

ORAL ARGUMENT NOT YET SCHEDULED  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| COMMONWEALTH OF       | ) | )              |
| MASSACHUSETTS,        | ) | )              |
|                       | ) | )              |
| <i>Petitioner,</i>    | ) | )              |
|                       | ) | )              |
| v.                    | ) | No. 19-19-1198 |
|                       | ) | )              |
| UNITED STATES NUCLEAR | ) | )              |
| REGULATORY COMMISSION | ) | )              |
| AND UNITED STATES OF  | ) | )              |
| AMERICA,              | ) | )              |
|                       | ) | )              |
| <i>Respondents.</i>   | ) | )              |
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**OPPOSITION OF THE COMMONWEALTH OF MASSACHUSETTS TO THE FEDERAL RESPONDENTS' AND PROPOSED INTERVENORS' MOTIONS FOR AN EXTENSION OF TIME**

The Commonwealth of Massachusetts opposes the Federal Respondents' and Proposed Intervenor's motions to extend the time, from November 7 to November 22, 2019, in which they may oppose the Commonwealth's Motion for a Stay Pending Appellate Review (Stay Motion) and seek dismissal of the Commonwealth's Petition for Review (Combined Submissions). The Commonwealth is willing to agree to a one-week extension to November 15, 2019, as a courtesy, to

accommodate the schedules of the Federal Respondents' counsel, but a longer extension would be unfair given the harm that the Commonwealth is suffering now and will continue to suffer in the absence of a stay and the scheduling conflicts such an extension would create for the Commonwealth's own counsel.<sup>1</sup> For those reasons, which are explained more fully below, the Court should deny the requested extensions or, alternatively, enter an order that adopts the compromise schedule set forth in the table in paragraph 6 below.

1. On September 25, 2019, the Commonwealth filed with this Court a Petition for Review of certain actions the Nuclear Regulatory Commission (NRC or Commission) took on August 20 and August 22, 2019. Petition for Review 1-5 (Sept. 25, 2019). Those actions authorized the transfer of the license for the Pilgrim Nuclear Power Station (Pilgrim) in Plymouth, Massachusetts to new entities—Holtec Pilgrim, LLC and Holtec Decommissioning International, LLC (HDI)—and authorized HDI to withdraw money from Pilgrim's

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<sup>1</sup> While Proposed Intervenor's Motion to Intervene has not been acted on yet and they therefore have no right to ask for more time, the Commonwealth, as explained below, is willing to afford them the same scheduling accommodation should their Motion to Intervene be allowed. See *infra* pp.8-9 ¶ 6.

Decommissioning Trust Fund (Trust Fund)—a fund created with money collected from Massachusetts ratepayers for the purpose of radiologically decontaminating Pilgrim—to pay for costs that the NRC’s regulations prohibit and that will deplete the Trust Fund to a level that is inadequate to ensure the protection of public health, safety, and the environment.

2. The NRC’s final actions—approving the license transfer while stripping out an obligation to maintain a \$50 million contingency fee to manage radiological decontamination risks, authorizing the use of the Trust Fund dedicated to ensuring radiological decontamination for other uses, and erroneously declining to conduct legally mandated environmental review—were made effective immediately, in conflict with the plain meaning of the NRC’s own regulations. And, the NRC took these final actions despite the NRC’s failure to act on a long-pending request by the Commonwealth for an adjudicatory hearing to contest them and without any exigencies that might have justified the NRC to act before affording the Commonwealth an opportunity to be heard. With the NRC having completely ignored the Commonwealth’s administrative challenges, Proposed Intervenors lost no time in

immediately seizing on the NRC's actions, completing the license transfer two-business days later on August 26, 2019. As the Commonwealth explained in its Stay Motion, there is no clear mechanism for requiring HDI to repay the money it withdraws from the Trust Fund if the Commonwealth prevails on its claim that those withdrawals are unlawful, Stay Mot. 17-18, and the Commonwealth and its citizens are likely to suffer irreparable harm caused by the NRC's actions in the absence of a stay, *id.* at 18-19.

3. The Commonwealth, for these reasons and the additional ones described in its Stay Motion, will be prejudiced by extending the time for a response to the Commonwealth's Stay Motion until November 22, 2019. The Federal Respondents' Combined Submission is currently due on November 7, 2019. *See* Fed. R. App. P. 27(a)(3)(A), (B). The extension they requested would enlarge their time for filing a response by fifteen days. While the Federal Respondents suggest that the decision by the Commonwealth to file its Stay Motion "on the last possible day under the Court's Scheduling Order" undermines any need for urgency in resolving the Commonwealth's Motion, *see* Fed. Resp'ts ¶ 2, they ignore the fact that "[a] petitioner," like the Commonwealth,

“must ordinarily move *first* before the agency for a stay,” Fed. R. App. P. 18(a)(1) (emphasis added), and then explain in its motion to this Court that “the agency denied the motion or failed to afford the relief requested,” Fed. R. App. P. 18(a)(2)(A)(ii). The Commonwealth filed such a motion with the NRC on September 3, 2019, and the Commonwealth thus waited until the filing deadline set by the Court’s Scheduling Order in hopes that the NRC would grant the requested relief during the nearly two intervening months and thereby relieve this Court of the burden of considering the Commonwealth’s request for a stay. The NRC, however, did not act by the date on which the Commonwealth’s motion was due to be filed in this Court; indeed, the NRC has failed to act on the Commonwealth’s motion.

