UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of ENTERGY NUCLEAR OPERATIONS, INC., ENTERGY NUCLEAR GENERATION COMPANY, HOLTEC INTERNATIONAL, AND HOLTEC DECOMMISSIONING INTERNATIONAL, LLC (Pilgrim Nuclear Power Station)	Docket Nos. 50-293-LT 72-1044-LT

CLI-19-11

MEMORANDUM AND ORDER

I. INTRODUCTION

On August 22, 2019, the NRC Staff issued an order approving the direct and indirect transfers of the renewed facility operating license for the Pilgrim Nuclear Power Station and the general license for the Pilgrim Independent Spent Fuel Storage Installation (ISFSI) (collectively, the facility).[1] The Staff also issued on the same day a related regulatory exemption allowing Holtec Pilgrim, LLC, as the licensed owner of the facility, and Holtec Decommissioning International, LLC (HDI), as the licensed operator for decommissioning the facility, to use a portion of the funds in the Pilgrim decommissioning trust fund to pay for spent fuel management

[1] Order Approving Direct and Indirect Transfer of License and Conforming Amendment (Aug. 22, 2019) (ADAMS accession no. ML19170A265) (Order Approving Transfers).

and site restoration activities.[2] The Staff subsequently informed us and the litigants that the proposed license transfer transaction closed on August 26, 2019, and that on August 27, 2019, the Staff issued a conforming license amendment to Holtec Pilgrim and HDI to reflect the license transfer and an associated name change (from Entergy Nuclear Generation Company to Holtec Pilgrim).[3]

The Commonwealth of Massachusetts (Commonwealth) and Pilgrim Watch seek a stay of the effectiveness of both the Staff's order approving the license transfer and of the issued exemption.[4] The applicants oppose the requests.[5] For the reasons outlined below, we deny the requests for a stay. As we emphasize below, however, the Staff's order is not the agency's final action on the license transfer application and exemption request. This adjudicatory proceeding continues separate from the Staff's review. The Staff's order therefore remains subject to our authority to modify, condition, or rescind, depending on this proceeding's outcome. Our decision today speaks only to timing—whether the Staff's order should be stayed pending the resolution of this adjudicatory proceeding. We conclude that the immediate

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[2] *See* Exemption (Aug. 22, 2019) (ML19192A086) (Exemption); Exemption; Issuance, 84 Fed. Reg. 45,178 (Aug. 28, 2019); *see also* Environmental Assessment and Finding of No Significant Impact; Issuance, 84 Fed. Reg. 43,186 (Aug. 20, 2019) (Exemption EA).

[3] *See* Amendment No. 249 to DPR-35, attached as Encl. 1 to Letter from Scott Wall, NRC, to Pierre Paul Oneid, Holtec International, and Pamela Cowan, HDI (Aug. 27, 2019) (ML19235A050) (License Amendment); *see also Notification of Issuance of Conforming Amendment* (Aug. 27, 2019) (ML19239A410).

[4] *See Application of the Commonwealth of Massachusetts for a Stay of the Effectiveness of the Nuclear Regulatory Commission Staff's Actions Approving the License Transfer Application and Request for an Exemption to Use the Decommissioning Trust Fund for Non-Decommissioning Purposes* (Sept. 3, 2019) (Commonwealth's Stay Application); *Pilgrim Watch Motion under 10 C.F.R. § 2.1327 to Stay Staff Order of August 22, 2019* (Sept. 3, 2019) (PW's Motion to Stay Order); *Pilgrim Watch Motion under 10 C.F.R. § 2.323 to Stay Staff Order of August 22, 2019 Granting Exemption* (Sept. 3, 2019) (PW's Motion to Stay Exemption).

[5] *See Applicants' Answer Opposing the Application of the Commonwealth of Massachusetts for a Stay* (Sept. 13, 2019) (Applicants' Answer to Commonwealth); *Applicants' Answer Opposing Pilgrim Watch's Stay Motions* (Sept. 13, 2019) (Applicants' Answer to PW).

effectiveness of the Staff's order will not limit our ability through this proceeding to address and, if warranted, to remedy the asserted deficiencies that the Commonwealth and Pilgrim Watch have raised regarding the license transfer.

II. BACKGROUND

This proceeding concerns a license transfer application filed by Entergy Nuclear Operations, Inc. (ENOI), on behalf of itself and Entergy Nuclear Generation Company (ENGC), Holtec International (Holtec), and HDI (together, the Applicants). As outlined in the application, the license transfer would be effectuated pursuant to the terms of an Equity Purchase and Sale Agreement, under which the equity interests in ENGC would transfer from ENGC's parent companies to Holtec; ENGC's name would be changed to Holtec Pilgrim (as the licensed owner); and the operating authority to conduct licensed activities at Pilgrim would transfer from ENOI to HDI.[6]

The NRC published a notice of the license transfer application and provided an opportunity for comment and to request a hearing.[7] The Commonwealth and Pilgrim Watch each filed a request for hearing and petition to intervene challenging the application.[8] We are reviewing the intervention petitions.

When there is no hearing request on a license transfer application, the Staff alone will conduct a review of the application (unless we were to review the application on our own

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[6] In addition, Entergy states that "Holtec (through its subsidiary HDI) has formed Comprehensive Decommissioning International, LLC (CDI), a jointly-owned company with SNC-Lavalin Group's subsidiary, Kentz USA Inc. CDI is majority-owned by HDI." Letter from A. Christopher Bakken III, ENOI, to NRC Document Control Desk (Nov. 16, 2018) (ML18320A031) (Bakken Letter).

[7] Pilgrim Nuclear Power Station; Consideration of Approval of Transfer of License and Conforming Amendment, 84 Fed. Reg. 816 (Jan. 31, 2019) (Hearing Opportunity Notice).

[8] *See Commonwealth of Massachusetts' Petition for Leave to Intervene and Hearing Request* (Feb. 20, 2019); *Pilgrim Watch Petition for Leave to Intervene and Hearing Request* (Feb. 20, 2019) (PW Petition to Intervene).

initiative, an unusual step). But if the NRC receives a hearing request on a license transfer application, we will review the intervention petition to determine if it satisfies the threshold standards for granting a hearing. The Staff's technical review and the Commission's adjudicatory review may overlap, but they are separate reviews, each of which must be completed and satisfied before a license transfer approval can be considered final.

NRC regulations anticipate that the Staff may complete its review of a license transfer application before the adjudication has concluded. The regulations specify that despite a pending adjudicatory proceeding, the Staff is "expected to promptly issue approval or denial" of the application, consistent with the findings in its Safety Evaluation Report (SER).[9] The Staff, therefore, generally issues an immediately effective order approving a license transfer although a hearing on the application, or a Commission decision on petitions for hearing, remains pending.[10] But a license transfer application "will lack the agency's final approval until and unless the Commission concludes the adjudication in the Applicant's favor."[11] While license transfer applicants may act in reliance on a Staff order approving an application, we have emphasized that both the transferor and transferee do so at their own risk "in the event that the

[9] *See* 10 C.F.R. § 2.1316(a).

[10] *See, e.g., Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 286 & n.1 (2000) (granting hearing requests although the Staff had issued orders approving both license transfers and the companies had closed on the sale of the two nuclear reactor plants); *Power Authority of the State of New York* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488 (2001) (declining, following a hearing on the merits, to disturb the Staff's approval of the license transfers); *Vermont Yankee Nuclear Power Corp. and AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000) (intervention petitions were pending before the Commission although the Staff had issued order approving the transfer); *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 257 n.8 (2008) (decision on intervention petitions issued after Staff had issued order approving transfer).

[11] *See Vermont Yankee*, CLI-00-17, 52 NRC at 83.

