

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
Entergy Nuclear Generation Co., and)	Docket No. 50-333-EA
Entergy Nuclear Operations, Inc.)	
)	
(James A. FitzPatrick Nuclear Power Plant))	

NRC STAFF'S RESPONSE TO BEYOND NUCLEAR & THE ALLIANCE
FOR A GREEN ECONOMY'S REQUEST FOR HEARING

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DECEMBER 5, 2016

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), the Staff of the Nuclear Regulatory Commission (Staff) hereby responds to the request for hearing filed by Beyond Nuclear and the Alliance for a Green Economy New York (Petitioners).¹ Petitioners seek a hearing on two recent requests submitted by Entergy Nuclear Operations, Inc. (Entergy or Licensee) for extensions of time to

¹ Beyond Nuclear & The Alliance for a Green Economy Petition to Request a Hearing and Leave to Intervene on Entergy's Request for an Extension to Comply with NRC Orders EA-12-049, EA-12-051, and EA-13-109 Requirements for the James A. FitzPatrick Nuclear Power Station (Nov. 10, 2016) (NRC Agency Documents Access and Management System (ADAMS) Accession No. ML16315A433). On November 21, 2016, Petitioners filed an errata sheet listing three corrections to the original petition, along with a corrected Petition. See CORRECTED Petition for Hearing and Leave to Intervene (Nov. 21, 2016) (ADAMS Accession No. ML16326A267); Petitioners Errata to Request for a Hearing and Leave to Intervene in the Matter of James A. FitzPatrick Request for Extension to Comply with NRC Orders EA-12-049, EA-12-051 and EA-13-109 (Nov. 21, 2016) (ADAMS Accession No. ML16326A266). The Staff's Answer is in response to the corrected petition and associated errata (Petition).

comply with NRC Orders EA12-049,² EA-12-051,³ and EA-13-109⁴ (Orders) at the James A. FitzPatrick Nuclear Power Plant (FitzPatrick).⁵ As discussed below, the Petitioners' request should be denied because Petitioners are not entitled to a hearing under the Atomic Energy Act or the NRC's regulations for such a request. Additionally, Petitioners have not established standing for a hearing, nor have Petitioners submitted an admissible contention. Therefore, the Commission should deny Petitioners' hearing request.

BACKGROUND

I. Fukushima Orders

On March 12, 2012, as part of its response to lessons learned from the March 2011 Fukushima Dai-ichi accident, the NRC issued three immediately effective orders: (1) EA-12-049, which requires all operating power reactor licensees to develop and implement strategies to restore or maintain core cooling, containment, and spent fuel pool (SFP) cooling capabilities during a beyond-design-basis external event;⁶ (2) EA-12-050, which requires all operating boiling-water reactor (BWR) licensees with Mark I or Mark II containments to install reliable,

² *All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status*, Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Effective Immediately) (March 12, 2012) (EA-12-049).

³ *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) (March 12, 2012) (EA-12-051).

⁴ *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), EA-13-109 (June 6, 2013) (EA-13-109).

⁵ Letter from Brian R. Sullivan, Entergy, to NRC, Request for Extension to Comply with March 12, 2012 Commission Orders Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events and Reliable Spent Fuel Pool Instrumentation (Order Numbers EA-12-049 and EA-12-051) (September 8, 2016) (ADAMS Accession No. ML16252A477) (2012 Orders Request); Letter from Brian R. Sullivan, Entergy, to NRC, 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" (September 8, 2016) (ADAMS Accession No. ML16252A482) (EA-13-109 Request). When discussed collectively these requests are referred to as Entergy's Requests or Entergy's September 8 Requests.

⁶ EA-12-049 at 6.

hardened vents;⁷ and (3) EA-12-051, which requires all power reactor licensees to enhance SFP instrumentation to ensure a reliable means of monitoring SFP levels during a beyond-design-basis event.⁸ On June 6, 2013, EA-12-050 was rescinded and replaced by Order EA-13-109, which requires the licensees identified in EA-12-050 to install reliable, hardened vents capable of operating during severe accidents.⁹

The Commission determined that the requirements to provide mitigating strategies (EA-12-049) and to provide reliable, hardened vents (originally required in EA-12-050 and carried over to EA-13-109) were necessary to provide reasonable assurance of adequate protection of public health and safety.¹⁰ The Commission concluded that the requirement for SFP instrumentation (EA-12-051) represented a “significant enhancement to the protection of public health and safety” that warranted adoption as an exception to 10 C.F.R. § 50.109, the “Backfit Rule,” and that the requirement for hardened vents capable of operating in severe accidents (EA-13-109) represented a cost-justified substantial safety improvement under the Backfit Rule.¹¹

Under each of the three Orders, affected licensees were required to submit an overall integrated plan (OIP) describing how compliance with each of the Orders would be achieved, along with status reports describing their progress in implementing the requirements.¹² Each

⁷ *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), EA-12-050 at 6 (March 12, 2012) (EA-12-050).

⁸ EA-12-051 at 7.

⁹ EA-13-109 at 5, 8. Order EA-13-109 rescinded the requirements of EA-12-050 and imposed new requirements to (1) provide a reliable hardened containment venting system (HCVS) to assist in preventing core damage (fulfilling the purpose of EA-12-050) and (2) ensure that containment venting functions will be available during severe accident conditions.

¹⁰ EA-12-049 at 6; EA-13-109 at 5.

¹¹ EA-12-051 at 6-7; EA-13-109 at 7.

¹² EA-12-049 at 9, EA-12-051 at 10, EA-13-109 at 13. The OIPs for EA-12-049 and EA-12-051 were due by February 28, 2013, and the OIP for Phase 1 of EA-13-109 was due by June 30, 2014. EA-

Order also contains implementation deadlines.¹³ Additionally, each Order contains a provision allowing the Director of the Office of Nuclear Reactor Regulation (NRR) to “relax or rescind any of the above conditions [referring to the requirements listed in Section IV of each order] upon demonstration by the licensee of good cause.”¹⁴ Finally, each Order offered an opportunity to request a hearing on the issue of whether the order should be sustained.¹⁵

II. Entergy’s Implementation of EA-12-049, EA-12-051, and EA-13-109 at FitzPatrick

In its answers to each of the Orders, Entergy consented to the requirements of the Orders, waiving its right to a hearing.¹⁶ However, Entergy noted that “future responses may include requests for schedule relief as warranted.”¹⁷

12-049 at 9, EA-12-051 at 10, EA-13-109 at 13. All three Orders required status reports at 6-month intervals following submittal of the OIP. EA-12-049 at 9, EA-12-051 at 10, EA-13-109 at 13.

¹³ For EA-12-049 and EA-12-051, implementation is to be completed “no later than two refueling outages after submittal of the [OIP] . . . or December 31, 2016, whichever comes first.” EA-12-049 at 7-8, EA-12-051 at 8-9. For Phase 1 of EA-13-109, implementation is to be completed “no later than startup from the second refueling outage that begins after June 30, 2014, or June 30, 2018, whichever comes first.” EA-13-109 at 11.

¹⁴ EA-12-049 at 9; EA-12-051 at 10; EA-13-109 at 13.

¹⁵ EA-12-049 at 10; EA-12-051 at 11; EA-13-109 at 13-14. Beyond Nuclear requested to join as a co-petitioner for a hearing request on EA-12-050 (the original hardened vents order) and EA-12-051, but subsequently withdrew its request. *See All Operating Boiling Water Reactor Licensees with Mark I & Mark II Containments: Order Modifying Licenses With Regard to Reliable Hardened Containment Vents (Effective Immediately) All Power Reactor Licensees & Holders of Constr. Permits in Active or Deferred Status: Order Modifying Licenses with Regard To Reliable Spent Fuel Pool Instrumentation (Effective Immediately)*, LBP-12-14, 76 NRC 1, 3 n. 7 (2012). The request was denied as outside the scope of the proceeding. *Id.*, *aff’d* CLI-13-2, 77 NRC 39 (2013).

