workers and their families if they relocate.

D. A Stay Is Not in the Public Interest

The Commonwealth acknowledges the public interest served by "the prompt decommissioning and restoration of Pilgrim." *Id.* at 10. The Commonwealth's suggestion that this interest is outweighed by the interest in ensuring that Holtec has the financial and technical capacity to do so ignores (1) the NRC's Staff determination that HDI and Holtec Pilgrim are qualified, (2) the NRC's rigorous oversight, and (3) the adequacy of the NRC's post-effectiveness hearing process to address any contentions that are found to present a genuine, material dispute with the Application. Further, the public interest is served by implementing the NRC's Subpart M procedures as they are intended – "to provide for public participation in the event of requests for hearing under these provisions, *while at the same time providing an efficient process that recognizes the time-sensitivity normally present in transfer cases*."[31] For these reasons, the public interest militates against a stay.

IV. CONCLUSION

For the reasons discussed above, the Commonwealth's application for a stay should be denied.

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[31] 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998) (emphasis added).

Respectfully submitted,

/signed electronically by David R. Lewis/

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