Commission later determines that intervenors have raised valid objections to the license transfer application."[12] Because this adjudicatory proceeding remains pending, the Staff's order approving the license transfer includes the following condition:

> The NRC Staff's approval of this license transfer is subject to the Commission's authority to rescind, modify, or condition the approved transfer based on the outcome of any post-effectiveness hearing on the license transfer application. For example, if the Commission overturns the NRC staff's approval of this license transfer, this Order and any conforming amendments reflecting this transfer, will be rescinded, and the Applicants must return the plant ownership to the status quo ante and revert to the conditions existing before the transfer.[13]

The NRC's procedural regulations for license transfers are based on the presumption—rooted in agency historical experience—that license transfers in general do not result in a significant impact on public health, safety, or the environment.[14] While ensuring that an applicant demonstrates financial qualifications is a key part of the Staff's review, the applicant's financial capabilities ultimately are "important over the long term, but have no direct or immediate impact" on the day-to-day activities at a facility.[15]

Accordingly, the license transfer regulations also generically establish that a license amendment that does no more than conform the license to reflect the transfer action involves "no significant hazards consideration" and therefore may be issued any time after the Staff has

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[12] *See id.*; *see also FitzPatrick/Indian Point*, CLI-00-22, 52 NRC at 286 n.1 (noting that notwithstanding the Staff's orders approving the license transfers, the Commission could modify the license or "require the Applicants to return the plant ownership to the *status quo ante*").

[13] *See* Order Approving Transfers at 6, Condition (2).

[14] *See* Streamlined Hearing Process for NRC Approval of License Transfers, Final Rule, 63 Fed. Reg. 66,721, 66,728 (Dec. 3, 1998) ("Safety Evaluation Reports (SERs) prepared in connection with previous license transfers confirm that such transfers do not, as a general matter, have significant impacts on the public health and safety") (Streamlined Process); *see also, e.g.,* 10 C.F.R. § 51.22(c)(21) (rule generically finding that absent special circumstances, approvals of direct and indirect license transfers and any associated amendments required to reflect the approvals, do not individually or cumulatively have a significant effect on the environment).

[15] *See* Streamlined Process, 63 Fed. Reg. at 66,722.

reviewed and approved a proposed license transfer.[16] The NRC's no significant hazards consideration determination affects only the timing of a potential hearing. Pursuant to section 2.1316, the Staff issued its order approving the Pilgrim license transfer despite this pending proceeding. To reflect the transfer, it also issued the related license amendment after concluding that the amendment involves no significant hazards consideration.[17] The Staff's conclusion on the no significant hazards consideration is final, "subject only to the Commission's discretion, on its own initiative, to review the determination."[18] We have inherent supervisory authority to stay the Staff's action or to rescind a license amendment. We decline to review the Staff's finding here.[19]

III. DISCUSSION

Although we can take corrective action if intervenors prevail in challenging a license transfer application, NRC regulations also provide the opportunity to seek a stay of a Staff order. Section 2.1327 governs applications to stay the effectiveness of the Staff's order on a license transfer application. In determining whether to grant or deny a stay, we consider the following four factors: (1) whether the requestor will be irreparably injured unless a stay is granted;

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[16] *See* 10 C.F.R. § 2.1315; Streamlined Process, 63 Fed. Reg. at 66,728.

[17] *See* Safety Evaluation by the Office of Nuclear Reactor Regulation Related to the Request for Direct and Indirect Transfers (Aug. 22, 2019) (ML19170A250) (SER), at 25; *see also* Hearing Opportunity Notice, 84 Fed. Reg. at 817; License Amendment.

[18] *See* 10 C.F.R. § 50.58(b)(6); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001).

[19] As we discuss later in this decision, the license amendment involved the deletion of specific license conditions of a financial nature. The deletion of the financial conditions does not involve any safety concerns that would render the license amendment unsuitable for a no significant hazards consideration determination. *See* 10 C.F.R. § 50.92 (outlining the factors considered in making a no significant hazards consideration finding); *see also infra* at 21-22, 30 (addressing why the deletion of License Condition J (4) poses neither an immediate nor irreparable harm).

(2) whether the requestor has made a strong showing that it is likely to prevail on the merits; (3) whether the granting of a stay would harm other participants; and (4) where the public interest lies.[20]

We long have considered the "most crucial" factor to be whether denying a stay will cause irreparable harm to the party requesting the stay.[21] The entity seeking a stay must show that it "faces imminent, irreparable harm that is both 'certain and great.'"[22] Irreparable injury "must be actual and not theoretical."[23] It is not merely injury that is "feared as liable to occur at some indefinite time."[24] Similarly, the possibility of some irreparable injury occurring in the "remote future" does not constitute the imminent likely harm that justifies granting a stay.[25] The injury must be of such "*imminence*" that there is a "clear and present need" for equitable relief to prevent irreparable harm from occurring pending a decision on the merits.[26] Here, neither the Commonwealth nor Pilgrim Watch has established that they are likely to suffer imminent, irreparable harm pending the outcome of this proceeding.

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[20] *See* 10 C.F.R. § 2.1327(d). The same four-part test is considered in ruling on a request for a stay of the effectiveness of a presiding officer decision. *See* 10 C.F.R. § 2.342(e). The standard restates the principles of equity commonly considered by courts when ruling on stay requests or similar forms of temporary injunctive relief.

[21] *See, e.g., Vermont Yankee*, CLI-00-17, 52 NRC at 83; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990).

[22] *Vermont Yankee LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)); *see also Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 529 (2012); *Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985).

[23] *See Wisconsin Gas*, 758 F.2d at 674.

[24] *Id.* (internal quotation and citation omitted).

[25] *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008).

[26] *See Wisconsin Gas,* 758 F.2d at 674 (internal quotation omitted).

A. Irreparable Harm

1. The Commonwealth

a. Drawdown of Decommissioning Trust Funds

In addressing irreparable harm, the Commonwealth makes three claims. It first argues that without a stay, the license transfer order will likely make it "impossible" to complete decommissioning or will lead to irreversible consequences if regulatory or financial concerns require a change from HDI's intended prompt decommissioning under the DECON decommissioning option to a different, longer-term approach such as the SAFSTOR decommissioning option.[27]

The Commonwealth rests its claim on a cashflow analysis prepared by HDI, which depicts HDI's projected year-by-year withdrawals from the decommissioning trust fund to pay for decommissioning, spent fuel management, and site restoration activities at Pilgrim. The

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[27] *See* Commonwealth's Stay Application at 7; Second Declaration of Warren K. Brewer (Sept. 3, 2019), at ¶ 15 (Brewer Decl.). Holtec Pilgrim and HDI intend to implement the DECON method of decommissioning. Under the DECON approach, the structures, equipment, and portions of the facility that contain radioactive contaminants are removed or decontaminated to a level that permits termination of the license shortly after cessation of operations. HDI's goal is to complete decommissioning and site restoration and to release the non-ISFSI portions of the site for unrestricted use within eight years after license transfer. *See* Application for Order Consenting to Direct and Indirect Transfers of Control of Licenses and Approving Conforming License Amendment; and Request for Exemption from 10 CFR 50.82(a)(8)(i)(A) (License Transfer Application), at 4. The license transfer application is attached as Encl. 1 to the Bakken Letter; the cover letter and application are available together under ADAMS accession number ML18320A031.

If this license transfer is not approved, ENOI plans (as had been its intention prior to the proposed transfer) to implement the SAFSTOR decommissioning approach, under which it intends to dismantle and decontaminate the facility during the years 2074 to 2078, terminate the license in 2079, and complete site restoration by 2080. *See* Pilgrim Post-Shutdown Decommissioning Activities Report (Entergy PSDAR), at 7, attached to Letter from Mandy Halter, ENOI, to NRC Document Control Desk (Nov. 16, 2018) (ML18320A034). Under SAFSTOR, after reactor fuel and radioactive fluids are removed, the facility is left intact for a long-term dormant period that allows for radioactivity levels to be significantly reduced; after this dormant period, the facility is dismantled and decontaminated to levels that permit license termination.

