ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1198

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Actions by the
Nuclear Regulatory Commission

FEDERAL RESPONDENTS' REPLY TO PETITIONERS' RESPONSE TO MOTION TO DISMISS

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GLOSSARY

AEA	Atomic Energy Act
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission

INTRODUCTION

The Nuclear Regulatory Commission (NRC) is currently presiding over Massachusetts's request for a hearing to challenge decisions associated with the agency's conditional approval of the transfer of the NRC license for the Pilgrim Nuclear Power Station. Although Massachusetts has abandoned its request that the Court stay the effectiveness of these decisions, Massachusetts's Letter, Doc. No. 1823697 (Jan. 10, 2020), it continues to urge the Court to review the merits of these actions *before* the Commission has rendered a decision resolving Massachusetts's assertions. The Amici States supporting Massachusetts likewise argue that the Court should review the actions now, rather than waiting for the Commission to conclude its hearing process. Memorandum of Law for the States of New York, et al. as *Amici Curiae* in Support of Petitioner at 17-19, Doc. No. 1824749 (Jan. 17, 2020) (State Amicus Br.). But the Court lacks jurisdiction to review these interim agency actions.

First, none of the seven actions that Massachusetts challenges are final because (in Massachusetts's own words) it is pursuing a hearing before the Commission "to contest those very actions." Massachusetts' Opposition to Respondents' and Intervenor-Respondents' Motions to Dismiss at 1, Doc. No. 1823698 (Jan. 10, 2020) (Massachusetts Br.). This Court's review should await the Commission's final order concluding the adjudicatory process. Second, the

National Environmental Policy Act (NEPA) does not require judicial review of the agency's actions prior to the Commission's consideration of Massachusetts's challenges. Third, Massachusetts can litigate its concerns about the immediate effectiveness of the agency's actions in the petition for review it filed in this Court on January 22, 2020 (Case No. 20-1019), challenging the Commission's December 17, 2019, order denying Massachusetts's application for a stay (Stay Decision). Attachment to NRC Rule 28(j) Letter, Doc. 1820762 (Dec. 18, 2019).

Massachusetts has a full and fair opportunity for judicial review as to both (1) the timing of the NRC's decisions, in its petition for review of the Commission's Stay Decision; and (2) the merits, if it seeks the Court's review of the Commission's final order concluding the adjudicatory hearing that Massachusetts requested. Federal Respondents' Combined Motion to Dismiss and Response to Petitioner's Stay Motion at 2-3, Doc. No. 1817319 (Nov. 22, 2019) (Motion to Dismiss). But because the actions that Massachusetts challenges in this case do not constitute final agency action, its Petition for Review is incurably premature and should be dismissed.

ARGUMENT

I. The decisions at issue are not "final orders" under the Hobbs Act until the Commission completes the adjudicatory proceeding in which Massachusetts challenges them.

As we established in our Motion to Dismiss (at 10-16), and as Massachusetts concedes (at 1, 17), the actions that Massachusetts challenges before the Court are the subject of ongoing proceedings before the Commission. Massachusetts requested that the Commission initiate those proceedings under Section 189.a of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a). Section 189.b of the AEA confirms that judicial review of Commission actions must await a "final order entered in any proceeding" under section 189.a. 42 U.S.C. § 2239(b)(1). Massachusetts fails to satisfy the first prong of the test for finality in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), because the actions it challenges are still the subject of pending litigation before the Commission and do not reflect the "consummation of the agency's decision-making process."

Massachusetts incorrectly asserts (at 2), that the AEA "generally requires the NRC to hold a hearing on contested license transfer or amendment applications before it makes any approval effective." In *Sholly v. NRC*, 651 F.2d 780 (D.C. Cir. 1980), this Court held that the agency could not eliminate an opportunity for a hearing altogether when it made a "no significant hazards consideration"

determination for a proposed license amendment. *Id.* at 787.[1] But *Sholly* did not, as Massachusetts asserts, "reject [the] claim that [the] agency could make [a] license amendment effective immediately upon [a] 'no significant hazards' finding." Massachusetts Br. at 3.

