UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 50-293-EA
ENTERGY NUCLEAR GENERATION CO. & ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Pilgrim Nuclear Power Station)	)	October 3, 2016

ENTERGY'S ANSWER OPPOSING REQUEST FOR HEARING REGARDING PILGRIM AND EA-13-109

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i), Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, "Entergy") submit this Answer opposing the request for hearing filed on September 7, 2016 ("Hearing Request") by Pilgrim Watch and co-petitioners Beyond Nuclear, Pilgrim Coalition, Pilgrim Legislative Advisory Committee, Cape Downwinders, Cape Downwinders Cooperative, Massachusetts Downwinders, and Citizens Awareness Network (collectively, "Petitioners").[1] Together, they challenge Entergy's request for an extension to comply with certain requirements in a June 6, 2013 Nuclear Regulatory Commission ("NRC") order, EA-13-109.

Following the 2011 Japan earthquake and tsunami, the NRC issued a series of orders imposing certain requirements on power reactor licensees. One such order, EA-13-109, required certain facilities, including Pilgrim Nuclear Power Station ("Pilgrim"), to maintain a hardened

[1] Pilgrim Watch & Co-Petitioners Request for Hearing Regarding Entergy's Request for Extension to Comply with NRC Order EA-13-109, Section IV Requirements Regarding Implementation of Phase 1 and Phase 2 Severe Accident Capable Vents for Pilgrim Nuclear Power Station (Sept. 7, 2016) (ML16251A500).

containment vent system ("HCVS") in the wetwell ("Phase 1") and drywell ("Phase 2"), and imposed other requirements related to instrumentation and inspections.[2] The Order effectively imposed a Phase 1 implementation deadline of Spring 2017 on Pilgrim. As with nearly all orders issued by the NRC, EA-13-109 provided authority to the Director of the Office of Nuclear Reactor Regulation ("NRR") to "relax or rescind" any of the Order's requirements upon demonstration of "good cause" (the "Relaxation Provision").[3]

On November 10, 2015, Entergy notified the NRC that Pilgrim would permanently cease power operations no later than June 1, 2019.[4] On June 26, 2016, Entergy requested an extension of the EA-13-109 Phase 1 implementation deadline ("Extension Request") to December 31, 2019.[5] In support of this request, Entergy cited: (1) the substantial progress it already had made toward compliance with EA-13-109, (2) its truncated remaining schedule for power operations, and (3) its plan to implement a Severe Accident Strategy fully capable of meeting all primary objectives of EA-13-109.[6] The only remaining requirements of EA-13-109 that Entergy has not yet satisfied (and for which it requests an extension of time in the Extension Request) are certain instrumentation and inspection requirements.[7] Indeed, Pilgrim was the first nuclear plant in the

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2 *See* Letter from E. Leeds, NRC, to All Operating Boiling-Water Reactor Licensees with Mark I and Mark II Containments, Issuance of Order to Modify Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions, Attach. 1 (June 6, 2013) ("EA-13-109" or the "Order") (ML13143A321).

3 *See* EA-13-109 § IV.

4 Letter from J. Ventosa, Entergy, to NRC Document Control Desk, Notification of Permanent Cessation of Power Operations (Nov. 10, 2015) ("50.82 Letter") (ML15328A053).

5 Letter from J. Dent, Entergy, to NRC Document Control Desk, Request for Extension to Comply with NRC Order EA-13-109, Order Modifying Licenses With Regard To Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (June 24, 2016) ("Extension Request") (ML16187A325).

6 *See generally* Extension Request.

7 *Id*., Attach. 1 at 2 (noting Pilgrim's venting system was updated in 2014 and satisfies all requirements in EA-13-109 except: (1) certain radiation monitoring instrumentation, for which it proposes to use existing

United States commercial nuclear industry to install a HCVS with a wetwell vent.[8] Pilgrim upgraded the HCVS as a key component of the FLEX Strategy for NRC order EA-12-049, and it continues to be used for the purpose of preserving and maintaining containment integrity, providing heat removal, and controlling combustible gases under all conditions.[9]

The Hearing Request and its single Proposed Contention challenge Entergy's Extension Request. The Hearing Request and Proposed Contention should be rejected for multiple, independent reasons. As a procedural matter, there is no valid hearing opportunity, so Petitioners' request is without basis. The Atomic Energy Act of 1954, as amended ("AEA"), requires a hearing opportunity for "the granting, suspending, revoking, or amending of any license."[10] Hearing opportunities are not required for any other action—including relaxation of the requirements of an NRC order. Here, Petitioners fail to even *acknowledge* that the Relaxation Provision is the basis for the Extension Request, much less identify any hearing right associated with the exercise of this provision. This fundamental flaw invalidates the entire Hearing Request.

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radiation monitors; (2) a dedicated power supply, for which it proposes to use safety related batteries; and (3) development of testing and inspection plans for dates beyond the expected closure, which are no longer necessary).

8 *See generally* Generic Letter 89-16, Installation of a Hardened Wetwell Vent (Sept. 1, 1989) (ML031140220).

9 *See* Letter from J. Dent, Entergy, to NRC Document Control Desk, Pilgrim Nuclear Power Station's Notification of Full Compliance with Order EA-12-049, Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events, Submittal of Final Integrated Plan, Responses to NRC Interim Staff Evaluation Open & Confirmatory Items, and Responses to FLEX/ SFPI Audit Report Items (July 17, 2015) ("EA-12-049 Compliance Notification") (ML15202A415); Letter from G. Bowman, NRC, to J. Dent, Entergy, Pilgrim Nuclear Power Station – Safety Evaluation Regarding Implementation of Mitigating Strategies and Reliable Spent Fuel Pool Instrumentation of Mitigating Strategies and Reliable Spent Fuel Pool Instrumentation Related to Orders EA-12-049 and EA-12-051 (TAC Nos. MF0777 and MF0778) (Mar. 3, 2016) ("SE for EA-12-049 Compliance Report") (ML16008B077).

10 Atomic Energy Act of 1954 ("AEA"), Pub. L. No. 83-703, § 189a(1)(A), 68 Stat 919 (1954) (codified as amended at 42 U.S.C. § 2239(a)(1)(A)).

Moreover, to the extent Petitioners challenge the timeliness of the Extension Request, the appropriate procedural avenue is a petition under 10 C.F.R. § 2.206. To the extent they challenge the inclusion and/or substantive provisions of the Relaxation Provision in the Order itself, their challenge is tardy by more than three years. To the extent they allege the Extension Request constitutes a license amendment, Petitioners have failed to identify any action granting Entergy any greater authority or otherwise altering the original terms of the Pilgrim license. Thus, no opportunity for a hearing arises in relation to EA-13-109.

Notwithstanding all of the above, even if a hypothetical hearing opportunity did exist, Petitioners have not met their burden to show standing pursuant to 10 C.F.R. § 2.309(d). Petitioners' stated basis for standing is their proximity to the Pilgrim facility. While the "proximity presumption" is a valid basis for standing in certain proceedings, it is not applicable to the type of proceeding alleged by Petitioners (*i.e.*, a purported license amendment proceeding), absent an "obvious potential for offsite consequences."[11] Petitioners do not plead—much less demonstrate—that the Extension Request involves such consequences. Hence, they have not demonstrated standing.

