

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman  
Jeff Baran  
Stephen G. Burns

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In the Matter of )  
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ENTERGY NUCLEAR OPERATIONS, INC. ) Docket No. 50-293-EA  
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(Pilgrim Nuclear Power Station) )  

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CLI-17-06

**MEMORANDUM AND ORDER**

Pilgrim Watch, on behalf of itself and a number of other groups, has requested a hearing on a recent request filed by Entergy Nuclear Operations, Inc. for an extension of time to comply with an NRC order with respect to Pilgrim Nuclear Power Station.<sup>1</sup> For the reasons discussed below, we deny Pilgrim Watch's hearing request.

**I. BACKGROUND**

Prompted by the March 11, 2011, earthquake and tsunami and the resulting accident at the Fukushima Dai-ichi nuclear plant in Japan, the NRC embarked on an extensive lessons-learned initiative. One product of this initiative was orders requiring certain plants to install

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<sup>1</sup> *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) (Pilgrim Watch Hearing Request). The hearing request identifies the other groups on whose behalf the request is filed as Beyond Nuclear, Pilgrim Coalition, Pilgrim Legislative Advisory Coalition, Cape Downwinders, Cape Downwinders Cooperative, Massachusetts Downwinders, and Citizens Awareness Network. *Id.* at 1, 3-9.

reliable hardened containment vents. The NRC issued the first such order, EA-12-050, on March 12, 2012.<sup>2</sup> After further examination of the issue, the NRC subsequently issued another order, EA-13-109, which rescinded and replaced EA-12-050.<sup>3</sup>

EA-13-109 introduces its requirements by stating that “all licenses identified in Attachment 1 to this order are modified as follows,” and then it specifies four conditions (labeled A through D) and provides a concluding paragraph addressing those conditions.<sup>4</sup> Pilgrim is one of the plants listed in Attachment 1 to EA-13-109. After Condition A provides that EA-13-109 supersedes the previous post-Fukushima hardened vents order (EA-12-050), Condition B then sets forth the basic EA-13-109 substantive requirements, directing plants to “promptly start implementation of the requirements in Attachment 2 to this Order upon issuance of the associated final interim staff guidance (ISG)” for each of the two implementation phases (“Phase 1” and “Phase 2”).<sup>5</sup> The role of the ISGs is to serve as the agency’s primary implementing guidance documents for the substantive provisions of EA-13-109. Condition C then outlines requirements to notify the NRC in the event a licensee believes relief from Condition B requirements is necessary or appropriate for the licensee’s plant.<sup>6</sup> Most relevant to this matter, subpart 1 of Condition C states:

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

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<sup>2</sup> “Order Modifying Licenses With Regard to Reliable Hardened Containment Vents (Effective Immediately),” EA-12-050 (Mar. 12, 2012) (ADAMS accession no. ML12056A043) (EA-12-050).

<sup>3</sup> “Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (Effective Immediately),” EA-13-109 (June 6, 2013) (ML13143A334) (EA-13-109).

<sup>4</sup> *Id.* at 10-13.

<sup>5</sup> *Id.* at 10-11.

<sup>6</sup> *Id.* at 11-12.

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.<sup>7</sup>

In the paragraph immediately following the list of conditions, EA-13-109 states, "The Director, Office of Nuclear Reactor Regulation [NRR] may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee of good cause."<sup>8</sup>

On November 14, 2013, the NRC Staff issued the final ISG for the EA-13-109 Phase 1 requirements.<sup>9</sup> Under the terms of condition C.1 as quoted above, therefore, the post-ISG notification deadline for Phase 1 was twenty days after that, or December 4, 2013.

In November 2015, Entergy notified the NRC of its intention to "permanently cease power operations at [Pilgrim] no later than June 1, 2019."<sup>10</sup> Subsequently, in June 2016, Entergy filed a request with the NRC for an extension of time to comply with certain requirements of EA-13-109 at Pilgrim.<sup>11</sup> Entergy cited, as its basis for the request, its announced plans to shut down Pilgrim permanently as well as its alternative plan to "have in-

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<sup>7</sup> *Id.* at 11. Condition D contains requirements for submitting compliance plans and progress reports to the NRC.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> 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).

<sup>10</sup> Letter No. 2.15.080 from John Ventosa, Entergy, to NRC Document Control Desk, "Notification of Permanent Cessation of Power Operations" (Nov. 10, 2015) (ML15328A053).

