

Attachment 4

DEP Appeal and Request for Stay

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March 2, 2020

**VIA HAND DELIVERY
and CERTIFIED MAIL, Return Receipt Requested**

Case Administrator
Office of Appeals and Dispute Resolution
One Winter Street
Boston, MA 02108

Re: In the Matter of Entergy Nuclear Operations, Inc.
Holtec Pilgrim, LLC
OADR Docket No.s. 2020-004, 2020-005
Water Quality Certification
NPDES Permit No. MA0003557

To the Honorable Jane A. Rothchild:

In connection with the above-referenced matter, enclosed for filing please find the following documents:

1. A copy of the adjudicatory hearing fee transmittal forms for both Entergy and Holtec;
2. A copy of two checks, each made payable to the Department of Environmental Protection, and each in the amount of one hundred (\$100.00) dollars;
3. The Joint Response to Order for a More Definite Statement, Motion for a Stay & Motion to Add Holtec Decommissioning International, LLC, as a Necessary Intervener;
4. The Affidavit of Elise Zoli in Support of Joint Response to Order for a More Definite Statement, Motion for a Stay & Motion to Add Holtec Decommissioning International, LLC, as a Necessary Intervener;
5. Exhibits A-K to the Affidavit, which contains the New NPDES Permit therein; and
6. The Notice of Appeal of the National Pollutant Discharge Elimination System Permit, No. MA 0003557 ("New NPDES Permit")

Please do not hesitate to call should you have any questions.

Very truly yours,



Christopher Hurd

CH/mn

Enclosures

cc: Service List (via Certified Mail, Return Receipt Requested)

NAI-1511729561v1

COMMONWEALTH OF MASSACHUSETTS
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

In the Matter of
Entergy Nuclear Operations, Inc.
Holtec Pilgrim, LLC

OADR Docket Nos. 2020-004, 2020-005
Water Quality Certification
NPDES Permit No. MA0003557

Plymouth, MA

**JOINT RESPONSE TO ORDER FOR A MORE DEFINITE STATEMENT, MOTION
FOR A STAY & MOTION TO ADD HOLTEC DECOMMISSIONING
INTERNATIONAL, LLC, AS A NECESSARY INTERVENER**

The above-captioned, consolidated appeals concern challenges to two authorizations: (1) the Water Quality Certification (“WQC”) issued by the Massachusetts Department of Environmental Protection (“MassDEP” or the “Department”); and (2) the related renewed, jointly issued U.S. Environmental Protection Agency (“EPA”) and MassDEP National Pollution Discharge Elimination System Permit, Permit No. MA0003557 (“New NPDES Permit”), both for the Pilgrim Nuclear Power Station, located in Plymouth, Massachusetts (the “Station”).

On February 19, 2020, the Office of Appeals and Dispute Resolution (“OADR” or the “Tribunal”) ordered the parties to file a more definite statement as to whether the already necessarily consolidated appeals (because as the Tribunal properly observed, the WQC is incorporated into the NPDES Permit), and any additional New NPDES Permit appeal timely made by Entergy Nuclear Operations, Inc. (“ENOI”), the Holtec Entities (as defined below), or

others, should further be consolidated. This Tribunal also requested all parties' respective insights on whether, upon review of the final New NPDES Permit, the consolidated appeals to date should proceed, be stayed, or be dismissed.

ENOI's and the Holtec Entities' (collectively, "Appellants")¹ response to this Tribunal's Order follows in Section II, and underscores the appropriateness of consolidation of the WQC and New NPDES Permit appeals (collectively, the "Appeals"). The Appellants received the official, complete New NPDES Permit from EPA on February 5, 2020.² Based on Appellants' respective reviews, additional challenges to the New NPDES Permit are warranted. To that end, Appellants' joint Notice of Appeal (the "Notice") with respect to those additional matters in the New NPDES Permit is filed herewith, with all forms and fees contemporaneously submitted.

This response also confirms—likewise, in response to this Tribunal's Order—the appropriateness of a stay, and in the alternative constitutes Appellants' affirmative motion for stay of these Appeals. As detailed below in Section III and consistent with 310 CMR 1.01(5)(a), this motion is advanced for good cause, will avoid needless complexity in these Appeals, and will avoid the squandering of public and private resources that would result from this complexity, absent a stay. Briefly, these Appeals occur against the backdrop of active litigation

¹ The Holtec Entities are defined to include Holtec Pilgrim, LLC ("Holtec Pilgrim"), the current owner of the Station, and Holtec Decommissioning International, LLC ("HDI"), the current operator of the Station. HDI was not an original party to the initial WQC Appeal because it was not then known that EPA and MassDEP would identify it as the NPDES Permit permittee (since the Entergy and Holtec entities had requested issuance to Holtec Pilgrim, LLC). Nonetheless, HDI is now an essential party to these consolidated Appeals, as the EPA- and MassDEP-identified New NPDES Permit permittee. Therefore and to ensure consistency across these consolidated Appeals, by motion filed contemporaneously with this Notice, HDI seeks to join in to WQC Appeal as an intervenor party.

² The signature page of the New NPDES Permit is dated January 30, 2020. *See* Aff. Exhibit K, at 2. That Permit, however, is not yet effective, and even if unchallenged here would not be for sixty (60) days. *See* 314 CMR 2.08(3)(a); Aff. Exhibit J, at 1 (60 day delayed effect). By filing the Notice of Appeal of the New NPDES Permit with this Tribunal, the contested provisions of the New NPDES Permit, and the related unseverable portions, are automatically stayed, with the Current NPDES Permit controlling on such matters for the duration of these Appeals. *See* 314 CMR 2.08(3). As such, for all practical purposes for the foreseeable future, the Current NPDES Permit for which the former ENGCO is the permittee is and will be the operative authorization.

regarding the ownership and operation of the Station, as initiated in late 2019 by the Massachusetts Attorney General's Office ("AGO") before the Nuclear Regulatory Commission ("NRC") and the United States Court of Appeals for the D.C. Circuit in opposition to an equity transaction and the corresponding requests for direct and indirect changes in control of NRC licenses (collectively, the "AGO Litigation"). Reportedly owing to the AGO Litigation, MassDEP has declined to recognize the equity transaction and pending requests for a change in control involving the former Entergy Nuclear Generation Company ("ENGC"), now Holtec Pilgrim. Per the NRC licensing decisions being challenged in the AGO Litigation, Holtec Pilgrim and HDI are now the respective owner and operator of the Station.

