

April 27, 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of) EA-12-050
All Operating Boiling Water Licensees)
With Mark I and Mark II Containments) ASLBP No. 12-918-01-EA-BD01

**ENERGY’S ANSWER TO PILGRIM WATCH REQUEST FOR HEARING
REGARDING INSUFFICIENCY OF ORDER MODIFYING LICENSES WITH
REGARD TO RELIABLE HARDENED CONTAINMENT VENTS**

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 Reliable Hardened Containment Vents” (“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 operating boiling water reactor (“BWR”) licensees with Mark I and Mark II containments, including Entergy. “Order to Modify Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately),” EA-12-050 (Mar. 12, 2012) (ADAMS ML12054A694) (“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 reliable hardened containment vents in Mark I and Mark II BWRs. 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 ("SBO"). *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 recovery actions, operators "were significantly challenged in opening the hardened wetwell (suppression chamber) vents because of complications from the prolonged SBO, and high radiation fields that impeded access." *Id.* at 2-3. Fukushima Dai-ichi Units 1, 2, 3 and 4 use the Mark I containment design.

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 Mark I

and Mark II BWR licensees be required to ensure reliable hardened containment vents. *Id.* at 41-42.

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-11-0124 (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 all operating BWR licensees with Mark I and Mark II containments, including Entergy, modifying their licenses to impose new requirements for Mark I and Mark II plants to maintain reliable hardened containment vents. Order at 1. The new requirements for ensuring reliable hardened vents are detailed in Attachment 2 to the Order. The 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 9. Entergy submitted answers consenting to the Order with respect to each of its affected plants on March 30, 2012.¹ Thereafter, on April 2, Petitioner filed its Hearing Request, as well as a Supplement to its Hearing Request seeking to provide additional materials to support its Hearing Request.

The Order expressly and unambiguously limited the scope of any hearing in this matter to the question of whether the Order should be sustained: “If a hearing is held, the

¹ See, e.g., “Entergy’s Answer to the March 12, 2012, Commission Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Order Number EA-12-050) Pilgrim Nuclear Power Station,” Docket No. 50-293, License No. DPR-35 (Mar. 30, 2012) (ADAMS ML12093A342).

issue to be considered at such hearing shall be whether this Order should be sustained.”
Order at 11.

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 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.” *Bellotti*, 725 F.2d at 1381. Rather, that authority lies with the Commission. *Id.* at 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].” *Id.*

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

The Petitioner here proffers two contentions on the Order:

- (1) 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).
- (2) 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.

Hearing Request at 3 (emphasis added). In so doing, the Petitioner clearly seeks to raise issues and request remedies (installation of filters and a rupture disc) 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

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.

specifies that any hearing will be limited to a consideration of a single issue: “whether this Order should be sustained.” Order at 9. 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,”³ but rather the Petitioner’s hearing request and proposed contentions 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, that the Order is “insufficient” because the agency should take additional action), 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); “[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.*); 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 and because it wants to “redress inadequacies of past and future modifications to containment in the context of [the Order].”

³ *Bellotti*, 725 F.2d at 1381, 1383.

The Petitioner's alleged harms caused by the Order appear to be that "if Pilgrim, and other BWR Mark I and II reactors, is allowed to operate without filtered vents that are passively actuated by means of a rupture disc...there will be an unacceptable risk to the environment jeopardizing the health, safety, property and finances of Petitioners' members." Hearing Request at 2-3.

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 9. 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 require licensees, such as Pilgrim, to install specific kinds of filtered vents “there will be an unacceptable risk to the environment jeopardizing the health, safety, property and finances of Petitioners’ members.” Hearing Request at 2-3. 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 reliable hardened vents in Mark I and Mark II

BWRs. 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 beyond those imposed by the Order.⁴ 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.

⁴ *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”).

The Petitioner also asserts a general concern for public health and safety and the environment. 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.

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.⁵

⁵ As set forth in the Hearing Request (at 2), the Petitioner alleges that "if Pilgrim, and other BWR Mark I and II reactors, is allowed to operate without filtered vents..." the Petitioner will be harmed.

“[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 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.*, 65 NRC at 409. The Petitioner has not provided sufficient information to demonstrate representational 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 1. 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.⁶

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

⁶ 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.

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.⁷

6. The Petitioner Does Not Have Standing Due to Its Participation in Other Licensing Proceedings⁸

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 the same facility does not automatically confer standing in a different proceeding concerning the same 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

⁷ *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).

⁸ 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/

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 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)(vi).

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.⁹

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

As noted above, the Petitioner raises two issues for consideration in this proceeding. The proposed contentions allege that the Order is insufficient to protect public health, safety, and property because it fails to require licensees to install vent filters and because it fails to require licensees to ensure that the filtered vents are passively actuated by means of a rupture disc. Hearing Request at 2-3. Neither of the proposed contentions meets the requirements of § 2.309(f)(1).¹⁰

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

⁹ *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).

