UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of	)	James A. Fitzpatrick 50-333 EA
Entergy's Request for Extension to Comply	)	
with NRC Orders EA-12-049, EA-12-051	)	
and EA-13-109	)	
	)	December 12, 2016

COMBINED REPLY BEYOND NUCLEAR & THE ALLIANCE FOR A GREEN ECONOMY TO ENTERGY AND NRC STAFF ANSWERS IN OPPOSITION TO PETITIONERS' REQUEST FOR HEARING AND LEAVE TO INTERVENE IN ENTERGY CORPORATION REQUEST FOR EXTENSION TO COMPLY WITH NRC ORDERS EA-12-049, EA-12-051 AND EA-13-109

Beyond Nuclear and Alliance for a Green Economy (AGREE), hereafter "Petitioners," provide their Combined Reply to Entergy Corporation, hereafter "Entergy," and the U.S. Nuclear Regulatory Commission (NRC) Staff, hereafter "Staff," in the matter of Entergy's "Request for Extension to Comply with NRC Orders dated March 12, 2012 Modifying Licenses with Regard to Requirements Mitigation Strategies for Beyond-Design-Basis External Events and Reliable Spent Fuel Pool Instrumentation (EA-12-049 and EA-12-051)," and "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" dated September 8, 2016.

The Petitioners reply to Entergy's Answer Opposing Petitioners' Request for Hearing dated December 5, 2016 and Staff's Response to Petitioners' Request for Hearing also dated December 5, 2016. Entergy and Staff's respective counsel make much the same argument in opposition.[1]

Petitioners' Combined Reply focuses on Entergy and Staff Answers as pertain to Entergy's Request for Extension to Comply with EA-13-109. Petitioners make the similar argue that Entergy's Request for Extension to Comply with NRC Orders EA-12-049 and EA-12-051 to delay FitzPatrick scheduled compliance date while resuming power operations constitutes a de facto license amendment request of the operating license that triggers the opportunity for public hearing per the protection of the Atomic Energy Act.

I. Introduction

Japan's Fukushima Daiichi nuclear catastrophe beginning March 11, 2011 exposed the significant generic design, construction and operational vulnerability in General Electric (GE) boiling water reactors with Mark I and Mark II containment systems under severe accident conditions. A demonstrated failure rate of 100% for all three of the GE reactors that were operating at full power and experienced station blackout subsequent to the earthquake and tsunami underscored the generic vulnerability and danger inherent in

[1] Seven days from December 5, 2016 is December 11, 2016. Since December 11 is a Sunday, this response is timely filed on December 12, 2016 as provided by 10 CFR 2.306

the undersized reactor pressure suppression containment system. This containment design vulnerability was first publicly identified by Dr. Stephen Hanauer in a September 20, 1972 memorandum to his colleagues at U.S. Atomic Energy Commission (AEC) advising the agency to discontinue further use of the GE Mark I reactor pressure suppression containment system. Dr. Hanauer warned of the safety disadvantage of the small volume containment system, its vulnerability to over-pressurization under accident conditions and that subject to catastrophic failure from the steam and non-condensable explosive gases. However, nuclear safety officials were simply "*unwilling to question basic safety design features of nuclear power plants*" after tens of billions of dollars had already been invested.[2] As a result, the James A. FitzPatrick nuclear generating station in Oswego, New York is one of a number of GE Mark I BWRs that were still issued an operating license (November 17, 1974) after Dr. Hanauer's recommendation was quietly shelved until public disclosure under the Freedom of Information Act in 1978.

The Fukushima nuclear disaster has reawakened the world to the danger and vulnerability of the undersized containment including the U.S. Nuclear Regulatory Commission. In March of 2012, the NRC issued 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 required FitzPatrick to install a reliable severe-accident capable hardened containment venting system no later than January 2017 prior to restart of power operations from that scheduled refueling outage.

[2] "Containment of a reactor meltdown," Frank von Hippel and Jan Beyea, September 1982, Reprinted March 16, 2011, Bulletin Archives, Bulletin of Atomic Scientists

NRC criteria set that January 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 FitzPatrick. [NRC Order EA-13-109 @ p. 7]. The Commission found that the required system was a cost-justified substantial safety improvement "*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*" [NRC Order EA-13-109 @ p.10]. The Order emphasized that this additional severe accident venting capability should be "*with minimal delays*." [NRC Order EA-13-109 @ p.4]. From June 6, 2013 when EA-13-109 was issued, Entergy has repeatedly stated that it would meet scheduled compliance for the installation and implementation of a required reliable severe accident capable hardened containment vent. As late as December 29, 2015, Entergy affirmed "*JAF expects to comply with the Order implementation date; however, based on Entergy's plan to permanently shut down the JAF Nuclear Power Plant (Reference 5), compliance with the Order will be affected. Future six-month status report submittals will address any requests for exemption from the order requirements prior to the Order implementation date. No relief or relaxation is requested at this time.*" [James A FitzPatrick Third Six-Month Status Report in Response 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), Entergy Nuclear Operations, December 29, 2015, ML15363A412, @ p.2 of 2].

