UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket Nos. 50-003-LT,
ENTERGY NUCLEAR OPERATIONS, INC.,	)	50-247-LT,
ENTERGY NUCLEAR INDIAN POINT 2, LLC,	)	50-286-LT, and
ENTERGY NUCLEAR INDIAN POINT 3, LLC,	)	72-051-LT-2
HOLTEC INTERNATIONAL, and HOLTEC	)	
DECOMMISSIONING INTERNATIONAL, LLC	)	
	)	November 12, 2020
(Indian Point Nuclear Generating Unit Nos. 1, 2, and 3)	)	

APPLICANTS' ANSWER OPPOSING RIVERKEEPER'S NOVEMBER 6, 2020 MOTION

I. INTRODUCTION

Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Holtec International, and Holtec Decommissioning International, LLC (together, the "Applicants"), submit this Answer opposing the "Motion of Riverkeeper, Inc for Full Adjudication of Its Pending Contention Prior to Any Decision by NRC on the License Transfer" ("Motion").[1] Therein, Riverkeeper asks that the NRC Staff's decision on Applicants' pending License Transfer Application ("LTA")[2] be postponed—i.e., *stayed*—until the Commission rules on Riverkeeper's pending Petition to Intervene[3] in this proceeding.[4]

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1 Filed on Nov. 6, 2020 (ML20311A660) (accompanied by Declaration of David A. Lochbaum (Nov. 6, 2020) (ML20311A661) ("Lochbaum Decl.")).

2 *See* NL-19-084, Letter from A. Christopher Bakken III, Entergy, to NRC Document Control Desk, "Application for Order Consenting to Transfers of Control of Licenses and Approving Conforming License Amendments" (Nov. 21, 2019) (ML19326B953) ("LTA").

3 Petition of Riverkeeper, Inc. to Intervene and for a Hearing (Feb. 12, 2020) (ML20043F530) ("Petition"). *See also* Applicants' Answer Opposing Riverkeeper, Inc.'s Petition to Intervene and for a Hearing (Mar. 9, 2020) (ML20069L613) ("Applicants' Answer to Riverkeeper Petition").

4 A further procedural history of this proceeding, as relevant to Riverkeeper, is provided in Applicants' Answer Opposing Riverkeeper, Inc.'s Motion to Supplement the Basis of Its Contention at 2 (Nov. 12, 2020) ("Applicants' Answer to Riverkeeper Motion to Supplement").

By way of background, Section 189a(1) of the Atomic Energy Act of 1954, as amended, ("AEA") provides that:

> in any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or any application to transfer control, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding.[5]

But as the Commission has long recognized,[6] the next few sentences of that same provision address the timing of that hearing and, in the case of a license transfer, do *not* require that the hearing occur before effectiveness of a license transfer. More specifically, Congress required a pre-effectiveness hearing only for other types of actions:

> the AEA requires the Commission to hold a pre-effectiveness or "prior" hearing on certain applications for a construction permit (second sentence) and to offer a pre-effectiveness hearing on certain applications for an amendment to a construction permit, an operating license, or an amendment to an operating license (third and fourth sentences)."[7]

Because Congress clearly could have—but did *not*—include proceedings on "application[s] to transfer control" among the types of proceedings for which a pre-effectiveness hearing is required, the Commission has long used post-effectiveness hearings in such proceedings.[8] As the Commission noted, "[t]his interpretation is longstanding, and supported by the legislative history of the 1957 amendments to the AEA."[9]

Indeed, in 1998, the Commission formally codified an expedited hearing process for license

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5 42 U.S.C. § 2239(a)(1).

6 *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 76 (1992).

7 *Id*. at 77.

8 *Id*. Congress amended the AEA in 1982 (the "Sholly Amendment") to carve out an exception to the enumerated list of pre-effectiveness hearings to permit post-effectiveness hearings for license amendments involving "no significant hazards consideration." 42 U.S.C. § 2239(a)(2)(A). The NRC subsequently codified its generic determination that amendments associated with license transfers involve "no significant hazards consideration." 10 C.F.R. § 2.1315(a).

