



November 23, 2020

Via Email and U.S. Mail

NRC Commissioners Svinicki, Baran, Wright, Caputo, and Hanson
U.S. Nuclear Regulatory Commission
Mail Stop 0-16 B33
Washington, DC 20555-0001

Re: Non-Licensee's Premature Request for Exemption from Federal Regulation Prohibiting Use
of Ratepayer-Financed Decommissioning Trust Funds for Federal Government Obligations
for Spent Fuel Management

Holtec LLC Exemption Request, Feb. 12, 2020 (ADAMS Accession No. ML20043C539)

Dear Chair Svinicki, Commissioner Baran, Commissioner Wright,
Commissioner Caputo, and Commissioner Hanson:

The New York State Department of Public Service requests that you, as Commissioners, exercise your authority to stay and defer Staff's effort to effectuate an exemption of Commission-promulgated regulations. As the Atomic Energy Act Commissioners, you are vested with regulatory authority by virtue of your confirmation by the U.S. Senate to review the exemption application. Your regulation, which prohibits holders of operating licenses from withdrawing monies contained in nuclear decommissioning trust funds and diverting such monies to pay for the management of spent nuclear fuel, is the right policy because it appropriately preserves ratepayer-financed decommissioning trust funds while also leaving the federal government to pay for and fulfill its obligation to manage spent fuel. Similarly, the Nuclear Regulatory Commission (NRC) should also review the additional request to exempt the owner of Indian Point from providing 30 days' advance notice before withdrawing from more than \$2 billion in decommissioning trust funds.

We write to each of you to ensure that, as the Senate-confirmed regulators, you have been fully presented with the facts and circumstances surrounding the Department's request.

NRC Staff's proposed exemption the Commission's generally applicable regulations inappropriately conflates two separate and distinct obligations: (1) the management of spent nuclear fuel and (2) the decommissioning of a reactor site.

Spent Fuel Management

Spent radioactive nuclear fuel is one of the most dangerous substances to humans and the environment and requires special handling and storage.¹ Power reactor sites were not intended nor designed to become radioactive waste storage sites. When the Atomic Energy Commission and the Nuclear Regulatory Commission approved the construction and operation of the Indian Point power reactors and spent fuel pools, they told the host communities and New York State that the radioactive spent nuclear fuel would be transported away from the site shortly after it was removed from a reactor.² Given the public health risks associated with radioactive spent nuclear fuel, the Nuclear Waste Policy Act and the federal Standard Contract required the federal government to take possession of spent radioactive fuel beginning in 1998.³ For years, the federal government has fundamentally and completely failed to live up to its statutory public trust and contractual obligations to take possession of and store spent and depleted radioactive nuclear fuel. Given this federal failure, the Entergy corporations, which hold the operating licenses for the Indian Point facilities, have sued the federal government in the Court of Federal Claims for breach of contract claims and recovered substantial financial judgments for those breaches.⁴

Decommissioning of Reactor Sites

In 1988, through an Administrative Procedure Act (APA) notice and comment rulemaking, the NRC Commissioners first promulgated decommissioning regulations by amending 10 C.F.R. Parts 30, 40, 50, 51, 70, and 72 to require facilities to begin to provide some assurances that licensees might be able to fund the future decommissioning of their facilities. See Final Rule, General, Requirements for Decommissioning Nuclear Facilities, 52 Fed. Reg. 24018 (June 27, 1988). The 1988 rule was premised on the regulated utility model; it required reactor owners to make regular payments to the decommissioning funds, and was complemented by economic oversight from State utility commissions, and left for States to decide how much would be collected for a decommissioning fund each year. The Commissioners defined decommissioning as the removal of residual radioactivity in order to release the site for other uses. 10 C.F.R. § 50.2 (1986) (decommissioning defined); 52 Fed. Reg. at 24049. In the accompanying Statement of Considerations, the Commission confirmed that “decommissioning” did not include management of spent fuel:

“Decommissioning as defined in the rule means to remove nuclear facilities safely from service and to reduce residual radioactivity to a level that permits release of the

¹ *State of New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012) (vacating NRC’s “waste confidence” rule); *Nuclear Energy Institute v. U.S. Environmental Protection Agency*, 373 F.3d 1251, 1258 (D.C. Cir. 2004).

² See NRC and AEC Indian Point, Vermont Yankee Environmental Impact Statements (Attachment A hereto).

³ NWPA § 302(a)(5)(B), 42 U.S.C. § 10222(a)(5)(B); Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11 at Art. II. See *Ind. Mich. Power Co. v. Dep’t of Energy*, 88 F.3d 1272, 1273 (D.C. Cir. 1996); *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (Fed. Cir. 2000) (courts can award monetary damages to an owner-operator licensee to compensate for the spent nuclear fuel storage costs incurred by owner-operators as a result of the federal government’s breach).

