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RE: Request that NRC either cancel or open entirely for public viewing the March 20, 2023 meeting with Holtec Decommissioning International, LLC

Dear Ms. Doell and Mr. Poole:

I'm writing on behalf of Beyond Nuclear and Don't Waste Michigan, two nonprofit organizations, to request that the forthcoming March 20, 2023 meeting scheduled between the NRC Staff and representatives of Holtec Decommissioning International, LLC to discuss regulatory "paths" to reopening the Palisades Nuclear Plant for operations be canceled for reasons detailed below. If you will not cancel the meeting, then we request that it be opened, 100%, to observation by the public as there should be no information that could be classified as "proprietary" related to this topic.

As you are likely aware, Holtec is seeking at least \$1.2 billion in Civil Nuclear Credit ("CNC") subsidies from the U.S. Department of Energy ("DOE") to restore Palisades to fission operations. Palisades does not qualify for such corporate welfare under the Infrastructure Investment and Jobs Act ("IIJA"), and any regulatory path that might result from NRC Staff collaboration with Holtec, short of treating Holtec's expected request to reopen as an application for a wholly-new license, would violate the Atomic Energy Act.

Congress intended the IIJA to support only currently operating commercial nuclear reactors that face termination of operations for economic reasons. The IIJA also mandates that the NRC provide legal assurances as part of the DOE's determination of Palisades' eligibility under the IIJA.

I. The IIJA Contemplates CNC Subsidies For Operating Reactors Only

Nowhere does the Infrastructure Act, codified at 42 U.S.C. § 18753, vest discretion in the Secretary of Energy to consider an already-closed commercial nuclear reactor for receipt of Civil

Nuclear Credits. The IIIA clearly allows subsidy only of operating commercial nuclear reactors, and Palisades isn't an operating reactor. Palisades permanently ended power generation activities on May 20, 2022. Its entire inventory of nuclear fuel was unloaded from the reactor core on June 10, 2022 by its former owner, Entergy. Permission to operate the reactor was formally terminated by the U.S Nuclear Regulatory Commission (NRC). On June 13, 2022, Entergy, the then-owner of PNP, sent the NRC a letter entitled "Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel."¹ Upon the docketing of these certifications, PNP's 10 CFR Part 50 operating license no longer authorized operation of the reactor, nor placement or retention of fuel in the reactor vessel. Holtec has been actively decommissioning Palisades and is expending money from the Palisades Decommissioning Trust Fund,² following the NRC's December 2021 grant of permission allowing it to be drawn upon without prior notification to the agency.³ Holtec International has been spending money from the Decommissioning Trust Fund since at least late June 2022⁴ to decommission the plant.

II. The Applicant Reactor Must Be Operating, and Projected To Cease Operations Due to Economics

According to 42 USC § 18753(b)(1), the DOE Secretary is ordered to "establish a civil nuclear credit program . . . to evaluate *nuclear reactors that are projected to cease operations due to economic factors. . .*" (Emphasis added). Palisades is not "projected" to cease operations. It has already ceased operations, nearly ten months ago already.

III. Palisades Cannot Meet NRC Requirements For Subsidy

The IIIA sets out factors at 42 USC § 18753(c)(2) that DOE must consider before it can certify a reactor to receive the credits. Palisades meets none of them.

A. The NRC Cannot Give 'Reasonable Assurance' Of Palisades' Continued Compliance With Its Current Licensing Basis

Subsection 18753(c)(2)(A)(ii)(III)(aa) mandates that "the Nuclear Regulatory Commission has reasonable assurance that the nuclear reactor will continue to be operated in accordance with the current licensing basis (as defined in section 54.3 of title 10, Code of Federal Regulations (or successor regulations) of the nuclear reactor." The NRC cannot provide

¹ The June 13, 2022 Certifications letter is available online at <https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML22164A067>

² Palisades Site-Specific Decommissioning Cost Estimate, <https://holtecinternational.com/wp-content/uploads/2022/06/HDI-Palisades-PSDAR.pdf> at p. 46.

³ NRC Exemption granted to Palisades, ADAMS No. ML21286A506 at p. 10, <https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML21286A506>

⁴ Holtec Decommissioning International (HDI) predicted that it would be expending DTF funds by the time the license transfer from Entergy to HDI was completed, which transfer was completed on June 28, 2022. See *Entergy Nuclear Operations, Inc., Entergy Nuclear Palisades, LLC, Holtec International and Holtec Decommissioning International, LLC* (Palisades Nuclear Plant and Big Rock Point Site), 95 NRC ___, CLI-22-08 at 38 (July 15, 2022).

this assurance since Palisades is closed. The phrase “current licensing basis” is a term of art⁵ and on its face contemplates an operating reactor. To require Palisades to “continue” to be operated in accordance with its current licensing basis is a nonsensical requirement because *it is not operating*. Palisades has no permission to conduct power generation operations and lacks a licensing basis that encompasses power generation.

