UNITED STATES OF AMERICA
NUCLEAR ENERGY REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of	:	
	:	Docket Nos.
ENTERGY NUCLEAR OPERATIONS, INC.;	:	50–003
ENTERGY NUCLEAR INDIAN POINT 2, LLC;	:	50–247
ENTERGY NUCLEAR INDIAN POINT 3, LLC;	:	50–286
HOLTEC INTERNATIONAL; AND HOLTEC	:	72–051
DECOMMISSIONING INTERNATIONAL, LLC;	:	
CONSIDERATION OF APPROVAL OF	:	
TRANSFER AND CONTROL OF LICENSES	:	
AND CONFORMING AMENDMENTS	:	
	:	
(Indian Point Nuclear Generating Station)	:	

TOWN OF CORTLANDT, VILLAGE OF BUCHANAN, AND HENDRICK HUDSON SCHOOL DISTRICT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF PETITION FOR LEAVE TO INTERVENE AND HEARING REQUEST

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PRELIMINARY STATEMENT

1. Petitioners, the Town of Cortlandt, the Village of Buchanan, and the Hendrick Hudson School District submit this reply memorandum in further support of their Petition to intervene in this proceeding and to request an adjudicatory hearing.

2. The Commission is currently considering whether to approve an application filed by Entergy Nuclear Operations, Inc., on behalf of itself, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC (collectively, "Entergy"), Holtec International, and Holtec Decommissioning International, LLC (collectively, "Holtec," and together with Entergy, the "Applicants"). The Applicants seek NRC approval to transfer control of the Indian Point Nuclear Generating Station, or IPEC, from Entergy to Holtec (the "License Transfer Application" or "LTA"). Submitted along with the License Transfer Application, the Applicants request that Holtec be permitted to use the IPEC Decommissioning Trust Fund ("DTF") for non-decommissioning expenses, including spent fuel management and site restoration (the "Exemption Request"),[1] along with a Post-Shutdown Decommissioning Activities Report ("PSDAR") and Site Specific Cost Estimate.

3. Petitioners, which represent the local community that has housed the IPEC for decades, support the concept of a prompt, environmentally sound decontamination and restoration

[1] On the same day that Petitioners filed their moving papers, Holtec filed the Exemption Request, which requests exemptions from 10 C.F.R. § 50.82(a)(8)(i)(A) "to allow use of a portion of the IP1, 2 & 3 Nuclear Decommissioning Trust funds . . . for the management of . . . spent fuel and on site restoration activities." *See* Letter from A. Sterdis, HDI, to NRC Document Control Desk, "Request for Exemptions from 10 C.F.R. 50.82 (a)(8)(i)(A) and 10 C.F.R. 50.75 (h)(1)(iv)" (Feb. 12, 2020) (ML20043C539). Additionally, Holtec seeks "exemptions from 10 C.F.R. 50.75(h)(1)(iv) to allow disbursements from the IP1, 2 & 3 [trust] funds for spent fuel management and site restoration costs to be made without prior notice, similar to withdrawals in accordance with 10 C.F.R 50.82(a)(8)." *Id*.

of the IPEC to return the Site to productive use. However, in its current form, License Transfer Application, taken with the Exemption Request and PSDAR, does not pass muster.

4. Petitioners have raised two Contentions that meet the Commission's admissibility criteria under 10 C.F.R. § 2.309(f). For their first Contention, Petitioners raise a genuine dispute as to whether Holtec has the financial qualifications to safely decommission the IPEC, restore the Site, and meet its ongoing spent fuel management obligations. In particular, the Applicants have not provided adequate financial assurances to protect public health and safety, as required by the Atomic Energy Act ("AEA") and the Commission's regulations. The Applicants have ignored several identifiable, non-speculative cost-overrun scenarios that could create a significant shortfall in the DTF, which is Holtec's sole basis for demonstrating its financial security. Moreover, Holtec's corporate structure, lack of independent assets or revenue streams, and distorted incentives further endanger Holtec's financial stability and place public health and safety in jeopardy.

5. To avoid facing these claims head-on, the Applicants repeatedly chide Petitioners for declining to submit an expert affidavit. But Commission precedent plainly does not require a petitioner to submit an expert affidavit to meet the intervention threshold; this is especially so when the errors and misstatements of law in a submission are apparent from face of the application itself.[2] Moreover, Petitioners have provided ample factual authority to support their claims by citing undisputed facts taken from the Commission's own experts and the Congressional Research Service.[3] On the current record, the Commission cannot find, as it must, that the License Transfer

[2] *See infra* note 27.

[3] *In re Calvert Cliffs 3 Nuclear Project, LLC, & Unistar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), 76 N.R.C. 127, 163 (Aug. 30, 2012) ("Thus, the expert opinions on which the Intervenors rely are those of the NRC experts who prepared the Task Force Report.").

Application would "provide adequate protection to the health and safety of the public."[4] At the very least, Petitioners have demonstrated a dispute of material fact as to Holtec's financial qualifications, and so Petitioners have a statutory right to litigate this issue in a hearing.

6. For their second Contention, Petitioners allege that the Commission cannot approve the Application in its current form without conducting, at a minimum, an environmental assessment of the potential direct and indirect environmental consequences of the License Transfer Application, Exemption Request, and PSDAR under the National Environmental Policy Act ("NEPA"). To evade scrutiny, the Applicants appear to suggest that certain aspects of the proposed transaction are immune from NEPA's reach. But the law is clear that NEPA subjects all related aspects of a proceeding to review. In suggesting otherwise, the Applicants urge the Commission to commit the cardinal NEPA sin of "segmentation."[5] The Commission should reject the Applicants' invitation to violate the law.

