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' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS PETITIONER'S PETITION FOR REVIEW

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INTRODUCTION

Massachusetts' Opposition ("Opp.") essentially fails to confront prong one of *Bennett v. Spear*, under which an agency action is final and reviewable only at "the 'consummation' of the agency's decision making process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Here, each of the NRC staff actions that Massachusetts' Petition challenges is still pending before the NRC Commissioners on Massachusetts' hearing request. Specifically, Massachusetts has argued to the NRC Commissioners:

> ***License transfer***: "The LTA [license transfer application] … fail[s] to comply with 10 C.F.R. § 50.82(a)(8)(i)(B) and (C)." Addendum to Massachusetts' Motion For A Stay Pending Appellate Review, Doc. 1812979 (D.C. Cir. Oct. 28, 2019) ("Add-_"), at Add-515.
>
> ***License amendment***: "Entergy and Holtec propose that the Commission strike from Entergy's license the $50 million contingency fund allowance …. This omission in and of itself justifies this hearing request." Add-518–19 (internal citation omitted).
>
> ***Exemption***: "The Commonwealth is entitled to a hearing on the Exemption Request to use the Decommissioning Trust Fund for spent fuel management and site restoration expenses because it is 'directly related' and inextricably intertwined with this license transfer and amendment." Add-533.
>
> ***No significant hazards***: "The Commonwealth raises an admissible challenge to the NRC Staff's finding of 'no significant hazards consideration.'" Ex. 9 to Federal Respondents' Combined Motion To Dismiss And Response To Petitioner's Stay Motion, Doc. 1817319, at 25 (D.C. Cir. Nov. 22, 2019).
>
> ***NEPA***: "NEPA requires an analysis of environmental impacts in the event of a shortfall in the Decommissioning Fund." Add-550.

Importantly, dismissal will not leave Massachusetts without an avenue to present to this Court Massachusetts' claims (Opp. 1) that it is suffering irreparable harm from the challenged NRC staff actions. Massachusetts has filed a separate petition in this Court (the "Stay Petition") concerning the *NRC Commissioners'* denial of Massachusetts' motion to stay the NRC staff actions pending the NRC Commissioners' review of those actions. All agree that the Stay Petition challenges final action, and thus it can proceed to normal merits briefing, oral argument, and decision.

ARGUMENT

I. WHILE MASSACHUSETTS' PETITION SEEKS REVIEW OF NON-FINAL NRC STAFF ACTIONS AND THEREFORE SHOULD BE DISMISSED, MASSACHUSETTS CAN SEEK RELIEF THROUGH ITS SEPARATE PETITION CHALLENGING THE NRC COMMISSIONERS' FINAL DECISION DENYING STAY

A. The NRC Staff Actions Challenged In Massachusetts' Petition Are Still Being Reviewed By The NRC Commissioners And Thus Are Not Final

Intervenors agree with Federal Respondents (Reply 3–8) that the NRC staff actions that Massachusetts' Petition challenges do not satisfy *Bennett*'s first prong.

As noted *supra*, at 1, the NRC Commissioners are still reviewing all of the NRC staff actions in connection with Massachusetts' still-pending request for a hearing. NRC regulations specifically contemplate such review, and an NRC staff order is not final during such review. *In the Matter of Vt. Yankee Nuclear Power Corp. & Amergen Vermont, LLC*, 52 N.R.C. 79, 83 (Aug. 30, 2000) ("If the staff

approves the application prior to the Commission completing its adjudication, the application will lack the agency's final approval until and unless the Commission concludes the adjudication in the applicant's favor."). *Accord*, Addendum to Opp. ("Opp.Add-") at Opp.Add-089 & n.11. Thus, NRC staff here made clear that its license transfer and license amendment decisions are subject to review, modification, and rescission by the NRC Commissioners. Opp.Add-006. And, in the event of rescission, "the Applicants must return the plant ownership to the status quo ante and revert to the conditions existing before the transfer," *id.*, such that the exemption from the regulation that prohibits spending DTF funds on SNF expenses is likewise not final, even absent language in the exemption itself noting that further review is ongoing.[1]

