ORAL ARGUMENT NOT YET SCHEDULED

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.

No. 19-1198

MOTION FOR A STAY PENDING APPELLATE REVIEW

MAURA T. HEALEY
Attorney General for the Commonwealth of Massachusetts
SETH SCHOFIELD
Senior Appellate Counsel
Joseph Dorfler
Assistant Attorney General
Energy and Environment Bureau
OFFICE OF THE ATTORNEY GENERAL FOR MASSACHUSETTS
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2436
seth.schofield@mass.gov

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INTRODUCTION

"Public participation" in Nuclear Regulatory Commission (NRC or Commission) adjudicatory proceedings, the Commission wrote in 1975, "is a vital ingredient to the open and full consideration of licensing issues and establishing public confidence in the sound discharge of the" NRC's duties. 69 Fed. Reg. 2,182, 2,182 (Jan. 14, 2004) (citation omitted). Casting this "vital ingredient" aside, the NRC unlawfully rendered a final determination that it could—*prior* to an adjudicatory hearing on the underlying issues and without confronting any of the Commonwealth's expressed concerns—(i) approve the transfer of the Pilgrim Nuclear Power Station's (Pilgrim) license to new owners that lack the technical and financial qualifications to hold it, (ii) strip from the license a $50 million financial assurance condition that protected the Commonwealth and its citizens against safety and environmental hazards, and (iii) exempt the new licensee from a NRC regulation that would otherwise have categorically prohibited the licensee from using a Massachusetts electric-ratepayer-funded trust in the requested manner. The error was compounded when the NRC ignored its obligation to consider the environmental consequences of these interdependent actions *before* taking final action and *without* soliciting any public comment.

The NRC staff, with the NRC Commissioners' tacit approval, made the approvals effective immediately and the applicants completed the license transfer two business days later. The Commonwealth, on September 3, 2019, filed an application

to stay the final actions but, almost two months later, the Commissioners have yet to rule on it. In the interim, Pilgrim's sale and license transfer have been completed and unlawful use of Massachusetts electric ratepayer funds has been authorized in disregard of the NRC's regulations and the National Environmental Policy Act (NEPA) and to the detriment of the interests of the Commonwealth and its citizens. The NRC's final decision to make the license transfer and exemption approval actions immediately effective, prior to holding an adjudicatory hearing, as requested by the Commonwealth nearly a year ago, was unlawful. Because those actions are causing irreparable harm to the Commonwealth and its citizens, and the balance of the equities strongly favors preserving the status quo pending appellate review, this Court should grant this motion staying the effectiveness of the NRC's actions.

BACKGROUND

Pilgrim, located in Plymouth, Massachusetts, sits on Cape Cod Bay's shore forty miles southeast of Boston, Massachusetts. *Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2)*, 7 N.R.C. 774, 776 (1978). Pilgrim began operating in 1972. 37 Fed. Reg. 20,086 (Sept. 23, 1972). Until 1999, Boston Edison Company owned and operated Pilgrim—a utility regulated by the Massachusetts Department of Public Utilities (DPU) and entitled to collect payments from Massachusetts customers (ratepayers) to pay for operational and post-shutdown costs, e.g., decommissioning (i.e., radiological decontamination), site restoration (i.e., non-radiological decontamination), and spent-nuclear fuel management costs. The money Boston

Edison collected from Massachusetts ratepayers for decommissioning was placed into the Pilgrim Decommissioning Trust Fund (Trust Fund). Induced by restructuring of the electric industry in Massachusetts, Boston Edison received state approval to sell Pilgrim and its Trust Fund to Entergy Nuclear Generation Co. (Entergy)—a non-rate regulated electricity generation company (i.e., a merchant reactor) that could cover Pilgrim's costs by selling electricity in the wholesale electricity market. *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768-69 (2016). That exclusive revenue-stream dried-up on May 31, 2019, when Pilgrim permanently closed. Add-1.