¹⁶ Letter from Michael J. Colomb, Entergy, to NRC, Entergy Nuclear Operations, Incorporated’s Answer to March 12, 2012, Commission Order Modifying Licenses With Regard To Requirements for Mitigation Strategies for Beyond-Design Basis External Events (Order Number EA-12-049) (March 30, 2012) (ADAMS Accession No. ML12090A498) (FitzPatrick EA-12-049 Answer); Letter from Michael J. Colomb, Entergy, to NRC, Entergy Nuclear Operations, Incorporated’s Answer to March 12, 2012, Commission Order to Modify Licenses With Regard To Reliable Spent Fuel Pool Instrumentation (Order Number EA-12-051) (March 30, 2012) (ADAMS Accession No. ML12090A511) (FitzPatrick EA-12-051 Answer); Letter from Lawrence M. Coyle, Entergy, to NRC, Entergy’s Answer to the June 6, 2013, Commission Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (Order Number EA-13-109) (June 26, 2013) (ADAMS Accession No. ML13177A275) (FitzPatrick EA-13-109 Answer).

¹⁷ FitzPatrick EA-12-049 Answer at 2; FitzPatrick EA-12-051 Answer at 2; FitzPatrick EA-13-109 Answer at 2.

In August 2012, the Nuclear Energy Institute (NEI) issued industry guidance documents NEI 12-06 and 12-02, which provide guidance on implementation of EA-12-049 and EA-12-051, respectively.¹⁸ Shortly thereafter, the NRC Staff issued its interim staff guidance (ISG) documents on implementation of EA-12-049 and EA-12-051.¹⁹ On February 28, 2013, Entergy submitted its OIPs for achieving compliance with EA-12-049 and EA-12-051 at FitzPatrick.²⁰ In these OIPs, Entergy stated that it planned to implement the requirements of EA-12-049 and EA-12-051 at FitzPatrick by the end of its Fall 2016 refueling outage.²¹

On November 7, 2013, NEI issued NEI 13-02, which provides guidance on implementing EA-13-109.²² One week later, on November 14, 2013, the NRC Staff issued its ISG on

¹⁸ "Diverse and Flexible Coping Strategies (FLEX) Implementation Guide," NEI 12-06, Revision 0 (August 21, 2012) (ADAMS Accession No. ML12242A378); "Industry Guidance for Compliance with NRC Order EA-12-051, 'To Modify Licenses with Regard to Reliable Spent Fuel Pool Instrumentation,'" NEI 12-02, Revision 1 (August 24, 2012) (ADAMS Accession No. ML122400399). Both NEI 12-06 and 12-02 contemplate the possibility that licensees may seek schedule relief. See NEI-12-06 at 64 (stating that status reports "should include an update of milestone accomplishments since the last status report, including any changes to the compliance method, schedule, or need for relief and the basis, if any."); NEI-12-02 at 1 (stating that "[e]ach licensee shall, unless granted relief by the NRC, comply with Order EA-12-051 within two fuel cycles following the submittal of the overall integrated plan required by Order EA-12-051 or not later than December 31, 2016, whichever comes first."

¹⁹ NRC Interim Staff Guidance JLD-ISG-2012-01, *Compliance with Order EA-12-049, Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events*, Revision 0 (August 29, 2012) (ML12229A174); NRC Interim Staff Guidance JLD-ISG-2012-03, *Compliance with Order EA-12-051, Reliable Spent Fuel Pool Instrumentation*, Revision 0 (August 29, 2012) (ML12221A339). The NRC ISGs endorse NEI 12-06 and 12-02, with exceptions and clarifications. JLD-ISG-2012-01 at 1; JLD-ISG-2012-03 at 1.

²⁰ Letter from Michael J. Colomb, Entergy, to NRC, Entergy's Overall Integrated Plan in Response to March 12, 2012, Commission Order to Modify Licenses With Regard To Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Order Number EA-12-049) (Feb. 28, 2013) (ADAMS Accession No. ML13063A287) (FitzPatrick EA-12-049 OIP); Letter from Michael J. Colomb, Entergy, to NRC, Entergy's Overall Integrated Plan in Response to March 12, 2012, Commission Order to Modify Licenses With Regard To Reliable Spent Fuel Pool Instrumentation (Order Number EA-12-051) (Feb. 28, 2013) (ADAMS Accession No. ML13063A267) (FitzPatrick EA-12-051 OIP).

²¹ FitzPatrick EA-12-049 OIP at 51; FitzPatrick EA-12-051 OIP at 5.

²² "Industry Guidance for Compliance with Order EA-13-109," NEI 13-02, Revision 0 (November 7, 2013) (ADAMS Accession No. ML13316A853). This document also contemplated the possibility of schedule changes in implementing the order. See NEI 13-02 at 61 (stating that the 6-month status reports should include, among other things, "[c]hanges to the compliance schedule as required by the Order or revised in other NRC communication on this topic.").

implementation of Phase 1 of EA-13-109.²³ On June 30, 2014, Entergy submitted to the NRC its OIP for achieving compliance with Phase I of EA-13-109 at FitzPatrick.²⁴ In the FitzPatrick EA-13-109 OIP, Entergy indicated that Phase 1 compliance was “[c]urrently scheduled for fall of 2016.”²⁵

III. Entergy’s Requests for Extension to Comply with EA-12-049, EA-12-051, and EA-13-109

A. Request for Relaxation of Compliance Dates for EA-12-049 and EA-12-051 Based on Anticipated Shutdown

On November 18, 2015, Entergy notified the NRC that it intended to permanently cease power operations at FitzPatrick “at the end of its current fuel cycle,” slated for late 2016 or early 2017.²⁶ On March 16, 2016, Entergy certified to the NRC that it would permanently cease power operations at FitzPatrick on January 27, 2017.²⁷ Subsequently, on April 14, 2016, Entergy submitted a request to the NRC for a “deferral of the implementation date for compliance with Orders EA-12-049 and EA-12-051 to June 30, 2017.”²⁸ As the basis for its request to relax the compliance date requirements of EA-12-049 and EA-12-051, Entergy stated

²³ JLD-ISG-2013-02, Revision 0, *Compliance with Order EA-13-109, Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions*, (November 14, 2013) (ADAMS Accession No. ML13304B836). The ISG endorsed NEI 13-02, with exceptions and clarifications. *Id.* at 1.

²⁴ Letter from Lawrence M. Coyle, Entergy, to NRC, James A. FitzPatrick Overall Integrated Plan in Response to June 6, 2013, Commission Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (Order Number EA-13-109), (June 30, 2014) (ADAMS Accession No. ML14181B117) (FitzPatrick EA-13-109 OIP).

²⁵ *Id.*, Attachment at 4.

²⁶ Letter from John Venotsa, Entergy, to NRC, Notification of Permanent Cessation of Power Operations (Nov. 18, 2015) (ADAMS Accession No. ML 15322A273). At the time of the notification, Entergy was unable to provide a more specific date “in order to allow for fuel coastdown variables.” *Id.*

²⁷ Letter from Brian R. Sullivan, Entergy, to NRC, Certification of Permanent Cessation of Power Operations (March 16, 2016) (ADAMS Accession No. ML 15322A273).

