

# **Official Transcript of Proceedings**

## **NUCLEAR REGULATORY COMMISSION**

Title: Fukushima-Related Orders Modifying Licenses

Docket Number: EA-12-050 and EA-12-051

ASLBP Number: 12-918-01-EA-BD01

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1 UNITED STATES OF AMERICA  
 2 NUCLEAR REGULATORY COMMISSION  
 3 ATOMIC SAFETY AND LICENSING BOARD PANEL  
 4 -----X  
 5 In the Matter of :  
 6 ALL OPERATING BOILING WATER :  
 7 REACTOR LICENSEES WITH MARK I : Docket Nos.  
 8 AND MARK II CONTAINMENTS : EA-12-050  
 9 AND : EA-12-051  
 10 ALL POWER REACTOR LICENSEES : ASLBP No.  
 11 AND HOLDERS OF CONSTRUCTION : 12-918-01-EA-BD01  
 12 PERMITS IN ACTIVE OR DEFERRED :  
 13 STATUS :  
 14 (Fukushima-Related Orders :  
 15 Modifying Licenses) :  
 16 -----X

17 Thursday, June 7, 2012  
 18 John McCormack Post Office Building  
 19 Courtroom 1  
 20 12<sup>th</sup> Floor  
 21 5 Post Office Square  
 22 Boston, Massachusetts  
 23 BEFORE:  
 24 E. ROY HAWKINS, Administrative Judge  
 25 DR. ANTHONY J. BARATTA, Administrative Judge

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## P R O C E E D I N G S

10:00 a.m.

ADMIN. JUDGE HAWKINS: On the record.

Good morning. Please be seated.

My name is Roy Hawkins. I'm joined on this Licensing Board by Judge Tony Baratta. We're two of the three members of the Licensing Board that will be hearing today's arguments.

The third member, Judge Rosenthal, regrettably advised us yesterday that due to some health issues he would not be joining us.

He nevertheless told us that he gave us his full concurrence to go forward with today's arguments. He will be a fully participating member in the decision making process. He'll have the benefit of the written briefs that we already have. He will have the benefit of the transcript of today's oral argument. And if he has any additional questions after reading the transcript, we will submit those questions to the parties and receive written responses afterwards.

I should tell you. Many of you do know him, have argued before him and he was devastated that he could not be here. In over 60 years of practice, both as an attorney with the Department of Justice and

1 as a judge with the Nuclear Regulatory Commission,  
2 including over half a dozen oral arguments before the  
3 Supreme Court, this is the first time he has missed an  
4 appearance. He was devastated and, in fact, so  
5 devastated he told me he was sending his sister to  
6 attend and report back to him on how the proceeding  
7 went. And we're glad that she's in the audience. We  
8 welcome you and you know that our thoughts are with  
9 Alan.

10 Would principal attorneys representing  
11 each party please identify themselves for the record  
12 and any individuals who are with them here today?

13 MS. SAFFORD: My name is Carrie Safford  
14 and I represent the Nuclear Regulatory Commission's  
15 staff. And with me today I have Mauri Lemoncelli.

16 MR. STENGER: And I'm Dan Stenger with the  
17 law firm of Hogan Lovells in Washington, D.C.  
18 representing Entergy. And with me today is Ruth  
19 Porter from Hogan Lovells.

20 ADMIN. JUDGE HAWKINS: Thank you.

21 MR. WEBSTER: And I'm Richard Webster from  
22 Public Justice. It's a public interest law firm in  
23 Washington, D.C. here representing Pilgrim Watch. And  
24 with me is Mr. Anthony Roisman who can answer your  
25 hard questions today I hope and Ms. Mary Lampert who

1 is the Director of Pilgrim Watch.

2 ADMIN. JUDGE HAWKINS: Thank you and  
3 welcome to everybody. At the outset, two  
4 administrative matters I want to address. The first  
5 on behalf of the Licensing Board and the parties I do  
6 want to express my gratitude to the Federal Court and  
7 its personnel who have allowed us to use the courtroom  
8 here today.

9 A couple of individuals I want to single  
10 out who have been especially helpful in coordinating  
11 with us, the bankruptcy court clerk, Jim Lynch, his  
12 deputy clerk Ms. Jude Crosom, the bankruptcy judge who  
13 normally occupies this court, Judge Joan Feeney, and  
14 the members of the U.S. Marshall Service who we're  
15 very grateful for their assistance here today.

16 The second item is when the NRC public  
17 website initially announced that we were going to be  
18 occupying this venue for the oral argument it  
19 incorrectly stated that people who wanted to listen to  
20 the argument but not necessarily attend could do so  
21 through teleconferencing. That was an error. We  
22 don't have teleconferencing capability here.

23 And we discovered that error we  
24 immediately corrected the website. Unfortunately, we  
25 did not discover that error until two days ago on

1 Tuesday. So for those in the audience who had  
2 intended to listen to this argument and to the comfort  
3 of their home we apologize for the inconvenience. But  
4 we're grateful that you're here with us.

5 For those who in reliance on that error  
6 are not here, we're going to make every effort to get  
7 the transcript out into the public arena as quickly as  
8 possible. We've coordinated with the court reporter  
9 to provide a final transcript in a 24 hour turnaround  
10 period. And then within one day we ought to have that  
11 on the electronic hearing docket on the NRC's website.  
12 And we've also taken actions within the NRC to ensure  
13 that that type of error does not occur again on the  
14 NRC website.

15 And finally before launching into the oral  
16 arguments for the benefit of the members of the  
17 audience, I'll provide a quick procedural history of  
18 this case and also describe the purpose of today's  
19 argument. The case involves a challenge to two orders  
20 that were recently issued by the NRC staff. These two  
21 orders which were issued on March 19, 2012 and  
22 published in the Federal Register were issued in  
23 response to the accident at the Fukushima nuclear  
24 reactor plants in Japan which occurred over a year ago  
25 in March of 2011.

1           The first order is addressed to all  
2           operating boiling water reactor licensees with Mark I  
3           and Mark II containments. And the order modifies  
4           effective immediately their licenses with regard to  
5           hardened containment vents.

6           The second order is addressed to all power  
7           reactor licensees and holders of construction permits.  
8           And it modifies also effectively immediately their  
9           licenses with regard to reliable spent fuel  
10          instrumentation.

11          The Petitioner in this case, Pilgrim  
12          Watch, challenges these orders. The basis of its  
13          petitions is that the orders are not adequate to meet  
14          the concerns stemming from the Fukushima accident.  
15          The case has been fully briefed by the parties.

16          Today we will hear only oral arguments  
17          from counsel on whether a hearing should be granted.  
18          And that's to be distinguished from addressing the  
19          merits of the claims brought by Pilgrim Watch. Rather  
20          today's argument will be really addressing two  
21          inquiries: first, whether Pilgrim Watch has  
22          established standing in accordance with our governing  
23          regulations and case law and, second, whether Pilgrim  
24          Watch raising an issue or contention that can be  
25          considered by this Licensing Board or that this

1 Licensing Board has the authority to adjudicate.

2 In a May 9th order to the parties, we  
3 advised the parties that they each would have 45  
4 minutes to present their arguments. Pilgrim Watch  
5 will have 45 minutes. The NRC staff and Entergy  
6 collectively will have 45 minutes. And we advise them  
7 that they could divide that time as they deemed  
8 appropriate.

9 We also in that order identified four  
10 issues that we would ask that the parties address at  
11 the outset. And then they can proceed into the rest  
12 of their oral arguments.

13 Initially, let me ask the NRC staff and  
14 Entergy how they want to divide their time and who  
15 will proceed first.

16 MS. SAFFORD: Your Honors, my name is  
17 Carrie Safford for NRC staff and we've discussed with  
18 Entergy counsel to just split the 45 minute time right  
19 down the middle. And that's about 22.5 minutes each.  
20 So NRC staff would like to take roughly 17 minutes to  
21 address the questions, the four questions, presented  
22 in the Board's order and any other questions that you  
23 have today and reserve five minutes for rebuttal.

24 ADMIN. JUDGE HAWKINS: All right.

25 MR. STENGER: Your Honor, we agree with

1 Ms. Safford's characterization. We'll roughly split  
2 the time as we go through the questions.

3 I think question one is really more  
4 directed to the staff. The staff will probably take  
5 the lead on that. And we would also ask to reserve  
6 five minutes at the end for rebuttal as necessary.

7 ADMIN. JUDGE HAWKINS: Thank you.

8 And, Mr. Webster, you'll be the principal  
9 advocate on behalf of Pilgrim Watch I understand.

10 MR. WEBSTER: That's correct. Yes, Your  
11 Honor.

12 ADMIN. JUDGE HAWKINS: All right.

13 MR. WEBSTER: And the order, they're  
14 reserving time for rebuttal. Could you clarify? I  
15 was going to ask for 15 minutes for rebuttal. So I  
16 don't know if we're going to be rebutting the rebuttal  
17 at some point.

18 ADMIN. JUDGE HAWKINS: You'll be going  
19 second. You'll be going after both the staff and  
20 Pilgrim Watch. So you'll have time to rebut there  
21 their principal deliveries.

22 MR. WEBSTER: Oh wonderful. Thank you,  
23 Judge.

24 ADMIN. JUDGE HAWKINS: All right.

25 You'll notice on the podium we have green

1 lights, amber lights and red lights. The amber light  
2 will come on when approximately five minutes are left.

3 The red light will come on when the time  
4 is expired. And we ask attorneys to please respect  
5 the light. When the red light comes on to finish up  
6 the thought. If we have additional questions, we'll  
7 give you additional time.

8 Let's please proceed.

9 MS. SAFFORD: Would you like me to proceed  
10 here or where?

11 ADMIN. JUDGE HAWKINS: From the podium  
12 please.

13 MS. SAFFORD: Okay. That's fine. Thank  
14 you. Do I need to do anything with the timer, the 45  
15 minutes timer, Your Honor?

16 ADMIN. JUDGE HAWKINS: Just observe it.

17 MS. SAFFORD: Just wanted to make sure.  
18 All right.

19 ADMIN. JUDGE HAWKINS: Please proceed.

20 MS. SAFFORD: Okay. Carrie Safford again  
21 on behalf of NRC staff. And this morning my plan was  
22 to begin by addressing the four questions that the  
23 Board set forth in the order, beginning with question  
24 one which inquired into whether there was any  
25 significance attached to the omission of a reference

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1 to 10 CFR 2.308(f) in the Federal Register notices.  
2 And what I'm going to refer to is the March 12th  
3 orders.

4 And just wanted to clarify for the record  
5 that the absence of a reference in the Federal  
6 Register notice to 10 CFR 2.309(f) which is the  
7 contention admissibility criteria was just a simple  
8 oversight in the drafting of the orders. There was no  
9 intention to not refer to 309(f) and only refer to  
10 309(d). It wasn't intentional and staff position is  
11 that there are no significance attaches to it.

12 And we go on further to note that the  
13 provision is codified in Part 2 of the Commission's  
14 regulations which went through the rule-making notice  
15 and comment period. And therefore the regulations  
16 have the full force and effect of law establishing  
17 legal constructive knowledge with no need for  
18 repetition in the Federal Register notice orders  
19 themselves.

20 We recognize that typically we do. But  
21 again it was simply an omission in the cutting and  
22 pasting and editing of the orders.

23 ADMIN. JUDGE HAWKINS: When was that  
24 mistake discovered?

25 MS. SAFFORD: When the Board issued their

1 question.

2 ADMIN. JUDGE HAWKINS: All right. If a  
3 petitioner had been prejudiced by this, what  
4 corrective action, if any, would the staff have taken?

5 MS. SAFFORD: If there were, and staff has  
6 not taken a position that anyone was prejudiced since  
7 the regulations themselves are codified, staff could  
8 -- One possible remedy would be to issue a replacement  
9 sheet. But staff is not taking any sort of position  
10 or would not agree that anybody had been prejudiced by  
11 this.

12 We think it's important to note that in  
13 the development of these orders -- and this goes back  
14 to the fall and winter of 2011 when we began with the  
15 public working group meetings to discuss the path  
16 forward on the near-term task force recommendations  
17 and the Tier 1 items and these items are part of Tier  
18 1 -- that we had both industry, industry  
19 representatives, and members of the public who were  
20 involved in the process. The draft orders were  
21 actually circulated throughout the agency and  
22 circulated to the public for review and comment before  
23 they were finalized. And, again, it was simply an  
24 omission.

25 ADMIN. JUDGE HAWKINS: And you mentioned

1 the requirement is already embodied in the regulations  
2 and has to establish standing and --

3 MS. SAFFORD: Yes, that's correct. And  
4 there are other provisions of 10 CFR 2.309 that we  
5 don't routinely address. However, they still apply.  
6 For example, timing. It's not something that we  
7 routinely pull out in an order, but it's still  
8 applicable.

9 ADMIN. JUDGE HAWKINS: Thank you.

10 MS. SAFFORD: With respect to Question 2  
11 which inquired into the significance of factual  
12 distinctions between these orders and the facts  
13 underlying the case law of Bellotti and Alaska  
14 Department of Transportation case, we recognize that  
15 there are factual distinctions here. But we also  
16 recognize that both the Bellotti and the Alaska DOT  
17 orders as well as these orders are all issued under  
18 Section 2.202 of the Commission's regulations. Any  
19 order that the Commission is going to -- an agency  
20 will issue will be pursuant to 2.202.

21 Commonly, they are referred to as  
22 enforcement orders. There are different types of  
23 orders that are issued, but they are all 2.202 orders.  
24 So whether there's a significance to the underlying  
25 facts of each of the case NRC staff says or takes the

1 position that for the applicability of the precedent  
2 of Bellotti and Alaska DOT that the underlying facts  
3 themselves don't distinguish, don't diminish, the  
4 importance of the precedence or the applicability of  
5 the precedent of the Bellotti case law.

6 ADMIN. JUDGE HAWKINS: So any order issued  
7 by the staff pursuant to 2.202 is characterized as an  
8 enforcement order.

9 MS. SAFFORD: That's correct. It could be  
10 an order such as this which is an order modifying a  
11 license. A similar proceeding would have been in the  
12 post-9/11 line of cases, the interim compensatory  
13 measures, which -- Get a second to make sure I've got  
14 my facts straight.

15 But in that line of cases an order was  
16 issued to ISFSI holder, I believe a Part 72 licensees  
17 for ISFSI imposing certain interim compensatory  
18 measures on all of those licensees. And it was also  
19 an order modifying a license. And in that case law  
20 the Commission specifically applied Bellotti. The  
21 Commission also directly stated that that order which  
22 is similar, near identical, to what we have here was  
23 "an enforcement order."