Following Entergy's Notification of Permanent Cessation of Operations dated March 16, 2016 and Entergy Nuclear Operations and Exelon Letter Application for Order Approving Transfer of Renewed Facility Operating License and Proposed Conforming License Amendment, dated August 18, 2016, Entergy submitted a "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*," Entergy Nuclear Operations, September 8, 2016, (ML16252A477). Entergy's Request for Extension to Comply is the subject of the Petitioners' Request for Hearing filed on November 10, 2016.

Both Entergy and Staff seem to take the position that a so-called Relaxation Provision in EA-13-109 allows Entergy to avoid and/or otherwise be shielded from review under the Atomic Energy Act of any and all undue risk adverse to public safety incurred from FitzPatrick resuming power operation after Entergy's fails to meet the scheduled compliance deadline as required by Order EA-13-109. The Commission's findings are clear 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 Atomic Energy Act requires.

Entergy and Staff Answers say very little about the realty raised in the Petitioners' Request for Hearing pertaining to the findings of NRC Temporary Instruction 2515/183 Inspection Report documenting FitzPatrick "*beyond design and design bases vulnerability in that current procedures do not address hydrogen considerations during primary venting*" and "*The [NRC] inspectors identified a beyond design and licensing bases vulnerability, in that FitzPatrick's current licensing basis did not require the plant*

to have a primary containment torus air space hardened vent system as part of their Mark I containment improvement program." [Petitioners' Request for Hearing, Contention C1, @ p. 37 of 58 referencing "*NRC Temporary Inspection Report 2515/183 Inspection Report,*" May 13, 2011, ML111330455 @ p.8]

Petitioners are providing the additional supporting Declaration of Mark Leyse attached as Exhibit 2.

Mr. Leyse Declaration and expert testimony support Petitioners' safety concerns arising out of Entergy's lack of hydrogen considerations during venting under accident conditions at FitzPatrick in four areas:

1.) The high hydrogen generation rates that would occur in the event of a severe accident at a BWR Mark I must particularly be taken into account in severe accident analysis and in the design of accident management components, such as FitzPatrick's partially hardened wetwell vent. However, computer safety models under-predict the actual rates of hydrogen generation that would occur in severe accidents. Evidence indicates that the licensee of FitzPatrick, Entergy, has not conducted adequate, conservative computer simulations of the hydrogen generation rates that would occur in the event of a severe accident. Like everyone else's computer simulations, Entergy's simulations under-predict hydrogen generation rates. For this reason, among others, Entergy cannot guarantee that FitzPatrick's original and currently decades-old partial wetwell vent would be effective in managing explosive hydrogen gas in the event of a severe accident. (This is discussed in paragraphs 25 and 32 of Leyse's testimony.)

2.) The defective, antiquated BWR Mark I design performed poorly in the Fukushima Daiichi accident. In the accident, three GE BWR Mark I reactors melted down, each generating hundreds of kilograms of explosive hydrogen gas. Hydrogen leaked from the primary containments into the reactor buildings, where it accumulated and detonated at different times, destroying three reactor buildings and damaging containments, which released large quantities of harmful radioactive material into the environment. A wide area was contaminated, prompting the evacuation of about 90,000 people. Fukushima Daiichi's similarly decades-old hardened vents did not prevent hydrogen from entering BWR Mark I secondary containments and detonating. In the event of a severe accident at FitzPatrick, hundreds of kilograms of explosive hydrogen gas would be generated. There is no guarantee that FitzPatrick's current decades-old wetwell vent would prevent the hydrogen from exploding and destroying the reactor building, releasing large quantities of harmful radioactive material into the environment, as occurred in the Fukushima Daiichi accident. (This is discussed in paragraphs 38 and 39 of Leyse's testimony.)

3.) The licensee of FitzPatrick, Entergy, has not demonstrated that FitzPatrick's current decades-old wetwell vent would perform adequately in severe accident scenarios in which there were rapid containment-pressure increases, rapid transients, or circumstances in which there would be the generation of between 5.0 and 10.0 kg of hydrogen per second. (This is discussed in paragraph 44 of Leyse's testimony.)

4.) Entergy referred to a September 1992 safety evaluation report on FitzPatrick's hardened wetwell vent when it requested an extension for complying with NRC Order EA-13-109. A 2007 OECD Nuclear Energy Agency report states that for simulating

severe accidents, modeling of steam condensation, gas density stratification, and jet injection needs to be improved. Computer safety models also have limitations in predicting the hydrogen distribution that would occur in different severe accident scenarios; furthermore, they also have limitations in predicting the phenomenon of hydrogen deflagrations transitioning into detonations, as well as the maximum pressure loads the containment (or other structures) would incur from detonations. Clearly, the September 1992 safety evaluation report upon which FitzPatrick's interim containment vent seeks to rely upon did not realistically evaluate what would actually occur in the event of a real severe accident at FitzPatrick. Furthermore, the Fukushima Daiichi accident provided empirical evidence that there is no guarantee that the original partially hardened containment vent at FitzPatrick would be able to prevent hydrogen from entering BWR Mark I secondary containments and detonating, in the event of a severe accident. (This is discussed in paragraphs 49, 50, and 51 of Leyse's testimony.)