²⁸ Letter from Brian R. Sullivan, Entergy, to NRC, Request for Relaxation of March 12, 2012 Commission Orders Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events and Reliable Spent Fuel Pool Instrumentation (Order Number EA-12-049 and EA-12-051) (April 14, 2016) (ADAMS Accession No. ML16105A379) (April 14 Request).

that it had cancelled its Fall 2016 refueling outage, in which it would have implemented EA-12-049 and EA-12-051, because of the anticipated permanent shutdown planned for January 2017.²⁹

B. Request for Relaxation of Compliance Dates for EA-12-049, EA-12-051 and EA-13-109 Based on Application for License Transfer

On August 18, 2016, Entergy and Exelon Generation Company, LLC (Exelon) jointly submitted an application for an order and conforming license amendment, which would transfer the FitzPatrick operating license from Entergy to Exelon.³⁰ The License Transfer Application states that Exelon and Entergy anticipate the agreement will close by April 1, 2017, pending satisfaction of all necessary conditions.³¹ Assuming that all of the conditions are satisfied, including the NRC's approval of the license transfer, Entergy will continue to operate FitzPatrick until the license is transferred.³² In order to do so, Entergy must "take such steps as necessary with the NRC to reflect the intent of the parties to operate FitzPatrick beyond January 2017."³³ Exelon also requested that Entergy's notice of intent to permanently cease power operations be deemed withdrawn upon approval of the license transfer and closing of the agreement.³⁴

²⁹ *Id.* at 2. Entergy supplemented its request with additional information describing mitigation strategies for beyond-design-basis events and spent fuel instrumentation currently in use at FitzPatrick. Letter from Brian R. Sullivan, Entergy, to NRC, Supporting Information for Request for Relaxation of March 12, 2012 Commission Orders Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events and Reliable Spent Fuel Pool Instrumentation (Order Number EA-12-049 and EA-12-051) (June 16, 2016) (ADAMS Accession No. ML16168A452).

³⁰ Letter from J. Bradley Fewell, Exelon, to NRC, Application for Order Approving Transfer of Renewed Facility Operating License and Proposed Conforming License Amendment (August 18, 2016) (ADAMS Accession No. ML16235A081) (License Transfer Application). This letter describes the circumstances leading to the license transfer request, most significantly, a new mechanism recently approved by the New York State Public Service Commission for Zero-Emissions Credits, which are designed to assist New York State with its goal of carbon emission reductions. License Transfer Application, Enclosure 1 at 3-6.

³¹ License Transfer Application, Enclosure 1 at 6.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

On September 8, 2016, in light of the proposed license transfer, Entergy submitted a second request for relaxation of the compliance deadlines for EA-12-049 and EA-12-051 (2012 Orders Request),³⁵ and a new request for relaxation of the compliance deadline for Phase 1 of EA-13-109 (EA-13-109 Request).³⁶ In its 2012 Orders Request, Entergy reiterated the request for an extension of time until June 30, 2017, to comply with the requirements of EA-12-049 and EA-12-051 at FitzPatrick.³⁷ Entergy indicated that, as a result of the decision to continue plant operation beyond the January 2017 outage, it has resumed work to fully implement the 2012 Orders at FitzPatrick.³⁸ However, due to the “unexpected change in plant status,” (i.e., from ceasing operations in January 2017 to continued operation beyond January 2017), Entergy stated that “completing all modifications [necessary to implement EA-12-049 and EA-12-051] prior to December 31, 2016 is not achievable.”³⁹ Entergy also stated that the extension does not pose a significant increase in plant risk or a reduction in safety because of current regulatory requirements, existing capabilities at FitzPatrick, and the limited duration of the requested extension.⁴⁰

³⁵ See *generally* 2012 Orders Request.

³⁶ See *generally* EA-13-109 Request.

³⁷ 2012 Orders Request at 2.

³⁸ *Id.*, Attachment at 2.

³⁹ *Id.* Entergy further explains that “the planned modifications, some of which were at or near 100% of the engineering planning process, will now require review, verification, and in some cases plan modification” and changes in plan scheduling and implementation “will require additional analysis to ensure no new adverse conditions are created.” *Id.*

⁴⁰ *Id.* at 4. On December 2, 2016, the Staff issued a letter relaxing the requirement for full implementation of Orders EA-12-049 and EA-12-051 at FitzPatrick until June 30, 2017, as sought by Entergy in its 2012 Orders Request. Letter from William M. Dean, NRC, to Brian R. Sullivan, Entergy, James A. FitzPatrick Nuclear Power Plant – Relaxation of the Schedule Requirements for Order EA-12-049 “Issuance of Order to Modify Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events” and Order EA-12-051, “Reliable Spent Fuel Pool Instrumentation” (CAC Nos. MF1077 and MF1076) (December 2, 2016) (ADAMS Accession No. ML16173A342).

In its EA-13-109 Request, Entergy requested an extension of its deadline to comply with Phase 1 of EA-13-109 at FitzPatrick until June 30, 2018, the final “backstop” date provided in EA-13-109.⁴¹ Entergy stated that as a result of the decision to cease power operations, it would not have been able to comply with the original deadline (end of the second refueling outage that begins after June 30, 2014) prior to shut down.⁴² Now, in light of the possible sale of FitzPatrick, Entergy stated that it has resumed work on implementing EA-13-109.⁴³ However, given the current status of implementation activities, and the need to implement the requirements of EA-12-049 and EA-12-051, full compliance with Phase 1 of EA-13-109 by the end of the January 2017 refueling outage is not achievable.⁴⁴ In the interim, Entergy stated that the existing FitzPatrick containment venting system used to comply with NRC Generic Letter 89-16 (GL 89-16) “continues to provide defense-in-depth measures and enhanced plant capability to mitigate the consequences of a beyond-design-basis external event and [] prevent severe accident conditions.”⁴⁵

IV. Petitioners’ Request for Hearing

On November 10, 2016, Petitioners filed their request for a hearing challenging Entergy’s September 8 Requests.⁴⁶ In their hearing request, Petitioners submitted two contentions. Contention 1, which challenges Entergy’s request for extension of time to comply with EA-13-109, consists of three parts: Contention 1A, which asserts that the request for an

⁴¹ EA-13-109 Request at 2; EA-13-109 at 11.

⁴² EA-13-109 Request, Attachment at 1.

⁴³ EA-13-109 Request at 2.

⁴⁴ EA-13-109 Request, Attachment at 1. Entergy currently plans to implement “all outage-required Phase 1 HCVS mechanical and electrical tie-ins and testing during the January 2017 outage.” EA-13-109 Request, Attachment at 4. However, “field work required to implement the remainder of the Phase 1 HCVS modifications will be performed online during operating cycle CY23,” with a target date of no later than June 30, 2018. *Id.*

⁴⁵ *Id.*, Attachment at 2.

⁴⁶ Petition at 1.

extension of time to comply with EA-13-109 is “in fact” a request for a license amendment; Contention 1B, which asserts that the request is not timely; and Contention 1C, which asserts that Entergy’s stated basis for the extension is not valid.⁴⁷ Contention 2, which challenges Entergy’s request for extension of time to comply with EA-12-049 and EA-12-051, consists of two parts: Contention 2A, which asserts that Entergy’s request is “in fact” a license amendment request, and Contention 2B, which asserts Entergy’s request is untimely.⁴⁸

LEGAL STANDARDS

I. AEA § 189a. Requirement for Hearing Opportunity

Section 189a. of the Atomic Energy Act of 1954, as amended (AEA), states that “[i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding”⁴⁹ The Supreme Court has stated that the section 189a. hearing requirement was “tailored to the scope of proceedings authorized under the licensing Subchapter.”⁵⁰ Therefore, “the only ‘right’ to an opportunity for a hearing under section 189 exists for those actions that are identified in section 189.”⁵¹ Orders issued under 10 C.F.R. § 2.202 alter the requirements of a license and therefore fall under the terms of section 189a. of the AEA.⁵²

⁴⁷ Petition at 18-19, 26, 31.

