

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-04-11

RAS 7868

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 06/02/04

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Before Administrative Judge:

G. Paul Bollwerk, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

FIRSTENERGY NUCLEAR OPERATING CO.

(Davis-Besse Nuclear Power Station, Unit 1)

Docket No. 50-346-CO

ASLBP No. 04-825-01-CO

June 2, 2004

MEMORANDUM AND ORDER
(Denying Intervention Petition)

Pending before the Licensing Board is a request for a hearing filed by individual petitioners Michael Keegan, Joanne DiRando, Donna Lueke, and the organization Nuclear Information and Resource Service (NIRS) (collectively Petitioners) challenging the NRC staff's March 8, 2004 immediately effective confirmatory order modifying the 10 C.F.R. Part 50 operating license of the Davis-Besse Nuclear Power Station, Unit 1. With that order, Davis-Besse licensee FirstEnergy Nuclear Operating Company (FENOC) is required to make several safety changes at the facility to address performance deficiencies relating to the March 2002 discovery of a corrosion-induced cavity in the reactor pressure vessel (RPV) head.

Both FENOC and the staff have provided responses opposing the Petitioners' hearing request. As we explain herein, having sought to litigate matters that fall outside the scope of this proceeding, the Petitioners have failed to establish their right to intervene in accord with 10 C.F.R. § 2.309. We thus deny their hearing petition.

I. BACKGROUND

FENOC owns and operates Davis-Besse Unit 1, a nuclear power station located in Ottawa County, Ohio. On March 6, 2002, during a routine refueling outage, FENOC discovered that small cracks in a nozzle that penetrates the RPV had caused reactor coolant containing boric acid to leak onto the RPV head. This long-term leakage had, in turn, created a cavity in the RPV head. See 69 Fed. Reg. 12,357, 12,357 (Mar. 16, 2004). The staff subsequently determined that the leak was caused, among other things, by FENOC's failure properly to implement boric acid corrosion control and corrective action programs. See id.

Because of the safety significance of the performance deficiencies, a number of corrective actions were taken by FENOC and the staff before the plant was permitted to restart. In this regard, the staff issued a March 13, 2002 confirmatory action letter (CAL) that detailed actions FENOC had to implement before the plant could reopen. Also, beginning in May 2002 the staff put in place an oversight panel to provide enhanced facility monitoring during shutdown and during and after any future restart until a determination was made that a return to normal NRC facility oversight was warranted. For its part, FENOC developed and submitted a May 21, 2002 return-to-service plan that described FENOC's actions for a safe and reliable return to service, while on August 16, 2002 the staff oversight panel established a restart checklist outlining the essential issues necessary to resolve the causes of the RPV head degradation so that FENOC could safely restart and operate the facility. Further, on November 23, 2003, FENOC submitted an operational improvement plan intended to ensure that implemented improvements continued after the plant reopened, including requiring that FENOC conduct regular refueling outage inspections for leakage from or above the RPV head. See id. at 12,358-59.

In issuing the March 2004 confirmatory order at issue in this proceeding, the staff declared that, notwithstanding the corrective actions taken by FENOC to address the staff's CAL and restart checklist and the actions that are planned by FENOC in its operational improvement plan, additional measures are necessary to improve FENOC's ability to self-assess plant problems, which the staff denoted as an essential element in preventing a recurrence of a safety-related event such as the RPV head degradation incident. To this end, that order modifies the FENOC operating license for Davis-Besse to require two additional actions. First, FENOC must obtain comprehensive independent outside assessments of the facility's operational performance, organizational safety culture (including safety-conscious work environment), corrective action program implementation, and engineering program effectiveness. Second, FENOC must conduct a visual examination of the RPV upper head during the next (Cycle 14) midcycle outage and report the results to the staff before restart from the outage. See id. at 12,359-60. With this immediately effective confirmatory order in place, the staff approved the restart of Davis-Besse on March 8, 2004.