Pilgrim, now shuttered, remains burdened with major costs and liabilities associated with obligations to decommission the plant, restore the site to comply with state and federal cleanup standards, and manage—potentially indefinitely—spent nuclear fuel onsite. The radiological and non-radiological contamination at the site and the 4,114 spent fuel assemblies stored there pose enormous risks to the health and safety of Massachusetts citizens and its environment. *See* Add-373. To address future radiological decommissioning costs, Boston Edison established the Trust Fund in 1995. Entergy succeeded to that Trust in 1999 when it purchased Pilgrim. *See* Add-193. As part of the deal, Boston Edison contributed additional money to the Trust Fund (derived largely from Massachusetts ratepayers) so that Entergy could comply with the NRC's financial assurance requirements. Add-193, 201. The NRC, as result, found that Entergy did comply with those requirements, but still imposed in its own license-transfer-approval condition requiring Entergy to maintain a $50

million contingency fund to cover operational and decommissioning costs, if needed, due to Entergy's inability to earn money to cover costs during non-operational and post-closure-periods. Add-200-201.

In late 2018, Entergy, Holtec International, and Holtec Decommissioning International, LLC (HDI) (collectively, Holtec) asked the NRC to approve the transfer of Pilgrim's license to Holtec Pilgrim, LLC and HDI and amend the license to reflect the transfer. Add-239. While they stated that the transfer would not affect the "material terms of" Pilgrim's license, they attached a red-line of the license showing as stricken the NRC-required $50 million contingency-fund-condition. Add-241-42, 278. The Applicants did not "fully describ[e]" that change in their application as 10 C.F.R. § 50.90 required; in fact, they did not mention it. Holtec also asked the NRC to exempt it from 10 C.F.R. § 50.82(a)(8)(i)(A), which reserves Pilgrim's Trust Fund exclusively for decommissioning, so that it would be able to draw on the Fund to cover all of its costs, including spent nuclear fuel management costs. Add-353. In support of the requests, Hotlec submitted a Post-Shutdown Decommissioning Activities Report (PSDAR) outlining its "expedited" decommissioning, site restoration, and spent fuel management plan and a cost-estimate for completing it. Add-400, 447. Holtec Pilgrim and HDI, both limited liability companies with no assets, relied solely on Pilgrim's Trust Fund and their Trust Fund exemption request to satisfy their financial assurance obligations. Add-254-56.

On January 31, 2019, the NRC provided public notice of the opportunity to comment on the license transfer application and the ability to request an adjudicatory hearing on it. 84 Fed. Reg. 816 (Jan. 31, 2019).[1] The agency did not mention or solicit comment on Holtec's Trust Fund exemption request. *See id.* at 816-19. Nor did it state how it intended to comply with the NRC's NEPA obligations prior to approving the interdependent requests or solicit any public comments regarding any NEPA review. *See id.* at 816-19. The NRC also recited its "no significant hazards consideration" license-transfer-rule, which, where it applies, authorizes the NRC to approve a license transfer request and make it effective immediately notwithstanding a pending hearing request. The rule provides that "unless otherwise determined by the Commission ... any amendment to a license ..., which does no more than conform the license to reflect the transfer action involves no significant hazards consideration." *Id.* at 817 (citing 10 C.F.R. § 2.1315(a)). The NRC stated that "[n]o contrary determination ha[d] been made" and did not solicit public comment on it. *Id.*

The Commonwealth and one other party (Pilgrim Watch) each filed timely petitions for a hearing and requested to intervene in the proceeding on February 20, 2019. *E.g.*, Add-500. Holtec opposed the two petitions and, on April 1, 2019, the Commonwealth and Pilgrim Watch filed replies. The NRC's regulations required its

[1] The NRC separately solicited comment and held a public meeting regarding Entergy's and Holtec's PSDARs and the accompanying site-specific costs estimates. 83 Fed. Reg. 65,760 (Dec. 21, 2018).

Commissioners to issue a decision on the Commonwealth's petition or tell the Commonwealth when it would make such a decision by May 16, 2019. *See* 10 C.F.R. § 2.310(j)(1). With a decision on the Commonwealth's petition long overdue and fearing that the NRC staff could act on the Applicants' requests, the Commonwealth, on August 1, 2019, asked the Commission to stay final action on the pending requests for ninety days to permit the Commonwealth and the Applicants to complete settlement negotiations, which could have resulted in the Commonwealth and Pilgrim Watch withdrawing their petitions. On August 14, 2019, the Commissioners, in a formal opinion, denied the motion. Add-69.