B. The NRC Cannot Reasonably Assure That Palisades Poses No Significant Safety Hazards

Subsection 18753(c)(2)(A)(ii)(III)(bb) mandates that “the Nuclear Regulatory Commission has reasonable assurance that the nuclear reactor poses no significant safety hazards.” The NRC cannot provide the DOE Secretary with reasonable assurance that there are no significant safety hazards. To the contrary, Palisades poses significant safety hazards, whether or not the plant can ever be restored to fission operations. Those include circumstances of severe, advanced reactor pressure vessel embrittlement, decades of nagging control rod drive mechanism and mechanism seal failures, long-overdue needed replacement of steam generators and reactor vessel closure head, emplacement of irradiated fuel dry storage casks on below-regulation concrete pads, a defective dry cask that has remained fully loaded for nearly three decades despite initial owner assurances to the contrary, and more.

Indeed, Palisades limped across the finish line to permanent closure on May 20, 2022 – 11 days early – because of the latest control rod drive mechanism seal failure amidst dozens in its history.⁶

IV. A Private Meeting of NRC Staff with Holtec Is Improper and Legally Unsupportable

Despite the clear legal findings the NRC must make under the Act, and the inevitability that the NRC cannot affirmatively provide the above reasonable assurances, the NRC Staff, the regulator, has indicated its willingness to collaborate with Holtec, the regulated reactor owner, to fabricate a path to a license for Palisades to operate again. We consider the very fact that a meeting is being called to discuss Holtec’s February 2023 proposed regulatory pathway, and that the meeting is likely to be conducted outside the observation of the public, as an admission that the agency is considering a procedure other than treating Palisades as needing a completely new operating license in order to return to operations.

The NRC doesn’t have regulations that explicitly encompass reopening of a permanently shut down nuclear reactor. Thus, any relicensing path that would be agreed by the NRC or its Staff would be *ad hoc* and would comprise, in effect, a legislative or

⁵ 10 C.F.R. § 54.3: *Current licensing basis* (CLB) is the set of NRC requirements applicable to a specific plant and a licensee's written commitments for ensuring compliance with and operation within applicable NRC requirements and the plant-specific design basis (including all modifications and additions to such commitments over the life of the license) that are docketed and in effect.

⁶ Press Release, “Entergy’s Palisades Team Finishes Strong As Facility Shuts Down,” <https://www.energynewsroom.com/news/entergy-s-palisades-team-finishes-strong-as-facility-shuts-down/> (May 20, 2022).

executive enactment by the Staff. If by its action the agency intends to create new rights or duties, the rule is properly considered to be a legislative rule which can be created only in the way set forth in the federal Administrative Procedure Act. *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (citations omitted), *cert. denied*, 471 U.S. 1074, 105 S.Ct. 2153, 85 L.Ed.2d 509 (1985). Any interpretation of the Atomic Energy Act (“AEA”) the NRC Staff uses to authorize the licensing of Palisades to operate anew will likely materially change the express and implied meanings of the AEA, the National Environmental Policy Act (“NEPA”), and possibly the IIJA, and so cannot stand. *United Technologies Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C. Cir. 1987); *Fertilizer Institute v. U.S.E.P.A.*, 935 F.2d 1303, 1308 (D.C. Cir. 1991).

Agencies have only those powers given to them by Congress, and “enabling legislation” is generally not an “open book to which the agency [may] add pages and change the plot line.” E. Gellhorn & P. Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999). The courts presume that “Congress intends to make major policy decisions itself, not leave those decisions to agencies.” *West Virginia v. U.S. Environmental Protection Agency*, 597 U.S. ___, WL 2347278, 2022 U.S. LEXIS 3268 (2022) (citing *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*)). The NRC must have “clear congressional authorization” to create a special licensing path for Palisades. *Id. Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014). By contrast, the NRC Staff is poised to directly cobble such a path together, in collaboration with the regulated beneficiary, and to do so in private. Beyond Nuclear and Don’t Waste Michigan and their respective members in the immediate vicinity of Palisades object to the apparent intentions of the NRC Staff and Holtec.

The Nuclear Regulatory Commission is supposedly there to regulate the nuclear power industry, not to conspire with it to thwart the Atomic Energy Act’s requirements that public health and safety and environment are paramount. Please either cancel the March 20, 2023 meeting entirely and advise Holtec to apply for a new license, or open up the full duration of the meeting so the public can be informed at the earliest time what is at stake, and what regulatory path to reactor restart at Palisades is being contemplated.

Thank you.

Sincerely,

/s/ Terry J. Lodge

Terry J. Lodge, Esq.

Counsel for Beyond Nuclear and
Don’t Waste Michigan