

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of)	Docket No. 50-255 NRC-2021-0036
Entergy Nuclear Operations, Inc., Entergy Nuclear Palisades, LLC, Holtec International, and Holtec Decommissioning International, LLC)	April 16, 2021
(Palisades Nuclear Plant and Big Rock Point))	

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**MEMORANDUM OF BEYOND NUCLEAR, MICHIGAN SAFE ENERGY FUTURE
AND DON'T WASTE MICHIGAN IN OPPOSITION
TO APPLICANT'S MOTION TO STRIKE LATE RESPONSES**

Now come Petitioners Beyond Nuclear, Michigan Safe Energy Future and Don't Waste Michigan, (BN, MSEF and DWM) (collectively, Petitioners), by and through counsel, and set forth their opposition to the April 16, 2021 "Applicant's Motion to Strike Late Responses" brought by Entergy Nuclear Operations, Inc. (ENOI), Entergy Nuclear Palisades, LLC, Holtec International, and Holtec Decommissioning International, LLC (HDI) (collectively, Holtec). Holtec seeks to exclude the "Reply of Beyond Nuclear, Michigan Safe Energy Future and Don't Waste Michigan in Opposition to Applicants' 'Motion to Strike Portions of Beyond Nuclear *et al.*'s Reply and Second Declaration of Robert Alvarez" (April 14, 2021) from the record.¹

As explained below, Holtec relies on inapropos legal authority for the proposition that Petitioners had only five days to respond to "Applicants' Motion to Strike Portions of Beyond Nuclear *et al.*'s Reply and Second Declaration of Robert Alvarez" (April 5, 2021).²

¹ADAMS Accession No. ML21104A427.

²ADAMS Accession No. ML21095A342.

I. Introduction

Holtec's entire argument to strike against Petitioners' memorandum is this:

Applicants' motion was filed and served on April 5, 2021. Pursuant to 10 CFR §§ 2.1325(b) and 2.306(a), responses were due no later than April 12, 2021. Beyond Nuclear et al. filed and served their response on April 14, 2021. . . .

Petitioners did file their opposition on April 14, 2021 – 9 days after Holtec filed on April 5, 2021 – but they were well within their right to do so because they had 10 days under the applicable rule.

II. 10 CFR § 2.1325 Is Inapplicable to This Stage of the Proceeding

Holtec has made no showing that the procedures of Subpart M apply to this stage of the proceeding. According to 10 CFR § 2.323(c), “For all written motions, other than motions for summary disposition, *within ten (10) days after service of the motion*, or other period as determined by the Secretary, the Assistant Secretary, or the presiding officer, *a party may file an answer in support of or in opposition to the motion*, accompanied by affidavits or other evidence.” (Emphasis added). There was no other period for answer determined by the Secretary of the Commission or the Presiding Officer. Notably, Holtec invoked 10 CFR § 2.323 as well as 10 CFR § 2.1325 in its April 5 Motion to Strike,³ but does not explain how § 2.323 did not supply Petitioners' filing deadline to oppose Holtec's Motion.

This proceeding is at a very early stage. The Presiding Officer has not contacted the parties to set the Petition for Leave to Intervene for a hearing, nor posited any other means by which it will be determined. In the Federal Register notice of the instant proceeding, the NRC

³*Id.* at 1: “Pursuant to 10 CFR §§ 2.323 and 2.1325, Entergy Nuclear Operations, Inc. (‘ENOI’), Entergy Nuclear Palisades, LLC, Holtec International (‘Holtec’), and Holtec Decommissioning International, LLC (‘HDI’) (collectively, ‘Applicants’) submit this motion to strike. . . .”

stated that “Petitions shall be filed in accordance with the Commission’s ‘Agency Rules of Practice and Procedure’ in 10 CFR part 2” and that “Interested persons should consult a current copy of 10 CFR § 2.309.”⁴

At this point, only the provisions of 10 CFR Subpart C govern the procedural landscape because there has not yet been a determination that a request for hearing/petition to intervene should be granted and a hearing held. Only when those determinations have been made will the Presiding Officer discharge her or his explicit responsibility to identify the hearing procedures which are to be specifically applicable to the remainder of the litigation.

According to 10 CFR § 2.310:

Upon a determination that a request for hearing/petition to intervene should be granted and a hearing held, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request/petition will determine and identify the specific hearing procedures to be used for the proceeding as follows—

(a) – (f) *****.

(g) Proceedings on an application for the direct or indirect transfer of control of an NRC license which transfer requires prior approval of the NRC under the Commission's regulations, governing statutes or pursuant to a license condition shall be conducted under the procedures of subpart M of this part, unless the Commission determines otherwise in a case-specific order. (Emphasis added).

Again, there has been no determination that the Petition to Intervene should be granted and a hearing held. Those rulings are obligatory prerequisites to assigning this case to a procedural track. The case will be assigned to the Subpart M track “unless the Commission determines otherwise in a case-specific order.” But indisputably, Subpart M procedures don’t attach to this early stage of the license transfer application case in the absence of that ruling.

Indeed, 10 CFR § 2.1300, which explains the scope of Subpart M, acknowledges that

⁴“Palisades Nuclear Plant and Big Rock Point Plant Consideration of Approval of Transfer of Control of Licenses and Conforming Amendments,” 86 Fed. Reg. 8225, 8226 (February 4, 2021).

Subpart M procedures do not automatically apply to license transfer applications: “This subpart provides the only mechanism for requesting hearings on license transfer requests, *unless* contrary case specific orders are issued by the Commission.”⁵ (Emphasis added).

The applicability of 10 CFR Subpart C procedures – the generally applicable, default procedural regulations – to this proceeding is further reinforced by certain amendments the Nuclear Regulatory Commission made to Subpart M regulations in 2012. In clarifying when Subpart M procedures apply, the Commission observed that 10 CFR § 2.1304 historically stated that the procedures in subpart M “will constitute the exclusive basis for hearings on license transfer applications.” But in the 2012 rulemaking, the Commission rescinded § 2.1304 in its entirety, explaining:

1. *Sections 2.1300 and 2.1304 — Provisions Governing Hearing Procedures for Subpart M Hearings:* Current § 2.1300 states that the provisions of subpart M, together with subpart C, govern all adjudicatory proceedings on license transfers, but current § 2.1304 states that the procedures in subpart M “will constitute the exclusive basis for hearings on license transfer applications.” Current § 2.1304, part of the original subpart M, was effectively replaced by current § 2.1300 in the 2004 part 2 revisions, and could have been removed as part of that rulemaking. The NRC is now removing § 2.1304 and amending § 2.1300 *to clarify that in subpart M hearings on license transfers, both the generally applicable intervention provisions in subpart C and the specific subpart M hearing procedures govern.*⁶ (Emphasis added).

III. Conclusion

Section 2.323(d) notifies the parties filing motions that they “are obligated, in their filings before the presiding officer and the Commission, to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis,

⁵10 CFR § 2.1300.

⁶77 Fed. Reg. 46,580, 46,598.

including, as appropriate, citations to the record.⁷” Holtec’s “Motion to Strike Late Responses” falls well short of that standard and must be summarily dismissed.

April 16, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2021, I deposited the foregoing “Memorandum in Opposition to ‘Applicant’s Motion to Strike Late Responses’” in the NRC’s electronic docket of this proceeding and that according to the protocols of that system, it was to be automatically transmitted to all parties of record registered to receive electronic service.

/s/ Terry J. Lodge
Terry J. Lodge, Esq.
Counsel for Petitioners

⁷10 CFR § 2.323(d).