

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO PILGRIM WATCH'S PETITION FOR REVIEW OF
MEMORANDUM AND ORDER (DENYING PETITIONS FOR HEARING), LBP-12-14, JULY 10,
2012, AND ACCOMPANYING BRIEF

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July 30, 2012

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the NRC Staff (“Staff”) hereby files its answer to Pilgrim Watch’s July 20, 2012, “Pilgrim Watch’s Petition for Review of Memorandum and Order (Denying Petitions for Hearing), LBP-12-14, July 10, 2012” (“Petition”).¹ Pilgrim Watch argues that the Atomic Safety and Licensing Board’s (“Board’s”) July 10, 2012, “Memorandum and Order (Denying Petitions for Hearing)” (“LBP-12-14”) was erroneous and should be remanded on the grounds that the Board should have granted Pilgrim Watch’s request for hearing. Petition at 4. For the reasons discussed below, the Staff opposes Pilgrim Watch’s Petition and believes that the Board correctly denied Pilgrim Watch’s request for hearing.

BACKGROUND

On March 12, 2012, in accordance with the Atomic Energy Act of 1954, as amended, and Title 10 of the *Code of Federal Regulations* (10 C.F.R.) § 2.202, the NRC issued three

¹ Pilgrim Watch filed its appeal pursuant to 10 C.F.R. § 2.341; however, Pilgrim Watch failed to fully address the criteria set forth in § 2.341(b)(4)(i-v). Petition at 1. While the Staff notes that Pilgrim Watch could have filed an interlocutory appeal under 10 C.F.R. § 2.311(c), the Staff believes that the Petition should be denied under either section.

immediately effective orders to impose license modifications requiring: (1) the development of strategies to deal with beyond-design-basis external events resulting in simultaneous loss of all ac power and loss of normal access to the ultimate heat sink (EA-12-049); (2) installation of reliable, hardened vents in BWR Mark I and Mark II containments (EA-12-050); and (3) enhancements to spent fuel pool instrumentation (EA-12-051) (hereinafter, the “March 12 Orders”). On April 2, 2012, Pilgrim Watch filed a request for hearing challenging two of the Commission’s immediately effective orders to impose license modifications requiring (1) installation of reliable, hardened vents in BWR Mark I and Mark II containments (EA-12-050); and (2) enhancements to spent fuel pool instrumentation (EA-12-051).² These enforcement orders followed the events at Fukushima Dai-ichi, based on the lessons learned arising from those events.³ In its hearing requests, Pilgrim Watch argued that the March 12 Orders adversely affected its members and that they were lacking key requirements necessary to protect the public.⁴ In response, both the NRC Staff and the licensee for the Pilgrim facility, Entergy Nuclear Operating Co. and Entergy Nuclear Operations, Inc. (“Entergy”) opposed

² See “Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses With Regard to Reliable Hardened Containment Vents” (Apr. 2, 2012) (ADAMS Accession No. ML12093A089); “Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses With Regard to Spent Reliable Spent Fuel Pool Instrumentation” (Apr. 2, 2012) (ADAMS Accession No. ML12094A182). On April 12, 2012, Pilgrim Watch filed the “Pilgrim Watch Supplement to Request for Hearing Regarding Insufficiency of Order Modifying Licenses With Regard to Spent Reliable Spent Fuel Pool Instrumentation” (ADAMS Accession No. ML12103A216).

³ See “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. 16082 (Mar. 19, 2012) (EA-12-051); “In the Matter of All 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); *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) (ADAMS Accession No. ML112310021).

⁴ Pilgrim Watch was initially joined by Beyond Nuclear as a co-petitioner. Subsequently, Beyond Nuclear 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) (ADAMS Accession No. ML12130A386).

Pilgrim Watch's petitions.⁵ After conducting an oral argument on June 7, 2012, in Boston, Massachusetts, the Board denied Pilgrim Watch's request for hearing. LBP-12-14, slip op. at 9.

DISCUSSION

Pilgrim Watch claims in its appeal to the Commission that (1) it "fully met the hearing prerequisites" of the enforcement orders; (2) "nothing in *Bellotti* or its progeny permits or requires the Board to deny [Pilgrim Watch] its right to a hearing"; and (3) that 10 C.F.R. § 2.206 or a petition for rulemaking are not valid options to address Pilgrim Watch's concerns. Petition at 20. In order to obtain a hearing, a petitioner must demonstrate standing and offer at least one admissible contention. In this regard, a key issue that must be addressed, and on which the issues of standing and admissibility are dependent, is whether the hearing request is within the scope of the proceeding outlined in the orders; in this case, whether the March 12 Orders being challenged should be sustained.⁶

In response to the Pilgrim Watch Petition, the Staff offers the following two arguments. First, the Board's decision was correct in that it appropriately applied longstanding federal and Commission case law in rejecting the requests for hearing. Contrary to the arguments proffered by Pilgrim Watch, the application of the holding in *Bellotti* is correct as a matter of law. Second, Pilgrim Watch's argument regarding 10 C.F.R. § 2.206 is inapplicable in this proceeding and should be rejected.