Commonwealth focuses on HDI's projected trust fund withdrawals over the next seventeen months. Specifically, the Commonwealth states that Holtec projects that it will spend over $138 million in 2019 and about $164 million in 2020. Therefore Holtec will "draw over $303 million from the Trust Fund during the first [seventeen] months of the decommissioning, site restoration, and spent fuel management work"—an amount reflecting twenty-nine percent of the value of the trust fund at license transfer.[28] The Commonwealth goes on to claim that this drawdown of funds in the first seventeen months of HDI's work at Pilgrim will likely mean that "if Holtec falters" or "if regulatory or financial concerns . . . require a modified decommissioning approach," there will not be sufficient funds remaining in the decommissioning trust fund for another entity to complete the decommissioning work, nor sufficient funds left in the trust fund to change from HDI's intended accelerated decommissioning under DECON to a decommissioning approach involving a longer timetable, such as SAFSTOR or a delayed DECON approach.[29]

More specifically, the Commonwealth argues that HDI's decommissioning efforts implementing DECON "may leave the facility in such a state as to preclude a transition to SAFSTOR, rendering meaningless the NRC's ability" to alter the decommissioning approach in the event of a shortfall in decommissioning funds or of an NRC "determination that . . . Holtec is technically unsuited to perform the work as planned."[30] Relatedly, the Commonwealth contends that if the "DECON process is halted and a switch made to SAFSTOR after gaps or holes have

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[28] *See* Commonwealth's Stay Application at 7-8; Brewer Decl. ¶¶ 5, 15. Specifically, for 2019 HDI projects to spend approximately $85 million for license termination (radiological decommissioning) activities, $54 million for spent fuel management activities, and $18,000 for site restoration activities. For 2020, HDI projects to spend approximately $79 million for license termination activities, $85 million for spent fuel management activities, and $28,000 for site restoration activities. *See* SER, Att. 1, Closing Balance Calculations.

[29] *See* Commonwealth's Stay Application at 7-8; Brewer Decl. ¶ 15.

[30] Commonwealth's Stay Application at 7-8.

been made in the containment but not all of the material has been removed from within the containment, the containment would not serve as a long-term weather-tight barrier to the spread of contamination and remedial work would be required to return the containment to a condition consistent with SAFSTOR."[31] The Commonwealth goes on to explain that if decommissioning begins under DECON but "in the future" a decision is made to change to SAFSTOR, "there may not be sufficient time for the depleted decommissioning fund to earn enough interest to cover the decommissioning costs associated with the switch."[32] The Commonwealth claims that as a result "local Massachusetts residents will be exposed to increased safety and health hazards."[33]

We find these claims insufficient to establish irreparable harm. First, pursuant to the condition imposed in the Staff's order, we can require the Applicants to "return the plant ownership to the status quo ante and revert to the conditions existing before the transfer."[34] If warranted, therefore, the NRC can require the Applicants to return the ownership of the plant to ENGC and ENOI and can further require the Applicants (which include ENGC and ENOI) to restore the trust fund to the amount existing at the time of the transfer.

As we earlier stated, while the Applicants are free to rely on the Staff's order approving a license transfer, they do so at their own risk if an adjudicatory proceeding remains pending. Based on the results of this proceeding, we can condition the license and/or the exemption, require additional financial assurance, or take other appropriate action including requiring a return to the original conditions existing before the transfer.

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[31] Brewer Decl. ¶ 15. The Commonwealth similarly claims that "once holes or openings have been created in other structures" (other than the containment) additional work would be required to restore the structures to "an acceptable state for long-term storage." *See id.*

[32] *See id.*

[33] Commonwealth's Stay Application at 8.

[34] *See* Order Approving Transfers at 6, Condition (2).

Second, the Commonwealth has not shown that HDI's projected trust fund withdrawals in the short term would render the fund either insufficient to allow another entity to take over and complete the decommissioning or insufficient to permit a change to a longer-term decommissioning method. In effect, the Commonwealth suggests that HDI will spend the next seventeen months focused only on performing decommissioning tasks specific to DECON, such as dismantling large facility components. Essentially, the Commonwealth's argument implies that if either another entity must take over the decommissioning, or a change to a longer-term decommissioning method must be implemented, the tasks performed during the initial seventeen-month period will not have advanced the decommissioning effort.

But much of the work that HDI intends to do in the next year and a half centers on spent fuel management, and it is the same kind of work that ENOI planned to do during this time. Of the $164 million in Holtec's projected expenses for 2020 that the Commonwealth references, for example, over half of the expenses—$85 million—are projected for spent fuel management activities, not decommissioning activities; and in 2019 over a third of Holtec's projected expenses—$54 million—are for spent fuel management activities. Entergy, similarly, expected during this same initial period to spend significant amounts from the trust fund on spent fuel management activities.[35] In short, both under HDI's DECON-based decommissioning approach and under ENOI's SAFSTOR-based approach, a significant part of the work to be performed at Pilgrim beginning in 2019 and extending into 2021 is for spent fuel management.

Consequently, a large portion of the projected withdrawals from the decommissioning trust fund over the next seventeen months will go towards work that would have been done regardless of the decommissioning method chosen or the licensee performing the work. Specifically, out of the referenced $303 million that HDI intends to withdraw during the initial

[35] *See* Entergy PSDAR, Attach. 1, Site-Specific Decommissioning Cost Estimate for the Pilgrim Nuclear Power Station, § 3, at 26 (projecting to spend for spent fuel management work approximately $60 million in 2019 and approximately $55 million in 2020).

seventeen months, close to half ($149 million) will be for spent fuel management. This work, which includes transferring the spent fuel from the wet storage pool to dry storage and expanding the facility's dry storage capacity, would be done whether HDI or ENOI is the licensed operator of Pilgrim.

Third, HDI affirms that between now and mid-2021 at the earliest, during which time it will be engaged in a campaign to transfer the spent fuel to the ISFSI, there will be "no activity which would prevent the plant from returning to SAFSTOR, or require significant additional expenditure to do so."[36] If HDI undertakes any decommissioning action inconsistent with that representation pending this proceeding, it and the other Applicants would bear the risk of the consequences if we were to disapprove the license transfer.

Fourth, the Commonwealth has not shown that the projected withdrawals in the short term from the trust fund would leave the fund with less than the amount necessary to change to a longer-term decommissioning approach. Based on HDI's projected $303 million drawdown from the trust fund over the first seventeen months after the license transfer, the amount left in the fund at the end of 2020 ($742 million) is comparable to the amount that ENOI estimated would remain in the fund at the end of 2020 ($776 million). And yet ENOI still projected the trust fund to have over $150 million remaining, unspent, in 2080 at license termination—following SAFSTOR-based decommissioning, the ISFSI decommissioning, and site restoration.[37] The Commonwealth has not shown that HDI's trust fund withdrawals—pending the outcome of this adjudication—will cause irreparable harm.

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[36] *See* Declaration of Pamela B. Cowan ¶ 3 (Cowan Decl.), attached to Applicants' Answer to Commonwealth.

[37] *See* Pilgrim Nuclear Power Station Updated Spent Fuel Management Plan, Table 5, Annual Cashflow Analysis, at 13, attached as Attach. 1 to Letter from Mandy Halter, ENOI, to NRC Document Desk (Nov. 16, 2018) (ML18320A036).

Fifth, the Commonwealth's claims regarding a potential need to alter the decommissioning approach or to change the licensee are in turn premised on uncertain events occurring in the next year and a half—e.g., "if Holtec falters"; "if regulatory or financial concerns . . . require a modified decommissioning approach."[38] These claims underscore the uncertain nature of the Commonwealth's asserted injury. For example, the Commonwealth claims that HDI's intended decommissioning approach may need to be changed because of an NRC "determination that . . . Holtec is technically unsuited to perform the work as planned."[39] As the Commonwealth notes, the Staff requested that the Applicants provide additional information to demonstrate that HDI's management and technical support organization would have sufficient resources to conduct licensed activities concurrently at the Oyster Creek and Pilgrim facilities.[40] The Commonwealth does not specifically contest HDI's response to the NRC regarding its ability to conduct decommissioning activities concurrently at both the Pilgrim and Oyster Creek facilities, but it questions HDI's ability to conduct activities concurrently at six different reactors.