24 ADMIN. JUDGE HAWKINS: What was the name  
25 of that case?

1 MS. SAFFORD: That's the Maine Yankee  
2 case. And let me see if I can find my notes here. In  
3 the matter of Maine Yankee Atomic Power Company and  
4 I'll try to find -- The Commission decision is 59 NRC  
5 52. And it's a 2004 Commission decision.

6 And at the end of that decision and the  
7 conclusion, what the Commission basically said was  
8 regardless -- and I'm putting a little bit of my words  
9 onto this. My take on it is regardless of the facts,  
10 regardless of whether you had a petitioner or a  
11 licensee rather who violated the regulations such as  
12 in Bellotti or Alaska DOT or whether you have a  
13 situation like you have here with the Mark with the  
14 Fukushima orders or with the interim compensatory  
15 measures orders, you still have to ask yourself the  
16 three questions that are fundamental to the  
17 determination under Bellotti which is would the  
18 petitioner be better off if the order is vacated,  
19 would the concerns be alleviated if the order is  
20 vacated and are additional measures being sought  
21 beyond those set out in the order. And those are the  
22 three questions for consideration on the Fukushima  
23 orders as well as regard to standing.

24 And, to continue along that line of  
25 thinking and going back into Bellotti, I suppose it's

1 a question of standing that one of the underlying  
2 tenants of Bellotti is that when the order is issued  
3 and it contains terms to make a facility safer.  
4 Neither staff nor the licensee would or should be  
5 subject to challenges to orders beyond the state of  
6 the scope.

7 And the scope of the order as we know is  
8 defined by the Commission. And the Commission has the  
9 authority to define the scope of any proceeding  
10 pursuant to the Atomic Energy Act (AEA) Section  
11 189(a).

12 Petitioners likewise have the right to  
13 hearing under AEA, Section 189(a). But the right to  
14 the hearing is defined by the Commission who then  
15 defines the scope of the proceeding. And, in this  
16 instance, the Commission defined the scope of the  
17 proceeding as to whether or not the order should be  
18 sustained in whole, not whether additional provisions  
19 should attach.

20 The question was not whether something  
21 else needed to be modified or changed. Just a  
22 straight question, should the orders be sustained?  
23 And that is the standard that should be applied when  
24 determining whether or not Petitioners have standing  
25 in this case.

1           ADMIN. JUDGE BARATTA: In CLI 82-16 which  
2           is the original order or decision that was challenged  
3           in Bellotti, the Commission noted that they may limit  
4           the issues in enforcement proceedings whether the  
5           facts stated in the order are true and whether the  
6           remedy selected is supported by those facts. Now  
7           would you consider that to be part of the scope of the  
8           proceeding?

9           MS. SAFFORD: Whether the facts could be  
10          challenged?

11          ADMIN. JUDGE BARATTA: Yes, whether or not  
12          the facts that the decision or action is based on can  
13          be challenged.

14          MS. SAFFORD: I would not agree. I think  
15          looking at the Alaska Department of Transportation  
16          case and there it was an enforcement proceeding, what  
17          I would call a traditional enforcement proceeding.  
18          There was a wrongdoing.

19          And the NRC and the licensee engaged in a  
20          confirmatory order that was subsequently issued. And  
21          in that case the Commission stated that the facts  
22          cannot be challenged. It's simply whether the order  
23          itself, the terms of the order itself, the action  
24          being imposed, should be sustained.

25          ADMIN. JUDGE BARATTA: There's another

1 part to that. It says the licensee -- where the  
2 licensee has already agreed to an enforcement order by  
3 the time the notice of hearing is published a  
4 challenge of the facts is stated in that order by the  
5 nonlicensee is not cognizable.

6 Now, in this case, have the licensees  
7 agreed to it? And, if so, where?

8 MS. SAFFORD: I would argue, yes, they  
9 have and I would actually state that these orders are  
10 very similar to a confirmatory order in the fact that  
11 licensees were required to respond to the order. And  
12 in this instance Entergy did file a response  
13 consenting to the terms and conditions of the order.  
14 So, in that respect, it's similar to a confirmatory  
15 order.

16 ADMIN. JUDGE HAWKINS: Entergy had filed  
17 that before Pilgrim Watch filed its petition.

18 MS. SAFFORD: One moment. I actually have  
19 it here in my binder. Hold on. They filed on March  
20 30, 2012. And I'm sorry. I don't know off the top of  
21 my head the date that Entergy filed their petition.  
22 But I can look real quick.

23 MR. STENGER: The answer is --

24 MS. SAFFORD: They filed on April 2nd.  
25 Did I get that correct?

1           ADMIN. JUDGE HAWKINS: So, in other words,  
2 Pilgrim Watch filed its petition before Entergy filed  
3 its agreement to the order.

4           MS. SAFFORD: The other way around.  
5 Entergy filed their response consenting to the terms  
6 of the order on March 30th. And then on April 2nd  
7 Pilgrim Watch filed their request for hearing.

8           ADMIN. JUDGE HAWKINS: All right.

9           ADMIN. JUDGE BARATTA: However, the order,  
10 if you actually look at the order, it states that the  
11 licensee and any other person adversely affected by  
12 the order may in addition to the demanding a hearing  
13 at the time answers filed -- it's a question of  
14 whether or not then -- I'm going to paraphrase this --  
15 is based on adequate evidence put on mere suspicion,  
16 invalid allegations or errors.

17           So how is that consistent with Alaska?  
18 That's within the scope of 12-050 and 12-051.

19           MS. SAFFORD: I think it goes back to the  
20 Commission's discretion then later on in the order to  
21 define the scope and to set the parameters for the  
22 issues. The Petitioners are permitted to seek a  
23 hearing, but they are subject to the issues that the  
24 Commission defines and set forth and that they're not  
25 permitted to go beyond that in a 2.202 proceeding.

1 Were there more questions on Question 2?

2 ADMIN. JUDGE BARATTA: Not at this time.

3 MS. SAFFORD: Okay. I'll move onto  
4 Question 3. Question 3 talks about should the 50-mile  
5 proximity presumption be deemed to apply in  
6 determining whether the Petitioners have established  
7 their standing to challenge the orders here involved.

8 And, as stated in our brief, and I can  
9 expand upon that here as well, the NRC staff holds  
10 that the straight proximity presumption of a 50-mile  
11 radius does not apply in this instance. Again, going  
12 back to --

13 ADMIN. JUDGE HAWKINS: What does the  
14 Commission say about it?

15 MS. SAFFORD: The Commission --

16 ADMIN. JUDGE HAWKINS: Give me the best  
17 Commission case law please.

18 MS. SAFFORD: Okay. I would talk about  
19 consumers where the Commission talks about the  
20 proximity presumption that applies in cases where  
21 there's an increased risk of radiological harm such as  
22 reactor construction permit proceedings or operating  
23 license proceedings.

24 Those proceedings are not -- We're not  
25 talking there on 2.202 orders. And those types of

1 proceedings, an applicant or a licensee will come in  
2 with a new application, for example, and they'll have  
3 a safety report and an environmental report.

4 Those documents will define the scope of  
5 the proceedings to go back to that issue. And it  
6 involves a new risk of a radiological harm. We're  
7 talking about a new reactor being built where one  
8 wasn't before, for example.

9 Here the standard that should apply would  
10 be the proximity plus. You have to show an injury.  
11 And it goes back again to the Bellotti line of cases,  
12 Alaska DOT and even Maine Yankee. You can have your  
13 proximity and you can demonstrate your proximity to a  
14 facility. But you also need to show an injury and you  
15 need to show that that injury can be redressed by the  
16 revocation of that order which we don't have here.

17 ADMIN. JUDGE HAWKINS: Now a new reactor  
18 application, a reactor renewal application, the  
19 proximity presumption applies. And I guess it's not  
20 clear to me why here you're dealing with amendments to  
21 the license for an operating reactor why that  
22 proximity presumption would not apply.

23 MS. SAFFORD: It goes back -- I just keep  
24 -- I'm bringing it back again to just the Bellotti  
25 line of thinking and even in Alaska DOT and the Maine

1 Yankee. Even with a proximity, you still have to  
2 satisfy because these are enforcement orders as  
3 defined by the Commission. They're orders issued  
4 pursuant to Section 2.202. Your standing is going to  
5 be determined by the holdings in the Bellotti line of  
6 cases.

7 In order to do that you need to show the  
8 harm and the redressability. And the redressability  
9 would be vacating that particular order.

10 ADMIN. JUDGE HAWKINS: So the Bellotti  
11 rule supercedes or displaces the proximity presumption  
12 in enforcement orders for third party petitions.

13 MS. SAFFORD: Yes, in enforcement  
14 proceedings.

15 ADMIN. JUDGE HAWKINS: But none of the --  
16 Neither Bellotti or its progeny expressly state that,  
17 do they?

18 MS. SAFFORD: They don't expressly speak  
19 to a comparison with a proximity test. Not to my  
20 knowledge.

21 ADMIN. JUDGE HAWKINS: Okay.

22 MS. SAFFORD: They don't. It wasn't an  
23 issue in either of those cases. I think another thing  
24 to look at and consider, another line of case, would  
25 be the Commonwealth Edison, the Zion case, where it's

1        been held that a petitioner can't base its standing on  
2        proximity unless the proposed action "quite obviously  
3        entails an increased potential for off-site  
4        consequences." And that went up for petition for  
5        review was denied at the D.C. Circuit.

6                ADMIN. JUDGE HAWKINS: And that was  
7        dealing with the reactor that was defueled and shut  
8        down though. So it's some material factual  
9        distinctions in the standing analysis.

10               MS. SAFFORD: Yes.

11               ADMIN. JUDGE HAWKINS: Let's talk then a  
12        little bit about your saying that the Bellotti  
13        standing principle displaces the proximity  
14        presumption. And it's not because there is less  
15        potential harm to individuals within 50 miles, but  
16        just because it's a different standard.

17               MS. SAFFORD: It's a different type of  
18        proceeding. It's a 2.202 proceeding. A new reactor  
19        proceeding is not a 2.202 enforcement proceeding.  
20        It's a new reactor application.

21               ADMIN. JUDGE HAWKINS: That's true, but  
22        people within 50 miles of the plant all have the same  
23        concern regardless if it's a 202 or a relicensing or  
24        a COL application.

25               MS. SAFFORD: But here in this proceeding

1 and in 2.202 proceedings, the intent of the order is  
2 to make the facility safer. It's imposing new  
3 measures on a facility with the intent to make it  
4 safer.

5 And that's true across Bellotti, Alaska  
6 DOT and Maine Yankee. And I think that's the  
7 distinction.

8 ADMIN. JUDGE BARATTA: I don't understand  
9 why that should impact the proximity. It doesn't --  
10 It's a license amendment nonetheless to an operating  
11 reactor. And the concern with an operating reactor is  
12 the potential large release of fission products. That  
13 doesn't change that situation. And that's what the  
14 50-mile assumption is based upon.

15 MS. SAFFORD: But this isn't an amendment  
16 proceeding. It's a proceeding just to modify the  
17 license.

18 ADMIN. JUDGE BARATTA: Which is an  
19 amendment to the license.

20 MS. SAFFORD: It's modifying -- I would  
21 definitely take a different position.

22 ADMIN. JUDGE BARATTA: I mean it's not the  
23 mechanism by which the license could be modified or  
24 amended. But it's still an amendment. And it's still  
25 an amendment to a facility that has a large inventory

1 of fission products there which is what the 50-mile  
2 presumption is based upon.

3 MS. SAFFORD: Like I said, I respectfully  
4 -- I don't necessarily agree that this is the same as  
5 an amendment proceeding. It doesn't have the same  
6 scope of an amendment proceeding might. It's a very  
7 narrow scope. And again --

8 ADMIN. JUDGE BARATTA: Tech spec changes  
9 are a very narrow scope, but they're still amendments,  
10 too.

11 MS. SAFFORD: I'm sorry. I didn't hear.

12 ADMIN. JUDGE BARATTA: Tech spec changes  
13 are very narrow in scope. They're about as narrow as  
14 you can be where sometimes one number is changed.

15 MS. SAFFORD: And amendment proceedings  
16 typically are initiated by a licensee; whereas here  
17 we're having a Commission-initiated action.

18 ADMIN. JUDGE BARATTA: But it changes the  
19 license, correct?

20 MS. SAFFORD: It's modifying the license,  
21 yes.

22 ADMIN. JUDGE BARATTA: Which is an  
23 amendment to the license.

24 MS. SAFFORD: There will not -- My  
25 understanding at this point, and again these are still

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1 under deliberation at the Commission because those  
2 orders were just issued, it's not clear whether  
3 there's actually going to be a formal amendment  
4 process that would be put in place.

5 In this order licensees must comply with  
6 the order in order to not violate any terms of their  
7 own license. It's tied down to the license now that  
8 it's been issued. So an actual amendment proceeding  
9 does not necessarily have to occur in order for this  
10 to be effective and for licensees to be required to  
11 comply with it.

12 So there won't necessarily be a proceeding  
13 down the road where licensees will submit an amendment  
14 in order to implement the terms of this order or  
15 either of these orders.

16 ADMIN. JUDGE BARATTA: Would submit.  
17 Okay. I understand.

18 ADMIN. JUDGE HAWKINS: Let me approach it  
19 from this direction. Is it fair to say the potential  
20 harm to people within 50 miles of the plant is the  
21 same regardless of whether it's enforcement order or  
22 a COL application or a nuclear plant renewal request?

23 But enforcement orders are unique in that  
24 under Bellotti the Licensing Board's authority is  
25 limited to determining whether or not the order should

1 be sustained. And to the extent a request for relief  
2 goes beyond that we cannot grant relief even if  
3 individuals live within 50 miles. And therefore the  
4 third inquiry for standing, namely, redressability  
5 cannot be satisfied under Bellotti.

6 MS. SAFFORD: I agree and stop me if I'm  
7 misrepresenting the question. I agree with the second  
8 part.

9 ADMIN. JUDGE HAWKINS: I mean that was a  
10 lengthy question. I don't know where the question  
11 was.

12 MS. SAFFORD: I agree with the second part  
13 that the Licensing Board's scope of review is indeed  
14 limited to what the order sets forth which is whether  
15 the order should be sustained. I don't agree that  
16 anybody living within the 50-mile is subject to a risk  
17 of harm if I'm understanding the beginning part of  
18 your question.

19 The same as with a COL proceeding.  
20 Because what we have here is a current status quo.  
21 And we're taking that as your current baseline and  
22 we're applying additional safety measures.

23 We're not saying the current status quo is  
24 unsafe. We're saying it's status quo. We still have  
25 reasonable assurance. We're still meeting our

1 regulations. But because of the events in Fukushima,  
2 because of the look that we took, we're going to now  
3 move forward, redefine, change that level of  
4 reasonable assurance and impose these additional  
5 safety measures on the facilities.