7. Moreover, Petitioners plainly do not, as the Applicants suggest, seek to challenge the Commission's regulation categorically excluding ordinary, non-substantive license transfers from further review under NEPA. Rather, Petitioners' modest submission is that special circumstances — namely, the environmental risk posed by the reasonably foreseeable event of a shortfall in the DTF — preclude application of the categorical exclusion here. In addition, Petitioner has raised a genuine dispute as to whether the environmental risks posed by the decommissioning of the IPEC are bounded by the 2002 Generic Environmental Impact Statement ("GEIS") or the 2018 Indian Point Site-Specific Supplemental Environmental Impact Statement ("SEIS"). Specifically, neither those documents nor the PSDAR address the serious environmental

[4] 42 U.S.C. § 2232(a).

[5] *See, e.g.*, *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1314 (D.C. Cir. 2014).

consequences that would result from a shortfall in the DTF or the potential environmental impact of climate change on decommissioning operations.

8. Rather than engaging with Petitioners arguments on the merits, the Applicants take various steps to elude NRC scrutiny. First, the Applicants attempt to divide their proposal into three discrete parts, arguing that Petitioners cannot dispute the veracity the PSDAR or the Exemption Request because neither is subject to a hearing. As to the PSDAR, the Applicants argue that "[b]ecause the NRC does not approve the PSDAR, the Commission has held that it 'does not give rise to a hearing opportunity.'"[6] However, Petitioners do not seek a stand-alone hearing on the adequacy of the PSDAR. Rather, Petitioners request a hearing on its Contention that Holtec has not adequately demonstrated its financial qualifications to hold the IPEC licenses. Because Holtec rests its qualifications solely on the DTF, the PSDAR is the single most important document to understanding whether Holtec is financially qualified to hold the licenses to Indian Point. To argue that such an essential component of the proposed transaction is not subject to scrutiny is not a fair statement of the Commission's rules. Because the Applicants rely on the PSDAR as part of the License Transfer Application, Petitioners are well within their rights to challenge the assumptions and calculations contained therein.[7]

9. As to the Exemption Request, Petitioners maintain that "although the Exemption Request requires NRC approval, the Commission has held that 'exemption requests are not subject to a hearing opportunity under the [Atomic Energy Act].'"[8] However, the Commission has long

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[6] Answer at 3 (quoting *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-16-17, 84 NRC 99, 104 & n.7 (2016)).

[7] Indeed, the Commission has held that there is "no prohibition from considering the information contained in the PSDAR to the extent it relates to [an applicant's] intentions." *In re Entergy Nuclear Vermont Yankee, LLC, And Entergy Nuclear Operations, Inc.*, No. 15-940-03-LA-BD01, 2015 WL 5883370, at *7 (Aug. 31, 2015), *vacated as moot,* 83 N.R.C. 463, 2016 WL 8260626 (June 2, 2016).

[8] Answer at 3 (quoting *Vermont Yankee*, CLI-16-17, 84 NRC at 115).

recognized that regulatory exemption requests that are "directly related" to a license amendment (such as the License Transfer Request) are within the scope of a license transfer proceeding.[9] Indeed, the Commission has expressly held that exemption requests that are "directly related" to a license amendment may *not* "be considered entirely separate" from the rest of the application."[10] As the Commission explained, "[t]he proper focus is on whether the exemption is necessary for the applicant to obtain an initial license or amend its license."[11] By stating that "HDI's funding plan for spent fuel management and site restoration activities relies on the use of" the DTF, the Applicants all but concede that this test is met.[12] "The Commission has never instructed its licensing boards to ignore reality."[13] The Exemption Request is "precisely the sort of directly related and dependent exemption-related issues that are within the scope of a license amendment proceeding."[14] Accordingly, consideration of the PSDAR and Exemption Request are within the scope of this proceeding.[15]

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[9] *Private Fuel Storage, LLC*, 53 N.R.C. 459, 476 (June 14, 2001).

[10] *In re Entergy Nuclear Vermont Yankee, LLC*, No. 15-940-03-LA-BD01, 2015 WL 5883370, at *7.

[11] *Private Fuel Storage, LLC*, 53 N.R.C. at 470; *see also id*. ("Where the exemption thus is a direct part of an initial licensing or licensing amendment action, there is a potential that an interested party could raise an admissible contention on the exemption, triggering a right to a hearing under the AEA.").

[12] Application Cover Letter at 4.

[13] *In re Entergy Nuclear Vermont Yankee, LLC*, No. 15-940-03-LA-BD01, 2015 WL 5883370, at *7.

[14] *Id*.

[15] The Applicants' reliance on *Entergy Nuclear Vermont Yankee, LLC* is misplaced. In that case, the Commission held that the exception for directly related actions did not apply "because Entergy has withdrawn its license amendment request and the Board has approved that withdrawal," and thus, "no active license amendment request remains that is arguably related to Entergy's exemption request." Here, the Applicants "seek[] NRC approval of the transfer of control of Provisional Operating License No. DPR–5 and Renewed Facility Operating License Nos. DPR–26 and DPR–64 for Indian Point Nuclear Generating, Unit Nos. 1, 2, and 3, . . . as well as the general license for the IPEC Independent Spent Fuel Storage Installation (ISFSI)." 85 Fed. Reg. 3947, 3948 (Jan. 23, 2020). Additionally, "[t]he NRC is also considering amending the licenses for administrative purposes to reflect the proposed transfer." *Id*. Thus, the rule set forth in *Private Fuel Storage* controls this case.

10. Next, the Applicants repeatedly attempt to shift the burden of proof to Petitioners. But Commission precedent is clear on this point: the burden of proof to demonstrate Holtec's financial qualifications lies at all times with the Applicants.[16] Additionally, Petitioners are not required to prove its contentions at the admissibility stage.[17] Rather, the Commission's precedent instructs that Petitioners need only make "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate."[18] Properly construed, Petitioners have adequately raised two admissible contentions.