More specifically, following the NRC's request for additional information, Entergy announced its intention to sell the Indian Point Units 1, 2, and 3 to Holtec.[41] Additionally, Holtec

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[38] *See* Commonwealth's Stay Application at 7; *see also* Brewer Decl. at ¶15 (if HDI is not able to manage and execute six decommissioning projects, then "it is possible that sufficient funding will not remain in the decommissioning trust funds to permit another vendor to complete the decommissioning work or to change the decommissioning approach").

[39] *See* Commonwealth Stay Application at 8. The Commonwealth's argument that Holtec is "technically unsuited" to perform the decommissioning work is based on its claim that Holtec's acquisition of additional plants to decommission may over-extend technical capabilities and resources. The Commonwealth otherwise has not challenged HDI's technical qualifications; the Commonwealth did not, for example, challenge any aspect of the technical qualifications discussion in the license transfer application.

[40] *See* E-mail from Scott Wall, NRC, to Philip Couture III, ENOI, Re: Request for Additional Information (Mar. 21, 2019) (ML19086A349); *see also* SER at 20-21. The Staff in its SER found HDI's response acceptable. *See id.* at 20-23.

[41] *See* Brewer Decl. ¶ 11 & n.8.

has stated that it intends also to acquire the Palisades Nuclear Generating Station. The Commonwealth therefore questions whether Holtec's resources or capabilities ultimately will be over-extended if it becomes "responsible for decommissioning as many as six reactors at four nuclear power stations."[42] The Commonwealth argues that Holtec has not provided "specific information for the NRC to evaluate its ability to act as owner, licensee, and decommissioning agent for six commercial nuclear reactors on schedule and within budget."[43]

But these concerns do not pose an imminent irreparable injury to the Commonwealth. First, the Applicants state that there is no "imminent overlap in the decommissioning of the six reactors" because Holtec's planned acquisitions of the Indian Point and Palisades plants will not occur before those plants cease operation, in April 2021 and spring 2022, respectively.[44] Further, Holtec's potential future purchase of Indian Point and Palisades would require separate, additional NRC license transfer reviews. These reviews would encompass Holtec's technical qualifications to carry out licensed activities at the additional respective plants. Just as the Staff specifically examined HDI's technical capability to conduct decommissioning activities concurrently at the Pilgrim and Oyster Creek facilities, the NRC would need to ensure that HDI has the technical capabilities and related resources to conduct licensed activities at each facility before approving future license transfer applications. In any event, the Commonwealth has not shown how it will be irreparably harmed during this proceeding by Holtec's potential future acquisition of these additional plants.

In short, the Commonwealth has not shown that the projected trust fund withdrawals during the 2019-20 period would make a potential change to another licensee or another decommissioning approach either financially or technically infeasible, or would otherwise make

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[42] *See id.* ¶ 11.

[43] *See id.* ¶ 12.

[44] *See* Applicants' Answer to Commonwealth at 3, 5; *see also* Cowan Decl. ¶ 5.

it impossible to decommission the Pilgrim facility. It has not shown that HDI's trust fund withdrawals during this adjudication will cause the Commonwealth certain, great, and irreparable harm. And most critically, the Pilgrim license is expressly conditioned. Based on the results of this proceeding, the Commission may modify the license or the issued exemption or may disapprove the license and order a return to the conditions existing prior to the license transfer.

b. Truck Shipments of Waste

The Commonwealth next claims that it will suffer irreparable health, safety, and infrastructure harm from frequent waste shipments over local roads, which the Commonwealth claims will increase the risks of accidents, affect traffic flow, damage infrastructure, and cause noise, dust, and air pollution.[45] The Commonwealth bases its claim on HDI's estimated radioactive waste volume of 1.4 million cubic feet. While noting that this amount is bound by the 1.5 million cubic feet of radioactive waste considered in the NRC's generic environmental impact statement for decommissioning (Decommissioning GEIS), the Commonwealth's affiant states generally that "waste volume is often underestimated."[46] He also claims that the estimated 1.4 million cubic feet of waste "[i]f shipped by truck, . . . could easily require more than 1,400 separate truck shipments just for radioactive waste alone."[47] He goes on to state that his estimate of 1,400 truck shipments for the radioactive waste reflects more than double the 671 truck shipments that the NRC's Decommissioning GEIS examined. He argues that there has

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[45] Commonwealth's Stay Application at 8.

[46] *See* Brewer Decl. ¶ 16 n.13.

[47] *See id.* ¶ 16; *see also* Commonwealth's Stay Application at 8. The Commonwealth's affiant derived his estimate of the number of truck shipments of radioactive waste by assuming that 1.4 million cubic feet of waste at 60 pounds per cubic foot results in 84 million pounds of waste; based on legal weight trucks carrying 60,000 pounds of waste per truck, he calculated that there would be 1,400 truck shipments of waste.

been no environmental analysis performed to "evaluate this significantly greater number of truck shipments of radioactive waste."[48]

The Commonwealth's affiant also claims that neither Entergy nor Holtec provided information on the amount of non-radioactive waste that would need to be removed and shipped for disposal offsite. Based on information on the decommissioning experience at the Maine Yankee facility, which he states involved 150 million pounds of non-radioactive waste, the Commonwealth's expert claims that the number of truck shipments of non-radioactive waste over the roads near Pilgrim "could be two to three times" his estimate of 1,400 truck shipments of radioactive waste; the Commonwealth states this would mean "2,400 to 3,400 total trips" by truck.[49]

The Commonwealth's affiant adds that legacy waste—waste that was generated during operations and has been stored on site—typically is removed and shipped within sixty days of the beginning of decommissioning under DECON to clear space on the site. He states that these shipments of legacy waste therefore will begin immediately. Based on these various claims, the Commonwealth argues that absent a stay, waste shipments by truck will begin immediately and will cause irreparable harm to local and state infrastructure, local health, safety, and the environment.[50]

At the outset, we note that the Commonwealth raises in its stay application its concern about the environmental impacts of truck shipments of waste for the first time. The Commonwealth did not include these truck transportation arguments in its request for hearing. Under NRC caselaw, "[t]o qualify as 'irreparable harm' justifying a stay, the asserted harm must

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[48] *See* Brewer Decl. ¶ 16.

[49] *See id.* ¶ 16; Commonwealth's Stay Application at 8.

[50] *See* Commonwealth's Stay Application at 8.

be related to the underlying" contention(s) before the NRC.[51] The purpose of a stay would be to prevent an irreparable harm from occurring before we have had the opportunity to resolve the claim. But here these truck-related environmental impacts claims are not pending before us as part of the Commonwealth's hearing request.

Moreover, we are not persuaded that the Commonwealth faces imminent irreparable harm from truck shipments of waste. First, as to the *imminence* of the truck shipments of waste (radioactive and non-radioactive) associated with the decommissioning process, the Applicants state that they will not start shipping any significant volumes of decommissioning-related waste until they begin the removal of the large components, which they only intend to undertake after they have concluded transferring the spent fuel to the ISFSI—at the earliest in mid-2021.[52]

The Applicants also state that shipments of legacy wastes—wastes removed during early stages of plant shutdown and prior to the removal of large components—would occur regardless of the license transfer (that is, regardless of whether the decommissioning approach chosen is DECON or SAFSTOR) and therefore would not be affected by a stay of the Staff's order. In addition, they state that such legacy waste shipments would not be "materially different from regular shipments of waste from Pilgrim which have occurred over the life of the plant," and which must comply with applicable packaging, labeling, and transportation requirements to protect public health and safety.[53]

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[51] *See Vogtle*, CLI-12-11, 75 NRC at 530-31 (2012) (internal quotation omitted).