6 ADMIN. JUDGE HAWKINS: And if a petitioner  
7 were to claim though that the amendment decreases  
8 safety, then that would satisfy the proximity plus  
9 standing standard and it would satisfy Bellotti.

10 MS. SAFFORD: To satisfy Bellotti, they  
11 would have to say that the terms of the -- The new  
12 terms issued in the order put them in a worse position  
13 than they currently are right now with no order, not  
14 with a different order, not with changes, but this  
15 current status quo that it puts them in a worse  
16 position which was not what was pled in this  
17 proceeding.

18 And in that instance if you go back to the  
19 proximity test and you go back to whether you need  
20 proximity plus I would argue that you would still in  
21 a 2.202 proceeding going to need proximity plus, plus  
22 the harm and the redressability. In that instance  
23 with the proper facts pled, you could possibly apply  
24 a proximity plus in order to survive the Bellotti.  
25 But you would still have to get through Bellotti.

1 ADMIN. JUDGE BARATTA: I hate to do this  
2 to you, but could I take you back to Question No. 2?

3 MS. SAFFORD: Yes.

4 ADMIN. JUDGE BARATTA: When was the order  
5 issued?

6 MS. SAFFORD: The orders were signed on  
7 March 12th and the Federal Register notice --

8 ADMIN. JUDGE HAWKINS: Published March  
9 19th.

10 MS. SAFFORD: Yes, it was March 19th.

11 ADMIN. JUDGE BARATTA: Okay. Going back  
12 to Alaska, it says "where the licensee has already  
13 agreed to an enforcement order by the time and notice  
14 of hearing is published, a challenge to the facts as  
15 stated in the order by the non-licensee is  
16 noncognizable." Now you said I believe they agreed on  
17 March 30th which after the date of notice of hearing  
18 which was March 19th.

19 MS. SAFFORD: Yes. If I'm understanding  
20 that correctly, the Federal Register notice went out  
21 on the 19th. The licensees' responded on the 30th.

22 ADMIN. JUDGE BARATTA: And they responded  
23 on the 30th. And then --

24 MS. SAFFORD: Petitioners responded --

25 ADMIN. JUDGE BARATTA: On the second.

1 MS. SAFFORD: -- three days later I  
2 suppose.

3 ADMIN. JUDGE BARATTA: The point being  
4 that clearly Entergy at the time of publication of the  
5 notice which is March 30th, I'm sorry, March 19th at  
6 that time they had not agreed to the order. So how  
7 does Alaska apply?

8 MS. SAFFORD: I think you can still take  
9 the facts of Alaska and the unique circumstances of  
10 this proceeding. And if you look even beyond the  
11 issuance date of the order and you go back to the  
12 process itself and the fact that the orders were  
13 developed in an open and public process with many  
14 public meetings, anybody who wanted to be involved  
15 could have been involved.

16 So there was adequate notice. There was  
17 active public participation as to what the terms of  
18 the orders were. Drafts of the orders were sent out.  
19 I'm not sure if that's fully responsive to your  
20 question.

21 ADMIN. JUDGE BARATTA: I think that's what  
22 we're here to judge.

23 ADMIN. JUDGE HAWKINS: Do you have follow-  
24 up to that?

25 ADMIN. JUDGE BARATTA: No. Not on that

1 one. Let's go on.

2 ADMIN. JUDGE HAWKINS: Fine.

3 MS. SAFFORD: I believe we're on Question

4 4. Just have a moment here to find my Question 4.

5 I'm sorry. I seem to have misplaced it in my papers.

6 (Off the record comments.)

7 I'm sorry.

8 ADMIN. JUDGE HAWKINS: That's all right.

9 Ms. Safford.

10 MS. SAFFORD: Yes.

11 ADMIN. JUDGE HAWKINS: Well, I'll wait

12 until you're ready to proceed. Then I'll ask a

13 question before you start on Question No. 4.

14 MS. SAFFORD: Okay. I've got it here in

15 front of me. I'm ready.

16 ADMIN. JUDGE HAWKINS: The Bellotti

17 analysis, the D.C. Circuit said that under the Atomic

18 Energy Act it was within the discretion of the

19 Commission to define the scope of the challenges that

20 could be brought in an adjudicatory hearing context.

21 It said it was reinforcing its view by an examination

22 of the overall regulatory structure and included in

23 that structure was the fact that the public had 2.206,

24 the opportunity to raise petitions under that. And if

25 the petitions were denied, you could seek judicial

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1 review.

2 Now it's my understanding that in the D.C.  
3 Circuit, in the 1st Circuit, you can no longer get  
4 judicial review for denials of 2.206 petitions. So  
5 that aspect of the case where the court found that its  
6 conclusion was reinforced by the overall structure no  
7 longer exists. And I wonder what impact, if any, that  
8 has on the continuing viability of Bellotti.

9 MS. SAFFORD: I agree that there was -- I  
10 believe was it the Lorian line of cases that held that  
11 2.206 denials are no longer reviewable. And if I'm  
12 understanding the question correctly, you're asking if  
13 that has in the past been relied upon as an alternate  
14 route for a petitioner to raise an issue if they were  
15 denied under Bellotti. Does that have an impact on  
16 the Bellotti holding or the applicability of the  
17 Bellotti holding?

18 ADMIN. JUDGE HAWKINS: Yes, you understand  
19 the question.

20 MS. SAFFORD: Okay. All right. I hope I  
21 can answer. I'll try my best. In representing -- In  
22 my position and my role in representing the NRC staff,  
23 as you know there are many divisions in OGC. In my  
24 division and I can only speak for -- I can't speak on  
25 behalf of the entire agency or even the entirety of

1 OGC or the entire process. I know this is a question  
2 that Judge Rosenthal had asked staff to look into, not  
3 this specific question, but the 2.206 process.

4 I don't think it has any impact on the  
5 applicability of the holding of Bellotti to  
6 enforcement type proceeding, 2.202 proceedings. And  
7 again, it goes back to that Commission's discretion  
8 under the Atomic Energy Act to define the scope of  
9 proceeding as they deem appropriate.

10 In the Bellotti line of cases, also even  
11 regardless of whether there's a judicial review of a  
12 2.206 denial, it still goes back to the question of if  
13 the Commission didn't have that discretion or if an  
14 outside party or any party for that matter were  
15 permitted to come in and define the scope of the  
16 proceeding, proceedings would seemingly be endless.  
17 You would not have -- You could potentially not have  
18 structure to your proceedings. Safety improvements  
19 might be delayed because you would be litigating  
20 various issues that were not within the scope of the  
21 order itself.

22 So there are a lot of concerns with  
23 Bellotti. And it's not necessarily whether there's an  
24 alternate remedy. But it's also focused on keeping an  
25 orderly process, making sure safety improvements in

1 2.202 orders are imposed as expeditiously as possible  
2 and that the focus of those proceedings is contained  
3 to whether the scope of the order should be sustained.

4 ADMIN. JUDGE HAWKINS: So it's your  
5 position that Bellotti survives the absence of  
6 judicial review of 2.206 petitions.

7 MS. SAFFORD: Yes.

8 ADMIN. JUDGE HAWKINS: Because it's based  
9 on the plain statutory language and the fact that  
10 regulatory structure supports it was not material to  
11 the court's decision.

12 MS. SAFFORD: Yes. I don't agree that the  
13 absence of a judicial review of a 2.206 petition would  
14 undermine the holding of Bellotti or the applicability  
15 to enforcement proceedings.

16 ADMIN. JUDGE BARATTA: So what you're  
17 relying on is the section of Bellotti where it talks  
18 about the Commission has the ability to allocate  
19 resources and such and that its main purpose should be  
20 inspection and not adjudication.

21 MS. SAFFORD: I think there is a number of  
22 places in Bellotti. That is certainly one of them.  
23 And if I can just have a just one quick moment here.

24 ADMIN. JUDGE BARATTA: I know it goes on  
25 and discusses --

1 MS. SAFFORD: It goes on. I don't have  
2 the cites.

3 ADMIN. JUDGE BARATTA: But it's basically  
4 that --

5 MS. SAFFORD: But they do say if you read  
6 the statute so broadly that any proceeding necessarily  
7 implicates all issues that might be raised concerning  
8 the facility in question, then you're going to be  
9 expanding these proceedings until what the Commission  
10 said was a virtually interminable -- I'm sorry -- the  
11 Court of Appeals virtually interminable, free-ranging  
12 investigations. And that could negatively impact the  
13 Commission's substantive discretion to decide what's  
14 important enough to merit examination.

15 ADMIN. JUDGE BARATTA: Bellotti also uses  
16 the term "the Commission amends the license in these  
17 proceedings" by the way.

18 MS. SAFFORD: I don't have that quote in  
19 front of me. But in the distinction of whether it's  
20 an amendment proceeding what happened in Bellotti was  
21 not a formal amendment proceeding but a modification  
22 to the license.

23 Can I wrap up with Question 4?

24 ADMIN. JUDGE HAWKINS: Please do.

25 MS. SAFFORD: Okay. Question 4 asked

1 assuming that the Petitioners' challenges to the  
2 orders are not subject to rejection for other reasons  
3 must they relate their claims that the orders are  
4 inadequate to the Pilgrim facility. Staff takes the  
5 position that, yes, in order to support the injury  
6 claim Pilgrim Watch must provide evidence that they're  
7 going to suffer an injury, in fact, which would come  
8 from the Pilgrim facility itself.

9 Petitioners' contents are not quite clear  
10 as to whether or not the claims are directed  
11 specifically at Pilgrim or at all licensees. There's  
12 a bit of a mix. And Petitioner again invokes no other  
13 reactor other than the Pilgrim facility by attempting  
14 to apply the proximity presumption.

15 So staff would take the position -- If I'm  
16 understanding the question correctly that all other  
17 things aside standing in Bellotti and all those  
18 questions aside that, yes, Petitioners must relate  
19 their claims specifically to the Pilgrim facility.  
20 And to go back it's staff's position that the question  
21 is moot because Pilgrim Watch is unable to establish  
22 standing in the proceeding as we've been discussing.

23 ADMIN. JUDGE HAWKINS: Is it the staff's  
24 position that this case if you were drafting the  
25 decision it would be resolved on standing or on

1 outside the scope for the contention? Or does it  
2 matter?

3 MS. SAFFORD: The thought process when we  
4 were drafting the orders?

5 ADMIN. JUDGE HAWKINS: No, I'm talking  
6 about the Licensing Board's decision. If you were  
7 involved in that process, would you suggest that it be  
8 based on standing under Bellotti or Bellotti also goes  
9 in some respects to contention admissibility, whether  
10 the proffered contention is within scope? Or does it  
11 matter?

12 MS. SAFFORD: NRC staff -- I think it does  
13 matter and NRC staff would take the position and we've  
14 taken the position in the past in other proceedings  
15 that it resolves strictly around the Bellotti question  
16 which is --

17 ADMIN. JUDGE HAWKINS: But Bellotti goes  
18 to scope and that goes to both contention  
19 admissibility as well as scope.

20 MS. SAFFORD: I think Bellotti -- In many  
21 instances I think we've applied it in both arguments  
22 to cover both arguments.

23 ADMIN. JUDGE HAWKINS: Indeed in your  
24 briefs before us you did.

25 MS. SAFFORD: Right. That's true. But,

1 yes, I think it turns strictly on Bellotti.

2 ADMIN. JUDGE HAWKINS: And you do it  
3 exclusively on standing or would you -- Again, I  
4 understand that you say Bellotti controls the outcome.  
5 But is it Bellotti withstanding or Bellotti with  
6 contention admissibility or Bellotti with both?

7 MS. SAFFORD: I agree that I think  
8 Bellotti can be a bit of a combination. However, I  
9 think you can apply it strictly to standing. And in  
10 this instance that would be -- That's the position  
11 that staff is taking that it's applicable to the  
12 standing question. And in this instance in these  
13 pleadings they don't survive the Bellotti challenge.

14 Did the Board have any additional  
15 questions for staff? I'll be happy to answer them.

16 ADMIN. JUDGE HAWKINS: Not at this point.  
17 Is there anything you want to bring to our attention,  
18 Ms. Safford?

19 MS. SAFFORD: I have nothing else at this  
20 point.

21 ADMIN. JUDGE HAWKINS: All right.

22 MS. SAFFORD: Thank you.

23 ADMIN. JUDGE HAWKINS: Thank you.

24 MR. STENGER: May it please the Board.

25 I'm Dan Stenger representing Entergy. We appreciate

1 the opportunity to be here today and wish Judge  
2 Rosenthal well.

3 Let me try to start by clarifying a couple  
4 of things, factual things. There were questions about  
5 when did Entergy submit its answer to the order in  
6 relation to the time of the hearing request. The  
7 NRC's orders that were issued on March 12th required  
8 the licensees to submit an answer to the order within  
9 20 days. That was the same time period for the  
10 licensee or any person adversely affected by the order  
11 to submit its hearing request.

12 Factually, Entergy submitted its answer to  
13 the orders on March 30, 2012. And Entergy consented  
14 to the orders, all three orders, that were issued that  
15 day including the two at issue here. Entergy fully  
16 consented to the orders and did not request a hearing  
17 on any of the orders. That was March 30th.

18 Now with respect to the Board's four  
19 questions, the first one on the significance of the  
20 reference to Section 2.309(d) in the orders, we accept  
21 the staff's explanation of the oversight that there  
22 wasn't a specific reference to the subsection on the  
23 contention admissibility requirements. But those  
24 contention admissibility requirements still apply.

25 As I think you alluded to Section 2.309(a)

1 of the NRC's hearing regulations provide that such  
2 requirements on contention admissibility apply in all  
3 proceedings governed by 2.309. So that would include  
4 the Contention Admissibility Criterion Section  
5 2.309(f).

6 There was no indication in the orders that  
7 the Commission in any way intended to waive its time-  
8 honored contention admissibility criteria. And  
9 there's no suggestion in Pilgrim Watch's request for  
10 hearing that there was any notice problem. In fact,  
11 their contention admissibility showing tracts, the  
12 section 2.309(f) criteria. So we don't believe there  
13 was any misunderstanding or prejudice there.

14 Now, with respect to the distinction  
15 between Bellotti and the Commission's decision in the  
16 Alaska Department of Transportation case and the  
17 current orders, I would emphasize that the rationale  
18 in Bellotti is that when an order imposes new safety  
19 requirements a petitioner is not allowed a hearing to  
20 litigate the need for additional safety measures. The  
21 rationale did not turn on the enforcement nature of  
22 the order at issue there or a finding of any  
23 underlying violation or the penalty aspect of that  
24 case.

