

April 27, 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. EA-12-051
All Power Reactor Licensees and Holders)	
of Construction Permits in Active or)	ASLBP No. 12-918-01-EA-BD01
Deferred Status)	

ENERGY’S ANSWER TO PILGRIM WATCH REQUEST FOR HEARING REGARDING INSUFFICIENCY OF ORDER MODIFYING LICENSES WITH REGARD TO SPENT RELIABLE SPENT FUEL POOL INSTRUMENTATION

Pursuant to 10 C.F.R. § 2.309(h)(1), Entergy Nuclear Operating Company and Entergy Nuclear Operations, Inc. (collectively “Entergy”) hereby provide this answer to "Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Spent [sic] Reliable Spent Fuel Pool Instrumentation" (“Hearing Request”) filed on April 2, 2012 by Pilgrim Watch (hereinafter "Petitioner"). The Petitioner requests a hearing on an immediately effective order issued by the U.S. Nuclear Regulatory Commission (“NRC”) to all power reactor licensees and holders of construction permits in active or deferred status, including Entergy. “Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately),” EA-12-051 (Mar. 12, 2012) (ADAMS ML12054A679) (“Order”). As more fully discussed below, the Hearing Request should be denied for three distinct reasons, each of which is legally sufficient on its own:

- the Petitioner is attempting to raise issues that are beyond the limited scope of this proceeding as defined in the Commission’s Order;
- the Petitioner lacks standing in this proceeding; and

- the Petitioner fails to propose at least one admissible contention.

In short, the Petitioner's hearing request seeks to challenge the sufficiency of the Commission's Order imposing new requirements for spent fuel pool instrumentation. Under the terms of the Commission's Order and the long-standing *Bellotti* precedent, the Petitioner's hearing request should be denied.

I. Background

On March 11, 2011, a magnitude 9.0 earthquake struck off the coast of the Japanese island of Honshu. Order at 1. The earthquake resulted in a large tsunami that caused extensive damage to the Fukushima Dai-ichi nuclear power plant site and a prolonged station blackout. *Id.* at 2-3. Eventually, operators lost the ability to cool the reactor core in some of the Fukushima Dai-ichi units, which resulted in core damage, high radiation levels, hydrogen production and containment failure at some of the units. *Id.* at 3. During the event, concern grew that the spent fuel in the spent fuel pool for one of the units was overheating and evaporating the water in the pool, exposing the fuel and causing a high-temperature reaction of steam and zirconium fuel cladding generating hydrogen gas. *Id.* at 2-3. However, subsequent analysis determined that the water level in the spent fuel pool did not drop below the top of the stored fuel and no significant fuel damage occurred. *Id.* at 3. In the Order the NRC explained that “[t]he lack of information on the condition of the spent fuel pools contributed to a poor understanding of possible radiation releases and adversely impacted effective prioritization of emergency response actions by decision makers.” *Id.*

Following the events at Fukushima, the NRC established a senior-level agency task force referred to as the Near-Term Task Force (“NTTF”) to evaluate the NRC's

regulations and processes and make recommendations regarding whether the NRC should make any changes to the Commission's regulatory requirements. The NTTF developed a set of recommendations that were provided to the NRC on July 12, 2011. "Near Term Report and Recommendations for Agency Actions Following the Events in Japan" (ADAMS ML111861807). Among other things, the NTTF recommended that licensees install instrumentation that would allow them to monitor the water level of spent fuel pools. *Id.* at 46. The NTTF also recommended that licensees be required to have seismically qualified means to spray water into spent fuel pools. *Id.*

These recommendations were refined and prioritized by the NRC Staff following interactions with stakeholders, as documented in "Recommended Actions To Be Taken Without Delay From the Near-Term Task Force Report," SECY-11-0125 (Sept. 9, 2011) (ADAMS ML11245A127) and "Prioritization of Recommended Actions To Be Taken in Response to Fukushima Lessons Learned," SECY-11-0137 (Oct. 3, 2011) (ADAMS ML11272A203).

On March 12, 2012, the NRC issued the Order to the affected licensees requiring reliable spent fuel pool instrumentation as a license condition. Order at 12. The same day, the NRC also issued an "Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Effective Immediately)" (Mar. 12, 2012) (ADAMS ML12054A735) ("BDB Order"). The BDB Order required affected licensees to "develop, implement and maintain guidance and strategies to restore or maintain core cooling, containment, and [spent fuel pool] cooling capabilities in the event of a beyond-design-basis external event." BDB Order at 6. Both the Order and the BDB Order required the affected licensees to comply with the new requirements

described in Attachment 2 and to submit an answer to the Order within twenty days informing the NRC, *inter alia*, whether the licensee consented to the Order. Order at 11; BDB Order at 10. Entergy submitted answers consenting to both the Order and the BDB Order with respect to each of its affected plants on March 30, 2012.¹ Thereafter, on April 2, Petitioner filed its Hearing Request. On April 12, Petitioner filed a Supplement to its Hearing Request seeking to provide additional materials to support its Hearing Request.

Both the Order and the BDB Order expressly and unambiguously limited the scope of any hearing in these matters to the question of whether the orders should be sustained: “If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.” Order at 11; BDB Order at 10.