<sup>11</sup> Letter No. 2.16.028 from John A. Dent, Jr., 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) (ML16187A325) (Entergy Extension Request).

place [at Pilgrim] a fully capable Severe Accident Strategy that meets all of the primary objectives of” EA-13-109.<sup>12</sup>

To support its assertion that its planned alternative approach would satisfy EA-13-109’s primary objectives, Entergy stated that Pilgrim’s containment venting system, modified in 2014, “meets the requirements of EA-13-109” with three exceptions.<sup>13</sup> Entergy then described proposed means, which Entergy claimed it would rely upon if its request were granted, for addressing two of the three identified exceptions, and claimed further that Pilgrim’s short remaining operating life renders it unnecessary for Entergy to address the third exception.<sup>14</sup>

According to Entergy, this relaxation request for Pilgrim would be followed later, once the plant has permanently shut down, by another request for relief from the EA-13-109 requirements at issue.<sup>15</sup> Entergy stated that its request was being filed “[i]n accordance with Section IV” of EA-13-109, which contains the order’s conditions and the paragraph that addresses “good cause” relaxation of those conditions, and that it was asking the Director of NRR to grant the extension.<sup>16</sup>

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<sup>12</sup> *Id.* at 2; *see also id.*, attach. 1 at 1. Entergy also cited an earlier extension request regarding EA-13-109 that the NRC has already granted for the Oyster Creek Nuclear Generating Station, another plant that has announced plans to permanently shut down in 2019. *Id.*, attach. 1.

<sup>13</sup> *Id.*, attach. 1 at 2. Specifically, Entergy indicated that the system does not yet include a permanent radiation monitor or a dedicated power supply and that Entergy has not yet developed the “detailed plans for [hardened containment vent system] testing and inspection required by the Order.” *Id.*

<sup>14</sup> *See id.* (summarizing Entergy’s plan to use a combination of existing radiation monitors in lieu of installing a new permanent radiation monitor and to use station batteries rather than installing a dedicated power supply for the system, and stating that “[w]hile Pilgrim will comply with the current established testing and inspection, the abbreviated operating timeframe (i.e., one operating cycle) will not require development of detailed” venting system testing and inspection plans).

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

## II. DISCUSSION

Section 189a.(1)(A) of the Atomic Energy Act of 1954, as amended (AEA), provides hearing rights with respect to “any proceeding . . . for the granting, suspending, revoking, or amending of any license.”<sup>17</sup> Accordingly, while hearing opportunities do not accompany every type of NRC regulatory action,<sup>18</sup> the NRC does provide hearing opportunities in connection with license amendment proceedings. We have also recognized that “agency actions not formally labeled as license amendments nevertheless can constitute *de facto* license amendments and accordingly trigger hearing rights for the public,”<sup>19</sup> but only if the NRC action has “(1) granted the licensee any greater authority or (2) otherwise altered the original terms of the license.”<sup>20</sup>

Pilgrim Watch asserts that Entergy’s relaxation request, though not styled as a license amendment request, is “in reality” a license amendment request and, as a result, is subject to hearing rights at the NRC. The NRC Staff and Entergy oppose the hearing request, arguing that the relaxation request is not properly viewed as a request for a license amendment.<sup>21</sup>

Specifically, Pilgrim Watch argues that EA-13-109 “modified, i.e., amended, the then-current licenses for twenty Operating Boiling Water Reactor Licensees, including Pilgrim.”<sup>22</sup> The

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<sup>17</sup> 42 U.S.C. § 2239(a)(1)(A).

<sup>18</sup> *Massachusetts v. NRC*, 878 F.2d 1516, 1522 (1st Cir. 1989); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 96 (2000); see also *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 739 (1985).

<sup>19</sup> *Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 334 (2015).

<sup>20</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-16-9, 83 NRC 472, 474 (2016) (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996)).

<sup>21</sup> *NRC Staff’s Response to Pilgrim Watch & Co-Petitioners’ Request for Hearing* (Oct. 3, 2016) (Staff Answer); *Entergy’s Answer Opposing Request for Hearing Regarding Pilgrim and EA-13-109* (Oct. 3, 2016) (Entergy Answer).

