

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK,

Petitioner,

v.

UNITED STATES NUCLEAR
REGULATORY COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

Case No. **21-1037**

**UNOPPOSED MOTION OF ENTERGY NUCLEAR OPERATIONS,
INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, ENTERGY
NUCLEAR INDIAN POINT 3, LLC, HOLTEC INTERNATIONAL,
AND HOLTEC DECOMMISSIONING INTERNATIONAL, LLC
FOR LEAVE TO INTERVENE**

Pursuant to Federal Rule of Appellate Procedure 15(d) and D.C. Circuit Rule 15(b), Entergy Nuclear Operations, Inc. (“ENOI”), Entergy Nuclear Indian Point 2, LLC (“ENIP2”), Entergy Nuclear Indian Point 3, LLC (“ENIP3”) (the “Entergy entities”), Holtec International (“Holtec”), and Holtec Decommissioning International, LLC (“HDI”) (the “Holtec entities”) (together with the Entergy entities, “Movants”) respectfully move for leave to intervene as party-respondents in the above-captioned matter. Respondent U.S. Nuclear Regulatory Commission, by its counsel

Andrew P. Averbach, has indicated that the NRC does not oppose Movants' intervention. Petitioner State of New York ("New York"), by its counsel, Joshua M. Tallent, has indicated that New York does not oppose the motion.

In support of the motion, Movants state as follows:

Background

1. The NRC was created to regulate the activities addressed in the Atomic Energy Act of 1954 ("AEA") and "to ensure the safe use of radioactive materials for beneficial civilian purposes while protecting people and the environment." United States Nuclear Regulatory Commission, *About NRC* (Feb. 8, 2021), <https://www.nrc.gov/about-nrc.html>. In this role, the NRC issues, amends, and oversees licenses for nuclear plant owners and operators.

2. Indian Point Energy Center ("IPEC") is located in Buchanan, New York, and consists of three pressurized water nuclear reactors (Unit 1 ("IP1"), Unit 2 ("IP2"), and Unit 3 ("IP3")) and an Independent Spent Fuel Storage Installation ("ISFSI") that are licensed and regulated by the NRC. (Herein, "NRC" refers to the agency, as distinguished from the Presidentially-appointed "Commission" and the "NRC Staff").

3. ENIP2 is the NRC-licensed owner of IP1 and IP2; ENIP3 is the NRC-licensed owner of IP3; and both are generally licensed under NRC regulations to possess the shared IPEC ISFSI.

4. ENOI is the NRC-licensed operator for the IPEC facilities.

5. IP1 ceased power operations on October 31, 1974; IP2 ceased power operations on April 30, 2020; and, by letter dated February 8, 2017, ENOI notified the NRC that it had decided to permanently cease power operations at IP3 by April 30, 2021.

6. Decommissioning a nuclear power plant is a process that commences at the end of the plant's power generation life and concludes with the restoration of the site for future use. *See generally* 10 C.F.R. § 50.2. The process of decommissioning the site includes permanently removing the plant from power generation service, defueling the reactor, transferring spent nuclear fuel to dry cask storage, decontaminating the site, and site restoration.

7. In order to effectuate expedited decommissioning of IPEC, ENIP2 and ENIP3 entered into a purchase and sale agreement whereby, after IP3 ceases power operations in April 2021, each will transfer its

respective interests in IPEC to new entities that will be acquired by a subsidiary of Holtec (the “Transaction”).

8. On November 21, 2019, Movants filed a License Transfer Application (“LTA”) with the NRC seeking regulatory consents to complete the Transaction. Specifically, the LTA sought NRC approval of: the transfer of control of the IPEC licenses from ENIP2 and ENIP3 to certain subsidiaries of Holtec following permanent shutdown of IP3 ; the transfer of authority to conduct licensed activities at IPEC from ENOI to HDI, a wholly-owned subsidiary of Holtec formed to decommission nuclear plants; conforming administrative amendments to the facility licenses to reflect the license transfers; and the deletion of certain license conditions no longer applicable as a result of the license transfers.