II. Argument

Where a Commission order is at issue, as in the present case, “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.” *State of Alaska Dep’t of Transp. and Pub. Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 405 (2004) (“ADOT”), citing *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004) (“FirstEnergy”). If that question is answered in the affirmative, the Licensing Board must then consider whether the petitioner has demonstrated “an interest affected by the

¹ See, e.g., “Entergy’s Answer to the March 12, 2012, Commission Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Order Number EA-12-051) Pilgrim Nuclear Power Station,” Docket No. 50-293, License No. DPR-35 (Mar. 30, 2012) (ADAMS ML12093A343); “Entergy Nuclear Operations, Incorporated’s Answer to March 12, 2012 Commission Order Modifying License With Regard To Requirements For Mitigation Strategies For Beyond-Design Basis External Events (Order Number EA-12-049) Pilgrim Nuclear Power Station,” Docket No. 50-293, License No. DPR-35 (Mar. 30, 2012) (ADAMS ML12093A340).

proceeding” – i.e., standing – and whether the petitioner has submitted at least one admissible contention. *ADOT*, 60 NRC at 405; 10 C.F.R. § 2.309(a).

In the present case, the Licensing Board should deny the Petitioner’s Hearing Request because none of those tests are satisfied: (1) the issues the Petitioner seeks to raise are outside the scope of this proceeding; (2) the Petitioner lacks standing because it is not adversely affected by the Order; and (3) the Petitioner fails to plead an admissible contention.

A. Petitioner’s Request is Beyond the Scope of this Proceeding

The Petitioner’s Hearing Request must be denied because the Commission defined the scope of this proceeding in the Order and the Petitioner’s Hearing Request is outside the Commission-defined scope of this proceeding.

1. Commission May Limit the Scope of a Proceeding

The Commission has authority under Section 189(a) of the Atomic Energy Act of 1954 (“AEA”) to define the scope of a hearing on an order. *See Bellotti v. NRC*, 725 F.2d 1380, 1381-82 (D.C. Cir. 1983) (“Bellotti”), *aff’g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 58 (2004) (“Maine Yankee”); *Pub. Serv. Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 440-42 (1980) (“Marble Hill”). This authority to define the scope of a hearing includes the authority to limit the hearing to the question of whether the order should be sustained. *Bellotti*, 725 F.2d at 1381; *see also ADOT*, 60 NRC at 405; *FirstEnergy*, 60 NRC at 157–58 (2004); *Maine Yankee*, 59 NRC at 56. That is exactly what the Commission has done in this case.

In the *Bellotti* case, the Commission found deficiencies in management of the Pilgrim nuclear power plant (“Pilgrim”) by the then-licensee, Boston Edison Company, and issued an enforcement order modifying the Pilgrim operating license to require development of a safety plan for reappraisal and improvement of management functions and imposing a civil penalty on the utility. *Bellotti*, 725 F.2d at 1381. The Attorney General of Massachusetts petitioned to intervene and requested a hearing to address the adequacy of the safety plan, the plant's continued operation, the nature of necessary improvements, and the adequacy of implementation of required changes. *Id.* Noting its authority to 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, the Commission denied the petition because the proceeding at issue was limited solely to “whether the order should be sustained,” which the petitioner did not challenge when it proposed additional measures that went beyond the NRC order. *Id. at 1385.*

The U.S. Court of Appeals for the D.C. Circuit upheld the Commission’s decision to deny the petition. Specifically, the *Bellotti* court upheld the Commission’s authority under the AEA to limit the scope of its hearings to the issues raised by the Commission order in question:

To read the statute [section 189(a) of 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.... [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...

Bellotti, 725 F.2d at 1381; *see also Sequoyah Fuels Corp.* (UF₆ Production Facility), CLI-86-19, 24 NRC 508, 513 (1986). The court held that the petitioner did not have the right to “define the agenda and substance of the proceeding.” Rather, that authority lies with the Commission. *Bellotti*, 725 F.2d at 1381, 1383. Based on that conclusion, the court determined that the “petitioner is not affected by the proceeding as the Commission has limited it, and so he is not entitled to intervene pursuant to section 189(a) [of the AEA].” *Bellotti*, 725 F.2d at 1383.

Subsequent Commission decisions have followed *Bellotti*: “[t]he Commission may lawfully limit a hearing to consideration of the remedy or sanction proposed in the order.” *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 70 (1994) (citing *Bellotti*, 725 F.2d at 1381-82 and *Marble Hill*, 11 NRC at 440-41); *see also Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-97-13, 46 NRC 195, 206 (1997) (a “proceeding [on an enforcement order] necessarily restricts the scope of remedies that intervenors may demand to those set out by the NRC staff in its enforcement order”).

The Commission also applied *Bellotti* when ruling on requests for hearing on the NRC’s post-September 11th security orders. For example, in *Maine Yankee Atomic Power Company* (Maine Yankee Atomic Power Station), LBP-03-26, 58 NRC 396 (2003), the Licensing Board denied a petition for a hearing submitted by the State of Maine on an NRC post-September 11th security order. Maine sought a hearing on the order because it believed the order should impose additional requirements on licensees, in particular on Maine Yankee Atomic Power Company. As here and in the *Bellotti* case, the Commission had limited any hearing on the order at issue to whether the order should

be sustained. The Licensing Board in the proceeding applied the *Bellotti* precedent and denied the petition for a hearing on the order. *Id.* at 401. The Licensing Board found that Maine did not oppose the substance of the order, but rather sought “additional agency action.” *Id.* at 400. The Board denied the hearing request, concluding that Maine sought to litigate concerns beyond the scope of the order (*id.*), and the Commission affirmed, noting that “*Bellotti*...holds that NRC hearing petitioners may not seek additional measures going beyond the terms of the enforcement order triggering the hearing request.” *Maine Yankee*, 59 NRC at 58.