[52] *See* Cowan Decl. ¶ 4; *see also id.* ¶ 3 (spent fuel campaign to end mid-2021 at the earliest).

[53] *See id.* ¶ 4.

The Commonwealth has not shown that shipments of legacy waste would be excessive, unusual, or otherwise would cause the Commonwealth an irreparable harm.[54] Nor did the Commonwealth link shipments of legacy waste to the transfer of the Pilgrim license.

We note, moreover, that the Commonwealth's arguments do not acknowledge relevant representations that HDI made about its plans for waste transportation. HDI stated, for example, that it may also construct a barge slip and remove a portion of the waste by barge to reduce the number of shipments over local roadways and that in addition to trucks, it may also use railcars to transport the waste to a disposal facility. Similarly, the Applicants' affiant states that Holtec "plans to use a combination of approaches" to transport the waste, including road, rail, and barge.[55]

HDI also stated that truck shipments of waste would occur over an extended period of time and therefore would not result in a significant change to traffic density or patterns or to worker or public dose.[56] The Decommissioning GEIS notes, for example, that the decommissioning experience has been that the number of low-level waste shipments from a decommissioning site averages "much less than [one] per day," which the GEIS concludes is "not nearly enough to have a detectable . . . effect on traffic flow or road wear."[57] And

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[54] To the extent that the Commonwealth may claim that truck shipments of legacy waste while this proceeding is pending will damage infrastructure or interfere with "local quality of life and enjoyment," it provided no support for these claims. *See id.*

[55] *See* DECON Post-Shutdown Decommissioning Activities Report, at 34-35, attached to Letter from Pamela Cowan, HDI, to NRC Document Control Desk (Nov. 16, 2018) (ML18320A040) (HDI PSDAR); Cowan Decl. ¶ 4.

[56] *See* HDI PSDAR at 34.

[57] *See* "Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities" (Final Report), NUREG-0586, Supplement 1, vol. 1 (Nov. 2002), at 4-79 (ML023470304, ML023470323) (Decommissioning GEIS). The Commonwealth does not suggest, for example, how the asserted increase in potential truck shipments (e.g., 1,400 instead of 671) would, if occurring over an extended period, be likely to cause significantly greater impacts (whether radiological or not) than those evaluated in the GEIS. The Decommissioning GEIS found both

decommissioning waste shipments generally take place over a period of years during the course of decontamination and dismantlement.[58] Therefore, the Commonwealth has not demonstrated that it faces certain, great, and irreparable harm from truck shipments of waste during this adjudication.

Moreover, this license transfer proceeding is focused squarely on the license transfer itself—whether Holtec Pilgrim and HDI have shown that they are qualified to be the Pilgrim licensees. This proceeding does not encompass an examination of the environmental impacts of HDI's planned decommissioning activities. A licensee in decommissioning must describe in its PSDAR the reasons why it has concluded that the environmental impacts associated with site-specific decommissioning "will be bounded" by appropriate previously issued environmental impact statements.[59] If the licensee cannot so conclude, it must prepare and provide the necessary additional environmental analysis, "describing and evaluating the additional environmental impacts."[60]

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the radiological and non-radiological effects of transporting waste to be neither detectable nor destabilizing. *See id.* at 4-78 to 4-81; *see also id.*, app. K. We do not find that the asserted increased numbers of truck shipments will certainly and imminently occur.

[58] *See* Decommissioning GEIS, app. K at K-2.

[59] *See* 10 C.F.R. § 50.82(a)(4)(i).

[60] *See Vermont Yankee*, CLI-16-17, 84 NRC at 124; Decommissioning Rule, 61 Fed. Reg. at 39,286. The PSDAR's purpose is to provide a general overview for the public and the NRC of the planned decommissioning activities and the licensee's schedule for those activities. *See* Decommissioning Rule, 61 Fed. Reg. at 39,281. It does not require NRC approval given that it does not permit a licensee to conduct any activity that is not already authorized under the existing license. Accordingly, a licensee that has submitted certifications of permanent cessation of operations and permanent removal of fuel may begin major decommissioning activities ninety days after the NRC has received its PSDAR. *See* 10 C.F.R. § 50.82(a)(5).

c. Failure to Prepare an Environmental Impact Statement

The Commonwealth argues that it has suffered an immediate, irreparable harm because the NRC did not prepare an environmental impact statement for the Staff's "now-approved actions."[61] Specifically, the Commonwealth argues that when a decision requiring a NEPA impacts analysis is made "'without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent" already has been suffered.[62]

In ruling on stay motions the Commission does not presume that a statutory violation without more "equates to a showing of irreparable injury."[63] The Commonwealth has not made such a showing here.

Moreover, the Staff concluded that the license transfer action and the associated license amendment meet the criteria of the NRC's categorical exclusion rule in 10 C.F.R. § 51.21.[64] The rule identifies specific categories of NRC licensing actions that have been found not to have a significant effect on the environment. A categorial exclusion indicates that the NRC has

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[61] *See* Commonwealth's Stay Application at 8.

[62] *See id.* at 8 (quoting *Massachusetts v. Watt,* 716 F.2d 946, 952 (1st Cir. 1983)).

[63] *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 322-23 (1998) (referencing *Amoco Production Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987) (presumption of irreparable damage is contrary to traditional equitable principles)); *see also Nevada v. United States*, 364 F. Supp. 3d 1146, 1151 (D. Nev. 2019) (court will not "presume irreparable harm; there must be a satisfactory showing"). And the First Circuit by its decision in *Massachusetts v. Watt* "did not mean" that a NEPA violation necessarily calls for an injunction. *See Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250, 1272 (1996).

[64] *See* SER at 33. In addition, the Staff prepared an EA for the exemption. *See* Exemption EA, 84 Fed. Reg. 43,186.

"established a sufficient administrative record to show that the subject actions do not, either individually or collectively, have a significant effect on the environment."[65]

(1) Deletion of License Condition Does Not Pose Imminent Irreparable Harm

The Commonwealth acknowledges the NRC's categorical exclusion of license transfer actions but argues that the categorical exclusion should not have been applied to the license amendment issued as part of this license transfer action. More specifically, the license amendment deleted several license conditions, including License Condition J (4), which required ENGC to have access to contingency funding in an amount up to $50 million dollars.[66] The Commonwealth claims that the license amendment is not encompassed by the NRC's categorical exclusion for license transfer actions because deleting License Condition J (4) was not "required to reflect approval" of the license transfer.[67] The Commonwealth therefore claims that the Staff needed to perform an environmental analysis for the license amendment that deleted this license condition.

However, the deletion of the contingency funding license condition does not present any risk of an imminent irreparable harm. By its own terms, the license condition involved *contingency* funding, to be made available only if necessary, and here the decommissioning trust fund at license transfer contained approximately $1 billion.[68] Contingency funding to pay for decommissioning activities would not be necessary unless all of the $1 billion is drained from the decommissioning trust fund during this proceeding, which is highly unlikely given the proposed expenditures over the next seventeen months.

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[65] *See* Categorical Exclusions from Environmental Review, Final Rule, 75 Fed. Reg. 20,248, 20,251 (Apr. 19, 2010) (Categorical Exclusions).

[66] *See* License Transfer Application, Attach. A, Renewed Facility Operating License (Changes), at 4, Condition J (4) (License Condition J (4)).

[67] *See* Commonwealth Stay Application at 5-6.

[68] *See* License Condition J (4).

Consequently, whether the categorical exclusion rule applies to the license amendment that deleted the license condition is not a question involving an imminent or irreparable harm. There is no imminent need of the contingency funding license condition. If, based on the results of this proceeding, we conclude that additional financial assurance is necessary, we can modify or condition the license. Similarly, if we were to ultimately conclude that the categorical exclusion does not apply to the license amendment and that there is a need for further environmental analysis, we can direct that a supplemental analysis be performed. Either way, NEPA's goal of ensuring that an agency's final decision accounts for the consequences of agency action will be preserved.