9 *Shoreham*, CLI-92-4, 35 NRC at 77 (citing *Joint Committee on Atomic Energy Staff Report*, "A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities" at 8 (1957) ("AEA History")).

transfer proceedings,[10] including a requirement at 10 C.F.R. § 2.1316 that the Staff "promptly issue approval or denial of license transfer requests" even if a hearing or hearing request remains pending. In that instance, the parties are permitted to consummate the transfer on the authority of Staff's provisional approval, but the approval can become "final" only after the Commission resolves the contested issue.[11] To be sure, the Commission also provided a mechanism to seek a "stay" of the Staff's approval, but only in extraordinary circumstances.[12] The Commission purposefully struck this careful balance to allow fulsome public participation while recognizing that license transfers usually involve upstream commercial transactions that do not affect technical operations.[13]

As a procedural matter, the Commission should deny the Motion because it is untimely without any justification for its lateness.[14] As to substance, the Commission should deny the Motion on the additional ground that it fails to satisfy *or even discuss* the legal standard for the relief it requests—a "stay." To be clear, the Commission is not required to rectify that defect by sifting through the factually-inaccurate and legally-incorrect statements dispersed throughout the Motion and Lochbaum Declaration to adjudicate legal arguments never advanced by the movants themselves. But even if it were, as explained below, the outcome would be the same.

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[10] Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721 (Dec. 3, 1998) (stating that "timely" reviews of license transfer applications are "essential") ("Subpart M Rule")

[11] *See, e.g.*, *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-19-11, 90 NRC 258, 261 (2019).

[12] 10 C.F.R. § 2.1327.

[13] Subpart M Rule, 63 Fed. Reg. at 66,722.

[14] Per 10 C.F.R. § 2.323(a)(2), "[a]ll motions must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises." *See also* 10 C.F.R. § 2.300 ("The provisions of this subpart apply to *all* adjudications . . . unless specifically stated otherwise in this subpart." (emphasis added)). Here, the Motion does not attempt to explain how this requirement is satisfied. Indeed, the only relevant "occurrence or circumstance" appears to be the filing of Riverkeeper's Petition approximately nine months ago. Importantly, Riverkeeper has provided no justification for this undeniably late filing. This, alone, requires that the Motion be denied.

II. THE COMMISSION SHOULD DENY THE MOTION BECAUSE IT FAILS TO SATISFY OR ACKNOWLEDGE THE RELEVANT LEGAL STANDARD

Although unusually styled as a general motion filed under 10 C.F.R. § 2.1325 (plus a petition for waiver filed under 10 C.F.R. § 2.335), the core of Riverkeeper's Motion pertains solely to the *timing* of certain Staff actions in this proceeding. More specifically, the Motion seeks to prevent the Staff from approving the LTA until the Commission rules on Riverkeeper's proposed contention. Simply put, Riverkeeper seeks to "stay" the Staff's not-yet-issued action pending the Commission's ruling on the Petition.[15]

In determining whether to grant a stay, the Commission considers the following four factors:

(1) whether the requestor will be irreparably injured unless a stay is granted;
(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.[16]

The Commission has further explained that a request to suspend a licensing proceeding is a particularly "drastic" action that is "generally unwarranted absent an immediate threat to public health and safety."[17] As detailed below, the Motion should be denied because it fails to satisfy the Commission's "stringent"[18] standard.

A. The Motion Fails to Acknowledge or Address the Relevant Legal Standard

Unquestionably, the Motion neither acknowledges nor addresses the four-factor stay test.[19]

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[15] *See Entergy Nuclear Operations, Inc., et al.* (Pilgrim Nuclear Power Station), CLI-19-8, 90 NRC 27, 28 (2019) (denying a request to "suspend the Staff's action" on a license transfer application and noting the movant failed to address the procedural requirements for a stay); *accord Pilgrim*, CLI-19-11, 90 NRC at 261 (noting that a ruling on a stay request in a license transfer proceeding "speaks only to timing"). A case-specific stay order under 10 C.F.R. § 2.1327 would supersede the general requirement for "prompt" Staff action in § 2.1316(a); thus, a separate evaluation of Riverkeeper's § 2.335(b) waiver request is unnecessary.

[16] *See* 10 C.F.R. § 2.1327(d); 10 C.F.R. § 2.342(e). Section 2.1327 applies to both pre-approval (i.e., Staff review or issuance) and post-approval (i.e., "effectiveness") stay requests. *See, e.g.*, *Pilgrim*, CLI-19-8, 90 NRC at 28.

[17] *Pilgrim*, CLI-19-8, 90 NRC at 28 n.5 (citing *Union Elec. Co. d/b/a Ameren Mo.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158 (2011)).