Specifically and most relevant to these Appeals, MassDEP has declined to perform the minor permit amendment necessary to transfer control of the current NPDES Permit, last jointly issued by EPA and MassDEP in 1991 (the "Current NPDES Permit"), to a Holtec subsidiary and to reflect a name change from the former ENGC to Holtec Pilgrim. MassDEP also has issued the New NPDES Permit to HDI with a disclaimer regarding the equity transaction, NRC licensing process, and Holtec Pilgrim. These twin actions by MassDEP compel ENOI and the Holtec Entities to participate in these Appeals.³ As such, pursuant to 310 CMR 1.01(5)(a), and in the interests of efficiency and procedural coherence, the Appellants respectfully request that this Tribunal stay these Appeals until the final resolution of the AGO Litigation.

³ As detailed herein, Appellants also acknowledge both that the MassDEP apparently believes and, theoretically, it is possible that the AGO Litigation may alter the respective rights and responsibilities of both the Entergy and the Holtec Entities with regard to the Station and, therefore, their positions in these Appeals.

I. BRIEF FACTUAL AND PROCEDURAL OVERVIEW

Appellants respectfully submit that this response and motion requires an understanding of the basic facts, which are provided here. A more fulsome statement of the relevant facts are provided in the Affidavit of Elise N. Zoli, Esq., attached hereto as Exhibit 1 (the “Aff.”).

A. **Holtec Pilgrim acquired 100% of the former ENGC’s Equity, effecting a change in corporate control of the official permittee of the Current NPDES Permit.**

The former ENGC was the official permittee on the Current NPDES Permit. *See* Aff. Exhibit B (Current NPDES Permit, cover page reflecting ENGC as permittee). ENOI was an operating affiliate for the former ENGC, and is the operating entity for other Entergy nuclear owners and power stations. *See* Aff. ¶ 1.

As the permittee, the former ENGC, with the requisite Holtec Entities, timely and sufficiently requested that MassDEP acknowledge—through its customary, routine, minor permit-modification process of the Current NPDES Permit⁴—a transaction in which a Holtec subsidiary acquired 100% of the former ENGC’s equity, thus effecting a corporate change in control (the “Equity Transaction”). Specifically, on June 18, 2019, the former ENGC, ENOI, and the Holtec Entities advised EPA and MassDEP in writing of the upcoming Equity Transaction, providing all necessary information for EPA and MassDEP, respectively, to “perform an automatic transfer (federal parlance) and minor modification (Commonwealth parlance)” of the Current NPDES Permit to Holtec Pilgrim, including the proposed closing date. *See* Aff. Exhibit C. On August 23, 2019, the former ENGC and Holtec prospectively confirmed for EPA and MassDEP in writing the actual Closing date. *See* Aff. Exhibit D.

⁴ Federal NPDES law, and in Massachusetts 314 CMR 3.19(25)(c), respectively authorize automatic transfers and minor modifications of MassDEP NPDES permits, including for a change in control and name change, as here.

Closing of the Equity Transaction occurred on 11:59 pm, August 26, 2019 (the “Closing”). *See* Aff. Exhibit D, at 1. As of that Closing, Holtec Entities acquired control over the former ENGC.⁵ *See* Aff. Exhibit A. Accordingly, as of the Closing, no Entergy entity retained any ownership, operational authority or control over the Station. *See* Aff. Exhibit A. Effective September 6, 2019, the former ENGC’s name was changed to Holtec Pilgrim. *See* Aff. Exhibit A.

Contemporaneous with the Closing, EPA advised ENOI that it had granted the automatic transfer, as would be confirmed in the New NPDES Permit. *See* Aff. ¶ 7. The New NPDES Permit confirms as much: “By letter of August 23, 2019, Entergy notified EPA that this NPDES Permit was transferred to Holtec Decommissioning International (Holtec). *Entergy has satisfied the automatic transfer provision noted above.*” *See* NPDES New NPDES Permit, Response to Comment 1.2 (emphasis added), Aff. Exhibit K, at 251. Also contemporaneous with the Closing, MassDEP’s Current NPDES Permit point person advised ENOI that the minor modification approval would be granted. *See* Aff. ¶ 7. At no time prior to the Closing did MassDEP request any additional substantive information, express any substantive concern or impediment to the routine, minor modification request. *See* Aff. ¶ 7.

B. The AGO Litigation Effects.

After the Closing, the AGO Litigation was filed, with the AGO objecting in various federal tribunals and courts to the NRC transfer, e.g., in the U.S. Court of Appeals for the D.C. Circuit (D.C. Cir. Nos. 19-1198 and 20-1019). If MassDEP objected to the Equity Transaction,

⁵ ENOI, the former operating entity of the Station, is therefore the only remaining Entergy entity available to bring this appeal to safeguard Entergy’s rights in the face of MassDEP’s assertion that Entergy remains responsible for the Current NPDES permit as a matter of law. Applicable regulations authorize challenges by, and give differentiated rights to, permit applicants and permittees. *See, e.g.*, 314 CMR 2.08(5). The former ENGC and ENOI were the New NPDES Permit applicants and submitted all comments on the New NPDES Permit.

it could have joined the AGO litigation. It has not done so. Nonetheless, and despite the fact that EPA already had accepted the Equity Transaction in the respect to the very same, jointly issued NPDES permit, MassDEP changed course regarding its position on the routine, minor modification of that NPDES Permit. *See* Aff. Exhibit K, at 2 n.1.

