# UNITED STATES OF AMERICA
# NUCLEAR REGULATORY COMMISSION

## BEFORE THE COMMISSION

| | | |
|---|---|---|
| In the Matter of: | ) | Docket No. 50-293-EA |
| ENTERGY NUCLEAR GENERATION CO. & ENTERGY NUCLEAR OPERATIONS, INC. | ) | |
| (Pilgrim Nuclear Power Station) | ) | October 11, 2016 |

---

**PETITIONERS' RESPONSE TO NRC STAFF'S AND ENTERGY'S OPPOSITION TO PETITIONERS' REQUEST FOR HEARING REGARDING ENTERGY'S REQUEST FOR EXTENSION TO COMPLY WITH NRC ORDER EA-13-109**

---

Counsel for Entergy filed Entergy's Answer Opposing Request for Hearing Regarding Pilgrim and EA-13-109 (hereinafter "Entergy Opposition") on October 3, 2016. Counsel for the NRC Staff filed NRC's Staff's Response to Pilgrim Watch and Co-Petitioner's Request for Hearing (hereinafter "Staff Response)" on the same day. The arguments the respective counsel made are much the same. For the convenience of the Commission, this Petitioners' Response replies to both.[1]

[1] Seven days from October 3, 2016 is October 10. Since October 10 is Columbus Day, a federal legal holiday designated by Congress, this response is timely filed on October 11, as provided by 10 CFR 2.306.

There is one point that Petitioners must address before turning to the substance of these two responses.

Footnote 26 on page 6 of the Staff Response insinuates that Petitioners' September 7, 2016 Request was not timely. That is not simply not true.

Petitioners understand that there are at least two different versions of ADAMS; and that the public has access to only one. Petitioners do not know when Entergy's request was added to the version of ADAMS to which the Staff, but not the public, had access, or to what "record in ADAMS" the Staff footnote refers.

The important fact, as shown by extract from the "Web-based ADAMS" to which Petitioners had access (Exhibit A hereto), is that Entergy's June 26, 2016 Request for Extension was added to ADAMS, at least the public version to which Petitioners had access (Declarations of Mary E. Lampert and Paul Gunther attached as Exhibit B), at 8:25 am on July 13, 2016, not on July 5 as the Staff footnote asserts. Petitioner's Request was filed less than 60 days later.

Despite the footnote, the Staff Response tellingly does not argue that Petitioners' Request was not timely. In fact, it was timely; and the Staff's misleading footnote should not mislead the Commission into thinking otherwise.

## I. Introduction

Before getting into the legal arguments of Entergy's Opposition and the Staff Response, it is important that the Commission have a plain English understanding of what this is really all about.

Fukushima was a disaster, and a wake-up call particularly about the risks and dangers of Boiling Water Reactors like that at Fukushima and Pilgrim. The NRC recognized the potential

danger. In March of 2012 the NRC issued an immediately effective Order (EA-12-50) requiring installation of reliable hardened containment venting system; and about 15 months later, it issued a second immediately effective Order (EA-13-109) that, among other things, required Pilgrim to install a severe-accident capable reliable hardened venting system no later than the Spring of 2017.

The NRC set that Spring 2017 deadline because, as the Order says, the reliable hardened venting system the Order requires is necessary "to protect health and to minimize danger to life or property" and "reduce the risks posed to the public from the operation of nuclear power plants" such as Pilgrim (Order, p. 7.) The Commission found that the required system was "cost-effective," "necessary to ensure reasonable assurance of adequate protection of public health and safety," and that "the public health, safety and interest require that this Order be made immediately effective" (Order, p. 10) and this additional severe accident venting capability should be "with minimal delays" (Order, p. 4)

From July 6, 2013 when EA-13-109 was issued until the end of 2015, Entergy repeatedly told the NRC that it could and would comply with the Spring 2017 deadline. Even today, Entergy has never said that it cannot do so.[2]

Nonetheless, in November of 2015, Entergy filed the Request that is the subject of this proceeding – not only asking that the date for compliance be delayed for some two and one-half years, but also making clear that it intended never to comply. (See Staff Response, p. 5)

Entergy's position seems to be that a so-called Relaxation Provision in EA-13-109 was an open invitation for Entergy to avoid doing what the Order required by Spring 2017, despite the

[2] Status Updates. NRC Website: http://www.nrc.gov/reactors/operating/ops-experience/japan/plants/pilg.html

Commission's findings that continued operation without a reliable hardened containment venting system would not "protect health," "minimize danger to life or property," or provide the "reasonable assurance" that the AEA requires.

According to Entergy, the NRC should relax or rescind the Order and grant the request without any hearing, simply because Entergy has said that Pilgrim will shut-down some three years from now - even though the Entergy's Opposition says that very little more work needs to be done, and that apparently only a short period of time, would be required for Entergy to comply. (See Entergy Opposition, p.2; and Staff Response, pp 5-6)

Entergy's Opposition and the Staff Response say very little about these realities. Much of what they do say is inaccurate and mischaracterizes Petitioners' Request.[3] Stripped to their essentials, Entergy's and the Staff's positions reduce to two unsustainable propositions:

1. AEA requirement for a hearing doesn't apply because the Order included what Staff and Entergy call a "relaxation provision."
2. Petitioners lack standing because they cannot rely on "proximity," and their Request is insufficient to satisfy the "traditional standing" requirements of 10 CFR 2.309(d)(1).

The first is wrong as a matter of fact and law; as discussed in Section II below, the Act's hearing requirement cannot be avoided by simply giving what is clearly a "license amendment" a different name; and the Staff admits that "Orders issued under 10 C.F.R. § 2.202 ... fall under the terms of section 189a of the AEA."

The second should not require any response. Petitioners, both organizations and individuals, are entitled to, and standing under the proximity presumption. Even if the proximity

[3] See Section IV, below.

presumption did not apply, what the Order itself says, and what Petitioners say in their Request, is clearly sufficient to satisfy the traditional standing requirements of 10 CFR 2.309(d)(1).