Entergy and Staff Answers, cumulatively and similarly, argue that the Petitioners' Request for Hearing should be denied. 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 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*." [Staff Answer @ p.15 of 35]

The second should not require any response. Petitioners are entitled to standing under the proximity presumption. Even if the proximity 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. [Entergy Answer @p.23 of 41 & Staff Answer @ p. 15 of 35]. The Staff Response admits that "*Orders issued under 10 C.F.R. § 2.202*[3] *alter the requirements of a license and therefore fall under the terms of section 189a of the AEA.*" [Staff Answer @ p.15 of 35].

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

Entergy and Staff both agree that Entergy's request for an extension to comply would change the Phase I compliance date that is part of Fitzpatrick current operating license. However, Entergy appears to insert its own interpretation to apparently misinterpret the scheduled compliance deadline explicit in EA-13-109.

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

EA-13-109 explicitly requires,

"*Phase 1 (severe accident capable wetwell venting system): 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 IV.B @ p. 14 of 36 (Emphasis added)].
Within that range, at the time Entergy consented to the Order, the FitzPatrick second refueling outage and scheduled compliance for implementation therefore falls within a scheduled refueling outage in the December 2016 and January 2017 timeframe as Entergy now intends to do.

Entergy's Answer, however, inserts its own interpretation of EA-13-109 scheduled compliance date by ignoring "*whichever comes first*" and by inserting its own interpretation of "*the 'hard' deadline of June 30, 2018*" into the Order. [Entergy Answer @ p. 12, 38 of 41]

The Petitioners dispute Entergy's interpretation that EA-13-109 established an extended range for scheduled compliance beyond the referenced second scheduled refueling outage from June 30, 2014. The Petitioners do not believe that Entergy has the prerogative to relax the Order's scheduled compliance deadline by its own interpretation of a later date range.

The 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 EA-13-109 @ 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).

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.*" [Entergy Answer @ p.23 of 41 & Staff Answer @ p.15 of 35]

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 FitzPatrick's license somehow is not an "*amendment*," but is rather only a "*relaxation*" [Entergy Answer @ pp.5, 6, 7, 9, 10. 11, 13, 14, 16, 17, 18, 19, 20, 21, 22, 31, 35 of 41 & Staff Answer @ pp.11, 12, 13, 21, 22, 23, 24, 27, 28, 29, 30 of 35], or otherwise "part of [the Staff's] ongoing oversight activities." [Entergy Answer @ p.11 of 41].

Given the Staff's admission that "*Orders issued under 10 C.F.R. § 2.202*[4] *alter the*

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

requirements of a license and therefore fall under the terms of section 189a of the AEA" [(Staff Answer @ p. 15 of 41], 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*" [Staff Answer @ p. 24 of 41] 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.

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).
The Order effectively imposed a Phase 1 implementation deadline for restart from the FitzPatrick second refueling outage that begins after June 30, 2014. [EA-13-109 @ p. 14 of 36]. Entergy's Request for Extension to Comply extension indisputably would amend that "*Phase 1 implementation deadline*," i.e., would alter the terms of the FitzPatrick license as it now exists; and, also indisputably, it would give FitzPatrick "*greater authority*," i.e., authority to operate after the January 2017 refueling outage without installing what Phase 1 of NRC Order EA-13-109 requires.

Entergy's argument that Part A of Petitioners' Contention 1 is "immaterial [and] unsupported" [Entergy Answer @ p.31 of 41] is wrong. 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 Answer @ p. 31 of 41]

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.

Entergy's argument that Part C of Petitioners' Contention 1 Is immaterial, unsupported, and fails to raise a genuine dispute [Entergy Answer @ p.37 of 41] is also wrong.

Entergy claims that the Petitioners have "misread the EA-13-109 Extension Request" for activities and compensatory actions that Entergy has done and plans to do in the upcoming 2017 outage. [Entergy Request @ p. 38-39 of 41]. The Petitioners' Request for Hearing is not negated by the work that Entergy has already done or plans to do at FitzPatrick in the upcoming 2017 outage. The fact of the matter is that Entergy will not achieve implementation of a reliable severe accident capable hardened containment vent on the scheduled compliance date that is incorporated into its modified operating license per EA-13-109 and does not plan to do so until June 30, 2018.[5] If FitzPatrick were to achieve compliance as required by its modified operating license it would not be seeking an extension to comply and for so long as FitzPatrick continues to operate out of compliance its leaves everyone near Fitzpatrick at undue 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 EA-13-109 @ p.7]

Entergy makes no attempt to illuminate upon how continued reliance outlined on the 1992 safety evaluation report [ML 13015A634] outlined in the Extension Request [Entergy Request for Extension to Comply EA-13-109 @ p. 6 of 8] is justified given the inspection findings of "*beyond design and design bases vulnerability*" involving

[5] The allegations made in Entergy's request about the extent to which it has already complied in fact must be proved as EA-13-109 deems for "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 EA-13-109 @ p.7]

hydrogen control and "*beyond design and design bases vulnerability*" in the FitzPatrick current licensing basis without the primary containment torus air space hardened vent system as identified in Technical Inspection Report 2515/183 Inspection Report." [Petitioners' Request for Hearing, Contention C1, @ p. 37 of 58 referencing "NRC Temporary Inspection Report 2515/183 Inspection Report," May 13, 2011, ML111330455 @ p.8]

The Petitioners provide expert testimony in the form of the Declaration of Mr. Mark Leyse in support of their contention 1C specific to under-predicted hydrogen generation rates during severe accident conditions. Mr. Leyse's testimony finds that Entergy's interim actions to operate FitzPatrick beyond the scheduled compliance without the required reliable, severe accident capable hardened containment vent is woefully inadequate and does not comply with the 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 Atomic Energy Act requires.