A day before the Commissioners denied the Commonwealth's stay motion, the NRC State liaison informed the Commonwealth that the NRC staff were prepared to consult with the Commonwealth regarding the pending license transfer request but not the exemption request. Add-635 & n.2. Prior to consulting at the agreed-on time, however, the NRC Staff informed the parties that Staff had notified the Commission that it now intended to approve both requests on August 21, 2019. *Id.* at 2. During the consultation that *followed*, the Staff, on August 14, 2019, also denied the Commonwealth's request to afford to it the same period of time to submit written comments—eighteen days—that the NRC Staff had given New Jersey two months earlier in a similar license transfer proceeding. *See* Add-610. The Commonwealth

submitted written objections five business days later.[2] Without addressing the Commonwealth's written objections, the NRC Staff, on August 22, 2019, approved the license transfer request, amended Pilgrim's license, and granted the Trust Fund exemption request. Add-1, 8, 54. The amended license eliminates the $50 million contingency fund condition for decommissioning that the NRC itself had previously required, Add-14, and the exemption allows Holtec to withdraw $500 million from the Trust Fund for spent fuel management costs—nearly half of the total Trust value—without requiring Holtec to return to the Trust the portion of those expenditures it recovers from the U.S. Department of Energy (DOE), *see* Add-478.[3] The approvals were made immediately effective based on a "Final No Significant Hazards Consideration" determination. Add-43.

The NRC Staff also concluded that the license transfer and amendment were exempt from NEPA based on an NRC NEPA "categorical exclusion." Add-51. "Except in special circumstances," 10 C.F.R. § 51.22(b), that regulation excludes from NEPA review "[a]pprovals of" license transfers "and any associated [license] amendments ... required to reflect the approval," *id.* § 51.22(c)(21). Separately, the NRC Staff, two days earlier, published a cursory Environmental Assessment (EA) of

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[2] In its comments, the Commonwealth challenged Holtec's technical and financial qualifications to hold the license because, among other reasons, Holtec had previously coached a federal employee to lie to federal investigators about a Holtec-orchestrated scheme to win federal contracts. Add-638.

[3] *E.g.*, *Consolidated Edison Co. of N.Y. v. United States*, 676 F.3d 1331 (Fed. Cir. 2012) (DOE contractually liable for damages for failing to take title to spent nuclear fuel).

the environmental consequences of granting Holtec's Trust Fund exemption request and issued a Finding of No Significant Impact (FONSI). 84 Fed. Reg. 43,186, 43,186-88 (Aug. 20, 2019). In the EA, the Staff found, based on Holtec's site-specific cost estimate, "that there is reasonable assurance of adequate funding based on the remaining Trust funds dedicated for radiological decontamination." *Id.* at 43,187. The Staff, however, did not address the fact that allowing Holtec to withdraw $500 million from the Trust Fund for spent fuel management costs without requiring Holtec to return to the Trust Fund the portion of those expenditures it recovers from DOE *will leave Holtec without any funds to pay for the full extent of future spent fuel management costs*. *See id.* at 43,186-88. The NRC did not solicit public comment on these NEPA decisions. *Supra* pp.5.[4]

On August 22, 2019—the day the NRC approved the license transfer and exemption request—Entergy and Holtec notified the NRC that they intended to complete Pilgrim's sale on August 26, 2019—two business days later. Add-641. On September 3, 2019, the Commonwealth and Pilgrim Watch each asked the NRC to stay the license transfer, license amendment, and Trust Fund exemption approvals. *E.g.*, Add-653. The Commissioners have yet to rule on those applications.

[4] *See Brodsky v. U.S. NRC*, 704 F.3d 113, 121-24 (2d Cir. 2013) (holding EA and FOSI deficient where NRC failed to explain why it did not provide notice and comment)

ARGUMENT

The Commonwealth, as explained next, is likely to prevail on the merits, it will suffer irreparable harm if a stay is withheld, Applicants will not suffer any harm if a stay is granted, and the public interest favors a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). A stay is thus appropriate "to preserve the status quo pending the outcome of" appellate review. *See Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006).

I. The Commonwealth is Likely to Succeed on the Merits.

The NRC violated its own regulations when its Staff approved the Applicants' license transfer request, issued a license amendment that included a highly significant substantive change and was not therefore "conforming," and made both immediately effective prior to affording the Commonwealth a requested hearing on their merits. The NRC compounded this error when, without soliciting any public comment, Staff unlawfully segmented its NEPA review of the potential environmental consequences of the interdependent actions before the Commission—the license transfer and Trust Fund exemption requests. These final actions violated the law.