Specifically, MassDEP indicated that: (1) MassDEP would not issue a routine, minor modification to the Current NPDES Permit acknowledging the transfer of control of the former ENG C to Holtec and the name change to Holtec Pilgrim; and (2) despite the transfer of control of the former ENG C, Entergy entities would remain responsible for the Current NPDES Permit as a matter of law. *See* Aff., Exhibit K. Indeed, the New NPDES Permit⁶, which was issued to HDI, contains an express MassDEP reservation regarding the Equity Transaction

(“Reservation”). The Reservation, echoed in the WQC, states as follows:

Massachusetts Department of Environmental Protection (MassDEP), by taking this action, does not acquiesce in or accept past or future decisions and actions of the Nuclear Regulatory Commission, including those of its staff, approving the direct and indirect transfer of the Pilgrim Renewed Facility Operation License DPR-35 and the general license for the Pilgrim Independent Spent Fuel Storage Installation (ISFSI) from Entergy Nuclear Operation Inc. and Entergy Nuclear Generation Company (*to be renamed Holtec Pilgrim, LLC*) to Holtec International and Holtec Decommissioning International, LLC. MassDEP takes this action in an abundance of caution to ensure protection of Massachusetts’ waters.

New NPDES Permit, Aff. Exhibit K, at 2 n. 1 (emphasis added).

⁶ This Tribunal correctly identifies that the New NPDES Permit reflects a signature date of January 30, 2020. However, the attached EPA cover letter circulating the actual, official New NPDES Permit, which was sent “Certified Mail – Return Receipt Requested” allowing effective tracking, is date-stamped February 3, 2020, when it was mailed to Appellants, and was received on February 5, 2020 by ENOI. *See* Aff. Exhibit J, at 1. Although Appellants were advised by EPA counsel on January 31, 2020 of imminent issuance of the New NPDES Permit, and electronically provided with a courtesy copy that afternoon, that courtesy copy was incomplete. *See* Aff. Exhibit I. Further, at 703 pages, even cursory consideration of the courtesy copy prior to the filing of the WQC Notice of Appeal was not possible or undertaken. *See* Aff. Exhibit K.

The Reservation is both unclear on its face and inaccurate, inasmuch as it incorrectly suggests that the Equity Transaction has not occurred (as it has), that Holtec Pilgrim is not the owner of the Station (as it is), or that Holtec Pilgrim is an inchoate or non-existing (“to be renamed”) entity (which it is not). *See* Aff. ¶ 3.

Entergy sought a rational resolution to this dynamic, proposing to MassDEP on January 31, 2020 a practical Memorandum of Understanding (“MOU”).⁷ This draft MOU stipulates that the MassDEP would conditionally approve the change in control of various MassDEP permits, including the Permits that are the subject of these Appeals, to Holtec Pilgrim, subject to the condition that the Permits will “immediately and automatically revert” to Entergy if: (a) the Massachusetts Attorney General prevails in the AGO Litigation; or (b) both ENOI and the Holtec Entities, on a consensus basis, request such a reversion. *See* Aff. Exhibit E. The draft MOU was later revised to include a stay of the WQC and New NPDES Permit proceedings, as their filings occurred. *See* Aff. Exhibit E. Although ENOI has diligently pursued this MOU since January 24, 2020, MassDEP has not provided a final approval or disapproval of the MOU. *See* Aff. ¶¶ 10-11.

C. Due to the procedural uncertainty, and in an abundance of caution, ENOI and the Holtec Entities jointly appealed the WQC and are filing herewith a Notice of Appeal of the New NPDES Permit.

ENOI’s status is at best limbo—according to its Commonwealth regulator, ENOI is responsible under the Current NPDES Permit for a Station over which it has no ownership or operational control, and is now forced to assess New NPDES Permit terms that it cannot reasonably ignore. Accordingly, on January 31, 2020, out of an abundance of caution, ENOI and

⁷ The draft MOU was submitted to MassDEP on confidential basis, and Appellants hereby request that this Tribunal recognize that status. *See* Aff. Exhibit E.

Holtec Pilgrim jointly appealed the WQC and, with HDI, hereby file their joint appeal of the New NPDES Permit. *See* Notice of Appeal of the New NPDES Permit, filed herewith.

II. RESPONSE TO ORDER.

Specifically and as set forth below, ENOI and the Holtec Entities (collectively, “Appellants”) hereby confirm the following:

1. As OADR indicated in its Order for a More Definite Statement, “The NPDES Permit incorporates the WQC and ‘[a]ll of the requirements (if any) contained in MassDEP’s water quality certification for the permit are hereby incorporated by reference into this state surface water discharge permit as special conditions pursuant to 314 CMR 3.11.’” As a result, Appellants confirm that the Tribunal appropriately consolidated and should adjudicate in one proceeding the WQC and New NPDES Permit.
2. In addition and in an abundance of caution, we file herewith and incorporate by reference Appellants’ Notice of Appeal of the New NPDES Permit. The Notice details the additional bases for challenging the New NPDES Permit, beyond the incorporation of the WQC language already addressed by this Tribunal.

Moreover, in the Order for a More Definite Statement, OADR requests the parties “explain[] and clarify[] whether these appeals should proceed, be stayed or be dismissed.” In response and as set forth below in Section III, Appellants hereby respectfully request that OADR stay these Appeals pursuant to 310 CMR 1.01(5)(a), pending resolution of the AGO Litigation.⁸

⁸ Recent conversations with MassDEP attorneys indicate that, although the Department may not acquiesce to a stay of the Appeals for the full duration of the AGO Litigation, MassDEP nonetheless agrees that the Appeals would be automatically stayed by Appellants’ appeal of the portions of the New NPDES Permit issued by EPA. *See* Aff. ¶ 19; *see also* 310 CMR s. 1.01(6)(h) (“Upon notice or motion by any party, the Department or the Presiding Officer shall stay administratively any appeal of a Surface Water Discharge Permit when the NPDES permit issued by the Environmental Protection Agency for the same discharge has been appealed under the federal Clean Water Act.”). Thus, there is a consensus that a stay is warranted, the duration of which is at least the period of the EPA proceedings.

During any such stay, as detailed below, Appellants welcome the opportunity to reconcile and ideally narrow the scope of the issues through Alternative Dispute Resolution, with Presiding Officer Jane Rothchild overseeing the process.