[18] *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Okla. Site), CLI-94-9, 40 NRC 1, 6 (1994).

[19] Even viewed as a general motion under 10 C.F.R. § 2.1325 seeking a discretionary exercise of Commission supervisory authority (which is procedurally "improper," *see Entergy Nuclear Operations, Inc.* (Indian Point, Units

This pleading defect, alone, provides ample grounds to deny the Motion.[20] As a matter of settled law, the presiding officer is not required to conjure arguments not advanced by the movant as to why the applicable (but disregarded) legal standard may have been satisfied.[21] Nevertheless, even assuming *arguendo* that the Commission were empowered[22] to do so here, the outcome would be the same. As explained below, even viewed in the light most favorable to Riverkeeper, the claims presented in the Motion do not remotely satisfy the "stringent" threshold to grant a stay.

B. <u>Riverkeeper Has Not Established Irreparable Injury or "Special Circumstances"</u>

The Commission has "long [] considered the 'most crucial' factor to be whether denying a stay will cause irreparable harm to the party requesting the stay."[23] To be clear, the movant *must* show that it "faces imminent, irreparable harm that is both 'certain and great,'" and the alleged irreparable injury "must be actual and not theoretical."[24] An alleged speculative injury that is merely "feared as liable to occur at some indefinite time" is insufficient for the requisite demonstration.[25] As the Commission has squarely held, the alleged 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] As detailed below, Riverkeeper's various

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2 & 3), CLI-09-6, 69 NRC 128, 138 (2009)), or evaluated against the "special circumstances" threshold in 10 C.F.R. § 2.335, the Motion fails for all of the same reasons articulated throughout this Answer.

[20] *See, e.g.*, 10 C.F.R. § 2.1327(b)(2) (stay requests "must" be accompanied by explicit references to the four factors); *Pilgrim*, CLI-19-8, 90 NRC at 28 & n.5 (denying stay request where movant failed to discuss the four factors); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), 49 NRC 328, CLI-99-11 (1999) (a pleading that provides "no analysis" against the applicable legal standard is legally insufficient).

[21] *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989) ("The Commission cannot be faulted for not having searched for a needle that may be in a haystack.").

[22] *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 146 n.53 (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (a presiding officer cannot "assume the role of advocate").

[23] *Pilgrim*, CLI-19-11, 90 NRC at 264 (citing *Vt. Yankee*, CLI-00-17, 52 NRC at 83; *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 258 (1990)).

[24] *Id*. (citing *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) (in turn, quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[25] *Id*. at 265 (citing *Wis. Gas*, 758 F.2d at 674 (internal quotation and citation omitted)). An alleged injury in the "remote future," likewise, is insufficient. *Id*. (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

[26] *Id*. (citing *Wis. Gas*, 758 F.2d at 674 (internal quotation omitted)).

assertions—many of which are factually inaccurate—fail to establish any irreparable injury here.[27]

1. Post-Effectiveness Hearings Do Not Violate the AEA

The primary claim advanced by Riverkeeper is that allowing Staff to issue a provisional (i.e., effective but non-final)[28] approval of the LTA before Riverkeeper's contention is adjudicated by the Commission would "violate Riverkeeper's hearing right under 42 U.S.C. § 2239(a)(1)(A)."[29] This claim is premised on Riverkeeper's erroneous belief that the AEA requires pre-effectiveness hearings for *all* licensing proceedings listed in the first sentence of Section 189a and that the "Sholly Amendment" (which does not mention license transfer proceedings) enumerates the sole exception to that general rule. However, Riverkeeper fundamentally misunderstands the operation of the statute.

As explained in Section I, above, the first sentence of Section 189a is silent as to the timing of hearings. The three subsequent sentences require pre-effectiveness hearings for certain actions, but *not* for license transfers. As Riverkeeper noted, "[t]he canon of '*expressio unius est exclusio alterius*' . . . translates to 'the expression of one thing is the exclusion of other things.'"[30] Simply put, Congress chose not to require pre-effectiveness hearings in license transfer proceedings.[31] In short, the NRC's longstanding and codified process for adjudicating challenges to license transfer applications is fully consistent with, and certainly does not "violate," the AEA.[32]

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[27] Riverkeeper's purported incorporation by reference, Motion at [PDF 3, 4], of *ex parte* communications from members of Congress to the NRC Commissioners also fails to establish irreparable injury. *See* Letter from A. Vietti-Cook, NRC Secretary, to Hon. C. Schumer *et al.* (Oct. 28, 2020) (ML20302A336) (explaining the prohibited nature of the communication and serving it on the parties as required by 10 C.F.R. § 2.347(c)).