(2) Substantive Environmental Concerns Do Not Pose Imminent Irreparable Injury

In addition, the Commonwealth's asserted underlying environmental concerns also do not present a potential to cause imminent, irreparable environmental harm that would occur during this adjudication. The specific substantive harms that the Commonwealth claims flow immediately from the Staff's approvals and will be irreparable either do not present an imminent harm or can be fully remedied through this proceeding.[69] These substantive harms include claims we already addressed and found unpersuasive: (1) the Commonwealth's argument that HDI's trust fund withdrawals will make it impossible for decommissioning to be completed, and (2) its argument on estimated truck shipments for waste transportation.

The Commonwealth also claims that it will suffer immediate, irreparable, environmental harm from withdrawals from the trust fund for site restoration—non-radiological and other restoration activities that go beyond NRC requirements for decommissioning the site and terminating the license.[70] Specifically, the Commonwealth argues that if, to "satisfy non-NRC

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[69] *See* Commonwealth's Stay Application at 8 (citing Brewer Decl. ¶¶ 5, 15-16, 19).

[70] *See* 10 C.F.R. § 50.2 (definition of decommissioning).

requirements," HDI spends five percent more than it projected on site restoration activities, then there could be insufficient funds left in the trust fund to complete the NRC required license termination work.[71]

This claim poses no potential of imminent harm during the adjudication. Essentially, the Commonwealth objects to the approval of an exemption that places no express conditions on the amount that Holtec Pilgrim and HDI can withdraw from the trust fund for site restoration activities. But if the Commonwealth prevails in its arguments on this claim, the Commission can impose conditions on the exemption or take other appropriate action to limit trust fund withdrawals. The Commonwealth has not shown that during this proceeding it will suffer an imminent, irreparable harm from trust fund withdrawals for site restoration. We note, moreover, that through 2020 HDI's projected withdrawals from the trust fund for site restoration are minimal.[72]

In short, the Commonwealth has not demonstrated that it faces an imminent irreparable harm relating to NEPA that stems from the timing of the transfer. Here the Staff found the NRC's categorical exclusion rule applicable to its approval of the Pilgrim license transfer and the associated license amendment. The Commonwealth argues that the license amendment is not encompassed by the categorical exclusion rule, but this question does not raise an imminent or irreparable environmental injury.

2. Pilgrim Watch

Pilgrim Watch also has not satisfied its burden to demonstrate that, pending completion of this proceeding, it has or will suffer imminent harm that would be irreparable. Initially, we note that Pilgrim Watch does not appear to acknowledge that there are two separate aspects of

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[71] *See* Brewer Decl. ¶ 19 (referenced in Commonwealth's Stay Application at 8).

[72] *See* SER, Attach. 1, Closing Balance Calculations, at 1 (during the years 2019 and 2020, HDI projects that it will spend $18,000 and $28,000, respectively, on site restoration activities).

the NRC's consideration of the requested license transfer—the Staff's review and this adjudication. Pilgrim Watch states that there is no indication that the Staff considered its various claims raised in contentions. But Pilgrim Watch's claims are pending in this adjudicatory proceeding, separate from the Staff's review.

Pilgrim Watch first argues that absent a stay both it and the public will be irreparably harmed because of "significant remaining radiological and hazardous contamination in portions of the Pilgrim site that Holtec thinks it has already decommissioned and remediated."[73] HDI, however, has not stated that it has already decommissioned and remediated any portion of the Pilgrim site. Nor has it represented that it will not perform radiological surveys of the site as it conducts decommissioning activities.

HDI's release of the site is not imminent. Under HDI's projected schedule, release of the non-ISFSI portions of the Pilgrim site is projected to occur around 2026.[74] HDI must submit to the NRC a License Termination Plan at least two years before the termination of the non-ISFSI portion of the license. That plan must include a site characterization, plans for site remediation, an updated decommissioning cost estimate, and detailed plans for the final radiation survey.[75]

NRC approval of the License Termination Plan requires a license amendment and will involve an opportunity to request a hearing. And HDI will need to perform final status surveys to show that the site can be released for unrestricted use.[76] Further, the NRC will conduct its own radiological surveys of the site before permitting release of any portion of the site for unrestricted use and before allowing the termination of the non-ISFSI portion of the license.

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[73] PW's Motion to Stay Order at 7.

[74] *See* HDI PSDAR at 35.

[75] *See* 10 C.F.R. § 50.82(a)(9).

[76] The NRC's criteria for site release are defined by the Multi-Agency Radiation Survey and Site Investigation Manual, known as MARSIMM. *See* "Multi-Agency Radiation Survey and Site Investigation Manual (MARSIMM)," NUREG-1575, Rev. 1 (Aug. 2000) (ML003761445).

Pilgrim Watch's claim that portions of the Pilgrim site will be left with contamination does not present an imminent, irreparable injury that is traceable to the decision to maintain the transfer in place during the pendency of this adjudication.

Pilgrim Watch also argues that there will be "leakage, resulting from lack of knowledge and poor and incomplete work, of contaminants into Cape Cod Bay," and therefore a "potential exists for unplanned and unmonitored releases of radioactive liquids to migrate offsite into the public domain undetected."[77] Pilgrim Watch further states that this asserted future leakage cannot be remediated. These claims do not raise an imminent, irreparable injury posed by the license transfer order.

Pilgrim Watch appears to rely on the NRC Staff's Liquid Radioactive Release Lessons Learned Task Force Report, issued in 2006.[78] But that report led to significant enhanced environmental monitoring and reporting at nuclear power plant facilities, including at Pilgrim. The current Groundwater Protection Initiative Program and Radiological Environmental Monitoring Program at Pilgrim will continue during the decommissioning process, regardless of whether the license transfer is made effective during the pendency of this proceeding. The results of the periodic groundwater and environmental monitoring are publicly available. Pilgrim Watch does not identify any current deficiency with respect to groundwater or environmental monitoring programs. Significantly, Pilgrim Watch also did not address the discussion in the license transfer application of HDI's technical qualifications to perform decommissioning activities. In sum, Pilgrim Watch has not shown that Holtec will cause imminent "unmonitored releases" or leaks of contaminants to occur, and it has not shown that any leaks that might occur would remain undetected and uncorrected despite ongoing monitoring activities at the site.

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[77] *See* PW's Motion to Stay Order at 8.

[78] *See id.* (citing PW Petition to Intervene at 103-04).

Pilgrim Watch likewise does not support its claim that there is or will be imminent or irreparable harm from airborne contamination affecting both workers onsite and the public offsite "because no site analysis was conducted" and therefore "Holtec did not know" that there is contamination.[79] HDI has stated that it will, during the decommissioning planning and preparation period, conduct surveys and site characterization activities to establish contamination and radiation levels throughout the plant.[80] HDI stated that the information acquired from the surveys and site characterization activities will be used to develop procedures to ensure that contaminated areas are remediated and worker exposure is controlled.[81] HDI also must comply with NRC regulations on worker and public dose limits and applicable federal and state regulations pertaining to air quality.[82] Environmental monitoring will continue during the decommissioning process, which remains subject to NRC oversight and inspection. Therefore, Pilgrim Watch has not demonstrated that the public or workers at Pilgrim will suffer imminent irreparable harm from airborne contamination during this proceeding.

Pilgrim Watch additionally claims that HDI will drain the decommissioning trust fund, leaving insufficient funds in the trust to properly complete the decommissioning. As a result, the public will have to pay for the decommissioning. More specifically, Pilgrim Watch argues that the actual cost to decommission Pilgrim, "even over the next six years, will be $100 million more than Holtec estimates."[83] Pilgrim Watch claims that once the money in the trust fund is spent,

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[79] *See id.* at 8.

[80] *See, e.g.*, HDI PSDAR at 10; *see also* Applicants' Answer to PW at 5.

[81] *See* HDI PSDAR at 10.

[82] *See generally* 10 C.F.R. Part 20 (establishing standards for worker and public dose limits).