II. The AEA Requires a Hearing

Section 189a of the Atomic Energy Act says that the "Commission *shall* grant a hearing" "*in any proceeding* under the ACT, *for* the … *amending* of any license," as Entergy and the Staff agree. (Staff Response, 6, Entergy Opposition, 11). The Staff Response even *admits* that "*Orders issued under 10 C.F.R. § 2.202*[4] alter the requirements of a license and therefore *fall under the terms of section 189a of the AEA*" (Staff Response p. 7).

A. Entergy's request to change the date for compliance is an amendment subject to Section 189a.

Entergy and the Staff also seem to agree that EA-13-109, issued under 10 CR 2.202 on June 6, 2013 (hereinafter "the Order"), amended Pilgrim's operating license to, among other things, set specific dates by which Pilgrim was required comply with the Order's Phase 1 and Phase 2 requirements. (Entergy Opposition, pp., 2, 7; Staff Response, p. 3)

They also agreed that Entergy's request for an extension of time would change the Phase I compliance date that is part of Pilgrim's current operating license. (Entergy Opposition, pp., 2, 9; Staff Response, p. 5)

Petitioners recognize that Order says relaxation requests should be directed to the Director, Office of Nuclear Regulation, and that the Director may" in writing, relax or rescind any of the above conditions" (Order, p. 14). But section 2.7.8 of the Enforcement Manual is clear that the Director cannot do so without involving the offices (here the Commission).

[4] EA-13-109 was issued "pursuant to … the Commission's regulations in 10 CFR 2.202." (Order, p. 10).

Most important, although the Order recognizes a potential of "relaxation," neither the NRC Staff nor Entergy suggests that simply calling what Entergy seeks a "relaxation," or writing an Order to delegate administrative responsibility to the Director of NRR, somehow allows the NRC to avoid the requirement of Section 189a that the "Commission *shall* grant a hearing" "*in any proceeding* under the ACT, *for* the … *amending* of any license."

The Staff's and Entergy's position thus reduces itself to their argument that a Sec. 189a hearing is not required because Entergy's requested change to the compliance date set by Pilgrim's license somehow is not an "amendment," but is rather only a "relaxation" (Entergy Opposition, pp 7, 9, 15, 16, 26; Staff Response, pp. 14, 18-19), or "part of [the Staff's] ongoing oversight activities" (Entergy Opposition, p. 17).

Given the Staff's admission that "*Orders issued under 10 C.F.R. § 2.202*[5] *alter the requirements of a license and therefore fall under the terms of section 189a of the AEA"* (Staff Response p. 7), Petitioners have difficulty in understanding why simply characterizing a change to a license as a "relaxation," or the fact that the Order did not explicitly "require[] Entergy to seek relaxation in the form of a license request" (See Staff Response, pp. 14, 19 are substantively important, or even relevant.

Contrary to what the Staff, and Entergy seem to assume, whether what Entergy has requested is neither a question of "form" nor a word game. As a matter of substance, consistent with the Staff's admission, the Courts and the Commission have made clear that, no matter what it may be called, an NRC action that alters the terms of a license, is an "amendment" and triggers Section 189a hearing rights.

[5] The Order was issued "pursuant to … the Commission's regulations in 10 CFR 2.202." (Order, p. 10).

In *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995), the First Circuit was very clear that "it is the substance of the NRC action that determines entitlement to a section 189(a) hearing, not the particular label that the NRC chooses to assign to its action." (Slip Op, 43), and that CAN was entitled to a hearing under section 189(a):

> The Commission elevates labels over substance. It would have us determine that a "proceeding" specifically aimed at excusing a licensee from filing a petition to amend its license is not the functional equivalent of a proceeding to allow a de facto "amendment" to its license. As this construct would eviscerate the very procedural protections Congress envisioned in its enactment of section 189(a), we decline to permit the Commission to do by indirection what it is prohibited from doing directly. See 42 U.S.C. Sec. 2239(a)(1)(A) (Commission must afford hearing "in any proceeding for the ... modification of rules and regulations dealing with the activities of licensees.")
> (*Id.*)

The NRC's Staff Practice and Procedure Digest, Section 6.1.4 Hearing Requirements for License/Permit Proceedings, agrees:

> Section 189.a. hearing rights are triggered despite Commission assertion that it did not "amend" the license when the Commission abruptly changed its policy so as to retroactively enlarge extant licensee's authority, and licensee's original license did not authorize licensee to implement major-component dismantling of type undertaken in project. Citizens Awareness Network v. NRC, 59 F.3d 284, 294 (1st Cir. 1995). The statute's phrase "modification of rules and regulations" encompasses substantive interpretative policy changes, and the Commission cannot effect such modifications without complying with the statute's notice and hearing provisions. 59 F.3d at 292.
>
> In evaluating whether an NRC authorization represents a license amendment within the meaning of section 189a of the Atomic Energy Act, courts repeatedly have considered whether the NRC approval granted the licensee any greater operating authority or otherwise altered the original terms of a license. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996).
>
> A technical specification is a license condition. A license request to change that condition constitutes a request to amend the license and therefore creates adjudicatory hearing rights under Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). See Cleveland

> Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 91 n.6, 93 (1993); General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 150 n.6 (1996).

The Practice and Procedure Digest also makes clear that the only relevant situation in which an NRC "authorization does not amend a license," and a hearing may not be required is (*Id.*):

> Where an NRC approval does not permit the licensee to operate in any greater capacity than originally prescribed and all relevant regulations and license terms remain applicable…. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315,327(1996).