9. Among other things, the NRC’s license transfer regulations require applicants to demonstrate that they are technically and financially qualified to conduct the radiological activities that would be authorized by the NRC license. *See generally* 10 C.F.R. § 50.80.

10. On January 23, 2020, the NRC published a notice in the *Federal Register* inviting public comments on the LTA. *See* 85 Fed. Reg. 3947 (Jan. 23, 2020).

11. On February 12, 2020, New York and certain other parties filed, with the Commission, petitions requesting the NRC to convene a formal evidentiary hearing (“Hearing Requests”) to adjudicate certain proposed challenges to the LTA (“Contentions”). Specifically, New York’s Contentions alleged that Holtec and its subsidiaries were not financially qualified to conduct the radiological activities that would be authorized by the NRC license.

12. Also on February 12, 2020, HDI submitted to the NRC a request for an exemption from certain NRC regulations related to the use of monies in the nuclear decommissioning trust funds for spent fuel management activities at IPEC (“Exemption Request”).

13. On March 9, 2020, Movants filed answer pleadings opposing each of the Hearing Requests on the ground that none of the proposed Contentions satisfied the NRC’s threshold requirements for convening a formal evidentiary hearing.

14. On March 24, 2020, New York filed a motion seeking leave to amend two of its proposed Contentions (“Motion to Amend”).

15. On April 20, 2020, Movants filed an answer pleading opposing New York's Motion to Amend on the ground that it failed to satisfy the NRC's attendant "good cause" standard for such amendments.

16. On November 23, 2020, following the NRC Staff's review of the LTA, but before the Commission ruled on the Hearing Requests, *see* 10 C.F.R. § 2.1327, the NRC Staff issued an order approving the LTA, pending the closing of the Transaction, and subject to the Commission's authority to rescind, modify, or condition the transfer based on the subsequent disposition of the Hearing Requests and any potential evidentiary hearing. *See* Pet., Ex. B; Order Approving Transfer of Licenses and Draft Conforming Administrative License Amendments (Nov. 23, 2020) (*see also* 85 Fed. Reg. 76,626 (Nov. 30, 2020)).

17. Also on November 23, 2020, the NRC Staff issued an order granting the Exemption Request. *See* Pet., Ex. C; Order Granting HDI Exemption Request (Nov. 23, 2020) (*see also* 85 Fed. Reg. 76,113 (Nov. 30, 2020)).

18. On January 15, 2021, the Commission issued a 76-page order declining to convene a formal evidentiary hearing. Specifically, the Commission held that none of the proposed Contentions satisfied the

NRC's stringent threshold requirement for convening a formal evidentiary hearing, and that New York's Motion to Amend failed to satisfy the NRC's "good cause" standard. Thus, it denied the Hearing Requests and Motion to Amend. *See* Pet., Ex. A; NRC Memorandum and Order CLI-21-01 (Jan. 15, 2021).

19. On January 22, 2021, New York petitioned this Court for review of: NRC Staff's order approving the LTA; NRC Staff's order approving the Exemption Request; and the Commission's order denying the Hearing Requests and Motion to Amend.

20. As of the date of this Motion, the Transaction has not yet closed, and thus the NRC has not yet amended the IPEC licenses to transfer control or operational authority from the Entergy entities to Holtec and its subsidiaries.

21. This Court has routinely permitted intervention by the owners and operators of nuclear power plants in cases where petitioners seek to challenge NRC actions concerning the plant. *See, e.g., Safe Energy Coalition of Mich. v. U.S. Nuclear Regulatory Comm'n*, 866 F.2d 1473 (D.C. Cir. 1989); *see also In re: Friends of the Earth, et al.*, No. 16-

1189, Order Granting Mot. to Intervene, ECF No. 1620139 (D.C. Cir. 2016).

22. In November 2019, this Court permitted ENOI and the Holtec entities to intervene in a different proceeding in which a state petitioned to challenge an NRC order approving a license transfer for a different nuclear plant. *See Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Comm'n*, No. 19-1198, Order Granting Mot. to Intervene, ECF No. 1814533 (D.C. Cir. 2019). Movants respectfully request that they be allowed to intervene here.