Finally, once again assuming that a hypothetical hearing opportunity exists, Petitioners' Proposed Contention fails to satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1). In essence, Petitioners ask the NRC to deny the Extension Request. Petitioners argue that the Extension Request is effectively a license amendment and therefore procedurally improper; that the Extension Request is untimely; that immediate compliance with the proscriptive requirements in Attachment 2 to EA-13-109 is necessary for reasonable assurance of adequate protection of public health and safety; and that Entergy has not provided an adequate basis for

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[11] *Fla. Power & Light Co.* (St. Lucie, Units 1 & 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

the requested extension. Petitioners, however, offer nothing beyond mere speculation and conjecture to underpin their arguments and those arguments are contrary to established law. Furthermore, Petitioners' various arguments are immaterial, unsupported, fail to raise a genuine dispute, impermissibly challenge a speculated future "No Significant Hazards Consideration" determination, and raise compliance challenges required to be submitted via the 10 C.F.R. § 2.206 process. Therefore, Petitioners have not proposed an admissible contention.

For all of these reasons, the Hearing Request should be summarily denied.[12]

II. REGULATORY AND PROCEDURAL BACKGROUND

A. NRC Authority to Issue Orders and Relax Their Requirements

AEA Section 161 grants the NRC authority to issue orders. This authority is implemented through 10 C.F.R. Part 2, Subpart B. As noted in the NRC Enforcement Manual, the NRC typically exercises this authority to ensure compliance with existing regulations or when otherwise deemed necessary.[13]

However, the "[r]equirements of an order can be relaxed based on a show of good cause in accordance with directions contained in the Order…."[14] As explicitly noted in the Enforcement Manual, the purpose of inserting discretionary relaxation provisions directly into an order "is to avoid the need to issue another order should the order need to be relaxed."[15]

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[12] On September 23, 2016, Petitioners filed a letter requesting that both a letter from the Massachusetts Congressional delegation related to the Extension Request and a corresponding press release be placed on the adjudicatory docket related to their Hearing Request. *See* Letter from M. Lampert, Pilgrim Watch (Sept. 23, 2016). Petitioners fail to explain the import of these documents to the Hearing Request, and there is none. These documents do not address any hearing opportunity on the Extension Request, nor do they provide any support for standing or the admissibility of the Proposed Contention.

[13] Nuclear Regulatory Commission Enforcement Manual, Rev. 9 at 154 (Sept. 9, 2013) (updated Dec. 10, 2015) ("Enforcement Manual") (ML102630150).

[14] *Id*. at 155.

[15] *Id*. at 162.

B. Brief Overview of Post-Fukushima Orders

On March 11, 2011, a strong earthquake struck Japan and resulted in a 45-foot tsunami. These events led to extensive damage to the Fukushima Dai-ichi nuclear power facility. Approximately one year later, the NRC took several actions based on lessons learned. More specifically, on March 12, 2012, the NRC issued:

- a request for information from all U.S. nuclear power plants related to seismic, flooding and emergency preparedness issues;[16]
- an order requiring all U.S. nuclear power plants to implement mitigating strategies related to loss of permanent electrical power sources for an indefinite amount of time;[17]
- an order requiring all U.S. nuclear power plants to install water level instrumentation in their spent fuel pools;[18] and
- an order requiring all U.S. nuclear power plants with certain containment designs to install reliable, hardened vents capable of removing heat and pressure before potential damage to a reactor core occurs.[19] On June 6, 2013, the NRC issued EA-13-109, which replaced the original hardened vents order.

The NRC has granted numerous extensions to deadlines specified in these orders.[20] Such extensions are routinely granted as part of the Staff's ongoing oversight activities and are accomplished via the "relaxation" provision within each order.[21]

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16 *See* Letter from E. Leeds and M. Johnson, NRC, to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status, Request for Information Pursuant to Title 10 of the Code of Federal Regulations 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3 of the Near-Term Task Force Review of Insights from the Fukushima Dai-Ichi Accident (Mar. 12, 2012) (ML12053A340).

17 *See* Letter from E. Leeds and M. Johnson, NRC, to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status, Issuance of Order to Modify Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events, Attach. 1 (Mar. 12, 2012) ("EA-12-049") (ML12054A735).

18 EA-12-051, Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately) (Mar. 12, 2012) (ML12056A044).

19 *See* Letter from E. Leeds, NRC, to All Operating Boiling-Water Reactor Licensees with Mark I and Mark II Containments, Issuance of Order to Modify Licenses with Regard to Reliable Hardened Containment Vents, Attach. 1 (Mar. 12, 2012) ("EA-12-050") (ML12054A694).

20 *See, e.g.*, Letter from W. Dean, NRC, to B. Hanson, Exelon, Oyster Creek Nuclear Generating Station - Relaxation of the Schedule Requirements for Order EA-13-109: Order Modifying Licenses with Regard to

C. Pilgrim and EA-13-109

NRC Order EA-13-109 imposed requirements on licenses of certain power reactors, including Pilgrim, to install a reliable, severe accident capable HCVS.[22] The Order bifurcated the requirement into two phases: a wetwell venting system ("Phase 1"), and a drywell venting system ("Phase 2").[23] The Order directed the affected licensees to begin implementation of the phases "upon issuance of the associated final interim staff guidance (ISG) for each phase."[24] The NRC issued its interim staff guidance for Phase 1 on November 14, 2013,[25] and for Phase 2 on April 29, 2015.[26]

The Order further specified a completion date for each phase. For Phase 1, "no later than startup from the second refueling outage that begins after June 30, 2014, or June 30, 2018,

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Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (TAC No. MF4352) (Nov. 16, 2015) ("Oyster Creek Extension") (ML15092A159); Letter from E. Leeds, NRC, to T. Joyce, PSEG, Hope Creek Generating Station - Relaxation of the Schedule Requirements for Order EA-12-049 "Issuance of Order to Modify Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events" (May 20, 2014) (ML14113A316); Letter from E. Leeds, NRC, to M. Pacilio, Exelon, Peach Bottom Atomic Power Station Unit 3 - Relaxation of Certain Schedule Requirements for Order EA-12-049 "Issuance of Order to Modify Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events" (Apr. 15, 2014) (ML14071A606).

21 For example, Exelon submitted a relaxation request to the NRC on June 2, 2014 for the Oyster Creek Nuclear Generating Station. Due to its plans to permanently shut down Oyster Creek no later than December 31, 2019, Exelon requested relaxation of its EA-13-109 implementation deadlines until January 31, 2020. The NRC Staff reviewed Exelon's request under the Relaxation Provision and "determined that the licensee has presented good cause for a relaxation of the order implementation date for Phase 1 implementation of Order EA-13-109." *See generally* Oyster Creek Extension. Entergy styled its Extension Request to match the Oyster Creek request. *See* Extension Request.

22 *See generally* EA-13-109 § IV, Attach. 2.

23 *See generally id.*

24 *Id*. § IV.B.

25 *See* JLD-ISG-2013-02, Compliance with Order EA-13-109, Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation under Severe Accident Conditions (Nov. 14, 2013) (ML13304B836).