[28] *Pilgrim*, CLI-19-11, 90 NRC at 262 ("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.").

[29] Motion at [PDF 3].

[30] *Id*. at [PDF 5] (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)). *See also* AEA History at 8.

[31] *Shoreham*, CLI-92-4, 35 NRC at 76.

[32] Riverkeeper cites various cases for the proposition that an agency may not deny a hearing right as to a material issue. Motion at [PDF 3-4]. But these cases are inapt. A post-effectiveness hearing would not *deny* any hearing

2. The LTA Does Not Involve "Technical Changes to Plant Operations"

In its Motion, Riverkeeper claims that the LTA "involves technical changes to plant operations insofar as the transfer is for the purposes of decommissioning, rather than continued operation as a nuclear generating facility."[33] This statement is incorrect. As clearly explained in the *Federal Register* notice announcing the hearing opportunity for this proceeding, "No . . . operational changes are being proposed in the application."[34] Simply put, a license transfer does not authorize any activity that is not *already* authorized in the existing license (e.g., the authority to decommission the facility). Riverkeeper's claim in this regard provides no support for a claim of irreparable injury or "special circumstances."

3. Modification, Conditioning, or Rescission of a Provisional Staff Approval Would Not Necessitate a Further "Complex Proceeding"

As noted above, a Staff order approving a license transfer is never the NRC's final action on a license transfer application. In practical terms, the transfer is not consummated until the underlying transaction closes, which may be many months after the approval. In this case, the closing is not targeted to occur until mid-2021,[35] so there is no "clear and present need for equitable relief."[36] Moreover, as with the recent *Pilgrim* precedent, if a hearing (or hearing request) remains pending post-closing, the Staff's provisional approval still would remain subject to the Commission's authority to remedy any deficiencies that it may find to exist through modification, conditioning, or even rescission of the approval, depending on the outcome.[37]

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right under the AEA. *See, e.g.*, *Pilgrim*, CLI-19-11, 90 NRC at 261 (the "adjudicatory proceeding continues separate from the Staff's review").

33 Motion at 5.

34 Indian Point Nuclear Generating Unit Nos. 1, 2, and 3; Consideration of Approval of Transfer of Control of Licenses and Conforming Amendments, 85 Fed. Reg. 3947, 3948 (Jan. 23, 2020). *See also* Applicants' Answer to Riverkeeper Petition at 26 n.91 (explicitly explaining this fact to Riverkeeper).

35 *See* LTA (cover letter at 4).

36 *Pilgrim*, CLI-19-11, 90 NRC at 265 (citing *Wis. Gas*, 758 F.2d at 674 (internal quotation omitted)).

37 *Id*. at 258, 261.

In its Motion, Riverkeeper claims that subsequent Commission action in this regard would "require a complex post-effectiveness proceeding" that would be arduous and inefficient.[38] This claim, however, is counterfactual and unsupported. Applicants are free to act in reliance on a provisional order approving a license transfer. But the Commission has emphasized that the parties do so at their own risk.[39] Notably, in a prior Indian Point license transfer case, the Commission explained that, notwithstanding a provisional Staff approval, the Commission retained authority via the adjudicatory hearing process (i.e., not a separate proceeding) to "require the Applicants to return the plant ownership to the *status quo ante*."[40] Collectively, this framework—which the Motion completely disregards—ensures that an intervenor's entitlement to redress, if any, is not impacted by the timing of the hearing. In sum, contrary to Riverkeeper's claims to the contrary, the Commission's authority to order appropriate relief is not contingent upon any further "complex" proceedings, and these claims do not establish any irreparable injury or "special circumstances."

4. Contention Admissibility Rulings and Unrelated Enforcement Proceedings Are Immaterial to the Instant Motion

Along with its Motion, Riverkeeper also submitted a Declaration from David Lochbaum providing his legal conclusion that "the question of Holtec's character must be answered before the license transfers are approved."[41] As a fundamental matter, Riverkeeper has not established that Mr. Lochbaum—an engineer—is competent to offer legal conclusions. Furthermore, the Declaration does not articulate a cognizable basis for those conclusions. More specifically, like the Motion, the Declaration fails to acknowledge or analyze the relevant legal standard. Instead, Mr.