The Commission has pointed out that it should not be expected that individuals will routinely be made parties to hearings on such orders:

In practicality it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders. That's because such orders presumably enhance rather than diminish public safety. Nevertheless, the notice of opportunity for hearing provides the public a "safety valve" because an order conceivably may remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation.

ADOT, 60 NRC at 406 n.28. Carefully circumscribing the opportunity to obtain a hearing is consistent with the rationale underlying *Bellotti*: “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.” *Id.* at 405.² Thus, under *ADOT*, a petitioner must demonstrate that the order at issue diminishes public safety, which the petitioner cannot accomplish by asserting that the order should do more than it does.

² The Licensing Board in the *Maine Yankee* case noted that the appropriate means for seeking measures beyond those defined in the order is through a Section 2.206 petition—i.e., a petition for enforcement action filed pursuant to 10 C.F.R. § 2.206. *See* 58 NRC at 400.

2. The Issues Petitioner Seeks to Raise Are Beyond the Scope of this Proceeding

The Petitioner here proffers a single contention on the Order:

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.³

Hearing Request at 1 (emphasis added). In so doing, the Petitioner clearly seeks to raise issues and request remedies (re-equipping spent fuel pools and dry cask storage) that go well beyond the hearing scope specified in the order, and beyond the license modifications and new safety requirements imposed in the Order. Indeed, as noted previously, the Order specifies that any hearing will be limited to a consideration of a single issue: “whether this Order should be sustained.” Order at 11. As described above, the *Bellotti* court expressly recognized that the Commission acts within its authority when it limits the scope of any hearing on an order to whether the order should be sustained. 725 F.2d at 1381. Likewise, *Bellotti* held that a petitioner does not have not have the right to “define the agenda and substance of the proceeding,”⁴ but rather the petitioner’s hearing request and proposed contention must fall within the scope of the proceeding defined by the Commission in the order. Because the Petitioner’s Hearing Request fails this basic test and instead argues that the Order should do more (that is, the Order is “insufficient” (Hearing Request at 1) because the agency should take additional action, specifically the Commission should issue a supplemental order adopting the Petitioner’s

³ It appears that the Petitioner is missing several words in its contention, so we are not entirely sure how this contention is intended to read.

⁴ *Bellotti*, 725 F.2d at 1381, 1383.

positions (Hearing Request at 11)), in accordance with *Bellotti, Maine Yankee* and like Commission precedents, the Petitioner's Hearing Request should be denied.

B. Petitioner Lacks Standing in This Proceeding

The Petitioner argues that it has standing to seek a hearing on the Order because: it "is a non-profit citizens' organization that serves the public interest in issues regarding the Pilgrim Nuclear Power Station" (Hearing Request at 1-2); "[m]any of its members live within the immediate neighborhood of the reactor, and others either within the 10-mile Emergency Planning Zone or within the 50-mile ingestion pathway" (*id.* at 2); and its representative, Mary Lampert, resides and works within approximately six miles of Pilgrim. *Id.* The Petitioner also appears to claim that it has standing because it is a party to the Pilgrim license renewal proceeding, where it raised safety issues regarding Pilgrim's spent fuel pool. *See id.*

The Petitioner's alleged harms caused by the Order appear to be that "if Pilgrim, is allowed to operate without a requirement for low-density, open-frame pool storage and dry cask storage for assemblies > 5 years old that there will be an unacceptable risk to the environment jeopardizing the health, safety, property and finances of Petitioners' members." Hearing Request at 3.

As explained in more detail below, the Petitioner fails to establish standing in this proceeding because it: (1) is not entitled to a hearing on the Order; (2) has suffered no injury from the Order and therefore fails to meet the Commission's general standing requirements in 10 C.F.R. § 2.309(d); (3) does not have presumptive standing in this proceeding; (4) does not have representational standing in this proceeding; (5) does not

have organizational standing in this proceeding; and (6) does not demonstrate standing as a result of Petitioner's involvement in other proceedings.

1. Petitioner Is Not Entitled to a Hearing

The Petitioner, in addition to raising concerns outside the scope of the proceeding, does not satisfy the standing requirements of 10 C.F.R. § 2.309(d), because it fails to demonstrate cognizable interests that could be affected by the outcome of the proceeding. *See Bellotti*, 725 F.2d at 1381. As discussed herein, the rights of any person to request a hearing and the scope of the issues that may be considered in a hearing challenging an order are determined by the terms of the order. *Id.* at 1381-82. As stated in the Order at issue here, only persons “adversely affected” by the Order have the right to request a hearing. Order at 11. Contrary to this requirement, the Petitioner does not contest the terms of the Order, but rather seeks to litigate issues that are outside the scope of the Order and seeks remedies that go beyond the conditions and new safety requirements imposed by the Order. Thus, under the terms of the Order, the Petitioner is not adversely affected and has no right to a hearing on the matters it seeks to litigate.