⁴⁸ Petition at 39, 50.

⁴⁹ Atomic Energy Act of 1954, as amended, § 189a.(1)(A), 42 U.S.C. § 2239(a)(1)(A).

⁵⁰ *Florida Power & Light v. Lorion*, 470 U.S. 729, 739 (1985).

⁵¹ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 (1994).

⁵² *All Operating Boiling Water Reactor Licensees with Mark I & Mark II Containments: Order Modifying Licenses With Regard to Reliable Hardened Containment Vents (Effective Immediately)* *All Power Reactor Licensees & Holders of Constr. Permits in Active or Deferred Status: Order Modifying Licenses with Regard To Reliable Spent Fuel Pool Instrumentation (Effective Immediately)*, CLI-13-2, 77 NRC 39, 44 (2013) (*All Operating Boiling Water Reactor Licensees*).

However, the Commission has the authority to define the scope of proceedings held under § 189a., including proceedings on enforcement orders. The Commission has limited the scope of such proceedings to one issue: whether the order should be sustained.⁵³ In *Bellotti v. U.S. Nuclear Regulatory Commission*, the D.C. Circuit upheld the Commission's limited scope in proceedings involving orders,⁵⁴ holding that the Commission has discretion to limit the scope of proceedings under § 189a. The court stated that:

To read the statute very broadly so that any proceeding necessarily implicates all issues that might be raised concerning the facility in question would deluge the Commission with intervenors and expand many proceedings into virtually interminable, free-ranging investigations.... [T]he 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. Such a reading of the statute is plainly untenable and cannot be what Congress intended.⁵⁵

Therefore, § 189a. permits an opportunity for hearing on an order, however, that opportunity is limited to the question of whether the order should be sustained.

II. Standing

In order for a hearing request to be granted, an organization must demonstrate that it has standing to intervene in the proceeding and submit at least one admissible contention.⁵⁶

⁵³ *Id.* at 44; *Detroit Edison Co.* (Fermi Power Plant Independent Spent Fuel Storage Installation), CLI-10-3, 71 NRC 49, 54 (2010). This limitation was first articulated in *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), where the Commission limited the scope of proceedings on an enforcement order issued under 10 C.F.R. § 2.202 to whether the facts as stated in the order were true and whether the remedy selected was supported by those facts. CLI-80-10, 11 NRC 438, 441 (1980). In explaining its reasoning for limiting proceedings to these narrow issues, the Commission found that public health and safety is best served by focusing the Commission's resources on inspections and related work, not legal proceedings, and that this consideration called for a policy encouraging licensees to consent to orders, rather than contest them. *Id.* Such a "policy would be thwarted," the Commission stated, if "licensees which consented to enforcement actions were routinely subjected to formal proceedings possibly leading to more severe or different enforcement actions." *Id.*

⁵⁴ *Bellotti v. U.S. Nuclear Regulatory Commission*, 725 F.2d. 1380, 1381 (D.C. Cir. 1983) *aff'g Boston Edison Co.* (FitzPatrick Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982).

⁵⁵ *Id.*

⁵⁶ 10 C.F.R. § 2.309(a).

The Commission's regulations in 10 C.F.R. § 2.309(d)(1) provide that to establish standing, a request for hearing or petition to intervene must state:

- (i) The name, address and telephone number of the petitioner;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

The Commission has long applied contemporaneous judicial concepts of standing to determine whether a party has a sufficient interest to intervene as a matter of right.⁵⁷ Thus, to establish judicial standing, the burden rests on the petitioner⁵⁸ to show (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.⁵⁹

When an organization requests a hearing, it must demonstrate either organizational or representational standing. To demonstrate organizational standing, the petitioner must show an "injury-in-fact" to the interests of the organization itself.⁶⁰ 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

⁵⁷ See *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

⁵⁸ See, e.g., *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (FitzPatrick Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012).

⁵⁹ See *Calvert Cliffs 3*, CLI-09-20, 70 NRC at 915 (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (internal quotations omitted)); see also *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988) (outlining traditional judicial standing test).

⁶⁰ *Energysolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-3, 73 NRC 613, 621 (2011).

own right, and that these members have authorized the organization to request a hearing on their behalf.⁶¹ In addition, the interests that the representative organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the required relief must require an individual member to participate in the organization's legal action.⁶²

The 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.⁶³ In non-reactor licensing cases, the Commission decides on a case-by-case basis whether the proximity presumption should apply, taking into account any “obvious potential for offsite [radiological] consequences,” as well as “the nature of the proposed action and the significance of the radioactive source.”⁶⁴

Where a Commission order modifying a license (or licenses) is at issue, an organization cannot establish standing by merely arguing that the Commission should impose a more stringent requirement on the licensee, because—absent a particularized showing—the organization is not injured by the purportedly less stringent requirement. The Commission has

⁶¹ See *Fermi*, CLI-10-3, 71 NRC at 51-52; see also *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI- 94-12, 40 NRC 64, 72 (1994) (citing *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979)) (“An organization seeking representational standing on behalf of its members may meet the ‘injury-in-fact’ requirement by demonstrating that at least one of its members, who has authorized the organization to represent his or her interest, will be injured by the possible outcome of the proceeding”).

⁶² *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007).

⁶³ *Calvert Cliffs 3*, CLI-09-20, 70 NRC at 915-16.

⁶⁴ *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (citing *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005)); see *Detroit Edison Co.* (Fermi Power Plant Independent Spent Fuel Storage Installation) LBP-09-20, 70 NRC 565, 577-78 (2009), *aff’d* CLI-10-3, 71 NRC 49 (2010) (declining to adopt a proximity presumption where petitioners failed to show how a Commission order modifying an ISFSI license created any potential for offsite consequences).

reasoned that “allowing NRC hearings on claims for stronger enforcement remedies risks ‘turning focused regulatory proceedings into amorphous public extravaganzas.’”⁶⁵

III. Contention Admissibility

Even when a petitioner demonstrates that it has standing to intervene in a proceeding, it cannot be admitted as a party unless it has proffered at least one contention that is admissible under the requirements of 10 C.F.R. § 2.309(f). A proposed contention is admissible under 10 C.F.R. § 2.309(f) only if it:

- (i) Provide[s] a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide[s] a brief explanation of the basis for the contention;
- (iii) Demonstrate[s] that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate[s] that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide[s] a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) . . . provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application. . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.⁶⁶

⁶⁵ *State of Alaska Dep’t. of Transp. and Pub. Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 404-05 (2004) (*ADOT*) (citing *Bellotti*, 725 F. 2d at 1382).

⁶⁶ 10 C.F.R. § 2.309(f)(1).

The contention admissibility requirements of 10 C.F.R. § 2.309(f) “are designed to ensure that only focused, well supported issues are admitted for hearing.”⁶⁷ The Commission has stated that contentions “must be set forth with particularity and must meet all six contention admissibility factors.”⁶⁸ The Commission “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”⁶⁹ The “contention admissibility ‘requirements are deliberately strict, and [the Commission] will reject any contention that does not satisfy the requirements.’”⁷⁰ Attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”⁷¹ The “contention pleading rules require a detailed, fact-based showing that a genuine and material dispute of law or fact exists.”⁷² A failure to meet any of the criteria in 10 C.F.R. § 2.309(f) renders a contention inadmissible.⁷³

⁶⁷ *DTE Electric Company* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 138 (2015).

⁶⁸ *Id.*

⁶⁹ Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) (Final Rule).

⁷⁰ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 71 NRC 245, 253 (2010) (quoting *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006)).

