

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE 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))

August 6, 2012

**PILGRIM WATCH REPLY TO JULY 20, 2012 ANSWER OF ENTERGY NUCLEAR
OPERATING COMPANY AND ENTERGY NUCLEAR OPERATIONS, INC. IN
OPPOSITION TO PILGRIM WATCH'S PETITION FOR REVIEW**

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**PILGRIM WATCH REPLY TO ANSWER OF ENTERGY IN OPPOSITION TO
PILGRIM WATCH'S PETITION FOR REVIEW(July 30, 2012)**

Pilgrim Watch (“PW”) seeks leave to reply to Entergy’s July 30 Answer (“Ans.”). Entergy, like Staff, has *not* disputed that the Orders admit (i) that the status quo does not adequately protect public health and safety, (ii) that the Orders do not do so either, or that (iii) that the NRC has a statutory duty (not a discretionary choice) to do so. Entergy incorrectly argues, among other things, that PW does not say that the Orders should not be sustained; and contrary to the Orders,¹ that PW had to meet 2.309(f), in addition to showing that it had standing under 2.309(d). PW's reply will assist the Commission properly to resolve the issues before it.

Entergy’s Arguments Are Incorrect

1. PW Demonstrated That The Orders Should Not Be Sustained: The core of Entergy’s argument are its mistaken conclusions that PW “has sought to establish not that the Enforcement Orders should not be sustained, but that additional safety measures above and beyond what the orders require should be imposed” (Ans., 3), and that a hearing is limited to “cases where NRC’s actions may potentially cause harm” (Ans., 5). Entergy is wrong.

Entergy's position makes a mockery of the concept of meaningful public participation. If Staff's and Entergy's position here is accepted, the public could never meet the test for a hearing because even the most meager (and inadequate) order might add some tiny increase in safety. Therefore, under their test, there is no reason to even pretend that the public ever has the right to seek a hearing.

¹ The Staff says that it "forgot" to include 2.309(f) in the Orders' requirements (Trans., NRC Staff Ms. Safford, 13). The Commission could republish new Orders with such a requirement, but the Orders actually published govern this proceeding.

Beyond that, Entergy incorrectly assumes that injury/harm can result only from action, and not equally from inaction, particularly when that inaction is the NRC's undisputed (by either Entergy or Staff) failure to meet its statutory duty. It is absolutely clear that failure to fulfill a duty to act is legally improper. (See Barron's Law Dictionary: "A neglect or failure to do something, that which...is left undone," 175 So. 358,364: the "neglect to perform what the law requires," 109 N.E. 2d 385, 387; may be intentional or unintentional. An act of omission will not give rise to liability unless there is a duty to act.")

Having admitted in the Orders that the status quo does not protect public health and safety (Petition for Review, 7), the NRC has a non-discretionary duty to act and meet its statutory obligation. The Orders acknowledge that "Reasonable assurance of adequate protection of public health and safety ... are the fundamental NRC regulatory objectives." (Orders II) PW is harmed by the NRC's failure to meet either its "fundamental...objectives" or its non-discretionary statutory obligation to adequately protect public health and safety. (Pet. Rev., 8-13). The fact that this duty is statutorily required and non-discretionary sets this case apart from *Bellotti* and its progeny that are relied upon by Entergy, Staff and the Board. All three fail to recognize that NRC's inaction in these Orders harms PW by not providing what NRC is statutorily required to do - adequately protect public health and safety. A "step-wise" process, perhaps later adding some now undefined measures, is inadequate because it leaves the Petitioner and the public harmed by exposing them, for an indeterminate period to the excess risks of nuclear accidents beyond what Congress mandated is the acceptable level. (Trans., Webster, 80-81). This sets this case apart from *Bellotti* and its progeny that are relied upon by Entergy, Staff and the Board.

Entergy says that "[a]n intervenor must demonstrate some tangible harm resulting from a Commission enforcement action to be entitled to a hearing on that action under Section 189a."