2. Petitioner Has Suffered No Injury from the Order

The Petitioner fails to allege an injury caused by the Order, as required under 10 C.F.R. § 2.309(d). In evaluating whether a petitioner has satisfied the general standing requirements of § 2.309(d), the Commission has stated that:

To demonstrate such a “personal stake,” the Commission applies contemporaneous judicial concepts of standing. Accordingly, a petitioner must (1) allege an “injury in fact” that is (2) “fairly traceable to the challenged action” and (3) is “likely” to be “redressed by a favorable decision.”

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (citations omitted). Additionally, the injury must be “concrete and particularized,” and not “conjectural” or “hypothetical.” *Crowe Butte Resources, Inc.* (North Trend Expansion Project License Amendment), LBP-08-6, 67 NRC 241, 271 (2008); *see also Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).

The Petitioner’s alleged harm is that, if the NRC does not impose additional requirements regarding low-density, open-frame pool storage and dry cask storage for assemblies greater than five years old, “there will be an unacceptable risk to the environment jeopardizing the health, safety, property and finances of Petitioners’ members.” Hearing Request at 3. This assertion does not support standing because the alleged harm has nothing to do with the limited scope of whether the measures covered by the Order should be sustained. The Order, while not taking the action requested by the Petitioner, imposes new requirements for spent fuel pools. In addition, the alleged harm is not “traceable” to the Order because it is not caused by the Order. As explained in the *ADOT* case, the Order “presumably enhance[s] rather than diminish[es] public safety” because it places additional safety restrictions upon licensees. *ADOT*, 60 NRC at 406 n.28. As further provided in *ADOT*, an individual may not request a hearing in order to impose a stricter burden on the licensee, because the individual is not injured by the lesser burden imposed in an NRC order. 60 NRC at 405 (citing *FirstEnergy*, 60 NRC at 157). The mere fact that an order does not advance the petitioner’s position does not establish standing. *ADOT*, 60 NRC at 406. To decide whether an individual’s hearing request should be granted, the relevant comparison is the individual’s position with and

without the order—the question is not whether the individual’s position would be improved by some hypothetical substitute order. *Id.* An individual “is not adversely affected by a Confirmatory Order that improves the safety situation over what it was in the absence of the order.” *Id.*

Here, the Petitioner has not shown that it is adversely affected by the Order. Rather, it requests additional measures that it would like reflected in a supplemental order, that go beyond those imposed by the Order.⁵ The Petitioner thus fails to allege an injury in fact resulting from the Order.

Additionally, the Petitioner’s harm cannot be redressed by a favorable decision. Because the Commission has limited the scope of the Order to whether the Order should be sustained, the only possible decisions are to sustain or not sustain the Order. The remedy requested by the Petitioner, i.e., to expand the Order to require the additional measures requested by the Petitioner, is not available. *See ADOT*, 60 NRC at 406.

The Petitioner also asserts a general concern for public health and safety and the environment. *See, e.g.*, Hearing Request at 2, 3. This concern is likewise insufficient to establish standing. As the Commission has held, "a mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing." *Portland* at 613. Thus, in this proceeding, Petitioner’s general concern for public health and safety is likewise not sufficient to establish standing.

⁵ *Bellotti*, 725 F.2d at 1383 (explaining “automatic participation at a hearing may be denied only when the Commission is seeking to make a facility’s operation safer”); *see also Maine Yankee*, 59 NRC at 56 n. 14 (stating “a person whose interest cannot be affected by the issues before the Commission in the proceeding lacks an essential element of standing”).

3. The Petitioner Does Not Have Presumptive Standing

In claiming that many of its members live or work near Pilgrim, including “within the 10-mile Emergency Planning Zone or within the 50-mile ingestion pathway,” it appears that the Petitioner is trying to establish that it has presumptive standing. This claim should be rejected because proximity alone is insufficient to establish standing in a hearing on the Order. Commission case law makes clear that, outside of the context of a construction permit or operating licensing proceeding, mere proximity to a plant is not sufficient to confer standing in every proceeding involving the plant. *See, e.g., Consumers Energy Co.*, (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007); *Oyster Creek*, LBP-06-07, 63 NRC at 195 (2006), *citing GPU Nuclear Inc.*, (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). In proceedings with a limited scope, such as a hearing on an order, a petitioner must show that an outcome of the proceeding itself, as distinct from the general operation of the plant, will adversely affect the petitioner's interests. *GPU Nuclear Inc.* 51 NRC at 213. By contrast, the harm the Petitioner alleges here rests entirely on the continued operation of Pilgrim—not on the Order.⁶

“[G]eneral references to members’ proximity” to a facility, which is what the Petitioner asserted here, are “too imprecise to meet [the Commission’s] requirements for proximity-based standing.” *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 526 (2007). For example, in a proceeding on an exemption request, the Commission held that a bare claim that petitioners resided within 50 miles of the plant and that operation would impact their health and safety, was not sufficient to

⁶ As set forth in the Hearing Request (at 3), the Petitioner alleges that “if Pilgrim is allowed to operate without a requirement for low-density, open frame pool storage and dry cask storage for assemblies >5 years old” the Petitioner will be harmed.

establish standing; the petitioners were required to show a causal link between the proceeding and harm to their interests. *Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2)*, CLI-00-5, 51 NRC 90, 98 (2000). Similarly, in a license amendment proceeding, the Commission held that petitioner's residence approximately 10 miles from a nuclear power plant could not establish standing, because the petitioner could not show that the license amendment entailed an obvious potential for offsite radiological releases or would otherwise adversely affect his interests. *Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2)*, CLI-99-4, 49 NRC 185, 188-93 (1999).

