

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
ALL OPERATING BOILING WATER)	
REACTOR LICENSEES WITH MARK I)	
AND MARK II CONTAINMENTS)	
)	
AND)	Docket Nos. EA-12-050 and EA-12-051
)	
ALL POWER REACTOR LICENSEES)	ASLBP No. 12-918-01-EA-BD01
AND HOLDERS OF CONSTRUCTION)	
PERMITS IN ACTIVE OR DEFERRED)	
STATUS)	
)	
(Fukushima-Related Orders Modifying))	
Licenses))	

NRC STAFF'S RESPONSE TO PILGRIM WATCH REQUESTS FOR HEARING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the Nuclear Regulatory Commission (“Staff”) hereby responds to the April 2, 2012, “Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses With Regard to Reliable Hardened Containment Vents,” (“Hearing Request I”) and the April 2, 2012, “Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses With Regard to Spent Reliable Spent Fuel Pool Instrumentation” (“Hearing Request II”) as consolidated (hereinafter, “Consolidated Hearing Requests”). On April 12, 2012, the “Pilgrim Watch Supplement to Request for Hearing Regarding Insufficiency of Order Modifying Licenses With Regard to Spent Reliable Spent Fuel Pool Instrumentation” was filed. As discussed below, the Consolidated Hearing Requests should be denied because Petitioner fails to demonstrate standing, seeks to litigate concerns that are outside the scope of the issues which may be raised in a hearing on the Orders it challenges, and fails to meet the contention admissibility requirements.

BACKGROUND

On March 12, 2012, in accordance with the Atomic Energy Act of 1954, as amended, and Title 10 of the *Code of Federal Regulations* (10 C.F.R.) § 2.202, the NRC issued three immediately effective orders to impose license modifications requiring: (1) the development of strategies to deal with beyond-design-basis external events resulting in simultaneous loss of all ac power and loss of normal access to the ultimate heat sink (EA-12-049); (2) installation of reliable, hardened vents in BWR Mark I and Mark II containments (EA-12-050); and (3) enhancements to spent fuel pool instrumentation (EA-12-051).

These three orders were the result of a months-long systematic and methodical review of the NRC's regulations and processes by a senior-level agency task force (the "Near-Term Task Force, or "NTTF") to determine if additional improvements to the agency's programs were warranted in light of the March 11, 2011, earthquake and tsunami at the Fukushima Da-ichi nuclear power plant in Japan. As a result of the NTTF's review, SECY-11-0093, "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan," (July 12, 2011) was issued containing a comprehensive set of recommendations. The NRC staff held numerous public meetings with interested stakeholders, which are documented in SECY-11-0124, "Recommended Actions To Be Taken Without Delay From The Near-Term Task Force Report," (Sept. 9, 2011), SECY-11-0137, "Prioritization of Recommended Actions To Be Taken In Response To Fukushima Lessons Learned," (Oct. 3, 2011), and SECY-12-0025, "Proposed Orders and Requests for Information in Response to Lessons Learned from Japan's March 11, 2011, Great Tohoku Earthquake and Tsunami."

DISCUSSION

A. Petitioners' Standing to Intervene

Although hearing requests will be construed in favor of the petitioner on issues of standing,¹ the petitioner nonetheless bears the burden of establishing standing. As discussed further below, Petitioner has failed to provide sufficient information to carry the burden of demonstrating either the standing of an individual member or representational standing. Thus, Petitioner has failed to satisfy the applicable standing requirements and its Consolidated Hearing Requests should be denied.

a. Applicable Legal Requirements

An organization that requests a hearing before the Commission must demonstrate standing and set forth at least one admissible contention.² 10 C.F.R. § 2.309(a). NRC regulations provide general requirements a petitioner must meet to demonstrate standing. 10 C.F.R. § 2.309(d). To satisfy these requirements, a petitioner must state (1) the nature of its right under the AEA to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest. 10 C.F.R. § 2.309(d)(1)(ii)-(iv). When assessing whether a petitioner has satisfied the requirements of 10 C.F.R. § 2.309, licensing boards apply judicial concepts of standing, requiring a petitioner to "(1) allege a

