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

THE STATE OF VERMONT, VERMONT YANKEE NUCLEAR POWER CORPORATION, and GREEN MOUNTAIN POWER CORPORATION, Petitioners, v. U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents.	No. 15-1279

PETITIONERS' OPPOSITION TO MOTION TO DISMISS

Petitioners, the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation, oppose Respondents' Motion to Dismiss. On August 13, 2015, Petitioners filed a timely Petition for Review under the Hobbs Act, challenging a Nuclear Regulatory Commission decision exempting the owner of the Vermont Yankee Nuclear Power Station from important regulatory requirements designed to safeguard funds put in place for radiological decommissioning of Vermont Yankee. Respondents, the Nuclear

Regulatory Commission and the United States of America, concede that the "exemption was final when it was issued" (Motion to Dismiss at 2), thus triggering this Court's jurisdiction. Respondents nonetheless ask this Court to dismiss Petitioners' timely challenge to final agency action on the basis of another proceeding that "could potentially" make review before this Court unnecessary. *Id.* at 3. Respondents are incorrect, and their motion to dismiss should be denied. In the alternative, although it is Petitioners' position that this matter is ripe for review by this Court and should proceed on schedule, if the Court agrees with Respondents' arguments for judicial economy, the Court should at most temporarily hold this matter in abeyance.

Nuclear Regulatory Commission ("NRC or "Commission") regulations establish that the sole purpose of nuclear decommissioning trust funds is to fund the activities necessary to safely remove nuclear power plants from service and reduce residual radioactivity to a level that allows unrestricted use of the property. 10 C.F.R. § 50.2, 50.82(a)(8)(i)(A); *see also General Requirements for Decommissioning Nuclear Facilities*, 53 Fed. Reg. 24018-01, 24018 (1988) ("Decommissioning activities do not include the removal and disposal of spent fuel which is considered to be an operational activity or the removal and disposal of nonradioactive structures and materials beyond that necessary to terminate the NRC license."). Despite that unequivocal language, on June 23, 2015, NRC Staff

granted a request by the owner of the Vermont Yankee Nuclear Power Station ("Vermont Yankee"), Entergy Nuclear Operations, Inc. ("Entergy"), that effectively allows Entergy to circumvent the very purpose of those important regulations.[1] That decision (the "Exemption Decision"), which was immediately effective, allows Entergy to make seemingly unlimited withdrawals from the Vermont Yankee Nuclear Decommissioning Trust Fund ("Decommissioning Fund") for non-decommissioning purposes. This directly threatens the viability of the Decommissioning Fund for its intended purpose and further delays the release of the site for unrestricted use.

The Commission made the Exemption Decision without a hearing or the opportunity for notice and comment, foreclosing any public participation in the exemption proceeding. The Commission also denied requests by interested parties to participate, including Petitioners here—despite Petitioners' clear interests in the

[1] NRC Staff, which is separate from the Commissioners (though subject to the Commissioners' supervision), made that decision under authority delegated to it by the Commission. NRC Staff's position is that its actions in granting exemptions are not subject to appeal to the Commission and function as final agency actions. *See, e.g.*, Exhibit 1 (June 16, 2015 Ltr. from William Dean re: Vermont Yankee Nuclear Power Station—Request for Public Participation on Entergy's January 6, 2015 Decommissioning Trust Fund Exemption Request (ADAMS Accession No. ML15162B001)).

stewardship of the Fund.[2] The Petition seeks the Court's review of the flawed Exemption Decision.

Respondents concede that the Exemption Decision was a final order. Motion to Dismiss at 2 ("This exemption was final when it was issued."). Indeed, Entergy has used—and continues to use—the Exemption Decision to withdraw millions of dollars from the Decommissioning Fund for non-decommissioning expenses.[3] Yet Respondents claim that Petitioners retroactively made a once-final agency action non-final by filing a separate request with the Commission after initiating proceedings in this Court.[4] That argument is premised on the mistaken

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[2] As explained in the Petitioners' submissions to the Commission seeking participation, the State of Vermont has an interest in protecting its residents and taxpayers from the potential consequences of leaving a nuclear site contaminated, and the Vermont Yankee Nuclear Power Corporation and Green Mountain Power Corporation have a direct financial interest in their contractual right to recover 55% of all unused funds from the decommissioning trust fund for their ratepayers.