25 In fact, the D.C. Circuit stated in

1 Bellotti "when the Commission amends a license to  
2 require additional or better safety measures"  
3 intervention will be denied to one who "wishes to  
4 litigate the need for more or still more safety  
5 measures." That was the rationale of Bellotti. And  
6 the Commission has closely adhered to that rationale.

7 In the ADOT case, the Commission states  
8 "the rationale underlying Bellotti is that when a  
9 licensee agrees to make positive changes or does not  
10 contest an order requiring remedial changes it should  
11 not be at risk of being subjected to a wide range in  
12 hearing and further investigation." So the key factor  
13 is whether safety is being improved by the order. So  
14 it's not necessarily the enforcement nature of the  
15 order. Although the orders in this case are as the  
16 NRC staff counsel pointed out issued under 10 CFR  
17 2.202 which it orders to modify, suspend or revoke a  
18 license, those are in the nature of enforcement  
19 actions.

20 In fact, the orders have a docket, an EA  
21 docket, standing for enforcement actions. But that  
22 was not the key factor underlying Bellotti. It's when  
23 the Commission takes action and orders licensees to  
24 take certain actions to improve safety. The  
25 Commission is not going to allow an intervener to come

1 in and seek additional safety measures.

2 Litigation over the need for additional  
3 safety measures is only likely to lead to a  
4 distraction of the staff and the licensee and a  
5 possible delay in implementation of the new safety  
6 requirements.

7 And the Commission recognized this and  
8 applied Bellotti to orders similar to these. It was  
9 in the Maine Yankee case where the Commission applied  
10 Bellotti to the post-September 11th security orders  
11 specifically orders directing additional requirements  
12 for the Maine Yankee independent spent fuel storage  
13 installation.

14 And the Commission stated in Maine Yankee  
15 "This case falls squarely within the Bellotti  
16 framework. Indeed it is difficult to imagine the State  
17 of Maine having any adverse interest in an increase in  
18 security requirements at the Maine Yankee ISFSI."

19 In addition, I would note that by  
20 requesting additional actions as the Petitioner is in  
21 this case it is really -- it is not attacking the  
22 underlying orders. The Petitioner doesn't seem to  
23 have any factual dispute or in any way challenge the  
24 requirements of the order and the facts stated in the  
25 order. But rather they're attacking by going beyond

1 the order in seeking additional safety measures. In  
2 essence, they're attacking the Commission's  
3 regulations which a petitioner is not allowed to do in  
4 an NRC adjudication.

5 ADMIN. JUDGE BARATTA: You would agree  
6 though that if they attacked the facts by claiming  
7 that they don't support the action because they're in  
8 error that that would be within the scope.

9 MR. STENGER: If there is a factual  
10 dispute about an error, that's possibly within the  
11 scope of the hearing. You ask a good question about  
12 whether the facts, the validity of the facts, and the  
13 remedy are within the scope of the proceeding. Well,  
14 the scope of the proceeding here is narrowly defined  
15 as whether the order, this order, should be sustained.  
16 It's not whether there's a better order.

17 So there is room obviously for the  
18 licensee who's directly affected to challenge the  
19 order and the underlying facts as stated in the order  
20 which we did not do in this case. But where a  
21 petitioner comes in, it is incumbent on them to show  
22 a factual dispute.

23 And here at bottom reading the hearing  
24 request it's quite clear that Pilgrim Watch is simply  
25 seeking additional measures. They're seeking vent

1       filtration systems on Mark I and II BWRs. They're  
2       seeking additional spent fuel actions. Those are all  
3       being considered now by the Commission as part of the  
4       ongoing effort to review the Fukushima Task Force  
5       report and decide what additional actions are needed.

6               The orders at issue here, the three orders  
7       issued on March 12th, are only the first in a series  
8       of NRC actions that are going to be taken to address  
9       the insights from Fukushima.

10              ADMIN. JUDGE HAWKINS: We might hear when  
11       Mr. Webster comes to the podium that they think  
12       consistent with Bellotti. The public would be safer  
13       without these orders if these orders were suspended  
14       because in their reply they talk about the adverse  
15       effects or the nature of socio-psychological factors.  
16       They don't fix the core problems. And they cause us  
17       to be lulled into thinking that the core causes are in  
18       fact redressed. And that puts us at greater risk.

19              How would you respond to the argument that  
20       we're better off without these two orders?

21              MR. STENGER: This idea that somehow the  
22       public and other authorities are lulled into  
23       complacency is totally belied by the fact that the NRC  
24       right now has significant ongoing public meetings  
25       including interactions with stakeholders to consider

1 a whole host of additional requirements necessary in  
2 light of the lessons learned from Fukushima. I would  
3 point out that that specifically includes a review of  
4 the need for vent filtration systems.

5 Now currently the staff is, as stated in  
6 the order, scheduled to present a policy paper to the  
7 Commission in July.

8 ADMIN. JUDGE HAWKINS: Dan, can I  
9 interrupt that?

10 MR. STENGER: Sure.

11 ADMIN. JUDGE HAWKINS: I have a blinking  
12 red light here. I'll ask John to turn that off. I  
13 think the NRC staff might have exceeded their time.  
14 But they did that because we were pressing her with  
15 questions. So we'll allow you to continue and we'll  
16 extend the same courtesy to Mr. Webster to allow him  
17 to make a full presentation.

18 MR. STENGER: Thank you. Again, that  
19 argument to somehow other authorities are lulled into  
20 complacency cannot be squared with the significant  
21 ongoing actions at the NRC now looking at additional  
22 regulatory actions related to venting, use of vent  
23 filtration systems. As I was mentioning, the staff is  
24 scheduled to present a policy paper to the Commission  
25 in July. So the Commission itself will be reviewing

1 the need for vent filtration systems.

2 In addition, there are additional spent  
3 fuel pool actions that are being considered and are  
4 under recommendation by seven of the NRC Fukushima  
5 task force. So the NRC is not being complacent any  
6 way.

7 I'd also point out that in the licensings  
8 one of the Licensing Board decisions in the Maine  
9 Yankee case that I mentioned the Licensing Board held  
10 that a party, Friends of the Earth, could not request  
11 a hearing, did not have standing to request a hearing.  
12 One of the arguments Friends of the Earth was making  
13 was this exact same lulling into complacency type of  
14 argument. And the Board easily dismissed that type of  
15 claim as a basis for standing.

16 ADMIN. JUDGE BARATTA: With regards to the  
17 facts in the order, the enclosure to the order with  
18 regards to hardened vents uses the term "reliable  
19 hardened vent system." Is that your understanding  
20 that this is required to be a reliable hardened vent  
21 system?

22 MR. STENGER: Yes. Hardened vent systems  
23 were installed as you know at all Mark I BWR in  
24 response to an NRC Generic Letter in 1989. So Pilgrim  
25 has a hardened vent system as do all other Mark I

1 BWRs.

2 One of the key findings from the Fukushima  
3 accident was that the operators had difficulty in  
4 operating the vent system. It is a different vent  
5 system in the Japanese reactors compared with the  
6 hardened vent here. There was difficulty in operating  
7 that system.

8 So what the NRC was focused on in this  
9 first tier action on the hardened vents is to make  
10 those systems more reliable. And many of those  
11 actions in Attachment 2 to the order is going to  
12 improve the reliability, the accessibility, the vents  
13 that need to operated and that sort of thing. So,  
14 yes, the order is directed at enhancing the  
15 reliability of the vent system. Correct.

16 ADMIN. JUDGE BARATTA: If these did not  
17 achieve an enhancement in reliability, would then this  
18 not be an enhancement in safety?

19 MR. STENGER: Well, that would be reaching  
20 an assumption. When the Commission itself approved  
21 these orders, when the Commission approves orders that  
22 the staff has studied in detail with a great deal of  
23 interaction with stakeholders, not just the industry,  
24 but a great deal of interaction with the public, since  
25 the Fukushima Task Force report was released in July

1 2011, there was a very transparent public process.  
2 The staff laid out its prioritization scheme for the  
3 actions it was going to require. And again these  
4 first three orders plus the significant Section  
5 50.54(f) request that was issued the same day, are  
6 part of just the Tier 1 actions. So the Commission  
7 has made a determination and the staff that these  
8 actions are necessary to enhance safety.

9 If someone -- Under the Bellotti precedent  
10 and the progeny, there is an opportunity for the  
11 public, someone adversely affected by an order, to  
12 seek a hearing. So what kind of situation could that  
13 be? They can't come in and argue for additional  
14 safety measures.

15 The Commission's precedent that the Board  
16 has also recognized is that hearing right is a safety  
17 valve for a person who is not subject to the order.  
18 If that person can come in and show that there is some  
19 adverse impact on safety from what's being required or  
20 that there's some relaxation of an existing  
21 requirement, that's the fair opportunity for hearing.  
22 That's the safety valve. But the Petitioners here are  
23 not arguing anything.

24 ADMIN. JUDGE BARATTA: Or what about the  
25 issue of error?

1 MR. STENGER: The issue of?

2 ADMIN. JUDGE BARATTA: Error. In the  
3 order it refers to immediate set aside if, in fact,  
4 the facts are mere allegations or an error.

5 MR. STENGER: Yes. And you asked that  
6 question earlier. I wanted to address that. You  
7 mentioned the language in the order that says that if  
8 there is -- if the order is based on error or  
9 unfounded allegations, someone can challenge that.  
10 That goes to the immediate effectiveness of the  
11 orders.

12 ADMIN. JUDGE BARATTA: Well, it actually  
13 says "on the grounds that the order" and it has a  
14 parenthetical, "including the need for immediate  
15 effectiveness."

16 MR. STENGER: Right.

17 ADMIN. JUDGE BARATTA: And how do you  
18 conclude that it's simply the immediate effectiveness  
19 because it says that the order is not based on  
20 adequate evidence but on mere suspicion, unfounded  
21 allegation or error?

22 MR. STENGER: What that goes to is the  
23 right of the licensee usually or another person  
24 adversely affected as well. "In addition to demanding  
25 a hearing," and I'm reading from the order itself, "at

1 the time the answer is filed may move the presiding  
2 officer to set aside the immediate effectiveness of  
3 the order on the ground that the order including the  
4 need for immediate effectiveness is not based on  
5 adequate evidence but on mere suspicion, unfounded  
6 allegation or error."

7 That's a specific procedure in 2.309 that  
8 allows usually the licensee to say it should not have  
9 been immediately effective for these reasons. And  
10 there's a specific procedure for that on which the  
11 Board would handle. But in this case no one has --  
12 The Licensee has not challenged the immediate  
13 effectiveness nor has --

14 ADMIN. JUDGE BARATTA: But then the facts  
15 say that the licensee or any other person that are  
16 personally affected by this order, right?

17 MR. STENGER: Yes. So there is a right  
18 for another person adversely affected to move to lift  
19 the immediate effectiveness. But that has not  
20 happened in this case. That's the standard that comes  
21 out of 2.309 for lifting the immediate effectiveness.

22 On the -- If I may just move ahead to  
23 Question 3, the 50-mile proximity presumption, I would  
24 point out that the 50-mile proximity presumption is  
25 used in new facility construction and licensing

1 applications over the years that standing presumption  
2 evolved. So when a new facility is being built,  
3 anyone living within 50 miles of a nuclear power plant  
4 if it's a new facility that's deemed to have standing,  
5 anyone in the neighborhood is going to be considered  
6 pretty good standing.

7 Now that does not apply for license  
8 amendment cases and it does apply for a challenge to  
9 an enforcement order. The two cases that are key are  
10 Nuclear Fuel Services, 66 NRC 277 in 2007, where the  
11 NRC stated that something in addition to geographic  
12 proximity has to be shown in order for a person not  
13 subject to the order to get a hearing to challenge an  
14 enforcement order. There must be a link between the  
15 order and alleged harm to the individual.

16 ADMIN. JUDGE BARATTA: Wasn't that a  
17 material license case?

18 MR. STENGER: That's a materials license  
19 case.

20 ADMIN. JUDGE BARATTA: Isn't the proximity  
21 plus required from material license cases?

22 MR. STENGER: Well, it is different. I  
23 understand that. It's a materials license case but it  
24 --

25 ADMIN. JUDGE HAWKINS: Do you have any

1 reactor case, say, license amendment case that --

2 MR. STENGER: The license amendment cases  
3 would be Florida Power and Light Licensing Board  
4 decision 68 NRC 533. And that's a license amendment  
5 case.

6 Judge Baratta asked about amending the  
7 tech specs. It was a tech spec amendment case and the  
8 NRC Board said that the proximity presumption for  
9 standing in license applications of new facilities is  
10 inapplicable in this license amendment proceeding. In  
11 such a proceeding, a petitioner cannot base its  
12 standing upon its distance from the nuclear facility  
13 unless the proposed action "quite obviously entails an  
14 increased potential for offsite consequences." And  
15 that's taken from a Commission decision in  
16 Commonwealth Edison involving the Zion Nuclear Station  
17 at CLI 99-4, 49 NRC 185.

18 In addition to geographic proximity there  
19 must be --

20 ADMIN. JUDGE HAWKINS: He was relying on  
21 what Commission decision? You said 49 NRC 185. What  
22 were the material facts in that case?

23 MR. STENGER: That was a license amendment  
24 request to reflect the shutdown status of Zion, Zion  
25 shut down in 1988.1999. So this was tech spec license

1 amendment.

2 ADMIN. JUDGE HAWKINS: So that's  
3 distinguished. I mean a shutdown reactor as opposed  
4 to an operating reactor seem to be materially  
5 different as far as the potential hazard to  
6 individuals within 50 miles.

7 MR. STENGER: Right. There are some  
8 distinctions, but again the language from the  
9 Commission is that in an operating license amendment  
10 proceeding a petitioner cannot base his or her  
11 standing simply upon a residence or visits near the  
12 plant unless the proposed action quite obviously  
13 entails an increased potential for offsite  
14 consequences.

15 So what needs to be shown is not just some  
16 geographic proximity but also direct harm, adverse  
17 effect, from the order in question here. So again  
18 there has to be a linkage between the action being  
19 taken. There must be concrete harm, injury and fact  
20 to the petitioners for an order imposing new  
21 requirements.

22 ADMIN. JUDGE HAWKINS: And perhaps more  
23 important a remedy that the Licensing Board can  
24 authorize.

25 MR. STENGER: Absolutely.

1 ADMIN. JUDGE HAWKINS: And redress.

2 MR. STENGER: Remedy in this case is  
3 either to sustain the order or not sustain the order.  
4 Petitioners are asking for a number of things that are  
5 just not within the scope of the proceeding for the  
6 Board to grant as a remedy. So, as you mentioned  
7 earlier, there is no redressability for the issues  
8 that they're raising.