<sup>22</sup> Pilgrim Watch Hearing Request at 9.

effect of the order's amendment, Pilgrim Watch states, was "to require the installation of reliable hardened vents promptly to be completed – 'no later than startup from the second refueling outage that begins after June 30, 2014 or June 30, 2018, whichever comes first.'"<sup>23</sup> Pilgrim Watch then asserts that Entergy's request "seeks to amend Pilgrim's license by delaying the compliance date" for Phase 1 to December 31, 2019, and that Entergy submitted the request well beyond the deadline specified in EA-13-109 Condition C.1, which Pilgrim Watch's hearing request suggests was the EA-13-109 provision governing this request.<sup>24</sup>

Based on this reasoning, Pilgrim Watch characterizes Entergy's request as "a transparent attempt to avoid the general requirements and guidance for amending an existing license as set forth in" NRC regulations governing license amendments.<sup>25</sup> Pilgrim Watch accordingly contends that "the NRC's rules, practice and regulations require that Petitioners, and any other parties with standing, be provided a hearing prior to issuance of Entergy's requested amendment."<sup>26</sup>

In response, Entergy and the Staff each argue that EA-13-109 itself permits relaxation of any EA-13-109 requirements upon the licensee successfully demonstrating "good cause" to the Director of NRR and that this "good cause" provision (rather than Condition C.1) governs Entergy's extension request.<sup>27</sup> The Staff further argues that relaxation of an order falls within

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<sup>23</sup> *Id.* at 16.

<sup>24</sup> *Id.* at 10-11, 16.

<sup>25</sup> *Id.* at 16.

<sup>26</sup> *Id.* at 11.

<sup>27</sup> Staff Answer at 12; Entergy Answer at 12, 15. Entergy, in addition to citing to language in its own extension request to support its position that it filed the extension request under the "good cause" provision, also cites, as further support, portions of the earlier Oyster Creek extension request that reference the "good cause" provision. Entergy Answer at 12 n.44. Entergy's extension request for Pilgrim specifically states that it "is based on the extension request already approved by the NRC for Oyster Creek." Entergy Extension Request, attach. 1 at 1. In granting the Oyster Creek extension request, the Director of NRR relied on the EA-13-109 "good cause" provision. See Letter from W. Dean, NRC, to B. Hanson, Exelon Generation Co.,

the same authority as the initial authority to issue the order.<sup>28</sup> Reasoning that the Commission has limited the scope of hearings on orders to the question of “whether the order should be sustained,” the Staff contends that relaxation of an order falls outside of the scope of issues that may be addressed in hearings involving orders.<sup>29</sup> Both the Staff and Entergy also argue that order relaxation falls within the realm of enforcement and ongoing regulatory oversight, where hearing rights are limited, rather than licensing.<sup>30</sup> Entergy and the Staff also argue that to the extent Pilgrim Watch claims that Entergy is not complying with EA-13-109,<sup>31</sup> or that some modification to Pilgrim’s license is needed for safety reasons,<sup>32</sup> the proper method to raise such a challenge is by filing a petition for enforcement under 10 C.F.R. § 2.206, not by requesting an adjudicatory hearing.

Entergy further argues that the EA-13-109 “good cause” provision “does not provide any hearing opportunity for relaxation requests; nor has the Commission ever recognized such a

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LLC, “Oyster Creek Nuclear Generating Station – Relaxation of the Schedule Requirements for Order EA-13-109; Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (TAC No. MF4352)” (Nov. 16, 2015), at 2 (ML15092A159) (“In light of the facts presented in the licensee’s [extension request] letters, the NRC staff has determined that the licensee has presented good cause for a relaxation of the order implementation date for Phase I implementation of Order EA-13-109.”). Entergy and the Staff point out that Pilgrim Watch’s hearing request does not even mention this “good cause” provision. Entergy Answer at 12; Staff Answer at 12.

<sup>28</sup> Staff Answer at 12.

<sup>29</sup> *Id.* at 12-13.

<sup>30</sup> See Staff Answer at 14 (arguing that assessing “good cause” order-relaxation requests “is part of the Staff’s regulatory and enforcement role” and that “[r]equiring a hearing each time the Staff made such a determination would lead to the interminable hearings the Commission sought to avoid in limiting the scope of those proceedings, and would impede the regulatory process”); Entergy Answer at 15-17 (arguing that “recent Commission decisions have made clear that agency actions related to at least two related topics do not trigger hearing opportunities: enforcement and oversight,” and asserting that “[a] request for ‘relaxation’ of the requirements of an order is comparable to both of these topics”).