Thus, the Petitioner's alleged proximity to Pilgrim, absent a demonstration of a harm caused by the Order it seeks to challenge, is insufficient to establish standing.

4. The Petitioner Does Not Have Representational Standing

By virtue of the Petitioner's failure to meet the requirements for presumptive standing based on proximity of one of its members, the Petitioner also fails the first prong of the test for representational standing, i.e., that at least one member fulfills the standing requirements. An organization may establish standing to intervene based on organizational standing (proof that its own organizational interests could be adversely affected by the proceeding, as discussed in more detail below) or representational standing (based on the standing of its members). When an organization seeks to establish representational standing, it must (1) show that at least one of its members may be affected by the proceeding, (2) identify that member by name and address, and (3) show that the member "has authorized the organization to represent him or her and to request a hearing on his or her behalf." See, e.g., *Consumers Energy Co.*, CLI-07-22, 65 NRC at 409. The Petitioner has not provided sufficient information to demonstrate representation

standing. The Hearing Request includes a vague statement that “[m]any of [the Petitioner’s] members live within the immediate neighborhood of the reactor, and others either within the 10-mile Emergency Planning Zone or within the 50-mile ingestion pathway.” Hearing Request at 2. However, only one member’s name is provided, and neither her address nor an affidavit or declaration that the organization is authorized to request a hearing on her behalf is included. Consequently, the Petitioner has no claim of representational standing in this proceeding.⁷

5. The Petitioner Does Not Have Organizational Standing

The Petitioner also fails to provide sufficient information to establish standing as an organization. Organizations may intervene in their own right as long as they satisfy the same standing requirements as individuals seeking to intervene. *Consumers Energy Co.*, 65 NRC at 411 (citing *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-052, 33 NRC 521, 528 (1991)). However, “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient, by itself, to render the organization ‘adversely affected’ or ‘aggrieved’” to confer standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Therefore, the Petitioner’s sole statement in its Hearing Request, that it “serves the public interest in issues regarding the Pilgrim Nuclear Power Station,” is insufficient to establish organizational standing.⁸

⁷ Additionally, the Petitioner fails to meet the second prong of the representational standing test because it does not identify in the Hearing Request the members upon which it is relying for standing by name and address.

⁸ See e.g., *Florida Power and Light Co.*, 33 NRC at 529 (stating “an organization’s asserted purposes and interests, whether national or local in scope, do not, without more, establish independent organizational standing”); *Consumers Energy Co.*, 65 NRC at 411 (concluding that the “promotion of ‘the public interest, environmental protection, and consumer protection’ are broad interests shared with many others and too general to constitute a protected interest” under the AEA or NEPA).

6. The Petitioner Does Not Have Standing Due to Its Participation in Other Licensing Proceedings⁹

The Petitioner does not have standing in this proceeding simply by virtue of its participation in other proceedings concerning Pilgrim. The mere fact that a petitioner was found to have standing in a prior proceeding involving that facility does not automatically confer standing in a different proceeding concerning that facility; the petitioner must independently demonstrate its standing in each proceeding. *See Nuclear Fuel Servs., Inc.* (Special Nuclear Facility) (Confirmatory Order), LBP-07-16, 66 NRC 277, 300 (2007) (“NFS”) (concluding that “the Sierra Club’s arguments that it has standing because it had standing in past licensing actions involving the NFS facility... are insufficient to meet the three-part framework the Board uses for standing inquiries. This inquiry is conducted by reviewing the alleged injury stemming from the regulatory action at issue, not that asserted to arise generally from the facility or the Licensee involved in the proceeding.”). Thus, the fact that the Petitioner intervened in the Pilgrim license renewal proceeding does not confer standing here.

C. Petitioner Fails to Plead an Admissible Contention

The Petitioner’s Hearing Request should be denied because it fails to set forth an admissible contention. Under the Commission’s rules of practice, petitioners seeking a hearing on an NRC order must meet two fundamental requirements: (1) establish

⁹ We note that the Petitioner, although *pro se*, is an experienced litigant in NRC licensing proceedings. Thus, the Petitioner should not be afforded any leniency to correct deficiencies in its Hearing Request. *See e.g.*, “Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima” (Nov. 18, 2011) (ADAMS ML11322A080); “Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy’s Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station” (Jan. 20, 2011) (ADAMS ML110200267); “Request for Hearing and Petition to Intervene by Pilgrim Watch” (May 25, 2006) (ADAMS ML061630125). In fact, it appears that Pilgrim Watch director Mary Lampert has been involved in Pilgrim proceedings for the last 25 years. *See* http://www.boston.com/news/local/massachusetts/articles/2012/03/11/duxbury_resident_keeps_up_the_fight_against_pilgrim/.

standing under the provisions of 10 C.F.R. § 2.309(d), and (2) propose at least one admissible contention under 10 C.F.R. § 2.309(f). As discussed above, the Petitioner fails to demonstrate standing in this proceeding. For the reasons discussed below, the Petitioner also fails to plead an admissible contention under § 2.309(f).