In any event, the "*Sholly* amendments" to the AEA clarify that the Commission *can* "issue and make immediately effective any amendment to an operating license . . . upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of any request for a hearing from any person." 42 U.S.C. § 2239(a)(2). Further, the *Sholly* amendments created a framework for the Commission to make such decisions. *Id.* § 2239(a)(2)(B), (C). The NRC followed that framework here, and Massachusetts has not explained why the traditional rules governing finality—which preclude judicial review of issues still before the agency— should not govern. Nor has Massachusetts explained how the no significant hazards consideration determination, which merely dictates the

[1] Massachusetts incorrectly asserts (at 8), that the no significant hazards consideration determination is a condition not only to the issuance of a license amendment prior to the completion of a hearing, but also to the agency's pre-hearing approval of a license transfer and exemption. The only action to which this determination relates is the issuance of a license amendment. *See* 42 U.S.C. § 2239(a)(2)(A).

timing of the effectiveness of a license amendment, constitutes a "final order" in a "proceeding" under Section 189.a.

Massachusetts also contends (at 1, 17), that the NRC has been dilatory so as to "preclude" judicial review. Its assertion that the Court should recognize an exception to well-settled finality principles based on this alleged delay is unavailing for three reasons.

First, Massachusetts has now filed in this Court a petition for review of the Commission's recent Stay Decision, which denied Massachusetts's request for a stay of the effectiveness of the agency's actions. Thus, Massachusetts is incorrect when it asserts (at 8), that its current Petition for Review represents the "only time when the Commonwealth may secure meaningful review" of the agency's decision about the timing of the effectiveness of its decisions.

Second, Massachusetts's assertion that the NRC has ignored its pleas—and created the "Kafkaesque" situation described in *Allegheny Defense Project v. FERC*, 932 F.3d. 940 (D.C. Cir. 2019)—is belied by the Commission's thorough consideration of Massachusetts's arguments about the immediate effectiveness of the agency's actions in its Stay Decision. And while Massachusetts cites to 10 C.F.R. § 2.309(j)(1) to criticize the agency for not issuing a decision concerning contention admissibility before May 15, 2019, it neglects to mention that this

provision specifically contemplates the possibility that admissibility decisions will take more than 45 days.

Third, although Massachusetts first requested a hearing before the Commission in February 2019, it has made several additional filings, including (in addition to its stay application): (1) a motion to supplement its petition for a hearing with new information on April 24, 2019; (2) a motion to stay proceedings for *ninety* days to complete settlement negotiations on August 1, 2019, which the Commission denied; and, most recently, (3) a motion to amend its petition with new information on December 13, 2019, briefing on which was only finalized two weeks ago. What Massachusetts characterizes as "delay" is more properly viewed as the ebb and flow of complex and hotly contested proceedings before the Commission.

Nor do Massachusetts's arguments about the no significant hazards consideration determination cure the jurisdictional defects of its Petition for Review, either in part or as a whole. Massachusetts repeatedly asserts that this determination, though previously the subject of its hearing request, has become final as a result of the Commission's denial of its application for a stay (in which the Commission declined to revisit the issue). Massachusetts Br. at 1, 9, 11, 20 (citing Commission Stay Decision at 6). State Amici likewise argue (at 18-19) that

Massachusetts's Petition for Review affords the "only forum" for judicial review of the hazards determination because it has now become "admittedly final."