A genuine dispute therefore exists that must go to hearing under the protections provided by the Atomic Energy Act.

The Staff's argument that Petitioners' contention "is outside the scope of hearings on orders under Marble Hill and Bellotti" (Staff Answer @ p. 23 of 35) is wrong, and is discussed in Section IV(C) below. 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.24 of 58]. Petitioners have not made any NSHC challenge; and we assume that any NSHC decision the Staff might make will be proper.[6]

III. The Petitioners have standing

A. Entergy and Staff Answers argue the Petitioners do not have standing

Both Entergy and Staff Answers argue that the Petitioners have not demonstrated standing. [Entergy Answer @ pp. 23-29 of 41 & Staff Answer @ pp.16-19 and 24-27 of 35].

1) Entergy and Staff argue that the Petitioners have not shown: (a) an actual or threatened, concrete and particularized injury that is (b) fairly traceable to the

[6] Entergy's Opposition does not mention Marble Hill or Bellotti. The caption to Energy's argument that Part 1 is inadmissible (Entergy Answer @p. 31 of 41) 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. 23 of 58. Petitioners have not made any NSHC challenge; and we assume that any NSHC decision the Staff might make will be proper.

challenged action and (c) likely to be redressed by a favorable decision. [Entergy Answer @ p.23-25 of 41 & Staff Answer @ pp.17-19 of 35].

2) Entergy and Staff argue that the Petitioners are not entitled to the 50-mile proximity presumption [Entergy Answer @ pp.25-28 of 41, and Staff Answer @ p.18, 26, 27 of 35]

3) Entergy and Staff argue that the Petitioners have not addressed any "obvious potential for offsite consequences. [Entergy Answer @ pp.8, 16, 25, 26. 27, 28 of 41 & Staff Answer @ pp.18, 26, 27 of 35].

4) Entergy and Staff argue that the Petitioners' organizations have not demonstrated either organizational or representational standing. [Entergy Answer @ pp.25, 28-29 of 41 & Staff Answer @ pp.25-26 of 35]

The Petitioners Reply

The Petitioners reply that Entergy and Staff have made a number of arguments in an attempt to show that there is no threatened injury-in-fact by extending FitzPatrick power operations for up to one and a half more years, and possibly longer, beyond the scheduled compliance date stipulated and consented to in their modified operating license per NRC Orders. The Petitioners argue that each of these arguments is wrong. Petitioners have met the requirements of 2.309(d)(1) and do have standing.

Petitioners' Request for Hearing has provided the name, address and telephone number of each petitioner, the nature of petitioners' right under the Atomic Energy Act 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.

The Petitioners have provided the same type information, as required.

1) The Petitioners have addressed (a) a distinct harm that constitutes an injury-in fact; (b) that the injury can be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision.

The Petitioners' Hearing Request has pointed out the inherent and distinct harm that arises absent FitzPatrick *"immediately effective" scheduled compliance with EA-13-109, "As discussed in SECY-12-0157, the NRC's determination that a venting system should be available during severe accident conditions considered both quantitative assessments of costs and benefits, as well as, various qualitative factors. Among the qualitative factors, one of the more important is enhancing 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. Other qualitative factors supporting installation of severe accident capable vents include addressing uncertainties in the understanding of severe accident events, supporting severe accident management and response, improving the control of hydrogen generated during severe accidents, improving readiness for external and multi-unit events, and reducing uncertainties about radiological releases and thereby improving emergency planning and response. The installation of a reliable, severe accident capable containment venting system, in combination with other actions such as ensuring drywell flooding capabilities, reduces the likelihood of containment failures and thereby enhances the defense-in-depth protections for plants with Mark I and Mark II containments*." [Petitioners' Hearing Request @32 of 58 quoting EA-13-109, Enclosure 1, p.9 of 36].

Petitioners have expressed concerns that are based on EA-13-109 itself, and also on Entergy's attempt to resume power while significantly delaying the scheduled compliance that the Order requires. Petitioners' concrete and particularized concerns for their health, safety, and property and financial interests were heightened by the agency findings that "*The NRC has concluded that (1) the requirement to provide a reliable HCVS to prevent or limit core damage upon loss of heat removal capability is necessary to ensure reasonable assurance of adequate protection of public health and safety, and (2) the requirement that the reliable HCVS remain functional during severe accident conditions is a cost-justified substantial safety improvement under 10 CFR 50.1 09(a)(3). The NRC is therefore requiring Licensee actions. In addition, pursuant to 10 CFR 2.202, the NRC finds that the public health, safety and interest require that this Order be made immediately effective*." [Petitioners' Request @ p.20 of 58, quoting EA-13-109 @ p.10]. 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 FitzPatrick.