As to the no significant hazards determination, contrary to Massachusetts' assertion (Opp. 1), the NRC Commissioners' December 2019 decision denying

[1] Massachusetts incorrectly asserts (Opp. 8) that a no significant hazards determination is required to dispense with a hearing before effectiveness of the *license transfer* and *exemption*. To the contrary, the Atomic Energy Act makes that determination a prerequisite only to dispensing with a pre-effectiveness hearing concerning the conforming *license amendment*. 42 U.S.C. § 2239(a)(2)(A); *In the Matter of: Long Isl. Lighting Co.*, 35 N.R.C. 69, 77 (Feb. 26, 1992).

Honeywell Int'l, Inc. v. NRC, 628 F.3d 568 (D.C. Cir. 2010) (cited at Opp. 15–16), is inapposite because the denial of the exemption there marked the end of the NRC's consideration, whereas here the exemption is part and parcel of a larger administrative process that is still pending before the NRC Commissioners.

Massachusetts stay application did not announce a final decision by the Commissioners on the issue of no significant hazards. Instead, the NRC Commissioners' stay decision indicated only that the Commissioners were *not* finally deciding no significant hazards "here" (*i.e.*, in the stay decision), which is consistent with the fact that there remain challenges to that determination in Massachusetts' pending hearing request. Opp.Add-091 ("We decline to review the Staff's finding *here*.") (emphasis added).[2] Massachusetts' cases (Opp. 9–10) are inapposite. In *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *Shoreham Wading River Cent. Sch. Dist. v. NRC*, 931 F.2d 102 (D.C. Cir. 1991), and *San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986), the *NRC Commissioners* had spoken on the issue of immediate effectiveness under the then-applicable regulations. But here, as explained above, the no significant hazards determination is still being reviewed by the NRC Commissioners. Likewise, the *dicta* in *Blue Ridge Envtl. Def. League v. NRC*, 668 F.3d 747 (D.C. Cir. 2012), offers Massachusetts no help because the petition there challenged a non-final interim order, was dismissed for lack of jurisdiction, and, in any event, relies upon *Massachusetts v. NRC*, which is inapposite as just explained. *Id.* at 757. And, unlike

[2] Moreover, as Federal Respondents observe (Reply 6–8), even if the NRC Commissioners' order denying a stay did finally decide the no significant hazards issue, that stay decision is not part of the instant Petition and it did not somehow transform the agency actions that are part of the instant Petition into final decisions on no significant hazards.

Massachusetts here, the plaintiff in *Center for Nuclear Responsibility, Inc. v. NRC*, 586 F. Supp. 579 (D.D.C. 1984), had not voluntarily injected the NRC staff's no significant hazards determination into the NRC Commissioners' broader decisionmaking process.[3]

Massachusetts' NEPA challenges are likewise still pending before the NRC Commissioners and hence not final. *See supra*, at 1. Intervenors agree with Federal Respondents (Reply 9–10) that *Natural Resources Defense Council v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018) ("*NRDC*"), is instructive. *NRDC* held that the NRC may issue a license before resolving contentions concerning alleged NEPA violations. *Id.* at 1209–12 (citing *Friends of the River v. FERC*, 720 F.2d 93 (D.C. Cir. 1983)). *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018), is not to the contrary. Instead, *Oglala* establishes that allegedly inadequate NEPA assessments—even ones approved by the NRC Commissioners, as opposed to those here that have so far been approved only by staff—are not final until the entire proceeding has culminated. *Id.*

[3] If Massachusetts' true concern (Opp. 2–3) is that the NRC Commissioners have delayed too long in deciding Massachusetts' hearing request, Massachusetts may file a mandamus petition. *See, e.g., In re Aiken Cty.*, 725 F.3d 255 (D.C. Cir. 2013) (Kavanaugh, J.) (granting mandamus where NRC's "inaction violate[d] the Nuclear Waste Policy Act"). But even that remedy does not make judicially reviewable the issues that remain pending before the agency; it just speeds them along to a final agency decision that is judicially reviewable. And, as to supposed harm that Massachusetts is suffering in the interim, it can seek relief through its Stay Petition.