[3] *See, e.g.*, Exhibit 2 (Entergy Letter, Pre-Notice of Disbursement from Decommissioning Trust Vermont Yankee Nuclear Power Station (Oct. 27, 2015)); Exhibit 3 (Entergy Letter, Pre-Notice of Disbursement from Decommissioning Trust Vermont Yankee Nuclear Power Station (Sept. 14, 2015)); Exhibit 4 (Entergy Letter, Pre-Notice of Disbursement from Decommissioning Trust Vermont Yankee Nuclear Power Station (Aug. 13, 2015)); Exhibit 5 (Entergy Letter, Pre-Notice of Disbursement from Decommissioning Trust Vermont Yankee Nuclear Power Station (July 16, 2015)).

[4] *See* Petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation for Review of Entergy Nuclear Operation, Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund (Nov. 4, 2015) (attached as Exhibit A to Respondents' Motion to Dismiss).

assumption that Petitioners filed a motion for reconsideration with the Commission, a misapprehension that colors Respondents' entire motion to dismiss. Petitioners did no such thing. Reconsideration of the Exemption Decision was not available, and the request to the Commission seeks a comprehensive review—that the Commission views as discretionary—of the central issues related to the Decommissioning Fund, only one of which is the Exemption Decision. Moreover, the Commission in the exercise of its discretion might not grant the review Petitioners have sought, and even if it does grant some review, there is no guarantee that review would include the substance of the Exemption Decision challenged here.[5]

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[5] NRC Staff highlights this point in its December 7, 2015 Answer to Petitioners' separate request to the Commission for a comprehensive review, noting "[t]he Commission has stated that simply because the Commission *may* exercise its [*sua sponte* review] authority 'in no way implies that parties have a *right* to seek [ ] review on that . . . ground.'" Exhibit 6 at 22 (footnote omitted) (NRC Staff Answer to the Vermont Petition for Review of Entergy Nuclear Operation Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund ("NRC Staff Answer")). That line of argument—that Vermont has no right to have the Commission conduct a comprehensive review of the many decommissioning requirements that Staff is evaluating on a piecemeal basis—is echoed in other portions of the NRC Staff Answer and in Entergy's Answer. *See, e.g.*, *id.* at 2 ("Vermont is not entitled to a hearing on the [NRC] Staff's grant of the exemption to the NRC regulations."); Exhibit 7 at 3, 4, 13, 14, 16, 18, 19, 20, 23, 24, 29, 32, 34, 36, 37, 39, 40, 43 (Entergy's Answer Opposing November 4, 2015 Petition Filed by the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation ("Entergy's Answer") (repeatedly arguing that the Commission "summarily reject" or "summarily dismiss" Petitioners' request for review). As Petitioners outlined in their

Respondents' motion seeks to deprive Petitioners of any means for review of the Exemption Decision: they urge the Court to dismiss the instant action on the basis that it would be a "pointless waste of judicial energy" to proceed before a "final order" issues in the NRC proceeding (Motion to Dismiss at 8-9), then argue that even if a final order issues, review by this Court *still* would be improper (Motion to Dismiss at 11-12)—while the NRC Staff is arguing to the Commission that the NRC proceeding should not take place at all (*supra* note 6). Because dismissal at this juncture could foreclose Petitioners' ability to ever obtain review of the Exemption Decision, in direct contravention of the Hobbs Act and the Administrative Procedure Act, Respondents' motion to dismiss should be denied. If, however, the Court is inclined to await the Commission's decision whether to initiate the proceedings sought by Petitioners, it should at most stay this action pending a decision by the Commission on Petitioners' request.

I. THIS COURT HAS JURISDICTION TO REVIEW THE NRC'S FINAL AGENCY ACTION

Respondents' motion to dismiss relies exclusively on the misconception that Petitioners filed a reconsideration request with the Commission. But Petitioners' filing with the Commission is not a motion to reconsider—it is a petition seeking a

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submission to the Commission, it is Petitioners' position that a number of federal statutes and regulations require and empower the Commission to address the issues raised by Petitioners' filing.

comprehensive review. The Commission views that review as discretionary and thus may grant, deny, or ignore it. Respondents also disregard the fact that the Exemption Decision has neither been tolled nor stayed, and every month Entergy withdraws millions of dollars from the Decommissioning Fund that it is using for non-decommissioning activities based on the Exemption Decision. Thus, the decision under review is a final agency action that this Court has jurisdiction to consider.