¹ See *Georgia Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

² A petitioner's right to participate in a hearing stems from Section 189a of the Atomic Energy Act of 1954, as amended ("AEA"). 42 U.S.C. § 2239(a)(1)(A) ("In 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.").

concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.”³

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.⁴ Where an organization seeks to establish representational standing, it must demonstrate that at least one of its members would be affected by the proceeding and identify any such members by name and address. Also, the organization must show that the identified members would have standing to intervene in their own right, and that these members have authorized the organization to request a hearing on their behalf.⁵ 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.⁶

The Commission has recognized that, in reactor licensing cases, a petitioner may establish standing based entirely upon his geographical proximity to the facility at issue.⁷ In such cases, a petitioner who resides within 50 miles of the reactor is presumed to have standing

³ See *EnergySolutions, LLC Radioactive Waste Import/Export Cases*, CLI-11-03, 73 NRC ___, slip op. at *3 (June 6, 2011); see also *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-98-21, 48 NRC 185, 195 (1998) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998)).

⁴ See *id.*; *Shaw AREVA MOX Services (Mixed Oxide Fuel Fabrication Facility)*, LBP-07-14, 66 NRC 169, 183 (2007) (citation omitted).

⁵ See *Detroit Edison Co. (Fermi Power Plant Independent Spent Fuel Storage Installation)*, CLI-10-03, 71 NRC 49, 51-52 (2010); see also *Sequoia Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 72 (1994) (citing *Houston Lighting and Power Co. (Aliens 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”).

⁶ *Consumers Energy Co. (Palisades Nuclear Plant)*, CLI-07-18, 65 NRC 399, 409 (2007).

⁷ See *Detroit Edison Co.*, CLI-10-3, 71 NRC at 51-52; see also *Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2)*, CLI-89-21, 30 NRC 325, 329-30 (1989).

without the need to plead injury, causation, and redressability.⁸ In non-reactor 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.”⁹

Where a Commission order modifying a license (or licenses) is at issue, “the threshold question—related to both standing and admissibility of contentions—is whether the hearing request is within the scope of the proceeding as outlined in the order.”¹⁰ The Commission has the authority to define the scope of the hearing, and this authority includes limiting the hearing to the question of whether the order should be sustained.¹¹ An organization cannot establish standing by merely arguing that the Commission should impose a stricter penalty on the licensee, because—absent a particularized showing—the organization is not injured by the purported lesser penalty. The Commission has reasoned that “allowing NRC hearings on claims for stronger enforcement remedies risks ‘turning focused regulatory proceedings into amorphous public extravaganzas.’”¹²

⁸ See *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010); *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

⁹ *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) (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).

¹⁰ *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 *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004)).

¹¹ See *Bellotti v. N.R.C.*, 725 F. 2d 1380, 1381 (D.C. Cir., 1983) *aff’g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982); see also *ADOT*, CLI-04-26, 60 NRC at 405; *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157–58 (2004); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004).

¹² *ADOT*, CLI-04-26, 60 NRC at 404-05 (citing *Bellotti*, 725 F. 2d at 1382).

b. Petitioners' Standing Analysis

Petitioner makes several arguments in support of its standing to intervene in this proceeding. First, Petitioner states that its organization “serves the public interest in issues regarding the Pilgrim Nuclear Power Station.”¹³ Petitioner argues that its organization is a party to Pilgrim’s license renewal adjudication proceedings, and can be expected to “meaningfully contribute to the record.”¹⁴ Further, Petitioner states that many of its members, including its representative, Mary Lampert, live within the immediate neighborhood of the reactor or within either the “10-mile Emergency Planning Zone or the 50-mile ingestion pathway.”¹⁵ This proximity, according to Petitioner, grants them standing in this proceeding and Petitioner “deserve[s] to be afforded their due process with all formal hearing rights.”¹⁶ Additionally, Petitioner “submits that the public in communities surrounding Pilgrim . . . should be afforded their due process with all formal hearing rights to redress inadequacies of past and future modifications to containment” with respect to both of the Commission’s Orders.¹⁷