⁴ For example, the federal government did not dispute an \$89 million claim related to Entergy’s construction of a dry cask storage facility at Indian Point to hold spent nuclear fuel because the federal government did not dispose of the high-level radioactive waste. See *Consolidated Edison Co. of New York Inc. v. United States*, 676 F.3d 1331, 1334 (Fed. Cir. 2012).

property for unrestricted use and termination of the license. . . . Decommissioning activities do not include the removal and disposal of spent fuel which is considered to be an operational activity or the removal and disposal of nonradioactive structures and materials beyond that necessary to terminate the NRC license.”

52 Fed. Reg. at 24019. In a subsequent APA rulemaking, the Commissioners reiterated that decommissioning funding did not include spent fuel management. 61 Fed Reg 39278, 39285 (July 29, 1996) (Statement of Considerations). That rulemaking is promulgated at 10 C.F.R. § 50.82(a)(8)(i)(A), which has remained unchanged. 10 C.F.R. § 50.75(h)(1)(iv) also prevents the use of monies in decommissioning trusts for spent fuel management expenses.

The State Public Service Commission Authorized the Collection of Ratepayer Money for the Decommissioning of Indian Point Unit 1 and Indian Point Unit 2

In 1992, the New York State PSC authorized Consolidated Edison to charge New York ratepayers \$14.8 million for the decommissioning of Indian Point Unit 1 and Unit 2 and to place the collected monies into separate decommissioning funds.⁵ This sum was based on the NRC’s minimum financial assurance requirements for removal of contaminated portions of the plant, plus an additional allowance for the removal of non-contaminated portions of the plant. Additional plant decommissioning allowances were authorized by the PSC.⁶ These decommissioning funds, which were held in trust, were then transferred from Consolidated Edison to Entergy when the latter acquired Indian Point Unit 1 and Unit 2 in 2001, together with a so-called "top off" payment of \$15 million from Consolidated Edison.⁷ This transfer also required—and received—New York PSC approval.⁸

In short, decommissioning costs were once placed in the Con Edison rate base, and those ratepayer monies then passed to Entergy when it acquired the Indian Point facilities. The principal payments to these decommissioning trusts have therefore been funded by New York ratepayers pursuant to New York State Public Service Commission orders.

Entergy reports that the three Indian Point decommissioning trust funds now contain, almost thirty years later, more than \$2 billion. Holtec’s exemption request seeks to inappropriately divert more than \$600 million for spent fuel management costs—costs which are not included within the scope of the Commission’s definition of decommissioning or the decommissioning regulations at issue here. It also seeks to avoid the 30-day advance notice requirement. The requested cancellation of 10 C.F.R. § 50.82(a)(8)(i)(A) and 10 C.F.R. § 50.75(h)(1)(iv) would each represent a significant departure from the Commission’s regulations.

⁵ See PSC Case 91-E-0462, Opinion and Order Adopting Settlement (April 14, 1992).

⁶ See PSC Case 96-E-0897, Order Adopting Terms of Settlement Subject to Conditions and Understandings (September 23, 1997); PSC Case 94-E-0334, Opinion and Order Approving Settlement (April 6, 1995). In April 2001, Con Edison reported to NRC that the Indian Point Unit 1 and Indian Point Unit 2 decommissioning trusts collectively contained \$330 million. See Con Edison Co. (Alan Blind) to NRC, NL-01-039 (April 2, 2001) ADAMS Accession No. ML010950012.

⁷ See PSC Case 01-E-0040, Order Authorizing Asset Transfer (August 31, 2001). The top-off payment was needed because, without it, the funds’ balances would have fallen short of federal requirements.

⁸ *Id.*

NRC Commissioner Oversight Responsibility Over Staff

The exemption proposed by Staff would upend the State orders issued in detrimental reliance on the Commission's decommissioning regulations and to facilitate licensee compliance with well settled Commission regulatory programs. Staff naturally is not going to look askance at diverting or gifting ratepayer money, since its intent is to cover a federal government obligation. Staff, however, is not applying appropriate comity towards legitimate State interests or cooperative federalism. Given the important potential interference with long-standing PSC orders issued in conjunction with the Commission's 1988 decommissioning regulations, the diversion of ratepayer trust funds to cover a federal government obligation, the potential for commingled funds, the need for methodical accounting controls over the release of tens of millions of dollars from decommissioning funds, and the Commission's own trusteeship and regulatory oversight responsibilities, the Department of Public Service respectfully requests that as Commissioners you exercise your inherent supervisory authority over agency Staff and agency proceedings that Congress has vested in you pursuant to the Atomic Energy Act and that you, not Staff, review and then reject the exemption application.