The Commission's recent decision in *Diablo Canyon,* CLI-16-09 (2016) makes very clear that the test for whether an NRC "action not formally labeled a license amendment could constitute a *de facto license* amendment and trigger hearing rights under Atomic Entergy Act section 289a" is whether "that action '(1) granted the licensee any greater authority or (2) otherwise altered the original terms of the license.'" (*Diablo p. 3).* Entergy admits that "The Order effectively imposed a Phase 1 implementation deadline of Spring 2017 on Pilgrim" (Entergy Opposition, p. 2). Entergy's Request for Extension to Comply extension indisputably would amend that "Phase 1 implementation deadline," i.e., would alter the terms of the Pilgrim's license as it now exists; and, also indisputably, it would give Pilgrim "greater authority," i.e., authority to operate after the Spring of 2017 without installing what Phase 1 requires.

Entergy's argument that Part 1 of Petitioners' contention is "immaterial [and] unsupported" (Entergy Response, pp 26-27) approaches the ludicrous. Whether what the Request seeks is legally and factually an amendment is the central disputed question here. Petitioners have shown that there plainly is a "genuine dispute" between Petitioner and Entergy (and the Staff) as to whether "the Extension would [] result in a license amendment." (Entergy Response, p. 26)

Beyond that, Petitioners' position is fully supported by the established law and facts discussed above. What has no legal or factual support is Entergy's (and the Staff's) erroneous assumption that the change in compliance dates sought by Entergy's Request is not a *de facto* amendment.

No matter what Entergy and the Staff may call it, a license amendment by any other name is still an amendment, the "Commission *shall* grant a hearing" under Section 189(a), and Petitioners' Contention admissible.

The Staff's argument that Petitioners' contention "is outside the scope of hearings on orders under *Marble Hill* and *Bellotti*" (Staff Response, 19) is wrong, and is discussed in Section IV(C) below.[6]

III. Petitioners Have Standing

Petitioners have fully met the standing requirements of 10 CFR 2.309(d)(1**).** Pages 2-8 of Petitioners' Request for Hearing set forth the name, address and telephone number of each petitioner, the nature of petitioners' right under the AEA to be a party to this proceeding, the nature and extent of the petitioner's property, financial or other interest in the proceeding, and that any decision or order might grant Entergy's Request would harm the petitioner's recognized interests.

[6] Entergy's Opposition does not mention *Marble Hill* or *Bellotti*. The caption to Energy's argument that Part 1 is inadmissible (Entergy Opposition, 26) says that it is "outside scope," but to the extent Petitioners understand Entergy's argument it seems to be only that, if the Staff were sometime to make a "no significant hazards consideration," 10 CFR §50.59(b)(c) would bar Petitioners from appealing that determination.

Assuming this is Entergy's "outside scope" argument, Entergy misses the point. Petitioners' Request said only that "Given the findings that the Commission has already made in the Order, the staff properly could not 'make a no significant hazards consideration finding' here." Petitioners' Request, p. 18. Petitioners have not made any NSHC challenge; and we assume that any NSHC decision the Staff might make will be proper.

Taking Pilgrim Watch and its Director Mary Lampert as an example, Petitioners Request said:

> Pilgrim Watch (hereinafter, "PW") is a non-profit citizen organization that serves the public interest in issues regarding the Pilgrim Nuclear Power Station, a Mark I BWR. The organization's director and representative in this matter is Mary Lampert who resides at 148 Washington Street, Duxbury, Massachusetts, 02332. (Email: mary.lampert@comcast.net; Telephone: 718-934-0389) Ms. Lampert, PW's director, makes her residence (that she owns and in which she has a financial interest) and her place of occupation and recreation within approximately six (6) miles of Pilgrim Nuclear Power Station. Many of PW's members live within the immediate neighborhood of the reactor, and others either within the 10-mile Emergency Planning Zone or within the 50-mile ingestion pathway. Ms. Lampert is also reasonably concerned for her and their health and safety, as the NRC has already found, in the event NRC does not require Entergy to meet EA-13-109's compliance date. (Pet. Request at 2)

All other Petitioners provided the same type information, as required.

According to the Staff and Entergy (Staff Response, p. 8; see also Entergy Response, pp 18-19), a Petitioner must show is "(1) a distinct harm that constitutes an injury-in-fact; (2) that the injury can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision.

The second and third require only brief comment. As shown in Section III, below, the injury to Petitioners "can be traced to," and indeed would be the direct effect of, extending the date for compliance; and that injury plainly would be redressed if Entergy's request was denied.

As for the first, Entergy and Staff have made a number of arguments in an attempt to show that there is no threatened injury-in-fact:

1. Petitioners are not entitled to the 50-mile presumption (See Entergy Opposition, pp. 19-21, and Staff Response, pp 9,17);

2. Petitioners' have not stated any "obvious potential for offsite consequences." (Entergy Opposition, pp. 4, 19, 22; Staff Response, p. 18); and
3. Petitioners' Response does not "demonstrate a 'concrete and particularized' injury-in-fact" (Staff Response 17) and that Petitioners' concerns about their property and financial interests are far too vague to establish traditional standing (Entergy Opposition, pp 20, 22, 23; Staff Response, p 16) and only Pilgrim Watch and Beyond Nuclear have shown that the respective organizations have authorized the named individuals to represent them (Staff Response, p, 17, Fn. 73).

Each of these is wrong. Petitioners have met the requirements of 2.309(d)(1) and do have standing. [7]

1. Petitioners are entitled to the 50-mile presumption

Entergy and the Staff seem to admit that Petitioners have standing if they are entitled to "rely on proximity to the plant to support standing" (Staff Response, p. 17-18; see also Entergy Opposition, p. 23). The Staff recognized that "[t]he Commission and licensing boards have normally allowed petitioners to satisfy standing requirements in construction permit and operating license proceedings for power reactors by demonstrating that they reside, or otherwise have frequent contacts, within 50 miles of the subject facility." (Staff Response, p. 9, Fn. 40). Entergy agrees that "'proximity' standing has been found for petitioners who reside within 50 miles of the facility in question." (Entergy Opposition, p. 19).