1. Applicable Legal Requirements

The legal requirements for contention admissibility are well established; they require that petitioners must “set forth with particularity” the contentions sought to be raised. 10 C.F.R. § 2.309(f)(1). Among other requirements, as set forth 10 C.F.R. § 2.309(f)(1), for each contention the petition must:

- Provide a specific statement of the issue of law or fact to be raised or controverted (§ 2.309(f)(1)(i));
- Provide a brief explanation of the basis for the contention (§ 2.309(f)(1)(ii));
- Demonstrate that the issue raised in the contention is within the scope of the proceeding (§ 2.309(f)(1)(iii));
- Demonstrate that the issued raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding (§ 2.309(f)(1)(iv));
- 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 (§ 2.309(f)(1)(v)); and
- Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. § 2.309(f)(1)(v).

The § 2.309(f)(1) contention pleading criteria are both mandatory and inclusive. Thus, a “[f]ailure to comply with any of these requirements is grounds for dismissal of a contention.” *NFS*, 66 NRC at 286 (emphasis added).

The NRC's rules of practice "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." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-119 (2006) (footnotes omitted). The purpose of the basis requirements for contentions is to: (1) assure that a contention raises a matter appropriate for adjudication in a particular proceeding; (2) establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *See Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); *see also Arizona Pub. Serv. Co.* (Palo Verde Nuclear Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991).

As the Licensing Board has held, a contention must be rejected where it: constitutes an attack on applicable statutory requirements or the Commission's regulations; is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be; seeks to raise an issue which is not proper for adjudication in the proceeding; or seeks to raise an issue which is not concrete or litigable.¹⁰

¹⁰ *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Philadelphia Elec., Co.* 8 AEC at 20-21); *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 (1983); *Metropolitan Edison Co.* 18 NRC at 1268-69; *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 365 (1998); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 151 (2001).

2. Petitioner's Contention Must be Rejected under the Requirements of § 2.309(f)(1)

As noted above, the Petitioner raises a single contention for consideration in this proceeding. The proposed contention alleges that the Order 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.” (Hearing Request at 3). As discussed below, this contention does not meet the requirements of § 2.309(f)(1).¹¹

First, the Petitioner's contentions are inconsistent with the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi) because they are not within the scope of this proceeding under the *Bellotti* precedent and therefore are not material to the NRC's findings in this proceeding. *See supra* Sections A and B;¹² *ADOT*, 60 NRC at 404 (finding that a petitioner may not challenge an NRC order imposing additional safety requirements on the grounds that the order is “too weak or otherwise insufficient,” rather,

¹¹ Entergy notes that the Hearing Request proffers a single technical contention based on an allegation of harm to the Petitioner's health and safety (Hearing Request at 1), but that the Petitioner cites to case law concerning an agency's environmental analysis under the National Environmental Policy Act (“NEPA”) to support its claim that the proposed contention falls within the scope of the proceeding. *See* Hearing Request at 3. The Commission recognizes two types of contentions—technical contentions, litigated under the AEA, and environmental contentions, litigated under NEPA. *See Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993). However, the Petitioner's reliance on NEPA case law to establish that the proposed contention falls within the scope of the proceeding is misplaced; under NRC case law, the right of interested persons to intervene as a party in a licensing proceeding stems from the AEA, specifically Section 189(a), not NEPA. *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 6 (2001). Moreover, Section 189(a) of the AEA does not provide an unqualified right to a hearing, but rather is limited by the NRC procedural regulations governing the filing of petitions to intervene and on the proffering of contentions. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1045 (1983) (citations omitted); 10 C.F.R. § 2.309. Thus NEPA case law and NRC NEPA regulations do not govern the scope of a hearing; rather the scope of the hearing falls under the NRC's Part 2 procedural regulations. *See also Bellotti*, 725 F. 2d at 1381 (finding that the Commission, not the Petitioner, has the right to “define the agenda and substance of the proceeding.”) Additionally, the cases referenced in the Hearing Request do not stand for the positions raised by the Petitioner; however, because NEPA case law does not govern the procedural issue of admissibility, we do not address that matter herein.

¹² *Bellotti*, 725 F.2d at 1383 (“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 § 2.206's petition procedures.”).

the only issue in such proceedings is “whether the order should be sustained. Boards are not to consider whether such orders need strengthening.”). Although the Petitioner superficially questions the NRC’s basis for the Order (Hearing Request at 5-11), it does so only to the extent that the Order did not adopt its preferred safety requirements, which the Petitioner proposed should be adopted in a supplemental order. *See id.* at 1, 11. The Petitioner cannot challenge the assumptions of the Order simply to justify its preferred alternative remedy that is outside the scope of this proceeding. Contrary to the controlling *Bellotti* precedent, the Petitioner seeks through its contention to impose additional requirements. It thus fails to meet the requirement of § 2.309(f)(1)(iii) that the issue raised in the contention falls within the scope of the proceeding. Moreover, because the proposed contention falls outside the scope of the proceeding, it is not material to the NRC findings made in the Order, as required by § 2.309(f)(1)(iv), nor can it present a genuine issue on a “material issue of law or fact” contained in the Order, as required by § 2.309(f)(1)(vi).