⁵ See "NRC Staff's Response To Pilgrim Watch Requests For Hearing" (Apr. 27, 2012); Entergy's Answer to Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Spent Reliable Spent Fuel Pool Instrumentation (Apr. 27, 2012); Entergy's Answer to Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Apr. 27, 2012). Numerous other licensees, as amicus curiae, also opposed Pilgrim Watch's request for hearing.

⁶ See 77 Fed. Reg. at 16,101; 77 Fed. Reg. at 16,085.

I. The Commission Should Affirm the Licensing Board's Decision Because the Decision Correctly Applies Longstanding Federal and Commission Case Law on the Legitimate Scope of the Enforcement Proceeding

In LBP-12-14, the Licensing Board denied Pilgrim Watch's requests for hearing on the March 12 Orders. The Board concluded that Pilgrim Watch raised issues beyond the scope of the proceeding and thus its petitions must be denied. See LBP-12-14, slip op. at 4. As a matter of law, the Board's decision is correct and should be affirmed.

NRC regulations provide that in order for a contention to be admissible, it must be within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii). The scope of this proceeding, as stated in each order, is whether the March 12 Orders should be sustained. This authority to define the scope of the proceeding is granted to the Commission under Section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.* ("AEA"), and is well-supported in both longstanding Commission and federal case law. See *Bellotti v. N.R.C.*, 725 F.2d 1380, 1381 (D.C. Cir., 1983) *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982) ("*Bellotti*"); see also *Alaska Department of Transportation & Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 405 (2004); *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157–58 (2004); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004). In *Bellotti*, the Court of Appeals affirmed the Commission's authority under section 189a of the AEA to define the scope of its proceedings, which, in *Bellotti*, the Commission defined as whether the order should be sustained. *Bellotti*, 725 F.2d at 1381. The rationale of *Bellotti* is to prevent "unstructured and almost interminable hearings on any issue some member of the public may wish to litigate." *Id.* at 1383. *Bellotti* further elaborated "that members of the public cannot be allowed to litigate before the Commission any and all issues that occur to them without demolishing the regulatory process." *Id.* at 1382.

Subsequent to the holding in *Bellotti*, the Commission reiterated the scope of an enforcement proceeding in *Alaska Department of Transportation*.⁷ There, the Commission held 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.” *Id.* at 404. Thus, a petitioner who seeks to intervene in an enforcement proceeding to have NRC impose a stricter penalty than has been imposed seeks to raise issues outside the scope of the proceeding. Issues in enforcement proceedings are limited to only those set out in the order.⁸ *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442 (1980).

The Commission has also addressed *Bellotti*’s applicability to a petitioner’s request for additional agency action cloaked as a petition seeking to challenge the order in *Maine Yankee*.⁹ In that case, the State of Maine had initially sought a hearing regarding a Commission Order imposing additional security measures. Notwithstanding the State’s contention that it had narrowed its hearing request to a determination of whether the order should be sustained, the Commission, in upholding the Board’s decision denying a hearing, focused on the question of whether the State’s hearing request, “*in reality* seek[s] additional measures beyond those set out in the disputed order?” *Id.* at 60 (emphasis added). The Commission held 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.” *Id.* at 58 (quoting *Maine Yankee*

⁷ *Alaska Department of Transportation & Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399 (2004), *rev’g*, LBP-04-16, 60 NRC 99 (2004).

⁸ As elaborated on during oral argument, the subject orders are considered “enforcement orders” because they were issued pursuant to the Agency’s authority under 10 C.F.R. § 2.202. See Transcript at p. 15, lines 18-23.

⁹ *Maine Yankee Atomic Power Company* (Maine Yankee Atomic Power Station), CLI-04-05, 59 NRC 52 (2004).

Atomic Power Co.'s Brief in Opposition to the Appeal by the State of Maine (Dec. 17, 2003) at 10). The Commission explained that the State did not really oppose the order in that it did not disagree with the order's security provisions, *i.e.*, it did not claim that they were unwarranted or should be relaxed, but rather was seeking to add measures to the order. *Id.* at 57.