[7] Contrary to what the Staff says (See Staff Response, p. 16), Petitioners' participation in prior NRC proceedings is a factor supporting standing.

Petitioners' Request is clear that at least two of the eight (8) organization petitioners have members that live within 10 miles of Pilgrim, and that all have members that live within Pilgrim's 50-mile radius.[8]

As shown in the NRC's Staff Practice and Procedure Digest, Section 2.10.4.1.1.1.E Injury Due to Proximity to a Facility Section 6.1.4 Hearing Requirements for License/Permit Proceedings, it is clearly established that "persons living within the roughly 50-mile radius of the facility 'face a realistic threat of harm' if a release from the facility of radioactive material were to occur," and that such a person, such as all the Petitioners here, "need not show a causal relationship between injury to its interest and the licensing action being sought in order to establish standing."

[8] I.e.:

- Pilgrim Watch: "Many of PW's members live within the immediate neighborhood of the reactor, and others either within the 10-mile Emergency Planning Zone or within the 50-mile ingestion pathway." (Petitioners' Request, p 2)
- Pilgrim Coalition: "All of its most active members live within the 50-mile Emergency Planning Zone; many live less than 10 miles from Pilgrim Station." (Petitioners' Request, p 3)
- The Pilgrim Legislative Advisory Coalition: "The more than 40 members of the Pilgrim Legislative Advisory Coalition make their residence throughout the fifteen towns on Cape Cod, on Martha's Vineyard or in other neighboring communities on the South Shore of Massachusetts, all of which are within the 50-mile Ingestion Zone." (Petitioners' Request, p 5)
- Cape Downwinders: "… members living throughout the fifteen towns on Cape Cod and both Martha's Vineyard Island and Nantucket. These communities are within the 50-mile Emergency Planning Zone." (Petitioners' Request, p. 6)
- Cape Downwinders Cooperative: "Its members reside on Cape Cod, within Pilgrim Nuclear Power Station's 50-mile ingestion pathway." (Petitioners' Request, p 7)
- Massachusetts Downwinders: "...a coalition of citizen organizations with members living throughout the state of Massachusetts working to protect the public interest in the event of a radiological accident at Pilgrim. Many represented communities are within the Emergency Planning Zone and would be negatively impacted if an accident at Pilgrim occurred." (Petitioners' Request, p. 7)
- CAN: "…has members living in the 50-mile Emergency Planning Zone for the Pilgrim reactor" (Petitioners' Request, p 8)
- Beyond Nuclear: "Beyond Nuclear has members within Pilgrim Station's Emergency Planning Zone." (Petitioners' Request, p. 4)

The Digest also makes clear that "Close proximity has always been deemed enough *standing alone*, to establish the requisite interest for intervention," that the proximity presumption "rests on the NRC finding … that persons living within the roughly 50-mile radius of the facility 'face a realistic risk of harm' if a release from the facility of radioactive material were to occur," and that each of the Petitioners thus "may base its standing upon a showing that its residence, or that of its members, is within the geographical zone that might be affected by an accidental release of fission products."

Staff and Entergy tried to avoid the unfortunate (for Staff and Entergy) fact that all of the Petitioners reside within the 50-mile proximity zone by pretending that this is somehow not "licensing case," despite Entergy's admission that this is a "license proceeding[]" (Entergy Opposition, p. 19).

EA-13-109 itself is titled, in bold and full capital letters, "**Order to Modify Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions**, and on page 10 says, again in full capital letters, that "IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT ALL LICENSES IDENTIFIED IN ATTACHMENT 1 TO THIS ORDER ARE MODIFIED AS FOLLOWS;" and that these "modifications" amended Pilgrim's operating license

Staff and Entergy ignore also the plain fact that, as shown in Section II, above, Entergy's Request would further amend Pilgrim's current operating license (that includes the "modifications" made by EA-13-109) by changing the compliance dates that the amended license sets forth,

This is a "licensing" case, and the proximity presumption principle applies.

B. Petitioners Also Proved their "Traditional" Right to Standing.

Even if this were not a "licensing" case, Petitioners would still have standing. See Staff Response, p. 9. The Staff's and Entergy's arguments that Petitioners have not stated any "obvious potential for offsite consequences." (Entergy Opposition, pp. 4, 19, 22; Staff Response, p. 18), and have only vaguely expressed the potential injury-in-fact to their property and financial interests and their health and safety, ignore both what Petitioners said in their Request and what the NRC found in EA-13-109.

1. Petitioners have shown the "obvious potential for offsite consequences".

Entergy's assertion that Petitioners did not "even recognize or attempt to address the 'obvious potential for offsite consequences'" (Entergy Opposition, p. 20) is simply wrong. Petitioners doubt that even Entergy would deny that a failure of Pilgrim's containment would have an "obvious potential for offsite consequences."

Petitioners' Request repeatedly said that a containment failure could have dire consequences: "letting Entergy remain out of compliance would deprive citizens of a severe capable wetwell vent that 'reduces the likelihood of *containment failures* and thereby enhances the defense-in-depth protections for plants with Mark I and Mark II containments;' and would place Pilgrim, among other very important things, at a relatively high probability[y] that [its] *containment[s] would fail* should an accident progress to melting the core.'" (Petitioners' Request, p. 21)

Pilgrim's request also quoted EA-13-109's explicit finding that "a venting system should be available during severe accident conditions … (to) enhance[e] the defense-in-depth characteristics of Mark I and Mark II containments by addressing the *relatively high probabilities that those containments would fail should an accident progress to melting the core*"

(See Petitioners' Request p. 22 quoting Order, p. 6, italics added), and that the Phase I requirements "are needed to protect health and to minimize danger to life or property because they will give licensees greater capabilities to respond to severe accidents and *limit the uncontrolled release of radioactive materials*" (See Petitioners' Request, p. 21,quoting Order, p. 7, italics added) .