A. The NRC Unlawfully Deprived the Commonwealth of its Right to a Pre-Effectiveness Hearing.

The NRC's license transfer regulations clearly outline the circumstances in which the Commission may approve a license transfer request and amend the license

to effectuate the transfer prior to a hearing on the merits of the requested transfer. They regulations provide that "[u]nless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the license ... *which does no more* than conform the license to reflect the transfer action, involves 'no significant hazards consideration.'" 10 C.F.R. § 2.1315(a) (emphasis added). The next proviso makes clear that the only license amendments contemplated by § 2.1315(a) are "*administrative* license amendments" that are "*necessary* to reflect an approved transfer," and then limits "[a]ny challenge to the *administrative* license amendment ... to the question of whether the license amendment accurately reflects the approved transfer." *Id.* § 2.1315(b) (emphasis added). Section 2.1315's text plainly precludes the NRC from making a license transfer approval and related license amendment immediately effective in the face of a hearing request where the license amendment *does more* than what is *necessary* to reflect the approved transfer. In other words, substantive (i.e., non-administrative) license amendments exceed the regulation's narrow scope.

The rulemaking history confirms the regulation's limited scope. In the preamble to the final rule for 10 C.F.R. § 2.1315, the Commission explained that it was finalizing specific rules for license transfer requests to create "an efficient and appropriate informal process for handling hearing requests associated with transfer applications commensurate with the nature of the issues involved and the rights of all parties." 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998). As to "the nature of the issues

involved," the Commission noted, "[i]n general, license transfers ... involve changes in ownership or partial ownership of facilities at a corporate level." *Id.* at 66,721. And, the Commission then made clear, that "[a]mendments to licenses are *required* [i.e., necessary] only to the extent that ownership or operating authority of a licensee, as reflected in the license itself, is changed by a transfer." *Id.* at 66,727 (emphasis added). That is, "[o]nly when the license specifically has references to entities or person that no longer are accurate following the approved transfer will a situation exist that requires [license] amendments." *Id.* Those amendments—name substitutions—are, the Commission continued, "essentially administrative in nature." *Id.* *A fortiori*, amendments that exceed this prescribed scope are substantive amendments that exceed § 2.1315's scope.

The NRC "must adhere to its own ... regulations," *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986), and any NRC actions at variance with them must be set aside, *National Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014). The latter is the case here, where the NRC Staff, with the NRC Commissioners' imprimatur, approved the Applicants' license transfer request and then made immediately effective a "conforming amendment" to Pilgrim's license, which stripped the longstanding NRC-required $50 million contingency fund requirement from the license. Add-14. Remarkably, however, in the "Final No Significant Hazards Consideration," the Staff described the amendment as "administrative in nature," and stated that the Commissioners, who had an

opportunity to object to it,[5] had not made a "contrary determination." Add-43. But the Staff's decision to strip the $50 million contingency fund condition—one that the NRC had imposed despite Entergy's compliance with the NRC's financial assurance requirements in 1999, Add-200-01—works a significant substantive change that places the amendment outside the scope of § 2.1315, *supra* pp.9-11, and the Commission's own prior decisions, and the NRC erred in making that decision immediately effective without opportunity for hearing.[6] Just as arbitrary, the NRC Staff did not even mention its s decision to strip out the crucially important contingency, let alone explain it. *See* Add-1-7, 19-53; *see also National Lifeline Ass'n v. FCC*, Nos. 18-1026 & 18-1080, 2018 WL 4154794, at * 1 (D.C. Cir. 2018) (granting stay where agency "entirely failed to consider" material issue).

B. The NRC Violated NEPA in Multiple Respects.

The Commonwealth is also likely to succeed on its claim 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. NEPA is "designed to ensure 'fully informed and well-considered decision[s]' by federal agencies." *Delaware*

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[5] Add-225.

[6] *In re Entergy Nuclear Vermont Yankee, LLC*, CLI-16-17, 2016 WL 8729987 at *16 (N.R.C. 2016) (holding that requirement "intended to provide reasonable assurance that sufficient funds will be available for radiological decommission" is "*substantive* in nature" (emphasis added).