But even if the Commission's Stay Decision forecloses future review by the Commission of the hazards determination, Massachusetts's remedy related to the effective date of the decisions at issue is to litigate this issue in its new petition for review of the Stay Decision. In so doing, Massachusetts can contest the propriety of the Commission's decision under the traditional standards governing the appropriateness of a stay of agency action pending adjudication. *Cf. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991) (characterizing the Court's consideration of its review of an "immediate effectiveness" determination, a different procedure than the one at issue here, as "akin to the review of a district court's grant of preliminary injunction"); *Shoreham-Wading River Cent. Sch. Dist. v. NRC*, 931 F.2d 102, 105 (D.C. Cir. 1991) (same).

Massachusetts's new petition for review of the Stay Decision vitiates its argument—expressed throughout its opposition, especially when it invokes the collateral order doctrine—that if it cannot pursue the present Petition for Review, "the Commonwealth and its citizens may well have suffered irreparable harms in the interim." Massachusetts Br. 10.[2] Without a doubt, Massachusetts can raise its

[2] Similarly, the Stay Decision answers Massachusetts's rhetorical question (at 19-20) about the Commission's ability to obtain repayment of funds withdrawn from the trust fund. Stay Decision at 10 (rejecting Massachusetts's claim of irreparable

concerns about irreparable harm in its new petition for review of the Stay Decision. What Massachusetts cannot do is breathe life into a Petition for Review that was premature when it was filed. *Western Union Tel. Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985) (concluding that section 2344 of the Hobbs Act "imposes a jurisdictional bar to judicial consideration of petitions filed prior to entry of the agency orders to which they pertain," and holding that "a challenge to now-final agency action that was filed before it became final must be dismissed"); *accord Pub. Citizen v. NRC*, 845 F.2d 1105, 1109-10 (D.C. Cir. 1988); *see also Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002).[3]

II. NEPA does not compel judicial review of the agency actions at issue prior to the completion of the hearing Massachusetts has requested.

Leaning on *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018), Massachusetts contends that review of the agency's NEPA analysis is required

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harm from depletion of the trust fund because the Commission can require the license transfer applicants "to restore the trust fund to the amount existing at the time of the transfer").

[3] We further note that Massachusetts asserts (at 16) that the exemption decision is not final because it was not the subject of a hearing request before the Commission. But Massachusetts based its request for a stay of the agency's decision before the Commission (and its assertion that it was likely to succeed on the merits of its contention) in substantial part on the basis of the alleged illegality of the exemption. Motion to Dismiss, Exhibit 8 at 6-7. Moreover, in its most recent request to amend its hearing request before the Commission with new information, Massachusetts asserted that the new information was "material because it invalidates the analysis" supporting the exemption. Exhibit 1 (Massachusetts Motion (Dec. 13, 2019), provided without supporting declaration) at 5.

now because NEPA requires the NRC to "take the required hard look . . . before taking . . . action." Massachusetts Br. at 12. This argument is unavailing for at least two reasons.

First, as we noted in our Motion to Dismiss (at 21-22), *Oglala Sioux Tribe* concluded the NRC had acted arbitrarily by permitting a license to remain in effect despite a determination during the hearing process that the agency had not evaluated all relevant environmental impacts. 896 F.3d at 531. Here, no determination has been made that the agency has failed to satisfy its NEPA obligations. Thus, the case fits comfortably within this Court's determination in *Natural Resources Defense Council v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018) (*NRDC*), that the NRC *can* issue a license before resolving contentions about noncompliance with NEPA. *Id.* at 1209-12, 1215 (finding "no harm and no foul under the NEPA"). The cases that Massachusetts cites (at 12-15), relate largely to agency determinations that, unlike the situation here, are not subject to further adjudicatory review. And to the extent they are not distinguishable, they do not reflect the law of this Circuit, as expressed in *NRDC*, 879 F.3d at 1209-12 (citing *Friends of the River v. FERC*, 720 F.2d 93, 106-08 (D.C. Cir. 1983)). In short, the Court should not engage in piecemeal review of NEPA analyses when the underlying agency actions are not final reviewable orders and when the agency has not identified any defects in its NEPA analysis.

