LBP-12-14

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARDS

Before Administrative Judges:

Alan S. Rosenthal, Chairman
E. Roy Hawkens
Dr. Anthony J. Baratta

In the Matters of	
All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately)	Docket No. EA-12-050 ASLBP No. 12-918-01-EA-BD01
All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status: Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately)	Docket No. EA-12-051 ASLBP No. 12-918-01-EA-BD01
	July 10, 2012

MEMORANDUM AND ORDER
(Denying Petitions for Hearing)

I. BACKGROUND

Before the Board are two petitions for hearing, filed by Pilgrim Watch, that challenge the adequacy, respectively, of two orders issued by the NRC Staff in the wake of the March 2011 Fukushima Dai-ichi nuclear power plant accident.[1] According to the Staff, while events like

[1] Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Apr. 2, 2012) (Petition on Hardened Vents); Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Apr. 2, 2012) (Petition on Spent Fuel Pool

(continued . . .)

those at Fukushima are unlikely to occur in the United States because of present NRC requirements and plant capabilities, the Fukushima events nonetheless highlighted vulnerabilities that must be addressed in the interest of the protection of public health and safety. As a step in addressing these vulnerabilities, on March 19, 2012, the Staff issued challenged orders EA-12-050 and EA-12-051.[2]

The first order, EA-12-050, requires that licensees of boiling water reactor (BWR) facilities with Mark I and Mark II containments (such as those at the Fukushima Dai-ichi facility) "take the necessary actions to install reliable hardened venting systems."[3] Such venting systems would, in the Commission's estimation, assist in efforts to cool the reactor core in an accident scenario.[4] The second order, EA-12-051, requires that all power reactor licensees and construction permit holders "have a reliable means of remotely monitoring wide-range spent fuel pool levels . . . ."[5] According to the NRC Staff, "Fukushima demonstrated the confusion and

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[1] (. . . continued)
Instrumentation); see also Pilgrim Watch Request for Leave to Supplement Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Apr. 2, 2012); Pilgrim Watch Supplement to Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Apr. 12, 2012). Pilgrim Watch's motions to supplement its petitions are hereby granted.

[2] In the Matter of All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments; Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately), 77 Fed. Reg. 16,098 (Mar. 19, 2012) (EA-12-050); In the Matter of All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status: Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately), 77 Fed. Reg. 16,082 (Mar. 19, 2012) (EA-12-051). These enforcement orders do not represent the final NRC response to the events at Fukushima Dai-ichi or to the lessons learned arising from those events. Rather, they represent just one part of a developing response on multiple fronts. See 77 Fed. Reg. at 16,099; id. at 16,083; see also Staff Requirements Memorandum for SECY–11–0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan (Aug. 19, 2011).

[3] 77 Fed. Reg. at 16,099.

[4] Id. at 16,100.

[5] Id. at 16,084.

misapplication of resources that can result from beyond-design-basis external events when adequate instrumentation is not available."[6]

Pilgrim Watch[7] alleges that the two orders adversely affect its members, many of whom, according to petitioner, reside within close proximity of the Pilgrim Nuclear Power Station located in Plymouth, Massachusetts.[8] As to the order on hardened vents, Pilgrim Watch asserts that the events at Fukushima reveal the order's inadequacy in that (1) the order "lacks a requirement for licensees to install filters in the direct torus vents (DTVs)" and (2) the order "does not require the hardened DTV to be passively actuated by means of a rupture disc, so that neither water nor electrical supply is needed and operator intervention is not necessary to actuate the system."[9] As to the order on spent fuel pool instrumentation, Pilgrim Watch maintains that the events at Fukushima reveal the order's inadequacy in that the order "lacks a requirement for licensees to re-equip their spent fuel pools to low-density, open-frame design and storage of assemblies >5 years removed from the reactor core placed in dry casks."[10]

In response, both the NRC Staff and the licensee for the Pilgrim facility, Entergy Nuclear Operating Co. and Entergy Nuclear Operations, Inc. (Entergy) oppose the grant of the Pilgrim Watch petitions, principally for the same reasons:[11] (1) Pilgrim Watch raises issues that are

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[6] Id.