Pilgrim Watch, in its Petition, makes similar assertions in arguing that rejection of the orders would require the Commission to issue an order providing greater protection.¹⁰ This argument is merely another variation on the same theme since it can be reduced to a claim that the March 12 Orders should have done more. Whether action is taken in one step by a licensing board imposing enhancements to an order, or in two steps by having the original order rejected such that the staff issues another more enhanced order, the end result and remedy is the same. Both seek additional protective measures.

The Licensing Board's decision correctly acknowledges that *Bellotti*, *Alaska Department of Transportation*, and *Maine Yankee*, *supra*, are the controlling authority in this case for determining the scope of the proceeding. See LBP-12-14, slip op. at 6. The Licensing Board stated that the fact that the March 12 Orders "do not involve a response to determined violations of Commission regulations . . . is of no significance given the Commission's ruling in [*Maine Yankee*] and *Detroit Edison Co.* (Fermi Power Plant Independent Spent Fuel Storage Installation), CLI-10-3, 71 NRC 49 (2010)." *Id.* In doing so, the Board focused on the fact that Pilgrim Watch's contentions fell "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." See LBP-12-14, slip op. at 8.

As the dissenting opinion in *Alaksa DOT* states, "this is but a variation on the theme, rejected by the *Bellotti* court, that 'something else is required' which precludes the order from

¹⁰ Pilgrim Watch argues that since the Commission's orders were based on a finding for adequate protection of the public health and safety, the Commission would not be able to fall back on the status quo ante. Petition at 7.

being sustained.”¹¹ Under *Bellotti* and subsequent NRC case law, any further adjudicatory inquiry regarding the sufficiency of the orders is prohibited. See *id.* at 27.

In summary, the Board has appropriately applied controlling case law to the issue at hand – whether the March 12 Orders should be sustained – and has correctly denied the hearing petitions.

II. Pilgrim Watch’s Arguments that the 2.206 Process Is Not a Viable or Appropriate Avenue for Relief Are Irrelevant

In its appeal, Pilgrim Watch contends that the 10 C.F.R. § 2.206 process is “not a viable or appropriate avenue for relief” and discusses the NRC’s record on § 2.206 petitions, as well as petitions for rulemaking (under 10 C.F.R. § 2.208) and backfitting (under 10 C.F.R. § 50.109). Petition at 17-20. Quite plainly, neither the efficacy of the § 2.206 process nor that of petitions for rulemaking or backfits are at issue in this proceeding. As the staff maintained *supra*, the scope of this proceeding, as stated in each order, is whether the March 12 Orders should be sustained. Despite its irrelevance to the legal merits of this proceeding, the staff notes that the Board majority¹² found that “the record before [it] falls short of rebutting the presumption that 10 C.F.R. § 2.206 is a *meaningful avenue for seeking administrative relief.*” LBP-12-14, slip op. at n. 36 (emphasis added).

¹¹ *Alaska Department of Transportation*, LBP-04-16, 60 NRC at 121; see also *Alaska Department of Transportation*, CLI-04-26, 60 NRC at 404.

¹² Despite noting that the inquiry is “entirely unnecessary” to the matter at issue, Judge Rosenthal included an “Additional Opinion,” in which he expresses doubt about whether 10 C.F.R. § 2.206 provides an “alternative avenue” for raising concerns. LBP-12-14, “Additional Opinion of Judge Rosenthal” at 1. The Commission, however, has already addressed this issue in a board proceeding during which the same skepticism was expressed. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551 (2005). As the Commission maintained, “[s]uch skepticism is entirely unwarranted and inappropriate in light of the Director Decisions (“DDs”) that rule upon section 2.206 petitions. Sixteen of this decade’s twenty-six DDs granted at least some of the requested relief — either by a direct grant or by noting that Staff action prior to the DD’s issuance had already provided the relief sought.” *Millstone*, CLI-05-24, 62 NRC at 565 n. 63 (2005) (citations omitted).

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Commission affirm the Board's Order denying Pilgrim Watch's hearing requests and terminating the proceeding.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 30th day of July, 2012

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “NRC STAFF’S ANSWER TO PILGRIM WATCH’S PETITION FOR REVIEW OF MEMORANDUM AND ORDER (DENYING PETITIONS FOR HEARING), LBP-12-14, JULY 10, 2012, AND ACCOMPANYING BRIEF” has been served in the above-captioned proceeding upon the following persons by Electronic Information Exchange (EIE) on this 30th day of July, 2012.

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Dated at Rockville, MD
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