The NRC has long known that Pilgrim's containment is too small (See Order, p. 2: "small containments such as the Mark I and Mark II designs."). Does either the Staff or Entergy really believe that an "*uncontrolled release of radioactive material*s would not have an "obvious potential for offsite consequences?"

2. Petitioners' Expressed Concerns Are Not Vague.

The Staff admits that Petitioners' Request says that all of the identified members of the petitioner organizations said "that they are 'reasonably concerned' that granting Entergy's Request would adversely affect their financial interests and health and safety" and that "if Entergy's Request is granted, 'it would deny Petitioners the protection a severe accident capable wetwell venting system would provide during at least the two remaining years of Pilgrim's operations." Staff also admits that the "two members of Beyond Nuclear assert … that they are concerned that if the NRC grants Entergy's Request, the continued operation of PNPS could adversely affect their lives, their families, their communities, and the environment, and that they are "particularly concerned about the undue risk an extension to comply presents for an accidental release of radiation and the potential harm that it would cause to public health and the environment." (Staff Response, p. 17)

Entergy's Opposition simply says that Petitioners' statements that they "are reasonably concerned' about health and safety" (Entergy Response, p. 20) and "their property and financial interests are far too vague (Entergy Response, p. 20.

One wonders if the Staff or Entergy lawyers read, or simply failed to appreciate, what Petitioners said at pages 20-23 of Petitioners' Request.

The NRC finding in EA-13-103, that there was at Pilgrim a "*high probability*" of an "*uncontrolled release* of radioactive materials" (See Petitioners' Request, p. 21, quoting Order, p. 7), would "reasonably concern" any person living near Pilgrim about their "health and safety" and about the effects that such a release would have on "their property and financial interest;" It certainly concerned the Petitioners.

Petitioners' concrete and particularized concerns for their health, safety, and property and financial interests were heightened by the NRC's additional findings that the Phase 1's required installation of a "reliable hardened venting system that is capable of performing under severe accident conditions" is "*needed to protect health and safety* and to *minimize danger to life or property*" (Petitioners' Request, p. 22, quoting EA-13-109, p. 7), and it was necessary to make the order immediately effective so that the required "*severe accident venting capability is provided … with minimal delays.*" (EA-13-109, p. 4).

The Staff's apparent view that granting Entergy's request to delay installation for at least two years of continued Pilgrim operation does not further "demonstrate a 'concrete and particularized' injury-in-fact" (Staff Response, p. 17) defies common sense. The Commission said that the system is "needed to protect health and safety and to minimize danger to life or property" and that it should be installed with "minimal delays." (EA-13-109, p. 4). The

Commission gave Pilgrim almost four years to install the system. Whether a four-year delay is minimal is open to question; at least six and a half years (from June of 2013 until December of 2019, and likely forever, is not.

Petitioners expressed concerns are based on EA-13-109 itself, and on also on Entergy's attempt not only to delay, but to avoid ever having to do, what that Order requires. These concerns and the reasons that Petitioners have them. are "concrete and particularized, and fully support their right to standing – even if we were to assume, contrary to fact and law, that Petitioners are not entitled to standing simply because of their proximity to Pilgrim.[9]

3. Plaintiffs' Right to Standing is not Negated by a Claim that Pilgrim already has a severe accident capable HCVS.

Entergy claims that Pilgrim "*already has* a severe accident capable HCVS" and that it "has made diligent progress toward installing the features required by EA-13-109." (Entergy Response, p. 21). This statement *admits* that Entergy as of today has not met the Phase 1 requirements, and the Staff agrees that it has not.[10] If Pilgrim had already complied with EA-13-109, Entergy would not be requesting an extension to comply until after Pilgrim closed, and for so long as Pilgrim continues to operate to leave everyone near Pilgrim at risk without the "modifications … needed to protect health and to minimize danger to life or property because they will give licensees greater capabilities to respond to severe accidents and limit the uncontrolled release of radioactive materials." (Order, p.,7, quoted in Request at 21)

[9] Although it is unlikely that the Commission will need to do, Petitioners point out that, at this stage of a proceeding, a petition must be construed in favor of the petitioners. Georgia Tech Research Reactor, Atlanta, Georgia, CLI-95-12, 42 NRC 111, 115 (1995)

[10] The Staff says that Entergy admits that three are at least three areas in which "the current design of [Pilgrim's] wetwell venting system" does not meet EA-12-109's requirements. Staff Response, p. 5

Exactly what Energy has done, and how closely that might conform to EA-13-109, remain to be proved. Most important here is that Entergy's allegations have nothing to do with Petitioners' right to standing at the required189.a hearing. It will be for the ASLB to consider whether Entergy's allegations are complete or correct, to consider all of the evidence, and then to decide whether and to what extent Pilgrim's license should be amended.

4. The Petitioner Organizations Have Standing

Petitioners do not dispute the Staff's statement that (Staff Response, p. 9) that

> Where an organization seeks to establish representational standing, it must demonstrate that at least one of its members would be affected by the proceeding and identify any such members by name and address. Also, the organization must show that the identified members would have standing to intervene in their own right, and that these members have authorized the organization to request a hearing on their behalf.

Petitioners have shown that at least one member of each organization would suffer an injury-in-fact if Entergy's request were granted and thus would have standing in their own right. See Section III, above.

As for whether that these organization their named representative to act on their behalf, the Staff admits that the Pilgrim Watch and Beyond Nuclear representatives have shown that they are authorized.

Contrary to what the Staff says, the representatives of the other organization are authorized also. As said in Petitioners' Request, Joseph Waldstein is an officer of the Pilgrim Coalition, Diane Turco is the Director of Cape Downwinders, and Paula Sharaga is Massachusetts Downwinders' Boston area coordinator. PLAC and Cape Downwinders Cooperative are consensus based-organizations. Each delegated a member to represent the organization. CAN's

director Deb Katz designated a member of the organization who resides within Pilgrim's 50-mile zone.[11]

## IV. Entergy's and the Staff's Other Arguments Are Wrong or Irrelevant

### A. Petitioners are not Challenging EA-13-109

Petitioners do not challenge any part of EA-13-109. It is Entergy, not Petitioners, that seeks to amend it.