26 *See* JLD-ISG-2015-01, Compliance with Phase 2 of Order EA-13-109, Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation under Severe Accident Conditions (Apr. 29, 2015) (ML15104A118).

whichever comes first"; and for Phase 2, "no later than startup from the first refueling outage that begins after June 30, 2017, or June 30, 2019, whichever comes first."[27]

Section IV.C.1 of EA-13-109 (the "Notification Provision") also stated:

> All Licensees shall, within twenty (20) days of the issuance date of the final ISG for Phase 1, notify the Commission (1) if they are unable to comply with any of the Phase 1 requirements described in Attachment 2, (2) if compliance with any of the Phase 1 requirements is unnecessary in their specific circumstances, or (3) if implementation of any of the Phase 1 requirements would cause the Licensee to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide the Licensee's justification for seeking relief from or variation of any specific requirement.[28]

The Order contained an identical provision related to Phase 2.[29]

The last paragraph of Section IV of EA-13-109 contained the Relaxation Provision, which reads as follows: "The Director, Office of Nuclear Reactor Regulation may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee of good cause."[30] Section V of EA-13-109 provided an opportunity for licensees "and any other person adversely affected by" the Order to submit an answer or request a hearing "within twenty (20) days of the date of this Order."[31] The Order further provided that the answer and hearing request deadline could be extended "[w]here good cause is shown."[32] Such extension requests also were due within 20 days of the date of the Order. Per Section V, in the absence of any hearing request or approval of an extension to request a hearing, the Order became "final" within 20 days of its

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27 EA-13-109 § IV.B.

28 *Id.* § IV.C.1.

29 *Id*. § IV.C.2.

30 *Id*. § IV.

31 *Id*. § V.

32 *Id*.

issuance.[33] No such requests were made for EA-13-109, and so it became final on June 26, 2013.

Pilgrim's "startup from the second refueling outage that begins after June 30, 2014" is expected to take place in the Spring of 2017 and, therefore, is the current Phase 1 implementation date for Pilgrim. However, approximately two years after the issuance of EA-13-109, due to unfavorable economic conditions, Entergy made the decision to permanently shut down Pilgrim. Accordingly, once a likely shutdown date had been identified, Entergy submitted to the NRC a "Notification of Permanent Cessation of Power Operations," pursuant to 10 C.F.R. § 50.82(a)(1)(i), stating it would close "no later than June 1, 2019."[34] Because of the planned shutdown, Entergy does not expect to have a "refueling outage that begins after June 30, 2017." In other words, the current Phase 2 implementation date for Pilgrim is beyond its expected shutdown date.

Accordingly, on June 24, 2016, pursuant to the Relaxation Provision of EA-13-109, Entergy submitted to the NRC a request for relaxation of the requirements of the Order.[35] More specifically, Entergy stated as follows:

> In accordance with Section IV of NRC Order EA-13-109, Entergy is hereby requesting that the Director, Office of Nuclear Reactor Regulation, grant an extension to comply with the requirements in Section IV of NRC Order EA-13-109 concerning implementation of the Phase 1 (wetwell vent) and Phase 2 (drywell vent) at Pilgrim until December 31, 2019. Pilgrim will submit a request for relief from NRC Order EA-13-109 no later than December 31, 2019

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33 *Id*. ("In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section IV above shall be final twenty (20) days from the date of this Order without further order or proceedings.").

34 50.82 Letter at 1.

35 Extension Request at 1.

> based upon the permanent shutdown condition of the plant at that time.[36]

As of the date of this Answer, the NRC has not acted upon Entergy's Extension Request.

Notwithstanding the decision to shut down Pilgrim and the submission of the Extension Request, Entergy has made substantial progress toward compliance with EA-13-109. The major upgrades performed as part of the FLEX Strategy for NRC Order EA-12-049, completed in May 2015, included a HCVS.[37]

D. Pilgrim Watch Hearing Request

Petitioners filed the Hearing Request on September 7, 2016, and included one Proposed Contention in four parts, as follows:

> 1. Entergy's Request should be denied on procedural grounds. It is in reality a request for a license amendment and Entergy should be required to follow NRC's rules and practices for amending its license.
>
> 2. Entergy's Request should be denied because it is not timely.
>
> 3. Entergy's Request should be denied because granting it would deny citizens and communities the protection that the severe accident capable wetwell venting system required by the Order otherwise would provide during the remaining years of Pilgrim's operations.
>
> 4. Entergy's Request should be denied because its argument in support of its request is not valid.

NRC regulations at 10 C.F.R. § 2.309(i)(1) provide that parties may file answers within 25 days after service of a hearing request. Therefore, this Answer is timely filed.

III. THE HEARING REQUEST MUST BE DENIED BECAUSE THERE IS NO OPPORTUNITY FOR A HEARING

The AEA requires a hearing opportunity in any proceeding for:

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36 *Id*. at 2.

37 *See generally* EA-12-049 Compliance Report; SE for EA-12-049 Compliance Report.

- "the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control;"
- "the issuance or modification of rules and regulations dealing with the activities of licensees;" or
- "the payment of compensation, an award, or royalties" under certain sections of the AEA.[38]

Hearings are not required for any other proceeding, or where there is no proceeding at all, because, "as should be obvious, there is no general right to a hearing for a hearing's sake."[39] Moreover, Section 189a of the AEA "does not confer the automatic right of intervention upon anyone."[40] The AEA specifies the limited subset of proceedings that require a hearing opportunity.[41]

As detailed below, Entergy's submission of the Extension Request, and the NRC's review of the same, is not such a proceeding. As an initial matter, Petitioners fail to even mention the Relaxation Provision of EA-13-109 invoked by the Extension Request, much less explain how it creates a hearing opportunity. Furthermore, Petitioners assert that the Extension Request is untimely, and base that assertion on the Order itself—in other words, they raise a *compliance* challenge. Such challenges must be submitted via the 10 C.F.R. § 2.206 process, and do not create a hearing opportunity. Alternatively, to the extent Petitioners challenge the inclusion and/or substantive provisions of the Relaxation Provision in EA-13-109, the opportunity for such a challenge has long since expired. And finally, relaxation of the requirements of an order, pursuant to flexibility purposefully *embedded* in the order *from its*

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38 AEA § 189a(1)(A).

39 *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-01-10, 53 NRC 273, 282 (2001), *aff'd*, 54 NRC 349 (2001), *reconsid. denied*, 55 NRC 1 (2002).

40 *Business and Professional People for the Public Interest v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974).

41 *See* AEA § 189a(1)(A).

inception, does not "amend" the order, or any license. Thus, the Hearing Request should be rejected.

A. Petitioners' Fundamental Misunderstanding of EA-13-109 and the Extension Request Is Not a Proper Basis for a Hearing

As discussed above, Entergy submitted its Extension Request pursuant to the Relaxation Provision, which states: "The Director, Office of Nuclear Reactor Regulation may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee of good cause."[42] But, Petitioners fail to even mention this provision in their Hearing Request. They instead erroneously argue that Entergy submitted the Extension Request pursuant to the Notification Provision, and that granting the Extension Request would require a license amendment because the deadlines specified in the Notification Provision have passed.[43] Petitioners fundamentally misunderstand EA-13-109 relative to the Extension Request.

To be clear, Entergy submitted its Extension Request pursuant to the Relaxation Provision embedded in Section IV of EA-13-109.[44] That provision does not provide any hearing opportunity for relaxation requests; nor has the Commission ever recognized such a hearing opportunity. Indeed, longstanding Commission policy in the NRC Enforcement Manual clearly explains that relaxation provisions were explicitly designed "to avoid the need to issue another order should the order need to be relaxed."[45] Accordingly, Petitioners have not identified a valid opportunity for a hearing.