Grounds for Intervention

23. Rule 15(d) states that a motion to intervene “must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.” Fed. R. App. P. 15(d). To satisfy this rule, a prospective intervenor must “simply . . . file a motion setting forth its interest and the grounds on which intervention is sought.” *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991). Since Rule 15(d) “provides no standard for resolving intervention questions,” appellate courts have identified two considerations: “first, the

statutory design of the act and second, the policies underlying intervention in the trial courts pursuant to Fed. R. Civ. P. 24.” *State of Tex. v. U.S. Dep’t of Energy*, 754 F.2d 550, 551 (5th Cir. 1985) (internal citation omitted); *see also Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 517-18 (7th Cir. 2004).

24. Under Federal Rule of Civil Procedure 24, this Court has held that “qualification for intervention as of right depends on the following four factors: (1) the timeliness of the motion; (2) whether the applicant ‘claims an interest relating to the property or transaction which is the subject of the action’; (3) whether ‘the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest’; and (4) whether ‘the applicant’s interest is adequately represented by existing parties.’” *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)); *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233-34 (D.C. Cir. 2003). Movants satisfy these requirements, as explained below.

The Motion Is Timely

25. This motion is timely because it has been filed within “30 days after the petition for review [was] filed.” Fed. R. App. P. 15(d); *see also Ala. Power Co. v. I.C.C.*, 852 F.2d 1361, 1367 (D.C. Cir. 1988).

Movants Have A Significant Interest In The Transaction That Is The Subject Of The Petition

26. Movants are the entities that asked for, and received, NRC approval to transfer ownership and operating authority (and ancillary approvals) from Entergy entities to Holtec entities for the purpose of expedited decommissioning and a return to beneficial use of the site and its resources. Movants have substantial interests in whether the transfers are allowed to stand.

27. NRC approval of the transfer will allow the Movants to proceed with executing Holtec’s expedited decommissioning plan for IPEC and begin realizing the respective benefits from aligning the risks and potential benefits associated with that decommissioning with their respective business goals and expertise. As a result, Movants clearly have a significant interest in the Transaction that is the subject of Petitioner’s challenge.

Disposition Of The Petition May As A Practical Matter Impair Or Impede the Movants' Ability to Protect That Interest

28. New York seeks, in its petition, a review of NRC rulings and processes relating to the transfers. If this Court were to overturn or forestall these actions or find the NRC's processes improper, the transfers would be affected.

29. As discussed above, if this Court were to grant the relief Petitioner seeks, it would, as a practical matter, adversely affect the benefits that Movants have already realized and expect to realize in the future as a result of the Transaction.

The Federal Agency Respondent May Be Unable To Represent The Movants' Unique Interests Adequately

30. A prospective intervenor's burden of showing inadequate representation "is not onerous," as it "need only show that representation of [its] interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

31. Although Movants are aligned with the NRC insofar as the NRC staff approved the LTA and the NRC Commissioners denied New

York's Hearing Request, Movants may have a unique perspective to offer beyond that of the NRC insofar as they are (or will be) the operating and owning entities with respect to IPEC. Movants may have different interests from the NRC in this litigation, beyond the shared interest of preserving the NRC regulatory framework and decision-making process, particularly with respect to which parties remain the owners and licensees of IPEC and the regulatory conditions imposed in connection with the same. As a result, the NRC may not adequately represent Movants' interests.

32. To ensure that Movants' participation as intervenors is helpful to the Court, Movants will endeavor to coordinate with the NRC to avoid duplicative briefing and to ensure that Movants focus on arguments and/or background facts that the NRC may not address.

WHEREFORE, Movants respectfully request that the Court grant Movants' leave to intervene as parties-respondents.

Dated: February 18, 2021

Respectfully submitted,

By /s/ Brad Fagg

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**ADDENDUM—CERTIFICATE OF PARTIES AND
CORPORATE DISCLOSURE STATEMENTS**

Pursuant to Federal Rule of Appeal Procedure 26.1 and D.C. Circuit Rule 26.1, Holtec International and Holtec Decommissioning International, LLC represent as follows:

Holtec International is a Delaware corporation engaged principally in the business of providing equipment, systems, and services to the nuclear industry throughout the world. Holtec International has no parent company, and no publicly-held company directly or indirectly holds a 10 percent or more equity interest in Holtec International.