Contrary to what Entergy says, Petitioners do not "challenge the inclusion and/or substantive provisions of the Relaxation Provision" (Entergy Opposition, p. 4; see also p. 14). Petitioners understand that such a provision is routinely included in Non-Enforcement Orders such as E-13-109. But it is clear that simply including such a provision in an Order could not excuse the Commission, or anyone to who it might delegate any of the Commission's authority, from complying with the Atomic Energy Act.[12]

The Staff also seems to suggest that Petitioners are challenging the facts stated in the Order or the Order's remedy. Again, that is simply not so. Petitioners' Request accepts that the facts stated in the Order are true,[13] and that the Order's remedy (compliance with the Phase I and II requirements by the date the Order set) is supported by those facts. See *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station), CLI-80-10, 11 NRC 438, 441 (1980), cited at p. 7, fn. 31 of the Staff Response.

---

[11] If the Commission wants affidavits/declarations, Petitioners will provide them.

[12] It seems far from clear that the NRC has any right to delegate the question whether a Section 189.a is required. See NRC Staff Practice and Procedure Digest, Section 2.10.4.1: "In this vein, a more recent case reiterating the rule that a Licensing Board may not delegate its obligation to decide significant issues to the NRC Staff is Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 318 (1978)."

[13] These facts support Petitioners' right to standing. See Section II, below.

B. Petitioners do not say that Entergy has not complied with the Order.

EA-13-109 109 requires Entergy to comply with the Phase 1 requirements "no later than startup from the second refueling outage that begins after June 30, 2014, or June 30, 2018, whichever comes first" (Order IV(B), p. 11); i.e., in the Spring of 2017 (Entergy Opposition, p.2). That date is several months in the future.

Entergy admits that what it has accomplished to date is not enough to meet all of the Phase 1 requirements, but Petitioners quite properly do not say that fact means that Entergy, as of today, has not complied with the Order.

As for the fact that Entergy did not submit anything pursuant to "the notice requirement" in Section IV.C.1 of the order (Staff Response, 11), Petitioners agree with the Staff's observation that the Order did not explicitly "require[] Entergy to seek relaxation in the form of a license request" (See Staff Response, pp. 14).[14]

That said, whether Pilgrim's license should be amended will, of course, be the central issue at the hearing to which Petitioners are entitled, and they expect to prove what Contention 1, Part 2 alleges at that hearing. Entergy's decision not to make any filing under the "notice requirement" will be evidence the license should not be amended as Entergy requests, as will the fact that to be timely Entergy's Request for Extension should have been filed as soon as Entergy knew that it intended to close Pilgrim early.[15]

[14] Petitioners similarly do not say that Entergy is barred from filing a request to amend its license by changing the compliance dates set forth in the Order. What if any amendment should be allowed is, of course, a question to be resolved at the required Section 189.a hearing.

[15] The allegations made in Entergy's request about the extent to which it has already complied in fact must be proved. At the hearing, Petitioner expect to prove that Pilgrim is fully capable of complying with the Phase requirements without any extension of the Order's dates, and that even Entergy's allegations were to be proved, they would not justify amending the license to change the ordered compliance dates.

C. Petitioners' Request is not "outside the scope of hearings".

In saying that "Petitioners' claim is outside the scope of hearings" (Staff Response, p.19) the Staff obviously failed to recognize that *Citizens Awareness Network, Cleveland Electric Illuminating Co.,* and *Cleveland Electric Illuminating Co, supra* at pp. 5-6, all squarely held that a Petitioner's "Section 189.a. hearing rights are triggered" when, as here, a licensee seeks, *de facto* or explicitly, to amend its license.

Rather, and not unexpectedly, the Staff turned to *Bellotti* and *Marble Hill* as its last refuge from conceding that Part 1 of Petitioners' Contention is admissible. Neither supports the Staff's view.

In *Bellotti*, the D.C. Court of Appeals could not have more clearly said that (italics added)

> The Commission's power to define the scope of a proceeding will lead to the denial of intervention *only* when the Commission *amends a license to require additional or better safety measures. … If,* on the other hand, *the Commission proposes to amend a license to remove a restriction upon the licensee,* the scope of the proceeding is defined by that proposal and *section 189(a) permits public participation* to oppose that relaxation.

The NRC's Staff Practice and Procedure Digest, Section 2.10.4.1 Judicial Standing to Intervene, also shows that *Bellotti* and *Marble Hill* have potential relevance *only* if a Petitioner claims that an order in an enforcement should have provided more extensive relief and seeks to have the NRC impose a stricter penalty:

> The Commission applies judicial tests of "injury-in-fact" and "arguably within the zone of interest" to determine standing. "Injury" as a premise to standing must come from an action, in contrast to failure to take an action. One who claims that an order in an enforcement action should have provided for more extensive relief does not show injury from relief granted and thus does not have standing to contest the order. Pub. Serv. Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 439 (1980); Maine Yankee Atomic

> Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57-58 (2004).
>
> One cannot seek to intervene in an enforcement proceeding to have the NRC impose a stricter penalty than the NRC seeks. Issues in enforcement proceedings are only those set out in the order. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980).
>
> One who seeks a stricter penalty than the NRC proposes has no standing to intervene because it is not injured by the lesser penalty. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980). State of Alaska Dep't of Transp. and Pub. Facilities, CLI-04-26, 60 NRC 399, 404 (2004), reconsid. denied, CLI-04-38, 60 NRC 652 (2004).
>
> The Commission may limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts. Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45 (1982), aff'd sub nom. Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir 1983); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 441-442 (1980); Sequoyah Fuels Corp. (UF6 Production Facility), CLI-86-19, 24 NRC 508, 512 n.2 (1986).