Petitioner has not provided sufficient information to establish organizational or representative standing. As an initial matter, Petitioner’s participation in the license renewal adjudication proceedings has no bearing on whether Petitioner has standing in this proceeding. Most importantly, Petitioner has not explained how the Orders’ requirements cause any injury to its organization or members. Instead, Petitioner relies on general statements that it serves the public interest and that its members would be harmed by the “unacceptable risk to the

¹³ Hearing Request I at 1; Hearing Request II at 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Hearing Request I at 2; Hearing Request II at 2.

environment jeopardizing the health, safety, property and finances” of its members.¹⁸ Petitioner argues that the Orders did not go far enough and should be supplemented with new requirements.¹⁹ Therefore, Petitioner is not alleging any harm from the requirements of the Commission’s Orders. Additionally, Petitioner has not provided the names and addresses of its members or stated whether these members would have standing in their own right. Therefore, Petitioner has not met the 10 C.F.R. § 2.309 standing requirements.

Petitioner appears to rely exclusively on the proximity of its organization and its members to the Pilgrim Nuclear Generating Station to establish standing. However, because this is not a reactor licensing proceeding, Petitioner is not entitled to presumptive standing based on proximity to the facility.²⁰ Here, Petitioner has not identified any potential offsite radiological consequences that would result from the Orders. Again, Petitioner is arguing that the Orders should be supplemented or strengthened, and not rescinded. Therefore, Petitioner has not demonstrated an injury-in-fact or why Petitioner should be granted standing based solely on its proximity to the plant.

Finally, Petitioner has failed to establish standing because its alleged injury is outside the scope of this proceeding. The *Federal Register* notice for both Orders stated that “[i]f a hearing is held, the issue to be considered at such hearing shall be *whether this Order should be sustained*.”²¹ Therefore, as discussed further below with respect to Petitioner’s contentions, Petitioner’s Consolidated Hearing Requests should be denied because Petitioner is not seeking rescission of the Orders.

B. Petitioner’s Contentions

¹⁸ Hearing Request I at 3; Hearing Request II at 3.

¹⁹ See Hearing Request I at 5; Hearing Request II at 11.

²⁰ See *Consumers Energy Co.*, CLI-07-19, 65 NRC at 426.

²¹ 77 Fed. Reg. at 16085; 77 Fed. Reg. at 16101 (emphasis added).

a. Applicable Legal Requirements

In addition to establishing standing, a hearing request must also include at least one admissible contention.²² The legal requirements for contention admissibility are well established, and require that petitioners must “set forth with particularity,” the contentions sought to be raised. For each contention, the petition must:

- (1) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (2) Provide a brief explanation of the basis for the contention;
- (3) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (4) Demonstrate 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;
- (5) Provide 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; and
- (6) Provide 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 (including the applicant’s environmental report and safety report) 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.

10 C.F.R. § 2.309(f)(1). The six criteria set forth in § 2.309(f)(1) are inclusive, thus, a “[f]ailure to

²² 10 C.F.R. § 2.309(a).

comply with any of these requirements is grounds for dismissal of a contention.”²³

The requirements governing the admissibility of contentions are strictly applied in NRC adjudicatory proceedings. The rules “require ‘a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention.’ Mere ‘notice pleading’ does not suffice. Contentions must fall within the scope of the proceeding . . . in which intervention is sought.”²⁴ The purpose of the basis requirements for contentions is (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose.²⁵ The Commission has held that a contention must be rejected if:

- (i) it constitutes an attack on applicable statutory requirements;
- (ii) it challenges the basic structure of the Commission’s regulatory process or is an attack on the regulations;
- (iii) it is nothing more than a generalization regarding the petitioner’s view of what applicable policies ought to be;
- (iv) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (v) it seeks to raise an issue which is not concrete or litigable.²⁶

²³ *Nuclear Fuel Services, Inc.*, (Special Nuclear Facility (Confirmatory Order)), LBP-07-16, 66 NRC 277, 286 (2007) (“NFS”).