⁷¹ *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (quoting *Exelon Generating Co., L.L.C.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

⁷² *Duke Energy Corp.*, (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 289 (2002).

⁷³ *N. States Power Co.* (Prairie Island Nuclear Generating Plant Indep. Spent Fuel Storage Installation), LBP-12-24, 76 NRC 503, 509 (2012).

DISCUSSION

I. Petitioners' hearing request should be denied because there is no opportunity for hearing

Petitioners assert that Entergy's September 8 Requests are "in fact" requests for license amendments.⁷⁴ Petitioners claim that there is "no authority to extend compliance for scheduled implementation of the modified license conditions per the three Orders."⁷⁵ Therefore, according to Petitioners, Entergy must submit license amendment requests in accordance with NRC regulations, and an opportunity for a hearing must be offered.⁷⁶ Petitioners fail to acknowledge that Entergy is requesting relaxation of certain conditions of EA-13-109, EA-12-049, and EA-12-051 as specifically permitted by the relaxation provision in Section IV of each of the Orders. Those provisions allow the NRC to "relax or rescind any condition of the Order upon demonstration by the Licensee of good cause."⁷⁷ Thus, Entergy is following the process for requesting relaxation of the Orders as expressly provided in the Orders.

The Commission has discretion to exercise its authority via licensing, orders, or rulemaking.⁷⁸ Following the Fukushima accident, the Commission chose to exercise its authority by issuing orders with respect to the ability of plants to mitigate severe accidents. As with most orders, the ability to seek relaxation of the Orders' provisions is incorporated as a term of the Orders. Therefore, should the Commission approve Entergy's Request, it would be doing so under its statutory authority to issue the Orders initially.

It is well established that the Commission has the legal authority to limit the scope of a proceeding. The Commission has, in its discretion, limited the scope of legal proceedings on

⁷⁴ Petition at 19, 39.

⁷⁵ Petition at 9.

⁷⁶ See Petition at 19-25, 39-45.

⁷⁷ EA-13-109 at 13; EA-12-049 at 9; EA-12-051 at 10.

⁷⁸ AEA § 161b., i., and o.; 42 U.S.C. § 2201(b), (i), and (o).

orders, including EA-12-049, EA-12-051, and EA-13-109, to the issue of “whether the order should be sustained.”⁷⁹ Therefore, while the Orders do allow licensees to seek relaxation, for the salient legal and policy reasons articulated in *Marble Hill* and *Bellotti*, the Commission does not afford an opportunity to request a hearing on such requests.⁸⁰

The Orders, the Staff’s ISGs, and industry guidance all contemplate that licensees might seek relief from the compliance deadlines.⁸¹ Additionally, in its answers consenting to each of the respective Orders, Entergy indicated that its future responses “may include requests for schedule relief as warranted,” and that such requests “would be submitted in accordance with the relaxation provision in Section IV of the Order.”⁸² The relaxation provision in an order is a

⁷⁹ *All Operating Boiling Water Reactor Licensees*, CLI-13-2, 77 NRC at 44.

⁸⁰ In *All Operating Boiling Water Reactor Licensees*, the Commission (citing *Marble Hill*) identified several advantages to the limited scope of proceedings on orders. *Id.* (citing *Marble Hill*, CLI-80-10, 11 NRC at 441). These include “allow[ing] safety improvements to be put in place quickly, without the delay of litigation over whether additional measures are also warranted,” and the greater incentive for licensees to negotiate the terms of orders without fear of exposure “to formal litigation over additional terms or requirements that third-party petitioners would like to see imposed.” *Id.* In *Bellotti*, the D.C. Circuit noted that this limited scope was based on a Commission policy of “directing agency resources toward the inspection rather than the adjudication process,” and that the policy through which the Commission has implemented this allocation of resources “serves its purpose well.” 725 F.2d. at 1382.

⁸¹ See NEI-12-06 at 64 (status reports “should include an update of milestone accomplishments since the last status report, including any changes to the compliance method, schedule, or need for relief and the basis, if any”); NEI-12-02 at 1 (“[e]ach licensee shall, unless granted relief by the NRC, comply with Order EA-12-051 within two fuel cycles following the submittal of the overall integrated plan required by Order EA-12-051 or not later than December 31, 2016, whichever comes first”); NEI-13-02 at 61 (“[t]he 6-month status submittal should delineate progress made in implementing the requirements of the Order and include the following information: ...Changes to the compliance schedule as required by the Order or revised in other NRC communication on this topic.”).

⁸² FitzPatrick EA-12-049 Answer at 2; FitzPatrick EA-12-051 Answer at 2; FitzPatrick EA-13-109 Answer at 2. Petitioners also argue that by consenting to the Orders, Entergy waived its opportunity for a hearing to challenge any aspect of the Order[s] including scheduled compliance.” Petition at 21, 46. Therefore, according to Petitioners, this late request must come in the form of a license amendment request affording the Petitioners an opportunity for hearing. Petition at 21, 46. Petitioners misconstrue the purpose of Entergy’s September 8 Requests. Entergy is not challenging any substantive aspect of the Orders. Rather, Entergy is requesting only extensions of the compliance deadlines. Entergy plans to fully comply with the Orders, but simply seeks more time to implement compliance due to the unexpected change in FitzPatrick’s planned operations. Moreover, nothing in the Orders prevents a licensee from seeking relaxation from the Orders’ requirements after consenting to implement those requirements.

mechanism that provides regulatory flexibility, allowing the Commission to “tailor its. . . requirements [in an Order] to the peculiar needs of individual licensees if necessary. . . .”⁸³ This is particularly important in orders such as EA-12-049, EA-12-051, and EA-13-109 that apply to numerous licensees and plants, which may differ in design and licensing bases. Relaxation provisions also encourage licensees not to challenge the issuance of Commission orders so that the Commission can more quickly respond to safety issues and focus its resources on inspections and related work.⁸⁴ The Commission retains the flexibility to tailor the Orders to FitzPatrick’s (and other licensees’) particular circumstances, or changes in circumstances, without requiring a hearing for each relaxation request.⁸⁵

In addition, determining whether a licensee has demonstrated good cause for relaxation or rescission of an order, is part of the Staff’s regulatory and enforcement role. Requiring a hearing each time the Staff made such a determination would lead to the interminable hearings the Commission sought to avoid in limiting the scope of those proceedings,⁸⁶ and would impede the regulatory process.⁸⁷ To the extent Petitioners believe that FitzPatrick is not complying with

⁸³ *All Power Reactor Licensees & Research Reactor Licensees Who Transport Spent Nuclear Fuel*, CLI-05-6, 61 NRC 37, 41 (2005).

⁸⁴ *Bellotti*, 725 F.2d. at 1382; *Marble Hill*, CLI-80-10, 11 NRC at 441; *see also ADOT*, CLI-04-26, 60 NRC at 405 (“The rationale underlying *Bellotti* is that, when a licensee agrees to make positive changes or does not contest an order requiring remedial changes, it should not be at risk of being subjected to a wide-ranging hearing and further investigation”).

⁸⁵ *Bellotti*, 725 F.2d. at 1381 (“To read the [AEA] very broadly so that any proceeding necessarily implicates all issues that might be raised concerning the facility in question would deluge the Commission with intervenors and expand many proceedings into virtually interminable, free-ranging investigations...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.”).

