

August 5, 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 Motion of the Commonwealth of
Massachusetts to Stay Proceedings to Complete Settlement Negotiations**

Pursuant to 10 C.F.R. § 2.1325(b), Entergy Nuclear Operations, Inc. (“ENOI”), Entergy Nuclear Generation Company (“ENGCO” – to be renamed “Holtec Pilgrim”), Holtec International (“Holtec”), and Holtec Decommissioning International, LLC (“HDI”), (collectively, “Applicants”), hereby answer and oppose the Motion of the Commonwealth of Massachusetts to Stay Proceedings to Complete Settlement Negotiations (“Motion”), dated August 1, 2019, in the license transfer proceeding for the Pilgrim Nuclear Power Station (“Pilgrim”). The Commonwealth of Massachusetts (“Commonwealth”) asks the Commission to stay “all activities” in this proceeding for 90 days to permit the participants to complete settlement negotiations. Motion at 1. The Commission should deny this Motion because it is inconsistent with NRC rules and practice, unsupported by any compelling reasons, and highly prejudicial to the interests of the Applicants.

As background, Applicants submitted their application on November 16, 2018, requesting that the Commission approve the transfer of ENOI’s authority to conduct licensed

activities at Pilgrim to HDI, and the indirect transfer of control of the Pilgrim facility and ISFSI licenses to Holtec. The Commonwealth and Pilgrim Watch each requested a hearing,¹ and their requests are currently pending before the Commission. In the meantime, consistent with NRC practice, the NRC Staff has been diligently reviewing the Application. The NRC Staff's December 19, 2018 acceptance review letter stated that the NRC Staff would endeavor to complete its review in seven months, and therefore completion of the NRC Staff's review may be imminent. No further approvals by any other agencies are required to close the transaction.

As the Motion states, in mid-June 2019, several months after the participants' in-person settlement meeting in February, the Commonwealth first provided to Entergy and Holtec a draft settlement agreement that indeed covered a broad range of issues. Holtec is working diligently to respond to the Commonwealth's wide-ranging requests and, after the necessary internal reviews and approvals, to provide a detailed response; it has also committed to negotiate in good faith after the Commonwealth receives its response. While the participants thus are committed to negotiating in good faith, a settlement has not yet been reached, nor given the broad scope of issues to be resolved is there a reasonable prospect that a settlement will be reached prior to the NRC Staff's anticipated completion of review of the license transfer application.

Nor would a stay of all proceeding activities "provide a quicker resolution to the proceeding and be more administratively efficient," as the Commonwealth suggests.² Pilgrim Watch has clearly stated its intention to adopt and take forward the Commonwealth's two contentions "[s]hould the Attorney General, for any reason, not proceed with any of her

¹ Commonwealth of Massachusetts' Petition for Leave to Intervene and Hearing Request (Feb. 20, 2019) (ADAMS Accession No. ML19051A114); Pilgrim Watch Petition for Leave to Intervene and Hearing Request (Feb. 20, 2019) (ADAMS Accession No. ML19051A019).

² *Id.* at 3.

contentions.”³ Further, Pilgrim Watch, indicated in a July 17, 2019 meeting of the Nuclear Decommissioning Advisory Committee Panel that even if the Commonwealth reaches a settlement, Pilgrim Watch will not to agree to settle and let the license transfer go forward unchallenged unless Pilgrim Watch’s priorities are also met.⁴

In support of its Motion, the Commonwealth fails to cite any NRC rule providing for a stay of “all activities” in this proceeding, which presumably includes the Commission’s issuance of an order related to the pending hearing requests as well as the NRC Staff’s review and issuance of an order relating to the license transfer application. With regard to a stay of the issuance of the Staff’s order, the Motion is at odds with the NRC’s rules governing license transfer proceedings, which provide that “[d]uring the pendency of any hearing under this subpart, consistent with the NRC staff’s findings in its Safety Evaluation Report (SER), the staff is expected to promptly issue approval or denial of license transfer requests.”⁵ The NRC rules do allow an application for a stay of the effectiveness of the NRC Staff’s order approving a license transfer⁶ or a decision or action of the presiding officer,⁷ but the Commonwealth has made no attempt to address the stay factors specified in these rules.⁸

In fact, consideration of the stay factors specified in the NRC rules compels denial of the Commonwealth’s Motion. The factors 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

³ Pilgrim Watch Petition at 130-31.