[7] At the outset of the proceeding, Pilgrim Watch was joined by Beyond Nuclear, as co-petitioner. However, Beyond Nuclear subsequently withdrew its co-petition. See Beyond Nuclear Withdrawal of its April 3, 2012 Pleading and Request to Co-Petition with the Pilgrim Watch April 2, 2012 Petition for Leave to Intervene and Request for Public Hearing (May 9, 2012).

[8] Petition on Hardened Vents at 1; Petition on Spent Fuel Pool Instrumentation at 1-2; Pilgrim Watch Reply to Answers to Pilgrim Watch Requests for Hearing at 2-3 (Apr. 27, 2012) (Reply Brief).

[9] Petition on Hardened Vents at 3.

[10] Petition on Spent Fuel Pool Instrumentation at 1.

[11] So too, numerous amicus curiae, representing licensees affected by the respective enforcement orders, opposed the petitions on much the same grounds.

beyond the scope of the proceeding; (2) Pilgrim Watch fails to provide sufficient information to establish its standing to challenge the orders in question; and (3) Pilgrim Watch fails to offer an admissible contention under 10 C.F.R. § 2.309(f)(1).

For the reasons set forth below, we conclude Pilgrim Watch raises issues beyond the scope of the proceeding. Accordingly, its petitions must be denied.[12]

II. ANALYSIS

Although Entergy and the Staff oppose the grant of the Pilgrim Watch petitions on several independent grounds, we need consider here only their insistence that those petitions raise issues beyond the scope of the proceeding. For it is clear on the basis of both judicial and Commission precedent that enforcement orders such as the two here-involved are not open to challenge in an adjudicatory proceeding on Pilgrim Watch's claim of inadequacy.

We begin the discussion of the scope question with the 1983 decision of the United States Court of Appeals for the District of Columbia Circuit in Bellotti v. NRC.[13]

In Bellotti, finding deficiencies in the management of the same Pilgrim facility that is the focus of the Pilgrim Watch petitioners, the NRC issued an enforcement order to then-licensee Boston Edison, amending the Pilgrim operating license to require development of a plan for reappraisal and improvement of management functions as well as imposing a civil penalty.[14] The enforcement order indicated that any subsequent proceeding regarding the order would be limited in scope to the issue of whether, "on the basis of matters set forth [therein, the] order should be sustained."[15] Thereafter, Francis X. Bellotti, the Attorney General of the

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[12] In reaching this decision on the petitions we also hereby grant the Pilgrim Watch Motion for Leave to File Transcript Corrections (June 15, 2012), and we deny the Pilgrim Watch Motion to Strike Staff Response of June 26, 2012 (June 27, 2012).

[13] Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983), aff'g, sub nom., Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982).

[14] Id. at 1381.

[15] 47 Fed. Reg. 4,171, 4,173 (Jan. 28, 1982).

Commonwealth of Massachusetts, petitioned to intervene and requested a hearing to address the adequacy of the plan, the plant's continued operation, the nature of necessary improvements, and the adequacy of implementation of required changes.[16]

The Commission concluded that Attorney General Bellotti's challenges were beyond the scope of the proceeding because he "[did] not oppose the issuance of the order nor [did] he raise in his petition or brief any suggestion that it [was] unsupported by the facts it set[] forth. . . . If anything, the Attorney General suggest[ed] that [the] facts not only support[ed] [the] order but also support[ed] further NRC action."[17] As a result of this determination, the Commission denied the petition.[18]

On the Bellotti appeal, the District of Columbia Circuit affirmed the Commission's decision, holding that Massachusetts had no cognizable adverse interest in the license amendment proceeding, given the scope of the proceeding the Commission established.[19] The court concluded that, by its terms, section 189a of the Atomic Energy Act of 1954[20] conferred upon the Commission authority to define the scope of its proceedings, which, in enforcement proceedings, the Commission took to permit challenges solely on whether an order should be sustained.[21] In the court's opinion, that conclusion was also administratively proper because, if the opposite were true and petitioners could raise any issue regarding an enforcement order

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[16] Bellotti, 725 F.2d at 1381.