Riverkeeper Network v. FERC, 753 F.3d 1304, 1309-10 (D.C. Cir. 2014) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)). To ensure that purpose is achieved, agencies may not "'segment[]' NEPA review" by dividing "connected, cumulative, or similar federal actions into separate" ones and "thereby fail[] to address the true scope and impact of the activities that should be under consideration." *Id.* at 1313; *see* 40 C.F.R. § 1508.25 ("[a]ctions are connected if they ... [a]re interdependent parts of a larger action and depend on the larger action for their justification"). These principles require a "comprehensive approach" to agency "environmental decisionmaking," *Delaware Riverkeeper*, 753 F.3d at 1314, and prohibit agencies from "act[ing] first and comply[ing] later." *Oglala Sioux Tribe v. U.S. NRC*, 896 F.3d 520, 523 (D.C. Cir. 2018).

The NRC violated NEPA's anti-segmentation rules. The agency had before it three interdependent proposals: (i) the license transfer and license amendment request; (ii) the Trust Fund exemption request; and (iii) the revised decommissioning planning report (PSDAR) and related site-specific cost estimate. Add-1, 8, 54, 400. These action-items are connected because Holtec's obligation to demonstrate its financial qualifications to hold Pilgrim's license depend entirely on receiving the Trust Fund exemption and the Trust Fund exemption request is based, in turn, on Holtec's vague site-specific decommissioning, site restoration, and spent fuel management cost estimate. Add-270. Approval of the Trust Fund exemption request and acceptance of HDI's site-specific cost estimate "[a]re interdependent parts of a larger action[, i.e.,

the license transfer,] and depend on th[at] larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(iii). Indeed, Holtec has conceded the point, noting that "the exemption was considered by the NRC Staff in approving the license transfer," Add-650, and stating that failure to receive the exemption would "prevent the transaction from occurring," Add-270. Yet, in violation of NEPA's anti-segmentation rule, the NRC siloed its review of the potential environmental impacts of the license transfer and related amendment from the impacts of the Trust Fund exemption—excluding categorically the license transfer and amendment from any NEPA review and issuing a curt EA and FONSI for the exemption. *Supra* pp.7-8.

Even if this segmented review were lawful under NEPA, which it is not, the license amendment categorical exclusion decision and the exemption request EA and FONSI were each independently unlawful under NEPA. First, the categorical exclusion the NRC relied on to exempt the license amendment from *any* NEPA review does not apply. Just like the no significant hazards consideration rule, *supra* pp.9-11, the license transfer categorical exclusion applies only to amendments that are "*required* to reflect the approval," 10 C.F.R. § 51.22(c)(21) (emphasis added), and the only required amendments the exclusion contemplates are "*administrative* license amendments." 63 Fed. Reg. at 66,728 (emphasis added). That is, again, name substitutions. *Id.* at 66,727. The unexplained decision to strip from the license the $50 million contingency fund condition imposed by the NRC in 1999, in contrast, was "substantive in nature," by no means *required*, and relates directly to the Commission's

obligation to ensure sufficient funds will be available to radiologically decontaminate Pilgrim. *See In re Entergy Nuclear*, 2016 WL 8729987 at *16. Indeed, the failure to consider this issue itself renders the decision unlawful, *National Lifeline Ass'n*, 2018 WL 4154794, at * 1, and the NRC's failure to explain the departure from past precedent makes it even more so, *Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 580-81 (D.C. Cir. 2010).

Second, the Trust Fund exemption EA and FONSI are also woefully deficient in their scope and analysis. *See* 84 Fed. Reg. at 43,186-88. It is settled, for example, that an agency must "evaluate seriously [in an environmental assessment] the risk" that an issue will occur and the environmental consequences that could flow from it. *Found. on Econ. Trends. v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985). But the NRC did not evaluate "seriously" any issue; instead, its analysis amounts to a series of baseless, repetitive, and wholly conclusory statements. 84 Fed. Reg. at 43,186-88. Indeed, the NRC asserted that "*[t]he reason* the human environment would not be significantly affected is that the proposed action involves an exemption from requirements that are of financial or administrative in nature that do not have an [environmental] impact," *id*. at 43,188 (emphasis added), even though the Commission has rejected that very argument, *In re Entergy Nuclear*, 2016 WL 8729987 at *16, and made clear that it fulfills its "responsibility to protect public health and safety" through financial assurance requirements like the one HDI no longer has to comply with, 46 Fed. Reg. 11,666, 11,667 (Feb. 10, 1981). And, in fact, the Commission has stated that "additional ...

funding" may be required for merchant reactors like Pilgrim that cannot obtain additional money once they stop selling electricity. *See* 61 Fed. Reg. 39,278, 39,285 (July 29, 1996).