The Court of Appeals in *Bellotti* succinctly summarized why Petitioners' contention that Entergy's Request requires a Section 189.a hearing is admissible is NOT "outside the scope of hearing":

> [A]utomatic participation at a hearing may be denied only when the Commission is seeking to make a facility's operation safer. Public participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare.

Granting Entergy's request to delay making the required Fukushima "fixes" would not make Pilgrim's operation less safe, and plainly would be potentially harmful to the public health and welfare.

D. Petitioners' Contention is Admissible.

Petitioners have made a single Contention: Entergy's Request for Extension to implement Phase 1 (severe accident capable wetwell venting system) should be denied. (Petitioners'

Request, p.9). That Contention had four Parts. Part 1 says that Entergy's Request should be denied because it in reality is a request to amend Entergy's current license and that such an amendment cannot be granted without a hearing pursuant to Section 189.a of the Atomic Energy Act. See Section II, above. Parts 2-4 set forth reasons that that the Entergy's request for delay in complying with the Order should be denied with or without a hearing, i.e., that

- Entergy's delay in making its Request until more than two and one-half years after EA-13-109 evidences that there is no "good cause" for extending the date for compliance for some two and one half more years.
- Granting Entergy's request would, for deny those near Pilgrim the protection of the reliable severe accident capable wetwell venting system for years longer than the Order envisioned.
- Entergy's supposed partial compliance with the Order is not a reason to delay completing implementation of what the Order requires.

Each of Parts I through IV provide reasons that Entergy's Request should be denied, and that Petitioners' contention is admissible

V. Conclusion

Entergy's request to extend the date by which it must comply with the Phase I requirement is a *de facto* request to amend its current license and "triggers" Petitioners right to a hearing under Section 189.a of the Atomic Energy Act. The individual representatives of the organization petitioners have standing, and through them the organizations have standing also.

Petitioners' Request for Hearing Regarding Entergy's Request for Extension to comply with NRC Order EA-13-109 should be granted.

Respectfully submitted by Pilgrim Watch on behalf of Co-Petitioners,

Signed (electronically) by
Mary Lampert
Pilgrim Watch, Director
148 Washington Street, Duxbury, MA 02332
Tel. 781-934-0389/Email: mary.lampert@comcast.net
October 11, 2016

# EXHIBIT A

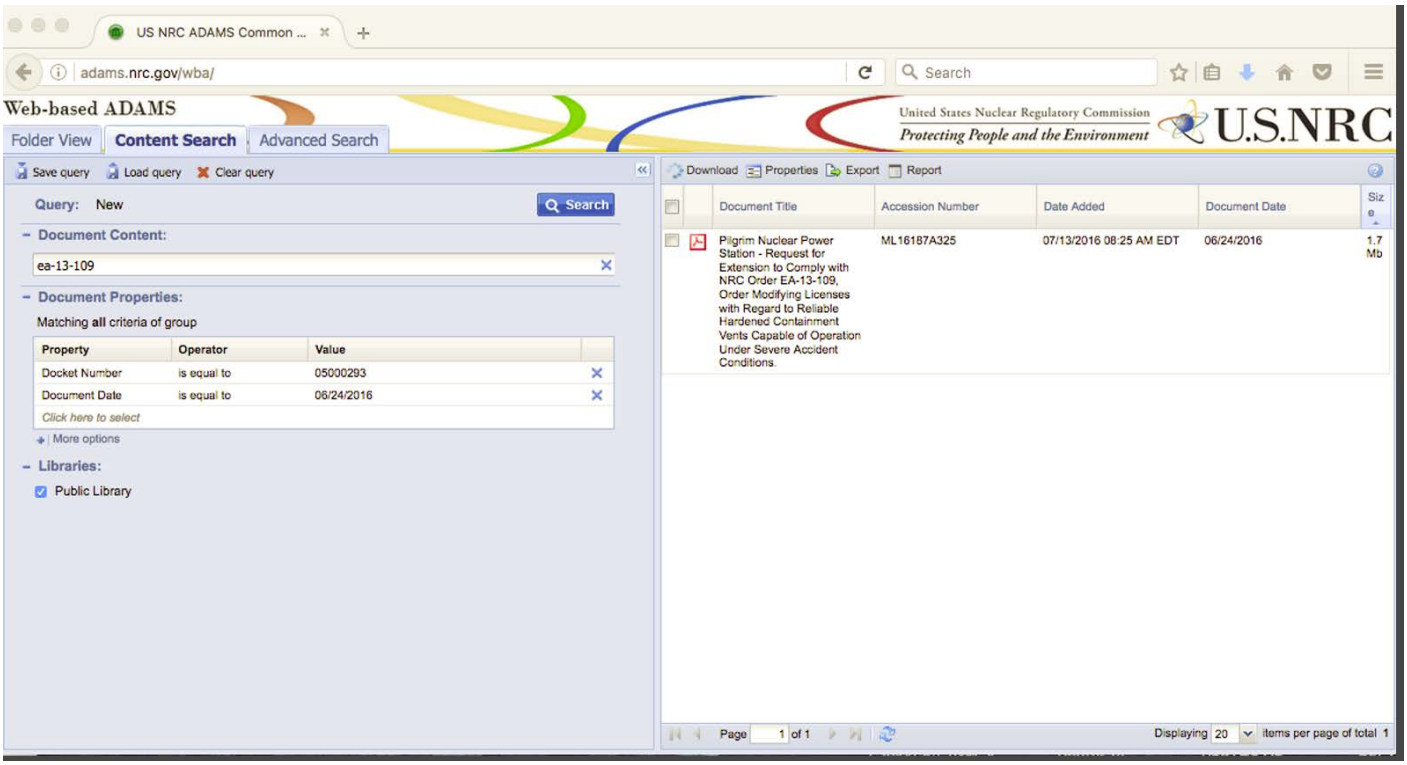
US NRC ADAMS Common ...
adams.nrc.gov/wba/
Search
Web-based ADAMS
United States Nuclear Regulatory Commission
Protecting People and the Environment
U.S.NRC
Folder View
Content Search
Advanced Search
Save query
Load query
Clear query
Query: New
Search
Document Content:
ea-13-109
Document Properties:
Matching all criteria of group
Property
Operator
Value
Docket Number
is equal to
05000293
Document Date
is equal to
06/24/2016
Click here to select
More options
Libraries:
Public Library
Download
Properties
Export
Report
Document Title
Accession Number
Date Added
Document Date
Size
Pilgrim Nuclear Power Station - Request for Extension to Comply with NRC Order EA-13-109, Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions.
ML16187A325
07/13/2016 08:25 AM EDT
06/24/2016
1.7 Mb
Page 1 of 1
Displaying 20 items per page of total 1