<sup>31</sup> Staff Answer at 14; Entergy Answer at 13-14.

<sup>32</sup> Staff Answer at 14.

hearing opportunity.”<sup>33</sup> Entergy also cites the NRC Enforcement Manual as reflecting a “longstanding Commission policy” that relaxation provisions in orders are designed to allow order relaxation to be handled on a relatively informal basis.<sup>34</sup>

In its reply to the Staff’s and Entergy’s answers, Pilgrim Watch argues that the name given to the requested action—“relaxation” rather than “amendment”—is irrelevant.<sup>35</sup> In Pilgrim Watch’s view, even if the requested action is labeled a “relaxation” that would be accomplished pursuant to the EA-13-109 “good cause” provision, it would still have the effect of amending Pilgrim’s license by changing the deadline set by EA-13-109 for Phase 1 compliance, which, Pilgrim Watch states, means that hearing rights attach.<sup>36</sup> Pilgrim Watch also argues that the lack of hearing rights associated with NRC orders applies only to the extent the NRC is imposing stricter requirements to make a plant safer, not where the NRC is relaxing requirements.<sup>37</sup>

We agree with Entergy and the Staff that the action Entergy requests is not a license amendment triggering hearing rights under section 189a. of the AEA. Entergy and the Staff are correct that AEA hearing rights are limited with respect to NRC enforcement and oversight activities. Here, we view Entergy as asking the NRC to exercise its inherent discretion not to enforce particular terms of EA-13-109 with respect to Pilgrim, pursuant to the “good cause”

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<sup>33</sup> Entergy Answer at 12.

<sup>34</sup> *Id.* (citing NRC Enforcement Manual (Rev. 9) (Sept. 9, 2013, updated Dec. 10, 2015), at 162 (ML102630150) (Enforcement Manual)).

<sup>35</sup> *Petitioners’ Response to NRC Staff’s and Entergy’s Opposition to Petitioners’ Request for Hearing Regarding Entergy’s Request for Extension to Comply with NRC Order EA-13-109* (Oct. 11, 2016), at 6 (Pilgrim Watch Reply).

<sup>36</sup> *Id.* at 6-8; *see also id.* at 19 (“[I]t is clear that simply including [a “good cause”] provision in an Order could not excuse the Commission, or anyone to who it might delegate any of the Commission’s authority, from complying with the Atomic Energy Act.”).

<sup>37</sup> *Id.* at 22-23.



order-relaxation process EA-13-109 specifies for invoking that discretion. We agree with the explanation in the Staff answer that even if the NRC grants the requested relaxation, EA-13-109 would still “remain in effect at Pilgrim and the relaxation could be revoked at any time.”<sup>38</sup> NRC decisions not to enforce particular requirements against particular licensees are not equivalent to license amendments and are not subject to hearing opportunities under the AEA.<sup>39</sup>

Because order relaxation is an exercise of NRC enforcement discretion, the relaxation that Entergy requests would not formally alter the terms of EA-13-109 or otherwise change the terms of Pilgrim’s license. Therefore, it would not constitute a license amendment. As the Staff explained, if the Staff grants Entergy’s relaxation request based, at least in part, on Entergy’s commitments to take alternative safety measures, but then Entergy does not follow through on its commitments, the Staff would have a clear recourse: it could revoke the relaxation and take any appropriate enforcement action based on Pilgrim’s noncompliance with EA-13-109.<sup>40</sup> With relaxation being an enforcement discretion tool that does not formally alter any EA-13-109 requirements, revoking the relaxation would not require the NRC to issue a new order, and it

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<sup>38</sup> Staff Answer at 14 n.63. Viewing order relaxation through the lens of enforcement is consistent with the “good cause” provision’s origins as an NRC enforcement tool routinely included in enforcement orders. See Enforcement Manual at 155, 162.