11. Finally, and most alarmingly, the Applicants downplay the facts and assertions raised in the Petition by urging the Commission to leave any meaningful regulation to the New York Public Service Commission ("New York PSC") to regulate in the public interest. Yet at the same time the Applicants are telling the NRC to defer to the New York PSC, the Applicants have demanded in public filings that the New York PSC **disclaim jurisdiction over the proposed transfer**.[19] In other words, Holtec has asked both principal regulatory authorities to defer to the other, hoping that neither body will scrutinize this transaction. This type of *léger de main* is not only deeply troubling, it illustrates that the Applicants seek to evade regulatory scrutiny from both state and federal agencies by pitting them against one another. The Commission must exercise its statutory duty to place significant limitations on its approval to align Holtec's incentives with the need to protect public health and safety.

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[16] *See, e.g.*, *In re Calvert Cliffs 3 Nuclear Project, LLC, & Unistar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), 72 N.R.C. 720, 756–57 (Dec. 28, 2010).

[17] *In re Gulf States Utilities Co., et al.* (River Bend Station, Unit 1), 40 N.R.C. 43, 51 (Aug. 23, 1994) (internal quotation marks omitted) (quoting Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989)).

[18] *Id*. at 51, 53.

[19] Joint Petition for a Declaratory Ruling Disclaiming Jurisdiction Over or Abstaining from Review of the Proposed Transfers at 34 (Nov. 21, 2019) (appended hereto as Attachment A).

THE APPLICANTS SEEK TO UNLAWFULLY SHIFT THE BURDEN OF PROOF

12. The Applicants repeatedly seek to shift the burden of proof to Petitioners and then raise that burden to an insurmountable height. This effort fails for at least two reasons.

13. First, Commission precedent is clear: "Although [the contention admissibility rule] imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner."[20] To be sure, to support a contention a party "has the *burden of going forward* with evidence to buttress that contention."[21] But once a petitioner "has introduced sufficient evidence to establish a *prima facie* case, the burden then shifts to the applicant who, as part of his overall burden of proof, must provide sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license."[22]

14. Moreover, the Commission has repeatedly emphasized that its contention admissibility rules do not "require a petitioner to prove its case at the contention stage," and "[f]or factual disputes, a petitioner need not proffer facts in formal affidavit or evidentiary form, sufficient to withstand a summary disposition motion."[23] Rather, all that is required is "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate."[24] Put differently, the contention rules simply require that a party submit "'some

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[20] *In re Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), 70 N.R.C. 227, 290 (July 31, 2009); *see also, e.g.*, *Calvert Cliffs Nuclear Power Plant, Unit 3*, 76 N.R.C. at 163.

[21] *In re Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), 69 N.R.C. 235, 269 (Apr. 1, 2009).

[22] *Id*.

[23] *In re Virginia Elec. & Power Co. d/b/a Dominion Virginia Power & Old Dominion Elec. Coop.* (N. Anna Power Station, Unit 3), 70 N.R.C. 992 (Nov. 25, 2009); *In re Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), 64 N.R.C. 257, 359 (Oct. 16, 2006);

[24] *In re Gulf States*, 40 N.R.C. at 51, 53 (internal quotation marks omitted).

factual basis' for an admitted contention."[25] "These requirements are intended to 'preclude a contention from being admitted where an intervenor has no facts to support its position and [instead] contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.'"[26] That is simply not the case here. Petitioners have raised substantial, fact-based arguments that warrant further consideration.[27]

15. The Commission's "contention rule should [not] be turned into a 'fortress to deny intervention.'"[28] Rather, "[t]he Commission and its Boards regularly continue to admit for litigation and hearing contentions that are material and supported by reasonably specific factual and legal allegations."[29] Petitioners have cleared this threshold.

PETITIONERS PRESENT TWO CONTENTIONS THAT MEET THE REQUIREMENTS OF 10 C.F.R. § 2.309(f) AND SO ARE ADMISSIBLE

16. Properly construed, Petitioners have alleged two contentions that meet these standards. The Commission should grant the Petition and promptly schedule a hearing.

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[25] *In re Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), 49 N.R.C. 328, 335 (Apr. 15, 1999) (quoting 54 Fed. Reg. at 33,171).

[26] *Id*. (quoting *In re Philadelphia Elec. Co. et al.* (Peach Bottom Atomic Power Station, Units 2 & 3), 8 A.E.C. 13, 21 (July 5, 1974).

[27] The Applicants also repeatedly chide Petitioners for not supporting their contentions with expert opinions. Of course, the Commission's precedent does not require the submission of expert opinions to adequately plead a contention. First, the Commission's regulations instruct that a petitioner must "[p]rovide a concise statement of the alleged facts *or* expert opinions which support requestor's/petitioner's position." 10 C.F.R. § 2.309(f)(1)(v) (emphasis added). Moreover, "the Commission has interpreted subsection (v), quite reasonably and simply, to require a petitioner to support its contentions with documents, expert opinion, or at least a fact-based argument." *In re Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 & 4)*, 70 N.R.C. 311 (Aug. 6, 2009) (internal quotation marks omitted). Finally, requiring a petitioner to undergo the expensive process of retaining an expert would place the Commission's adjudicative process outside the reach of local governments and community groups. The Contention Rule and the Commission's decisions do not require such a draconian result.

[28] *Oconee Nuclear Station, Units 1, 2, & 3*, 49 N.R.C. at 335 (internal quotation marks omitted).

[29] *Id*.

A. Petitioners Have Raised a Dispute of Material Fact as to Whether Holtec Has Provided Sufficient Financial Assurances to Protect Public Health and Safety

17. Section 182(a) of the Atomic Energy Act requires a license applicant to prove that it possesses adequate financial assurances to protect public health and safety.[30] Here, Holtec bases its financial qualifications exclusively on the Decommissioning Trust Fund. For the reasons explained in the Petition and further described herein, Holtec's site-specific decommissioning cost estimate contains several flawed assumptions that, individually and collectively, raise substantial concerns about its financial suitability to hold the IPEC licenses. Moreover, Holtec's corporate structure and incentives render it unfit to take on the massive obligation of decommissioning the IPEC. At the very least, Petitioners have raised a dispute of material fact as to whether Holtec has provided sufficient financial assurances to protect public health and safety. That is all that is required at this stage.