Second, Massachusetts's NEPA argument conflicts with the procedures that Congress authorized in the AEA. Intervenors seeking to challenge NRC licensing decisions can raise contentions challenging the agency's compliance with NEPA, as Massachusetts has done here. But nothing in NEPA, the AEA, or this Court's precedents suggest that NEPA overrides Congress's express contemplation that the NRC can issue license amendments on an immediately effective basis, with a hearing to follow. *See* 42 U.S.C. § 2239(a)(2). Nor has Massachusetts identified a prohibition in the AEA against the NRC following this practice with respect to license transfers and, here, exemptions for which a hearing opportunity is available.[4]

III. If judicial review were available at this stage, it would be confined to the timing of the effectiveness of the agency actions at issue.

Massachusetts asserts (at 15-18) that the agency's actions conditionally approving the amendment, license transfer, and exemption orders are reviewable now because the agency made them immediately effective, but this argument misreads *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991). Applying a two-part test, *Massachusetts* held that judicial review of the Commission's proceedings

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[4] Although no hearings are available under Section 189.a of the AEA for stand-alone exemptions to regulations, *see Brodsky v. NRC*, 578 F.3d 175, 180-81 (2d Cir. 2009), this Court has recognized that the opportunity exists for exemptions that, like the one at issue in this case, are inextricably intertwined with licensing decisions that are themselves subject to hearing requirements, *see Honeywell, Int'l, Inc. v. NRC*, 628 F.3d 568, 575-76 (D.C. Cir. 2010).

on a full power license was confined to the "exceedingly limited" question of the immediate effectiveness determination because (1) "it will not disrupt the orderly process of adjudication within the agency"; and (2) "because significant legal consequences flow from the Commission's action." *Id.* at 322. The Court in *Massachusetts* emphasized that review of the merits of the agency determination had to await completion of the NRC's adjudicatory process. *Id.*[5]

As we explained in our Motion to Dismiss (at 2, 14-15, 19), the Court can, consistent with *Massachusetts*, review any final determination by the Commission on the effectiveness date of license-related decisions. But the only decision in that category is the Stay Decision, which falls outside the scope of the current Petition for Review. And to the extent that the *Massachusetts* two-part test remains good law after *Bennett v. Spear*, judicial review of the conditional approval of the license amendment, license transfer, and exemption request would "disrupt the orderly process of adjudication," 924 F.2d at 322, since the adjudicatory process is still ongoing.

Finally, as to Massachusetts's argument concerning exhaustion (Massachusetts Br. at 18-20), that issue is no longer relevant now that

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[5] The Amici States repeatedly raise the merits of the issues pending before the Commission. As *Massachusetts* makes clear, these are issues that Massachusetts may raise with this Court *after* all of the issues it has raised before the Commission have been resolved.

Massachusetts has withdrawn its request for a judicial stay. Thus, we agree with Massachusetts that the sole remaining issue is whether the agency actions being challenged are final orders.

CONCLUSION

The Petition for Review should be dismissed.

Respectfully submitted,

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DJ Number 90-13-3-15867
Dated: January 29, 2020

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

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 2,599 words, excluding the parts of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Andrew P. Averbach
ANDREW P. AVERBACH

Counsel for Respondent United States Nuclear Regulatory Commission

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Andrew P. Averbach
ANDREW P. AVERBACH

Counsel for Respondent United States Nuclear Regulatory Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.,	)	
ENTERGY NUCLEAR GENERATION	)	
COMPANY, AND HOLTEC	)	Docket Nos. 50-293 & 72-1044
DECOMMISSIONING INTERNATIONAL,	)	
LLC; CONSIDERATION OF APPROVAL OF	)	
TRANSFER OF LICENSE AND	)	
CONFORMING AMENDMENT	)	
	)	
(Pilgrim Nuclear Power Station)	)	