Simply stated, the Petitioners have further asserted that potential injury "*can be traced to,*" and indeed would be the direct effect by "*Entergy's intended operation of FitzPatrick in non-compliance with the scheduled implementation date adds undue risk on the public health, safety and interest with the non-compliant power operation of the nuclear power station*" by extending the date for scheduled compliance with NRC Order EA-13-109 of such significant safety importance as to be issued '*immediately effective*." [Petitioners' Request for Hearing @ p.33 of 58]

The Petitioners' Hearing Request further elaborates on potential injury-in-fact traced to disclosure of NRC Temporary Instruction 2515/183 Inspection Report for FitzPatrick dated May 13, 2011 identifying "*beyond design and design bases vulnerability in the current procedures do not address hydrogen considerations during primary venting*" and "*a beyond design and licensing bases vulnerability, in that FitzPatrick's current licensing basis did not require the plant to have a primary containment torus air space hardened vent system as part of their Mark I containment improvement program*." [Petitioners' Request for Hearing @ p. 36 of 58]

The Petitioners have further stated that injury plainly would be redressed if Entergy's request is denied and a properly noticed license amendment request be submitted to provide an opportunity for hearing to any and all adversely impacted parties. [Petitioners' Hearing Request @ p. 54 of 58]

2) Petitioners are entitled to the 50-mile presumption of proximity

NRC Order EA-13-109, from which Entergy seeks an extension to comply with requirements in its modified operating license, is based in good part on the modeling, findings and recommended options advanced in NRC SECY-12-0157. [Petitioners' Request @ p.32 of 58 and EA-13-109 @ p.9 of 36] The Petitioners assert that Entergy's failure to achieve and interference with implementing the scheduled compliance per requirements of NRC Order EA-13-109 establishes a "*plausible chain of causation*" [US NRC Staff Practice and Procedures, NUREG-0386, Digest 16, Office of

General Council, June 2011, No Published Accession Number Available in ADAMS, @ p.150 of 794] of adverse impacts affecting the Petitioners within a 50-mile radius around the GE Mark 1 boiling water reactor nuclear power station. It is, in fact, EA-13-109 and SECY-12-0157 that analyze the 50-mile perimeter as the base case scenario for the potentially reach of harmful and adverse radiological impacts on public health and economic consequences absent adherence to FitzPatrick scheduled compliance.

3.1 Public Health (Accident) "*Section 2 described the evaluation of the base case and options in terms of possible exposures to the populations within 80 kilometers (50 miles) of a plant undergoing a severe accident for which the installation of severe accident capable or filtered vents could reduce the offsite consequences*." ["Consideration of Additional Requirements for Containment Venting Systems for Boiling Water Reactor with Mark I and Mark II Containments," US NRC SECY-12-0157, November 26, 2012, ML12 @ p.32 of 331]

The Petitioners argue that Entergy's inability to achieve the required scheduled compliance raises reasonable and justifiable concern for which the Petitioners must seek redress through the requested hearing proceeding.

Staff would seem to admit that Petitioners have standing if they are entitled to "*rely on proximity to the plant to support standing*" (Staff Response @p.26 of 35)
The Staff recognizes 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.18 of 35].

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 "*Close proximity has always been deemed enough standing alone, to establish the requisite interest for intervention. The incremental risk of reactor operation for an additional 13–15 years is sufficient to invoke the presumption of injury-in-fact for persons residing within 10 to 20 miles of the facility. Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-93-1, 37 NRC 5 (1993). In such a case the petitioner does not have to show that his concerns are well-founded in fact, as such concerns are addressed when the merits of the case are reached. Distances of as much as 50 miles have been held to fall within this zone. Virginia Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54, 56(1979); Duquesne Light Co. (Beaver Valley Power Station, Unit 2),LBP-84-6, 19 NRC 393, 410, 429 (1984), citing South Texas, supra,9 NRC at 443-44; Enrico Fermi, supra, 9 NRC at 78; Tennessee Valley Auth. (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418,1421 n.4 (1977); Texas Utils. Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-79-18, 9 NRC 728, 730 (1979); Pilgrim Nuclear Power Station, LBP-06-23, 64 NRC at 270; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13,68 NRC 43, 60 (2008)."* [United States Nuclear Regulatory Commission Staff Practices and Procedural Digest, NUREG-0386, Digest 16, Office of General Counsel, General Matters (GM), No Published Accession Number in ADAMS, June, 2011, @ p. 149 of 794 (Emphasis added)].

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*." [NUREG-0386 Digest 16 @ p.149 of 794]

However, Staff and Entergy try to avoid the fact that all of the Petitioners members reside, work and recreate within the 50-mile proximity zone by pretending that the Request for Hearing is somehow not a licensing case.

However, 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 OPERATIONG 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*" have amended the FitzPatrick operating license, and as such, any further modifications to the specifications in the operating license must be amended per NRC Rules and Procedures as argued by the Petitioners.