The Applicants' Assumption that DOE Will Begin Accepting Spent Nuclear Fuel by 2030 is Untenable

18. In their Answer, the Applicants doggedly defend their assertion that DOE will begin accepting spent nuclear fuel by 2030 and that DOE will remove all spent fuel from the IPEC by 2061. For the reasons explained in detail in the Petition, this claim is a fantasy, and no evidence in any of the Applicants' submissions supports it.

19. To dispute this point, Holtec maintains that "its use of the 2030 date reflects DOE's 2013 policy."[31] That policy, titled "Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste," *never mentions* the date 2030. Rather, in Holtec's own words, that policy "indicat[ed] plans to implement a program over the next 10 years that begins

[30] 42 U.S.C. § 2232(a).

[31] Answer at 11.

operations of a pilot interim storage facility by 2021 with an initial focus of accepting used nuclear fuel from shutdown reactor sites with a larger interim storage facility to be available by 2025."[32] In the very next sentence, Holtec concedes that "[a]lthough the DOE proposed it would start fuel acceptance in 2025, *no progress has been made* in the repository program since DOE's 2013 strategy was issued except for the completion of the Yucca Mountain safety evaluation report."[33] In other words, seven years ago the DOE issued an aspirational document calling for the implementation of a pilot program that would begin in 2021, and virtually no progress has been made since. From this, Holtec has somehow divined that the DOE will begin accepting spent fuel in 2030, notwithstanding the fact that more recent evidence, including evidence from the Commission itself, suggests that this assumption is unreasonable.[34] Although Holtec suggests that its assumption "aligns with industry assumptions regarding DOE performance for decommissioning costs estimates," Holtec has offered no support for that suggestion.[35] Indeed, Holtec has not cited a single decision from the Commission or the ASLB accepting a similar assumption regarding DOE's spend fuel acceptance.[36]

20. Holtec next claims that Petitioners' reliance on the Commission's Continued Storage Rule is "misplaced."[37] Specifically, Holtec asserts that its estimate that "DOE will remove

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[32] PSDAR at 64.

[33] *Id.* (emphasis added).

[34] Petition at 12–14.

[35] Answer at 11–12.

[36] Rather, this case is similar to the 2015 *Vermont Yankee* decision, in which the Atomic Safety and Licensing Board found that Vermont had adequately pleaded its contention "concerning Entergy's alleged failure to demonstrate the financial ability to store spent fuel indefinitely." No. 15-940-03-LA-BD01, 2015 WL 5883370, at *12. Specifically, the ASLB declined to credit Entergy's unsupported assertion that DOE would begin accepting spent nuclear fuel by 2026, and noted that Entergy's cost estimate "fails to explain how it would address the contingency of indefinite onsite storage, including all safety and environmental concerns regarding transferring fuel into new dry casks every 100 years." *Id*. The same is true here.

[37] Answer at 12.

all high-level waste from Indian Point [by] 2061 . . . generally aligns with the" Continued Storage Rule and its Generic EIS.[38] This is simply incorrect. Even in a short-term timeframe, which the Commission defined as "60 years of continued storage after the end of a reactor's licensed life for operation," spent fuel would remain at Indian Point until 2081, nearly two decades after Holtec has projected.[39] Moreover, the Applicants' projection ignores the entirely plausible scenario, envisioned by the Continued Storage Rule, that on-site storage will be required for 160 years, if not indefinitely.[40] Additionally, Holtec claims that the Commission's Continued Storage Rule is "not relevant to HDI's site-specific DCE and cash flow analysis" simply because the Rule was issued to fulfill the Commission's obligations under NEPA.[41] It is difficult to understand why the Commission's own evaluation of on-site storage timelines, issued to comply with a federal statute, is irrelevant to the plausibility of Holtec's assumptions.

21. The fundamental problem is that Holtec has refused to offer *any* alternative calculation for how it will meet its spent nuclear fuel obligations in the very likely event that the DOE does not begin accepting spent fuel by 2030. It is Holtec's burden to demonstrate its financial qualifications, and all credible evidence in the record suggests that this projection is not "based on plausible assumptions and forecasts."[42] Holtec's failure to account for these costs raises genuine concerns with its application.

22. Holtec's remaining critiques fare no better. Holtec first asserts that Petitioners are required to offer an "expert opinion or other supporting information to show that DOE cannot

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[38] *Id.*

[39] Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,245 (Sept. 19, 2014).

[40] *Id*.

[41] Answer at 13.

[42] *In re N. Atl. Energy Serv. Corp., et al.* (Seabrook Station, Unit 1), 49 N.R.C. 201, 221–22 (Mar. 5, 1999).

achieve" its aspiration of accepting spent nuclear fuel next year.[43] But it is Holtec's burden to show its financial qualifications, and those qualifications rest entirely on Holtec's own assumptions and projections for how it will spend the DTF.[44] Because Holtec has not adequately supported its own assumptions, it has failed to demonstrate its financial suitability.

23. The same can be said of Holtec's next argument, which critiques Petitioners' rough estimate, based on Holtec's own figures, that ongoing spent fuel management could cost up to $18.5 million per year. Holtec criticizes this figure by stating that its costs will decline once it removes spent fuel from storage pools into the ISFSI.[45] But here again, it is Holtec's burden to demonstrate its financial qualifications, not Petitioners' burden to offer counter-projections. By failing to offer *any* alternative calculations for different spent fuel scenarios, Holtec has failed that charge.

24. To remedy its error, Holtec now suggests, *for the first time in its Answer*, that spent fuel management would cost approximately "$12.5 million per year for all three units" after 2030.[46] Yet Holtec *still* refuses to estimate how long it could pay those costs without fully depleting the DTF in a long-term storage scenario. Once again, a simplified cost estimate illustrates the problem. Assuming that the DTF for all three IPEC units stands at approximately $263,253,000 in 2063 (as Holtec estimates), that the DTF grows at an annual rate of 2%, and that annual spent fuel management costs equal $12.5 million, an additional 25 years of spent fuel management would bankrupt the DTF. These figures illuminate the problem, but Holtec's fundamental error is missing the forest for the trees. The point is not whether Petitioners' math is

[43] Answer at 13.