MOTION OF THE COMMONWEALTH OF MASSACHUSETTS TO AMEND ITS PETITION WITH NEW INFORMATION

Petitioner, the Commonwealth of Massachusetts (Commonwealth or Massachusetts), respectfully requests to amend its Petition for Leave to Intervene and Hearing Request, Docket Nos. 50-293 & 72-1044, filed on February 20, 2019 (Petition) to include new information that supports the Commonwealth's Contention that a delay by Holtec Pilgrim LLC and Holtec Decommissioning International (HDI) (collectively, Holtec) in decommissioning the Pilgrim Nuclear Power Station (Pilgrim) is not only likely, but is now a reality. As described below, the two-and-a-half to three-year delay that Holtec publicly disclosed on November 14, 2019, causes a certain, significant shortfall in Pilgrim's Decommissioning Trust Fund (DTF)—the only committed source of funds. Holtec's public-delay announcement and the resulting DTF shortfall caused by that delay violate 10 C.F.R. § 50.82(a)(6)(iii) because it is no longer reasonable to assume that adequate funds are available in the DTF to decommission Pilgrim. The public-delay announcement also violates 10 C.F.R. § 50.82(a)(7) because Holtec failed to provide written notice to the NRC and the Commonwealth of the significant schedule change, which will result

in a cost increase of at least $85 to $102 million. In further support of this Motion, the Commonwealth states as follows:

1. The Commonwealth specifically incorporates by reference, as if fully set forth here, the Third Declaration of Warren K. Brewer (Third Brewer Decl. ¶ __), which is attached to this motion.

2. This matter concerns the Commonwealth's Petition under 10 C.F.R. § 2.309 on the Applicants' License Transfer Application (Application or LTA), Holtec's unconditioned Exemption Request to use Pilgrim's Decommissioning Trust Fund for site restoration and spent fuel management costs (incorporated into the LTA by LTA Enclosure 2) (Exemption Request), and Holtec's Revised Post Shutdown Activities Report (PSDAR) and Site-Specific Cost Estimate (DCE) (incorporated into the LTA by LTA Attachment D). On February 20, 2019, the Commonwealth filed its Petition. On March 18, 2019, the Applicants filed their Answer Opposing the Commonwealth's Petition. On April 1, 2019, the Commonwealth filed its Reply. On April 24, 2019, the Commonwealth filed a motion to supplement its Petition with new information. The NRC Staff approved the Application and Exemption Request, effective immediately, on August 22, 2019, and the Applicant's effectuated the license transfers on August 26, 2019. The Commonwealth disputes the legality of both the timing and bases for those approvals.[1]

3. On November 14, 2019, Holtec presented at the Pilgrim Nuclear Decommissioning Citizens Advisory Panel on the current status of its efforts to decommission Pilgrim. During its oral presentation, Holtec displayed and referred to the power-point presentation that is attached

[1] The Commonwealth, for example, has filed a Petition for Review of, *inter alia*, those approvals in the U.S. Court of Appeals for the District of Columbia Circuit (No. 19-1198).

as Exhibit 1 to the Third Brewer Declaration. There, Holtec reviewed its updated, current schedule for decommissioning Pilgrim, including, among other items, timelines for license termination and site restoration activities. Those timelines, however, differ significantly from the schedule provided by Holtec in its PSDAR and DCE, which were submitted on November 16, 2018 in support of the LTA. Third Brewer Decl. ¶¶ 5-9. Holtec, according to its public presentation, has extended its original schedule by up to two-and-a-half to three years. *Id*. at ¶ 6. Thus, in the less than three months that have passed since Holtec assumed control as Pilgrim's licensee under the NRC's improperly granted license transfer approval, Holtec has already incurred a significant decommissioning schedule delay.