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42 EA-13-109 § IV.

43 *See* Hearing Request at 9-11.

44 *See* Extension Request at 2 (stating the extension was requested "[i]n accordance with Section IV of NRC Order EA-13-109"); *id.*, Attach. 1 at 1 ("This extension request is based on the extension request already approved by the NRC for Oyster Creek"); Oyster Creek Extension at 1 (characterizing the Oyster Creek Extension Request as a "request…for relaxation"); *id*. (citing the Relaxation Provision in EA-13-109, and its "good cause" standard, as the mechanism for the extension).

45 Enforcement Manual at 162.

Petitioners' failure to correctly assess the procedural basis for the Extension Request is the first of several fatal flaws in their Hearing Request.

B. Petitioners' Challenge to the Timeliness of the Extension Request Is a Compliance Challenge that Should Have Been Submitted Under the Provisions of 10 C.F.R. § 2.206

Petitioners assert that the Extension Request should have been submitted within 20 days of the issuance date of the final ISG for Phase 1 (*i.e.*, December 15, 2013), and that the request is untimely because it was submitted on June 24, 2016.[46] The Hearing Request plainly asserts that the timing requirement is established by the Notification Provision (*i.e.*, Section IV.C.1 of EA-13-109).[47] As explained in Section III.A, above, the Extension Request was submitted pursuant to the Relaxation Provision (last paragraph of Section IV of EA-13-109), not the Notification Provision. But, even assuming Petitioners' characterization hypothetically is correct, the Hearing Request must be rejected because a challenge to compliance with currently-applicable requirements is not a proper basis for a hearing request, but rather a call for enforcement action.

Petitioners cannot create a hearing opportunity merely by claiming that a facility has not complied with a regulatory requirement because "[s]uch claims are appropriately raised in a petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206, rather than by a request for a hearing under AEA section 189a."[48] In other words, to the extent Petitioners are

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46 Hearing Request at 18-20.

47 *Id.* at 18 (quoting EA-13-109 § IV.C).

48 *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-15-27, 82 NRC 184, 192 (2015), *aff'd*, CLI-16-09, 83 NRC __ (slip op. at 2-3) (2016); *see also Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 334 (2015).

challenging Entergy's compliance with the Notification Provision, or any other part of the Order, they should have submitted a petition under 10 C.F.R. § 2.206.[49]

Regardless, the Extension Request is in fact timely because EA-13-109 does not impose a deadline for requesting the NRR Director's exercise of authority under the Relaxation Provision. Petitioners conflate the Notification Provision with the Relaxation Provision, which provides for relaxation of "any of the above conditions"—including the Notification Provision—without any temporal restriction. Ultimately, Petitioners' timeliness argument simply does not identify nor provide a hearing opportunity.

C. The Time for a Hearing Opportunity on EA-13-109 Expired Over Three Years Ago

To the extent Petitioners generically assert that an exercise of the Relaxation Provision in Section IV of EA-13-109 would result in some unspecified harm, they are challenging the NRC's decision to include the Relaxation Provision in the Order itself. Importantly, EA-13-109 explicitly permitted an opportunity to request a hearing for challenges such as this, *i.e.*, challenges to the inclusion of a relaxation provision. But Section V of EA-13-109 explains that such challenges (including challenges to the Relaxation Provision) were due within 20 days of the issuance of the Order. EA-13-109 was issued on June 6, 2013; thus, any challenges were due by June 26, 2013. And while Section V permitted requests for extension of this deadline, such requests also were due within 20 days of the issuance of the Order. As Petitioners' September 7, 2016 Hearing Request is more than three years delinquent, and they neither requested nor received an extension of time to request a hearing, there is no remaining hearing opportunity related to EA-13-109.

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[49] The Commission has repeatedly upheld the viability of the 2.206 process. *See, e.g.*, *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-13-2, 77 NRC 39, 50 n.57 (2013).

Thus, Petitioners' challenge here is incurably untimely, and does not present a valid opportunity for a hearing.

D. The Extension Request Does Not Seek or Require a License Amendment

The Commission recently has explained that NRC "case law acknowledges that an agency action not formally labeled a license amendment could constitute a *de facto* license amendment and trigger hearing rights under AEA section 189a. if that action '(1) granted the licensee any greater authority or (2) otherwise altered the original terms of the license.'"[50] However, the Extension Request would not grant Entergy any greater authority—it would modify a deadline—and it does not alter the original terms of the Pilgrim license. Because the Relaxation Provision embedded in the Order already permits the action contemplated in the Extension Request—a relaxation of the Order requirements—such action does not entail any modification of authority or license terms.

Moreover, recent Commission decisions have made clear that agency actions related to at least two related topics do not trigger hearing opportunities: enforcement and oversight. A request for "relaxation" of the requirements of an order is comparable to both of these topics, and similarly does not trigger hearing rights under AEA Section 189a.

In 2014, the Sierra Club filed a hearing request focused on the NRC Staff's issuance of a Confirmatory Action Letter ("CAL") related to external flooding requirements at Fort Calhoun. The CAL documented actions that the licensee had committed to take prior to restarting the plant. The licensee eventually completed all of its commitments and the NRC closed the CAL, allowing the plant to restart. Among other things, the Sierra Club argued that modifications

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[50] *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-16-09, 83 NRC __ (slip op. at 2-3) (2016) (citing *Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 334 (2015)).

necessary for proper flood protection would require a license amendment. The Commission denied the hearing request noting that it "reflects a misunderstanding of the distinction between our agency's hearing and oversight processes."[51] The Commission, instead, referred the matter to the Executive Director for Operations for consideration as a request for enforcement action under 10 C.F.R. § 2.206.[52]

Also, on August 26, 2014, Friends of the Earth ("FOE") filed a hearing request claiming that Diablo Canyon had to suspend operations until it evaluated new seismic information. FOE argued that the licensee and NRC Staff interactions on seismic issues constituted a *de facto* license amendment proceeding that triggered an opportunity for a hearing. A licensing board rejected the hearing request, finding that "the NRC has neither granted PG&E greater authority than that provided by its existing licenses nor otherwise altered the terms of those licenses."[53] In finding that there was no hearing opportunity, the board explained that "[a] *de facto* license amendment proceeding is not initiated merely because a licensee takes an action that requires some type of NRC approval."[54] The Commission recently upheld the board's decision, affirming its view that ongoing oversight activities that do not approve or authorize any change to the license are not *de facto* license amendments.[55]

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51 *Fort Calhoun*, CLI-15-5, 81 NRC at 334.

52 The Commission also commented that "the prospect of a possible future license amendment does not trigger hearing rights now." *Fort Calhoun*, CLI-15-5, 81 NRC at 336. In other words, a "notice of hearing," a "notice of proposed action," or the performance of some action is an absolute prerequisite to any potential hearing opportunity. The reason for this is simple—it would be premature to litigate an issue when a Commission determination might make the issue moot. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 341 (1991). Because no opportunity for a hearing has arisen even under Petitioners' imaginative license amendment theory, the Hearing Request must be rejected.

53 *Diablo Canyon*, LBP-15-27, 82 NRC at 184.

54 *Id.* at 191.