[44] *See Fermi Nuclear Power Plant, Unit 3*, 70 N.R.C. at 290.

[45] Answer at 14.

[46] *Id*. at 14–15.

perfect, but whether the Holtec has adequately demonstrated its financial qualifications. Holtec's own submissions show that it simply has not done so.

25. Finally, Holtec criticizes Petitioners' reliance on the Continued Storage Rule for the undisputed proposition that "[s]pent fuel canisters and casks would be replaced approximately once every 100 years."[47] Holtec does not explain why it believes additional support beyond the Commission's own expert study would be necessary. Holtec then misrepresents the contents of the Continued Storage Rule's GEIS by arguing that construction of a Dry Transfer System and replacement of spent fuel canisters would not be required until 2181, at the end of the long-term storage timeframe.[48] This is simply incorrect. For context, the Continued Storage Rule contemplates three storage scenarios: short-term, requiring on-site storage for no more than 60 years; long-term, requiring on-site storage for between 61 and 160 years; and indefinite, which, as the name suggests, would require indefinite on-site storage.[49] Consistent with the text of the Continued Storage Rule quoted above, the GEIS estimates that long-term storage would require "one-time replacement of ISFSIs and spent fuel canisters and casks," and that an indefinite scenario would require "replacement of ISFSIs and spent fuel canisters and casts every 100 years."[50] That is precisely what Petitioners represented in their moving papers. Still, Holtec has declined to consider this contingency, which the Commission has described as "very possible."[51]

26. Without any genuine defense for their assumption regarding DOE's acceptance of spent fuel, the Applicants are left with the claim that any error in their calculations is not material,

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[47] 79 Fed. Reg. at 56,245.

[48] Answer at 15–16.

[49] GEIS § 1.8.2.

[50] *Id*.

[51] *In re Entergy Nuclear Vermont Yankee, LLC, And Entergy Nuclear Operations, Inc.*, No. 15-940-03-LA-BD01, 2015 WL 5883370, at *12 ("[I]ndefinite storage of spent fuel on-site is a very possible outcome").

principally because (1) Holtec may recover additional funds from DOE for failing to accept spent fuel, and (2) NRC would have ongoing regulatory authority over Holtec. As to its first point, Holtec has taken great pains to claim its potential recovery from the DOE to bolster its financial suitability, yet Holtec has curiously declined to include that same recovery in its cost estimates and has steadfastly *refused* to commit to reinvesting that money back into the DTF to offset its spending on spent fuel management. Holtec asserts that its decision not to include its potential DOE recovery in its cost estimate proves that its forecast is conservative.[52] In reality, Holtec has adopted this strategy for one reason: to increase its own profits.

27. The Commission's own regulations bar Holtec from spending trust funds on spent fuel management costs.[53] Yet under Holtec's one-sided approach, Holtec would be permitted to spend freely from the *publicly funded* DTF to cover spent fuel management costs — costs that legally should be borne by the DOE, not the DTF — only to then retain any recovery secured from the DOE through litigation or settlement. In other words, Holtec would be free to spend public money on spent fuel management and then line its own pockets once it recovers those funds from the DOE. To rectify this inequity, the Commission must, at a minimum, condition granting the Exemption Request by requiring Holtec to reinvest any DOE recovery back into the DTF.

28. Holtec also relies throughout its Answer on the notion that the "NRC's comprehensive and rigorous oversight of [trust] funds and disbursements" makes up for any inadequacy in its own projections.[54] To support this view, Holtec relies exclusively on two cases: a 2016 *Vermont Yankee* decision and a 2019 *Oyster Creek* decision.[55] But those cases do not

[52] Answer at 31–32.

[53] 10 C.F.R. § 50.82(a)(8)(i)(A).

[54] *Id.* at 9, 16, 18, 30, 34, 36.

[55] *Vermont Yankee*, CLI-16-17, 84 NRC at 118 (noting the NRC's regulatory authority may rebut a "general claim that Entergy's proposed expenditures will prematurely deplete the fund"); *see also Exelon Generation*

purport to hold, nor could they hold, that the NRC's generic regulatory authority washes away all manner of sins. Rather, those cases refer to the Commission's ongoing regulatory authority in response to generalized, unsupported concerns over the adequacy of decommissioning funds.[56] That is not this case. The Commission may not require mathematical precision in reviewing decommissioning cost estimates, but at the very least an application must contain plausible assumptions and forecasts sufficient to generate public confidence in a licensee's ability to protect public health and safety. Holtec has not met that burden.

HDI's Cost Estimate Does Not Account for Unanticipated Costs

29. In their moving papers, Petitioners identified several categories of unanticipated costs that could significantly deplete the DTF and hinder Holtec's ability to safely decommission the IPEC. Specifically, Petitioners identified an existing plume of radiological contamination in the groundwater at the IPEC, the unknown status of non-radiological contamination at the Site, and the potential for a radiological accident to delay Holtec's aggressive decommissioning timeline.[57]

30. The Applicants' lengthy rebuttal on this point fails for one simple reason: they do not and cannot dispute the fact that Holtec has not conducted *any* on-site study of the nature and extent of radiological and non-radiological contamination at the IPEC, and they have not adequately accounted for the possibility that their cost projections could underestimate actual on-site contamination.

Co. (Oyster Creek Nuclear Generating Station), CLI-19-06, 90 NRC __, __, 2019 WL 2632851 (June 18, 2019) (slip op. at 13) (rejecting intervention where the proposed intervenor failed to "identify any particular financial data that it considers necessary yet finds missing from the application" and asserted only "generalized concerns . . . such as normal increased overhead costs").

[56] *Id*.

[57] *See* Petition at 16–20.