The NRC also failed to consider the fact that granting the exemption without a condition requiring HDI to return to the Trust Fund the $500 million in spent nuclear fuel costs it is likely to recover from DOE will leave Holtec with *no* money to cover spent fuel costs after 2063—*seventy-nine* years *before* Holtec has told the NRC in another proceeding that DOE may comply with its contractual obligation to transport spent fuel to a permanent repository. Add-625. Holtec's own cost-estimate for Pilgrim, which the Commonwealth contends significantly underestimates likely future costs, indicates that the limited liability company will have only $3.6 million total left in the Trust Fund by 2063 while the annual cost to safely maintain the spent nuclear fuel onsite is approximately $7 million. Add-492-93.

Spent nuclear fuel, as this Court recognized, "poses a dangerous, long-term health and environmental risk." *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012). Yet, reminiscent of the reason this Court invalidated the NRC's Continued Storage Rule, the NRC has effectively said Holtec will have money "if necessary," even though Holtec will have no money and both the EA and FONSI are devoid any analysis of the potential environmental consequences of this nearly certain funding shortfall. *See New York*, 681 F.3d at 478-79; 84 Fed. Reg. at 43,187 (focusing only on funding assurance for radiological decommissioning); Add-19-53. And, in this regard,

the EA and FONSI are also inconsistent with another Commission decision, which required another licensee to return DOE spent fuel recoveries to the trust fund to better ensure long-term funding for decommissioning, site restoration, and spent fuel management. *See* 83 Fed. Reg. 50,966, 50,967 (Oct. 10, 2018).

II. The Commonwealth Will Suffer Irreparable Harm Absent a Stay.

Absent a stay, the Commonwealth will suffer irreparable harm that is "certain," "great," not remediable by a later favorable opinion, and caused by the actions the Commonwealth seeks to stay. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

First, the NRC has unlawfully authorized Holtec to withdraw money from the Trust Fund—a fund created by money collected from Massachusetts ratepayers—to cover, *inter alia*, spent fuel management costs without any obligation for Holtec to return the money it recovers from DOE for incurring those costs to the Fund. In effect, the NRC has permitted Holtec to take millions in Massachusetts ratepayer money as private profit while depriving the Fund of money needed to ensure the successful radiological decontamination of Pilgrim. According to Holtec's own cost-estimate, it plans to draw $53 million from the Fund in 2019 and an additional $84 million from the Fund in 2020 to cover spent fuel management costs, a very significant portion of which it is then likely to recover from DOE. Add-491. While economic loss generally does not constitute irreparable harm, that rule yields when "no 'adequate compensatory or other corrective relief will be available at a later date.'"

Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 555 (D.C. Cir. 2015) (citation omitted). Such is the case here: once Holtec spends Trust Fund money there is no clear path to recover it because the Trust Fund—by design—is Holtec's only asset.

Second, the Commonwealth and its citizens are also likely to suffer irreparable harm due to the immediate start of decommissioning activities at Pilgrim by a licensee that is neither technically or financially qualified to perform that work. Those injuries include health, safety, and infrastructure harm inflicted by frequent waste shipments over local roads, which will cause noise, dust, and other air pollutant emissions, increase the risk of traffic accidents, and damage transportation infrastructure. Add-677-78 ¶ 16. In fact, the environmental impacts of the 1,400 truckloads of just radiological waste anticipated by Holtec vastly exceeds the 671 shipments the NRC evaluated in its prior generic environmental impact statement for decommissioning nuclear power plants. *Id.* By contrast, Entergy, Pilgrim's licensee before the August 26, 2019 license transfer, planned to undertake those activities decades from now. Add-388-99. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. v. Village of Gambell*, 480 U.S. 531, 545 (1987). And, when coupled with the procedural violations of NEPA described above, *supra* Part I.B, "courts have not hesitated to find a likelihood of irreparable injury," *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) (citation omitted).