<sup>39</sup> See *Illinois v. NRC*, 591 F.2d 12 (7th Cir. 1979) (holding that NRC denial of petition filed under 10 C.F.R. § 2.206 to modify, suspend, or revoke a license does not trigger hearing rights under AEA); see also *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 383 (D.C. Cir. 1983) (distinguishing, for purposes of notice and comment requirements under the Administrative Procedure Act, between an NRC “‘statement of policy’ regarding its intent not to enforce [a] deadline” and an NRC action that actually amends licenses). An NRC Enforcement Manual provision cited by Pilgrim Watch that addresses NRC inter-office coordination in connection with order relaxation requests, but which makes no mention of adjudicatory hearings, does not indicate otherwise. See Pilgrim Watch Reply at 5; Enforcement Manual at 162.

<sup>40</sup> Entergy proposes to rely on alternative measures to achieve some of the goals of EA-13-109. We understand Entergy’s commitments regarding alternative safety measures as intended to support its “good cause” showing.

would not provide Entergy with any hearing rights to contest the revocation.<sup>41</sup> To obtain more substantial safeguards, including hearing rights, against the NRC subsequently revoking the relaxation, Entergy would need to request a formal change to the terms of its license by applying for a license amendment.<sup>42</sup>

Pilgrim Watch argues that pertinent federal court decisions require a different result. Given order relaxation's function as an enforcement discretion tool, however, we view our holding as consistent with applicable case law. In *Citizens Awareness Network v. NRC*, the First Circuit Court of Appeals reasoned that "it is the *substance* of the NRC action that determines entitlement to a section 189a. hearing, *not* the particular label the NRC chooses to assign to its action."<sup>43</sup> As we have explained, order relaxation is distinct from amending licenses not just in name, but also in substance: specifically, in the lack of alteration of license terms and the consequent lack of hearing rights for licensees should the NRC subsequently decide to revoke the relaxation. Further, exercising discretion in enforcement of a term of an order requiring additional safety measures is not analogous to affirmatively authorizing a licensee to undertake some new, previously unlicensed activity. It is the latter that is the defining feature of a license amendment for AEA purposes.<sup>44</sup>

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<sup>41</sup> Even though there may not be formal procedures or hearing rights associated with revocation of a previous order-relaxation decision, we expect that any Staff decision to revoke a previous order relaxation decision would be supported by a reasoned basis. And if the revocation of a relaxation were to result in the NRC taking enforcement action against the licensee, the licensee would have the usual right to request a hearing challenging any enforcement order issued against it.

<sup>42</sup> Applying for a formal license change via the license amendment process would also provide Pilgrim Watch or others an opportunity to challenge the license amendment request in a hearing.

<sup>43</sup> 59 F.3d 284, 295 (1st Cir. 1995).

<sup>44</sup> *Id.* at 294-95.

Additionally, although the D.C. Circuit in *Bellotti v. NRC* drew a distinction between situations “when the Commission amends a license to require additional or better safety measures,” which need not involve public hearing rights, and situations when “the Commission proposes to amend a license to remove a restriction upon the licensee,” which do trigger public hearing rights, that rule, by its own terms, would not apply where no license is being amended.<sup>45</sup> And while *Bellotti* also expressed the same principle in broader terms, stating that “[p]ublic participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare,”<sup>46</sup> we interpret that language, consistent with subsequent views of the U.S. Supreme Court, as addressing only those NRC actions listed in section 189a. of the AEA.<sup>47</sup> An NRC decision not to enforce certain terms of an order is not an action listed in that section.

Consistent with that view, the First Circuit has held that exemptions from NRC regulations that the NRC grants using authority included in those same regulations—an NRC action AEA section 189a. also does not list—do not trigger hearing opportunities under section 189a.<sup>48</sup> Similarly, Entergy here seeks relief from an order’s requirements by invoking a

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<sup>45</sup> See 725 F.2d 1380, 1383 (D.C. Cir. 1983).

<sup>46</sup> *Id.*

<sup>47</sup> See *Lorion*, 470 U.S. at 739 (recognizing Congressional intent to limit AEA hearing rights to licensing proceedings only).