⁸⁶ *Id.*

⁸⁷ Additionally, Petitioners are not in the position of intervening in an already contested proceeding on EA-13-109 in order to ensure it is upheld. *See Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 68-71 (determining that the petitioner had standing because the petitioner sought to intervene in an already contested hearing to ensure that an enforcement order would be upheld). Unlike *Sequoyah*, where the licensee sought a hearing to contest the implementation of an order, Entergy has not contested the Order. Entergy has only sought relaxation of the Order in accordance

the Orders, or that FitzPatrick's license should be modified because of a safety issue, Petitioners may file a petition under 10 C.F.R. § 2.206 as their recourse.⁸⁸

In summary, the Commission provided licensees the ability to seek relaxation of the Orders. Nothing in the Orders requires Entergy to seek relaxation in the form of a license amendment request. Thus, Entergy submitted its September 8 Requests in accordance with the terms of the Orders. As discussed in *Marble Hill* and *Bellotti*, defining the scope of hearings on orders is squarely within the Commission's authority. The Commission did not include requests for relaxation within that scope. Accordingly, Petitioners are not entitled to a hearing on Entergy's September 8 Requests.

II. Petitioners' hearing request should be denied because Petitioners have failed to establish standing or to submit an admissible contention

For the reasons discussed in Section I above, there is no opportunity to request a hearing on Entergy's September 8 Requests. But assuming *arguendo* that Petitioners are entitled to seek a hearing, Petitioners' request should be denied because they have failed to meet the standing and contention admissibility requirements in 10 C.F.R. § 2.309(d) and (f), respectively.

A. Petitioners have failed to demonstrate standing

Petitioners consist of two non-profit organizations with various public interest and advocacy missions related to protecting health, safety and the environment in the context of nuclear power.⁸⁹ For each organization, Petitioners identify at least one member who lives within

with its terms. Should the request be granted, EA-13-109 would remain in effect at FitzPatrick and the relaxation could be revoked at any time.

⁸⁸ *Bellotti*, 725 F.2d at 1382; *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 158 (2004). As discussed further in note 128, Petitioners have availed themselves of the 10 C.F.R. § 2.206 petition process regarding the issues raised in Contention 1C.

⁸⁹ See *generally* Petition at 1, 13-15.

fifty miles of FitzPatrick and state that this member is “reasonably concerned” that granting Entergy’s Request would adversely affect the member’s “interests and . . . health and safety.”⁹⁰

When an organization requests a hearing, it must demonstrate either organizational or representational standing. As discussed above, to demonstrate organizational standing, an organization must show an “injury-in-fact” to the interests of the organization itself.⁹¹ Here, neither of the Petitioners has alleged any injury to its organizational interests; instead, they have merely stated that their organizational missions or purposes relate to protecting health, safety and the environment in the context of nuclear energy and FitzPatrick. Such statements are insufficient to establish organizational standing.⁹²

Petitioners have also failed to provide sufficient information to establish representational standing. When an organization seeks to establish representational standing, it must demonstrate that at least one of its members may be affected by the proceeding, identify any such members, show that the identified members would have standing to intervene in their own right, and demonstrate that those members have authorized the organization to request a hearing on their behalf.⁹³ Although Petitioners have identified at least one member of each organization that may be affected by the proceeding, they have not shown that these members would have standing to intervene in their own right.⁹⁴ For the identified members of Beyond

⁹⁰ *Id.* at 13-15.

⁹¹ *Energysolutions, LLC*, CLI-11-3, 73 NRC at 621.

⁹² *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528 (1991), *aff’d in relevant part*, CLI-91-13, 34 NRC 185, 187-88 (1991) (“[A]n organization’s asserted purposes and interests, whether national or local in scope, do not, without more, establish independent organizational standing.”); *see also Palisades*, CLI-07-18, 65 NRC at 411-12 (stating that promoting “the public interest [and] environmental protection” are “broad interests shared with many others,” and that such “general environmental and policy interests” are the type the Commission “has repeatedly found insufficient for organizational standing.”).

⁹³ *Palisades*, CLI-07-18, 65 NRC at 409.

⁹⁴ With respect to Alliance for a Green Economy New York, the two members whose interests the organization represents, failed to authorize the organization to do so. Rather, both individuals indicated that they are authorized to represent the organization’s interest. However, no explanation is given as to what organizational interest Alliance for a Green Economy New York has in this case.

Nuclear and Alliance for a Green Economy New York (AGREE), the Petition asserts only that they are “reasonably concerned” that granting Entergy’s Requests would adversely affect their interests and health and safety.⁹⁵ The two members of AGREE assert in their written declarations that they are concerned that if the NRC grants Entergy’s Request, the continued operation of FitzPatrick could adversely affect their lives, their families, their communities, and the environment, and that they are “particularly concerned about the undue risk these requests for extension to comply present in terms of an accidental release of radiation and the potential harm that a radiation release would cause to public health and the environment.”⁹⁶ Because none of these statements demonstrate a “concrete and particularized” injury-in-fact that would stem from granting Entergy’s Request, they are insufficient to confer standing on any of the members, and thus insufficient for representational standing for Petitioners.

Finally, Petitioners cannot rely on proximity to the plant to support standing in this case. While the Commission recognizes standing based on geographic proximity in construction permit and reactor licensing proceedings,⁹⁷ in proceedings outside that context, the Commission decides on a case-by-case basis whether the proximity presumption should apply, taking into account any “obvious potential for offsite [radiological] consequences,” as well as “the nature of the proposed action and the significance of the radioactive source.”⁹⁸ Here, because Petitioners

Commission case law “requires an organization to submit written authorization from a member whose interests it purports to represent in order to have a ‘concrete indication’ that the member wishes to have the organization represent his interests there.” *Crow Butte Resources* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 343 (2009); see also *Palisades*, CLI-07-18, 65 NRC at 409-10. Therefore, only Beyond Nuclear has met this criterion for establishing representational standing.

⁹⁵ See Petition at 13-15.

⁹⁶ Declaration of Andrea Leimanis and Declaration of Jessica Chasnoff.

⁹⁷ See *Calvert Cliffs 3*, CLI-09-20, 70 NRC at 915.

⁹⁸ *Big Rock Point*, CLI-07-19, 65 NRC at 426 (citing *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005)); see also *Fermi*, LBP-09-20, 70 NRC at 577-78 (declining to adopt a proximity presumption where petitioners failed to show how a Commission order modifying an ISFSI license created any potential for offsite consequences).

are challenging requests to relax provisions of orders, the proximity presumption is not automatic, and Petitioners have not identified any “obvious potential for offsite radiological consequences” that would result from relaxation of the Orders. Therefore, Petitioners have not demonstrated an injury-in-fact or that they should be granted standing based solely on their proximity to the plant.

B. Petitioner’s hearing request should be denied because their contentions are inadmissible.

1. Contentions 1A and 2A⁹⁹

Contention 1A states as follows:

Entergy’s “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’” should be denied on procedural grounds. The request is in fact a request for a license amendment affecting public health and safety; and Entergy should therefore be required to follow the NRC’s standard rules and practices for amending its modified operating license.¹⁰⁰

Contention 2A states as follows:

Entergy’s combined “Request for Extension to Comply with NRC Order EA-12-049 and EA-12-051” should be denied on procedural grounds. The request is in fact a request for a license amendment affecting public health and safety; and Entergy should therefore be required to follow the NRC’s standard rules and practices for amending its modified operating license.¹⁰¹

Petitioners argue that because the Orders modified FitzPatrick’s license to incorporate the requirements of the Orders, Entergy’s Requests are “in fact a request for a license amendment.”¹⁰² Therefore, Petitioners argue, Entergy’s Requests should be denied and

⁹⁹ As noted in the Background section *supra*, Contentions 1A and 2A and 1B and 2B make identical assertions about Entergy’s EA-13-109 Request and 2012 Orders Request, respectively. Therefore, the Staff has grouped these contentions together for purposes of this Discussion.

¹⁰⁰ Petition at 18-19.