III. MOTION FOR STAY.

Per 310 CMR 1.01(5)(a), a Presiding Officer may stay appeals to avoid “unnecessary expenditure of the Department’s administrative resources, or for other good cause.” (Emphasis added.) Section 1.01(5)(a) is doubly applicable here, because good cause is readily established by the pendency of the AGO Litigation, and because a stay would prevent the possibility of unnecessary expenditures of Department resources. Further, such stays are routinely granted for a variety of reasons, including to allow the parties to engage in settlement negotiations, or allow matters before other tribunals to be adjudicated. *See, e.g., In the Matter of Thomas T. Mierze Jewski*, OADR Docket No. 2016-021 (June 3, 2019) (referencing a granted stay to allow parties to engage in settlement discussions); *In the Matter of Exelon West Medway, LLC and Exelon West Medway II, LLC*, OADR Docket No. 2017-001 (2017) (referencing a granted stay to allow a party to obtain a final decision under another law); *In the Matter of Boston Redevelopment Authority*, OADR Docket No. 2008-128 RM (2017) (referencing a prior order to stay pending the outcome of federal court litigation).

The AGO Litigation has driven MassDEP to decline to act on a routine, minor modification, the effect of which is to trap ENOI in these Appeals. Further, and without crediting the AGO Litigation, MassDEP’s position—in declining to release Entergy—appears to be that the AGO Litigation has the potential to substantially affect ENOI’s status with regard to the Station and these Permits, a position with which ENOI does not conceptually disagree. Given MassDEP’s position, it is inescapable that ENOI’s very presence here is a direct artifact of

the AGO Litigation, one that may alter the positions ENOI will take in these Appeals, and therefore required.

We see no measurable value to MassDEP or the environment of this Tribunal engaging with multiple, alternative or contingent permittees, with perhaps varying views, in these Appeals. The parties—and this Tribunal—deserve a process that allows a single permittee with definitive, unchallenged Station ownership and control to address the concerns on a critical authorization. Given that EPA and MassDEP have taken almost twenty years to issue the New NPDES Permit, which numbers 703 pages long (with its responses to comments), we see no reason that moving forward with alacrity despite the AGO Litigation is a credible or necessary proposition. *See* Aff. Exhibit K.

Conversely, if a stay is granted, the parties could engage in a meaningful discussion, including via alternative dispute resolution (“ADR”)⁹, regarding the contours of and potential changes to the New NPDES Permit, itself of value. Such discussions also could redress the dynamic created by MassDEP’s position on the minor modification request, including via the MOU. Thus, staying the Appeals not only may prevent the unnecessary expenditure of MassDEP resources on more substantive issues than necessary, it may avoid these Appeals altogether.

Finally, in the event a stay is not granted, ENOI hereby advises the Tribunal that it intends to challenge MassDEP’s decision not to grant the routine, minor permit modification related to the Equity Transaction as contrary to the letter and spirit of applicable law. Briefly, there can be no doubt that Appellants followed all regulatory guidance and made no missteps.

⁹ For these reasons and to be clear, during any stay, Appellants support the use of ADR, with Presiding Officer Jane Rothchild overseeing the same, consistent with 310 CMR 1.01(5)(a) and 1.01(5)(a)(15).

Indeed, the New NPDES Permit specifically records the adequacy of the former ENG C's and the Holtec Entities' submissions. *See* New NPDES Permit, Response to Comment 1.2, Aff. Exhibit K, at 251. Moreover, MassDEP never advanced any contention that the former ENG C's and the Holtec Entities' submissions were deficient, that more was needed or otherwise. To the contrary, MassDEP provide no indication that it intended to ignore the minor modification request or disregard the Equity Transaction until after the Closing of that Equity Transaction and the EPA's automatic transfer of the Current NPDES Permit. For all of these reasons, MassDEP's inaction on that routine, minor modification request is facially improper.¹⁰

IV. MOTION TO ADD HDI AS A NECESSARY INTERVENER.

As noted in the WQC Appeal, contrary to applicable regulation, MassDEP did not identify the recipient of the WQC or, within the WQC, the entities that it designated as permittees. Aff. Exhibit G. Thus, at the time of the WQC Appeal, Appellants could not reasonably identify the challengers of that authorization. With issuance of the NPDES Permit, it is apparent that MassDEP has elected to identify HDI over Holtec Pilgrim as the permittee, both of which are challenging the NPDES Permit, per the NPDES Notice of Appeal. For this reason and to avoid confusion in the consolidated Appeals, Appellants hereby move to have HDI recognized and added as a necessary intervener in the WQC Appeal.

CONCLUSION

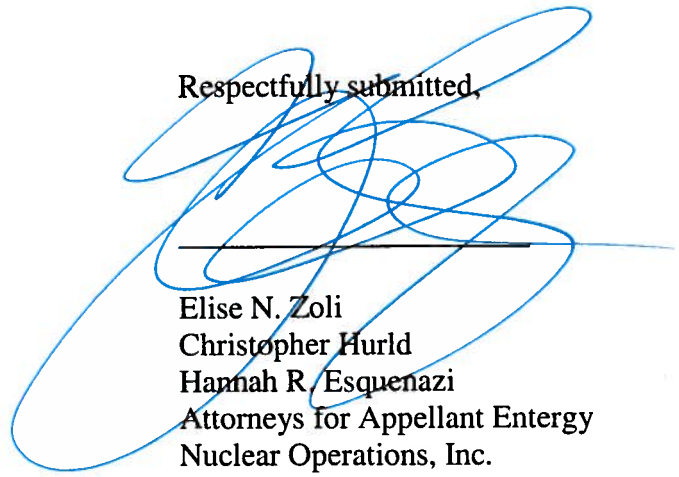
Appellants thank the Tribunal for the opportunity to clarify the facts and their positions in these Appeals. To that end, Appellants respectfully confirm, in response to this Tribunal's Order, that consolidation of the WQC and New NPDES Permit Appeals is appropriate, including

¹⁰ ENOI has on multiple occasions requested some indication that the MassDEP's action occurred, to no success. *See* Aff. ¶ 9.

based on a timely Notice of Appeal of the New NPDES Permit filed herewith. Separately, Appellants respectfully address the appropriateness of, and move for, a stay of these Appeals, pending resolution of the AGO Litigation, with appropriate ADR undertaken in the interim. Finally, Appellants move to include HDI in the WQC Appeal.