[83] *See* PW's Motion to Stay Order at 8.

no additional money can be obtained because "Holtec will not provide more money, and the NRC cannot force it to do so."[84]

Pilgrim Watch's claim of higher-than-expected decommissioning costs spread out over the next several years does not identify an "imminent" injury. Pilgrim Watch raised the argument of potential escalating decommissioning costs in its request for hearing, and we will address the claim in ruling on the hearing requests.[85] Pilgrim Watch has not shown that it or the public will suffer irreparable harm from trust fund withdrawals that may be made pending a final decision in this proceeding.

In this proceeding we will address the Commonwealth's and Pilgrim Watch's contentions, which include claims that HDI has underestimated particular decommissioning and other costs and that HDI therefore has neither demonstrated adequate financial qualifications for the license transfer nor justified the related exemption. As we have emphasized, depending on the result of this proceeding, we can require Holtec Pilgrim and HDI to provide additional financial assurance, and we can modify or condition the license and/or the exemption. Pursuant to the condition imposed in the Staff's order, were we to overturn the transfer, we can require the Applicants to restore the decommissioning trust fund, to the extent warranted.

Further, through required annual status reports, the NRC will monitor the status of the decommissioning funding and the spent fuel management funding.[86] If, for example, through the end of 2020 HDI's withdrawals from the trust fund prove to be significantly higher than HDI projected and HDI does not remedy a projected shortfall, the NRC can revoke the exemption, preventing HDI from making any further withdrawal for any purpose other than for radiological

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[84] *See id.*

[85] *See* PW Petition to Intervene at 25.

[86] *See* 10 C.F.R. § 50.82(a)(8)(v), (vii).

decommissioning expenses. In addition, if the financial assurance status report projects a shortfall in funding to pay the estimated remaining decommissioning costs, HDI must promptly provide additional financial assurance to make up the projected shortfall.[87]

The trust fund at the time of license transfer contained approximately $1 billion, over $400 million more than HDI's estimated decommissioning cost. The Commonwealth and Pilgrim Watch have not shown that withdrawals that may be made from the trust in the short-term—during this adjudication—are likely to irreparably threaten the ability to safely decommission the Pilgrim facility.

In a separate filing, Pilgrim Watch also seeks a stay of the exemption granted to Holtec Pilgrim and HDI.[88] But Pilgrim Watch does not address the four factors that we consider in ruling on stay motions. It repeats many claims that it made in its contentions or that the Commonwealth made in its hearing request. Essentially, Pilgrim Watch reiterates that HDI has underestimated the costs of decommissioning, site restoration, and spent fuel management, and therefore Pilgrim Watch concludes there is no reasonable assurance that the trust fund will be sufficient to cover the costs of all three activities. To the extent that Pilgrim Watch raised these claims in its earlier-filed contentions, we will address the claims in this proceeding. Pilgrim Watch has not demonstrated irreparable harm from the current effectiveness of the exemption, nor otherwise demonstrated that a stay of the exemption is warranted. Given the

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[87] More specifically, if the decommissioning funds remaining in the trust (plus calculated earnings at no greater than a 2% annual real rate of return) do "not cover the cost to complete the decommissioning, the financial assurance status report *must include additional financial assurance* to cover the estimated cost of completion." *See* 10 C.F.R. § 50.82(a)(8)(vi) (emphasis added). The NRC can enforce this regulation, contrary to Pilgrim Watch's claim that "no one is legally required . . . to supply more money." *See* Pilgrim Watch's Stay Order at 2. Under the AEA, the NRC may "prescribe such regulations or order as it may deem necessary. . . to ensure that sufficient funds will be available for the decommissioning of any production or utilization facility." *See* AEA § 161i.(4), 42 U.S.C. § 2201.

[88] *See generally* PW's Motion to Stay Exemption.

intertwined nature of the license transfer and the exemption, if the petitioners prevail in this proceeding regarding their challenges to Holtec Pilgrim's and HDI's financial qualifications, we can through this proceeding correct any deficiency found that relates to the granting of the exemption.

B. Likelihood of Success on the Merits

In the absence of a showing of irreparable injury, as is the case here, movants must make "an overwhelming showing" of likely success on the merits.[89] They must demonstrate that success on the merits is a "virtual certainty."[90] This is a high standard that the petitioners have not met at this threshold stage of the proceeding.

1. NEPA Claims

With respect to NEPA, the petitioners' arguments do not overwhelmingly demonstrate that this license transfer action required an environmental assessment or environmental impact statement.[91] First, except for cases involving special circumstances, the NRC has categorically excluded license transfer actions from the need to perform an environmental analysis.[92] To the extent, therefore, that the petitioners claim that the Staff's order approving the license transfer required an EIS, they would appear to impermissibly challenge the categorical exclusion provision in section 51.21(c)(21).

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[89] *See, e.g.*, *Vogtle*, CLI-12-11, 75 NRC at 529; *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008).

[90] *See Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 154 (2010); *Oyster Creek*, CLI-08-13, 67 NRC at 400; *David Geisen*, CLI-09-23, 70 NRC 935, 937 (2009); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1999).

[91] *See* Commonwealth's Stay Application at 5-6; PW's Motion to Stay Order at 4-5.

[92] *See* Streamlined Process, 63 Fed. Reg. at 66,728.

Second, to the extent that the petitioners argue that the categorical exclusion rule does not apply to the license amendment issued to Holtec Pilgrim and HDI, the petitioners also have not overwhelmingly demonstrated a likelihood of success on the merits. The petitioners highlight that the license amendment deleted a license condition that required ENGC to have access to up to $50 million in contingency funding—a license condition that the NRC added to the Pilgrim license in 1999, as part of the previous license transfer transaction in which ENGC and ENOI became the Pilgrim licensees. In particular, the petitioners argue that the deletion of License Condition J (4) was not "required to reflect the approval" of the license transfer and therefore that the license amendment is not covered by the categorical exclusion.[93]

License Condition J (4), which the Commonwealth seeks to have retained in the Pilgrim license, involved a different license transfer application and different circumstances. The NRC imposed the contingency funding license condition when it approved the transfer of the Pilgrim operating license from the Boston Edison Company to ENGC. The license condition involved an inter-company credit agreement by which the company Entergy International Ltd., LLC, agreed to provide its affiliate Entergy Nuclear Generation Company up to $50 million, if needed, and as outlined in the inter-company agreement.[94] No such inter-company contingency funding agreement was part of the Applicants' license transfer application here. At this stage of the

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[93] *See* 10 C.F.R. §51.22(c)(21); Commonwealth's Stay Application at 5-6; PW's Motion to Stay Application at 5.

[94] *See* Safety Evaluation by the Office of Nuclear Reactor Regulation for the Proposed Transfer of Operating License and Materials License for Pilgrim Nuclear Power Station to Entergy Nuclear Generation Co., at 2, 4-5, 9 (Apr. 29, 1999) (SER for 1999 License Transfer); Order Approving the Transfer of Facility Operating License and Materials License for Pilgrim Nuclear Power Station, from Boston Edison Co. to Entergy Nuclear Generation Co., and Approving Conforming Amendments (Apr. 29, 1999), at 5. Both the SER and the Order relating to the license transfer to ENGC are attached (as encl. 3 and encl. 1, respectively), to Letter from Alan Wang, NRC, to Theodore Sullivan, Boston Edison Co., and Jerry Yelverton, ENGC (Apr. 29, 2019) (ML011910099).

proceeding, the petitioners have not overwhelmingly demonstrated that the deletion of the funding provision from the license was not necessary to reflect the actual terms of the license transfer as it was approved by the Staff.

The history of the license transfer rules makes clear that those amendments "that would *directly affect* the actual operation of a facility" do not fall within the scope of the categorical exclusion.[95] But, the deletion of the contingency funding provision here has no direct effect, much less any imminent effect, on the current day-to-day activities at Pilgrim. At this stage, the Commonwealth has not shown why a license amendment that now removes the condition, based on a different demonstration of financial qualifications, would not likewise be a conforming amendment necessary to reflect the transfer and therefore fall within the scope of the categorical exclusion.

