

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of)	
Holtec Decommissioning International, LLC)	Docket No. 50-255-ER
)	
(Palisades Nuclear Plant Request for)	
Exemption))	
)	

**PETITIONERS’ MEMORANDUM IN OPPOSITION TO HOLTEC MOTION FOR
SECRETARY ORDER DENYING PETITION FOR A HEARING ON EXEMPTION**

Now come Beyond Nuclear, Michigan Safe Energy Future, and Don’t Waste Michigan, Intervenor herein (“Petitioners”), by and through counsel, and state their opposition to Holtec Decommissioning International, LLC’s (“Holtec”) “Motion for Secretary Order Denying Beyond Nuclear et al.’s Petition for a Hearing on an Exemption Request.”

Holtec’s motion should be denied for a couple of reasons. It is a procedural nullity. If the Secretary or Commissioners of the Nuclear Regulatory Commission entertain the motion on the merits, then they must determine whether granting the requested exemption¹ would change or amend the present Palisades license (which is for possession only). And if it causes a change or amendment to the present license, the Commission must deny Holtec’s motion and set the matters raised by Petitioners for a trial on the merits.

I. Introduction

Palisades began producing electricity in 1971 under an operating license granted by the Atomic Energy Commission. The operating license was renewed in 2006 to authorize operation through 2031. In 2016, Entergy, then-owner of Palisades, decided to cease operations by 2018,

¹ Letter, “Palisades Nuclear Plant - Request for Exemption from Certain Termination of License Requirements of 10 CFR 50.82” (“Exemption Request”),
<https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML23271A140>

which cessation it later moved back to May 2022. On May 20, 2022, Entergy finally closed Palisades and placed the plant into decommissioning status. Entergy certified, pursuant to 10 C.F.R. § 50.82(a)(1)(i), that power operations ceased at Palisades on May 20, 2022. Then, pursuant to 10 C.F.R. § 50.82 (1)(a)(ii), the fuel was permanently removed from the Palisades reactor vessel and placed in the spent fuel pool on June 10, 2022.² Entergy’s June 13, 2022 certification of these two acts to the NRC simultaneously and permanently terminated the Palisades reactor license as an operator’s license.³ Holtec seeks an “exemption” from the requirements of 10 CFR § 50.82 so as to reverse the operating license termination as a matter of administrative paperwork. The Petitioners maintain that the licensure of Palisades to operate must start at the beginning of the NRC procedure, with the submission of a completed operating license application which would then be processed by NRC staff reviews. Holtec itself agrees that if the exemption is denied, its plan to restart Palisades fails.

On October 6, 2023, Holtec’s Exemption Request first publicly appeared in the NRC’s ADAMS archive. Then, on December 5, 2023, Petitioners filed their ““Petition for Leave to Intervene and Request for Hearing.”” On December 11, 2023, Holtec filed the motion bringing this matter before the Secretary and/or Commissioners.

II. Holtec’s Motion Is Procedurally Inappropriate and a Nullity

NRC regulations do not provide for the filing of threshold motions or objections. This is a bright-line precept in NRC litigation practice.

NRC regulations do not recognize an objection or motion to dismiss at this stage; 10 CFR § 2.309(i) states as follows:

² “Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel,” Letter, June 13, 2022, <https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML22164A067>

³ Exemption Request, p. 3.

(i) *Answers to hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline.* Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request, petition, or motion—

(1) The applicant/licensee, the NRC staff, and other parties to a proceeding *may file an answer to a hearing request, intervention petition, or motion for leave to file amended or new contentions* filed after the deadline in § 2.309(b) within 25 days after service of the request, petition, or motion. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (h) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under § 52.103 of this chapter, the participant who filed the hearing request, intervention petition, or motion for leave to file new or amended contentions after the deadline may file a reply to any answer. The reply must be filed within 7 days after service of that answer.

(3) *No other written answers or replies will be entertained.*

(Emphasis supplied).

The regulation clearly limits Holtec’s options at this point to answering a hearing request, intervention petition or motion for leave to file amended or new contentions. A motion to dismiss here is a procedural anomaly.

In *Holtec International* (HI-STORE Consolidated Interim Storage Facility), 89 NRC 353, LBP-19-4 (May 7, 2019), the licensing board had this to say about an “objection” that a petitioner wrote at the beginning of their petition for leave to intervene:

Joint Petitioners also include an “objection” in their initial petition and move “for the dismissal and termination of this licensing proceeding.” Joint Pet’rs Pet. at 24–25. They allege that “there is no federal authorization for the Holtec CISF” because “neither Part 72 nor the NWPA [Nuclear Waste Policy Act] authorize” it, and the proposed facility does not fall under the NRC’s definition of an independent spent fuel storage installation under 10 C.F.R. § 72.3. *Id.*

The Board overrules the objection. As explained in the Commission Secretary’s Order denying Beyond Nuclear and Fasken’s substantially similar motions to dismiss, the NRC’s regulations do not provide for the filing of threshold motions or objections. See Order Denying Motions to Dismiss. Even if Joint Petitioners had made this argument in the form of a contention, we would not admit it for the same reasons we do not admit Beyond Nuclear’s contention and Sierra Club Contention 1.