9 On Question 4 about whether Pilgrim Watch  
10 must relate its claims to Pilgrim, I would just  
11 emphasize in addition to what the staff said. In the  
12 orders the Commission here imposed generally  
13 applicable new requirements on all relevant plants.  
14 The Commission clearly wanted to address all licensees  
15 in common way, do it in an expeditious manner, to  
16 incorporate key lessons learned from the Fukushima  
17 accident as quickly as possible.

18 You know the other alternative to impose  
19 legally-binding requirements would have been rule-  
20 making. And we all know how long the NRC can and  
21 other agencies can take with rule-making.

22 Pilgrim Watch here raises essentially  
23 generic issues that have been issues the Commission  
24 has looked at over the years and is continuing to  
25 consider now in light of Fukushima such as the vent

1       filtration systems and new policy on need to move  
2       spent nuclear fuel to dry storage.

3               Pilgrim Watch does not relate these claims  
4       to Pilgrim other than trying to do so in a very  
5       conclusory fashion. They don't show how Pilgrim is  
6       unique. And, in fact, it would be contrary to what  
7       the Commission tried to accomplish with these orders  
8       to somehow single out Pilgrim and have different  
9       requirements for Pilgrim than every other plant in the  
10      country.

11              And Pilgrim Watch certainly does not make  
12      any showing of how its concerns relate to any other  
13      plants in the country. And I think the Board  
14      correctly noted in essentially delegating the other  
15      licensees who answered the request for hearing to the  
16      status of the mecus curei (phonetic).

17              So there is certainly no basis to  
18      establish new requirements in these areas solely for  
19      Pilgrim when the Commission clearly wanted to  
20      establish generally applicable new requirements for  
21      all the affected plants. Thank you.

22              ADMIN. JUDGE HAWKINS: Thank you.

23              Mr. Webster, are you -- Do you want to  
24      take a five minute break before you proceed? Or if  
25      you're ready to proceed, let me check with my

1 colleague to make sure he's likewise ready to proceed.

2 MR. WEBSTER: Judge, just one request. We  
3 haven't actually -- We had a look at our items last  
4 night and couldn't find Entergy's consent. So if we  
5 could we would request a copy of Entergy's consent and  
6 five minutes to have a quick look at it. That would  
7 be wonderful.

8 ADMIN. JUDGE HAWKINS: All right. Let's  
9 take a five minute break. We will resume at 11:15  
10 a.m. We are recessed. Off the record.

11 (Whereupon, a short recess was taken.)

12 ADMIN. JUDGE HAWKINS: Would the members  
13 of the audience please be seated, please come to  
14 order?

15 BAILIFF: Quiet, please.

16 MR. WEBSTER: May it please the Board.  
17 I'm Richard Webster from Public Justice representing  
18 Pilgrim Watch.

19 It's a pleasure to be here before you once  
20 more and we wish Judge Rosenthal the best.

21 ADMIN. JUDGE HAWKINS: Thank you.

22 MR. WEBSTER: So again, I'm going to run  
23 through my responses, or Pilgrim Watch's responses, to  
24 the full questions. I'm very happy to pick up your  
25 questions along the way and then in the end we'll do

1 a little bit of a wrap up if we can.

2 So the important status of the element  
3 here is that these orders find something very  
4 important. These orders find that at the moment there  
5 is a lack of adequate protection which is the safety  
6 standard required by the Atomic Energy Act. They find  
7 that the Fukushima disaster has exposed weaknesses in  
8 the NRC's regulatory structure that must be corrected  
9 in order for the licensees to operate within the  
10 requirements of the Atomic Energy Act.

11 That means, and I think as the staff  
12 conceded, that these are not routine enforcement  
13 orders. This is not a situation where a licensee has  
14 failed to comply with existing regulations. This is  
15 not a situation where the staff or the Commission is  
16 imposing any sort of penalty for lack of compliance.  
17 Although the staff says that it is issued under 202,  
18 all orders are issued under 202. That doesn't really  
19 provide any sort of a commonality. And indeed, the  
20 staff mentioned that this is a unique circumstance to  
21 some extent. Certainly we hope it's a very unusual  
22 circumstance where an accident, a major accident at a  
23 plant of a very design to those operating in the  
24 United States, exposes weaknesses in the NRC  
25 regulatory structure. I think we all agree that

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1 should be an extremely rare event.

2 And so standard formulations may not apply  
3 to this unique circumstance.

4 ADMIN. JUDGE HAWKINS: I believe we heard  
5 from the NRC staff and Entergy that Main Yankee,  
6 Detroit Edison, for example, contained analogous  
7 situations where it was not sanctions in response to  
8 wrongdoing by a licensee. How would you distinguish  
9 those cases?

10 MR. WEBSTER: Well, that's correct, but  
11 the distinction with those cases is that here, the  
12 Commission has found, for instance, that reliable  
13 hardened vent is essential for adequate protection.  
14 Pilgrim Watch's papers dispute whether the vent that's  
15 required is reliable.

16 They mention a need, for instance, for a  
17 rupture disc. And Pilgrim Watch is stating, I think  
18 fairly plainly, that we will be better off without  
19 this order. And that is something that was not  
20 clearly stated in any of those other cases, and indeed  
21 that was the basis upon which most of those cases  
22 turn.

23 ADMIN. JUDGE HAWKINS: Can you point in  
24 your opening brief where you made that clear, Mr.  
25 Webster?

1 MR. WEBSTER: Well, I think I can point to  
2 it certainly in the reply brief.

3 ADMIN. JUDGE HAWKINS: I prefer the  
4 opening brief and then we'll talk about the reply.

5 MR. WEBSTER: Okay. Well, maybe I'll ask  
6 my colleague to help me out on that and I'll continue  
7 with that in a little while.

8 ADMIN. JUDGE HAWKINS: I am concerned that  
9 if it was not in the opening brief and it was not  
10 expressed until the reply brief where the parties  
11 didn't have the opportunity to respond to it, whether  
12 we should even consider that. But we'll see.

13 MR. WEBSTER: We will look carefully at  
14 the pleadings.

15 ADMIN. JUDGE HAWKINS: All right. You  
16 seem to focus on the reliability of the hardened  
17 vents. You say likewise, that Pilgrim Nuclear Power  
18 Plant would be better off without the order on the  
19 reliable spent fuel instruments?

20 MR. WEBSTER: No. That isn't quite what  
21 we're saying, actually. We're not saying that Pilgrim  
22 Nuclear Power Plant will be better off. We're not  
23 saying that the licensee is being harmed by this  
24 order. We're saying that Pilgrim Watch will be harmed  
25 by this order.

1 ADMIN. JUDGE HAWKINS: You're saying  
2 safety would not be enhanced, the status quo would  
3 actually -- safety would be diminished by implementing  
4 both of these orders?

5 MR. WEBSTER: Not quite, Your Honor. What  
6 we're saying is that the level of safety enhancement  
7 that's required by these orders is insufficient to  
8 meet adequate protection. And so Pilgrim Watch is  
9 being harmed because it has a right to adequate  
10 protection under the statute.

11 ADMIN. JUDGE HAWKINS: I hate to keep  
12 interrupting you, but there's a lot of nuances here  
13 and when you say the level of safety enhancements are  
14 insufficient, it sounds like you are acknowledging  
15 there is some, even if it's small incremental safety  
16 measures, there are some safety measures being  
17 implemented here.

18 MR. WEBSTER: There are.

19 ADMIN. JUDGE HAWKINS: And if that's true,  
20 why do you say that petitioners would nevertheless be  
21 better off without the implementation of these  
22 additional safety measures?

23 MR. WEBSTER: That's because the  
24 Commission has very broad power to require adequate  
25 protection. And it's our contention that the

1 Commission should use that power to ensure that  
2 adequate protection is delivered to Pilgrim Watch's  
3 members. And so as you discussed a little earlier,  
4 having an order -- the order is not very explicit.  
5 The order never says that these measures are  
6 sufficient to provide adequate protection. In fact,  
7 Entergy's motion to strike, I think, pointed out that  
8 it said these measures are necessary, but maybe  
9 they're not sufficient.

10 Our argument is that kind of step-wise  
11 process not providing adequate protection as quickly  
12 as possible harms our members because they're exposed  
13 to a lack of adequate protection for longer than their  
14 lowest would be. The alternative to safety  
15 improvements at the power plant to provide adequate  
16 protection is that the power plant could close down  
17 temporarily while the Commission decides what measures  
18 are needed for adequate protection. There's no given  
19 that the power plant has to operate. The power plant  
20 is supposed to operate within the terms of the  
21 statute. And the regulations are supposed to provide  
22 the level of protection that the Congress has mandated  
23 to the public that live close to the reactors.

24 The Commission has found that that is not  
25 the case right now, that we need to do something.

1 That part of the order we have no problem. We totally  
2 agree with that. What we don't agree with is that the  
3 Commission can just keep considering what to do and  
4 leave the situation unaddressed.

5 ADMIN. JUDGE HAWKINS: Doesn't that apply  
6 in chief to Bellotti that says you cannot seek a  
7 petitioner under the -- under the Bellotti rule  
8 cannot seek additional corrective measures.

9 MR. WEBSTER: And I think this goes to  
10 scope. We're not seeking additional corrective  
11 measures. We're pointing out that the facts in the  
12 order -- and you're incorrect -- that the facts -- the  
13 facts say that basically that this order will provide  
14 a reliable vent. We say it doesn't provide a reliable  
15 vent. We're not pointing those things out to say you  
16 should require additional measures. We're pointing  
17 out to say what you have said is necessary isn't  
18 provided.

19 And in addition, what we're saying is that  
20 because the level of safety that's required by these  
21 orders is insufficient, the Commission must take  
22 action and the action -- in other words, let's say  
23 this. The Commission should have decided in this  
24 order whether adequate protection was being met. It  
25 did not decide that. And that's why the order

1 shouldn't be sustained. We do not -- we're disputing  
2 whether the order makes us better off or worse off.  
3 It makes us worse off because it forecloses other  
4 remedies.

5 We have this discussion about scope. The  
6 scope is should the order be sustained or not? Our  
7 belief is the order should not be sustained because  
8 the lack of sustaining of the order opens up remedies  
9 to us and we can get redressability for the lack of  
10 adequate protection if the order is not sustained.

11 And so we're better off. I mean  
12 ironically we're better off. I think this is what the  
13 case is --

14 ADMIN. JUDGE HAWKINS: It's a very  
15 creative argument and I understand how you're trying  
16 to advance it consistent with Bellotti, but it still  
17 seems very strange to me where on the one hand you  
18 appear to concede that both orders will provide some  
19 enhanced safety.

20 MR. WEBSTER: That's right.

21 ADMIN. JUDGE HAWKINS: And it seems to me  
22 that having acknowledged that Bellotti bars you from  
23 arguing that because it doesn't provide as much safety  
24 as you would like, you're here challenging today.

25 MR. WEBSTER: I think the critical

1 discussion with Bellotti is there was no argument that  
2 the measures required by Bellotti would provide  
3 adequate protection. Bellotti was based on the  
4 existing regulation structure. There's a presumption  
5 that the existing regulation structure provides  
6 adequate protection. And so in Bellotti, the  
7 assumption was that if the Commission requires  
8 compliance with the regulations, there will be  
9 adequate protection. Here, that assumption doesn't  
10 hold.

11 I'll also point out that there's a line in  
12 case Heckler v. Chaney which basically says in terms  
13 of enforcement which is -- the law is clearly  
14 enforcement. There's a line in Heckler v. Chaney  
15 which says that enforcement is subject to maximum  
16 deference, very seldom reviewable and that's indeed  
17 why the two 206 petitions are now -- they're no longer  
18 reviewable at all. But --

19 ADMIN. JUDGE HAWKINS: Very difficult to  
20 review.

21 MR. WEBSTER: Difficult to get a review  
22 than it was before. And this order -- just one more  
23 point, this order isn't a classic enforcement order.  
24 It is an enhancement. It is requiring and deciding we  
25 need an analysis safety.

1           ADMIN. JUDGE HAWKINS: But it's clear  
2           under Bellotti's progeny Commission decisions, Detroit  
3           Edison, Maine, that Bellotti applies in these  
4           circumstances. It's not a classic enforcement order,  
5           but Bellotti clearly applies.

6           MR. WEBSTER: And as I say, the  
7           distinction between those cases and this case we are  
8           -- those cases say the petitioners aren't attempting  
9           to strike down the order. I would suggest they're  
10          more on the scope than they turn on standing because  
11          the scope, the Commission has defined the scope  
12          generally fairly narrowly. There's some issues here  
13          about the Commission has allowed some disputed facts  
14          as well as issues of sustainability, but the bottom  
15          line is all those cases said well, really the  
16          petitioners here don't want to strike down the order,  
17          they want to enhance it. What we're saying is if this  
18          is the order, we're better off without it.

19          ADMIN. JUDGE HAWKINS: And you're saying  
20          you're better off without not because it increases  
21          safety or not because it is adverse to safety  
22          concerns, but that because it forecloses in the  
23          immediate future consideration of needed safety  
24          concerns? Is that --

25          MR. WEBSTER: Yes. It makes it much more

1 difficult for us to seek redress. For instance, we  
2 could see redress in terms of closing the plant. The  
3 Commission has made this finding as a lack of adequate  
4 protection. If that lack of adequate protection -- if  
5 that lack of protection isn't being redressed, then I  
6 think we have a very strong argument the plant should  
7 close.

8 If we try to go down that route now, the  
9 licensee would probably switch this argument and say  
10 oh, actually, although the Commission didn't say it  
11 was insufficient, it actually is.

12 ADMIN. JUDGE HAWKINS: Have you tried any  
13 2.206 petitions, for example, for the vent saying we  
14 should have filters on them?

15 MR. WEBSTER: Oh, to be clear, 2.206 is  
16 about compliance to the existing regulations. One  
17 can't go into a 2.206 proceeding alleging that a  
18 regulation seems to be enhanced.

19 ADMIN. JUDGE HAWKINS: Right, right,  
20 right.

21 MR. WEBSTER: And so -- there's two points  
22 on this. First of all, we wouldn't be permitted to  
23 bring a 2.206 petition about safety enhancement. But  
24 second of all, I think this is important --

25 ADMIN. JUDGE HAWKINS: Let me ask you,

1 2.206(a) says any person that files a request to  
2 institute a proceeding pursuant to Section 202 to  
3 modify the license.

4 MR. WEBSTER: Right, but I think that's  
5 based on -- there's an underlying assumption that one  
6 can't challenge rules and regulations of the  
7 Commission, I do believe.