⁴ <https://www.youtube.com/watch?v=AjQCfZnTvqU> at approximately the 2:00:30 mark.

⁵ 10 C.F.R. § 2.1316(a).

⁶ 10 C.F.R. § 2.1327(a).

⁷ 10 C.F.R. § 2.342.

⁸ 10 C.F.R. § 2.1327(b)(2) requires an application for a stay of the effectiveness of the NRC Staff’s order to address the factors in 10 C.F.R. § 2.1327(d), and 10 C.F.R. § 2.342(b)(2) requires an application for a stay of a presiding officer’s decision or action to address the same factors in 10 C.F.R. § 2.342(e).

prevail on the merits; (3) whether the granting of a stay would harm other participants; and (4) where the public interest lies.⁹ None of the factors favors a stay in this proceeding.

First, the Commonwealth has not shown it will be irreparably injured unless a stay is granted.¹⁰ A party seeking a stay must show that it faces irreparable injury that is not only “imminent” but also “certain and great.”¹¹ The Commonwealth’s Motion states that it is asking for a stay to “preserve the current positions of the parties,”¹² but provides no explanation why its current positions would not be preserved if the NRC Staff’s decision-making proceeds. While the Commission’s rules allow – and indeed, expect – the NRC Staff to issue the order on the a license transfer while hearing requests are still pending, thereby allowing the transfer to proceed if approved, the Commission has made it clear that transfer applicants who proceed with the transfer before hearings are complete do so at the risk that the subsequent hearing process could result in additional conditions or even rescission of the license transfer.¹³ 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.¹⁴ Moreover, as the Motion acknowledges, Holtec has committed to the Commonwealth that it is “prepared to undertake good faith

⁹ 10 C.F.R. § 2.1327(d)(1)-(4); 10 C.F.R. § 2.342(e)(1)-(4).

¹⁰ Irreparable injury is “the most crucial factor.” *Vermont Yankee Nuclear Power Corp. & Amergen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 N.R.C. 79, 83 (2000).

¹¹ *Southern Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 and 4), CLI-12-11, 75 N.R.C. 523, 529 (2012).

¹² Motion at 1.

¹³ *Susquehanna Nuclear, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-17-04, 85 N.R.C. 59, 61 n.5 (2017) (“We retain the authority . . . to rescind or condition an approved transfer based on the outcome of any such proceeding.”).

¹⁴ See *Shieldalloy Metallurgical Corp.*, CLI-10-8, 71 N.R.C. 142, 153 n.56 (2010) (quoting *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958)) (“The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm.”).

discussions to finalize a comprehensive agreement.”¹⁵ Thus, if the NRC Staff were to issue an order approving the transfer, it would result in no prejudice to the Commonwealth’s positions, or prejudice the Commonwealth’s ability to participate in this proceeding.¹⁶

On the other hand, staying all activities in this proceeding will greatly prejudice and harm the Applicants. Applicants’ primary concern with delay in the NRC’s decision and license transfer is the impact such delay would have on the nearly 270 individuals who work at Pilgrim. Any prolonged uncertainty regarding whether and when these individuals will become CDI or HDI employees can have a significant impact on their personal and professional lives, and Applicants oppose any stay that would leave Pilgrim workers in limbo and potentially disposed to seeking more secure positions elsewhere while settlement negotiations proceed. Further, any delay in the license transfer would necessitate further expenditure by Entergy prior to the transfer, and could impact the sequencing of decommissioning activities, including delays in the commencement of certain DECON activities by HDI.

In addition, rather than preserving the current positions of the parties, as the Commonwealth suggests, the stay would in fact give the Commonwealth undue and unfair leverage in the settlement negotiations. In essence, if the requested stay is granted, the Applicants would be able to move forward only if they acquiesced to the Commonwealth’s settlement demands.

Second, 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

¹⁵ Motion at 1 (citing Exhibit 1 to Motion).