Second, the Petitioner’s contention is inconsistent with the requirements of § 2.309(f)(1)(v) because the Hearing Request fails to provide a concise statement of facts with references to the relevant supporting documents to support its contention. The Petitioner asserts that “[t]he facts and expert opinion that support PW’s contention are stated in: The Massachusetts Attorney General’s Request for a Hearing and Petition for Leave to Intervene With respect to Entergy Nuclear Operations Inc.’s Application for Renewal of the Pilgrim Nuclear Power Plants Operating License and Petition for Backfit Order Requiring New Design features to Protect Against Spent Fuel Pool Accidents, Docket No. 52-293, May 26, 2006” and references numerous supporting documents.

Hearing Request at 4. The wholesale incorporation of large documents does not constitute a concise statement of facts under § 2.309(f)(1)(v). *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209 (1976). Thus, the Petitioner's reference to the Massachusetts Attorney General's filing and numerous supporting documents fails to satisfy the requirements of § 2.309(f)(1)(v).¹³

Additionally, merely referencing or attaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention. *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 298-99 (1988); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 254 (2007). Thus, the Petitioner's general reference to documents and expert witnesses that the Petitioner expects will provide testimony, without supporting affidavits from those witnesses (Hearing Request at 4, Section IV; *see* April 12 Supplement to the Hearing Request), is insufficient to meet the requirements in § 2.309(f)(1)(v).¹⁴

¹³ In any event, many of the documents and positions offered by the Petitioner have been brought to the Commission's attention before and consistently rejected. *See, e.g., Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-11-35, 74 NRC ___, slip op. (Nov. 28, 2011), *aff'd* CLI-12-06 (Mar. 8, 2012) (ADAMS ML12068A187) (considering and rejecting positions Pilgrim Watch relies on in the Gordon Thompson report, "New and Significant Information from the Fukushima Daiichi Accident in the Context of Future Operation of the Pilgrim Nuclear Power Plant, A Report for the Office of the Attorney General Commonwealth of Massachusetts" (June 1, 2011), when rejecting Pilgrim Watch's proposed post-Fukushima spent fuel pool contention in the Pilgrim relicensing proceeding.); "The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking," 73 Fed. Reg. 46204 (Aug. 8, 2008), *aff'd New York v. NRC*, 589 F.3d 551 (2d Cir. 2009) (*per curiam*) (In a rulemaking proceeding decision subsequently upheld by the Second Circuit, the Commission considered and rejected the Gordon Thompson report "Risks of Pool Storage of Spent Fuel at Pilgrim Nuclear Power Station and Vermont Yankee, a Report for the Massachusetts Attorney General" (May 2006) and the National Academy of Sciences report, "Safety and Security of Commercial Spent Nuclear Fuel Storage" (2006), on which Petitioner relies.).

¹⁴ The Petitioner submitted a hearing request with a similar type of generalized support, which was rejected by the Licensing Board in the Pilgrim license renewal proceeding. *See* "Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima" at 5-6, 12-17, 20-21 (Jun. 1, 2011) (ADAMS ML111530448); Memorandum and Order Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident, LBP-11-23, 74 NRC __ (Sept. 8, 2011) (ADAMS ML11251A206). In that case, the Licensing Board found, among other things, that

3. **Petitioner's Contention Must be Rejected under Applicable Case Law**

The Commission has held that a contention must also 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.

See, e.g., Pub. Service Co. of New Hampshire, n. 9 supra. Thus, the Petitioner's contention must be rejected under the Commission's precedent if any one of the above-listed criteria is met.

As explained above, the Petitioner's contentions raise issues that are not proper for adjudication within the scope of this proceeding under (iv) above. Accordingly, the Petitioner's contentions must be rejected.

The Petitioner's proposed contention must also be rejected pursuant to (ii) and (iii) above because the Petitioner's contention challenges NRC regulations and amount to nothing more than the Petitioner's generalized view of what the Commission's policies should be. The Petitioner essentially claims in the proposed contentions that the NRC's current requirements are inadequate because they do not require licensees to adopt the additional measures proposed by the Petitioner. With the Order—as with the Commission's other post-Fukushima orders addressing hardened venting requirements and mitigation of beyond design basis external events—the NRC is adjusting its regulatory requirements to incorporate insights gained from Fukushima. In seeking to

contrary to the requirements in § 2.309(f)(1)(v), "Pilgrim Watch's contention lacks adequate basis, instead relying upon speculation and non-expert information." LBP-11-23 at 37.

impose additional requirements that go beyond the NRC's orders and existing regulations, the Petitioner is challenging the adequacy of the Commission's regulatory scheme, contrary to (ii) and (iii) above. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987) (stating that a contention presents an impermissible challenge to the Commission's regulations by seeking to impose requirements in addition to those set forth in the regulations); *Pub. Serv. Co. of New Hampshire*, 16 NRC at 1656; *Florida Power and Light Co.*, 53 NRC at 159.

For example, the Petitioner challenges the Commission conclusion in the Order that "[i]n the case of spent fuel pools, compliance with existing regulations and guidance" is adequate. Hearing Request at 7, citing Order at 5. Thus, the Petitioner is clearly challenging the existing NRC regulations, contrary to (ii) above. To support its position that the spent fuel pools should be re-equipped with low-density, open frame racks, the Petitioner asserts that "reducing the probability of a pool fire should be NRC's priority." Hearing Request at 8. The Petitioner also asserts that "[t]he Order's focus on spent fuel pool instrumentation fails to address the real problem." Hearing Request at 3. The Petitioner is essentially asserting that the Commission's priorities should align with the Petitioner's priorities, and thus the Petitioner is clearly attempting to litigate a contention based on its generalized view of what NRC policy should be, in violation (iii) above.