Staff and Entergy attempt to ignore the plain fact that Entergy's Request for Extension to Comply seeks to further modify, i.e. amend, the current FitzPatrick operating license (as modified by Orders) by changing the compliance dates as set forth by Order.

The Petitioners assert this is, in fact, a "*licensing*" case, and the proximity presumption principle duly applies.

3) Petitioners' have addressed the "*obvious potential for offsite consequences*"

"*The initial issue in deciding a question of 'proximity standing' is whether the kind of action at issue, when considered in light of the radioactive sources at the plant, justifies a presumption that the licensing action 'could plausibly lead to the offsite release of radioactive fission products from…the…reactors.' The petitioner carries the burden of making this showing. If the petitioner fails to show that a particular licensing action raises an 'obvious potential for offsite consequences,' then the standing inquiry reverts to a 'traditional standing' analysis of whether the petitioner has made a specific showing of injury, causation, and redressability."* [NUREG-0386 Digest 16 @ p.154 of 794]

The Staff and Entergy argue that Petitioners have not stated any *"obvious*" potential for offsite consequences. [Entergy Answer @ pp.8, 16, 25, 26. 27, 28 of 41 & Staff Answer @ pp.18, 26, 27 of 35], and have only vaguely expressed the potential injury-in-fact to their property and financial interests and their health and safety. Staff and Entergy attempt to ignore both what Petitioners said in their Request for Hearing and what is said in NRC documents EA-13-109 and SECY-12-0157 on which the Order EA-13-109 is in large part based. The lack of hydrogen control and reliable venting during a severe accident and a resulting breach of containment with early release of radiation are principle concerns in these documents that prompted the "*immediately effective*" scheduled compliance by Order modifying the FitzPatrick operating license.

Petitioners' Request for Hearing Contention 1C includes the FitzPatrick findings produced by NRC "*Temporary Instruction 2515/183 Inspection Report*" dated May 13, 2011. NRC inspectors found "*beyond design and licensing basis vulnerability in the current procedures do not address hydrogen considerations during primary venting*" and "*a beyond design and licensing bases vulnerability, in that FitzPatrick's current licensing basis did not require the plant to have a primary containment torus air space hardened vent system as part of their Mark I containment improvement program*" at FitzPatrick. [Petitioners' Request @ p. 35-36 of 58]

Anyone who witnessed video coverage of the two visible hydrogen explosions during the Fukushima Daiichi nuclear accident is fully aware of the "*obvious potential for offsite consequences*" arising from the lack of hydrogen considerations and reliable venting during a severe accident.

The Petitioners are duly concerned by the obvious harm arising out of Entergy's apparent lack of consideration for hydrogen venting as an identified "*beyond design and licensing basis vulnerability*" and "*current licensing basis*" vulnerability issues that are not adequately addressed for Entergy's requested extension period beyond EA-13-109 scheduled compliance for which the Petitioners have requested a hearing process. To that end, the Petitioners provide the Declaration and Testimony of Mark Leyse. [Exhibit 2-Declaration of Mark Leyse 12-09-2016 and Exhibit 3-CV of Mark Leyse 12-09-2016].

Mr. Leyse has outlined the areas of expert concern in his testimony in four areas.

a.) The high hydrogen generation rates that would occur in the event of a severe accident at a BWR Mark I must particularly be taken into account in severe accident

analysis and in the design of accident management components, such as FitzPatrick's partially hardened wetwell vent. However, computer safety models under-predict the actual rates of hydrogen generation that would occur in severe accidents. Evidence indicates that the licensee of FitzPatrick, Entergy, has not conducted adequate, conservative computer simulations of the hydrogen generation rates that would occur in the event of a severe accident. Like everyone else's computer simulations, Entergy's simulations under-predict hydrogen generation rates. For this reason, among others, Entergy cannot guarantee that FitzPatrick's original and current decades-old wetwell vent would be effective in managing explosive hydrogen gas in the event of a severe accident. (This is discussed in paragraphs 25 and 32 of Leyse's testimony.)

b.) The defective, antiquated BWR Mark I design performed poorly in the Fukushima Daiichi accident. In the accident, three BWR Mark I reactors melted down, each generating hundreds of kilograms of explosive hydrogen gas. Hydrogen leaked from the primary containments into the reactor buildings, where it accumulated and detonated at different times, destroying three reactor buildings and damaging containments, which released large quantities of harmful radioactive material into the environment. A wide area was contaminated, prompting the evacuation of about 90,000 people. Fukushima Daiichi's decades-old hardened vents did not prevent hydrogen from entering BWR Mark I secondary containments and detonating. In the event of a severe accident at FitzPatrick, hundreds of kilograms of explosive hydrogen gas would be generated. There is no guarantee that FitzPatrick's current decades-old wetwell vent would prevent the hydrogen from exploding and destroying the reactor building, releasing large quantities of harmful radioactive material into the environment, as occurred in the

Fukushima Daiichi accident. (This is discussed in paragraphs 38 and 39 of Leyse's testimony.)