55 *Diablo Canyon*, CLI-16-09, 83 NRC at __ (slip op. at 31).

As in the *Fort Calhoun* and *Diablo Canyon* cases, the Staff reviews relaxation requests as part of its ongoing oversight activities, pursuant to authority granted to it by the order itself. Petitioners confuse the NRC's oversight and hearing processes. The oversight activities prescribed in EA-13-109 do not offer additional future hearing opportunities each time the agency engages in oversight activities under the terms, and within the scope, of the Order. Thus, Petitioners have not identified any right to a hearing under the AEA.

At all relevant times—from its issuance date to the date the Hearing Request was filed—EA-13-109 (and the license, to the extent it was modified by the Order) has included the Relaxation Provision, and with it, the possibility that the requirements therein could be "relax[ed] or rescind[ed]" without "the need to issue another order"—and without the need to amend the license because such action does not entail any modification of licensee authority or the terms of the license. Accordingly, because the Extension Request neither seeks nor requires a license amendment, and because granting the Extension Request would neither grant Entergy any greater authority nor otherwise alter the original terms of the Pilgrim license, the Hearing Request fails to identify any right to a hearing under the AEA, and should be rejected.

IV. THE HEARING REQUEST MUST BE DENIED BECAUSE PETITIONERS HAVE NOT DEMONSTRATED STANDING

Even assuming for the sake of argument that Petitioners had identified a hearing opportunity, they have not demonstrated standing as required by 10 C.F.R. § 2.309(d)(1). Accordingly, the Hearing Request still must be denied for this second independent basis.

A. Governing Legal Standards

AEA Section 189a states that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding."[56] The Commission's regulations implementing this requirement include the standing requirements in 10 C.F.R. § 2.309(d)(1), which require a petitioner to address: (1) the nature of the petitioner's right under the AEA to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

In assessing these factors, the NRC applies "contemporaneous judicial concepts of standing."[57] Thus, to demonstrate standing, a petitioner must show: (1) an actual or threatened, concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.[58] These three criteria are referred to as injury-in-fact, causation, and redressability, respectively.

First, a petitioner's injury-in-fact showing "requires that the party seeking review be himself among the injured."[59] The injury must be "concrete and particularized," not "conjectural" or "hypothetical."[60] As a result, standing will be "denied when the threat of injury is too speculative."[61] Second, a petitioner must establish that the injuries alleged are "fairly

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56 AEA § 189a(1)(A).

57 *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914-16 (2009) (internal citation omitted); *see also Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006).

58 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

59 *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

60 *Sequoyah Fuels Corp*. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (citations omitted).

61 *Id.*

traceable to the proposed action."[62] Finally, each petitioner must demonstrate that the injury can be "redressed" by a favorable decision. Furthermore, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[63]

Under some circumstances, a petitioner may be presumed to have standing based on his or her geographic proximity to a facility.[64] In certain proceedings involving power reactors, "proximity" standing has been found for petitioners who reside within 50 miles of the facility in question.[65] The Commission has explained, however, that this proximity presumption only applies to proceedings involving applications for "construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool."[66] The presumption applies because "those cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences."[67] Thus, in license amendment proceedings, absent an "obvious potential for offsite consequences," a petitioner must satisfy the traditional standing requirements.[68]

Finally, an organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representational

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62 *Id*. at 75.

63 *Id*. at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)).

64 *See Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 579-83 (2005).

65 *See, e.g.*, *Calvert Cliffs*, CLI-09-20, 70 NRC at 916.

66 *St. Lucie*, CLI-89-21, 30 NRC at 329 (citing *Virginia Elec. Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54 (1979)).

67 *Id.* at 329.

68 *Id.* at 329-30; *see also Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-04, 49 NRC 185, 191 (1999); *Fla. Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 & 4), LBP-08-18, 68 NRC 533, 539 (2008).

capacity (by demonstrating harm to the interests of its members).[69] To establish representational standing, an organization must: (1) show that at least one of its members has standing in his or her own right; (2) identify that member; and (3) show, "preferably by affidavit," that the organization is authorized by that member to request a hearing on behalf of the member.[70]

B. Petitioners Have Not Demonstrated Standing

As a threshold matter, Petitioners bear the burden of showing standing.[71] Generally speaking, the Hearing Request claims that certain of Petitioners' members reside within 50 miles of Pilgrim and are "reasonably concerned"[72] about health and safety issues related to the Extension Request. As explained below, these statements are far too vague to demonstrate standing.

1. Petitioners Cannot Rely on the Proximity Presumption

First, Petitioners cannot rely solely on the proximity presumption absent an "obvious potential for offsite consequences." Petitioners cite no authority for proximity-based standing. Nor do they even recognize or attempt to address the "obvious potential for offsite consequences" standard.

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69 *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Ga. Inst. of Tech*. (Ga. Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995)).

70 *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-10 (2007); *see also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Indep. Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *GPU Nuclear Inc*. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

71 *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-07, 71 NRC 133, 139 (2010).

72 Hearing Request at 9; *see also id.* at 2-9 (basing standing claims for individual Petitioners on residence and activities within 50 miles of Pilgrim).

There simply is no "obvious" potential for offsite consequences here.[73] Petitioners make a highly generalized assertion that granting the Extension Request would "deprive citizens of a severe capable [sic] wetwell vent."[74] But that statement lacks a basis in fact, as Entergy *already has* a severe accident capable HCVS. Furthermore, Entergy has made diligent progress toward installing the features required by EA-13-109. Pilgrim's HCVS was upgraded as a key component of the FLEX Strategy for NRC order EA-12-049.[75] The HCVS continues to be used for the purpose of preserving and maintaining containment integrity, providing heat removal, and controlling combustible gases under all conditions.[76] The only remaining requirements of EA-13-109 that Entergy has not yet satisfied (and for which it requests an extension of time) are certain instrumentation and inspection requirements.[77] Moreover, these instrumentation installations have been replaced with enhancements to Pilgrim's existing FLEX capabilities, which were designed with Severe Accident capabilities.[78] Thus, Petitioners must demonstrate an "obvious potential for offsite consequences" that would result from a two-year extension of the implementation deadline for those specific instrumentation and inspection requirements that Entergy has not yet implemented, and that are not otherwise addressed by strategies set forth in

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73 In fact, the requested extension of the compliance deadline to December 31, 2019, is only 18 months beyond the hard deadline in the Order (June 30, 2018), and is sooner than the extended deadline the NRC recently approved for Oyster Creek (January 31, 2020).

74 Hearing Request at 21.

75 *See generally* EA-12-049 Compliance Report; SE for EA-12-049 Compliance Report.

76 *See* Extension Request at 2. Pilgrim has designed and implemented a FLEX Strategy that utilizes Wetwell Venting and Severe Accident Water Addition and Management Strategies to mitigate all Beyond-Design-Basis conditions as described in NRC Order EA-13-109.

77 Extension Request, Attach. 1 at 2 (noting Pilgrim's venting system was updated in 2014 and satisfies all requirements in EA-13-109 except: (1) certain radiation monitoring instrumentation, for which it proposes to use existing radiation monitors; (2) a dedicated power supply, for which it proposes to use safety related batteries; and (3) development of testing and inspection plans for dates beyond the expected closure, which are no longer necessary).