A. Petitioners' filing with the Commission is not a motion for reconsideration

Respondents incorrectly claim that "there is no 'qualitative difference' between a 'reconsideration' request and Vermont's petition before the NRC." Motion to Dismiss at 10. Petitioners' filing with the Commission, however, is practically, procedurally, and functionally different than a motion for reconsideration.

Petitioners asked the Commission to exercise its general supervisory authority to convene a proceeding to review actions related to the Decommissioning Fund. That request is not a motion for reconsideration, nor the functional equivalent of one. Respondents emphasize the fact that the Commission ordered briefing on Petitioners' filing (Motion to Dismiss at 6 n.4), but fail to recognize that a briefing schedule in no way binds the Commission to make a

decision, or even hold a hearing, on any of the issues raised in Petitioners' filing. Respondents seem to suggest that the mere *possibility* of Commission review requires dismissal here since the Commission *could* overturn the Exemption Decision and thus "nullify" the efforts of this Court. Motion to Dismiss at 8 (citing *United Transp. Union v. ICC*, 871 F.2d 1114, 1117 (D.C. Cir. 1989)). But that multi-layered hypothetical cannot be the test. There are many things that could nullify this Court's efforts before a decision is rendered. For instance, the U.S. Department of Energy could finally meet its contractual obligation to remove all spent fuel from Vermont Yankee, thus eliminating the need for Entergy to withdraw money from the Decommissioning Fund for spent fuel management expenses. That would likely moot this case, but until that occurs, this Court maintains jurisdiction.

NRC Staff and Entergy recently filed Answers strenuously arguing that the Commission should not undertake the requested review. In particular, although the Commission argues in its motion to dismiss this Petition that "there is no 'qualitative difference' between a 'reconsideration' request and Vermont's petition before the NRC" (Motion to Dismiss at 10), NRC Staff has argued quite the opposite in its Answer filed with the Commission, positing that Vermont's request for a comprehensive review "is more akin to a request that the Commission

exercise its supervisory authority and order a discretionary hearing outside of the traditional hearing process." NRC Staff Answer at 25.

Further, Respondents' motion to dismiss fails to recognize that NRC regulations narrowly circumscribe the circumstances under which a motion for reconsideration can be filed. First, such a motion is permitted only in Subpart C of Part 2 of 10 C.F.R., which is restricted to "adjudications conducted under the authority of the Atomic Energy Act." 10 C.F.R. § 2.300. Second, NRC Staff, in granting the exemptions at issue here and rejecting Petitioners' efforts to participate in the exemption review process, has denied that a decision on an exemption is an "adjudication" as to which the right to seek an adjudicatory hearing exists.[6] Third, the only mention of the right to seek "reconsideration" appears in a portion of Subpart C of Part 2 of 10 C.F.R. that is limited to decisions by licensing boards on motions filed by parties and is narrowly tailored. 10 C.F.R. § 2.323(e). Fourth, other provisions of Subpart C that relate to review of decisions are limited to appeals to the Commissioners of decisions of licensing boards and explicitly disallow a petition for reconsideration of a decision of the Commissioners following review of a decision of a licensing board. 10 C.F.R.

[6] *See, e.g.*, Exhibit 1.

§ 2.241(d). Quite simply, no direct means for reconsideration or review of the Exemption Decision was available at the agency level.

That point was emphasized by NRC Staff in a letter from William Dean, Director of the Office of Nuclear Reactor Regulation, to Petitioners, which states in part that "a petitioner may seek a hearing on license amendments, but not on exemption requests." Exhibit 1 at 2. That "long-standing regulatory position" of the Commission foreclosed any opportunity for Petitioners to voice their concerns about the exemption request. *Id.* Such a hearing would have provided Petitioners the opportunity to make a substantive record and compel the NRC Staff to produce a rational basis for its decision to allow Entergy to use the Decommissioning Fund for purposes unrelated to decommissioning.