c.) The licensee of FitzPatrick, Entergy, has not demonstrated that FitzPatrick's current decades-old wetwell vent would perform adequately in severe accident scenarios in which there were rapid containment-pressure increases, rapid transients, or circumstances in which there would be the generation of between 5.0 and 10.0 kg of hydrogen per second. [This is discussed in paragraph 44 of Leyse's testimony.]

d.) Entergy referred to a September 1992 safety evaluation report on FitzPatrick's hardened wetwell vent when it requested an extension for complying with NRC Order EA-13-109. A 2007 OECD Nuclear Energy Agency report states that for simulating severe accidents, modeling of steam condensation, gas density stratification, and jet injection needs to be improved. Computer safety models also have limitations in predicting the hydrogen distribution that would occur in different severe accident scenarios; furthermore, they also have limitations in predicting the phenomenon of hydrogen deflagrations transitioning into detonations, as well as the maximum pressure loads the containment (or other structures) would incur from detonations. Clearly, the September 1992 safety evaluation report upon which FitzPatrick's interim containment vent seeks to rely upon did not realistically evaluate what would actually occur in the event of a real severe accident at FitzPatrick. Furthermore, the Fukushima Daiichi accident provided empirical evidence that there is no guarantee that the original partially hardened containment vent at FitzPatrick would be able to prevent hydrogen from entering BWR Mark I secondary containments and detonating, in the event of a severe accident. [This is discussed in paragraphs 49, 50, and 51 of Leyse's testimony.]

The Petitioners' Request for Hearing has set forth the "*obvious*" potential for offsite consequences. [Petitioners' Hearing Request @ 2-3 of 58] The Petitioners reiterate that the nuclear catastrophe at Fukushima Daiichi resulted in massive land contamination, significant radiation exposure to a large proportion of the Japanese population and significant population and economic dislocation.

The Petitioners seriously doubt that even Entergy can deny that the potential catastrophic failure of FitzPatrick containment during a severe accident, as did the GE Mark I containment systems at Fukushima Daiichi Units 1, 2 and 3, would have adverse and "obvious potential for offsite consequences."

More importantly, Petitioners' Request for Hearing not only cites that a containment failure would have dire consequences for public health and safety but Petitioners have pointed out that "*The installation of a reliable, severe accident capable containment venting system, in combination with other actions such as ensuring drywell flooding capabilities, reduces the likelihood of containment failures and thereby enhances the defense-in-depth protections for plants with Mark I and Mark II containments*." [Petitioners' Request for Hearing @ p.32 od 58 quoting EA-13-109, Enclosure I, p.9 of 36]

The Petitioners' Request for Hearing quoted EA-13-109's explicit finding that ""*The Commission has determined that requiring BWR facilities with Mark I and Mark II*

containments to make the necessary plant modifications and procedure changes to provide a reliable hardened venting system that is capable of performing under severe accident conditions is a cost-justified substantial safety improvement. These modifications 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. In such situations, the Commission may act in accordance with its statutory authority under Section 161 of the Atomic Energy Act of 1954, as amended, to require Licensees to take appropriate action to reduce the risks posed to the public from the operation of nuclear power plants." [Petitioners' Request for Hearing @ p. 33 of 58 quoting EA-13-109, p.10 of 36].

The NRC has long known that the FitzPatrick containment is too small [EA-13-109, Enclosure 1 @ p. 2: "*small containments such as the Mark I and Mark II designs*."]. Both Staff or Entergy therefore should fully be aware that an uncontrolled release of radioactive materials would have an "*obvious potential for offsite consequences*."

4. The Petitioners have demonstrated standing

At the outset, the Petitioners reassert that both organizations have met the criteria for standing.

Staff argues that AGREE has not demonstrated organizational standing by not alleging '"*injury-in-fact' to the interests of the organization itself*." [Staff Answer @ p.25 of 35] The Petitioners reply that both affidavits of the Jessica Azulay Chasnoff and Andra Leimanis have declared that "*if the NRC grants Entergy's referenced request for an extension to comply with NRC Orders the continued operation of the FitzPatrick Nuclear*

Generating Station could adversely affect my life, the lives of AGREE's membership, their communities and the environment." [Affidavits of Jessica Azulay Chasnoff, signed and dated November 7, 2016 and Andra Leimanis, signed and dated November 10, 2016] Both affidavits First, it appears that Staff attempts to ignore that the affidavits are submitted in context of the potential "*injury-in-fact*" articulated in the Request for Hearing to address the operation of FitzPatrick in violation of the scheduled compliance as the license is modified by Order EA-13-109 as informed and guided by the findings and recommended options of SECY-12-0157. The Petitioners believe that the NRC Staff is fully aware of those findings. It further appears that Staff attempts to differentiate and negate the concerns and interests expressed in Ms. Azulay Chasnoff and Ms. Leimanis affidavits for their lives, the members of AGREE within the 50-mile EPZ, their communities in which they live and the environment from the organization's interests. AGREE's expressed concerns for the communities and the environment within the 50-mile EPZ are the direct result of the potential "*injury-in-fact*" by radiation exposure, land contamination and economic dislocation that EA-13-109 seeks to prevent or minimize.