<sup>48</sup> *Massachusetts v. NRC*, 878 F.2d 1516, 1521 (1st Cir. 1989); see also AEA § 189a. Courts have also recognized the particularly broad discretion agencies have when making enforcement decisions. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”); *Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958) (recognizing that the FTC “alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically”); see also *Alaska Department of Transportation & Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 409 (2004) (“The NRC Staff has considerable latitude in choosing enforcement weapons.”); *Sequoyah Fuels Corp. & General Atomics* (Gore, Oklahoma Site Decontamination and Decommission Funding), CLI-97-13, 46 NRC 195, 207 (1997) (discussing

relaxation process that the order itself authorizes. Both processes reflect the NRC's exercise of discretion not to enforce applicable requirements against a particular licensee based on the licensee's particular circumstances.<sup>49</sup> Given their similarities, we do not find that one of these processes triggers hearing opportunities under the AEA while the other does not.

Also important is that EA-13-109 allowed licensees, or any other person affected by the order, an opportunity to request a hearing on the order within twenty days of its issuance.<sup>50</sup> Such hearings are limited to the issue of whether the order should be sustained.<sup>51</sup> All other things being equal, an order from which relief may be obtained by making a simple "good cause" showing to a particular NRC Staff official is seemingly less strict—thus providing licensees less incentive to challenge it—than an order from which relief may be obtained only by invoking our formal license amendment process. We decline to find, long after the deadline for requesting a hearing to challenge the order, that the order is stricter than it appears on its face. We are also cognizant of our longstanding policy of "encourag[ing] licensees to consent to, rather than contest, enforcement actions."<sup>52</sup> Retroactively reinventing this order provision or

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the extent of NRC's discretion when "the agency decides whether to initiate enforcement action").

<sup>49</sup> See *Sequoyah Fuels*, CLI-97-13, 46 NRC at 220 ("[I]nsistence on strict regulatory compliance in all cases . . . would rule out agency use of exemptions and enforcement discretion to relax rules in particular circumstances—a position at odds with maintaining regulatory flexibility and with NRC rules and practice.").

<sup>50</sup> EA-13-109 at 13-18.

<sup>51</sup> See, e.g., *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents*, CLI-13-2, 77 NRC 39, 44 (2013) (defining scope of hearing as whether the "order should be sustained" in the form it was issued).

<sup>52</sup> *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980); *accord Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 58 n.21 (2004). Although EA-13-109 was not itself issued as an enforcement measure for violations of NRC requirements, the general policy considerations discussed in *Marble Hill* also apply to orders like EA-13-109. See *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments*, CLI-13-2, 77 NRC at 45-49 (discussing case law regarding enforcement actions in context of challenge to post-

requiring a hearing on the provision's exercise when no such hearing had previously been contemplated would undermine that policy with respect to future orders.

We recognize that the "good cause" provision nowhere expressly states that order relaxation is an exercise of enforcement discretion rather than a licensing action. Thus, reading the provision in isolation, one might conclude that order relaxation could have the same sort of formal, binding effect as NRC issuance of a license amendment or order, notwithstanding that the relaxation process described is much simpler than typical NRC licensing processes. Considering all relevant factors, however, we do not view such an interpretation as reasonable. First, the "good cause" provision does not state, or otherwise require, that order relaxation *would* have formal, binding effect akin to that of a license amendment or order. Moreover, as Entergy observed, NRC guidance recognizes a distinction between relaxing an order and issuing a new order—a distinction that would make little sense if the two actions were functionally equivalent.<sup>53</sup> And most importantly, it would be inconsistent with the AEA to interpret the relaxation process described in the "good cause" provision as serving the same functional purpose as the license amendment process.<sup>54</sup> Thus, even if one could argue that the text of the "good cause" provision on its own might permit interpreting order relaxation as the functional equivalent of amending a license, we decline to adopt this problematic interpretation.

The circumstances of EA-13-109's issuance underscore the value of having a built-in mechanism for efficient exercise of enforcement discretion. EA-13-109 provides a one-size-fits-

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Fukushima non-enforcement orders and rejecting hearing petitioner's attempt to distinguish the two scenarios for purposes of determining hearing rights).

<sup>53</sup> See Entergy Answer at 12 ("[L]ongstanding Commission policy . . . clearly explains that relaxation provisions were explicitly designed 'to *avoid the need to issue another order* should the order need to be relaxed' (emphasis added).).