²⁴ *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-119 (2006) (footnotes omitted) (emphasis added).

²⁵ *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); see *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991).

²⁶ See, e.g., *Peach Bottom*, *supra*, 8 AEC at 20-21.

b. Petitioner's Contentions Do Not Meet the Requirements of 10 C.F.R. § 2.309(f)(1)

Petitioners raise three issues for consideration in this proceeding:

- (1) EA-12-050: Based on new and significant information from Fukushima, the Order Modifying Licenses With Regard to Reliable Hardened Containment Vents issued March 12, 2012 (EA-12-050) is insufficient to protect public health, safety and property because it lacks a requirement for licensees to install filters in the direct torus vents (DTVs).²⁷
- (2) EA-12-050: Based on new and significant information from Fukushima, the Order Modifying Licenses With Regard to Reliable Hardened Containment Vents issued March 12, 2012 (EA-12-050) is insufficient to protect public health, safety and property because it does not require the hardened DTV to be passively actuated by means of a rupture disc, so that neither water nor electrical supply is needed and operator intervention is not necessary to actuate the system.²⁸
- (3) EA-12-051: Based on new and significant information from Fukushima, the Order to Modify Licenses With Regard to Reliable Spent Fuel Pool Instrumentation issued March 12, 2012 (EA-12-051) is insufficient to protect public health, safety and property because it lacks a requirement for licensees to re-equip their spent fuel pools to low-density, open-frame design and storage of assemblies >5 years removed from the reactor core placed in dry casks.²⁹

As discussed below, Petitioner has failed to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), thus, none of the contentions proffered by Petitioner are admissible. In addition, Petitioner's arguments do not satisfy the threshold requirements for

²⁷ Hearing Request I at 3. Petitioner's contention claims to seek compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347. Hearing Request I at 7. Commission actions relating to enforcement actions or proceedings are not subject to Section 102(2) of NEPA. 10 C.F.R. § 51.10(d). Therefore, the Orders at issue do not constitute a "major federal action" in terms of NEPA. 40 C.F.R. § 1508.18(a). Petitioner makes a similar claim with respect to its contention regarding EA-12-051. See Hearing Request II at 3.

²⁸ Hearing Request I at 3.

²⁹ Hearing Request II at 1.

hearing requests in enforcement proceedings set forth in *Bellotti v. NRC* and related cases:³⁰

(1) would the petitioner be better off if the order were vacated, (2) would the petitioner's concerns be alleviated if the order were vacated, and (3) does the petitioner in reality seek additional measures beyond those set out in the disputed order?³¹

It is well established that Petitioner may not challenge enforcement orders on the grounds that the order is "too weak or otherwise insufficient." Rather, "the only issue in an NRC enforcement proceeding is whether the order should be sustained. Boards are not to consider whether such orders need strengthening."³² Moreover, Petitioner must show that:

[they] would be adversely affected by the enforcement order as it exists, rather than being adversely affected by the existing order as it might be compared to a hypothetical order that the petitioner asserts would be an improvement.³³

Petitioner's first contention regarding hardened vents asserts that a filtered vent system "could reduce the possibility of containment-building explosions, by releasing radioactive gases to the atmosphere through a large filter system."³⁴ The addition of filters to prevent spreading of radiological contaminants during an accident discussed in Petitioner's pleading does not, however, fall within the limited scope of the Order, e.g., "whether this Order should be sustained."³⁵ Instead, the Petitioner impermissibly challenges the Order as being "*insufficient* to

³⁰ 725 F.2d 1380, 1383 (D.C. Cir. 1983) ("automatic participation at a hearing may be denied only when the Commission is seeking to make a facility's operation safer"); see *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 n. 14 (2004) ("a person whose interest cannot be affected by the issues before the Commission in the proceeding lacks an essential element of standing"); *ADOT*, CLI-04-26, 60 NRC at 399.