¹⁶ See *Vermont Yankee*, CLI-00-17, 52 N.R.C. at 84. Even if a change in the status quo were reversible (which would not be the case here), such a change is not sufficient in itself to justify a stay. A petitioner must show that the change in status quo is of enough significant to constitute irreparable harm. *Cuomo v. U.S. Nuclear Regulatory Commission*, 772 F.2d 972, 976 (D.C. Cir. 1985).

warrant issuance of a stay.”¹⁷ 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.

Further, for the reasons discussed in Applicants’ response to the Commonwealth’s hearing request,¹⁸ neither of the Commonwealth’s two contentions raises a genuine material dispute with the Application. The Commonwealth’s first contention, which seeks to challenge the financial qualifications of HDI and Holtec Pilgrim (despite over \$1 billion in the decommissioning trust fund), did not address or provide any basis to dispute the efficacy of the Commission’s rigorous decommissioning oversight rules, which require annual reporting and, as needed, adjustment to funding for decommissioning and spent fuel management, as well as further review of funding assurance when a full site characterization is submitted as part of the license termination plan. The Commonwealth also failed to address or dispute the substantial conservatism in the financial analysis in the license transfer application, in that the cash flow analysis does not credit recovery of spent fuel costs from the U.S. Department of Energy (“DOE”), which will provide considerable additional cash flow over the life of the project and ample means to adjust funding assurance if needed. The Commonwealth’s second contention, which argued that an environmental review was necessary, impermissibly challenged the NRC’s rule categorically excluding license transfers from review. Moreover, the license transfer will only occur if the NRC Staff’s review and safety evaluation independently determines that the license transfer standards have been met and that HDI and Holtec Pilgrim are properly qualified.

¹⁷ *Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, N.J. Site), CLI-10-8, 71 N.R.C. 142, 154 (2010).

¹⁸ Applicants’ Answer Opposing the Commonwealth of Massachusetts’ Petition for Leave to Intervene and Hearing Request (Mar. 18, 2019) (ADAMS Accession No. ML19077A232).

Thus, the likelihood that the Commonwealth will prevail on the merits is far from a “virtual certainty” – indeed, in Applicants’ estimation, it is highly unlikely.

Third, the Commonwealth has not addressed or acknowledged the harm to Applicants from the stay that it seeks. As explained above, Applicants are very concerned with the impact that a delay in the NRC’s decision and license transfer will have on the nearly 270 individuals who work at Pilgrim. In addition, rather than preserving the current positions of the parties, as the Commonwealth suggests, the stay would in fact give the Commonwealth undue and unfair leverage in the settlement negotiations.

Fourth, the public interest militates strongly against the stay. As Commission policy recognizes, “applicants for a license are . . . entitled to a prompt resolution of disputes concerning their applications.”¹⁹ Further, if the stay is granted, the Commission would not only be giving the Commonwealth undue leverage in the settlement discussions, but in fact would also be ceding the Commission’s own decision-making authority to the Commonwealth by not allowing the license transfer to proceed unless the Commonwealth’s demands are met. The Commonwealth asserts that resolution of the settlement negotiations could prove valuable to the NRC’s own decision-making process,²⁰ but offers no explanation why the NRC Staff would need any additional information to complete its review. Indeed, as Applicants expect that the NRC Staff is nearly ready to issue its safety evaluation, the Motion would only delay, and not advance, NRC decision-making.

The Commonwealth also argues that the NRC’s longstanding policy favors settlement, but such a policy does not mean that the Commission should favor a party by granting an

¹⁹ Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 19 (1998).

²⁰ Motion at 1.

opposed stay as a means of coercing a settlement to the detriment of the other party. Allowing the NRC Staff to proceed with the issuance of its order in no way precludes a settlement, as the Commonwealth's hearing request remains pending before the Commission, and Applicants remain committed to those negotiations. Entergy and Holtec have had frequent communications with the Commonwealth since mid-June concerning the status and expected delivery date for a response. Further, as stated in Holtec's July 17, 2019 letter to the Commonwealth, provided as Exhibit 1 to the Motion, Holtec is prepared to undertake good faith discussions to finalize a comprehensive agreement that will provide assurances to the citizens of the Commonwealth and associated stakeholders.