at 526-27; *see also Pub. Citizen v. Office of U.S. Trade Representatives*, 970 F.2d 916, 920 (D.C. Cir. 1992) ("[C]ourts routinely dismiss NEPA claims in cases where agencies are merely contemplating a particular course of action but have not actually taken any final action at the time of suit").[4] And none of the out-of-circuit cases on which Massachusetts relies concerned a *still-ongoing* agency review process. *See Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808 (8th Cir. 2006); *Cure Land, LLC v. Dep't of Agric.*, 833 F.3d 1223 (10th Cir. 2016); *Envtl. Law & Policy Ctr. v. NRC*, 470 F.3d 676 (7th Cir. 2006).[5]

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[4] Indeed, in *Oglala*, this Court deemed the NEPA issue non-final even though the NRC Commissioners had already found "a *significant deficiency* in the NRC Staff's NEPA review." 896 F.3d at 531 (internal quotation marks and citation omitted; emphasis in original). Here, the NRC Commissioners have not found any such deficiency in NRC Staff's NEPA compliance.

[5] Massachusetts' other NEPA cases (Opp. 12–13) concern *ripeness*, which is separate and distinct from finality. *See, e.g., Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737(1998) (addressing, in *dicta*, when a NEPA claim becomes ripe); *Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466,481-82 (D.C. Cir. 2009) (NEPA claims were not ripe); *Nevada v. Dep't of Energy*, 457 F.3d 78, 84–87 (D.C. Cir. 2006) (addressing ripeness).

Indeed, ripeness is an alternative basis to finality for dismissing Massachusetts' Petition here. *See, e.g.*, *Devia v. NRC*, 492 F.3d 421, 424 (D.C. Cir. 2007) (In part "to protect the agencies from judicial interference until an administrative decision has been formalized," and in part to avoid deciding an issue the Court "may never need to" decide, a court may decline jurisdiction under the ripeness doctrine). As previously explained (Fed. Resp. Br. 14; Intervenors' Br. 18), the simultaneous review of Massachusetts' complaints by this Court and the NRC Commissioners should be avoided. While Massachusetts argues it should not be required to exhaust administrative remedies (Opp. 18), it does not dispute that the ongoing agency process may moot or impact the merits arguments it wishes to make in this Court.

B. The Collateral Order Doctrine Is Inapposite

Massachusetts' reliance (Opp. 10–11) on the collateral order doctrine to obtain review of the no significant hazards determination is misplaced. Only a limited category of orders are appealable under the collateral order doctrine—those that are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment in the underlying action. *Oglala*, 896 F.3d at 527–28.

Because Massachusetts may seek relief through its Stay Petition, Massachusetts has another avenue for review, such that the no significant hazards determination for the license amendment is not "effectively unreviewable."

In addition, contrary to Massachusetts' position (Opp. 11), the no significant hazards determination is not "separate from the merits." Massachusetts has (correctly) asserted in its Stay Petition that the challenged actions are "integrally related" and "inextricably tied to one another." *Commonwealth of Massachusetts v. NRC*, No. 20-1019, Pet. at 2, 4 (D.C. Cir. Jan. 22, 2020). Massachusetts does not challenge 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." The only challenge Massachusetts makes is

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Review now would interfere with the NRC Commissioners' process and waste judicial resources.

whether the elimination of a $50 million line of credit from an affiliate falls within the rule. But, even if a financial (rather than physical) change could potentially take a license amendment outside the scope of the generic finding of no significant hazards consideration, the remaining question of the materiality of the financial change is tied up with the question—presented by the entire license transfer package still under review by the NRC Commissioners—whether there is adequate financial assurance that Holtec can decommission Pilgrim. Thus, Massachusetts' challenge will be subject to review in this Court along with the entire license transfer package once the NRC Commissioners finally decide those issues, and any interim effects will be subject to review in this Court now in connection with the Stay Petition, as further discussed below.

C. Massachusetts May Seek Relief Through Its Stay Petition

Massachusetts incorrectly claims (Opp. 1) that, if its instant Petition is dismissed, Massachusetts will be left with no avenue for judicial relief concerning the harms it is allegedly suffering from the effectiveness of NRC staff's decisions. In fact, Massachusetts has a clear and direct path for review of that decision—its pending Stay Petition.