³¹ *Maine Yankee*, 50 NRC 52 at 60.

³² *ADOT*, CLI-04-26, 60 NRC at 404.

³³ *Nuclear Fuel Services, Inc.*, (Special Nuclear Facility (Confirmatory Order)), LBP-07-16, 66 NRC 277, 285 (2007).

³⁴ Hearing Request I at 5.

³⁵ 77 Fed. Reg. at 16101.

public health, safety and property”³⁶ Petitioner has failed to show that it is adversely affected by the Order (which enhances safety during a severe accident) and requests additional measures beyond those imposed by the Order.³⁷ Thus, Petitioner has failed to raise an issue within the limited scope of the Order, thereby failing to satisfy the requirements of *Bellotti* and 10 C.F.R. § 2.309(f)(1). Accordingly, Petitioner’s first contention should be denied.

Likewise, Petitioner’s second contention maintains that because the Order “does not require the hardened DTV to be “passively actuated by means of a rupture disc,” it is insufficient.³⁸ Petitioner does not, however, allege any adverse affect as a result of the Order and again seeks additional measures beyond the scope of the Order, contrary to *Bellotti*; therefore, Petitioner’s second contention should be denied.

Petitioner’s third contention, regarding spent fuel pool instrumentation, claims that the Order is insufficient because it lacks a requirement for licensees to re-equip their spent fuel pools to low-density, open-frame design and storage of assemblies >5 years removed from the reactor core placed in dry casks.³⁹ By its own admission, Petitioner indicates that the contention addresses a “defect” in the Order.⁴⁰ As indicated above, the only issue at hand in this proceeding, as specified in the Order, is whether the Order should be sustained.⁴¹ Any attempt to cure a “defect” in the Order constitutes an impermissible request for different or additional measures under *Bellotti*. For these reasons, Contention 3 should be denied.

³⁶ Hearing Request I at 5 (emphasis added).

³⁷ “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. Then, one who . . . wishes to litigate the need for still more safety measures . . . will be remitted to section 2.206’s petition procedures.” *Bellotti*, 725 F.2d at 1383.

³⁸ Hearing Request I at 16.

³⁹ Hearing Request II at 1.

⁴⁰ Hearing Request II at 3.

⁴¹ 77 Fed. Reg. at 16085.

As demonstrated above, Petitioner's request is simply an attempt to supplement the measures specified in the Orders – which improves public health and safety in the post-Fukushima era – in direct contravention of Commission doctrine approved in *Bellotti* and, thus, is outside the scope of the proceeding. Petitioner has failed to satisfy the requirements for contention admissibility, and its contentions should be rejected.

CONCLUSION

For the reasons stated above, Petitioner (1) has failed to demonstrate either individual or representational standing, (2) seeks to impermissibly litigate concerns that are outside the scope of the issues which may be raised in a hearing on the Orders it challenges, and (3) fails to meet the contention admissibility requirements. Therefore, Petitioner's Consolidated Hearing Requests should be denied.

Respectfully submitted,

/Signed (electronically) by/
Carrie M. Safford

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Dated at Rockville, Maryland
this 27th day of April, 2012

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Licenses))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO PILGRIM WATCH REQUESTS FOR HEARING" has been served in the above-captioned proceeding upon the following persons by Electronic Information Exchange (EIE) on this 27th day of April, 2012.

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Dated at Rockville, MD
This 27th day of April, 2012