¹⁰¹ Petition at 39.

¹⁰² *Id.*

Entergy must submit a request to amend FitzPatrick's license under 10 C.F.R. § 50.90 and § 50.91, with an opportunity for hearing.¹⁰³

Entergy properly submitted its September 8 Requests in accordance with the terms of the Orders, which explicitly state that the NRC will consider requests for relaxation or rescission "upon demonstration by the Licensee of good cause." Nothing in the Orders, or elsewhere, requires Entergy to submit a request for relaxation in the form of a license amendment request. Therefore, there is no legal or factual basis for Petitioners' claim, as required by 10 C.F.R. § 2.309(f)(1)(ii). Moreover, Petitioners' claim is outside the scope of hearings on orders under *Marble Hill* and *Bellotti*.¹⁰⁴ Thus, Contentions 1A and 2A do not meet the Commission's contention admissibility requirements under 10 C.F.R. § 2.309(f)(iii), and therefore, should be denied.

2. Contentions 1B and 2B

Contention 1B states as follows:

Entergy's Request should be denied because it is not timely. Entergy filed the FitzPatrick Request for Extension to Comply on September 8, 2016, nearly three years after the Order's 20 days filing requirement to notify the Commission if the operator is unable to comply with any of the Phase I requirements in its modified license. (EA-13-109, Section IV, part C)¹⁰⁵

Contention 2B states as follows:

Entergy's Request should be denied because it is not timely. Entergy filed the FitzPatrick Request for Extension to Comply on September 8, 2016, more than four years after the Order's 20 days filing requirement to notify the Commission if the operator is unable to comply with any of the Phase I requirements in its modified license. (EA-12-049 and EA-12-051, Section IV, part B)¹⁰⁶

¹⁰³ Petition at 19-25, 39-45.

¹⁰⁴ *Bellotti*, 725 F.2d at 1381; *Marble Hill*, CLI-80-10, 11 NRC at 441.

¹⁰⁵ Petition at 26.

¹⁰⁶ Petition at 50.

Petitioners' Contentions 1B and 2B claim that Entergy's Request for relaxation was untimely, based on the deadlines for the notification requirements in Section IV.B.1 of Orders EA-12-049 and EA-12-051, and Section IV.C.1 of EA-13-109.¹⁰⁷ Petitioners assert that the Orders "required Entergy to notify the Commission within 20 days of the ISG"¹⁰⁸ It appears, however, that Petitioners are confusing the notice requirement in Section IV of the Orders with the relaxation provision at the end of Section IV. Provisions IV.B.1 of EA-12-049 and EA-12-051 and IV.C.1 of EA-13-109 required licensees to respond no later than 20 days after the date of the final ISG in the following circumstances: (1) if the licensee was unable to comply with the applicable substantive requirements of the Orders;¹⁰⁹ (2) if compliance with the applicable requirements was unnecessary in their specific circumstances; or (3) if compliance would cause the licensee to violate Commission regulations or the license.¹¹⁰ Entergy did not submit responses under the respective notice requirements and subsequently timely filed OIPs demonstrating how FitzPatrick intended to comply with each of the Orders.¹¹¹ The relaxation provisions in the Orders state that the Director of the Office of Nuclear Reactor Regulation "may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee of good cause."¹¹² No time limit is specified for making such a request. Because the Orders did not actually contain a time limit for seeking relaxation, there is no genuine dispute on a material

¹⁰⁷ EA-12-049 at 8; EA-12-051 at 9; EA-13-109 at 11-12.

¹⁰⁸ *Id.* at 27, 51.

¹⁰⁹ The applicable substantive requirements were the Phase 1 requirements in Attachment 2 of EA-13-109, the requirements in Attachment 2 of EA-12-049, and the requirements in Attachment 3 of EA-12-051. EA-13-109 at 11; EA-12-049 at 8; EA-12-051 at 9.

¹¹⁰ *Id.*

¹¹¹ See *generally* FitzPatrick EA-12-049 OIP; FitzPatrick EA-12-051 OIP; FitzPatrick EA-13-109 OIP.

¹¹² EA-13-109 at 13; EA-12-049 at 9; EA-12-051 at 10. The phrase "above conditions" refers to the requirements in Sections IV of each Order, including the schedule for implementation.

issue of law or fact. Thus, Contentions 1B and 2B fail to meet the requirements of 10 C.F.R.

§ 2.309(f)(1)(vi) and should be denied.

3. Contention 1C

Petitioner's contention 1(C) states that:

Entergy's Request for extension to comply with EA-13-109 Phase I scheduled implementation should be denied because its argument in support is not valid. Entergy does not demonstrate that it provides adequate protection for the public health and safety throughout the requested extension to comply period.

Petitioners make several arguments to support their claim that Entergy's support for its extension request is invalid. First, Petitioners quote extensively from the sections of EA-13-109 pertaining to the justification for issuing the order.¹¹³ Specifically, Petitioners state that hardened containment vents are necessary to provide reasonable assurance of adequate protection of public health and safety, and that the availability of hardened vents during severe accidents is a cost justified substantial safety improvement.¹¹⁴ However, Petitioners do not explain how these statements support their assertion that Entergy's arguments in support of an extension are invalid. Entergy is not requesting relaxation of any substantive provisions of EA-13-109, but merely a schedule extension to fully comply. Because Petitioners do not provide sufficient information to demonstrate that a genuine dispute exists on a material issue of law or fact, they have failed to meet the requirements of 10 C.F.R. 2.309(f)(1)(vi).

Next, Petitioners state that operation of FitzPatrick in the interim period between the outage-based compliance date and the June 30, 2018 backstop date "adds undue risk on the public health, safety and interest."¹¹⁵ Petitioners do not offer any support for this assertion.

¹¹³ Petition at 31-33.

¹¹⁴ Petition at 32.

¹¹⁵ Petition at 33.

Therefore, their unsupported statement that an extension of time adds undue risk to public health and safety fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v).

Finally, Petitioners claim that Entergy fails to “provide a valid argument for assuring adequate safety with FitzPatrick’s current containment venting system for [the] requested extension period without the scheduled implementation of Phase 1 requirements.”¹¹⁶ Petitioners assert that the 1992 NRC Safety Evaluation Report (SER) cited by Entergy in its EA-13-109 Request “is dated and in fact updated” by findings of a post-Fukushima May 2011 NRC inspection,¹¹⁷ and that Entergy fails to address the findings of that inspection in its extension request.¹¹⁸ Specifically, Petitioners refer to two beyond-design-basis vulnerabilities identified during the May 2011 inspection: (1) current procedures do not address hydrogen considerations during primary containment venting, and (2) FitzPatrick’s current licensing basis did not require the plant to have a primary containment torus air space hardened vent system.¹¹⁹

This argument fails for several reasons. First, the requested extension is within the timeframe allowed by the order. If its request for extension is approved, Entergy will have to comply with the Phase 1 requirements of EA-13-109 by June 30, 2018, the final “backstop” compliance date allowed in the order, rather than the date indexed to the second refueling outage that begins after June 30, 2014 (which is estimated to conclude in March 2017).¹²⁰

¹¹⁶ Petition at 33-34.

¹¹⁷ Petition at 35 (citing Letter from Lawrence T. Doerflein, NRC, to Kevin Bronson, Entergy, James A. FitzPatrick Nuclear Power Plant - NRC Temporary Instruction 2515/183 Inspection Report 05000333/2011008 (May 13, 2011) (ADAMS Accession No. ML111330455) (May 2011 Inspection Report). The May 2011 inspection was conducted in conjunction with inspections of other operating commercial nuclear plants “to evaluate the United States nuclear industry’s readiness to safely respond” to events similar to the Fukushima incident, and to “help the NRC determine if additional regulatory actions are warranted.” 2011 NRC Inspection Report.