Staff acknowledges that Beyond Nuclear has met the criterion for representational standing. [Staff Answer @ p.26 of 35]

Entergy Answer argues that the Petitioners have not demonstrated representational standing referencing that the Petitioners have not shown any members having standing in his or her own right, members that cannot rely upon on the proximity presumption, and not demonstrating traditional standing through any obvious offsite consequences. [Entergy Answer @ p. 28 of 41]

As the Petitioners have argued above, Entergy's Answer has been addressed in the Petitioners' Hearing Request.

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 that is traceable to Entergy's Request for Extension to Comply, redressed by denying Entergy's Request and provided an opportunity for hearing through NRC rules and procedures for a license amendment request.

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

A. Petitioners are not Challenging NRC Orders

Petitioners do not challenge any part of the NRC Orders. It is Entergy, not Petitioners, that seeks to amend Orders.

Contrary to what Entergy says, Petitioners do not "*challenge the inclusion and/or substantive provisions of the Relaxation Provision.*" [Entergy Answer @ p.14 of 41]. 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.[7]

[7] 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)."

The Staff also seems to suggest that Petitioners are challenging the facts stated in the Order or the Orders' remedy. Again, that is wrong. Petitioners' Request accepts that the facts stated in the Orders are true, and that the Orders' remedy (in the case of EA-13-109, compliance with the Phase I and II requirements by the date the Order set) is supported by those facts. [Public Service Co. of Indiana (Marble Hill Nuclear Generating Station), CLI-80-10, 11 NRC 438, 441 (1980). [Staff Answer @ 16 of 35].

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

Entergy answers that the "*Petitioners cannot create a hearing opportunity merely by claiming that a facility has not complied with a regulatory requirement because '[s]uch claims are appropriately raised in a petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206, rather than by a request for a hearing under AEA section 189a.'*" [Entergy Answer @ p.18 of 41] To be clear, EA-13-109 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 EA-13-109 IV(B) @ p. 11] which in the FitzPatrick case follows the scheduled refueling outage for January 2017. At present, January 2017 is still in the future. Entergy admits that what it has accomplished to date is not enough to meet implementation of the Phase 1 requirements nor does it plan to be able to achieve implementation as required by its modified operating license, but Petitioners quite properly do not say those facts mean 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 Answer @ p.29 of 35], 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*." [Staff Answer @ p.24 of 35]. [8]

That said, whether FitzPatrick license should be amended will be the central issue at the hearing to which Petitioners are entitled.

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

In saying that "*Petitioners' claim is outside the scope of hearings"* [Staff Answer @ p.28 of 35] 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 (emphasis 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*

[8] 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.

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' contentions 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" while continuing power operations would make FitzPatrick operation less safe, and plainly would be potentially harmful to the public health and welfare.

D. Petitioners' Contentions Are Admissible.

Petitioners' Contentions should be admitted and Petitioners' Request for Hearing should be granted regarding Entergy's Request for Extension to Comply with NRC Orders EA-12-049, EA-12-051 and EA-13-109. 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. The Petitioners have set forth that Entergy's request for delay in complying with NRC Orders should be denied with or without a hearing.

Entergy's delay in making its Requests after NRC Orders scheduled compliance evidences that there is no "*good cause*" for extending the date for compliance while continuing power operations up to one and one half more years and potentially longer.

Granting Entergy's request to resume power operations without first implementing scheduled compliance will unreasonably deny protection for those near FitzPatrick for up to one and a half years longer and potentially longer than the Order required "*immediately effective*."

Entergy's supposed partial compliance with NRC Orders is not a reason to resume FitzPatrick power operation while delaying the completion of implementation what the Orders require, when required.

The Petitioners have provided justifiable reasons that Entergy's Requests should be denied, and that Petitioners' contentions be admitted.

V. Conclusion

Entergy's request to extend the date by which it must comply with the requirements of EA-12-049, EA-12-051 and EA-13-109 Phase 1 are de facto requests to amend its current license and "triggers" Petitioners right to a hearing under Section 189(a) of the Atomic Energy Act. The 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 Orders EA-12-049, EA-12-051 and EA-13-109 should be granted.

Respectfully submitted by Beyond Nuclear on behalf of Co-Petitioner AGREE,

Signed (electronically) by
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December 12, 2016

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

December 12, 2016

In the Matter of Fitzpatrick 50-333-EA Entergy's Request for Extension to Comply with NRC Orders EA-12-049, E-12-051 and EA-13-109, James A. Fitzpatrick Nuclear Power Station.

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (revised), I hereby certify that copies of the foregoing

BEYOND NUCLEAR & THE ALLIANCE FOR A GREEN ECONOMY COMBINED REPLY TO ENTERGY AND NRC STAFF ANSWERS IN OPPOSITION TO PETITIONERS' REQUEST FOR HEARING AND LEAVE TO INTERVENE dated December 12, 2016 have been filed and certified for service to all appropriate parties through the Electronic Information Exchange, the NRC's E-Filing System in the above-captioned proceeding on December 12, 2016.

----/Electronically Signed through the EIE/----

Paul Gunter

Beyond Nuclear