[17] Pilgrim, CLI-82-16, 16 NRC at 46.

[18] Id. at 47.

[19] Bellotti, 725 F.2d at 1381, 1383.

[20] 42 U.S.C. § 2239a.

[21] Bellotti, 725 F.2d at 1381. Also underpinning the court's decision was what it considered the NRC's "larger regulatory structure" available to petitioners. Id. at 1382. The court observed that as part of that structure, petitioners denied a hearing for raising an issue outside the scope of a proceeding could still raise the issue through a petition for enforcement under 10 C.F.R. § 2.206. Id. at 1382-83.

issued to a facility, then proceedings would be expanded into "virtually interminable, free-ranging investigations."[22] Attorney General Bellotti's petition, which did not seek recission of the enforcement order, but rather sought additional enforcement measures beyond those prescribed by the order, therefore had been properly denied.[23]

More recently, in a similar factual context, the Commission returned to the question of an enforcement proceeding's scope in Alaska Department of Transportation.[24] As in Bellotti, the NRC had issued an enforcement order against a licensee (the Alaska Department of Transportation) charging it with discriminatory acts against the state's radiation safety officer in violation of 10 C.F.R. § 30.7.[25] As in Bellotti, a petitioner requested a hearing, seeking additional enforcement relief beyond that prescribed in the order – civil penalties and enforcement actions against individual managers.[26] Reversing a licensing board's grant of the petition, the Commission held, citing Bellotti, that "[t]he only issue in an NRC enforcement proceeding is whether the order should be sustained. . . . Boards are not to consider whether such orders need strengthening."[27]

It is true that, unlike the enforcement orders issued in Bellotti and Alaska Department of Transportation, the two orders now in front of us do not involve a response to determined violations of Commission regulations. That fact is, however, of no significance given the

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[22] Under such a regime, "[f]ew formal proceedings would be scheduled, and the Commission's substantive discretion to decide what is important enough to merit examination would be subverted by a procedural provision requiring the Commission to consider any issue any intervenor might raise." Id. at 1381.

[23] Id. at 1383.

[24] Alaska Dep't of Transp. & Pub. Facilities (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399 (2004), rev'g, LBP-04-16, 60 NRC 99 (2004).

[25] Id. at 401-02.

[26] Id. at 401-03.

[27] Id. at 404.

Commission's ruling in Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52 (2004), and Detroit Edison Co. (Fermi Power Plant Independent Spent Fuel Storage Installation), CLI-10-3, 71 NRC 49 (2010).

Maine Yankee involved a challenge to an NRC enforcement order, issued under 10 C.F.R. § 2.202, that modified the licenses of all 10 C.F.R. Part 50 licensees that stored or had near-term plans to store spent fuel in an independent spent fuel storage installation.[28] On reviewing the content of a challenge to that order, the licensing board determined that the challenge could not be entertained. This was because the petitioner was not opposing the substance of the order, but rather, was seeking the imposition of additional license modifications.[29] Affirming the licensing board's rejection of the challenge, the Commission cited Bellotti and added that "[i]f a petitioner could avoid the Commission's limitation on the scope of an enforcement order simply by characterizing its petition as opposing the order unless additional measures are granted, the Commission would never be able to limit its proceedings."[30]

Similarly, in Fermi, the Commission affirmed a licensing board's application of Bellotti to deny a hearing request by petitioners who sought to challenge an immediately effective enforcement order requiring Detroit Edison to take "certain physical security measures, in addition to those already required by [NRC] regulations, to protect the spent fuel it plan[ned] to store" at its power plant site.[31] Petitioners endeavored to bring their claim within the Bellotti rule

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[28] Maine Yankee, CLI-04-5, 59 NRC at 54 n.2 (citing Order Modifying Licenses (Effective Immediately), 67 Fed. Reg. 65,152 (Oct. 23, 2002)).