Holtec Decommissioning International, LLC is a Delaware limited liability company engaged principally in the business of operating and decommissioning shutdown nuclear power plants. Holtec Decommissioning International, LLC is a direct, wholly-owned subsidiary of Holtec Power, Inc., which in turn is a direct, wholly-owned subsidiary of Holtec International.

Pursuant to Federal Rule of Appeal Procedure 26.1 and D.C. Circuit Rule 26.1, Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC represent as follows:

Entergy Nuclear Operations, Inc. is a Delaware corporation engaged principally in the business of operating nuclear power facilities owned by its affiliates in the northeastern United States. Entergy Nuclear Operations, Inc. is a direct, wholly-owned subsidiary of Entergy Nuclear Holding Company #2 and an indirect wholly-owned subsidiary of Entergy Corporation (NYSE: ETR). No other publicly-held company directly or indirectly holds a 10 percent or more equity interest in Entergy Nuclear Operations, Inc.

Entergy Nuclear Indian Point 2, LLC is a Delaware limited liability company formed to hold the assets related to Indian Point Unit 1 and Unit 2. Entergy Nuclear Indian Point 2, LLC is a direct subsidiary of and partially owned by Entergy Power BJE Holding, Inc. and Entergy Nuclear Holding Company #3, LLC. Entergy Power BJE Holding, Inc. is a direct, wholly-owned subsidiary of Entergy Power Investment Holding, Inc. and an indirect, wholly-owned subsidiary of Entergy Corporation. Entergy Nuclear Holding Company #3, LLC is a direct, wholly-owned subsidiary of Entergy Nuclear Holding Company, LLC and an indirect, wholly-owned subsidiary of Entergy Corporation.

No other publicly-held company directly or indirectly holds a 10 percent or more equity interest in Entergy Nuclear Indian Point 2, LLC.

Entergy Nuclear Indian Point 3, LLC is a Delaware limited liability company formed to hold the assets related to Indian Point Unit 3. Entergy Nuclear Indian Point 3, LLC is a direct, wholly-owned subsidiary of Entergy Nuclear New York Investment Company, LLC and an indirect wholly-owned subsidiary of Entergy Nuclear Holding Company #1. Entergy Nuclear Holding Company #1, LLC is a direct subsidiary of and partially owned by Entergy Global, LLC and Entergy Corporation. Entergy Global, LLC is a direct, wholly-owned subsidiary of Entergy International Holdings LLC and an indirect wholly-owned subsidiary of Entergy Corporation. No other publicly-held company directly or indirectly holds a 10 percent or more equity interest in Entergy Nuclear Indian Point 3, LLC.

In addition, pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), the undersigned counsel certifies that no parties appeared before a district court; and all parties, intervenors, or amici in this Court (Case No. 21-1037) are as follows:

- Parties: State of New York (Petitioner); U.S. Nuclear Regulatory Commission and the United States of America (Respondents);
- Intervenors (Motion Pending): Entergy Nuclear Operations, Inc.; Entergy Nuclear Indian Point 2, LLC; Entergy Nuclear Indian Point 3, LLC; Holtec International; and Holtec Decommissioning International, LLC; and
- Amici: None.

/s/ Brad Fagg
Brad Fagg

Dated: February 18, 2021

CERTIFICATE OF SERVICE

I, Brad Fagg, a member of the Bar of this Court, hereby certify that on February 18, 2021, I electronically filed the foregoing “UNOPPOSED MOTION OF ENTERGY NUCLEAR OPERATIONS, INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, ENTERGY NUCLEAR INDIAN POINT 3, LLC, HOLTEC INTERNATIONAL, AND HOLTEC DECOMMISSIONING INTERNATIONAL, LLC, FOR LEAVE TO INTERVENE” and the Addendum thereto, “CERTIFICATE OF PARTIES AND CORPORATE DISCLOSURE STATEMENTS” with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate ECF system.

/s/ Brad Fagg

Brad Fagg

Dated: February 18, 2021