Among its procedural provisions, the confirmatory order states that "[a]ny person adversely affected by this [order], other than the licensee, may request a hearing within 20 days of its issuance." Id. at 12,360. The order also declares that "[i]f a hearing is held, the issue to be considered at such a hearing shall be whether this Confirmatory Order should be sustained." Id. Pursuant to the order, on March 29, 2004, the Petitioners filed a hearing request. See Objections to Confirmatory Order Modifying License (Mar. 29, 2004) [hereinafter Hearing Petition]. In their intervention request, the Petitioners ask that the agency (1) hold an evidentiary hearing on fire-protection issues; (2) suspend FENOC 's 10 C.F.R. Part 50 operating license and halt the restart of Davis-Besse because of the NRC's alleged "regulatory indifference"; and (3) require FENOC to satisfy all licensing criteria before allowing the

commercial generation of electricity at Davis-Besse. See Hearing Petition at 3-11. Both FENOC and the staff filed responses asserting the hearing request should be denied. See [FENOC] Answer to Objections to Confirmatory Order and Request for Hearing (Apr. 23, 2004) at 1-2 [hereinafter FENOC Response]; NRC Staff Response to Objections to Confirmatory Order Modifying License (Apr. 23, 2004) at 1 [hereinafter Staff Response]. Subsequently, the Petitioners filed additional declarations in support of their standing claims, see Notice of Filing of Declarations in Support of Petitioners' Standing to Sue (Apr. 29, 2004) [hereinafter Support Declarations], and a reply to the NRC and FENOC answers, see Petitioners' Combined Reply in Opposition to "NRC Staff Response to Objections" and FENOC's "Answer to Objections" (May 13, 2004) [hereinafter Petitioners Reply].

III. ANALYSIS

Under section 2.309(d), (f) of the Commission's recently amended rules of practice,¹ a petitioner seeking to obtain a hearing has the burden of demonstrating that he or she has standing and has proffered at least one admissible contention. In this regard, and particularly in connection with a staff enforcement order such as the one at issue in this proceeding, an initial question a licensing board must confront is whether a hearing request falls within scope of the proceeding as defined by that order.

It is well-established that the Commission has the authority to define the scope of a proceeding. See Bellotti v. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983), aff'g, Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-05, 59 NRC 52, 56 (2004); Public

¹ The new rules, which became effective February 13, 2004, apply to this proceeding. See 69 Fed. Reg. 2182, 2182 (Jan. 14, 2004).

Serv. Co. of Indiana (Marble Hill Nuclear Generation Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980). This authority includes limiting a proceeding regarding an enforcement order narrowly to the issue of whether the order should be sustained. See Bellotti, 725 F.2d at 1382.

In Bellotti, the United States Court of Appeals for the District of Columbia Circuit was asked to review a Commission decision denying the request of the Attorney General of the Commonwealth of Massachusetts (Attorney General) for a hearing on a staff enforcement order issued in connection with a nuclear power plant in his state. The order there in question modified the facility license to require, among other things, a plan for reappraisal and improvement of management functions. See id. at 1381. Seeking to intervene to challenge the plant's continued operation, the adequacy of the reappraisal plan, the nature of the necessary improvements, and the adequacy of the plant's implementation of necessary changes, the Attorney General argued that he was entitled to a hearing under the language of Atomic Energy Act section 189(a) providing an adjudicatory forum for "any person whose interest that may be affected by the proceeding." Id. (quoting 42 U.S.C. § 2239(a)). In upholding the Commission's decision not to grant the Attorney General's hearing request, the Bellotti court determined that the Commission was not arbitrary in limiting the scope of the proceeding to whether the enforcement order should be upheld. Moreover, given that the Attorney General was seeking to litigate whether other, additional corrective measures were needed, the court concluded that such matters fell outside the ambit of the proceeding as lawfully defined by the Commission -- i.e., whether the order should be sustained -- so that the Commission was correct in denying his intervention request. See id. at 1382-83.