[29] Id. at 56-58.

[30] Id. at 58 (internal quotations omitted).

[31] CLI-10-3, 71 NRC at 50. These physical security measures were developed by the Commission in the wake of the September 11 terrorist attacks and had been deemed "necessary to protect the public health and safety in the 'current threat environment' and [were] intended 'to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility.'" Fermi, LBP-09-20, 70 NRC 565, 568 (2009).

by arguing that they would be better off if the order were rescinded because, otherwise, the order could have "negative effects" by creating a "false sense of security by emphasizing the formation of human security workforce over the substance of putting into place physical barriers and important technologies to protect the plant itself . . . ."[32] The Commission rejected this argument as being "both cursory and unsupported," holding that petitioners "do not explain why the 'false sense of security' purportedly created by the Staff Order – whose security benefits Petitioners do not question – would be ameliorated by revoking the Order."[33]

In the instant case, Pilgrim Watch's contentions – on their face – fall squarely within the Bellotti rule because those contentions explicitly complain that the safety enhancements in the Enforcement Orders are insufficient and require additional safety measures.[34]

At oral argument, we provided Pilgrim Watch every opportunity to distinguish Bellotti and its progeny. Pilgrim Watch's counsel made it crystal clear that the claim is not that the implementation of the challenged orders would reduce the existing level of safety but, rather, that safety of plant operation would be enhanced if additional measures were required.[35] As such, the claim falls squarely within the Bellotti rule and must be rejected.[36]

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[32] Fermi, CLI-10-3, 71 NRC at 52-53.

[33] Id. at 53.

[34] See supra text accompanying notes 9-10.

[35] See, e.g., Tr. at 62 (Pilgrim Watch counsel indicates that petitioner does not maintain that safety would be diminished by implementing the enforcement orders; rather "[w]hat we're saying is that the level of safety enhancement that's required by these orders is insufficient."); id. (Pilgrim Watch counsel acknowledges the orders will result in implementation of "some safety measures."); id. at 65 (Pilgrim Watch counsel concedes that "both orders will provide some enhanced safety.").

[36] For the first time in its Reply Brief and later at oral argument, Pilgrim Watch attempted to recast its claim to fit it within the Bellotti rule. See, e.g., Reply Brief at 7; Tr. at 81 (Pilgrim Watch counsel asserts that the enforcement orders "should not be sustained . . . . We're not saying these orders erode public safety. We're saying they erode the ability of the public to achieve adequate protection . . . ."). Even assuming arguendo that we should entertain this late-filed argument, we find it utterly inadequate to remove Pilgrim Watch's contentions from the

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III. CONCLUSION

For the reasons set forth above, the two petitions are denied.[37]

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
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Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE
/RA/

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E. Roy Hawkens
ADMINISTRATIVE JUDGE
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Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 10, 2012

The additional opinion of Judge Rosenthal follows.

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[36] (. . . continued)
Bellotti rule. To the extent Pilgrim Watch seeks to have Entergy implement additional safety measures, its recourse is to petition for rulemaking pursuant to 10 C.F.R. § 2.802, or to petition for license modification, suspension, or revocation pursuant to 10 C.F.R. § 2.206.

Contrary to the view expressed infra in the Additional Opinion of Judge Rosenthal, and guided by the maxim that adjudicative bodies are to "accord Government records and official conduct a presumption of legitimacy," United States Dep't of State v. Ray, 502 U.S. 164, 179 (1991), Judges Hawkens and Baratta find that the record before the Board falls far short of rebutting the presumption that 10 C.F.R. § 2.206 is a meaningful avenue for seeking administrative relief.