78 *See generally* EA-12-049 Compliance Report; SE for EA-12-049 Compliance Report.

the Extension Request. Petitioners have not done so; the Hearing Request does not even mention those requirements, much less offer meaningful conclusions regarding any alleged offsite consequences.

Petitioners effectively assert that the Extension Request will not be adequately analyzed by Staff absent Petitioners' participation in a hearing.[79] In 1998, a petitioner similarly challenged an actual license amendment request for the Millstone Nuclear Power Station, Unit 3.[80] That petitioner asserted that a requested modification had "not been analyzed adequately."[81] The *Millstone* licensing board found that such vague claims "do[] not demonstrate, without a great deal more, how an accident with offsite consequences results from" the requested amendment.[82] In rejecting the petitioner's claim of standing due to vagueness, the *Millstone* board held that, "even assuming the instant amendment . . . *somehow* presents the potential for offsite . . . consequences, that potential is anything but obvious."[83] Although the *Millstone* petitioner challenged a different type of action, in an actual license amendment proceeding, the same premise applies here—even assuming a two-year extension of the implementation deadline for the remaining *instrumentation and inspection* requirements (but not the wetwell vent requirement, because it already has been completed) could somehow present the potential for offsite consequences, that potential is "anything but obvious." Again, Petitioners cannot rely solely on the proximity presumption absent an "obvious potential for offsite consequences." As

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79 Hearing Request at 26 (alleging the NRC Staff's review of the Oyster Creek Extension Request included "no consideration of any important facts" and that "the NRC 'rubber-stamped' Oyster Creek's request for an extension because no one opposed it," and arguing that "Pilgrim's should not be.").

80 *See generally Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149 (1998).

81 *Id.* at 156.

82 *Id.*

83 *Id*. at 155-56 (emphasis added).

Petitioners have neither pled nor demonstrated such potential, proximity cannot serve as a basis for their standing.

2. Petitioners Have Not Demonstrated Traditional Standing

Additionally, Petitioners' bald assertions that they are "reasonably concerned" about their property and financial interests are far too vague to establish traditional standing.[84] Petitioners offer no explanation for how these "concern[s]" are fairly traceable to the challenged action, and thus fail to satisfy the causation element of traditional standing.[85] As noted above, Petitioners make a highly generalized assertion that granting the Extension Request would "deprive citizens of a severe capable [sic] wetwell vent."[86] Aside from its factual inaccuracy—because Pilgrim does have a HCVS—Petitioners offer no discussion of how their "concern[s]" are "fairly traceable" to an extension of the implementation deadline for the few remaining instrumentation and inspection provisions of EA-13-109.[87] Petitioners' vague concerns also are not "concrete and particularized," but are "conjectural" or "hypothetical" and must be denied as "too speculative."[88] Accordingly, Petitioners have not demonstrated traditional standing.

3. Petitioners Have Not Satisfied the Pleading Requirements for Representational Standing

All of the Petitioners plead representational style standing. However, for the very reasons discussed above, Petitioners have not shown that any of their members would have standing in his or her own right; these members cannot rely on the proximity presumption, and have not otherwise demonstrated traditional standing. Furthermore, representational standing

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84 *See* Hearing Request at 2-9.

85 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

86 Hearing Request at 21.

87 *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

88 *Id*. at 72.

requires a demonstration, "preferably by affidavit," that the organization is authorized by each member to request a hearing on behalf of the member.[89] Yet, the Hearing Request does not plead such authorization for all organizations.[90] Accordingly, Petitioners have not demonstrated representational standing.

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As Petitioners cannot rely on the proximity presumption, which does not apply here, and have not demonstrated a causal link between their alleged "concerns" and the Extension Request, the Hearing Request fails to demonstrate standing, contrary to 10 C.F.R. § 2.309(a) and (d). Thus, the Hearing Request should be rejected.

V. THE HEARING REQUEST MUST BE DENIED BECAUSE PETITIONERS HAVE NOT PROPOSED AN ADMISSIBLE CONTENTION

Even assuming for the sake of argument that Petitioners had identified a hearing opportunity, and had demonstrated standing, they still have not submitted an admissible contention, as required by 10 C.F.R. § 2.309(f)(1). Accordingly, the Hearing Request must be denied for this third independent basis.

A. Governing Legal Standards for Contention Admissibility

Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." Section 2.309(f)(1)(i) through (vi) identify the six admissibility criteria for each proposed contention:

i. provide a specific statement of the legal or factual issue sought to be raised;
ii. provide a brief explanation of the basis for the contention;
iii. demonstrate that the issue raised is within the scope of the proceeding;

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89 *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-10 (2007); *see also Monticello & Prairie Island*, CLI-00-14, 52 NRC at 47; *Oyster Creek*, CLI-00-6, 51 NRC at 202.

90 The Hearing Request curiously includes only 2 affidavits from Beyond Nuclear members, but no affidavits for the remaining Petitioners.

iv. demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;

v. provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and

vi. provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.

Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[91] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[92]

With respect to factual information or expert opinion proffered in support of a contention, the presiding officer "is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention."[93] "[A]n expert opinion that merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong') without providing *a reasoned basis or explanation* for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion" as it is alleged to provide a basis for the contention.[94] Furthermore, a petitioner's imprecise reading of a document cannot be the basis for a litigable contention.[95]

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91 *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Private Fuel Storage*, CLI-99-10, 49 NRC at 325.

92 Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

93 *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998), *aff'd*, CLI-98-13, 48 NRC 26, 37 (1998).

94 *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (emphasis added) (quoting *Private Fuel Storage*, LBP-98-7, 47 NRC at 181).

95 *See Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995), *aff'd*, CLI-95-12, 42 NRC 111, 124 (1995).

B. The Proposed Contention Is Inadmissible

1. Petitioners' Procedural Arguments in Part 1 Are Immaterial, Unsupported, Outside Scope, and Fail to Raise a Genuine Dispute

Part 1 of the Proposed Contention states: "Entergy's Request should be denied on procedural grounds. It is in reality a request for a license amendment and Entergy should be required to follow NRC's rules and practices for amending its license."[96]

As a preliminary matter, the Extension Request would not result in a license amendment. Petitioners argue that it is a license amendment claiming that the Extension Request modifies the Order and changes to the Order are amendments to the license.[97] As explained above, however, the Extension Request would not modify the Order; rather, it is an exercise of the Relaxation Provision, which already is part of the Order. And Petitioners have identified no hearing rights for the Relaxation Provision. Furthermore, the Order is linked to the Pilgrim license because paragraph 3 of the Pilgrim operating license states that it "is subject to all applicable provisions of the Act and to the rules, regulations, and orders of the Commission."[98] Thus, if Petitioners' argument were valid that a change to an order requirement is a license amendment, then changes to the AEA and NRC regulations applicable to Pilgrim likewise must be considered license amendments with hearing opportunities. This would result in an absurd outcome.

Additionally, assuming for the purposes of argument that the Extension Request already has been determined to involve a license amendment—a prerequisite for finding a hearing opportunity—this entire Part 1 is moot. It argues the threshold question, but is not otherwise

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96 Hearing Request at 15.

97 *Id*. at 9-11.