In addition, the 25-year old unpublished licensing board decision that the Commonwealth cites in support of its Motion²¹ is inapposite. That decision related to a stay of discovery – not all activities or a decision – in an NRC enforcement proceeding, where the licensee and the NRC Staff were negotiating the means by the licensee would comply with an NRC enforcement order. The intervenors in that proceeding had intervened in support of the enforcement action and therefore had limited rights of participation,²² and the settlement was an extension of the NRC Staff's prosecutorial enforcement authority. Even under those circumstances, the licensing board recognized that “to favor settlement is not to say that it must become the overriding force in any adjudication such that ‘settlement negotiation’ becomes a magic phrase the invocation of which must bring the proceeding to a complete halt until the participants decide that the

²¹ Motion at 2, citing *Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), ASLBP No. 94-684-01-EA, Dkt. No. 40-8027-EA, at 7 (Nov. 13, 1995) (ADAMS Accession No. ML13109A473) (“*Sequoyah Fuels*, Unpublished Memorandum and Order Extending Discovery Stay”).

²² See *Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-97-13, 46 N.R.C. 195, 222–24 (1997).

negotiation process is exhausted,”²³ and required a showing that the stay was needed to avoid substantial prejudice to the NRC Staff’s negotiations.²⁴

In short, all of the stay factors weigh strongly against any stay. Even if the Commonwealth’s Motion were treated as a “motion to suspend,” which the Commission has occasionally considered pursuant to its inherent supervisory powers over proceedings, it should be denied.²⁵ The Commission considers a “suspension of licensing proceedings a ‘drastic’ action that is not warranted absent ‘immediate threats to public health and safety,’” or other compelling reason.²⁶ In considering a motion to suspend a proceeding, the Commission considers (1) whether moving forward will jeopardize the public health and safety; (2) whether continuing the review process will “prove an obstacle to fair and efficient decisionmaking”; and (3) whether going forward will “prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our . . . ongoing evaluation.”²⁷ Here, allowing NRC decision-making to occur will not jeopardize the public health and safety, let alone cause “an immediate threat,” because any approval of the license transfer will be predicated on the NRC’s Staff’s safety evaluation and finding of reasonable assurance that the transfer will not be inimical to the public health and safety (i.e. on adequate protection). Further, rather than proving an obstacle to fair and efficient decision making, allowing NRC decision-making to proceed will prevent undue delay,

²³ *Sequoyah Fuels*, Unpublished Memorandum and Order Extending Discovery Stay, at 7.

²⁴ *See id.* at 4, 5, 10.

²⁵ *See, e.g., Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 N.R.C. 376 (2001) (“PFS”); *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2) *et al.*, CLI-11-05, 74 N.R.C. 141, 158 (2011); *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 N.R.C. 352, 373 (2012). Such motions have typically related to events such as the September 11 terrorist attacks and the accident at Fukushima—circumstances bearing no similarity to issues in the Pilgrim proceeding.

²⁶ *Callaway*, CLI-11-05, 54 N.R.C. at 158 (quoting *PFS*, CLI-01-26, 54 N.R.C. at 380). *See also Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-4, 57 N.R.C. 273, 277 (2003); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3) *et al.*, CLI-14-07, 80 N.R.C. 1, 7 (2014).

²⁷ *Callaway*, CLI-11-05, 54 N.R.C. at 158–59.

provide the prompt decision to which Applicants are entitled, and avoid creating unfair leverage in the settlement negotiations. And proceeding with prompt decision-making would not prevent implementation of any pertinent rule or policy that might emerge from the hearing process, because, as previously discussed, the Commission retains authority to take further action if warranted by the outcome of the hearing.

In sum, there is no legal basis for the Commonwealth's Motion, and that Motion would deny Applicants a timely decision, create uncertainty for the Pilgrim employees, and greatly prejudice Applicants in the settlement negotiations. Given that the NRC Staff decision on the license transfer application may be imminent, Applicants submit that the Commonwealth's Motion to stay all activities in this proceeding, including the effectiveness of such order as the NRC Staff may issue, should be denied with prejudice.

For the reasons described above, the Commission should deny the Commonwealth's Motion.

Respectfully submitted,

/signed electronically by David R. Lewis/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Applicants' Answer Opposing the Motion of the Commonwealth of Massachusetts to Stay Proceedings to Complete Settlement Negotiations has been served through the E-Filing system on the participants in the above-captioned proceeding this 5th day of August 2019.

/signed electronically by /
David R. Lewis