8 ADMIN. JUDGE HAWKINS: Well, I guess  
9 perhaps not in the 2.202 or 2.206, but how about  
10 petition for rulemaking?

11 MR. WEBSTER: Well, and this is an  
12 important point, actually, which is the staff stresses  
13 that the Commission has a lot of discretion about  
14 setting the scope and so forth. And the cases say  
15 that. So we don't dispute that. But the Commission  
16 also has and the staff in this case, has directed us  
17 to this very proceeding. In the order, the staff  
18 state very clearly that if you are a non-licensee and  
19 you think this order should not be sustained, you  
20 should come to this proceeding. And indeed, very  
21 often a reason for throwing out petitioners has been  
22 oh, I'm sorry, you're pleading outside the scope of  
23 the order.

24 So the forum to which the order direction  
25 must matter, in effect, the Commission or the staff

1 here, the staff I should say, the staff here can't  
2 treat this like a bull fight where they wave the cape  
3 over here and say come over here and then when the  
4 petitioner runs over here they lift the cape and say  
5 oh, sorry, actually, you're supposed to go over here.  
6 And then you go over here and they say oh, no,  
7 actually, you should be somewhere else.

8 And so yes, there may be alternative  
9 forum, but the point is that the order directs us  
10 here. And so we've come here because like the staff,  
11 we agree that the order does matter. The words of the  
12 order do matter. And the staff, I think, sometimes  
13 wants to have it both ways. When they make a mistake  
14 they say oh, well, the words of the order, everyone  
15 knows what underlies the order.

16 ADMIN. JUDGE HAWKINS: Would you agree  
17 that it's critical to establish standing you have to  
18 provide factual support that you'll be better off if  
19 these two orders are not sustained?

20 MR. WEBSTER: Well, I think we agree that  
21 --

22 ADMIN. JUDGE HAWKINS: You probably should  
23 agree with that because that's a quote from Detroit  
24 Edison.

25 MR. WEBSTER: We agree there's additional

1 -- we think the 50-mile standard really says that if  
2 the plant doesn't have adequate protection, we'll be  
3 affected. That's the presumption.

4 ADMIN. JUDGE HAWKINS: That's the general  
5 application of proximity presumption. That's correct.

6 MR. WEBSTER: And then we do agree that  
7 actually, and it's really because the order states it,  
8 the order states how you're harmed by this order as  
9 one of the requirements. And so we agree that we do  
10 have to state how we're harmed. And I'm endeavoring  
11 to do that and I believe the pleadings said that as  
12 well that we're harmed because we are not getting the  
13 level of protection that is required and because the  
14 order makes it harder for us to obtain that level of  
15 protection. So that is our harm.

16 And there's a number of other harms. Let  
17 me flip through the other harms.

18 ADMIN. JUDGE HAWKINS: Before you do, Mr.  
19 Webster, couldn't that argument be made in any  
20 enforcement action proceeding similar to this and that  
21 would really do away with the Bellotti rule?

22 MR. WEBSTER: Well, first of all, the  
23 Bellotti rule applies generally to enforcement  
24 actions. As the staff said, this is a very unusual  
25 type of action. You can characterize it as

1 enforcement if you want --

2 ADMIN. JUDGE HAWKINS: But it's consistent  
3 with past precedent, with Commission case law, Detroit  
4 Edison?

5 MR. WEBSTER: We would agree --

6 ADMIN. JUDGE HAWKINS: I don't think you  
7 -- or can you? Perhaps you can meaningfully  
8 distinguish that case.

9 MR. WEBSTER: Well, that case, the  
10 difference is that the petitioners did not state how  
11 they were better off without the order. And so it's  
12 not that the legal standard is really different. It's  
13 that the petitioners, the way it was pled is  
14 different.

15 ADMIN. JUDGE HAWKINS: So you're saying so  
16 long as the petitioners use the magic words in their  
17 pleading, they can get around the Bellotti rule?

18 MR. WEBSTER: Well, not magic words, but  
19 I think the Bellotti rule --

20 ADMIN. JUDGE HAWKINS: Should not be  
21 sustained?

22 MR. WEBSTER: No --

23 ADMIN. JUDGE HAWKINS: We'll be better off  
24 --

25 MR. WEBSTER: I think with standing I

1 think it's pretty clear, Lujan gives you a pretty  
2 clear guidance on standing, right? Which is injury,  
3 traceability, redressability.

4 To the extent Bellotti addressed standing,  
5 I think you can look to the Supreme Court precedent.  
6 The extent to which it addressed scope, I think we're  
7 within the scope. And so we do have to -- as I  
8 concede, we do have to show injury here as well as I  
9 think traceability is addressed by 2.309 and 2.309(d).  
10 And then redressability, as I was saying, I think  
11 perhaps the order notably doesn't require any  
12 discussion of redressability. And you can ask why is  
13 that? And one potential reason is redressability is  
14 kind of obvious in a situation where there's a lack of  
15 adequate protection. I think there's no dispute the  
16 Commission has extremely broad powers to require any  
17 protection, adequate protection.

18 In addition, there are a number of other  
19 means of seeking redress available to non-licensees.  
20 And so if you really treat the terms of the order as  
21 an important indicia of what the staff were thinking,  
22 which I'm not sure the staff necessarily does, but if  
23 you do, then I think we can conclude there really is  
24 no problem with redressability.

25 ADMIN. JUDGE HAWKINS: Correct, so long as

1       you're asking that the license not be sustained.

2               MR. WEBSTER: I'm trying to distinguish  
3       here between standing and scope.

4               ADMIN.       JUDGE       HAWKINS: Well,  
5       redressability, we have to have the authority to  
6       provide a remedy, to provide redress. If you ask for  
7       something beyond revoke or say this order cannot be  
8       sustained, we cannot provide that relief.

9               MR. WEBSTER: I think first of all, I  
10       think the Commission and the staff cannot define the  
11       scope so narrowly that it's impossible to get a  
12       hearing. There is a hearing right. And so if the  
13       scope is defined so narrowly that it's impossible ever  
14       for a non-licensee ever to get a hearing, that's a  
15       violation of the hearing right.

16               Let's assume for the purposes of the  
17       argument that the order says what it means which is  
18       non-licensees can get a right -- can get a hearing.  
19       Now although the Licensing Board has some limited  
20       power, if the Licensing Board's only power is to  
21       sustain or not sustain, then clearly the rest of the  
22       Agency will have to provide the redress. But the rest  
23       of the Agency will be required to provide the redress.

24               The Commission has a statutory duty to  
25       ensure adequate protection. If the Licensing Board

1 does not sustain this order, then it will necessarily  
2 require the Commission to provide adequate protection,  
3 either through some change in safety measures of the  
4 plant, through closing plants or through some other  
5 measures, which perhaps my rather small brain is not  
6 capable of conceiving right now.

7 ADMIN. JUDGE HAWKINS: That's a concession  
8 you need not make.

9 (Laughter.)

10 MR. WEBSTER: So I think that perhaps  
11 redressability has been looked at rather generically.  
12 The redress steps from the lack of sustaining of the  
13 order rather than is ordered directly in the  
14 proceeding.

15 (Pause.)

16 MR. WEBSTER: All right, my esteemed  
17 colleague, Mr. Roisman, has helped me out a little bit  
18 with these orders. Your question previously was where  
19 in its opening brief did Pilgrim Watch raise the issue  
20 of the insufficiency of these measures to provide  
21 adequate protection. And the contentions actually  
22 specifically state that.

23 Let me read the first one. "Based on new  
24 and significant information from Fukushima" --

25 ADMIN. JUDGE HAWKINS: Can I ask you to

1 point out the page so I can follow with you?

2 MR. WEBSTER: It's at page 3 of the  
3 opening petition. This is page 3 of the vent  
4 petition. 1250.

5 The first contention states "Based on new  
6 and significant information from Fukushima, the order  
7 modifying licenses" -- I'll skip a little bit -- "is  
8 insufficient to protect public health, safety, and  
9 property."

10 And the second contention has a similar  
11 wording. So clearly, there's an allegation that these  
12 orders do not provide adequate protection. And so the  
13 sustaining on order that does not provide adequate  
14 protection harms us. And by reversing the logic, the  
15 striking down of an order that doesn't require any  
16 protection provides us with the ability to seek that  
17 adequate protection.

18 ADMIN. JUDGE HAWKINS: So under -- if I  
19 look at Alaska, it says "The critical inquiry under  
20 Bellotti in a proceeding on a confirmatory order is  
21 whether the order improves the licensee's health and  
22 safety conditions. If it does, no hearing is  
23 appropriate." And that's a succinct definition of  
24 what Bellotti says, all right? That's what the  
25 Commission has said.

1 MR. WEBSTER: Right, but I think that that  
2 wording is too narrow, obviously, because it takes a  
3 very narrow view of what the injury is here. It  
4 implies that the only injury that's recognizable for  
5 standing is a decrease in safety. That simply isn't  
6 true. If you look at the precedent on standing, the  
7 injuries that are recognizable are very, very broad.

8 ADMIN. JUDGE HAWKINS: I understand your  
9 point. It's a reasonable one, but we are bound by  
10 Commission case law and it seems in every -- the  
11 progeny of Bellotti, they seem to use the shorthand  
12 that Judge Baratta just used, strongly suggesting that  
13 to the extent an order does incrementally increase  
14 safety, Bellotti bars its challenge.

15 MR. WEBSTER: As I've explained, I think  
16 the reason they used that language is because the  
17 petitioners did not clearly articulate other harms.  
18 And so where the petitioners did not articulate other  
19 harms, the Commission decided on the harms that the  
20 petitioners were articulating which was a lack of  
21 safety.

22 (Pause.)

23 MR. WEBSTER: Right. Mr. Roisman is  
24 prompting me that neither Bellotti nor Alaska dealt  
25 with a situation when there was a lack of adequate

1 protection. Admittedly, some of the later cases I  
2 think you're pointing to did deal with that situation,  
3 but again, the petitioners did plead their harm.  
4 Obviously, the Commission didn't decide and the  
5 Commission didn't have to get creative. And had you  
6 provided a hypothetical theme, had you pled something  
7 else, you might have been able to get a hearing. They  
8 just said well, you didn't plead this. You didn't  
9 plead harm -- the harm you pled rather was inadequate.  
10 And so therefore because the harm you pled was  
11 inadequate, you're out.

12 As I said, most of those things -- I think  
13 they conflate, actually, scope and standing because --  
14 and I know it's not your purview to criticize  
15 Commission decisions, but I think it's important to  
16 divide here between scope and standing. The standing  
17 injuries are very broad and the injuries that I'm  
18 articulating here are clearly within the terms of  
19 standing.

20 For scope, the Commission has -- and this  
21 is to me what's most important about Bellotti. As I  
22 say, Bellotti talks about standing, but there's lots  
23 of other case law out there about standing. Lujan  
24 being perhaps the one that springs most to mind. And  
25 Massachusetts v. EPA, actually, I would look to as

1 well, for guidance to show that injuries and  
2 redressability can actually be very broad to provide  
3 standing.

4 So Judge Baratta --

5 ADMIN. JUDGE BARATTA: I want to go back  
6 to adequate protection for a second because I'm trying  
7 to find in the order where the Commission acknowledges  
8 that the current situation does not provide adequate  
9 protection. And I do see in the Federal Register  
10 notice on page 16099 on the third column the statement  
11 that "reliability hardened venting systems in BWR  
12 systems, Mark I and Mark II containments, are needed  
13 to ensure that adequate protection of public health  
14 and safety is maintained."

15 So are you saying that that is an  
16 admission that the Commission is making that the  
17 current -- currently there is not adequate protection?

18 MR. WEBSTER: I have a few quotes here.  
19 It goes on to say "Accordingly, the Commission has  
20 determined that these measures are necessary to ensure  
21 adequate protection of health and safety." So I think  
22 because the Commission is saying to ensure adequate  
23 protection you need additional measures, that must  
24 mean that the current measures are insufficient.

25 "Additional requirements must be imposed

1 on licensees to increase the capability. These  
2 additional requirements are needed to provide adequate  
3 protection to public health and safety."

4 ADMIN. JUDGE HAWKINS: And you agree they  
5 increase public health and safety, but it's your  
6 position they don't provide adequate public health and  
7 safety?

8 MR. WEBSTER: Its opposition -- and I'm  
9 not sure -- the orders are somewhat unclear here  
10 whether the Commission -- the staff intended these to  
11 provide adequate protection or whether the staff  
12 intended this to be a step-wise process where adequate  
13 protection will be gained over time as wisdom is  
14 increased. I think either way they harm us because if  
15 they're intended to provide adequate protection, our  
16 contention is they don't.

17 If it's a step-wise process, our  
18 contention is that that's inadequate. We're harmed by  
19 a step-wise process because our members are exposed to  
20 this lack of adequate protection for far longer than  
21 they should be. That's another harm which I was going  
22 to get to actually is that having an elongated process  
23 to gradually approach adequate protection, this is  
24 what's totally different to say Bellotti or Alaska is  
25 here we know we have adequate protection. And it's a

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1 possibility certainly that the Commission hasn't  
2 provided adequate protection and they intended to.  
3 And that harms our members because they're exposed to  
4 these excess risks of nuclear accidents beyond what  
5 Congress has mandated is a decidedly desirable level.

6 And so I think there's really -- when you  
7 think about it more broadly, it's quite plain that the  
8 Commission's actions here harm our members. And they  
9 harm our members because the protection level which  
10 Congress has mandated is not being achieved now and  
11 you have to treat our pleadings as correct for the --  
12 in the standing analysis, one treats the pleadings as  
13 correct. According to the pleadings, the measures  
14 taken here do not provide our members with the  
15 protection that they require or the protection the  
16 Congress requires. And so therefore, the order should  
17 not be sustained.

18 ADMIN. JUDGE HAWKINS: It's not your  
19 position that these orders erode public safety.

20 MR. WEBSTER: And that's one of the  
21 reasons we haven't looked to set aside these orders  
22 with immediate effect. We're not saying these orders  
23 erode public safety. We're saying they erode the  
24 ability of the public to achieve adequate protection,  
25 to get the protections to which they're due. And

1 that's an invasion of a statutory right. We have a  
2 statutory right to adequate protection. The  
3 Commission has a duty to provide adequate protection.  
4 It is not meeting its duty and that's harming our  
5 members. And that's why we have standing.

6 ADMIN. JUDGE BARATTA: It's not your  
7 contention then that with respect to the systems that  
8 are being proposed that there's any lack of support  
9 that those systems would operate would be reliable?

10 MR. WEBSTER: Well, I think there is a  
11 dispute about whether there is reliability. The  
12 Commission says a reliable vent is required. We are  
13 saying the vent that is in the order is not a reliable  
14 vent. So there is some dispute about the facts of the  
15 order as well as the -- what the order purports to  
16 achieve.

17 So let me just -- maybe I should -- how am  
18 I doing on time? I'm getting towards the end so I  
19 better move alone.

20 ADMIN. JUDGE HAWKINS: Can I ask you to  
21 take about three minutes and briefly address each of  
22 the four issues that we did mention in our May 9th  
23 order?