The situation here is therefore distinct from the challenges to FERC's procedure in *Allegheny Def. Project v. FERC*, 932 F.3d 940, 947–48 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019), in

which no such direct path for review was available. Moreover, while the FERC tolling arrangement in *Allegheny* allowed seizure of land and homes, destruction of homes, and construction of the pipeline at issue, *id.* at 952–53 (Millett, J., concurring), the actions taken in reliance on the immediate effectiveness of the transfer are *not* irreversible. Here, the ownership and licenses can be transferred back, the amendment canceled, and the exemption rendered moot, and more than adequate funding will remain in the decommissioning trust fund to finance the remainder of the decommissioning project. Opp.Add-006; Opp.Add.-100.

II. *AMICI*'S MERITS ARGUMENTS ARE INCORRECT OR MISLEADING

Amici New York *et al.* relegate to the end of their brief (at 17–21) the only issue germane to the motions to dismiss—whether the Petition challenges non-final agency actions—and instead focus (Br. 1–16) on the merits. Even if the merits were relevant now, *Amici*'s assertions are incorrect or misleading. For example:

- Contrary to *Amici*'s claim (Br. 3) that Holtec has "no decommissioning experience," its employees have substantial experience. *E.g.*, Add-304 ("decommissioning planning activities" at Oyster Creek and Zion nuclear plants), Add-319 ("35 years' experience in nuclear decommissioning projects").[6]

- Contrary to *Amici*'s suggestion (Br. 5) that Kewaunee's plan not to finish decommissioning "until at least 2073" proves that delay is endemic, *Amici* disregard that Kewaunee's owner *originally chose* this decades-long

[6] Massachusetts did not question Holtec's technical capabilities in Massachusetts' petition to the NRC Commissioners, instead raising only financial and NEPA issues. *See* Intervenors' Br. 13.

SAFSTOR method, whereas Holtec has chosen for Pilgrim the much-faster DECON method that is projected to finish by the late 2020s. *See* United States Nuclear Regulatory Commission, Kewaunee Power Station (Jan. 31, 2020), https://www.nrc.gov/info-finder/decommissioning/power-reactor/kewa.html

- While *Amici* invoke (Br. 5) cost overruns at another project to argue that decommissioning costs are unpredictable, they disregard, among other things, Holtec's extreme conservatism in not taking credit in its funding analysis for the hundreds of millions of dollars in recoveries it will receive from DOE for DOE's breach of the Standard Contract to accept and dispose of Pilgrim's spent nuclear fuel. Add-270. *Amici* also ignore the rules that NRC promulgated following the decommissioning experience to which *Amici* refer, requiring nuclear plants (including Pilgrim) to conduct surveys of areas, including the subsurface, to prevent incomplete knowledge of residual radioactivity that might result in underestimation of decommissioning costs. Decommissioning Planning; Final Rule, 76 Fed. Reg. 35,512, 35,514, 35,518 (June 17, 2011).

- *Amici* claim that Intervenors argued (Br. 16 n.22) that a license amendment poses "no significant hazards" if it does not concern a still-operating (as opposed to shutdown) plant. In fact, Intervenors contended that the NRC's generic finding of no significant hazards in 10 C.F.R. § 2.1315 does not cover *physical* changes to a plant (whether or not still operating), but does cover *financial* changes to a license that are made (as here) to conform the license to an approved license transfer. *See* Intervenors' Br. 26 ("'the Applicants requested no *physical* or operational changes to the facility'" (quoting Add-43) (emphasis added)).

CONCLUSION

The Petition should be dismissed.

Dated: February 5, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(D)

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 Fed. R. App. P. 27(d)(2)(C) because it contains 2598 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
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CERTIFICATE OF SERVICE

I, Sanford I. Weisburst, a member of the Bar of this Court, hereby certify that on February 5, 2020, I electronically filed the foregoing "INTERVENORS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR 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.

/s/ Sanford I. Weisburst
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Dated: February 5, 2020