31. Rather than defending this decision outright, Holtec spends pages and pages documenting its due diligence efforts and the historical records it reviewed. In doing so, Holtec concedes that it has not taken the straightforward, common-sense step of conducting a site-characterization on the IPEC. The only defense Holtec can muster is that NRC's guidance does not expressly state whether on-site characterization of contamination is required.[58] But that is beside the point. The question presented is whether Petitioners have demonstrated a genuine dispute about Holtec's financial projections and, thus, its qualification to hold the IPEC licenses.[59] Petitioners' limited submission is not that an on-site characterization is required in every case, but that Holtec's particular cost projections do not adequately account for the possibility that an on-site characterization will reveal additional contamination beyond that contained in the historical record.

32. Rather than engaging with Petitioners' claim directly, Holtec brushes aside Petitioners' concerns as "purely speculative."[60] But there is nothing speculative about the existing plume of tritium and strontium-90 contamination in the groundwater at the IPEC. Nor is there anything speculative about the extensive non-radiological contamination at the Site, as documented by the State of New York's Petition to Intervene in this matter.[61] Nor is it speculative to raise the possibility of a radiological accident causing, at the very least, an expensive delay in decommissioning operations; indeed, Holtec has already experienced an incident at another facility

[58] Answer at 24

[59] *Seabrook Station, Unit 1*, 49 N.R.C. at 221 ("Always in question under section 50.33(f)(2) is whether the Applicant's cost and revenue estimates are reasonable.").

[60] Answer at 17–18.

[61] Petition of the State of New York for Leave to Intervene and for a Hearing at 23–26.

involving a Holtec employee that resulted in significant delays.[62] And as the Commission has already recognized, cost overruns caused by unanticipated contamination are commonplace in decommissioning operations.[63] Taken together, Petitioners have adequately raised several unanalyzed, non-speculative cost-overrun scenarios.

33. These errors are compounded by the fact that, as Holtec concedes in its Answer, its so-called "contingency allowance" does not actually account for unanticipated costs. As explained in the Petition, Holtec admits that it expects its contingency allowance to be "fully consumed" during the decommissioning process.[64] Holtec offers no response to this charge. Because Holtec's contingency allowance accounts only for costs it expects to incur, the allowance cannot cure Holtec's decision not to account for the cost-overrun scenarios described herein.

34. More fundamentally, Petitioners are not asking for absolute precision or an account of every conceivable cost. Petitioners, as representatives of the local communities surrounding the IPEC, ask only that Holtec's Decommissioning Cost Estimate provide a realistic outlook for the IPEC's financial picture based on "plausible assumptions and forecasts."[65] In arguing that Petitioners' have failed to demonstrate their Contentions, Holtec confuses the pleading requirements with the ultimate question of whether Holtec has adequately demonstrated financial assurances sufficient to protect public health and safety. But this is a question for a hearing, not a

[62] Ltr. from NRC, to Southern California Edison Company, *Revised NRC Special Inspection Report 050-00206/2018-005, 050-00361/2018-005, 050-00362/2018-005, 072-0041/2018-001 And Revised Notice of Violation*, San Onofre Nuclear Generating Station, EA-18-155, at 1 (Dec. 19, 2018) (ADAMS Accession No. ML18341A172).

[63] *In re Entergy Nuclear Vermont Yankee, LLC*, No. 15-940-03-LA-BD01, 2015 WL 5883370, at *11 (citing expert report outlining experience at other nuclear facilities that "have historically led to enormous escalations in decommissioning costs" (internal quotation marks omitted)).

[64] PSDAR at 95.

[65] *Seabrook Station*, 49 N.R.C. at 221–22.

question of contention admissibility. Petitioners have identified specific, non-speculative costs that could prematurely deplete the DTF. This Contention "lie[s] at the core of the NRC's license transfer inquiry."[66] The Commission "cannot brush aside such economically based safety concerns without giving [Petitioners] a chance to substantiate its concerns at a hearing."[67]

Holtec's Corporate Structure Raises Significant Concerns About Its Financial Suitability

35. For the reasons explained in detail in the Petition, Holtec's corporate structure, lack of independent assets or revenue streams, and inexperience raises genuine concerns about its ability to safely decommission the IPEC.

36. Without disputing any of the facts raised in the Petition, the Applicants downplay their significance by noting that several limited liability companies hold operating licenses to nuclear facilities, and by arguing that NRC Staff have recently approved two "license transfer application for closed or closing nuclear generating plants where the transfer applicants relied exclusively on the [trust funds] to establish their financial qualifications." This argument misstates Petitioners' concerns. It is the *combination* of Holtec's corporate structure, which is designed to avoid liability and maximize profits, coupled with Holtec's sole reliance on the DTF that raises a red flag. Taken together, these two facts present a serious risk that, if the DTF proves inadequate, the LLCs can simply declare bankruptcy and walk away from the IPEC, having used up the only source of funds dedicated to decommissioning the IPEC. The only examples the Applicants can cite that have sanctioned such an arrangement have been approved only by NRC Staff, not the Commission itself.[68] The fact that this type of arrangement continues to present grave concerns

[66] *Id.* at 219.

[67] *Id*. at 222.

[68] *See* Oyster Creek License Transfer Safety Evaluation Report at 7-10 (June 20, 2019) (ML19095A457); Pilgrim License Transfer Safety Evaluation Report at 7-15 (Aug. 23, 2019) (ML19235A300). Notably, Holtec was the proposed license holder in both cases.

to States and local communities, despite the NRC's Staff's apparent lack of concern, is a weakness of the Applicants' submission, not a strength.

37. Next, the Applicants repeat their claim that potential future recoveries from the DOE bolster Holtec's financial qualifications. For the reasons explained above, this argument cannot bear the weight the Applicants assign to it.