[37] The Pilgrim Watch Motion for Leave to File a Reply to Entergy's Comments on NRC Staff Response to the Board Order Regarding Petitions Under 10 C.F.R. § 2.206 of July 3, 2012 (July 10, 2012) is hereby granted.

Additional Opinion of Judge Rosenthal

I fully subscribe to the Board's decision. It is beyond cavil that Pilgrim Watch's hearing requests are entirely foreclosed by the teachings of Bellotti and its progeny.

I am nonetheless constrained to write separately to address a statement in the Commission's Bellotti decision, later upheld by the United States Court of Appeals for the District of Columbia Circuit. Although entirely unnecessary to the result reached therein (i.e., the denial at the threshold of a hearing requester's challenge to the adequacy of an NRC enforcement order), the Commission pointed to one of its Rules of Practice[1] as providing an alternative avenue for the presentation of the concerns that undergirded that unsuccessful challenge.[2]

Section 2.206 provides in relevant part that "[any] person may file a request to institute a proceeding pursuant to [section] 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper." For its part, section 2.202 specifically authorizes the institution of such a proceeding; indeed, the Fukushima-related enforcement orders that are the subject of the proceeding now before us were issued under that authority.[3]

Bellotti was scarcely the first or last occasion on which the filing of a section 2.206 petition has been cited as an available alternative to the seeking, in an adjudicatory context, of such substantive relief as the modification, suspension, or revocation of an NRC-issued license. To the contrary, over the course of the many years that I have been associated with this agency, as first an Appeal Panel member and more recently a member of the Licensing Board Panel, seekers of some form of substantive relief have often been told by the NRC Staff, if not

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[1] 10 C.F.R. § 2.206.

[2] Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 47 (1982), aff'd, sub nom., Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983).

[3] 77 Fed. Reg. 16,098, 16,100 (Mar. 19, 2012) (EA-12-050); 77 Fed. Reg. 16,082, 16,084 (Mar. 19, 2012) (EA-12-051).

by the Commission itself, something along the lines of the following: You have not met the standing and/or contention admissibility requirements that are a condition precedent to obtaining an adjudicatory hearing on your safety or environmental concerns but there remains available the opportunity to present those concerns in a petition filed with the appropriate NRC official.

Over the course of the same number of years, there has been considerable speculation regarding just how meaningful the section 2.206 remedy has proven to be in practice. Beyond question, there has been the grant of requests for such procedural action as, e.g., the institution of an investigation into asserted misconduct. There equally can be no doubt that, in many instances, the petitioner derived benefit from the action taken. At the same time, there was uncertainty regarding the extent to which there had been the like grant of requests for such substantive relief as was being sought in Bellotti and is now being sought in the matter at bar.

Believing this to be an appropriate occasion to endeavor to remove that uncertainty, with the indulgence of Judges Hawkens and Baratta I issued an order on May 17, 2012 in which I directed the Staff to provide the Board with a list of those section 2.206 petitions filed with it since January 1975 (the birth of the agency) in which substantive relief had been sought and granted.[4] In the case of each petition so listed, a summary of the granted relief was also to be supplied.

On June 15, the Board received the Staff response. We were told that the Staff had examined a total of 387 Directors' Decisions. It had then "screened out" those that had been denied. That left two petitions that were said to have been granted in full in the 37 years under scrutiny, and 140 that, according to the Staff, had either been granted in part or "although denied, either prompted responsive action by the Staff or were already being addressed by the

[4] Licensing Board Memorandum and Order (Requesting Filing on Petitions under 10 C.F.R. § 2.206) at 1-2 (May 17, 2012) (unpublished).

Staff."[5] A summary was provided of the substantive relief said to have been granted in each instance.[6]

The most cursory examination of the 142 items left me in no doubt that there had been a total failure by the Staff to have understood the direction contained in the May 17 order. For one thing, how possibly could the outright denial of a petition be considered the according of substantive relief simply because the matter in question was already being addressed by the Staff? And was it reasonable to accept that, in every one of those many instances in which the petition was granted in part and denied in part, the granted part represented the totality of the substantive relief that had been sought?