Bellotti clearly remains the controlling precedent in this context. Recently, using the Bellotti analysis, the Commission in the Maine Yankee proceeding considered a Licensing

Board decision denying the petition of the State of Maine (State) for a hearing on an order modifying a license to store spent nuclear fuel at a Maine reactor site by imposing additional security measures. The agency order likewise limited any hearing requested by an interested person to whether the order should be sustained. The State argued that Bellotti did not preclude its intervention in that it opposed the order because it wanted provisions added that would allow it to better evaluate the financial and environmental impacts of the order's security provisions on the State. See Maine Yankee, CLI-04-5, 59 NRC at 55. The Commission disagreed with the State's analysis, reasoning that the State did not substantially oppose the order, but rather sought "additional measures." Id. at 57. The Commission explained that the State did not really oppose the order in that it did not disagree with the order's security provisions (i.e., did not assert they were unwarranted or should be relaxed), but rather was seeking to add measures to the order. The Commission thus upheld the Board's conclusion that a petition seeking to add to an existing enforcement order amounts effectively falls outside the scope of the proceeding as defined in the order. See id. at 57-58, 60-61.

As was noted earlier, the staff's March 2004 confirmatory order limits the scope of any hearing to whether the order should be sustained. See 69 Fed. Reg. at 12,360. As Bellotti and the Commission's recent Maine Yankee decision suggest, this limitation affects both who has standing to be admitted as an intervenor and what contentions may be litigated. In connection with their standing, the individual petitioners in this case, who declare they live as close as nineteen miles to the Davis-Besse nuclear power station, and organizational petitioner NIRS, which seeks to establish its representational standing based on the membership of an individual living within twenty-five miles of the facility, allege general concerns for public and private welfare and the possibility of illness or death in the event of an accident involving a radiation release. See Hearing Petition at 1-3; see generally Support Declarations, attachs. While such

proximity to a plant might be sufficient to establish standing in a reactor operating license proceeding, the scope of litigable concerns in those proceedings is much broader than the current proceeding. Relative to the staff's March 2004 enforcement order, as defined by that order the only matters at issue are the two measures intended to improve FENOC's self-assessment efforts. The Petitioners, who do not address the Bellotti precedent in either their petition or their reply filing despite extensive discussions in both the FENOC and the staff responses to their petition, see FENOC Response at 5-8; Staff Response at 4-6, have made no effort in the context of the confirmatory order to establish how the order's corrective measures cause them any harm whatsoever. Thus, under the scope of this proceeding as defined in the confirmatory order, the Petitioners have failed to establish the requisite injury-in-fact. See Maine Yankee, CLI-04-5, 59 NRC at 56 n.14 (person whose interest cannot be affected by the issues before the Commission in a proceeding lacks essential element of standing).

By the same token, the Petitioners also fail to proffer any admissible contentions. Because the March 2004 confirmatory order limited any challenges to its terms to whether it should be sustained, any issues the Petitioners seek to litigate would fall within the scope of the proceeding only if they amount to matters that oppose the issuance of the order as unwarranted, so as to require relaxation, or affirmatively detrimental to the public health and safety, so as to require rescission (as opposed to supplementation). Upon examination, the Petitioners' arguments clearly do not oppose the issuance of the order, but rather seek to add additional safety measures or sanctions that ultimately fall outside the scope of this proceeding.