24 MR. WEBSTER: That was exactly what I was  
25 going to do, Judge. I think I've pretty much covered

1 the lack of 2.309(f) in the order. We do believe what  
2 is in the order is important. We did cover 2.309(f)  
3 in our pleadings.

4 ADMIN. JUDGE HAWKINS: So they're in err  
5 and not including it did not prejudice Pilgrim Watch  
6 in this case?

7 MR. WEBSTER: It did not prejudice it, but  
8 we met the requirement. Bellotti, as I was saying,  
9 huge numbers of distinguishing points. The Circuit  
10 Court law is inapplicable to this proceeding. Now the  
11 Commission law applying Bellotti and there are a  
12 number of important distinctions there. I think the  
13 2.206 lack of reviewability is one of them, but the  
14 key one is that Bellotti was about bringing licenses  
15 up to existing standards, not enhancing the standards.

16 Now the Commission law, as we were saying,  
17 is about I think the way it was pled rather than about  
18 the underlying law. We will still argue that Bellotti  
19 is actually inapplicable. We recognize this Licensing  
20 Board doesn't have the power to overturn those  
21 Commission decisions. So let me be very clear. We  
22 don't think Bellotti is applicable. We recognize you  
23 don't have the power to overturn that and we think we  
24 can meet the requirements of the proximity plus  
25 requirements of standing by showing harm due to the

1 promulgation of the order and by showing redress from  
2 the lack of sustaining the order.

3 ADMIN. JUDGE HAWKINS: Mr. Webster, would  
4 the remedy here be directing the Board directing that  
5 the order does not apply solely to the Pilgrim plant?

6 MR. WEBSTER: Okay, well, let me go to  
7 Question 4, I think --

8 ADMIN. JUDGE HAWKINS: I don't want to  
9 interrupt you then, just so long as you remembered  
10 that.

11 MR. WEBSTER: That's fine, let me do  
12 Question 4 now which is we think the Pilgrim plant  
13 will provide a case study. Clearly, we're  
14 establishing standing with respect to the Pilgrim  
15 plant. Therefore, we will address in the hearing  
16 primarily the issues with the Pilgrim plant. But the  
17 order is generic as Entergy points out. And so to the  
18 extent that a case cite of Pilgrim plant highlights  
19 generic problems with the order, we believe the  
20 relief, lack of sustaining of the order, would apply  
21 to all of the plants.

22 I do have a few case cites for that kind  
23 of position. In fact, I think Lujan says "once a  
24 plaintiff has demonstrated standard challenge to  
25 specific final Agency action, a Federal Court's

1 intervention may also have the effect of requiring a  
2 regulation, a series of regulations, or even a whole  
3 program to be revised by the Agency in order to avoid  
4 the unlawful conduct that the Court discerns." So in  
5 other words, of course, Pilgrim Watch will address  
6 itself primarily to Pilgrim, but the relief that comes  
7 out of that, the non-sustaining of the order, if it's  
8 a generic problem, I mean if it's a specific, the  
9 Licensing Board has discretion to make it specific to  
10 Pilgrim. If it's a generic problem, the Licensing  
11 Board can make the whole order not sustainable.  
12 That's something that's within the discretion of the  
13 Licensing Board.

14 The proximity of presumption, well, again,  
15 we concede that the order required both proximity and  
16 injury and so we pled proximity and injury. We think  
17 that the presumption that a lack of adequate  
18 protection at nuclear power plants will harm people  
19 within 50 miles does apply. And I haven't heard any  
20 dispute about that from my esteemed colleagues over  
21 here. I think that the presumption applies, but we  
22 still have to show how we are within the scope and how  
23 we have standing -- sorry, how we have injury.

24 So let me get back to distinctions between  
25 Bellotti because I think it's important to realize

1 that Bellotti is a D.C. Circuit case. It's a  
2 relatively old case. Standing law has moved on since  
3 then. The Commission decisions are about situations  
4 where people pled that they want more rather than  
5 pleading that they're better off without the order.  
6 And so basically the Bellotti rule, if the Bellotti  
7 rule is that you have to show standing, we do that.  
8 If the Bellotti rule is that you have to be within  
9 scope, we're within scope. If the Bellotti rule is  
10 that -- if the order enhances safety by a scintilla,  
11 you can never get a hearing, that's wrong.

12 ADMIN. JUDGE BARATTA: But that's what the  
13 Commission said. I mean it doesn't matter whether the  
14 probability of an accident or exposure is reduced by  
15 something in the tenth decimal place, it still is an  
16 improvement of safety.

17 MR. WEBSTER: But Judge Baratta, if that  
18 were true, then the order wouldn't have all these  
19 provisions for hearings. The Commission clearly  
20 thinks that this order enhances safety. But the order  
21 doesn't say because this order enhances safety no  
22 licensee can get standing. So don't bother applying  
23 for a hearing.

24 ADMIN. JUDGE BARATTA: Well, the question  
25 really before us is not whether -- is whether it

1 really does enhance safety, I think. In looking at  
2 the notice, there is clearly the statement there that  
3 facts basically are in error, then you're entitled to  
4 a hearing if you can show that.

5 MR. WEBSTER: Well, the facts we're  
6 disputing here are, as I said, the issue of whether  
7 the vent required is reliable. We can't show that  
8 they're going to make the vents worse through this  
9 order. We don't have to show that. The Commission  
10 when it wrote the order clearly thought yes, it  
11 provided two elements for a hearing, one was should  
12 the order be sustained and the other was the factual  
13 issue. If the Commission thought that on the  
14 sustained point that no one had standing, no one  
15 licensee had standing to bring that issue up into a  
16 hearing, why does the order give all these  
17 instructions on how to go seek a hearing? Is that  
18 another mistake from the NRC staff? Or is there  
19 really a hearing right?

20 ADMIN. JUDGE BARATTA: In fairness, I  
21 think you have to acknowledge the Commission has said  
22 the Bellotti rule will significantly narrow the pool  
23 of petitioners who will be able to bring cognizable  
24 petitions to enforcement orders.

25 MR. WEBSTER: Right, and I think in

1 Detroit Edison the Commission said we expect  
2 petitioners to be able to rarely establish standing.  
3 And I submit to you this is one of those rare cases.  
4 This is one of those rare cases where petitioners have  
5 both pled and shown that they have standing and they  
6 have stayed within the scope of the proceeding. And  
7 for those reasons, we ask you to grant the contentions  
8 and provide a hearing on this important issue of  
9 whether these orders provide -- whether these orders  
10 should be sustained because -- we believe they should  
11 not because they subject our members to a lack of  
12 safety. And our members are congressionally entitled,  
13 have a statutory right to that level of safety.

14 ADMIN. JUDGE BARATTA: Let me go to the  
15 issue of reliability for a minute. What is it that  
16 calls into question the reliability? What's your  
17 basis for that?

18 MR. WEBSTER: Well, the basis is there's  
19 no passive system. And so a reliable vent would  
20 operate even in the absence of backup power and even  
21 in the absence of other operator actuation.

22 ADMIN. JUDGE BARATTA: And are you calling  
23 into question that because in the -- if you look again  
24 at Enclosure 1, I believe it is, to the order, there  
25 appears to be no mention in the first part which is to

1 have reliable vent and later on it talks about --  
2 excuse me, you have operated for an extended period of  
3 station -- prolonged station blackout whereas later on  
4 in the order in Section 1.2.5 it does talk about the  
5 HCV as "the hardened containment vent system shall  
6 include a means to monitor the effluent discharge  
7 during prolonged station blackouts." So there does  
8 seem to be a dichotomy there that the hardened vent is  
9 not required to be able to be operated during a  
10 prolonged station blackout, but the equipment that  
11 monitors it is.

12 MR. WEBSTER: I think that's among the  
13 reasons certainly. We believe that the hardened  
14 reliable vent would operate during prolonged blackout,  
15 should be required to operate during prolonged  
16 blackout.

17 ADMIN. JUDGE BARATTA: But what about the  
18 issue of inadvertent operation of the rupture disc  
19 that's been raised when these were considered  
20 previously?

21 MR. WEBSTER: Actually, I think the issue  
22 raised -- correct me if I'm wrong. I think the issue  
23 raised was what about load pressure venting. If a  
24 ruptured disc were in the way of a vent path, then you  
25 couldn't do low pressure venting. And that, I think,

1 can be worked around by a bypass system.

2 The only time, it seems to me, that you  
3 could have -- what's the word -- incorrect or  
4 inadvertent operation of rupture disc, is if the  
5 pressure in the containment went higher than the  
6 design pressure for rupture. And I guess I would hope  
7 that -- the existing regulations mean that the  
8 licensee would know what an outside accident  
9 situation, when that was going to happen and could  
10 make sure that a rupture disc doesn't rupture during  
11 design pressurization of the containment.

12 (Pause.)

13 MR. WEBSTER: I'm being prompted from the  
14 side here that, of course, if it were during operation  
15 that this pressurization occurred, we ask for rupture  
16 -- the level of adequate protection would be provided  
17 by having both a rupture disc and the filter. And the  
18 filter would provide a safeguard against inadequate  
19 operation. If inadequate operation would occur, the  
20 filter would ensure that our members are protected  
21 because it would filter out the radioactive gases.

22 ADMIN. JUDGE BARATTA: Is that true,  
23 though, because when you have a release, isn't it true  
24 that a majority of the release associated with notable  
25 gases which are not trapped by filters?

1 MR. WEBSTER: I mean I think the  
2 filtration numbers for non-notable gases is very good.  
3 For notable gases, they're not very good. But the  
4 fact remains that -- the fact remains that we contend  
5 and it's important that for the purposes of this  
6 decision on standing, we have to assume that what's in  
7 our pleadings is correct. And I think what we're  
8 talking about now really goes to adjudication which is  
9 what are the facts underlying this? Is it really true  
10 that the rupture disc can filter? Provides adequate  
11 protection? Is it really true that what's currently  
12 provided by the Commission doesn't require -- doesn't  
13 provide adequate protection? Those are the issues for  
14 the hearing. We concede that if there is adequate  
15 protection, then our contention will fail. But that's  
16 an issue that the hearing will decide.

17 If you have nothing more, thank you very  
18 much. Thanks for your attention.

19 ADMIN. JUDGE HAWKINS: Thank you.

20 (Pause.)

21 ADMIN. JUDGE HAWKINS: Would either Ms.  
22 Safford or Mr. Stenger like any rebuttal?

23 MS. SAFFORD: If I could just have a few  
24 moments of rebuttal, just a couple of minutes will be  
25 fine.

1           ADMIN. JUDGE HAWKINS: All right, and will  
2 that be in addition to or in lieu of Entergy?

3           MR. STENGER: Entergy would request a few  
4 minutes of rebuttal, too.

5           ADMIN. JUDGE HAWKINS: All right, I'll  
6 grant two minutes to each.

7           MS. SAFFORD: Thank you. There are just  
8 a few points that I'd like to raise on rebuttal.  
9 First, if I could attempt to clarify the question that  
10 was raised before on adequate protection and  
11 reasonable assurance. I think it's important when  
12 everyone is reading the order that they turn to the  
13 Section 3 of the order, for example, that states  
14 "reasonable assurance and adequate protection of the  
15 public health and safety and assurance of the common  
16 defense and security are the fundamental NRC  
17 regulatory objectives."

18           And further in the order we state  
19 "compliance with NRC requirements presumptively  
20 assures adequate protection. However, new information  
21 may reveal that additional requirements are  
22 warranted." That language right there clarifies the  
23 issue of whether the NRC has lost reasonable assurance  
24 of adequate protection. It has not. There is no  
25 question in the orders.

1           If at any time the Commission had lost  
2       reasonable assurance, then the plant or any licensee  
3       would be subject to immediate measures to modify,  
4       suspend, or revoke a license. No action of any sort  
5       was taken here. This is simply redefining a level of  
6       adequate protection and putting additional measures in  
7       place. Current regulatory requirements are being  
8       satisfied and are being met.

9           ADMIN. JUDGE HAWKINS: I think I  
10      understood Mr. Webster to say there would be some  
11      impediment to him bringing a 2.206 proceeding to ask  
12      for additional safety enhancements related to these  
13      orders. Do you see an impediment to such a petition?

14      MS. SAFFORD: One issue I would point out  
15      and speaking specifically here as to whether or not  
16      petitioners or any party could bring 2.206 petition.  
17      One of the impediments here and by virtue of the  
18      regulation we are in a current adjudicatory proceeding  
19      on this matter. So a 2.206 petition could either be  
20      held in abeyance or rejected on the grounds that it is  
21      currently being adjudicated in another forum.

22      The same is true, for example, the issue  
23      of the filters on the vents. That's currently in a  
24      process that is going to go up in a Commission paper  
25      later in the summer. It's currently in the public

1 process. The public are invited to come and  
2 participate and provide their views with industry and  
3 with the NRC on those issues. That issue is currently  
4 under discussion, under development, and that would be  
5 an impediment at this time bringing a 2.206. At the  
6 conclusion of those proceedings, then yes, petitioner  
7 could attempt to submit a 2.206 petition.

8 ADMIN. JUDGE BARATTA: I guess I would  
9 call into question here the assumption that the order  
10 presumes that there's adequate protection because  
11 throughout this I see the wording "to provide  
12 reasonable assurance of adequate protection we have to  
13 do this." "To provide reliability to assure adequate  
14 protection we have to do this." And that plain  
15 language reading of that suggests that currently some  
16 reactors may or may not have adequate protection  
17 because their systems are not reliable.

18 MS. SAFFORD: I think if that were the  
19 case, then as I stated earlier, then the Commission  
20 would have initiated action against any of those  
21 licensees.

22 ADMIN. JUDGE BARATTA: It would seem that  
23 that's what they're doing by this order.

24 MS. SAFFORD: But the presumption is that  
25 if the current regulations are being met, then we have

1       adequate protection.

2               ADMIN. JUDGE BARATTA: The question is  
3 whether or not the current regulations in light of the  
4 events are adequate and that seems to be what this  
5 order is saying that they are not adequate and  
6 therefore these enhancements are required in order to  
7 return them to adequate protection.

8               MS. SAFFORD: It's not a return to  
9 adequate protection. Under -- I didn't bring all the  
10 pages up with me, and I don't have the regulation with  
11 me, but under 50.109(a)(4)(ii) the can -- this is the  
12 backfit rules -- redefine adequate protection. And by  
13 redefining inadequate protection, the Commission is  
14 not saying that the current state of adequate  
15 protection or current regulations are somehow  
16 inadequate, but they're simply redefining based upon  
17 the events that occurred at Fukushima or any event  
18 that would cause the Commission to step back and react  
19 to an external situation, Fukushima, September 11,  
20 Three Mile Island, any of those significant events.