Conclusion

Staff's November 16, 2020 proposal to disregard the Commission's promulgated regulations in the context of a potential future transfer of the Indian Point site is contrary to law and arbitrary and capricious. Staff's proposal completely upends previous orders of the PSC and diverts New York ratepayer funds for purposes not authorized by such PSC orders and that are beyond the scope of decommissioning as defined in 10 C.F.R. §§ 50.2 and 50.82(a)(8)(i)(A) to cover the federal government's obligation for spent fuel management and also exceeds the limitation on decommissioning expenses imposed by § 50.75(h)(1)(iv). Further, even if the Commission were to hold that the funds were appropriate to now be used for spent fuel management, there is no justifiable reason for Staff to cancel the Commission's commonsense accountability control requiring 30-day advance notice of withdrawals from the trusts. The New York State Department of Public Service requests that, as Senate-confirmed regulators and Commissioners, you decline and deny Staff's proposal to cancel 10 C.F.R. § 50.82(a)(8)(i)(A) and 50.75(h)(1)(iv) for the Indian Point site and take up and review the exemption request, and then reject it, as inconsistent with your decommissioning regulations and the purpose of the decommissioning trusts.

Respectfully submitted,

s/

John Sipos
Deputy General Counsel
Ryan Coyne
Assistant Counsel

Copies to (via email):

Annette Vietti-Cook, Secretary
Douglas Tifft, Staff State Liaison
Richard Turtill, Staff Financial Analyst
Bruce Watson, Staff Reactor Decommissioning Branch Chief
Richard Guzman, Senior Project Manager
Margaret Doane, Executive Director of Operations

Jason Day, Esq., Holtec International
Susan Raimo, Esq., Entergy Services
William Flynn, Esq., counsel for Holtec
Doreen Saia, Esq., counsel for Entergy

Attachment A

The federal government told host communities that spent nuclear fuel would be removed rapidly from reactor sites:

Vermont Yankee Nuclear Power Station Final Environmental Impact Statement, U.S. Atomic Energy Commission, at 93-94, ML061880207 (July 1972) (irradiated fuel elements will be shipped after minimum 90-day cooling period); *Final Environmental Statement for Indian Point, Unit 2*, Volume I, U.S. Atomic Energy Commission, at 257, ML072390276 (Sept. 1972) (approximately 35 truckloads of irradiated fuel per year will be transported from Indian Point to Midwest Fuel Recovery Plant in Morris, IL); *id.*, at IX-3 (PDF, 298), p. V-87 (PDF 258); *Final Environmental Statement for Indian Point, Unit 3*, Volume I, U.S. Nuclear Regulatory Commission, NUREG-75/002, at 412, ML072390284 (Feb. 1975) (irradiated fuel could be transported to the Allied-Gulf Nuclear Services Plant in Barnwell, SC).

See also Statement of NRC Commissioner Victor Gilinsky, 48 Fed. Reg. 22730, 22733 (May 20, 1983) (“The current generation of nuclear power plants was licensed on the assumption that spent fuel would be retained on site for a brief period, prior to being sent away for reprocessing.”); Government Accountability Office, Report to Congressional Requesters, *Nuclear Fuel Cycle Options* (GAO 12-70), at 2 (Oct. 2011).

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CHAIRMAN Resource

From: Sipos, John (DPS) <John.Sipos@dps.ny.gov>
Sent: Monday, November 23, 2020 10:45 AM
To: CHAIRMAN Resource; CMRBARAN Resource; CMRCaputo Resource; CMRWright Resource; CMRHanson Resource; NRCExecSec Resource; Vietti-Cook, Annette
Cc: wflynn@harrisbeach.com; J.Day@cdi-decom.com; Raimo, Susan; said@gtlaw.com; Tiff, Doug; Guzman, Richard; Turtill, Richard; Watson, Bruce; Doane, Margaret; Coyne, Ryan (DPS)
Subject: [External_Sender] Indian Point Units 1, 2, 3 -- Request for NRC Commissioner Action Concerning Application for Exemption from Commission Regulations
Attachments: 20201123 NYS DPS letter to NRC Commissioners.pdf

November 23, 2020

Re: Non-Licensee's Premature Request for Exemption from Federal Regulation Prohibiting Use of Ratepayer-Financed Decommissioning Trust Funds for Federal Government Obligations for Spent Fuel Management

Holtec LLC Exemption Request, Feb. 12, 2020 (ADAMS Accession No. ML20043C539) – Indian Point Unit 1, Unit 2, Unit 3

10 C.F.R. §§ 50.82(a)(8)(i)(A) and 50.75(h)(1)(iv)

Dear Chair Svinicki, Commissioner Baran, Commissioner Wright, Commissioner Caputo, Commissioner Hanson, and Secretary Vietti-Cook:

Enclosed please find a letter from the New York State Department of Public Service requesting that the Commissioners (and not Staff) evaluate, resolve, and reject the pending application to exempt two Commission regulations that concern monies in decommissioning trust accounts for the Indian Point site.

Respectfully submitted,

J.Sipos
R.Coyne
Office of General Counsel
NYS Department of Public Service