**EXHIBIT B**

**BEFORE THE COMMISSION**

| | | |
|---|---|---|
| In the Matter of: | ) | Docket No. 50-293-EA |
| ENTERGY NUCLEAR GENERATION CO. & ENTERGY NUCLEAR OPERATIONS, INC. | ) | |
| (Pilgrim Nuclear Power Station) | ) | October 11, 2016 |

**DECLARATION OF MARY LAMPERT**

1. I am the authorized representative of Petitioner Pilgrim Watch in this proceeding.
2. I and Paul Gunter, the authorized representative of Petitioner Beyond Nuclear, worked together in Petitioners' Request and insuring that it was timely filed.
3. During the period that we were drafting Petitioners' Request we were acutely aware of the requirement that the Petitioners' Request be filed within 60 days after Entergy's Request for Extension to Comply with NRC Order EA-13-109 was publicly available on ADAMS.
4. A few days after July 13, 2016, Paul Gunter told me that Entergy had filed its Request for Extension to comply, and that Entergy's Request had been published on ADAMS on July 13, 2016.

EXHIBIT B

5. Thereafter, and up to and including the day that I filed Petitioners Request for Hearing, I regularly checked ADAMS to be sure that the date on which Entergy's Request and been posted had not been changed from July 13, 2016.

6. During this same period, I regularly spoke with Paul Gunter concerning, among other things, what ADAMS said about the when Entergy's Request had been added to ADAMS. My understanding from these conversations was that Paul Gunter similarly had been checking ADAMS, that he also had seen nothing to indicate any change in ADAMS's statement that Entergy's Request had been added to ADAMS on July 13, 2016.

7. I filed Petitioners Request for Hearing on September 7, 2016, less than 60 days after July 13, 2016.

8. Before receiving the Staff Response of October 3, 2016 I had never seen anything suggestion, or been told by anyone, that Entergy's Request may have been posted on any version of ADAMS before July 13, 2016.

Signed under the pains and penalty of perjury and 18 U.S.C §1001 this 11th day of October 2016.

Mary Lampert

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

| | | |
|---|---|---|
| In the Matter of: | ) | Docket No. 50-293-EA |
| ENTERGY NUCLEAR GENERATION CO. & ENTERGY NUCLEAR OPERATIONS, INC. | ) | |
| (Pilgrim Nuclear Power Station) | ) | October 11, 2016 |

## DECLARATION OF PAUL GUNTER

1. I am the authorized representative of Petitioner Beyond Nuclear in this proceeding.
2. I and Mary Lampert, the authorized representative of Petitioner Pilgrim Watch, worked together in Petitioners' Request and insuring that it was timely filed.
3. I became aware of Exelon's Oyster Creek "Request for an Extension to Comply" posting to Public ADAMS to delay its implementation of EA-13-109 too late to meet the sixty-day filing deadline for a timely hearing request.
4. Thereafter, up to and including today, I regularly check Public ADAMS to see if any other BWR licensee have made a similar request.

EXHIBIT B

5. In a subsequent search of Public ADAMS, I learned that a similar request by Entergy had been added to Public ADAMS on July 13, 2016. During the period that we were drafting Petitioners' Request we were acutely aware of the requirement that the Petitioners' Request be filed within 60 days after Entergy's Request for Extension to Comply with NRC Order EA-13-109 was made publicly available on ADAMS.
6. Shortly after July 13, 2016, and based on my search of Public ADAMS, I communicated to Mary Lampert that Entergy had filed its "Request for Extension to Comply", and that Entergy's Request had been published on Public ADAMS on July 13, 2016.
7. I am providing as an exhibit a current screenshot taken of Public ADAMS that dates the first public posting of Entergy's Pilgrim request as July 13, 2016.
8. Before receiving the Staff Response of October 3, 2016, I did not see or hear anything to suggest that Entergy's Request may have been posted on any version of ADAMS before July 13, 2016.

Signed under the pains and penalty of perjury and 18 U.S.C §1001 this 11th day of October 2016.

Signed by Paul Gunter

**UNITED STATES OF AMERICA**

**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE NUCLEAR REGULATORY COMMISSION**

In the Matter of Pilgrim 50-293-EA

Entergy's Request for Extension to Comply

With NRC Order EA-13-109, Pilgrim Station

October 11, 2016

## CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (revised), I hereby certify that copies of the foregoing PETITIONERS' RESPONSE TO NRC STAFF'S AND ENTERGY'S OPPOSITION TO PETITIONERS' REQUEST FOR HEARING REGARDING ENTERGY'S REQUEST FOR EXTENSION TO COMPLY WITH NRC ORDER EA-13-109 dated October 11, 2016 have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, on October 11, 2016.

(Signed (electronically) by,
Mary Lampert
Pilgrim Watch, Director
148 Washington Street, Duxbury, MA 02332
Tel. 781-934-0389/Email: mary.lampert@comcast.net
October 11, 2016