¹⁰ Entergy notes that the Hearing Request proffers two technical contentions based on an allegation of harm to the Petitioner's health and safety (Hearing Request at 2), 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 contentions fall within the scope of the proceeding. See Hearing Request at 6-7. 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 contentions fall 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.

findings in this proceeding. *See supra* Sections A and B;¹¹ *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, the only issue in such proceedings is “whether the order should be sustained. Boards are not to consider whether such orders need strengthening.”). Contrary to the controlling *Bellotti* precedent, the Petitioner seeks through its contentions to impose additional requirements. It thus fails to meet the requirement of § 2.309(f)(1)(iii) that the issue raised in the contention fall within the scope of the proceeding. Moreover, because the proposed contentions fall outside the scope of the proceeding, they cannot be material to the NRC findings made in the Order, as required by § 2.309(f)(1)(iv), nor can they 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 contentions are inconsistent with the requirements of § 2.309(f)(1)(v) because the Hearing Request fails to provide a concise statement of facts with specific references to the relevant supporting documents to support its contention.¹² The Petitioner generally asserts that it “relies on government documents, scientific materials, and reports from Japan” to support its contentions, but it does not actually do so. Hearing Request at 7. The Petitioner relies primarily on its own assertions with an occasional citation to an article in a trade journal or similar source. *See generally*

¹¹ *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.”)

¹² The Petitioner provides a statement of the basis of its contentions in Section E of the Hearing Request in accordance with § 2.309(f)(1)(ii). *See* Hearing Request at 8-24. This requirement, however, is distinct from the requirement to provide a concise statement of facts in accordance with § 2.309(f)(1)(v). The Petitioner apparently relies on the generalized assertions to meet the latter requirement, but those assertions are insufficient.

Hearing Request at 5-19. 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 7, Section D), fails to satisfy the requirements in § 2.309(f)(1)(v).

The Petitioner submitted a very similar hearing request, which was rejected by the Licensing Board in the Pilgrim license renewal proceeding. *Compare* Hearing Request at 3-4, 17-24 *with* 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), *aff’d* CLI-12-03 (Feb. 22, 2012) (ADAMS ML12053A104). In that case, where the Petitioner proposed a contention with a nearly identical basis to the proposed second contention in the present Hearing Request, the Licensing Board found, among other things, that 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.

3. Petitioner’s Contentions Must be Rejected under Applicable Case Law

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.

See, e.g., Pub. Service Co. of New Hampshire, n. 9 supra. Thus, the Petitioner's contentions 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 contentions must also be rejected pursuant to (ii) and (iii) above because the Petitioner's contentions challenge 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 spent fuel pool instrumentation and mitigation of beyond design basis external events—the NRC is adjusting its regulatory requirements to incorporate insights gained from Fukushima. Therefore, in seeking to 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.

Moreover, one of the issues the Commission has identified for further regulatory action is the issue of filtered vents. Order at 4-5. As the Commission states, "there are policy issues that need to be resolved before any regulatory action can be taken to require Licensees to install filtered vents." Order at 4. In this regard, the Order notes that the NRC Staff plans to submit a Policy Paper to the Commission on this issue in July 2012. Order at 5.¹³

Finally, the Petitioner's contentions must be rejected under (v) above because they seek to raise an issue that is not concrete enough to litigate. Although the Petitioner's contentions 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 provide a concise statement of facts with specific references to relevant supporting documents and evidence to support its contention, the proposed contentions lack 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 states that the Petitioner is relying on "government documents, scientific materials, and reports from Japan" to support its contentions, but it does not actually do so in its Hearing Request.

¹³ Rather than through a hearing on the present Order, the appropriate avenue for the Petitioner to raise the concerns set forth in the proposed contentions is: (1) in comments on any future rulemakings or other regulatory activities the Commission initiates on the subject, (2) in a request for agency action under § 2.206, or (3) in comments on any subsequent order that the NRC issues on filtered vents.

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 7. Instead, the Petitioner relies primarily on its own assertions with an occasional citation to a published article. *See generally* Hearing Request at 5-19. Thus, the Petitioner fails to provide enough specificity in and support for its contentions to make them suitable for litigation. For example, it is unclear from the Hearing Request whether the Petitioner is claiming that all BWR Mark I and II plants, all operating reactors, or just Pilgrim Nuclear Station should be equipped with filtered vents. *See* Hearing Request at 2-3. Moreover, the Petitioner does not specify what type of filtered vent (e.g, design, filter media, flow capacity or flow path) it would find acceptable or the criteria it would use to identify such equipment, or any parameters relating to the design, materials or operation of rupture disks. *See id.* at 5-15. Consequently, the Petitioner's contentions must be rejected as not concrete enough to litigate under criteria (v) above.

III. Conclusion

For the 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
ENTERGY NUCLEAR OPERATIONS, INC.

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)	EA-12-050
All Operating Boiling Water Licensees)	
With Mark I and Mark II Containments)	ASLBP No. 12-918-01-EA-BD01

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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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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With Mark I and Mark II Containments)	ASLBP No. 12-918-01-EA-BD01

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 Reliable Hardened Containment Vents,” 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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