<sup>54</sup> See AEA § 189 (establishing various requirements for NRC license amendment proceedings); see also 10 C.F.R. §§ 50.90-50.92 (setting forth NRC regulations governing license amendment proceedings, which aim to ensure compliance with AEA requirements).

all solution for several plants. Because of our interest in responding promptly to lessons learned from Fukushima, we issued the EA-13-109 requirements via a single generic order rather than through individually tailored, site-specific orders. In doing so, we did not attempt to hardwire a thorough set of exceptions into EA-13-109 itself to account for variance in site-specific circumstances. Instead, we view order relaxation based on a case-by-case “good cause” finding as providing flexibility to account for different circumstances among sites.<sup>55</sup> Indeed, Condition C of EA-13-109 explicitly recognizes the need for site-specific flexibility, at least for plant-specific implementation issues that are identified based on the additional implementation guidance provided in the ISGs.<sup>56</sup>

Because Pilgrim Watch’s hearing request also speaks to the merits of Entergy’s extension request, and because the Staff’s and Entergy’s answers include responses to those aspects of the hearing request, we refer the pleadings filed in this matter to the Director of NRR

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<sup>55</sup> Providing for this exercise of enforcement discretion as an alternative to amending licenses to address site-specific implementation issues is also consistent with our overall interest in handling post-Fukushima matters expeditiously. Moreover, removing the option to address site-specific order-implementation issues where there is good cause to do so could tend to deter future Commission decisions to impose binding requirements by order, particularly with respect to broadly applicable orders like EA-13-109. *See Bellotti*, 725 F.2d at 1382 (explaining that finding more expansive hearing rights in connection with orders may “cause the Commission to be more circumspect in its drafting of orders and seek to accomplish some reforms informally”).

<sup>56</sup> With regard to Condition C, we also observe that the “good cause” provision expressly allows relaxation of any of EA-13-109’s conditions if there is “good cause” to do so. A relaxation under the provision logically includes any applicable notification deadline in Condition C, not only the substantive requirements in Condition B. The purpose of the Condition C deadline is to ensure timely identification and notification to the NRC of matters derived from the implementation guidance in the ISG—an interest not necessarily pertinent to a request for relaxation based on a licensee’s unrelated business decision to close a plant early.

for consideration in reaching a decision on Entergy's relaxation request.<sup>57</sup> Entergy's request is not, however, a license amendment request with an accompanying hearing opportunity.<sup>58</sup>

### III. CONCLUSION

For the reasons provided above, we *deny* Pilgrim Watch's request for a license amendment hearing on Entergy's request for relaxation of Commission order EA-13-109. We also *refer* the pleadings in this matter, and two other documents Pilgrim Watch requested be added to the docket in this matter, to the Director of NRR for information in connection with Entergy's relaxation request.<sup>59</sup>

IT IS SO ORDERED.

For the Commission

**NRC Seal**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 6<sup>th</sup> day of April, 2017.

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<sup>57</sup> This referral would include the two supporting documents Pilgrim Watch requested be added to the docket in this matter. See Letter from Mary Lampert, Pilgrim Watch (Sept. 23, 2016) (transmitting a September 21, 2016, letter from eleven Members of Congress and a September 22, 2016, news article discussing that letter). The referral should not be construed as converting the Director of NRR's decision into a contested adjudicatory matter. Rather, it reflects that agency stakeholders may at any time submit correspondence to the NRC about matters pending before the agency and that we take such input seriously.

<sup>58</sup> Because we deny Pilgrim Watch's hearing request on the ground that Entergy's relaxation request is not a license amendment request, we need not reach questions of whether Pilgrim Watch has demonstrated standing or submitted an admissible contention.

<sup>59</sup> In denying Pilgrim Watch's hearing request, we take no position on the merits of Entergy's relaxation request. Per EA-13-109, the merits of Entergy's request are before the Director of NRR.

## **Additional Views of Commissioner Baran**

Although I think the Commission decision reaches the correct legal conclusion, I write separately to discuss in more detail the complex question of first impression presented in this case.

On March 9, 2012, the Commission approved the issuance of Order EA-12-050, which required boiling water reactors with Mark 1 or Mark 2 containments, including Pilgrim, to install reliable hardened containment vents.<sup>1</sup> The Commission found that the order was necessary to provide adequate protection of public health and safety.<sup>2</sup> On March 19, 2013, the Commission approved the issuance of an updated order, EA-13-109, which added a requirement that the hardened vents remain functional during severe accidents.<sup>3</sup> The Commission agreed with the Staff that this additional requirement was a cost-justified substantial safety enhancement.<sup>4</sup> The updated order included the following broad language: “The Director, Office of Nuclear Reactor Regulation may, in writing, relax or rescind any of the above conditions [i.e., the requirements] upon demonstration by the Licensee of good cause.”<sup>5</sup>

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<sup>1</sup> Staff Requirements—SECY-12-0025—Proposed Orders and Requests for Information in Response to Lessons Learned from Japan’s March 11, 2011, Great Tohoku Earthquake and Tsunami (Mar. 9, 2012).