(Ans., 10-11); and follows with the absurd argument that “*The petitioner here has failed to make the requisite showing that the Enforcement Orders do it harm, and therefore the Board properly denied Pilgrim Watch’s hearing request.*” (Ibid) Does Entergy really believe that the NRC's admitted failure to provide adequate protection does not cause "tangible harm?" Contrary to Entergy (Ans., 5), PW's right to a hearing was underscored in *Bellotti* where Judge Bork recognized that "[p]ublic participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare.² (*Bellotti*, ¶11) PW clearly has demonstrated its right to a hearing under the AEA. (Pet. Rev., pg., 7, note 7)

2. PW Met Standing Requirements: Entergy, unlike Staff, incorrectly argues that PW lacks standing. (Ans., 7-9) PW clearly did meet the standing requirements of §2.309 (d)(i-iv). (Petition Review, 12; Requests, Bases) Pilgrim NPP is visible from PW’s director & pro se representative’s primary residence, approximately 6 miles from Pilgrim across open water. PW’s contentions clearly say “the Order...is insufficient to protect public health, safety and property," and showed a causal nexus (Requests, Bases). These harms/injuries would be redressed if NRC either shut-down the reactors because they are out of compliance with statutory requirements, as the Orders admit and Entergy and Staff do not dispute, or issued orders that really do protect the public health and safety.

Although the Orders only required PW to meet the standing requirements in §2.309(d), PW also met what Entergy calls three judicial concepts of standing. (Ans., 8) “Injury in fact” is by necessity figurative because the Orders are directed to *mitigation in the event of* a severe accident. (EA-12-050 & EA-12-051 at 7) There is utterly no support, or rational basis, for

² Entergy's Answer correctly noted that the *Bellotti* did not include the statement that "where the public health and safety are concerned the right to a hearing is absolute." This statement fully comports with what Judge Bork's just quoted actual statement, but the quotation marks inadvertently were not deleted in late editing.

Entergy's apparent position (Ans., 8-9) that neither PW nor anyone else is injured until *after* a severe accident has actually happened. PW demonstrated injury *reasonably anticipated* to herself, and other affected citizens, in the event of a severe accident. The second concept, "traceable to the challenged action," was fully met. An improperly fixed vent results in either the reactor blowing up (Fukushima's Unit 1,2,3; EA-12-050 Request, 4) or spewing highly contaminated material into surrounding schools, homes and on property. A spent fuel pool fire at Pilgrim can result in as much as \$488 billion dollars in damages and 24,000 latent cancers. (EA-12-051 Request, 14) The third concept is that the anticipated injury is "likely" to be "redressed by a favorable decision." Not sustaining the Orders and thus either shutting down the reactors or fix the problem by protecting public health, safety and property provides "redress."

3. Section 2.206 is Relevant here: Entergy complains that PW "continues to insist that section 2.206 is not a meaningful alternative, as if that somehow gives it a right to raise out-of-scope issues in this proceeding...." (Ans., 10) There are many things wrong with this statement.

Judge Bork justified his decision by saying that because of 10 C.F.R § 2.206, "Petitioner Bellotti is in no sense left without recourse." (*Bellotti*, ¶9) That belief may have been justified in 1983, but the record here shows it is not the case now.³ Judge Bork's other justification for his decision, that by granting the Attorney General (who did not ask that the order there at issue not be sustained) a hearing would open the floodgates to litigation that would interfere with the

³ Entergy's laundry list of other things that PW might do (Entergy,11, note 39) is laughable. It says that PW, "[C]ontinues to be an active participant in the ongoing deliberations of the Commission's Near Term Task Force....[r]ulemaking ...and a ...§2.206 are still further avenues for raising issues...in short, Pilgrim Watch is not without opportunities to be heard." One thing is clear this record shows 2.206 petitions have provided the public with essentially no substantive relief since 1975; and neither rule making petitions nor backfits provide anything approaching a viable alternative to a hearing here.

NRC's ability to do its job, is similarly not the case here. Here, all that PW asks is that the NRC does what the statute requires.

Unless the Commission reverses and remands PW's Request for hearing, PW will have been denied the right to a hearing that is guaranteed by the AEA, and that *Bellotti* in no way denies. Entergy's statement that "Bellotti and its progeny control here" is wrong. (See PW Petition for Review, 14-17) The decisions cited by Entergy simply held that the NRC could limit the scope of a hearing to exclude cases in which a petitioner was asking for additional discretionary relief. None denied, or justified denying, a petitioner the right to prove that Orders do not meet the NRC's non-discretionary obligation to protect the public health and safety, and for that reason should not be sustained. PW showed that it would be better off if the Orders were not sustained - because the options then available to the NRC would be either better orders or shutdown Pilgrim and other applicable reactors - both options benefit PW and the public far more than do the current Orders.

To conclude, "The commission...has directed us to this very proceeding. In the order, the staff state(s) very clearly that if you are a non-licensee and you think this order should not be sustained, you should come to this proceeding.... the order directs us here." (Trans., 69- 70)

Respectfully submitted,

(Electronically signed)

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