Had there been room for doubt, however, it would have been dispelled by an examination of one of the two items that the Staff represented to be the grant of full substantive relief.[7] In response to a section 2.206 petition alleging that the Pacific Gas & Electric Company (PG&E) had violated certain antitrust conditions in the Diablo Canyon operating licenses, the Director of the Office of Nuclear Reactor Regulation withheld action on the petition until the issuance of a ruling by a federal district court on related issues. That ruling being adverse to PG&E, unsurprisingly the utility was then directed by the Staff to submit a report regarding the steps the utility had taken and planned to take to comply with it.[8] In short, far from providing substantive relief itself in response to the section 2.206 petition, the Staff simply had given effect, as was its clear obligation, to a judicial determination that there had been a violation of the terms of an NRC-issued license.

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[5] NRC Staff Response to the Board Order Regarding Petitions Under 10 C.F.R. § 2.206 at 2 (June 15, 2012).

[6] Id., attach. (Listing of Section 2.206 Substantive Relief).

[7] Listing of Section 2.206 Substantive Relief at 16, 22 (citing Battelle Mem'l Inst. Columbus Operations (Columbus, Ohio), DD-94-11, 40 NRC 359 (1994) and Pac. Gas And Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-90-3, 31 NRC 595 (1990)).

[8] Diablo Canyon, DD-90-3, 31 NRC at 602-04.

In the circumstances, it appeared that the appropriate course was to give the Staff a second opportunity to specify which of the 142 items identified in the June 15 filing in fact represented, for the present purposes of ascertaining the meaningfulness of the section 2.206 remedy, the grant of substantive relief requested in a section 2.206 petition. That opportunity was provided in a June 19 order,[9] to which the Staff responded in a June 26 submission that insisted that the June 15 filing had been in full compliance with the Board's May 17 directive.[10] We were told in emphatic terms that "the Staff stands by its initial determination and continues to maintain that each of the [142] instances [cited in the June 15 filing] reflects substantive relief provided to the petitioner."[11]

With respect to the PG&E matter alluded to above, the Staff would have it that the Notice of Violation that inevitably followed the district court ruling qualified as the grant of substantive relief despite the fact that, apparently, no civil penalty was assessed against PG&E on the strength of that notice. It is not necessary, however, to quarrel with the Staff's assertion on that score in order to establish the total lack of substance to its remarkable insistence that, without a single exception, every one of the 140 partial grants of section 2.206 petitions accorded substantive, rather than simply procedural, relief to the petitioner.

It might be, as the Staff further maintains, "that reasonable minds can differ with respect to whether a particular matter is one of procedure or of substance."[12] And it might also be that there are some forms of substantive relief that do not involve the modification, suspension, or revocation of a license. That said, no reasonable mind applying the most expansive definition of

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[9] Licensing Board Memorandum and Order (Directing Staff to Amend Filing on 10 C.F.R. § 2.206) (July 19, 2012) (unpublished).

[10] NRC Staff Response to the Board Order Directing Staff to Amend Filing on 10 C.F.R. § 2.206 at 3 (June 26, 2012).

[11] Id.

[12] Id. at 2.

"substantive" could possibly apply such a characterization in the case of, to cite but one example, the section 2.206 petition acted upon in 1997 with regard to the St. Lucie and Turkey Point facilities that, the Staff would have it, provided substantive relief.[13]

There, petitioners requested that the NRC take enforcement actions with respect to Florida Power & Light Co. (FPL) and certain employees for allegedly retaliating against one of the petitioners, who, when an FPL employee, had raised nuclear safety concerns with his management.[14] Among the various forms of relief sought, petitioners requested that the NRC modify, suspend, or revoke FPL's operating licenses for the St. Lucie and Turkey Point facilities; conduct a public hearing before a licensing board on whether FPL had violated NRC regulations; impose a civil penalty on certain FPL employees; and conduct an interview with petitioners regarding the substance of their section 2.206 petition.[15] In response, the NRC Staff held a public meeting with a petitioner, during which he elaborated on the bases for the petition and raised other concerns.[16] All other relief sought by petitioners was denied.[17] Yet, the Staff offers this as one of 142 instances on which substantive relief sought in the petition was granted.