98 Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), Docket No. 50-293, Renewed Facility Operating License, Renewed License No. DPR-35 at 2-3 (ML052720275).

aimed at demonstrating any element of an admissible contention. Thus, for contention admissibility purposes, this portion of Part 1 fails to raise a material issue, or to show that a genuine dispute exists with regard to a material issue of law or fact within the scope of the hearing opportunity, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii), (iv), and (vi).

The remaining portions of Part 1 do not otherwise explain how, and do not offer any support for the proposition that, the Extension Request is contrary to "NRC's rules and practices for amending its license." Petitioners cite various NRC regulations and cases related to license amendments, including a discussion of the general standards for granting license amendments.[99] Entergy does not dispute the existence of these standards. But, beyond the threshold question mentioned above (which would be moot if a hearing opportunity already exists), Petitioners do not analyze or even discuss these standards in the context of their claim that the Extension Request is contrary to "NRC's rules and practices for amending its license." Thus, for contention admissibility purposes, this discussion is unsupported and fails to raise a genuine dispute contrary to 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

Furthermore, Petitioners cite the regulatory prerequisite for Staff to issue an immediately-effective license amendment: a no significant hazards consideration ("NSHC") determination.[100] Petitioners claim that "the staff properly could not 'make a no significant hazards consideration finding' here."[101] However, 10 C.F.R. § 50.58(b)(6) explicitly states that: "No petition or other request for review of or hearing on the Staff's significant hazards consideration determination will be entertained by the Commission." Section 50.58(b)(6) has long been held to be a

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99 Hearing Request at 16.

100 *Id*. at 17-18.

101 *Id*. at 18.

jurisdictional bar to NSHC challenges.[102] Moreover, this impermissible argument challenges something that does not even exist; the Staff has not issued any NSHC determination here. Petitioners' NSHC arguments are explicitly barred by law and are far beyond scope, contrary to 10 C.F.R. § 2.309(f)(1)(iii).

As Petitioners' arguments in Part 1 are immaterial, unsupported, fail to raise a genuine dispute, and beyond scope, Part 1 does not support an admissible contention.

2. Petitioners' Timeliness Argument in Part 2 Is Immaterial, Unsupported, and Fails to Raise a Genuine Dispute, and Is Procedurally Improper Because It Can Only Be Raised via the 10 C.F.R. § 2.206 Process

Petitioners assert, in Part 2 of their Proposed Contention, that "Entergy's Request should be denied because it is not timely."[103] More specifically, Petitioners argue that, based on the Notification Provision, the Extension Request should have been submitted within 20 days of the issuance date of the final ISG for Phase 1 (*i.e.*, "December 15, 2013"), and that the Extension Request is untimely because it was submitted June 24, 2016.[104] This argument is utterly unsupported and rests on a misreading of the applicable documents. Moreover, assuming for the purposes of argument that the Extension Request already has been determined to involve a

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102 *See, e.g.*, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001) (holding that intervenor challenges on this topic will be summarily rejected: "Our regulations provide that '[n]o petition or other request for review of or hearing on the Staff's no significant hazards consideration determination will be entertained by the Commission.' . . . The regulations are quite clear in this regard.") (quoting 10 C.F.R. § 50.58(b)(6)); *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 90-91 (1990) ("The issue of whether the proposed amendment does or does not involve a significant hazards consideration is not litigable in any hearing.") (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-86-12, 24 NRC 1, 4-5 (1986), *rev'd and remanded on other grounds sub nom.*, *San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986)); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-89-15, 29 NRC 493, 495-96 (1989).

103 Hearing Request at 14.

104 *Id*. at 15, 18-19.

license amendment—a prerequisite for finding a hearing opportunity—this argument is circular and misplaced, and does not provide support for an admissible contention.

First, Petitioners' entire timeliness claim is unsupported—and demonstrably incorrect. As explained in Section III.A above, Petitioners conflate the Notification Provision (which required certain notifications to the NRC by a specified date) with the Relaxation Provision (which provides for relaxation of "any of the above conditions," without any temporal restriction). In one sentence, Petitioners recognize that the Extension Request *does not* provide the type of information requested in the Notification Provision.[105] Yet, in another sentence they claim the Extension Request is a "notification" under that very provision.[106] But Petitioners' contradictory claim in this regard—upon which their entire timeliness claim rests—is unsupported. As explained in Section III.A above, the Extension Request was submitted under the Relaxation Provision of the Order, which Petitioners fail to even mention. NRC case law makes clear that a petitioner's imprecise reading of a document cannot form the basis of a litigable contention, regardless of how convenient it may be to their argument.[107] Thus, Part 2 fails to raise a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

To the extent Petitioners argue that the Extension Request was submitted under the Notification Provision, and that Pilgrim did not timely submit the information required therein, they are raising a compliance challenge. However, "[s]uch claims are appropriately raised in a

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105 *See id.* at 19 (noting that the Extension Request does not plead inability to comply or allege regulatory violations that would flow from compliance); *see also id*. (stating Petitioners' opinion that "[t]he most that can be said" of the Extension Request is that compliance is unnecessary, but not offering any alleged statement by Entergy to that effect).

106 *See* Hearing Request at 19 (claiming that the "Order required Entergy to notify the Commission within 20 days of the ISG").

107 *See Ga. Tech.*, LBP-95-6, 41 NRC at 300, *aff'd*, CLI-95-12, 42 NRC 111, 124 (1995).

petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206."[108] Thus, to the extent this is the argument Petitioners raise in Part 2, it is outside scope, contrary to 10 C.F.R. § 2.309(f)(1)(iii).

Alternatively, to the extent Petitioners argue a license amendment is impermissible because the time specified in the Notification Provision has passed, their argument is circular and unsupported. Petitioners cite no authority for the irrational proposition that, to obtain a license amendment, a licensee must demonstrate compliance with the very requirement it seeks to amend. Nor could they—there is no such requirement in 10 C.F.R. §§ 50.90-92. Thus, Petitioners have not provided any support for their argument, contrary to 10 C.F.R. § 2.309(f)(1)(v), and have not identified an issue material to the findings the NRC must make to support a purported license amendment request, contrary to 10 C.F.R. § 2.309(f)(1)(iv).

Additionally, Petitioners offer rampant speculation in their claim that Entergy "intentionally delayed" submitting the Extension Request.[109] This statement is unsupported speculation, and is utterly immaterial to any required finding. Petitioners point to no requirement in 10 C.F.R. §§ 50.90-92 regarding an applicant's decision regarding when to submit an Extension Request. Nor do they offer a shred of support for their claim. Accordingly, Petitioners have not provided any support for their argument, contrary to 10 C.F.R. § 2.309(f)(1)(v), and have not identified an issue material to the findings the NRC must make to support a purported license amendment request, contrary to 10 C.F.R. § 2.309(f)(1)(iv).

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[108] *Diablo Canyon*, LBP-15-27, 82 NRC at 192, *aff'd*, CLI-16-09, 83 NRC __ (slip op. at 2-3) (2016); *see also Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 334 (2015).

[109] Hearing Request at 19.

Accordingly, Petitioners' timeliness argument in Part 2 is immaterial, unsupported, outside scope, and fails to raise a genuine dispute, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi). Thus, Part 2 does not support an admissible contention.