Both petitioners also seek to litigate in this proceeding the environmental impacts of decommissioning activities. However, this license transfer proceeding focuses on the qualifications of Holtec Pilgrim and HDI, not on the environmental impacts of decommissioning activities. Accordingly, in its SER the Staff states that it reviewed HDI's PSDAR "only to determine whether Holtec Pilgrim and HDI are financially and technically qualified to hold the license for Pilgrim and the general license for the Pilgrim ISFSI."[96] The Staff did not conduct a review of the environmental impacts of the planned decommissioning activities. Just as ENOI was free to begin major decommissioning activities ninety days after submitting its PSDAR to the NRC—without need of NRC approval of its PSDAR—HDI also did not need NRC approval of its PSDAR to begin major decommissioning activities. HDI stated in its PSDAR that the environmental impacts associated with its planned decommissioning activities are less than and

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[95] *See* Streamlined Process, 63 Fed. Reg. at 66,728.

[96] *See* SER at 3.

bounded by previously issued environmental impact statements.[97] If HDI plans to conduct any decommissioning activity that may result in significant environmental impacts not previously reviewed, it would need to provide a supplemental environmental analysis and would need to request a license amendment.[98] NRC regulations prohibit HDI from performing any decommissioning activities that result in significant environmental impacts not previously reviewed.[99] Given that petitioners' arguments concerning the environmental impacts of decommissioning appear to be beyond the scope of this proceeding, we find they have not demonstrated the requisite likelihood of success on the merits sufficient to warrant a stay.

2. *Financial Qualifications Claims*

Both petitioners separately raise numerous arguments challenging the Applicants' financial qualifications for the license transfer and similarly challenging the Applicants' justification for the exemption. Several of these claims raise novel issues that we have not yet addressed in a license transfer proceeding and that may warrant further inquiry. Even assuming, however, that a hearing is granted on specific challenges to the Applicants' financial qualifications, a final Commission decision on the merits of the financial claims would depend on further information developed in the hearing record. For example, some of the claims pending before us in the intervention petitions challenge particular cost estimates by questioning whether they have been adequately explained or supported. Whether any such claim, if admitted for hearing, would prevail on the merits would ultimately depend on additional information, explanations, or argument provided in the record. In other words, to the extent that we may conclude that one or more challenges to the financial qualifications discussion in the application

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[97] *See* HDI PSDAR at 20.

[98] *See* 10 C.F.R. § 50.82(a)(6)(ii); *supra* at 19.

[99] *See* 10 C.F.R. § 50.82(a)(6)(ii).

raise an admissible dispute for hearing, to resolve the dispute we likely would require additional focused information or answers from the litigants.

But in the absence of irreparable harm, all we need decide now is whether the petitioners have carried their burden of showing an overwhelming likelihood of prevailing. Overall, given the limited information and arguments before us, at this stage the petitioners have not shown a virtual certainty of success on the merits.[100]

C. Harm to Other Participants

Absent a showing of irreparable harm or likelihood of success on the merits, we need not make a determination on the remaining two stay factors.[101] Nonetheless, the remaining factors do not tilt in the movants' favor.

The Applicants argue that a stay would "raise numerous commercial, administrative and logistical concerns."[102] They note that they have taken employment-related actions involving incumbent Entergy employees, amended contracts with vendors, replaced insurance, and performed other administrative modifications based on the license transfer order.[103] While we find that a stay would result in some harm to the Applicants, we do not find the potential administrative or commercial harms identified to present significant or insurmountable harm.

The Applicants also claim that staying the license transfer would create uncertainty for Pilgrim site employees regarding the likelihood that HDI and CDI will be allowed to proceed with the DECON method of decommissioning Pilgrim and with their long-term employment. The

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[100] We also have before us a Pilgrim Watch motion to file a new and third contention for hearing, which raises claims regarding licensee character and integrity. *See Pilgrim Watch Motion to File New Contention* (July 16, 2019) (ML19197A330). We have not yet resolved the timeliness and admissibility of the claims, but if any such claims were admitted for hearing, success on the merits similarly would depend on additional information developed in a hearing.

[101] *See Shieldalloy*, CLI-10-8, 67 NRC at 163; *Oyster Creek,* CLI-08-13, 67 NRC at 400.

[102] *See* Applicants' Answer to Commonwealth at 9.

[103] *See* Cowan Decl. at 4.

extent of this asserted harm is not obvious to us, particularly given that until we terminate this proceeding the license transfer action is not final agency action. We find that a stay would cause some limited harm to the Applicants. This factor therefore tilts modestly against the granting of a stay.

D. Where the Public Interest Lies

The license transfer regulations expressly instruct the Staff, consistent with its conclusions in the SER, to promptly issue approval or denial of a license transfer request despite a pending adjudicatory proceeding. The intent behind the regulations was to expedite the Staff's decisions on license transfer requests given potentially time-sensitive license transfer transactions and an increase in the numbers of transfer requests. The regulations balance the interest in prompt Staff action with the interest in affording petitioners the opportunity to participate meaningfully in the adjudicatory proceeding.

These longstanding regulations have provided a predictable, reliable framework, allowing for both expeditious agency action and meaningful public participation. The Staff's approval of a license transfer therefore generally is expected to be made immediately effective, while we retain the authority to condition the license transfer or overturn it, based on the result of an adjudicatory proceeding. As a policy matter, the default rule sets the balance at an optimal point. To deviate from the established regulatory approach for license transfers, where no irreparable harm has been shown, would introduce uncertainty and render less reliable the established framework for license transfers. The petitioners have not provided a sufficient basis to depart from the usual practice.

The NRC recognized at the time that it issued the license transfer regulations that some adjudicatory proceedings could involve unusual or complex questions. It stated, for example, that while the license transfer regulations outline a streamlined adjudicatory process, the

adjudicatory process is not intended be a "hurried" one.[104] Here, the petitioners have each submitted multiple claims in lengthy intervention petitions and in supplemental filings. We are carefully considering the numerous claims raised and will issue a decision on the hearing requests. The public's strong interest in the NRC providing a meaningful opportunity to challenge the proposed licensing action will be satisfied in this proceeding without a stay of the effectiveness of the Staff's license transfer order and of the issued exemption.

IV. CONCLUSION

The Commonwealth and Pilgrim Watch have not shown that absent a stay they are likely to suffer irreparable harm, and the balance of equities tilts against them. We therefore *deny* their requests for a stay of the immediate effectiveness of the Staff's actions.

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of December 2019.

[104] *See* Streamlined Process, 63 Fed. Reg. at 66,723.

Additional Views of Commissioner Baran

I concur in the Commission's decision to deny the requests for a stay. However, my agreement with this legal outcome should not be read as an endorsement of the NRC regulation that permits the Staff to approve a license transfer before an adjudicatory challenge to the transfer has been resolved. In fact, I have serious doubts about the wisdom of this practice and disagree with the assertion that "the default rule sets the balance at an optimal point."

As a practical matter, once the Staff takes the step of issuing an approval while an adjudicatory challenge is pending, a motion for a stay is subject to the demanding irreparable harm standard. It is difficult for the Commonwealth and Pilgrim Watch to meet this standard because the Commission has the authority to void or further condition the license transfer if the Petitioners are successful on the merits. In that situation, the options available to the Commission would also include an order to restore the decommissioning trust fund to the balance existing at the time of the transfer.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	
ENTERGY NUCLEAR GENERATION	)	Docket Nos. 50-293 and 72-1044 LT
COMPANY, HOLTEC INTERNATIONAL,	)	
and HOLTEC DECOMMISSIONING	)	
INTERNATIONAL, LLC	)	
	)	
(Pilgrim Nuclear Power Station	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Commission Memorandum and Order (CLI-19-11)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of December 2019.