¹¹⁸ Petition at 35-36.

¹¹⁹ Petition at 36-37 (citing May 2011 Inspection Report, Enclosure at 8-9).

¹²⁰ EA-13-109 Request at 3. The Request states that the refueling outage will begin in the “January/February 2017 timeframe.”

Second, the May 2011 Inspection Report does not support Petitioners' claim. Petitioners only speculate as to the relevance of the inspection findings. Thus, they take a finding that "procedures do not address hydrogen considerations during primary venting"—a finding that Petitioners themselves point out was immediately corrected by the licensee—to mean that "FitzPatrick operators . . . may not in fact be able to reliably and safely vent a severe accident where hydrogen gas is present."¹²¹ Similarly, Petitioners interpret the finding that "the current licensing basis did not require a primary containment torus air space hardened venting system" to mean that FitzPatrick relies on a containment venting system that will operate contrary to GL 89-16 recommendations.¹²² They provide no support for either of these interpretations. In fact, the 1992 SER found that FitzPatrick's venting system met the criteria established in response to GL 89-16, and Petitioners provide no facts or expert opinion to the contrary.¹²³

In addition, Petitioners do not explain how the two findings from the inspection "update" the 1992 NRC SER or render its analysis and conclusions "dated" or invalid. The 1992 SER evaluated FitzPatrick's wetwell venting system capability and found it acceptable, and the Petitioners have not provided any facts or expert opinion that challenge the evaluation and conclusions in that document.¹²⁴ And, although Entergy does not address the inspection or its findings specifically, the EA-13-109 Request discusses combustible gas control (i.e., hydrogen) and venting capability.¹²⁵ Petitioners do not identify specific deficiencies in that discussion. In sum, the Petitioners have not provided any support for their assertions regarding lack of support

¹²¹ *Id.* at 37.

¹²² Petition at 37.

¹²³ See "Hardened Wetwell Vent Capabilities at the James A. FitzPatrick Nuclear Power Plant," at 6 (September 28, 1992) (1992 SER) (ML13015A634).

¹²⁴ The 1992 SER evaluated FitzPatrick's wetwell vent capability according to the Boiling Water Reactor Operators Group hardened vent design criteria, found that the plant met the criteria or their intent, and deemed the existing containment vent path capability acceptable. 1992 SER at 2.

¹²⁵ EA-13-109 Request at 2.

for Entergy's request, nor have they raised a genuine dispute with the request. Therefore, Petitioners fail to satisfy 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Finally, Petitioners' assertion that granting Entergy's Requests presents a risk to public health and safety is, at bottom, an attack on FitzPatrick's current license. According to Petitioners, the May 2011 Inspection Report identified "vulnerabilities" in FitzPatrick's existing containment vent system.¹²⁶ Petitioners essentially argue that without prompt implementation of EA-13-109, these vulnerabilities in the current license for FitzPatrick's containment venting system will continue to present a risk to public health and safety.¹²⁷ This claim does not meet the requirements of 10 C.F.R. § 2.309(f)(iii) because concerns regarding the safety of a plant's current license are within the Staff's oversight and enforcement role, and should be pursued via the 10 C.F.R. § 2.206 petition process.¹²⁸ In fact, Petitioners have already availed themselves of the § 2.206 petition process for these same concerns regarding FitzPatrick.¹²⁹ Moreover, although the NRC issued EA-13-109 as an immediately effective order, the NRC did not find it

¹²⁶ Petition at 37-38.

¹²⁷ *Id.*

¹²⁸ *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-15-14, 81 NRC 729, 736 (2015) ("a request for a hearing on safety...falls squarely within the purposes of a request for enforcement action.").

¹²⁹ On March 9, 2012, the Petitioners submitted a petition under 10 C.F.R. § 2.206 for emergency enforcement to immediately suspend operations at FitzPatrick on the basis that FitzPatrick's existing containment venting system is "not a fully 'hardened vent' system," the capability of which relies on "non-conservative and faulty assumptions." *Beyond Nuclear and the Alliance for a Green Economy Petition to the United States Nuclear Regulatory Commission Requesting Emergency Enforcement Action Per 10 CFR 2.206 for the FitzPatrick Nuclear Power Plant, Oswego, New York*, at 7 (March 9, 2012). In the supplement to their § 2.206 petition, Petitioners asserted, as they do here, that the findings in the May 2011 Inspection Report regarding venting of hydrogen gas and the lack of a primary containment torus air space demonstrate a public health and safety risk from continued operations at FitzPatrick. *Joint Petitioners' Supplement 1 March 9, 2012 Petition for Emergency Enforcement Action RE: James A. FitzPatrick Nuclear Power Plant Refusal to Install the Direct Torus Vent System as Recommended by NRC Generic Letter 89-16*, at 4 (March 20, 2012). The Staff accepted the § 2.206 petition in part and held in abeyance the Petitioners' concerns regarding hydrogen control and mitigation because of ongoing Staff review. Email from Booma Venkataraman, Project Manager, to Jessica Azulay, Organizer, Alliance for a Green Economy, (October 17, 2016, 13:16 EST). The Staff rejected all other issues raised in the § 2.206 petition. *Id.* On October 17, the Staff informed the Petitioners that it is rejecting the Petitioners concerns regarding hydrogen and mitigation because SECY-15-0137 (approved by the Commission in 2016) closed these concerns generically for all Mark I plants. *Id.*

necessary to suspend operations at the affected plants.¹³⁰ This comports with the NRC's Near Term Task Force determination that operating power reactors could continue to operate safely under their current licensing bases.¹³¹ Furthermore, as previously discussed in Section I, the only matter within the scope of a proceeding on an order is whether the order should be sustained.¹³² Thus, Petitioners attack on the current license for FitzPatrick's containment venting system is outside the scope of a proceeding on EA-13-109 and should be pursued via the 10 C.F.R. § 2.206 petition process.¹³³

CONCLUSION

For the reasons stated above, the Commission should deny the Petition because Petitioners are not entitled to a hearing on Entergy's Requests. In the alternative, if the Commission were to find that an opportunity for a hearing exists, Petitioners have failed to demonstrate standing and proffer an admissible contention.

Respectfully submitted,

*/Signed (electronically) by/
Robert Carpenter*

Robert Carpenter
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Marcia J. Simon
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 5th day of December, 2016

¹³⁰ See "Recommendations for Enhancing Reactor Safety in the 21st Century, The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident," at 18 (July 12, 2011) (NTTF Report). The Commission also noted in CLI-13-2 that the NTTF Report determined that continued operation of licensed activities does not pose a threat to public health and safety. This was in response to the assertion that if the orders issued following the Fukushima accident were rescinded, the plants at which the orders were directed would have to shut down. *All Operating Boiling Water Reactor Licensees*, CLI-13-2, 77 NRC at 47.

¹³¹ NTTF Report at 18.

¹³² *All Operating Boiling Water Reactor Licensees*, CLI-13-2, 77 NRC at 44.

¹³³ *Bellotti*, 725 F.2d at 1382; *Davis-Besse*, CLI-04-23, 60 NRC at 158.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
Entergy Nuclear Generation Co., and)	Docket No. 50-333-EA
Entergy Nuclear Operations, Inc.)	
)	
(James A. FitzPatrick Nuclear Power Plant))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (revised), I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO BEYOND NUCLEAR & THE ALLIANCE FOR A GREEN ECONOMY'S REQUEST FOR HEARING" dated December 5, 2016 have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 5th day of December, 2016.

/Signed (electronically) by/

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Date of Signature: December 5, 2016