4. Nor should the number of issues or their “complexity,” both of which are overstated by the Federal Respondents, *see* Fed. Resp’ts ¶ 4,<sup>2</sup> or the fact that the Federal Respondents plan to file a Combined

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<sup>2</sup> For example, the Federal Respondents’ make repeated references to the fact that the Commonwealth’s Petition seeks review of “seven [NRC] actions,” Fed. Resp’ts ¶ 1; *see id.* ¶¶ 4-5, but the Commonwealth’s Stay Motion focuses principally on only three of them, *see* Stay Motion 9-17, and the issues the Commonwealth raised in its Stay Motion turn on straightforward legal issues, *see id.*

Submission be allowed to supersede the Commonwealth's interest in prompt briefing for its Stay Motion. To be sure, the Commonwealth did not request "emergency relief," *id.* ¶ 2, but a decision not to seek emergency relief is not tantamount to an expressed lack of concern about halting the source of the injury to the Commonwealth and its citizens pending appellate review in this Court. And while the Stay Motion was recently filed, the Federal Respondents have had ample time to review the Commonwealth's Petition and begin drafting the motion to dismiss they seek an extension to file. Indeed, counsel for the NRC informed counsel for the Commonwealth that the NRC was considering filing a motion to dismiss on September 26, 2019—more than a month ago and a mere day after the Commonwealth filed its Petition.

5. The Commonwealth will also be prejudiced if the requested extension is allowed because the schedule that would flow from it creates scheduling conflicts for the Commonwealth's counsel that will impair their ability to respond in an effective and timely manner. If the extension is allowed, the Commonwealth's deadline for filing its response to both the Federal Respondents' and Proposed Intervenors'

Combined Submissions (if, again, Proposed Intervenors' Motion to Intervene is allowed by that time) would be December 2, 2019, *see* Fed. R. App. P. 27(a)(3)(A), (B); Circuit Rule 27(d). Undersigned counsel for the Commonwealth would then have only *four* business days to draft and file a response to what could be two briefs with a combined total of up to 15,600 words. *See* Circuit Rules 18(b) & 27(c). That is so because Thursday, November 28, 2019, is the Thanksgiving Holiday, and the Commonwealth's counsel both have pre-planned vacation scheduled for Friday, November 29, 2019.<sup>3</sup> A short extension of the Commonwealth's own response time would not remedy this unfairness because undersigned lead counsel Schofield has an argument on December 3, 2019, an over-length brief due in a case with a 20,399 page administrative record before the U.S. Court of Appeals for the First Circuit on December 11, 2019, and a multi-state amicus brief due in the U.S. Court of Appeals for the First Circuit on December 27, 2019.

6. The Commonwealth is, however, sensitive to the scheduling issue a November 7 filing deadline presents for counsel to the United

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<sup>3</sup> Undersigned counsel Dorfler is in fact scheduled to be on vacation for the entire Thanksgiving week.

States and the NRC. *See* Fed. Resp'ts ¶ 7. With that issue and the other competing interests described above in mind, the Commonwealth would agree, as a courtesy, to an extension until November 15, 2019, and a subsequent short extension for the Federal Respondents' reply to the Commonwealth's response to their Combined Submission from December 2, 2019 to December 6, 2019 to accommodate the Thanksgiving holiday. If Proposed Intervenors' Motion to Intervene is allowed, then the Commonwealth would agree to the same extended deadlines for them as well. For clarity, the following table summarizes the Commonwealth's proposed compromise schedule:

| Event  | Current Deadline   | Revised Deadline  |
|--|--|-------------------|
| Federal Respondents' Combined Submission   | November 7, 2019   | November 15, 2019 |
| Commonwealth's combined reply in support of its Stay Motion and opposition to the Federal Respondents' Combined Submission | Within 10 days of Federal Respondents' Combined Submission | November 25, 2019 |
| <i>continued next page</i>   |  |                   |



| Event                      | Current Deadline  | Revised Deadline |
|----------------------------|---|------------------|
| Federal Respondents' Reply | Within 7 days of Commonwealth's combined response (December 2 if the Commonwealth files on November 25, 2019) | December 6, 2019 |

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For the foregoing reasons, the Commonwealth requests that this Court deny the Federal Respondents' and Proposed Intervenors' Motions for an Extension of Time or, alternatively, enter an Order establishing the briefing schedule set forth in the Table in paragraph 6 above.

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Respectfully submitted,

COMMONWEALTH OF  
MASSACHUSETTS

By its attorneys,

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Dated: November 5, 2019

**CERTIFICATE OF COMPLIANCE WITH Fed. R. App. P. 27(d)**

I hereby certify that:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 1,513 words, excluding the parts of the filing 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 filing has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point, Century Schoolbook-style font.

Dated: November 5, 2019

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

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing opposition with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on November 5, 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.

Dated: November 5, 2019

/s/ Seth Schofield  
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