4. This new information was announced publicly after the Commonwealth filed its Reply and was thus not previously available. *See* 10 C.F.R. § 2.309(c)(1)(i). This revised schedule provides new information because it is the first Holtec has publicly acknowledged that its license termination and site restoration schedule will be significantly delayed from the schedule set forth in its PSDAR, which served as the foundation for its DCE. Holtec's Master Summary Schedule indicates a completion date of five-and-a-half years, *see* PSDAR at 17 Fig.3-1 (PNPS Decommissioning Schedule); DCE at 45-47 & Fig.5-1 (Pilgrim Master Summary Schedule), and Holtec's Site Specific-DCE relies on that schedule, *see* DCE, at 45-47 Tbl. 5-1 (Decommissioning Funding Cash Flow Analysis Master Summary Schedule). Unsurprisingly, NRC Staff relied on that very five-and-a-half-year schedule in its analysis of whether Holtec demonstrated adequate financial assurance.[2] While Holtec apparently did, in passing, state apart

[2] *See* Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Request for Direct and Indirect Transfers of Control of Renewed Facility Operating License No. DPR-35 and the General License for the Independent Spent Fuel Storage Installation from Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. to Holtec Pilgrim, LLC and Holtec Decommissioning International, LLC (Pilgrim Nuclear Power Station), Docket Nos. 50-293 and

from its scheduling figures that it intended to achieve partial site release of the Pilgrim site within eight years of license transfer, no one—not Holtec in its DCE cash flow analysis or NRC Staff in its analysis of Holtec's DCE—relied on that stray reference to an eight year completion schedule. The Commission should thus reject any claim now by Holtec that it actually meant something different than what it relied on in its actual cost estimate analysis, especially since, no one actually relied on an eight-year schedule—a schedule that does not align at all with the schedule set forth in its decommissioning schedule figures. 10 C.F.R. § 50.9(a) ("Information provided to the Commission by … a licensee … shall be complete and accurate in all material respects."). Holtec cannot have it both ways.

5. This new information is material because it reinforces the Commonwealth's contention that there is *insufficient* financial assurance to decommission Pilgrim–indeed, it is not only likely, but now certain that the DTF will be underfunded. Third Brewer Decl. ¶ 4, 13. Holtec has not provided a cost estimate that correlates with this schedule. *Id.* at ¶ 7, 13. However, comparing the new schedule with the one provided in its PSDAR, it appears that the delay is related to license termination and site restoration work. *Id.* at ¶¶ 7-9. Holtec's estimated project management and overhead costs for these activities is about $34 million per year. *Id.* at ¶ 9. Using this cost for the additional two to three-an-a-half years, Holtec's announced schedule delay could result in added decommissioning costs of at least $85 million to $102 million for project management and overhead alone. *Id.* at ¶ 9. These added costs are well above than the $3.6 million margin of error Holtec left itself according to its own DCE, especially considering the loss of interest earnings that the DTF otherwise would have accrued. *Id.* at ¶¶ 9-10. These

72-1044, at 10, 14-15, Att. 1 (Aug. 22, 2019) (ADAMS Accession No. 19234A365) (Safety Evaluation Report)

costs also do not include any additional costs that may be necessary for expenses other than project management and overhead costs. *Id.* at ¶ 10. Further, Holtec cannot assume that it can absorb these added costs through contingency included in the DCE because even if there were enough contingency to cover these added costs, which there likely is not, the added costs would consume virtually all of it. *Id.* at ¶ 12. Holtec's only committed available source of money is Pilgrim's DTF. And the assumptions built into its DCE demonstrate that this significantly revised schedule will cause a DTF shortfall. *Id.* at ¶ 13.