Unlike a motion for reconsideration—which requires a ruling from the Commission—an appeal to the Commission's supervisory authority may go unheard, unanswered, or be ignored in certain circumstances.[7] Because Petitioners' filing with the Commission is not a reconsideration request, Respondents' arguments are not aided by their reliance on precedent that parties

[7] The Commission's supervisory authority empowers it to address a wide range of matters (*see, e.g.*, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), 11 N.R.C. 514, 516 (1980); *see also, e.g.*, *Safety Light Corp., et al.* (Bloomsburg Site Decontamination & License Renewal Denials), 36 N.R.C. 79, 85 (1992)), but there is no guarantee it will do so.

may not seek "both agency *reconsideration* and judicial review of an agency's order." *See, e.g.*, *Wade v. FCC*, 986 F.2d 1433, 1433 (D.C. Cir. 1993) (emphasis added). Those cases are premised on the fact that the agency must act on a motion to reconsider. That precedent, and—as Respondents concede—the Hobbs Act's finality requirement, is "grounded in concerns for judicial economy." Motion to Dismiss at 8. In other words, since a reconsideration request must be addressed and resolved by the agency, it would not be efficient for a court to proceed with a petition for review until after the agency acts. That is not the case here, where there is no guarantee that the Commission will act.

Respondents place undue reliance on *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1405 (9th Cir. 1996), in which the Ninth Circuit addressed an appeal of a notice of violation of child labor laws under the Fair Labor Standards Act of 1938. In that case, an automobile dealer received a notice of violation which "advised each dealer of its option to file an 'exception' to the Administrator's decision, which would initiate a referral to an Administrative Law Judge ("ALJ") for hearing." *Id*. The dealers concurrently filed the "exception" and an action in the district court challenging the notice. *Id*. Noting that the structured appeals process established by the Fair Labor Standards Act provided that an ALJ decision must issue before judicial action may be commenced, the court held that the appeal to the ALJ was functionally the same as a motion to reconsider. Here, by contrast,

there is no appeal process within the NRC that Petitioners could pursue before seeking review in this Court. *Acura* is also distinguishable because that court held that there was not yet a final decision since the "exception" process served to toll the impact of the challenged action until a final decision issued. That is not the case here—it is undisputed that the Exemption Decision is currently in effect.

Another important distinction between the reconsideration cases relied upon by Respondents and this case is the recourse available to Petitioners if the Commission refuses to grant review or grants only a limited review. If the Commission declines to convene the proceeding Petitioners requested, Entergy or the Commission may argue that any review of that decision should be limited and not reach the merits of the underlying proceeding. *See I.C.C. v. Bd. of Locomotive Engineers*, 482 U.S. 270, 278 (1987). Dismissal of this appeal now could therefore render the Exemption Decision immune to any meaningful review. Such an outcome is contrary to both the Hobbs Act and the Administrative Procedure Act.

Instead, this case is similar to *Craker v. Drug Enforcement Administration*, 714 F.3d 17 (1st Cir. 2013), in which the First Circuit recognized that despite the general rule that "a petition for review filed during the pendency of a motion for agency reconsideration is 'incurably premature,'" there is a clear distinction in the applicability of that rule between cases in which "the governing statute or the implementing regulations expressly provided for agency reconsideration" and

situations in which no such "procedural guarantees" exist. *Id.* at 24. Thus, in *Craker*, the court held that even when direct (if limited) reconsideration was available, dismissal of a petition filed during pendency of the reconsideration motion was not appropriate since reconsideration "may or may not have been permitted in the agency's discretion" and thus "broader reconsideration of the factual and legal bases for the agency's final order remained only, at the time of the filing of the petition for review, a mere possibility." *Id.* at 25. The court further noted that concerns regarding judicial economy are "considerably diminished" in cases "where the reconsideration process is ad hoc." *Id.* Surely they are diminished further still—if not eliminated—here, where not even an "ad hoc" reconsideration process exists at the agency level.

In an analogous situation in the Tenth Circuit, a municipality brought action under the Administrative Procedure Act challenging a decision of the Department of Labor. *See City of Colo. Springs v. Solis*, 589 F.3d 1121 (10th Cir. 2009). That court found that the Administrative Procedure Act's tolling rule was inapplicable "because the [Department of Labor] ha[d] not established a rehearing or reconsideration process" and so there existed "no 'discretionary review period specifically provided by the agency' of which the City could avail itself." *Id.* at 1141. The court therefore "conclude[d] that the [Department of Labor's initial] decision was a 'final agency action' subject to judicial review." *Id.* Similarly,

since no right exists here for moving to reconsider, or even review, the Exemption Decision at the agency level, the NRC Staff's decision constituted final action. Petitioners were required under the Hobbs Act to appeal (as they did) within 60 days of that final agency action.