Id. at 89 NRC 426, fn. 476. As the ASLB noted in the above ruling, the NRC Secretary earlier in the same litigation had denied threshold motions to terminate the proceeding brought by other intervenors as being procedurally inapropos.⁴

HDI may not move for dismissal at this juncture, but must answer the Petition fully according to the explicit instructions set forth in 10 CFR § 2.309(i).

III. The Exemption Would Change or Amend the Present Palisades License

Petitioners concur that 10 CFR § 2.346(h) authorizes the NRC Secretary to “(h) Deny a request for hearings, where the request fails to comply with the Commission's pleading requirements set forth in this part, and fails to set forth an arguable basis for further proceedings. . . .” But Petitioners have an “arguable basis for further proceedings.” While the Atomic Energy Act (“AEA”) does not grant a hearing right on exemption requests, what Holtec seeks is not a *bona fide* exemption request, but is, instead, a license amendment. The test is found in the very decision cited by Holtec, *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 N.R.C. 90 (2009). The Commission in *Commonwealth Edison* explicitly held that only a “pure” exemption was immune from a demand for a hearing. *Id.* at 51 NRC 91.

The requested exemption at issue in *Commonwealth Edison* was relief from the need to comply with five separate provisions of 10 C.F.R. § 73.55 that pertain to protecting nuclear reactors against sabotage. ComEd asked to implement a revised “defueled physical security plan” which it asserted would be more appropriate for a permanently shut down and defueled facility.

Reciting the history of § 189 of the AEA, the Commission noted:

The upshot of this history is that Congress intentionally limited the opportunity for a hearing to certain designated agency actions — that do not include exemptions. Thus, we continue to regard our previous analysis of the question whether

⁴ <https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML18302A328>

a person is entitled to a hearing regarding a request for an exemption from NRC regulations as valid. As Senator Hickenlooper pointed out, the statute “clearly specifies the type of circumstance in which hearings are to be held.” *Id.* Unless the exemption in question here can be properly characterized as one of these “circumstances,” Petitioners have no right to a hearing.

In *Commonwealth Edison*, the Commission held that it “must address whether the requested Zion exemption, regardless of its label, somehow constitutes an action for which a hearing is required, *i.e.*, whether the exemption is in effect an amendment of the facility license or modification of the rules and regulations dealing with the activities of licensees.” *Id.* at 51 NRC 96. The Commission also considered and applied *Commonwealth of Massachusetts v. NRC*, 878 F.2d 1516 (1st Cir. 1989), where the First Circuit Court of Appeals had ruled that the NRC’s grant of an exemption did not constitute a license amendment. In 1989, the NRC granted Boston Edison an exemption from the requirement in 10 C.F.R. Part 50, App. E, to conduct a biennial full-participation emergency preparedness exercise at the Pilgrim facility, and did not offer a hearing. Massachusetts challenged the exemption, arguing that it constituted an amendment to the Pilgrim license and that the AEA required the NRC to hold a prior hearing. 878 F.2d at 1519. The appellate court rejected the state’s argument, noting that although the Boston Edison license required Boston Edison to operate in accordance with NRC regulations, the exemption was granted pursuant to another NRC regulation, 10 C.F.R. § 50.12, also in Part 50, the source of the requirement from which Pilgrim was being exempted. Thus, the Court noted, “The exemption did not change Edison’s duty to follow NRC rules; it only changed which rule applied for a brief period of time. Edison was thus operating in accordance with its unaltered license.” 878 F.2d at 1521.

The Commission in *Commonwealth Edison* assessed that “the grant of this exemption does not change or amend the Zion license or modify the Commission’s regulations, and accordingly a hearing is not required in this case.” *Id.*, 51 NRC 97.

Beyond Nuclear, Michigan Safe Energy Future and Don’t Waste Michigan maintain that the exemption sought by Holtec is indeed a “circumstance” listed in § 189 that would “change or amend” the Palisades license or modify Commission regulations. Specifically, Holtec’s exemption would “modify” its possession-only license. *Id.* Holtec seeks a sweeping exemption from the licensing requirements of the AEA that are explicitly assigned to the NRC, whose mission is to enforce licensing requirements governing inherently dangerous radioactive operations.