38. Finally, the Applicants maintain that Holtec is financially and technically qualified to decommission the IPEC, without having ever successfully decommissioned a nuclear facility, principally because Holtec subsidiaries "are now NRC licensees for two plants undergoing active decommissioning: Pilgrim Nuclear Power Station and Oyster Creek Nuclear Generating Station."[69] HDI has also entered into agreements with Entergy to purchase the Palisades nuclear facility and the Big Rock Point Spent Fuel Storage Installation in Michigan.[70] Here again, the fact that Holtec would be responsible for decommissioning a fleet of nuclear facilities across several states raises additional red flags. The Commission should hesitate before placing such wholesale reliance on a single company, not to mention one with no record of successfully decommissioning a nuclear facility.

39. For these reasons, Holtec has not demonstrated that it is financially qualified to hold the Indian Point licenses under 10 C.F.R. § 50.33(f)(2), which requires an applicant to "submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license."

[69] Answer at 32–33.

[70] Our Fleet, Holtec Decommissioning International, https://hdi-decom.com/our-fleet/.

The Unconditional Exemption Request Creates Dangerous Incentives that the Commission Is Uniquely Positioned to Regulate

40. Initially, the Applicants do not dispute that the structure of this transaction incentivizes Holtec to cut corners to permit Holtec to retain as much of the DTF as possible once decommissioning operations are complete. Nor do the Applicants refute the allegation that this incentive structure presents genuine public health and safety concerns.

41. Rather than engage with these concerns directly, the Applicants sidestep the issue by arguing that the Exemption Request raises no problem because the NRC has ongoing regulatory authority over Holtec. For the reasons explained above, this argument cannot cure fundamental deficiencies in an application. If it could, Holtec could evade even the most basic regulatory requirements simply by pointing to its annual reporting obligations or the NRC's authority to place financial conditions on its use of the DTF sometime in the future.

42. Even more troublingly, the Applicants insist that Petitioners' proposed license conditions are outside the scope of NRC's authority, arguing that the New York Public Service Commission is the entity designed to regulate in the public interest. But the Applicants fail to mention that they have urged the New York PSC to **disclaim jurisdiction over the proposed transfer**. Specifically, the Applicants have argued, in public filings with the New York PSC, that "[b]ecause the proposed transfers will take place after all units [of the IPEC] have been permanently retired, the Transfers are not subject to Commission jurisdiction."[71] This type of litigation behavior suggests that Holtec is seeking to evade all regulatory authority over the proposed transaction. Indeed, if Holtec has its way, it will receive *no meaningful regulation* to align its incentives with the public health and safety from the NRC or the NY PSC.

[71] Attachment A at 34.

43. Moreover, the conditions proposed in the Petition — capping the profits Holtec can extract from the DTF, requiring that those funds be returned to the local community, and imposing financial assurance mechanisms like parent company guarantees — are well within the Commission's authority. Indeed, the Applicants do not dispute the Commission's broad prerogative to impose license conditions.[72] The license conditions proposed in the Petition would align Holtec's incentives to encourage the safe, prompt, and responsible decommissioning of the IPEC. This fits comfortably within the Commission's obligation to ensure that the proposed transfers "provide adequate protection to the health and safety of the public."[73]

44. At the contention admissibility stage, Petitioners are simply required to make "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate."[74] Petitioners' "pleadings, and the Applicants' own vigorous responses, demonstrate that a genuine dispute exists regarding this issue."[75] Nothing more is required at this stage.

B. Petitioners Have Raised a Dispute of Material Fact as to Whether the Commission May Grant the Application Without Additional Review Under NEPA

45. For its second Contention, Petitioners argue that the Commission may not grant the License Transfer Application in its current form without conducting additional review under NEPA. The Applicants' belated submission of the Exemption Request and its accompanying Environmental Assessment does not change that fact, and the Applicants' responses in their Answer do not effectively refute the points raised in the Petition.

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[72] Petition at 30.

[73] 42 U.S.C. § 2232(a).

[74] *In re Gulf States*, 40 N.R.C. at 51, 53 (internal quotation marks omitted).

[75] *Seabrook Station, Unit 1*, 49 N.R.C. at 219.

46. First, the Applicants appear to dispute the notion that the Commission must collectively review all aspects of the proposed transaction — including the License Transfer Application, PSDAR, and Exemption Request. Specifically, the Applicants seek to divide their submission into three parts, arguing that the License Transfer Application is subject to a categorical exclusion, that "no environmental assessment of the PSDAR [is] required," and that the NRC will review the Exemption Request "in a separate licensing action." The Applicants' analysis is fundamentally flawed because it ignores the Commission's statutory obligation to review related components of an application together.[76] Thus, contrary to the Applicants' suggestion, Petitioners do not claim that the PSDAR itself requires independent review under NEPA.[77] Rather, all that Petitioners ask is that the Commission consider the entire scope of the proposed transaction, including the Exemption Request and the PSDAR, in determining whether the categorical exclusion that ordinarily applies to license transfers is appropriate in this case. Both Commission precedent[78] and NEPA itself[79] require as much.

[76] Petition at 37.

[77] *See Vermont Yankee*, CLI-16-17, 84 NRC at 124.

[78] *See In re Entergy Nuclear Vermont Yankee, LLC*, No. 15-940-03-LA-BD01, 2015 WL 5883370, at *7 (noting exemption requests that are "directly related" to a license amendment must be considered together). Here again, the Applicants reliance on *Vermont Yankee* is misplaced. That case holds only that the filing of a PSDAR does not require "a separate NEPA review"; it does not hold that the Commission must blind itself to the cost estimates contained in the PSDAR in discharging its obligation to review other aspects of the proposed transaction, including the License Transfer Application and the Exemption Request. *See Vermont Yankee*, CLI-16-17, 84 NRC at 124.

[79] *See, e.g.*, *Delaware Riverkeeper Network*, 753 F.3d at 1314 ("The justification for the rule against segmentation is obvious: it prevents agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." (internal quotation marks and alterations omitted)).