Dated: March 2, 2020

Respectfully submitted,

A large, stylized handwritten signature in blue ink, consisting of several overlapping loops and flourishes, positioned above a horizontal line.

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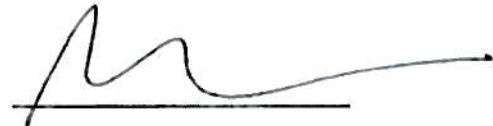
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Dated: March 2, 2020

Respectfully submitted,

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SERVICE LIST

IN THE MATTER OF:

**Entergy Nuclear Operations, Inc.
Holtec Pilgrim, LLC**

Docket Nos. 2020-004, 005

Plymouth

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

March 2, 2020

In the Matter of
Entergy Nuclear Operations, Inc.
Holtec Pilgrim, LLC

OADR Docket Nos. 2020-004, 2020-005
Water Quality Certification
NPDES Permit No. MA0003557

Plymouth, MA

**AFFIDAVIT OF ELISE ZOLI IN SUPPORT OF JOINT RESPONSE TO ORDER FOR A
MORE DEFINITE STATEMENT, MOTION FOR A STAY & MOTION TO ADD
HOLTEC DECOMMISSIONING INTERNATIONAL, LLC, AS A NECESSARY
INTERVENER**

I, Elise Zoli, declare as follows:

1. I was counsel for the former Entergy Nuclear Generation Company (“ENGC”), and remain counsel for the former ENGC’s operating entity, Entergy Nuclear Operations, Inc. (“ENOI”). ENGC was the former owner of the Pilgrim Nuclear Power Station (the “Station”) and the former permittee on several, relevant governmental authorizations, including the Water Quality Certification (“WQC”) and the National Pollutant Discharge Elimination System Permit, MA 0003557 (the “New NPDES Permit;” collectively, the “Permits”) that have been issued by the Massachusetts Department of Environmental Protection (“MassDEP”) (including jointly with the United States Environmental Protection Agency (“EPA”)) and are the subject of these Appeals. As the operating entity for former ENGC , ENOI and ENGC jointly applied for these authorizations,

submitted comments on them and engaged in ongoing discussions with regulators with respect to the permits held by and on behalf of the former ENGC.

2. The purpose of this affidavit is to clarify both: (1) the relevant entities and their roles in these Appeals, particularly in light of the history of the equity transaction transferring ownership and control of the Station; and (2) the timing of issuance of the New NPDES Permit.

ENERGY/HOLTEC TRANSACTION

3. On July 30, 2018, the former ENGC (and its direct parent Entergy Nuclear Holding Company #1) entered into an Equity Purchase and Sale Agreement with Holtec International and its subsidiary Nuclear Asset Management Company, LLC (“NAMCo”) for the sale of one hundred percent (100%) of the equity in the former ENGC to Holtec Entities (the “Equity Transaction”), and with that Equity Transaction ownership and control over the Station. Because the Station is a nuclear asset, the Equity Transaction was subject to Nuclear Regulatory Commission (“NRC”) review and approval, all of which occurred on August 22, 2019. Closing of the Equity Transaction occurred on 11:59 p.m., August 26, 2019 (“Closing”).
4. Importantly for purposes of these Appeals, the Equity Transaction effected a change in control—from ENGC to Holtec Pilgrim, LLC (“Holtec Pilgrim”), after a contemporaneous statutory-based conversion of the ENGC corporation to an LLC, effective on August 22, 2019, and a name change from ENGC to Holtec Pilgrim, LLC (via NAMCo), effective on September 6, 2019. *See* Certificate of Amendment, Exhibit A. In other words, as of that Closing and final name change, NAMCo acquired control over the former ENGC, initiated a name change to Holtec Pilgrim, and ENOI’s operating

authority was transferred to Holtec Decommissioning International, LLC (“HDI”).

Accordingly, ENGC no longer exists as an Entergy entity; and the sole surviving entity is Holtec Pilgrim. Thus, as of these dates, and with the NRC’s prior approval, Holtec Pilgrim became the owner of the Station. Likewise, as a result of the NRC’s approval, HDI became the licensed operating entity for the Station, replacing ENOI.

5. Before Closing, the former ENGC operated the Station subject to and with the benefit of the jointly issued NPDES Permit, issued April 29, 1991, held in the name of ENGC (“Current NPDES Permit”). *See* Current NPDES Permit, Exhibit B. As such, in connection with the Equity Transaction, Entergy and Holtec entities undertook to appropriately advise and, where necessary, obtain approvals from, all federal, state and local regulators to have authorizations related to the Station, reflecting the changes in control, LLC conversion, and name change resulting from the Equity Transaction. Except as enumerated herein, relative to MassDEP, all such approvals—even for the EPA’s portion of the jointly issued New NPDES permit—were obtained.
6. ENGC and Holtec Pilgrim undertook on a timely basis all necessary steps to obtain the MassDEP approvals for the change in control of the New NPDES Permit and WQC (among others). Specifically with respect to the New NPDES Permit, by correspondence, dated June 18, 2019, the Entergy and Holtec Entities jointly requested that EPA and MassDEP, respectively, perform an automatic transfer (federal parlance) or a minor modification (Commonwealth parlance) of the Current NPDES Permit. *See* June 18, 2018 Letter to EPA and MassDEP, Exhibit C; *see also* Current NPDES Permit, Exhibit B. In that correspondence, ENGC and Holtec specified the proposed Closing Date, and—as closing dates normally will shift, based on the timing of regulatory

approvals—committed to advise MassDEP of any such shifts. *See* June 18, 2018 Letter to EPA and MassDEP, Exhibit C; *see also* Current NPDES Permit, Exhibit B. On August 23, 2019, ENGC and Holtec confirmed the Closing date in writing to the EPA and MassDEP. *See* August 23, 2019 Letter to EPA and MassDEP, Exhibit D. In short, MassDEP had advanced notice of the Equity Transaction, and written confirmation of the Closing date.