3. Petitioners' "Reasonable Assurance" Claims Are Unsupported and the Remaining Claims in Part 3 Are Immaterial

In Part 3 of their Proposed Contention, Petitioners assert that "Entergy's Request should be denied because granting it would deny citizens and communities the protection that the severe accident capable wetwell venting system required by the Order otherwise would provide during the remaining years of Pilgrim's operations."[110] Petitioners selectively quote excerpts from EA-13-109 regarding the NRC's "reasonable assurance" and backfit analyses in 2013, and conclude that these statements *per se* demonstrate that granting the Extension Request would result in a lack of "reasonable assurance."[111]

Petitioners, however, have failed to provide a sufficient factual basis for an admissible contention.[112] Petitioners essentially claim that full compliance with the proscriptive requirements in Attachment 2 to EA-13-109 constitute the only means of providing reasonable assurance (*i.e.*, an extension could never be granted). However, such a conclusion ignores the various relief and relaxation opportunities explicitly included in the Order. These mechanisms demonstrate that, from the very beginning, the NRC contemplated alternative means of achieving the required reasonable assurance. Once again, a petitioner's imprecise reading of a document cannot be the basis for a litigable contention.[113]

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110 *Id*. at 20.

111 *See, e.g.*, *id.* at 11-12.

112 *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 47-48 (2004).

113 *See Ga. Tech.*, LBP-95-6, 41 NRC at 300, *aff'd*, CLI-95-12, 42 NRC 111, 124 (1995).

Furthermore, for Petitioners' argument to hold together, one must assume either that no relevant factual inputs to the 2013 analyses have changed, or that the changes that have occurred have no effect on "reasonable assurance." But, Petitioners neither plead nor demonstrate support for either assumption. Petitioners also do not even appear to recognize that many of the features required by EA-13-109 have been implemented at Pilgrim, and certainly they do not provide a reasoned basis for concluding that the few remaining items in the Order (instrumentation and inspections) are still necessary to provide "reasonable assurance." Petitioners cannot create an admissible contention merely by ignoring relevant intervening facts—it "deprives the Board of the ability to make the necessary, reflective assessment" of their conclusion.[114] Thus, Petitioners have failed to provide the support required by 10 C.F.R. § 2.309(f)(1)(v).

Finally, Petitioners' references to Entergy's purported "purely economic reasons" for submitting the Extension Request are both speculative and immaterial to any finding that must be made to grant the Extension Request. An applicant's "reasons" for submitting an application are neither relevant to, nor within the scope of, any purported hearing opportunity on that application. Petitioners point to no regulatory requirement regarding an applicant's motive for submitting an Extension Request. Nor do they offer any support for their claim. Accordingly, Petitioners have not provided any support for their argument, contrary to 10 C.F.R. § 2.309(f)(1)(v), and have not identified an issue material to the findings the NRC must make to support a purported license amendment request, contrary to 10 C.F.R. § 2.309(f)(1)(iv).

As Petitioners' arguments here are immaterial and unsupported, Part 3 does not support an admissible contention.

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114 *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (quoting *Private Fuel Storage*, LBP-98-7, 47 NRC at 181).

4. Part 4 Is Immaterial, Unsupported, and Fails to Raise a Genuine Dispute

Petitioners assert that "Entergy's Request should be denied because its arguments in support of its request are not valid."[115] However, Petitioners do not provide any reasoned basis for this conclusion. Petitioners primarily just repeat Entergy's statements from the Extension Request, cite the requirements of EA-13-109, and conclude that Entergy has not satisfied those requirements. But such arguments are nonsensical—Entergy is requesting relaxation of those requirements, not pleading satisfaction of them. Indeed, if Entergy already had fully completed the requirements of the Order, there would be no need for the Extension Request. Thus, Petitioners' arguments here are immaterial to any finding that must be made to grant a purported license amendment.

Petitioners quote from the Extension Request, noting Entergy's statement that its "FLEX Severe Accident Strategy will preclude the occurrence of core damage."[116] Petitioners then note that "Entergy nowhere says that either FLEX or anything else that Entergy has done or intends to do will" satisfy the requirements of EA-13-109.[117] Petitioners later state that "nothing in Entergy's Request suggests that Pilgrim is fully capable of doing, or will do, what the Order requires."[118] However, Petitioners cite no authority for the illogical proposition that, in order to secure approval for a purported license amendment, Entergy must first demonstrate satisfaction of the very requirements from which it seeks relief.

Moreover, to the extent Petitioners arguments could be construed to challenge Entergy's statements in the Extension Request that Pilgrim will be capable of providing *equivalent*

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115 Hearing Request at 23.

116 *Id*. at 24 (quoting Extension Request at 2).

117 *Id*. at 24-25.

118 *Id*. at 27.

protection to that required by EA-13-109, these arguments also are unsupported. The full extent of their proffer of support is that some people "do not believe" Entergy's conclusions.[119] Entergy acknowledges that Petitioners are not required to prove their case at the contention admissibility stage—but at least *some* minimal reasoned basis is required. "To proffer an admissible contention, [p]etitioners must 'explain the basis for the contention and read the relevant parts of the . . . application and show where the application is lacking'; an assertion that additional analysis is necessary, without further support . . . is not sufficient."[120] Petitioners' mere claim of "belief," without explanation or even mention of a particular fact or document that would dispute Entergy's conclusions, is woefully inadequate to demonstrate the support required by 10 C.F.R. § 2.309(f)(1)(v).

As explained earlier, the presiding officer "is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention."[121] As Petitioners failed to provide any expert opinion nor a reasoned basis, their bare assertion fails to provide the support required by 10 C.F.R. § 2.309(f)(1)(v).

Additionally, Petitioners argue that Entergy's reference to an extension of the compliance date for EA-13-109 recently granted by the NRC for Oyster Creek "provides no precedent for Entergy's Request" because there was no request for hearing.[122] Petitioners fail to state any basis (much less a "reasoned" basis) for this bizarre conclusion. They provide no factual analysis of the NRC's conclusions regarding the Oyster Creek extension, nor do they explain why those conclusions are not instructive here. Moreover, they cite no authority for the proposition that

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119 *Id*. at 25.

120 *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC __ (slip op. at 10) (Nov. 9, 2015).

121 *Private Fuel Storage*, LBP-98-7, 47 NRC at 181 (1998), *aff'd*, CLI-98-13, 48 NRC 26, 37 (1998).

122 Hearing Request at 12-13.

precedent must be provided as a precondition for granting a purported license amendment. Nor could they, because no such requirement exists. Thus, this claim is unsupported, fails to raise a material issue, and fails to show that a genuine dispute exists with regard to a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(iv)-(vi). Accordingly, Part 4 does not support an admissible contention.

VI. CONCLUSION

As demonstrated above, Petitioners have not identified an opportunity for a hearing. Thus, the Hearing Request is procedurally improper and should be summarily denied. Even assuming a hearing opportunity, Petitioners have not satisfied the standing requirements in 10 C.F.R. § 2.309(d) and fail to proffer a contention satisfying the admissibility requirements in 10 C.F.R. § 2.309(f)(1). For these reasons, Entergy respectfully requests that the Hearing Request be rejected in its entirety.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, DC
this 3rd day of October 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 50-293-EA
ENTERGY NUCLEAR GENERATION CO. & ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Pilgrim Nuclear Power Station)	)	October 3, 2016

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of the foregoing "Entergy's Answer Opposing Request for Hearing Regarding Pilgrim and EA-13-109" were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above-captioned matter.

Signed (electronically) by Ryan K. Lighty

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