47. Relatedly, Petitioners are not challenging the NRC's categorical exclusion rule.[80] Rather, the Petition is quite clear that Petitioners simply challenge whether the categorical exclusion for license transfers applies here.[81] As the Petition explains, granting the License Transfer Application seeks to transfer the operating licenses and DTF from Entergy to Holtec. As part of that transaction, Holtec has asked the Commission to grant the Exemption Request to permit Holtec to spent trust funds on non-decommissioning activities. For the reasons explained both in the Petition and herein, approving those requests poses a substantial, unanalyzed risk that a shortfall in the DTF could cause significant environmental harms. Put in terms of NEPA, approving these directly related transactions presents "reasonably foreseeable" environmental risks that the Commission must consider before approving the License Transfer Application.[82]

48. The Applicants attempt to placate these concerns by noting that the NRC will review the newly minted Environmental Assessment "in due course in a separate licensing action."[83] But this answer falls flat for at least three reasons. First, submitting the Environmental Assessment the exact same day as the Commission's deadline to submit petitions to intervene creates the appearance that the Applicants are seeking to evade scrutiny of their environmental review documents.[84]

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[80] 10 C.F.R. § 51.22(c)(21) (creating categorical exclusion, absent special circumstances, for "[a]pprovals of direct or indirect transfers of any license issued by NRC and any associated amendments of license required to reflect the approval of a direct or indirect transfer of an NRC license").

[81] Petition at 39 ("[T]he expanded scope of the proposed license transfer constitutes a 'special circumstance' that renders inapplicable the categorical exclusion for ordinary license transfers.").

[82] *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 113, 119 (2d Cir. 2013).

[83] Answer at 38.

[84] Despite the fact that the Applicants filed the Environmental Assessment *the same day* as the deadline to submit an intervention petition, the Applicants repeatedly criticize Petitioners for "fail[ing] even to acknowledge the environmental assessment in the Exemption Request." Answer at 42. For obvious reasons, Petitioners could not have addressed the Environmental Assessment in their initial filing.

49. Second, EA itself does not consider or analyze the reasonably foreseeable possibility of significant cost overrun scenarios. The EA, which includes just over two pages of analysis, largely rests on the premise that "[t]he proposed action involves exemptions from requirements that are of a financial or administrative nature and that do not have an impact on the environment."[85] Here again, and consistent with the representations contained in the Applicants' Answer, Holtec implies that any shortfall in the DTF can be addressed through the Commission's ongoing supervisory and regulatory authority to require "additional financial assurance."[86] Yet Holtec does not explain what additional financial assurances the Commission might impose, nor how the Commission could obtain financial assurances if the Holtec LLCs go bankrupt.

50. Third, as the Applicants themselves eagerly point out, "exemption requests are not subject to a hearing opportunity under the" AEA.[87] Thus, delaying consideration of these environmental impacts would not only violate NEPA, it would prevent the public from having a meaningful opportunity to participate in the license transfer process, of which the Exemption Request is an integral part.

51. Finally, Petitioners separately argued in the Petition that the environmental threats identified in the PSDAR are not bounded by prior environmental impact review.[88] Specifically, the Applicants have not considered the reasonably foreseeable environmental impacts of a depletion of the DTF or the potential for climate change to affect the decommissioning process. The first of these arguments rests on the analysis contained in Contention I, *supra*. As to the

[85] Exemption Request, Enclosure § 7.A.3.

[86] *Id*.

[87] Answer at 3 (quoting *Vermont Yankee*, CLI-16-17, 84 NRC at 115).

[88] *See* 10 C.F.R. § 50.82(a)(4)(i) (requiring PSDAR to include "a discussion that provides the reasons for concluding that the environmental impacts associated with site-specific decommissioning activities will be bounded by appropriate previously issued environmental impact statements").

potential threats of climate change, the Applicants have offered no response to the charge that prior environmental review did not specifically consider how the increased frequency and intensity of extreme weather events would affect decommissioning, spent fuel management, and site restoration at the IPEC. Indeed, the Applicants acknowledge that hurricane-associated precipitation will increase as a result of climate change, but do not defend the fact that prior environmental review did not consider the effect of that increase on the decommissioning process.

52. The Applicants' final defense seems to be that "[n]either NRC regulations nor regulatory guidance contains . . . a requirement" that "the PSDAR must address the impacts of climate change."[89] But NEPA is an independent statute with its own body of law that requires consideration of climate change in environmental impact review.[90] Put differently, Petitioners' point is simply that the environmental risk of decommissioning, spent fuel management, and site restoration could be exacerbated by climate change, and existing environmental review has not considered those effects.

[89] Answer at 44.

[90] *See Brodsky*, 704 F.3d at 119 (explaining NEPA requires "agencies contemplating 'major [f]ederal actions significantly affecting the quality of the human environment' to prepare an Environmental Impact Statement ('EIS') demonstrating agency consideration of the reasonably foreseeable environmental effects" (quoting 42 U.S.C. § 4332(2)(C))).

CONCLUSION

For the reasons outlined in the Petition and further supported herein, the Commission should grant Petitioners' request to intervene in this proceeding and promptly schedule a hearing to address the Contentions raised herein.

Respectfully submitted,

Daniel Riesel

Signed (electronically) by

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UNITED STATES OF AMERICA
NUCLEAR ENERGY REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of	:	
	:	Docket Nos.
ENTERGY NUCLEAR OPERATIONS, INC.;	:	50–003
ENTERGY NUCLEAR INDIAN POINT 2, LLC;	:	50–247
ENTERGY NUCLEAR INDIAN POINT 3, LLC;	:	50–286
HOLTEC INTERNATIONAL; AND HOLTEC	:	72–051
DECOMMISSIONING INTERNATIONAL, LLC;	:	
CONSIDERATION OF APPROVAL OF	:	
TRANSFER AND CONTROL OF LICENSES	:	
AND CONFORMING AMENDMENTS	:	
	:	
(Indian Point Nuclear Generating Station)	:	

CERTIFICATION OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that copies of the Reply Memorandum in Further Support of the Petition for Leave to Intervene and Hearing Request in the above-captioned proceeding were served via the NRC's Electronic Information Exchange on this 20th day of March, 2020.

Executed in Accord with 10 CFR 2.304(d)

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