7. At no time prior to the Closing did MassDEP request of the Entergy entities, or to our knowledge the Holtec entities, additional information, nor did MassDEP express or indicate any substantive concerns with, or suggest any impediment to the Equity Transaction with respect to what had been submitted that was not addressed, e.g., the date of the NRC approval. To the contrary, point persons for the respective authorizations confirmed MassDEP’s intent to approve them as the automatic or routine, minor approvals that they are. For instance, contemporaneously, EPA advised Entergy that it had granted the automatic transfer, that per EPA custom no letter would issue, but that the approval would be reflected in the New NPDES Permit, when it was issued, as in fact occurred (without reservation).
8. After Closing, the Massachusetts Attorney General’s Office (“AGO”) petitioned in multiple fora for several hearings, objecting to the NRC’s already-completed authorizations in connection with the Equity Transaction, with AGO-initiated proceedings currently pending before: (a) the NRC; (b) the U.S. Court of Appeals for the D.C. Circuit (D.C. Cir. No. 19-1198), in which NRC and U.S. are respondents, and certain Entergy and Holtec entities are intervener-respondents; and (c) the U.S. Court of Appeals for the D.C. Circuit (D.C. Cir. No. 20-1019), in which NRC and the U.S. are

respondents, and certain Entergy and Holtec entities have moved to intervene as intervener-respondents (collectively, the “AGO Litigation”).

9. Thereafter, MassDEP reversed its position that it would issue a routine, minor amendment, indicating instead that—owing to the AGO-initiated MAG Action—MassDEP would not recognize the change in control, and that in MassDEP’s view Entergy entities remained on and are responsible for the Permits, despite the fact that Entergy possessed neither ownership, nor control over the Station and its Permitted activities.
10. To resolve the matter, we endeavored, on behalf of Entergy, to draft a functional resolution with MassDEP, set forth in the attached Memorandum of Understanding (“MOU”), one that was respectful of the Commonwealth’s position. *See* MOU, Exhibit E. ENOI’s efforts to advance a resolution, and commitment to this process, are reflected in ongoing communications with MassDEP and our meeting with a MassDEP representative to go over the MOU, which we provided in a written form on January 24, 2020. I repeatedly have inquired regarding the MOU’s status, and requested coordination across MassDEP. *See* Emails re Status of MOU, Exhibit F.
11. We have revised the MOU to reflect subsequent MassDEP actions, circulating it to MassDEP in January 2020. MassDEP also requested that we complete Appendix A to the MOU, which we did on February 14, 2020. At no time has MassDEP rejected the MOU.
12. In January 2020, MassDEP began taking steps to facilitate the renewal of the Current NPDES Permit, by issuing the WQC and Massachusetts Office of Coastal Zone Management Consistency Certification of the New NPDES Permit. First, the MassDEP

issued a WQC with respect to the Station, facially dated January 10, 2020. *See* WQC, Exhibit G. This WQC was not addressed to any Entergy or Holtec entity, but only to the EPA. Entergy did not receive any notice of the WQC until January 31, 2020, when I requested the document from MassDEP (after learning from another regulator that it had been sent to EPA). MassDEP complied on what I understand was a courtesy basis. Although the WQC expressly relates to the New NPDES Permit, at the time the WQC was provided to me, the New NPDES Permit had not been issued.

CONFIRMATION OF THE TIMING OF THE WQC APPEAL/ISSUANCE OF THE NEW NPDES PERMIT

13. The WQC contained no appellate mandate, although required to do so.¹ 314 CMR 9.09(1)(g) (providing that the WQC must contain the “right to request an adjudicatory hearing as described in 314 CMR 9.10”).
14. MassDEP regulations are not clear on appeals of WQCs, owing in part to the fact that the WQC regulations at 314 CMR 9.09(1)(g) focus on the Section 404 dredging, not NPDES, permit process. As a result, in the absence of relevant information, Appellants both: (1) employed the January 10, 2020 date on the WQC as the date of certification, and (2) employed the earliest possible challenge deadline applicable to a WQC, i.e., twenty-one (21) days from the date of certification, to establish that the deadline to appeal was January 31, 2020. To the extent that 314 CMR 9.10(2) does not control because of the WQC context, it can be argued that default appellate timeline is 21 or 30

¹ Issuance and notice of the WQC must also be sent to the applicant. 314 CMR 9.09(1). As it stands, Appellants received no notice of the WQC until January 16, 2020, six days after it was issued, on a curtesy basis.

days. *Compare* 310 CMR 1.01(6)(a) *with* 314 CMR 2.08. Again, Appellants privately selected the shorter deadline, a decision the MassDEP has called “smart.”

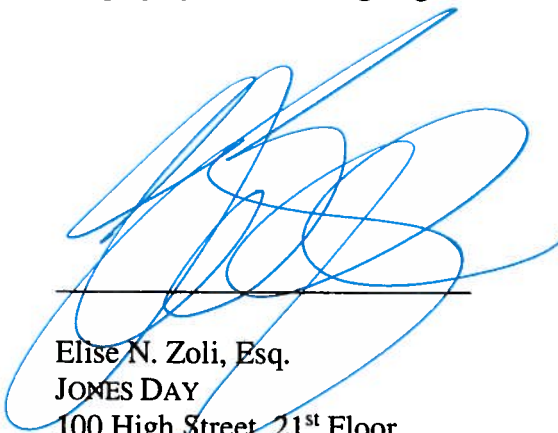
15. The Appellants filed, accordingly, on the last available day, January 31, 2020, specifying the complexity of this dynamic, none of which was a result of the Appellant’s making or actions.
16. Such filings do not occur in an instant, but require drafting, client approvals and timely submission of the documents, associated forms and fees. My custom is by noon of the filing date to have all prepared to go. That custom occurred here, and by January 31, 2020 at noon, we had completed the submission, obtained approval from the Appellants, signed the final versions for filing, and directed my colleagues to begin the process of actual filing. All filing and copies were completed and overseen by an associate and filing staff in my office.
17. On January 31, 2020, at 2:33 P.M., an EPA representative emailed me a courtesy copy of the New NPDES Permit. *See* Email from Michael Curley, Exhibit H; *see also* New NPDES Permit, Exhibit K. Email is not an authorized form of distribution of official final permits. *See* 40 CFR 124.10 (stipulating that public notice of a NPDES determination shall be sent to the applicant by mail). In any event, the courtesy copy was not and did not purport to be official or complete, e.g., did not include the official cover letter specifying the recipients and appellate information. *See* New NPDES Permit, Exhibit K. Even still, what I received at 2:33 P.M. was 703 pages. *See* Email from Michael Curley, Exhibit H; *see also* New NPDES Permit, Exhibit K. In other words, while the New NPDES Permit may have been signed on January 30, 2020, at no

time before the email on January 31, 2020 did ENOI or I receive it. Even then, the New NPDES Permit was neither complete nor official.