Third, the Commonwealth is also presently suffering irreparable harm due to the NRC's unlawful decision to make the license transfer and Trust Fund exemption immediately effective prior to a hearing on the Commonwealth's long-ago filed challenges to the underlying requests. As explained above, the determination to make those approvals immediately effective is plainly inconsistent with the governing regulation's text. *Supra* Part I.A. Yet, just as in *Oglala*, the NRC continues to take the position that to secure a stay from the agency for those approvals, the Commonwealth must demonstrate that "'irreparable harm' would result from going forward before the agency completes a valid" NEPA review. 896 F.3d at 532. But that, as this Court made clear, turns NEPA on its head, because the statute requires the NRC to "take the required hard look *before* taking action." *Id.* (citations omitted). As the Court also explained, that practice "stands in stark contrast to the approach" other agencies employ whereby a stay is "automatically ... granted until the concerns are resolved by the [agency], with no showing of irreparable harm or probability of success ... required." *Id.* at 533 (quotations and citations omitted). Here, the Commonwealth has not even obtained a ruling on its stay application—filed almost two months ago—under those standards that this Court has held are "contrary to law." *Id.*

III. The Balance of Harms and the Public Interest Justify a Stay.

The balance of the harms and the public interest also favor a stay. In this case, any harm claimed by Entergy and Holtec is purely economic and thus not irreparable.

See Mot. for Leave to Intervene 10 (referring to interest as achievement of "business goals"); *Wisconsin Gas*, 758 F.2d at 674 ("economic loss does not, in and of itself, constitute irreparable harm"). And, even if interference with their "business goals" was a cognizable injury, it was self-inflicted, because Entergy and Holtec filed their license transfer application at a time when they knew it could not be approved by the NRC prior to the plant's closure. Then, despite being aware of the Commonwealth's challenges and its intention to seek a stay of the approvals, the Applicants rushed to complete the transfer a mere two business days after they received the NRC's approval. They thus assumed the risk of any injury they may claim. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011). A stay also would not harm the NRC since the license would simply revert to Entergy over which the NRC maintains the same regulatory authority. *Cf. Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511-512 (D.C. Cir. 2016) (FEC's interest in continued enforcement of challenged regulation outweighed where it had other tools to address the issue).

The public interest, in contrast, strongly favors a stay. There is, of course, an overriding public interest in "an agency's faithful adherence to" the laws that govern its decisionmaking. *See Jacksonville Port Authority v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977); *see also Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (noting "public interest in having governmental agencies abide by the federal laws that govern their existence and operations."). Indeed, "just as important as the public interest in potential economic gains is 'the public's confidence that its government agencies act

independently, thoroughly, and transparently when reviewing [licensing] applications.'" *Sierra Club*, 645 F.3d at 997.

Here, that interest is especially strong because the Commonwealth's claims concern, *inter alia*, the unlawful use, and yet-to-be evaluated environmental impacts, of the Trust Fund, which was funded by Massachusetts ratepayers to ensure the safe cleanup of Pilgrim without further potential financial obligations on the Commonwealth or its taxpayers. Add-111. While the Commonwealth has an interest in Pilgrim's prompt decommissioning and restoration, its preeminent interest, again, is ensuring that Holtec has the financial and technical capacity to perform those task in a manner that is safe and protects public health and safety and the environment and that ratepayer money is not converted to private profit to deprive the Trust Fund of resources necessary to safely maintain spent fuel onsite. The public, of course, also has a substantial interest "in having legal questions decided on the merits, as correctly and expeditiously as possible," rather than through administrative fiat. *See Washington Metro.*, 559 F.2d at 843.

CONCLUSION

The Court should grant the requested stay.

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Respectfully submitted,

COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
Attorney General of the Commonwealth of Massachusetts,

By its attorneys,

/S/ Seth Schofield
SETH SCHOFIELD
Senior Appellate Counsel
JOSEPH DORFLER
Assistant Attorney General
Energy and Environment Bureau
OFFICE OF THE ATTORNEY GENERAL
OF MASSACHUSETTS
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2436
seth.schofield@mass.gov

Dated: October 28, 2019

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

I hereby certify that:

1. This motion complies with the type-volume limitations of Fed. R. App. P. 27(d)(2), because it contains 5,184 words, excluding the accompanying documents authorized by Fed. R. App. P. 27(a)(2)(B) and the parts of the motion exempted by Fed. R. App. P. 32(f); and.

