

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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| 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) |) | |

August 6, 2012

**PILGRIM WATCH REPLY TO 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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**PILGRIM WATCH REPLY TO NRC STAFF'S ANSWER TO PILGRIM
WATCH'S PETITION FOR REVIEW OF LBP-12-14, July 30, 2012**

In accordance with § 2.323(c) Pilgrim Watch ("PW") seeks leave to reply to NRC Staff's ("Staff") July 30, 2012 Answer Opposing PW's Petition for Review of LBP-12-14 ("Ans."). PW makes this request because it could not have reasonably anticipated the arguments made by Staff to support denying PW a hearing. This five page reply clearly will in no way disrupt, and in fact will assist, the Commission properly to resolve the issues before it.

The fundamental question here is whether the public properly can be automatically and irrevocably excluded from a hearing - even where Staff has found a lack of adequate protection for public health and safety and issued demonstrably ineffective orders. To do so would make a mockery of the concept of meaningful public participation. The Orders provide for a hearing that permits someone other than the licensee to question whether the Orders meet NRC's statutory obligations and should be sustained. But, if Staff's and Entergy's positions are accepted, the public could never meet their test for a hearing because even the most meager (and inadequate) order might add some tiny increase in safety. If that is the test, why even pretend to give the public the right to seek a hearing? Why not come right out and say only licensees can seek a hearing?

Staff's arguments essentially reduce to a series of incorrect propositions.

1. The Staff apparently agrees that the Orders govern the scope of a hearing, but continue in their incorrect argument that the Orders should be read as if they required PW to offer "at least one admissible contention" (see Staff 3, 4), which they do not. At the pre-hearing the Staff admitted that the Order itself only required PW to meet the requirements of 2.309(d).

The Staff had simply forgotten to cite 2.309(f), also¹. PW has demonstrated standing, which is all that the only applicable subsection of 2.309 required it to do.

2. Second, PW agrees that the issue at any hearing will be whether the Orders should be sustained. What the Staff continues completely to ignore is that this is precisely what PW will ask the Board to do – NOT SUSTAIN THE ORDERS.

3. Third, the Staff incorrectly says that “the application of the holding in *Bellotti* is correct as a matter of law.” It was not.

4. Fourth, the Staff incorrectly says that the finding that ¶ 2.206 does not provide a public petitioner any viable route for relief is irrelevant for this proceeding. It is relevant that neither 2.206 petitions, rule change petitions nor backfits provide a viable path to require NRC to meet its non-discretionary, mandatory, statutory obligations is central to whether PW is entitled to a hearing here - where the Order directed us to come.

The Staff response is also notable for what it does not say. In particular, the Staff nowhere disputed that: (a.) The Orders effectively admit that the status quo does not adequately protect the public health and safety. (See Petition for Review, 7-8, 12-14) (b.) The Orders are insufficient to adequately protect public health and safety. (c.) PW has standing under 2.309(d). (d.) PW is adversely affected.

¹ PW Petition for Review, note 14: Neither of the Orders referred to any other provision of 2.309. The Staff's argument to the Board that it simply forgot to include the rest of 2.309 when it wrote the orders, and that the Board should rewrite the orders to include what the Staff "forgot,"(Trans., NRC Staff Ms. Safford, 13) approaches the ludicrous. The Orders are what they are.

A. What the Orders Require of PW

The two step process the Orders set forth could not be clearer. Step 1 asks two questions: Does PW have standing under 2.309(d), and is it adversely affected? PW has shown that it does, and the Staff does not say otherwise.

Since the requirements of Step 1 have been met, the next step is for the Commission to set the time and place for a hearing at which the issue will be whether the Orders should be sustained. (Orders, V, italics added: "[i]f a hearing is requested by ... a person whose interest is adversely affected, the Commission *will* issue an Order designating the time and place of any hearings.") Staff (and also Entergy) quite clearly have not appreciated that, for PW to be entitled to a hearing at which the issue is whether the Orders should be sustained, nothing in the Orders requires it to satisfy more than Step 1.

B. The Scope of the Hearing

PW agrees with Staff that "[t]he scope of this proceeding, as stated in each order, is whether the March 12 Orders should be sustained," but one would never know this from pages 4-5 of the Staff response that go to great lengths to create the impression that PW seeks something else. It agrees also that the Commission has authority to define the scope of the proceeding – so long as it does so in a way that complies with Section 189a of the Atomic Energy Act.

What the Staff continues to ignore is that the Atomic Energy Act does not permit the Commission effectively to exclude the public when the Orders admit that the status quo does not

adequately protect the public health and safety;² and PW has shown the Orders do not do so either. *Bellotti* is inapposite for at least three reasons – (i) it did not ask that the order there at issue not be sustained, (ii) there was no contention (or admission) that the status quo did not meet the Commission’s mandatory, non-discretionary, statutory obligation, and (iii) the further steps that the Commission was asked to take were entirely discretionary. The latter two of these also apply in every other decision relied on by the Staff.

As PW said in the Pre-Hearing and in its Request for Review, no prior decision did, or allows the Commission to, limit the scope of a proceeding to deny a hearing to a petitioner asking that Orders that will not adequately protect the public health and safety not be sustained.

The Staff’s, like Entergy’s, fundamental error is that they choose to overlook the basic issue - that the Orders should not be sustained because, as the Orders admit, the status quo does not protect public health and safety and neither do the Orders; because, the Orders do not satisfy NRC’s nondiscretionary statutory obligations and adversely affect the Petitioner. These facts set PW’s Requests apart from *Bellotti* and its progeny. Unlike in the decisions cited by Staff, PW showed it is better off without the Orders because if they are not sustained NRC has no choice other than shut the reactors or issue new Orders that do protect public health and safety. In either case, PW is better off than it would be with the Orders.

The Staff at least noted PW’s position: “...since the Commission’s orders were based on a finding for adequate protection of the health and safety, the Commission would not be able to fall back on the status quo ante.” (Staff 6, note 10) Quite tellingly, the Staff nowhere even

² “Public participation is automatic with respect to all Commission actions that are potentially harmful to the public health and safety.” (*Bellotti*, ¶ 10) PW apologizes to the Commission for the quotation marks used with its statement that “where the public health and safety are concerned, the right to a hearing is absolute.” This statement fully comports with Judge Bork’s actual statement, but inadvertently were not deleted in late editing.

intimates that PW's position is wrong, or that this simple fact does not show why all of the decisions on which the Staff relies simply do not apply here.

The Staff's repeated "PW is simply looking for more than the Orders require" is a red herring. (See PW Reply Entergy's Ans., 1-3) PW is not asking the Commission to take further discretionary steps. Rather it asks that the Orders not be sustained so that the Commission will do its job and adequately protect the public health and safety - as NRC is required to do - or shut the reactors down. How the Commission does so is discretionary; that it must do so is not.

C. The Fact Sec. 2.209 Does Not Provide Relief is Relevant

Staff's cynically states that "neither the efficacy of the §2.206 process nor that of petitions for rulemaking or backfits are at issue in this proceeding" (Ans., 7; see Petition for Review, 17-20) Neither the years required for rule making, nor backfits that depend on incorrect and outdated cost-benefit analyses, nor a Section 2.206 process that asks the Staff to say that it was wrong are viable alternatives - which underlines the importance of a full and fair hearing to which PW is entitled here. Under the AEA, and the explicit terms of these Orders, PW has the right to a hearing to prove that the present Orders do not adequately protect the public health and safety, and should not be sustained.

Respectfully submitted

(Electronically signed)

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