18. On February 5, 2020, my office received the New NPDES Permit from EPA via certified mail, return receipt requested. *See* USPS Tracking, Exhibit I. The cover letter of the New NPDES Permit has a stamp reflecting it was not mailed by EPA until February 3, 2020. *See* Cover Letter to New NPDES Permit, Exhibit J. The cover letter of the New NPDES Permit also stipulated that the deadline to appeal was within thirty (30 days) of the “receipt of [the] letter,” by certified mail. *See* Cover Letter to NPDES Permit, Exhibit J. This would be thirty (30) days after February 5, 2020. *See* USPS Tracking, Exhibit I.
19. On February 27, 2020, my office had a telephone conference with counsel for the MassDEP to discuss these Appeals. MassDEP indicated among other things that because an appeal of the federal portions of the New NPDES Permit is imminent, these Appeals would be stayed as a result.
20. While it need not be submitted prior to March 6, 2020, for the convenience of the Tribunal and the parties, Appellants have included their joint Notice of Appeal related to MassDEP’s New NPDES Permit in this submission. Appellants likewise advise this Tribunal that they intend to timely submit a joint appeal for the EPA’s New NPDES Permit, and absent a prior resolution, expect to advance the process before the Environmental Appeals Board (the “EAB”). As such, Appellants expect that a stay of these Appeals will occur, the duration of which will be at least as long as required for resolution of the EAB process. 310 CMR 1.01(5)(a).
21. I make this declaration based upon my own personal knowledge and in support of ENOI’s Response to Order for a More Definite Statement & Motion for a Stay.

Pursuant to 28 U.S.C § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 2020



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Boston, MA 02110
ezoli@jonesday.com

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

In the Matter of
Entergy Nuclear Operations, Inc.
Holtec Pilgrim, LLC

OADR Docket Nos. 2020-004, 2020-005
Water Quality Certification
NPDES Permit No. MA0003557

Plymouth, MA

NOTICE OF APPEAL

This joint notice of appeal (the “Notice”) to the Office of Appeal and Dispute Resolution (“OADR”) constitutes the challenge of the below-named appellants (collectively, “Appellants”), by and through their undersigned counsel, of those additional aspects of the jointly issued National Pollutant Discharge Elimination System Permit, No. MA 0003557 (the “New NPDES Permit”), for the Pilgrim Nuclear Power Station (the “Station”), not already under appeal as determined by OADR in its February 13, 2020 Consolidation Order. *See* OADR Docket Nos. 2020-004, 2020-005, Order Consolidating Appeals (February 13, 2020). Holtec Decommissioning International, LLC (“HDI”), the EPA and MassDEP-identified permittee for the New NPDES Permit, joins in this Notice as an Appellant.¹

By this Notice, Appellants hereby request the right to an adjudicatory hearing as described in 314 CMR 2.08, with respect to the New NPDES Permit, which was officially issued

¹ HDI was not an original party to the initial WQC Appeal because it was not then known that EPA and MassDEP would identify it as the NPDES Permit permittee (since the Entergy and Holtec entities had requested issuance to Holtec Pilgrim, LLC). Nonetheless, HDI is now an essential party to these consolidated Appeals, as the EPA- and MassDEP-identified New NPDES Permit permittee. Therefore and to ensure consistency across these consolidated Appeals, by motion filed contemporaneously with this Notice, HDI seeks to join in to WQC Appeal as an intervenor party.

and received from the U.S. Environmental Protection Agency, including on behalf of the Massachusetts Department of Environmental Protection (“MassDEP”), by Appellants on February 5, 2020 (as established via certified mail, return receipt requested).

This Notice is facially timely, as well as provided in express conformity with the timeframe for appeal specified by MassDEP in the cover letter to the New NPDES Permit, consistent with 314 CMR 2.08. Specifically, this Notice is timely as provided in Section 2.08, because it is issued within thirty (30) days of the date set by MassDEP for appeal of the New NPDES Permit. This Notice is otherwise in conformity with MassDEP regulations, including because it is submitted, as required, with payment of the requisite fees specified by MassDEP in the NPDES Permit. This Notice does not repeat, but herein incorporates by reference, the merits presented in the Water Quality Certification (“WQC”) Notice of Appeal submitted by Entergy Nuclear Operations, Inc. (“ENOI”) and Holtec Pilgrim, LLC (“Holtec Pilgrim”), which as OADR already has determined is expressly incorporated within the NPDES Permit. *See* OADR Docket Nos. 2020-004, 2020-005, Order Consolidating Appeals (February 13, 2020).

Substantively, Appellants expect to advance multiple challenges with respect to the following New NPDES Permit matters, all as set forth in detail in the former Entergy Nuclear Generation Company’s and ENOI’s prior comments to EPA and MassDEP on the draft NPDES Permit (collectively, the “Comments”), including with respect to the enumerated, *exemplary* New NPDES Permit sections:

- All conditions relating to Intake Screenwash and Rotating, e.g., New NPDES Permit I.A.4.
- All conditions relating to the chlorination of intake water, e.g., New NPDES Permit I.A.1 FN 7.