By means of the Order and other actions it is taking, the NRC is moving forward with implementing policies and requirements based on insights learned from Fukushima. In the comment process on the NTTF, some suggested that additional or different requirements be imposed. As the Petitioner explains:

Stakeholders recommended that the spent fuel pool hazard be decreased by accelerating the transfer of irradiated fuel > 5 years out of the reactor in

dry storage, thereby reducing the density of the fuel remaining in the pools.

NRC instead assigned accelerated transfer of spent fuel to dry storage issues to Tier 3 - placed it on the back burner. Moreover, the staff has “determined that the current regulatory approaches to these issues are acceptable” and will “review new information that becomes available as a result of specific ongoing activities to confirm this conclusion and gain additional insights.” (*US Nuclear Power Safety One Year after Fukushima*, UCS, Lyman & Lochbaum, viii).

Hearing Request at 6 (emphasis added).¹⁵ Thus, it appears that the contention raised by the Petitioner here was already presented to the Commission and rejected.¹⁶

Finally, the Petitioner’s contention must be rejected under (v) above because it seeks to raise an issue that is not concrete enough to litigate. Although the Petitioner’s contention may appear concrete at first blush, because the Petitioner fails to meet the criteria of 10 C.F.R. § 2.309(f)(1)(v), and to provide a concise statement of facts with specific references to relevant supporting documents and evidence to support its contention, the proposed contention lacks concreteness. *See Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-15, Nuclear Reg. Rep. P 31617 (Jun. 17, 2010) at *2 (explaining that in order to ensure that parties and the Licensing Board are on notice of the issues to be litigated, contentions must be pled with particularity). The Petitioner’s Hearing Request claims to rely on

¹⁵ Although Petitioner laments that the Order is deficient because the NRC has not imposed the additional measures desired by the Petitioner, the agency has indicated that it will undertake additional actions regarding spent fuel pools. In addition to this, the NRC has also identified that it will address spent fuel pool issues, including strategies for maintaining spent fuel pool cooling capabilities, in subsequent agency actions, such as under the BDB Order. BDB Order at 6. As explained in the BDB Order, the agency will provide future guidance on this issue in a guidance document scheduled for issuance in August 2012. *Id.* at 4. Accordingly, it appears that the Petitioner will have several future opportunities to properly raise the concerns it improperly seeks to bring into this proceeding.

¹⁶ The appropriate avenue for the Petitioner to re-raise its concerns is not in a challenge to the Order, but rather: (1) through stakeholder comments on various actions the NRC is undertaking to address spent fuel pool enhancements; (2) through a § 2.206 petition; or (3) through a petition to intervene on a subsequent order, if any, involving the actions the Petitioner seeks to have the Commission impose.

filings made by the Massachusetts Attorney General in the Pilgrim relicensing proceeding to support its contentions, but it does not actually do so in its Hearing Request. Petitioner also claims to rely on a number of expert witnesses, none of whom provide affidavits of support to the Petitioner's proposed contentions. Hearing Request at 5. Instead, the Petitioner relies primarily on its own assertions with an occasional citation to a published article. *See generally* Hearing Request at 6-19. Thus, the Petitioner fails to provide enough specificity in and support for its contentions to make them suitable for litigation. For example, the Petitioner fails to specify the parameters for the pool to be considered "low-density" storage as it requests, such as number of assemblies, spacing, burnup, or time since discharge from the core. *See* Hearing Request at 11. Consequently, the Petitioner's contention must be rejected as not concrete enough to litigate under criteria (v) above.

III. Conclusion

For reasons set forth above, Petitioner's request for a hearing does not satisfy applicable requirements for a hearing request under the NRC's precedent or the requirements of 10 C.F.R. § 2.309. Accordingly, the Petitioner's Hearing Request should be denied.

Respectfully submitted,

/Signed electronically by Mary Anne Sullivan/

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ATTORNEYS FOR ENTERGY NUCLEAR OPERATING COMPANY AND
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Dated in Washington, D.C. this
27th Day of April 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. EA-12-051
All Power Reactor Licensees and Holders)	
of Construction Permits in Active or)	ASLBP No. 12-918-01-EA-BD01
Deferred Status)	

NOTICE OF APPEARANCES

Notice is hereby given that Mary Anne Sullivan, Daniel F. Stenger, Amy C. Roma, and Ruth M. Porter, all being attorneys at law in good standing admitted to practice before the courts of the District of Columbia, hereby each enter their appearance as counsel on behalf of Entergy Nuclear Operating Company and Entergy Nuclear Operations, Inc., in any proceeding related to the above-captioned matter.

Respectfully submitted,

/Signed electronically by Mary Anne Sullivan/

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ATTORNEYS FOR ENTERGY NUCLEAR OPERATING COMPANY AND
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CERTIFICATE OF SERVICE

I hereby certify that copies of “Entergy’s Answer to Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses With Regard to Spent Reliable Spent Fuel Pool Instrumentation,” and “Notice of Appearances,” each dated April 27, 2012, have been served upon the following persons by Electronic Information Exchange (EIE) on this 27th day of April 2012.

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