2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1) (referring to Fed. R. App. 32(a)(5), (a)(6)) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point, Garamond-style font.

Dated: October 28, 2019

/s/ Seth Schofield
Seth Schofield
Counsel for the Commonwealth of Massachusetts

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion to Stay with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on October 28, 2019, and that parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system. I further certify that pursuant to Circuit Rule 27(b), the original and four paper copies of this Motion to Stay will be sent to the Court on October 29, 2019 via overnight United Parcel Service (UPS) delivery.

Dated: October 28, 2019

/s/ Seth Schofield
Seth Schofield
Counsel for the Commonwealth of Massachusetts

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to Circuit Rules 18(a)(4) and 28(a)(1):

A. Parties and Amici

Petitioner

The Petitioner in this matter is the Commonwealth of Massachusetts.

Respondents

The Respondents in this matter are the United States Nuclear Regulatory Commission and the United States of America.

Intervenors

Entergy Nuclear Operations, Inc., Holtec International, Holtec Decommissioning International, LLC, and Holtec Pilgrim, LLC have filed a motion for leave to intervene in this proceeding.

Amici

The Petitioner is not aware of any *amici* in this matter.

B. Rulings

The rulings under review in this proceeding are the United States Nuclear Regulatory Commission's (NRC):

1. Order Approving Direct and Indirect Transfer of License and Conforming Amendment in *In the Matter of Entergy Nuclear Generation Company, Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), EA-19-084, Docket Nos. 50-293 and

72-1044 (Aug. 22, 2019) (effective upon issuance), notice of which was published in the Federal Register on August 28, 2019, 84 Fed. Reg. 45,176 (Aug. 28, 2019);

2. Holtec Decommissioning International, LLC and Holtec Pilgrim, LLC (Pilgrim Nuclear Power Station), Amendment to Renewed Facility Operating License, Renewed License No. DPR-35, Docket No. 50-293 (Aug. 22, 2019) (effective upon issuance) (hereinafter, License Amendment), notice of which was published in the Federal Register on August 28, 2019, 84 Fed. Reg. 45,176 (Aug. 28, 2019);

3. Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Request for Direct and Indirect Transfers of Control of Renewed Facility Operating License No. DPR-35 and the General License for the Independent Spent Fuel Storage Installation from Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. to Holtec Pilgrim, LLC and Holtec Decommissioning International, LLC (Pilgrim Nuclear Power Station), Docket Nos. 50-293 and 72-1044 (Aug. 22, 2019) (hereinafter, Safety Evaluation), notice of which was published in the Federal Register on August 28, 2019, 84 Fed. Reg. 45,176, 45,177 col.3 (Aug. 28, 2019);

4. Final No Significant Hazards Consideration determination for the License Amendment, which made the License Amendment immediately effective. Notice of the Final No Significant Hazards Consideration was included in the Safety Evaluation;

5. Finding that the License Transfer Order and the License Amendment are categorically exempt from any review under the National Environmental Policy Act

(NEPA), 42 U.S.C. §§ 4321-4347, notice of which was included in the Safety Evaluation;

6. Holtec Decommissioning International, LLC (Pilgrim Nuclear Power Station), Exemption, Docket No. 50-293 (Aug 22, 2019), effective immediately upon issuance of the License Amendment. Notice of the Exemption approval was published in the Federal Register on August 28, 2019, 84 Fed. Reg. 45,178 (Aug. 28, 2019);

7. Environmental Assessment and Finding of No Significant Impact under NEPA for the Exemption approval, notice of which was published in the Federal Register on August 20, 2019, 84 Fed. Reg. 43,186 (Aug. 20, 2019).

C. Related Cases

The cases on review have not previously been before this Court or any other court. In addition, counsel for the Petitioner is not aware of any case involving substantially the same parties and the same or similar issue currently pending in this court or in any other court.

Dated: October 28, 2019

/s/ Seth Schofield
Seth Schofield
Senior Appellate Counsel
Energy and Environment Bureau
OFFICE OF THE ATTORNEY GENERAL OF MASSACHUSETTS
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2436
seth.schofield@mass.gov