<sup>2</sup> EA-12-050 at 7.

<sup>3</sup> Staff Requirements—SECY-12-0157—Consideration of Additional Requirements for Containment Venting Systems for Boiling Water Reactors with Mark I and Mark II Containments (Mar. 19, 2013).

<sup>4</sup> EA-13-109 at 7.

<sup>5</sup> The order itself does not define the terms “relax,” “rescind,” or “good cause.” However, NRC’s Enforcement Manual addresses this type of relaxation provision. Section 2.7.8 of the Manual states that the purpose of a relaxation provision is “to avoid the need to issue another order should the order need to be relaxed.” It states that “the term ‘rescind’ should be used when it is concluded that because of a basic mistake of law or fact, the action should not have been issued at all.” This is distinct from withdrawing an order, which the Manual defines as “dropping all or part of an order.”



Although this was essentially boilerplate order text that has been used in many orders over the years, the Commission has never before been asked to interpret this language or determine its legal significance and effect. I agree with the Commission decision that it is more reasonable to treat the use of the relaxation provision as an exercise of enforcement discretion rather than as a *de facto* license amendment. But I understand why Pilgrim Watch would see staff action on the Pilgrim relaxation request as something other than the ordinary exercise of enforcement discretion. Entergy has characterized the requested action as an “extension” to comply with the order. But because Pilgrim is scheduled to permanently shut down by June 1, 2019, the practical effect of granting this “extension” would be that the plant would probably never have to meet the requirements of the order. As the Commission decision explains, exercising enforcement discretion to relax the order will not have the legal effect of withdrawing the order for Pilgrim because the Staff could opt to enforce the requirements of the order at any time. But the requested relaxation would represent an expansive use of the enforcement discretion afforded to the Director of the Office of Nuclear Reactor Regulation. The request does not involve a minor tweak to the order’s requirements, such as an extra month to comply or a slightly modified technical approach for complying. The practical result of granting the request would be to set aside the requirements altogether. Though I agree with the Commission’s legal conclusion that this potential use of enforcement discretion cannot be classified as a *de facto* license amendment, I want to be clear that my concurrence in the Commission decision should not be read as expressing a view on the merits of granting the Pilgrim relaxation request.

The order’s relaxation provision is very broad. It empowers the Director of the Office of Nuclear Reactor Regulation to effectively set aside the core requirements of the order for “good cause” without the approval of the Commission and without any standards or criteria for determining what constitutes “good cause.” If I had been serving on the Commission when the order was issued, I would not have supported including this virtually unfettered staff discretion to

waive compliance with the central provisions of the Commission's order. When the Commission determines that an order is necessary to provide reasonable assurance of adequate protection of the public health and safety, I believe a relaxation provision should be more narrowly tailored. Going forward, I support directing the Staff to develop general criteria for determining whether there is "good cause" to relax the requirements of an order that the Commission approved as necessary for adequate protection. Standards of this kind would have been helpful in the Staff's evaluation of the Oyster Creek relaxation request, the granting of which is now being cited as precedent for the Pilgrim request.

Pilgrim Watch correctly notes that section 2.7.8 of NRC's Enforcement Manual provides that "[t]he same offices that were involved in issuing the order are to be involved before relaxing or terminating a provision of the order." For the Pilgrim relaxation request and all future requests for the relaxation of orders approved or directed by the Commission, I expect that the Staff will consult with the Commission before making a decision about whether to relax the order. As part of this informal consultation, the Staff should discuss the basis for its determination of whether there is "good cause" to relax such an order.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
ENTERGY NUCLEAR GENERATION & )  
ENTERGY NUCLEAR OPERATIONS, INC. )  
(Pilgrim Nuclear Power Station) )

Docket No. 50-293-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-17-06)**, have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Clara Sola \_\_\_]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
This 6<sup>th</sup> day of April, 2017