In this regard, the Petitioners' first argument that the plant has inadequate fire protection and the public must have an "opportunity to examine and question the adequacy of fire protection at Davis-Besse within the context of a public license amendment proceeding," Hearing Petition at 7, is outside the scope of the order given that the order does not discuss fire

protection. The Petitioners argue that fire safety nonetheless is an admissible matter because the Davis-Besse oversight panel considered fire safety, thus making it a matter relevant to restart. See Petitioners Reply at 4-5. As the Bellotti court noted, however, in the context of agency enforcement proceedings a “whether the order should be sustained” limitation on the scope of any hearing is intended to address a serious concern about whether members of the public can be afforded the opportunity to litigate before the Commission “any and all issues that occur to them without demolishing the regulatory process.” 725 F.2d at 1382. The same is true regarding the Petitioners’ arguments that (1) the Board should suspend FENOC’s operating license and halt the restart of Davis-Besse based on NRC’s “regulatory indifference” and a pervasive problem of unresolved safety issues, including NRC “indifference to completion of analysis” before allowing restart,² see Hearing Petition at 7-8, 11; Petitioners Reply at 18; and (2) NRC has not imposed civil sanctions against FENOC, consequently minimizing the possibility that a criminal indictment will be made against the company, so that the Board should not allow FENOC to operate Davis-Besse for the commercial generation of electricity until FENOC has satisfied all licensing criteria and a grand jury has made its report and imposed sanctions, see Hearing Petition at 8, 10-11; Petitioners Reply at 20.

This is not to say the Petitioners are without recourse relative to these matters. Commission regulations provide for public requests to modify a license. If the Petitioners believe the NRC should take action to address fire safety matters or impose other enforcement sanctions, they can file a petition pursuant to 10 C.F.R. § 2.206. The NRC provides this

² The Petitioners’ argument that FENOC’s operating license should be suspended based upon perceived staff inaction not only fails to address whether the March 2004 confirmatory order should be sustained, but also is outside the scope of the proceeding in light of the longstanding principle in NRC adjudications that issues concerning the conduct of the staff as it carries out its regulatory functions are outside the purview of a Licensing Board. See Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 74 & n.23 (2004).

procedure for any interested person who wants some action taken beyond those adopted by the staff in the exercise of its enforcement discretion. See Marble Hill, CLI-80-10, 11 NRC at 442. Such petitions could lead to a license modification proceeding if the agency finds it appropriate.³

III. CONCLUSION

As it seeks to challenge the staff's March 2004 confirmatory order on grounds that go beyond the scope of that order, i.e., based on concerns that various additional measures are necessary to make the Davis-Besse facility safer prior to and following its restart, we conclude the Petitioners' intervention request is not cognizable in this proceeding and must be denied.

For the foregoing reasons, it is this second day of June 2004, ORDERED, that:

1. The March 29, 2004 intervention petition of Michael Keegan, Joanne DiRando, Donna Lueke, and NIRS is denied and this proceeding is terminated.

³ The Petitioners note that NIRS, along with Greenpeace and the Union of Concerned Scientists, filed a section 2.206 petition in October 2003. See Petitioners Reply at 15-16. Subsequent to their intervention request regarding the staff's confirmatory order, the section 2.206 petition was denied by the Director of the NRC's Office of Nuclear Reactor Regulation. See DD-04-01, 59 NRC __ (Apr. 22, 2004). Although the Petitioners argue that this director's decision is not adjudicatory in nature so that it cannot have res judicata or collateral estoppel effect to bar the admissibility of the Petitioners' contentions, see Petitioners Reply at 17, this assumes that the matters they wish to have addressed in this proceeding are litigable here, which we have concluded they are not.

2. In accord with the provisions of 10 C.F.R. § 2.311, as it rules upon an intervention petition, this memorandum and order may be appealed to the Commission within ten days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD⁴

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Charles N. Kelber
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 2, 2004

⁴ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) the Petitioners; (2) FENOC; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
FIRSTENERGY NUCLEAR) Docket No. 50-346-CO
OPERATING COMPANY)
)
(Davis-Besse Nuclear Power Station,)
Unit 1))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING INTERVENTION PETITION) (LBP-04-11) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-346-CO
LB MEMORANDUM AND ORDER (DENYING
INTERVENTION PETITION) (LBP-04-11)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of June 2004