The short of the matter thus is that, with regard to two of the 142 section 2.206 petitions on the Staff's list, there has been an egregious and mystifying mischaracterization of the nature of the relief granted to the petitioner. There remains, however, the 140 other petitions on the Staff's list. In the present circumstances, must one now examine the relief granted with respect

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[13] See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2; Turkey Point Nuclear Generating Plant, Units 3 and 4), DD-97-20, 46 NRC 96 (1997).

[14] Id. at 99-100.

[15] Id. at 97-98.

[16] Id. at 98.

[17] Id. at 106-07.

to each of those petitions in order to determine whether there has been a like misrepresentation that that relief had been substantive in character?

Upon analysis, I have concluded that no such exceedingly laborious undertaking is required in order to reach a sufficient level of confidence that very few, if any, of the section 2.206 petitions had led either to the modification, suspension, or revocation of an NRC license or to some other administrative action of equally consequential effect. To reach that conclusion, one need not rely entirely, or even primarily, on the high degree of improbability that, with respect to each of the partially-granted petitions, the relevant Office Director had granted the most consequential relief sought while, at the same time, denying that of appreciably less significance. Rather, the conclusion can rest on this wholly reasonable inference: had there been indisputable instances of grants of substantive relief, such as significant affirmative administrative action taken with regard to a licensee or license, in compliance with the Board's first order those instances would have been simply identified by the Staff without the addition of the patently absurd and demonstrably false claim that all partial grants were substantive.[18]

Although deemed very remote, I cannot exclude the possibility that the drawn inference gives too much credit to the Staff. Should, however, the inference be on target, I question the justification for the often reference, both in Commission decisions and in Staff briefs filed with licensing boards, to the broad availability of the section 2.206 remedy as a realistic alternative to an adjudicatory hearing. Where it has been determined that the hearing requester, such as Pilgrim Watch here, has not established an entitlement to a licensing board's evidentiary consideration of a claim for what manifestly amounts to substantive relief (here the further modification of reactor operating licenses), the matter should be left at that. An unsuccessful

[18] In a July 3, 2012 filing, Entergy points to four of the section 2.206 petitions on the Staff's list that, according to Entergy, produced substantive relief. See Entergy's Comments on NRC Staff Response to the Board Order Regarding Petitions Under 10 C.F.R. § 2.206 (July 3, 2012). In none of the cited instances, however, was any affirmative administrative action taken with respect to the licensee or license in question. Yet, the petitioner in each instance had sought, directly or indirectly, such action.

hearing requester is, of course, always free to invoke the section 2.206 remedy. But, at least where truly substantive relief is being sought (i.e., some affirmative administrative action taken with respect to the licensee or license), there should be no room for a belief on the requester's part that the pursuit of such a course is either being encouraged by Commission officialdom or has a fair chance of success.[19]

[19] My colleagues disagree with the conclusion reach in this opinion. Their reliance in footnote 36 of the Board decision upon the well-established presumption of legitimacy of official action is, however, unavailing. To begin with, the question here is not whether section 2.206 is "a meaningful avenue for seeking administrative relief." It is, instead, whether in practice, petitions filed under that section have often, if ever, provided truly substantive relief (i.e., requested action of consequence taken against a licensee or license). On that score, the record must speak for itself.

Moreover, it is not my view that section 2.206 provides a totally meaningless remedy. As noted in the text, supra p.2, there doubtless have been many occasions upon which section 2.206 petitioners have received beneficial, if not substantive, responses to their petitions.

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Petitions for Hearing) (LBP-12-14)** have been served upon the following persons by Electronic Information Exchange (EIE).

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