6. This new information is also material because it invalidates the analysis NRC Staff purported to perform when it approved the LTA and Exemption Request. Just like Holtec, NRC Staff relied solely on Pilgrim's DTF in its financial assurance analysis. Safety Evaluation Report at 14-15, Att. 1. The NRC Staff based its approval of the LTA and Exemption request on the "reasonableness" of Holtec's site-specific DCE, which included, and was based on, Holtec's original decommissioning schedule. *Id.* at 11-13. However, as fully outlined above and in the attached Third Brewer Declaration, the significant delay in Holtec's decommissioning schedule renders Holtec's DCE unreliable. And the significant delay, as described above, renders the DTF insufficient to cover all of Holtec's decommissioning expenses as well as site restoration and spent fuel management costs. Third Brewer Decl. ¶¶ 4, 13. Simply put, this new and material information fatally undermines the NRC Staff's analysis, which, in turn, further undermines its approvals of the LTA and Exemption Request.

7. Holtec's publicly announced schedule delay also violates two NRC regulations. First, Holtec is prohibited from undertaking decommissioning activities that will "[r]esult in there no longer being reasonable assurance that adequate funds will be available for decommissioning." 10 C.F.R. § 50.82(a)(6)(iii). As outlined above and in the attached Third Brewer Declaration,

Holtec's new, delayed schedule will lead to a shortfall in the DTF—Holtec's only source of funds to decommission Pilgrim, restore the site, and safely manage its spent nuclear fuel onsite for decades. Without a credible revised PSDAR and DCE reflecting this extended schedule and somehow accounting for the certain increase in decommissioning costs (along with addressing all of the other flaws with Holtec's DCE that the Commonwealth has raised in its previous filings), there currently exists a lack of reasonable assurance that adequate funds will be available to fully decommission Pilgrim in violation of 10 C.F.R. § 50.82(a)(6)(iii).

8. Second, Holtec is required to provide written notice to the NRC, with a copy to the Commonwealth, of "any decommissioning activity inconsistent with, or making any significant schedule change from, those actions and schedules described in the PSDAR, including changes that significantly increase the decommissioning cost." 10 C.F.R. § 50.82(a)(7). As outlined above and in the attached Third Brewer Declaration, Holtec's new, delayed-schedule is inconsistent with the schedule Holtec included in its PSDAR and relied on in its DCE and constitutes a significant schedule change. In addition, as also explained above, the delay also will significantly increase Holtec's decommissioning costs (above and beyond what is estimated in its DCE). Holtec, however, has not provided written notice to the NRC, with a copy to the Commonwealth, of this significant change in violation of 10 C.F.R. § 50.82(a)(7).

9. This Motion is timely. 10 C.F.R. § 2.309(c)(1)(iii). A motion for a new or amended contention is timely under 10 C.F.R. § 2.30(c)(1) if it is filed within thirty (30) days of the discovery of the basis for the motion. *DTE Electric Company* (Fermi Nuclear Power Plant, Unit 2), 2017 WL 4310358, *3 (Jan. 10, 2017) (citing *Southern Nuclear Operation Co.* (Vogtle Electric Generating Plan, Units 3 and 4), 74 N.R.C. 214, 218 n.8 (2011)). The new information became available on November 14, 2019 and this Motion is being filed on December 13, 2019.

10. The Commonwealth conferred with the Applicants regarding this Motion on December 12, 2019. Counsel for the Applicants indicated that they oppose this Motion. The Commonwealth also conferred with Petitioner Pilgrim Watch regarding this motion on December 12, 2019. A representative of Pilgrim Watch indicated that Pilgrim Watch supports this Motion.

* * *

For the foregoing reasons, and for good cause shown, the Commonwealth requests that the Commission grant this Motion and consider this new information in connection with the Commission's consideration of the Commonwealth's pending Petition.

Respectfully submitted this 13th day of December, 2019,

COMMONWEALTH OF MASSACHUSETTS

By their attorneys,

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CONFORMING AMENDMENT	)	
	)	
(Pilgrim Nuclear Power Station)	)	

CERTIFICATION OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that copies of the Commonwealth of Massachusetts's Motion to Amend its Contention with New Information have been served upon the Electronic Information Exchange, the NRC's e-filing system, in the above-captioned proceeding this 13th day of December 2019.

Signed (electronically) by
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Dated: December 13, 2019