- All conditions relating to maximum concentration of boron, e.g., New NPDES Permit I.A.9 FN5e.
- All conditions suggesting that MassDEP possesses authority over nuclear safety and the management of radioisotopes by federal regulators, e.g., New NPDES Permit I.H.4.
- All conditions relating to the monitoring of non-contact cooling water for Temperature, Effluent, Temperature Rise (delta T), Total Suspended Solids (“TSS”), and Oil and Grease at Outfall #010, e.g., New NPDES Permit I.A.3.
- All conditions related to the frequency of monitoring discharged circulating water for Temperature, Effluent and Temperature Rise (delta T) at Outfall #001, e.g., New NPDES Permit I.A.1.
- All conditions relating to the requirement that a routine sampling program shall be developed in which samples are taken at the same location, same time and same days of the month, e.g., New NPDES Permit I.A.1 FN1 and I.A.6 FN1.
- All conditions relating to sampling of storm water discharged from electrical vaults (manholes), e.g., New NPDES Permit I.A.7.
- All conditions relating to the requirement that the Permittee report any planned physical alterations or additions to the permitted facility, e.g., New NPDES Permit I.B.1.
- All conditions relating to the specifically delineated contents of the SWPPP to be developed, e.g., New NPDES Permit I.D.2.b.

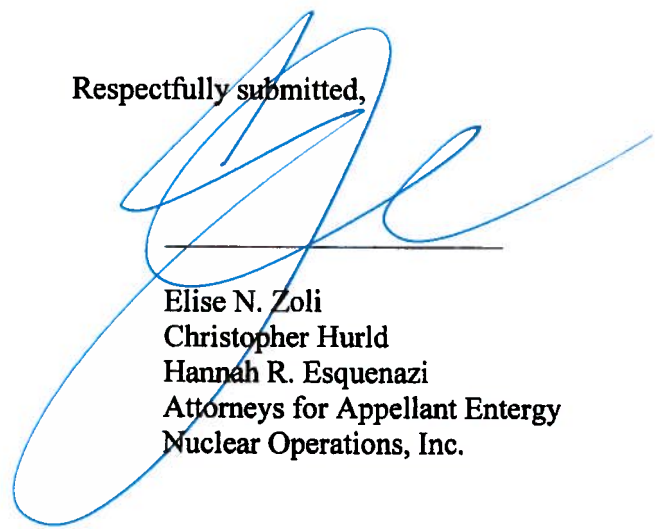
With respect to the EPA-issued New NPDES Permit, please be advised that Appellants intend to file a timely, conforming appeal with the federal Environmental Appeals Board (the “EAB”). As set forth in the Response and Motion to Stay (the “Response/Motion”) filed contemporaneously with this Notice (the contents of which are not repeated here), Appellants

also respectfully submit that these consolidated Appeals are necessary because MassDEP has declined to acknowledge a change in control of the ownership of the Station, among other corporate action, from the former ENGC to Holtec Pilgrim. The Department's inaction creates needless uncertainty regarding the Appellants' responsibilities with respect to the New NPDES Permit, as well as those aspects of the current, existing NPDES permit that will remain in force during these Appeals. With respect to the New NPDES Permit, the remedy requested is revision of that Permit in conformity with the law and fact, consistent with the prior Comments and this Notice.

Finally, in its contemporaneous Response/Motion, Appellants are supportive of Alternative Dispute Resolution ("ADR") to be carried out under the oversight of this Tribunal. Given this position on ADR, Appellants hereby reserve any and all rights to alter, amend, supplement or revise the above issues for appeal in this Notice, based on the results of that ADR, the EAB appeal or the AGO Litigation (as defined in the Response/Motion).

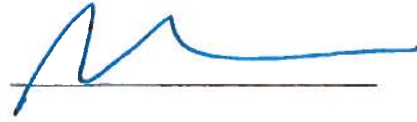
Dated: March 2, 2020

Respectfully submitted,

A large, stylized handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right. The signature is positioned above a horizontal line that serves as a separator between the signature and the typed name below.

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SERVICE LIST

IN THE MATTER OF:

**Entergy Nuclear Operations, Inc.
Holtec Pilgrim, LLC**

Docket Nos. 2020-004, 005

Plymouth

REPRESENTATIVE

PARTY

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Department

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Department



Adjudicatory Hearing Fee Transmittal Form

IMPORTANT! This form is intended for fee transmittal only. The contents of a request for an adjudicatory appeal (Notice of Claim) are established at 310 CMR 1.01(6) and the substantive statutes and regulations governing the Department's action.

A. Person/Party Making Request

1. Name and address of person or party making request:

Entergy Nuclear Operations, Inc., contact person Susan Margaret Floyd

Name - If appropriate, name group representative

639 Loyola Avenue, 22nd Floor

Street Address

New Orleans

City

LA

State

70113

Zip Code

2. Project Information:

Pilgrim Nuclear Power Station, 600 Rocky Hill Road

Street Address

Plymouth

City

MA 003557

MA

State

02360

Zip Code

\$ 100

DEP File or ID Number

sfloyd3@entergy.com

Email Address

Amount of filing fee attached

B. Applicant (if applicable)

1. Name and address of applicant:

Name - If appropriate, name group representative

Street Address

City

State

Zip Code

Email Address

C. Instructions

1. Send this form and check or money order of \$100.00 payable to the Commonwealth of Massachusetts to the MassDEP Lockbox at:

Department of Environmental Protection
P.O. Box 4062
Boston, MA 02211

2. Send a **copy** of this form and a **copy** of the check or money order with the Request for Adjudicatory Appeal (Notice of Claim) to:

Case Administrator
Office of Appeals and Dispute Resolution
One Winter Street
Boston, MA 02108

Important: When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.





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A. Person/Party Making Request

Important: When filling out forms on the computer, use only the tab key to move your cursor - do not use the return key.



1. Name and address of person or party making request:

Holtec Decommissioning International, LLC, Attn: Andrea L. Sterdis

Name - If appropriate, name group representative

Krishna P. Singh Campus, 1 Holtec Blvd.

Street Address

Camden

City

NJ

State

08104

Zip Code

2. Project Information:

600 Rocky Hill Road

Street Address

Plymouth

City

MA

State

02360

Zip Code

MA 003557

DEP File or ID Number

\$ 100.00

Amount of filing fee attached

Email Address

B. Applicant (if applicable)

1. Name and address of applicant:

Holtec Pilgrim, LLC Attn: Andrea L. Sterdis

Name - If appropriate, name group representative

600 Rocky Hill Road

Street Address

Plymouth

City

MA

State

02360

Zip Code

Email Address

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P.O. Box 4062
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