Further, Respondents' motion to dismiss fails to recognize that there are a number of circumstances in which motions filed with a lower court do *not* deprive an appellate court of jurisdiction. *See Stone v. I.N.S.*, 514 U.S. 386, 402-03 (1995). Granted, "[t]he majority of post-trial motions, such as Rule 59 render the underlying judgment nonfinal both when filed before an appeal is taken (thus tolling the time for taking an appeal), and when filed after the notice of appeal (thus divesting the appellate court of jurisdiction)." *Id*. Crucially, however, the Supreme Court has explained that "[o]ther motions, such as Rule 60(b) motions filed more than ten [now 28] days after judgment, do not affect the finality of a district court's judgment, either when filed before the appeal (no tolling), or afterwards (*appellate court jurisdiction not divested*)." *Id*. at 403 (emphasis added). By analogy, while a timely filed motion to reconsider could make a final agency action non-final, that is not the case for Rule 60(b) motions—when a Rule 60(b) motion is filed, "appellate court jurisdiction [is] not divested." *Id*.[8] That is

[8] Indeed, this Court has held that, once appellate jurisdiction has been triggered, Rule 60(b) motions cannot be decided until the case is remanded by this

in part because, like here, the Commission has discretion to rule on Petitioners' filing, just as a district court has such discretion over a Rule 60(b) motion. *See Computer Professionals for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996). And there is no set time for petitioning the Commission—just as Rule 60(b) motions only need to be filed within a "reasonable time." Fed. R. Civ. P. 60(c)(1). Just as a Rule 60(b) motion at a district court would not deprive an appellate court of jurisdiction, this Court is not deprived of jurisdiction by Petitioners' filing.

B. The Exemption Decision is final and Entergy has used—and will continue to use—it to make improper withdrawals from the Decommissioning Fund

The Supreme Court's two-part test to determine when an agency decision is reviewable as final action is unmistakably met here. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and internal quotation marks omitted). The first part of this test—final decision—

Court. *See Envtl. Policy Institute v. Nat'l Coal Ass'n*, No. 93-5029, 1997 WL 404909, at *1 (D.C. Cir. June 27, 1997) (per curiam) (citing *Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952) (per curiam) and *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992)).

is satisfied. Respondents concede that the Exemption Decision is the consummation of the agency's decisionmaking process (Motion to Dismiss at 2, 5 ("This exemption was final when it was issued.")), and nothing has rendered that decision in any way non-final, for the reasons explained *supra*. The second part of the Supreme Court's test also is met, as rights and legal consequences flow from the Exemption Decision—consequences that continue every month as Entergy withdraws millions of dollars from the Decommissioning Fund for non-decommissioning expenses.

Respondents fail to cite a single case in which a review petition was denied when the challenged agency action had immediate, sustained, and real impact on the petitioner—without a defined review process pending at the agency. Rather, the cases relied upon by Respondents uniformly feature an established administrative path that *guarantees* substantive review on the merits of the underlying decision.[9] Other cases that Respondents cite are inapposite because

[9] *See Blue Ridge Envtl. Def. League v. NRC*, 668 F.3d 747, 753 (D.C. Cir. 2012) (challenge to a "response-sheet" was premature because response sheets "do not constitute . . . the consummation of the administrative process"; review would have been available after response sheet became a final order); *City of New Orleans v. SEC*, 137 F.3d 638, 639 (D.C. Cir. 1998) (petitioner filed official request for reconsideration to the agency, which had jurisdiction to review it); *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980, 980 (D.C. Cir. 1993) (petitioner filed official request for reconsideration to the agency, which had jurisdiction to review it); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 112 (D.C. Cir. 2002) (official reconsideration was filed and therefore court will "wait until the

they address challenges to preliminary agency actions before those actions are finalized or published in the Federal Register. *See W. Union Tel. Co. v. FCC*, 773 F.2d 375, 377 (D.C. Cir. 1985); *Pub. Citizen v. NRC*, 845 F.2d 1105, 1109 (D.C. Cir. 1988).