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[38] Motion at 5.

[39] *Pilgrim*, CLI-19-11, 90 NRC at 264 (citations omitted).

[40] *Power Auth. of N.Y., et al.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 286 n.1 (2000). *See also, e.g.*, *Pilgrim*, CLI-19-11, 90 NRC at 263.

[41] Lochbaum Decl. at 4. It is unclear whether Mr. Lochbaum's conclusion refers to the provisional Staff approval or the actual "final" approval by the Commission. As noted above, Riverkeeper's proposed contention (if found to be admissible) *will be* fully adjudicated before any approval becomes final. *See supra* Parts I, III.B.3.

Lochbaum cites inapt adjudicatory precedent on contention admissibility,[42] and historical enforcement actions involving personal wrongdoing.[43] But, neither of these is relevant to any purported claim of irreparable injury or "special circumstances" associated with *this* proceeding. More importantly, Riverkeeper has not demonstrated otherwise.

* * *

In sum, nothing in the Motion supports a finding of irreparable injury.

C. <u>Riverkeeper Has Not Otherwise Justified Its Stay Request</u>

In the absence of a showing of irreparable injury, as is the case here, the requestor of a stay must make "an overwhelming showing" that success on the merits is a "virtual certainty."[44] Here, Riverkeeper has not submitted an admissible contention.[45] Even assuming *arguendo* that it had, the instant Motion—which, as noted above, is riddled with numerous factual, legal, and procedural inaccuracies—does not remotely provide an "overwhelming" demonstration that its ultimate success on the *merits* of that contention is a "virtual certainty."[46] Absent a showing of irreparable harm or likelihood of success on the merits, a stay cannot be granted; in fact, the Commission need not even make a determination on the other two factors.[47] That is precisely the case here.

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[42] Mr. Lochbaum cites a decades-old ruling, in a different proceeding, in which a separate licensing board found a dissimilar "character" contention admissible under the NRC's 1993 procedural rules. Lochbaum Decl. at 2-4 (citing *Ga. Power Co., et al*. (Vogtle Elec. Generating Plant, Units 1 & 2), LBP-93-5, 37 NRC 96 (1993)). To be clear, the general notion that applicant "character" may be a material issue in certain limited circumstances is not disputed here; but, the NRC places strict limits on such contentions. *See* Applicants' Answer to Riverkeeper Petition at 5-6. Indeed, the case cited by Mr. Lochbaum was appealed and the Commission provided important clarification that this does not "throw[] open an opportunity to engage in a free-ranging inquiry into the 'character' of the licensee," as Riverkeeper seeks to do in its contention. *Ga. Power Co., et al*. (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-93-16 38 NRC 25, 32 (1993).

[43] Lochbaum Decl. at 5-6.

[44] *Pilgrim*, CLI-19-11, 90 NRC at 280 (citations omitted).

[45] *See generally* Applicants' Answer to Riverkeeper Petition.

[46] *See generally id.*; Applicants' Answer to Riverkeeper Motion to Supplement.

[47] *Pilgrim*, CLI-19-11, 90 NRC at 283 (citing *Shieldalloy*, CLI-10-8, 67 NRC at 163; *Oyster Creek*, CLI-08-13, 67 NRC at 400). This is particularly true where the movant fails to advance any argument alleging their satisfaction.

III. CONCLUSION

This Answer completes the briefing sequence on the Motion; Riverkeeper has no opportunity to file a Reply.[48] Accordingly, for the reasons stated above, the Commission should deny Riverkeeper's Motion.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, DC
this 12th day of November 2020

[48] 10 C.F.R. § 2.1327(c) ("No further replies to answers will be entertained"); *accord* 10 C.F.R. § 2.1325 (providing no opportunity to file a reply).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ENTERGY NUCLEAR INDIAN POINT 3, LLC,	)	72-051-LT-2
HOLTEC INTERNATIONAL, and HOLTEC	)	
DECOMMISSIONING INTERNATIONAL, LLC	)	
	)	November 12, 2020
(Indian Point Nuclear Generating Unit Nos. 1, 2, and 3)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "Applicants' Answer Opposing Riverkeeper's November 6, 2020 Motion" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

Signed (electronically) by Ryan K. Lighty
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