Holtec says as much in its exemption request:

Specifically, HDI is requesting an exemption from 10 CFR 50.82(a)(2) to allow for a one-time rescission of the PNP docketed 10 CFR 50.82(a)(1) certifications submitted on June 13, 2022 (Reference 1), to remove the restrictions that prohibits operation of the PNP reactor or emplacement or retention of fuel into the PNP reactor vessel. *The proposed exemption would allow resumption of power operations at PNP after U.S. Nuclear Regulatory Commission (NRC) approval of operating authority transfer and the license amendments necessary to reinstate the PNP Renewed Facility Operating License (RFOL) power operations license basis (POLB).*⁵

Holtec wants to be exempted from prospectively having to live with the limitation of its license capability to “possession only,” *i.e.*, that it may only safekeep the radioactive fuel in its possession and has no authority to fuel and operate the Palisades reactor. There is an option available for Holtec, *viz.*, applying for a new operating license, but Holtec is trying to leapfrog over the rigors of that process, even though Holtec has zero prior experience operating a commercial nuclear power reactor, much less restarting a reactor that has been permanently shut down. Unlike the *Commonwealth of Massachusetts* or *Commonwealth Edison* cases, if the NRC

⁵ “Request for Exemption,” p. 6/143 of .pdf.

grants the exemption Holtec is pursuing, it would change or amend the Palisades license and modify the Commission's regulations, and accordingly a hearing is required. Moving from possession-only to an operating license is the most momentous change imaginable. Granting the exemption would modify the Commission's regulations by setting a precedent that there is no finality to defueling and shutdown certifications and changes in license types.

What Holtec proposes here is not an exemption at all, but instead, an ill-concealed license amendment. It is plant-specific ("HDI is requesting an exemption from 10 CFR 50.82(a)(2) to allow for a one-time rescission of the PNP docketed 10 CFR 50.82(a)(1) certifications"⁶). While the grant of an exemption from a generic requirement does not constitute an amendment to the reactor's license that would trigger hearing rights *Kelley v. Selin*, 42 F.3d 1501, 1517 (6th Cir. 1995), presumably the converse is also true: that the site-specific "exemption" sought by Holtec is evidence that the true nature of Holtec's request is a license amendment.

IV. Conclusion

When one reads all of the formal adjudications and court decisions on the topic of NRC exemptions, what is striking is that all of them involve limited work authorizations or one-time waivers of emergency plan drills or waivers of strict adherence to security protocols for a reactor which no longer contains fuel. The reversal of a decision to surrender an operating license – a decision tantamount to being awarded an operating license – is not within the contemplation of the exemption rule. The exemption being sought is an exemption from the core function of the Atomic Energy Act over commercial nuclear power – safe regulation in the interest of the public health and safety. The unprecedented nature of the exemption being sought, the astronomical cost to the public (\$4.5 billion and counting), and the very high risk to health, safety, security, and the environment (given Palisades' very troubled safety-significant systems, structures, and

⁶ "Request for Exemption," p. 6/143 of .pdf.

components' status, made worse by lack of maintenance since shut down), should preclude a Palisades restart via a mere exemption loophole and a mere paperwork reshuffle. Exemptions are for short-duration bypasses of NRC regulations, or for construction of nonnuclear parts of a plant, not for reversing a major licensing event. The costs and risks can't be overstated. This request for permission to restart is a major change, deserving of full-blown "from scratch" licensing proceedings, as NRC Commissioner Crowell himself phrased it just ten months ago.⁷

One need look no further than the convoluted pathway to regulatory restart Holtec has been finessing through multiple semi-public meetings since March 2023 to understand that Palisades is wholly inappropriate for an exemption. The NRC Staff has occasionally expressed confusion or surprise at Holtec's suggestions, possibly because they find it hard to bypass the conventional aspects of regulation for an aged reactor with known accumulated problems that is sponsored by a company with no prior reactor operation nor reactor restart experience. This exemption scheme is not consistent with the Atomic Energy Act and its regulations. Palisades falls well outside all historic applications of the exemption rule. Holtec is attempting to save a great deal of money by an end-around of the Atomic Energy Act. It is unlawful and dangerous.

WHEREFORE, Petitioners pray that the Secretary and/or the Nuclear Regulatory Commissioners deny Holtec's motion as a procedural anomaly; or that the Commission find and declare that Holtec's request for an exemption is actually a request for a change or amendment to the present possession-only license for Palisades and that Holtec's "Motion for Secretary Order" be denied accordingly.

⁷ www.exchangemonitor.com/nuclear-renaissance-now-or-never-30-minutes-with-bradley-crowell-commissioner-nuclear-regulatory-commission/

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CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305, I hereby certify that copies of the foregoing "Memorandum in Opposition to Motion for Secretary Order" were served upon the Electronic Information Exchange (NRC Filing System) in the captioned proceeding this 13th day of December, 2023 and that according to the protocols of the EIE they were served upon all parties registered with the system.

Respectfully submitted,

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