In the cases cited by Respondent, judicial review was not available until the required direct administrative review process was completed. Here, by contrast, there is no required direct administrative review of the Exemption Decision—appeal to this Court was and is Petitioners' only avenue for guaranteed review of the merits of that ruling.

In fact, one of the cases relied upon by Respondents, *Gorman v. NTSB*, 558 F.3d 580 (D.C. Cir. 2009), supports Petitioners' position. In *Gorman*, when a request for reconsideration was filed after the agency's deadline for such requests,

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Commission *has resolved* its pending administrative requests" (emphasis added)); *Stone*, 514 U.S. at 392 (INS had official procedures for reconsideration of deportation orders); *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994) (petitioner requested formal reconsideration and therefore review will be available "[w]hen the agency *acts* upon the petition for reconsideration" (emphasis added)); *United Transp. Union*, 871 F.2d at 1117 (agency review was ongoing and noting that "[t]he petition for reconsideration remains pending before the Commission"); *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (noting process whereby agency will "*issue[] its decision* on reconsideration" (emphasis added)); *Wade*, 986 F.2d at 1434 (noting "petition for reconsideration" is "pending" and agency thus "exercis[ing] . . . [its] jurisdiction"); *Locomotive Eng'rs*, 482 U.S. at 284-85 (agency had already acted on petition for reconsideration); *Acura*, 90 F.3d at 1406-08 (agency had structured appeals process requiring an administrative law judge, upon a request that had already been made, to rule on the issue).

and there was (like here) no guarantee that the agency would address the merits, this Court held that such a filing "does not vitiate the timely judicial petition." *Id.* at 588.

Unlike the cases Respondents rely upon, in which the impacts of agency decisions were tolled, no further agency action was required for the Exemption Decision to have effect here. Since the Commission issued the Exemption Decision, Entergy has proceeded to withdraw millions of dollars from the Fund.[10] In October alone, Entergy provided notice of an additional $6.6 million withdrawal from the Fund for expenses including spent fuel management.[11]

To date, the Commission has not tolled the Exemption Decision while Petitioners await a determination on their filing with the Commission. In their motion to dismiss, Respondents seek an outcome that could entirely inoculate the Exemption Decision from review. Such a result—especially given the practical, real world effects of the underlying decision—would fly in the face of the Hobbs Act and the Administrative Procedure Act and should not be permitted.

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[10] *See* Exhibits 2-5. Those letters reveal $25 million in disbursements but do not differentiate between decommissioning and spent fuel expenses, so it is impossible for Petitioners to determine exactly what percentage of those monies are for improper spent fuel activities. According to other public filings from Entergy, such expenses appear to be in the $10 million range for 2015.

[11] *See* Exhibit 2.

II. AT MOST, THIS COURT SHOULD STAY THIS ACTION PENDING FINAL DISPOSITION FROM THE COMMISSION ON PETITIONERS' FILING

Although it is Petitioners' position that this matter should go forward on the usual schedule, at most this Court should simply stay the proceeding until the Commission rules—or decides not to rule—on Vermont's request seeking comprehensive review. Further, at that point, both matters could be consolidated and heard together. *See, e.g.*, *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 980 (D.C. Cir. 1996) (noting that this Court held a related matter "in abeyance pending Commission reconsideration" for later consolidation with another pending matter once the Commission issued its ruling); *see also, e.g.*, *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (noting that "every court" can act in a way that creates "economy of time and effort for itself, for counsel, and for litigants" so long as it "weigh[s] competing interests and maintain[s] an even balance").

CONCLUSION

For these reasons, Petitioners respectfully request that the Court deny Respondents' motion to dismiss, or, at most, stay this case pending further action from by the Commission.

Dated: December 11, 2015 Respectfully submitted,

THE STATE OF VERMONT

By its attorneys,

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Respondents.	)	

CERTIFICATE OF SERVICE

I certify that on December 11, 2015, a copy of the above Petitioners' Opposition to Motion to Dismiss was filed with the Clerk of the Court and served upon the counsel of record through the CM/ECF System.

/s/ Kyle H. Landis-Marinello

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