

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARDS

Before Administrative Judges:

Alan S. Rosenthal, Chairman
E. Roy Hawkens
Dr. Anthony J. Baratta

In the Matters of

All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately)

Docket No. EA-12-050
ASLBP No. 12-918-01-EA-BD01

All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status: Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately)

Docket No. EA-12-051
ASLBP No. 12-918-01-EA-BD01

May 9, 2012

MEMORANDUM AND ORDER
(Scheduling Oral Argument)

Before this Licensing Board are the petitions of Pilgrim Watch, joined in separate petitions by Beyond Nuclear, seeking a hearing with regard to two orders entered by the NRC Staff in the wake of the March 11, 2011 catastrophic accident at the Fukushima Dai-ichi nuclear power plant in Japan. The first order is addressed to all operating boiling water reactor licensees with Mark I and Mark II containments and modifies, effective immediately, their licenses with regard to reliable hardened containment vents.¹ The second is addressed to all

¹ In the Matter of All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments; Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately), 77 Fed. Reg. 16,098 (Mar. 19, 2012).

power reactor licensees and holders of construction permits in an active or deferred status and modifies, also effective immediately, their licenses with regard to reliable spent fuel pool instrumentation.²

Filed in response to an opportunity to seek a hearing set forth in Federal Register notices pertaining to these orders, the basis of the petitions is that the orders are not adequate to meet the concerns stemming from the Fukushima accident that prompted the issuance of the orders.³ Grant of the petitions is opposed, on a wide variety of grounds, by both the NRC Staff and a number of the licensees to whom the orders are addressed. It appears that all of the affected licensees have acquiesced in the orders given that none likewise has sought a hearing to challenge their terms.

Upon its consideration of the Pilgrim Watch petitions⁴ and the oppositions thereto, the Board has concluded that the filings raise several issues that require further exploration at an oral argument. Accordingly, such an argument is hereby scheduled for 10 am (EDT) on June 7, 2012 at a location, yet to be determined, in or around Boston, Massachusetts. The participants in the argument will be a single counsel or other representative on behalf of each of the

² In the Matter of All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status: Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately), 77 Fed. Reg. 16,082 (Mar. 19, 2012).

³ Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Apr. 2, 2012); Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Spent Reliable Spent Fuel Pool Instrumentation (Apr. 2, 2012); see also Pilgrim Watch Request for Leave to Supplement Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Apr. 2, 2012); Pilgrim Watch Supplement to Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Spent Reliable Spent Fuel Pool Instrumentation (Apr. 12, 2012).

⁴ In addition to its petitions, Pilgrim Watch filed a reply, in which it responds to the NRC Staff's and licensees' opposition. Pilgrim Watch Reply to Answers to Pilgrim Watch Requests for Hearing (May 4, 2012).

following: Pilgrim Watch; the Pilgrim licensee; and the NRC Staff.⁵

For planning purposes, we assign 45 minutes a side for the presentation of argument.⁶ In fact, however, these time allocations might be enlarged or shortened during the course of the argument. In that regard, we stress that the purpose of the oral argument is not to provide the parties an opportunity either to rehearse the arguments advanced in their written submissions or to elaborate upon those submissions with new arguments that should have been, but were not, included in them. Once again, the oral argument is being held because, and only because, the Board has questions that it wishes the parties to address in aid of the Board's reaching an informed decision on the matters put before it.

To ensure that the participants will be fully prepared to address them, we are identifying now the principal questions that we intend to explore at the oral argument. It is likely, of course, that additional questions will occur to the Board during the course of the argument. Thus, the participants should be further prepared to address any issue that has been raised by the filings before the Board.

The questions upon which the parties are to direct their particular attention are as follows:

1. What significance, if any, attaches to the fact that, in terms, the Federal Register notices here-involved required those seeking a hearing, such as Pilgrim Watch and Beyond Nuclear, to satisfy only the standing criteria found in

⁵ Pilgrim Watch has established standing, if at all, just with relation to the Pilgrim facility. For its part, although claiming it has members who live, work, or recreate within fifty miles of facilities subject to the two orders under challenge, Beyond Nuclear does not provide any substantiation for that claim. In these circumstances, any relief that this Board might direct would appear to be restricted in scope to the Pilgrim facility.

Thus, there is considerable room for doubt as to the standing to oppose the petitions in hand of the other licensees subject to the orders. Accordingly, although we are accepting the filings of those licensees as having been submitted as amicus curiae, only the Pilgrim licensee is being permitted to participate in the oral argument. It appears, however, that there is not a significant difference between the position of the Pilgrim licensee and that of the other licensees on the issue of the acceptability of the Pilgrim Watch petitions.

⁶ For the purpose of allocating time, the NRC Staff and the Pilgrim licensee constitute one side.

10 C.F.R. § 2.309(d). Unlike in notices pertaining to previous enforcement orders,⁷ there is no mention in these Federal Register notices of the contention admissibility criteria contained in 10.C.F.R. § 2.309.

2. What significance, if any, attaches to the marked factual distinction between these enforcement orders and those in Bellotti⁸ and Alaska Transportation?⁹ Specifically, unlike the orders at bar, the Bellotti and Alaska Transportation orders assessed penalties for determined wrongdoing. Is it not generally understood in both judicial and quasi-judicial arenas that standing is lacking to challenge a punitive order on the claim that the assessed penalty should have been greater? If so, might the result in those cases be explained on a basis that has no applicability to the orders now under challenge?

3. Should the 50-mile proximity presumption be deemed to apply in determining whether the petitioners have established their standing to challenge the orders here-involved?

4. Assuming that the petitioners' challenges to the orders are not subject to rejection for other reasons, must they relate their claims that the orders are inadequate to the Pilgrim facility?

On or before noon on June 1, 2012, Jonathan Eser, Esq., the law clerk assigned to these proceedings, is to be provided with the names of the counsel or other representative who will be participating in the oral argument. Mr. Eser's e-mail address is Jonathan.Eser@nrc.gov and his telephone number 301-415-5880.

It is so ORDERED

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 9, 2012

⁷ See, e.g., In the Matter of State of Alaska Department of Transportation & Public Facilities, Anchorage, AK Confirmatory Order Modifying License, (Effective Immediately), 69 Fed. Reg. 13,594, 13,596 (Mar. 23, 2004).

⁸ Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983).

⁹ Alaska Dep't of Transp. & Pub. Facilities (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399 (2004).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
ALL OPERATING BOILING WATER)
REACTOR LICENSEES WITH MARK I)
AND MARK II CONTAINMENTS)
)
AND) Docket Nos. EA-12-050 and EA-12-051
)
ALL POWER REACTOR LICENSEES)
AND HOLDERS OF CONSTRUCTION)
PERMITS IN ACTIVE OR DEFERRED)
STATUS)
)
(Fukushima-Related Orders Modifying)
Licenses))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Scheduling Oral Argument)** have been served upon the following persons by Electronic Information Exchange (EIE).

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Dated at Washington, DC
this 9th day of May 2012

Original signed by Nancy Greathead
Office of the Secretary of the Commission