21               ADMIN. JUDGE HAWKINS: You have 30 more  
22 seconds, Ms. Safford.

23               MS. SAFFORD: Just a couple of points.  
24 Let me see if I can get through these --

25               ADMIN. JUDGE HAWKINS: You need not use

1 all of them.

2 MS. SAFFORD: Okay.

3 (Laughter.)

4 MS. SAFFORD: I did want to clarify. I  
5 don't think staff at any point intended to, and I'm  
6 not sure that I actually did say that we have a unique  
7 circumstance here. To clarify, 2.202 orders are  
8 enforcement orders, all of them, whether it's this  
9 type of order modifying a license, whether it's  
10 imposing civil penalties and remedy or a confirmatory  
11 order. They're all enforcement orders. This is not  
12 unique. This is still within the toolbox of what the  
13 Commission can choose under Section 2.202 to impose  
14 upon licensees.

15 And the last point I wanted to make, just  
16 going back to the Alaska DOT discussion that we had  
17 earlier. We do want to just clarify that our position  
18 is the case is not distinguishable and it's not  
19 appropriate to examine the underlying facts of this  
20 order. The staff and its technical expertise working  
21 with industry, working with the public, has determined  
22 that the provisions in these orders will enhance  
23 public health and safety. And we'd like to point out  
24 that this goes back to the thrust of Judge Bollwerk's  
25 dissent in Alaska DOT which the Commission, when they

1 issued their order, agreed with that allowing a  
2 petitioner to attack a confirmatory order under the  
3 guise of a factual dispute would effectively permit an  
4 end run around Bellotti. And thus, the facts in this  
5 situation, this order, this enforcement order are not  
6 at issue. Again, it goes back to the issue of whether  
7 the order itself should be sustained.

8 And to point out one additional point,  
9 it's not whether the order should be sustained and  
10 then NRC staff should go back and institute additional  
11 measures. The appropriate time frame to look at this  
12 is your current status quo or the order, not something  
13 different the petitioners might like to see instead of  
14 the provisions in this order. Thank you.

15 ADMIN. JUDGE HAWKINS: Thank you.

16 MR. STENGER: The petitioners requiring a  
17 hearing turns on the theory that somehow the  
18 Commission order does not go far enough to preserve  
19 adequate protection, but point out in the order the  
20 Commission -- I was careful to explain that the type  
21 of accident that occurred at Fukushima, those events  
22 are highly unlikely to occur in a U.S. nuclear power  
23 plant. The Commission found that current plans are  
24 continuing to be safe to operate.

25 They found that these actions required by

1 the order in the hardened vent order are necessary to  
2 ensure that adequate protection is maintained. Now if  
3 any additional -- beyond that, licensees are complying  
4 with NRC regulations. And as the order explains,  
5 compliance with NRC regulations presumptively ensures  
6 adequate protection. So to say that the order doesn't  
7 go far enough to preserve adequate protection is  
8 essentially an attack on the existing regulations  
9 which is not permissible and NRC issued adjudicatory  
10 hearing.

11 We also don't understand the logic of  
12 trying to say because the Commission did not go far  
13 enough in this order the relief should be to rescind  
14 an order that affirmatively is adopted to maintain  
15 adequate protection. So what this boils down to the  
16 petitioners' request for hearing is essentially a  
17 2.206 petition and it should be. They're asking that  
18 a supplemental order be issued. They're asking for  
19 additional remedy that cannot be granted by the Board  
20 under the scope of the proceeding as defined by the  
21 Commission. The appropriate avenue for their relief  
22 is 2.206. And there's no reason to assume that a  
23 properly supported 2.206 petition would not be taken  
24 seriously by the NRC staff. It will be.

25 Moreover, when Judge Baratta questions

1 about the reliability of the hardened vents and  
2 whether more needs to be done, etcetera, and the  
3 rupture disc should be adopted, those issues are part  
4 of the consideration going on now by the Commission.  
5 As explained, these orders now are just part of the  
6 first series of regulatory actions. The Commission is  
7 continuing to study the issue of vent filtration  
8 systems and other actions.

9 I would also point out that the spent fuel  
10 order is different. The Commission there based its --  
11 that order on an administratively exempting itself  
12 from the backfitting rules so it didn't have to make  
13 a finding of adequate protection or that there was a  
14 cost justified substantial increase of the underlying  
15 basis for the hearing request really doesn't apply for  
16 the spent fuel instrumentation order.

17 The last thing I point out, there has been  
18 discussion about the language that a person may  
19 challenge the order because it's based on unfounded  
20 allegations, etcetera. That is the procedure for  
21 challenging the immediate effectiveness of an order.  
22 I gave the wrong citation before. That is in 10 CFR  
23 2.202(c)(2)(i). That's a process for the licensee or  
24 another person to challenge the immediate  
25 effectiveness. That's very narrow and specific

1 procedure. Thank you.

2 ADMIN. JUDGE HAWKINS: Thank you.

3 MR. WEBSTER: Judge, your indulgence? Mr.  
4 Roisman has a couple of words he'd like to enlighten  
5 us with.

6 ADMIN. JUDGE HAWKINS: Generally, the  
7 petitioner has the right of the final word in these  
8 cases, so we'd be pleased to hear from him.

9 MR. WEBSTER: Thank you.

10 MR. ROISMAN: Thank you, Your Honor. I  
11 think there's a need to sort of get very clear what we  
12 have in this order. This order basically has two  
13 components: a finding that unless something is done,  
14 there is not adequate protection for the public health  
15 and safety. Now the Commission has determined or I  
16 should say the staff has determined that that can be  
17 done over a period of time. So they're able to say we  
18 think things are okay right now, but over a period of  
19 time, we're going to have to do something. And I  
20 quote from page four of the order just as an example.  
21 "Reliable, hardened venting systems in BWR facilities  
22 with Mark I and Mark II containments are needed to  
23 ensure that adequate protection of public health and  
24 safety is maintained."

25 Now that's a finding of fact. It is not

1       disputed. The applicant has consented to it. The  
2       staff has agreed and issued it.

3               So the next question is there's a second  
4       finding and that is a finding that says what this  
5       order proposes to do provides that reliable hardened  
6       vent system. That's a factual question. And it's a  
7       factual question which according to the staff and the  
8       applicant can never be challenged except by a  
9       licensee. The licensee can come in and say oh no, we  
10      don't need that much in order to have a reliable vent.  
11      But the public is given the right to say the order  
12      should not be sustained. One basis by which any order  
13      can be struck down is that the basis for the order is  
14      factually wrong.

15             Pilgrim Watch has made that argument.  
16      They presented a factual basis for that. They've  
17      attached the reports of experts on that. They have  
18      done everything they would be required to do under  
19      2.309(f) to demonstrate that there's a genuine issue  
20      of material fact as to whether or not that factual  
21      conclusion in the order is correct or incorrect. That  
22      alone should be sufficient to also meet the standing  
23      requirement because the order invites you to challenge  
24      the order and say should it be sustained or not and  
25      one reason why it shouldn't be sustained is it is

1 factually wrong. But there's a second reason.  
2 Equally important and that was referred to by staff  
3 counsel a moment ago. Staff counsel said well, the  
4 choices are between sustaining the order or going back  
5 to the status quo.

6 Okay, what do we have if we go back to the  
7 status quo? That's the part that staff and applicant  
8 have not wanted to address. The status quo is this,  
9 we have an uncontested and now uncontestable finding  
10 that unless something is done it is not providing  
11 adequate protection for the public health and safety  
12 to continue to operate Pilgrim. We have that finding.  
13 That's a given. So the status quo is -- without this  
14 order, Pilgrim Watch has two options. Option 1,  
15 Pilgrim Watch can simply say shut it down. You have  
16 no order that brings this plant up to the necessary  
17 level. That's one consequence that Pilgrim Watch  
18 could achieve. That's the status quo.

19 The U.S. Supreme Court in the Power  
20 Reactor Development case said you can't operate a  
21 nuclear power plant unless you have definitive  
22 findings of safety. Fukushima and the Commission's  
23 investigation of Fukushima has demonstrated that you  
24 cannot make those definitive findings of safety for  
25 these BWR plants unless something is done. So in this

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1 hearing we get a chance to ask the question is the  
2 something that's been proposed enough to get you to  
3 that level? And if the Board were to conclude it's  
4 not enough, then we'll go back to the status quo and  
5 you have to shut down the plant.

6 Now there's an alternative to shutting  
7 down the plant. This order illustrates how that  
8 alternative would work. The alternative would be that  
9 the Commission would come up or the staff would come  
10 up with a fix for the problem. And they would propose  
11 that the fix be implemented in a certain time period  
12 and in a certain way and so forth. So if they did  
13 that and you had ruled that this fix is not adequate,  
14 then they would have to come up with a better fix or  
15 else find themselves right back in front of you again  
16 with another challenge from Pilgrim Watch saying once  
17 again, they have not come up with a reliable solution.

18 Now this has nothing to do with Bellotti.  
19 It has nothing to do with the Alaska case because in  
20 those cases, as counsel has pointed out, the real  
21 issue was petitioner trying to expand the scope of the  
22 hearing to look at issues that weren't there? In this  
23 case, all we're trying to do is look at the issues  
24 that are here, that are right here in the four corners  
25 of the order. We're not asking the Board to implement

1 some new safety procedures. We're not asking the  
2 Board to look at other aspects of Pilgrim that might  
3 in light of Fukushima make it an unsafe plant.

4 We are narrowly looking at just this order  
5 and what this order is talking about. So if we go  
6 back to the status quo, there are at least two real  
7 possibilities both of which are better for Pilgrim  
8 Watch than the current situation. Either the plant  
9 will have to be shut down because there's not adequate  
10 protection or a much better order will have to be  
11 formulated that can support the proposition that with  
12 those improvements Pilgrim Watch will have, as the  
13 order says, a reliable hardened venting system which  
14 it does not have under this order.

15 Finally, what we're looking at in the  
16 cases that the Commission took Bellotti and applied it  
17 to these kinds of cases like Detroit Edison and Maine,  
18 I urge the Board to look at two things. Number one,  
19 look at the pleadings of the petitioner in that case  
20 and look at the Commission's orders. The Commission's  
21 orders made clear that the failing was not that you  
22 could never get a hearing. The failing was that those  
23 petitioners didn't know how to plead it correctly.  
24 Pilgrim Watch and Mary Lambert are far more  
25 sophisticated than that. Six years of fighting

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1 Pilgrim have made this one of the great intervenor  
2 lawyers just doesn't happen to have a law degree. So  
3 those cases are not a posit here except to the extent  
4 that they say you have to plead it correctly. And  
5 staff and the applicants say oh, well, you're just  
6 talking about putting in the right words. Come on.  
7 What is Part 2 all about?

8 Part 2 is all about putting in the right  
9 words. Part 2 is what we used to call in the federal  
10 civil system common law pleading. You've got to say  
11 it the right way. You've got to say it on the right  
12 day. You've got to do it on the right kind of paper.  
13 That's what those rules are. So Pilgrim Watch is  
14 playing the game. We're saying all the right things.  
15 And we're saying them in exactly the forum that we're  
16 supposed to be in.

17 If we think these factual findings in this  
18 order are wrong, where is the forum for us to talk  
19 about them? Doesn't exist. It was created by the  
20 staff in its order. It said come on over. Here we  
21 are. We're ready to talk. Thanks.

22 ADMIN. JUDGE HAWKINS: One quick question,  
23 Mr. Roisman, you provided Mr. Webster with a cite in  
24 your opening brief for the vents for drawing the  
25 inference that you were asking for relief of recision

1 of the order. Can you point to, in the brief, for the  
2 instrumentation for the spent fuel pool where we'd  
3 have a similar --

4 MR. ROISMAN: Yes. Can you give me just  
5 one second?

6 ADMIN. JUDGE HAWKINS: Sure.

7 (Pause.)

8 MR. ROISMAN: In the massive papers, we  
9 focused only on the vents. Could we just write you a  
10 letter and just say page 6, whatever? We know it's  
11 there. We asked Ms. Lambert. I'm not sure I can give  
12 it to you this second. Unless you want to wait like  
13 30 seconds.

14 ADMIN. JUDGE HAWKINS: I'll wait the 30  
15 seconds. That would be fine or however long it takes  
16 you. If you have a great amount of difficulty finding  
17 it, you can provide it later.

18 MR. ROISMAN: If I can get to my computer,  
19 I'll be able to find it.

20 (Pause.)

21 MR. ROISMAN: Yes, the contention which is  
22 on the first page of that petition reads "based on new  
23 and significant information from Fukushima, the order  
24 spelled out is insufficient to protect public health  
25 and safety and property because it lacks the

1 requirement for licensees to re-equip their spent fuel  
2 pools to low density, open frame design, and storage  
3 of assemblies greater than five years removed from the  
4 reactor core placed in dry casks." And let me just  
5 make sure -- yes, that was the contention.

6 ADMIN. JUDGE HAWKINS: And explain to me  
7 briefly why that gives you standing under Bellotti or  
8 puts you within the Bellotti rule?

9 MR. ROISMAN: Well, again, the underlying  
10 order, as with the one with the vents, indicated that  
11 there was a lack of adequate protection unless certain  
12 things were done. They proposed to do certain things.  
13 They said these certain things will provide that level  
14 of protection. We contest that finding.

15 So if that finding were found to be  
16 invalid, in other words, if we were factually able to  
17 challenge that in this proceeding and the Board agreed  
18 with us, we'd go back to the status quo. We'd then  
19 have a plant that didn't have adequate protection,  
20 public health and safety. Either shut it down or  
21 provide a better order.

22 ADMIN. JUDGE HAWKINS: All right.

23 MR. ROISMAN: Thank you.

24 ADMIN. JUDGE HAWKINS: Thank you very  
25 much, Mr. Roisman. Thank you. Thank you to counsel

1 for their very good presentations this morning. Thank  
2 you to Pilgrim Watch and thank you to the audience for  
3 attending this. The case is submitted and the  
4 proceeding is adjourned. Thank you.

5 (Whereupon, at 12:25 p.m., the proceeding  
6 was concluded.)  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ALL OPERATING BOILING WATER	)	
REACTOR LICENSEES WITH MARK I	)	
AND MARK II CONTAINMENTS	)	
	)	
AND	)	Docket Nos. EA-12-050 and EA-12-051
	)	
ALL POWER REACTOR LICENSEES	)	
AND HOLDERS OF CONSTRUCTION	)	
PERMITS IN ACTIVE OR DEFERRED	)	
STATUS	)	
	)	
(Fukushima-Related Orders Modifying	)	
Licenses)	)	

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Dated at Washington, DC  
this 8<sup>th</sup> day of June 2012

Original signed by Nancy Greathead  
Office of the Secretary of the Commission