

April 23, 2004

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

April 27, 2004 (11:08AM)

In the Matter of

FIRSTENERGY NUCLEAR
OPERATING COMPANY

(Davis-Besse Nuclear Power Station,
Unit 1)

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Docket No. 50-346-CO

ASLBP No. 04-825-01-CO

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

NRC STAFF RESPONSE TO OBJECTIONS TO
CONFIRMATORY ORDER MODIFYING LICENSE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Nuclear Regulatory Commission Staff ("Staff") hereby responds to the March 29, 2004, "Objection to Confirmatory Order Modifying License" ("Objection") filed by four individuals (hereafter referred to as "Petitioners"). As discussed below, the Petitioners' request should be denied because they have failed to establish standing and are seeking to litigate concerns that are outside the scope of the issues which may be raised in a hearing on the Order they challenge.¹

BACKGROUND

FirstEnergy Nuclear Operating Company ("FENOC") owns and operates the Davis-Besse Nuclear Power Station located in Ottawa County, Ohio, under a license issued by the Nuclear Regulatory Commission ("NRC"). In March, 2002, during a refueling outage, FENOC discovered a cavity in the reactor pressure vessel head of the reactor which had been caused by corrosion from long-term exposure to leakage of the reactor coolant, containing boric acid, from small cracks in one of the nozzles that penetrates the reactor pressure vessel.

¹On March 8, 2004, a "Confirmatory Order Modifying License (Effective Immediately)" was issued to FirstEnergy Nuclear Operating Company regarding Davis-Besse Nuclear Power Station, Unit 1 ("Order").

The Staff determined that the leakage had resulted from FENOC's failure to properly implement boric acid corrosion control and corrective action programs, and found that these performance deficiencies were of high safety significance. Letter from J. E. Dyer to Lew Myers, May 29, 2003, (ADAMS Accession No. ML031490778). Accordingly, a number of actions were taken by FENOC and the Staff to ensure that appropriate corrective actions were taken before the plant was restarted. These included issuance of a Confirmatory Action Letter on March 13, 2002 (ADAMS Accession No. ML020730225), outlining actions to be implemented before restart of the facility and the development an operational improvement plan to ensure that actions implemented during the outage remain in place once operations resume and are thereafter relied upon to further improve performance.² Among other things, FENOC committed to conduct inspections for leakage from the reactor pressure vessel upper head and from pressure-retaining components above the reactor pressure vessel head during every refueling outage. *Id.* Order at 6. The NRC also instituted enhanced oversight by a panel comprised of NRC Staff members.³

To ensure that the corrective actions were effective, FENOC performed a number of self assessments and evaluations during the extended shutdown which began in February 2002. While many were thorough, the Staff found that some of FENOC's assessments failed to identify a number of deficiencies that were subsequently identified during an NRC inspection conducted in December 2003. Order at 7. Specifically, the Staff found problems during the inspection that were not identified by FENOC in its self assessments in safety culture, the corrective action program and in the quality of engineering calculations and analyses. *Id.* Thereafter, FENOC erroneously

² Davis-Besse Nuclear Power Station Operational Improvement Plan - Operating Cycle 14, submitted by letter dated January 27, 2004, "Integrated Report to Support Restart of the Davis-Besse Nuclear Power Station and Request for Restart Approval," November 23, 2003, (ADAMS Accession No. ML033360251), as revised (ADAMS Accession No. ML040280597).

³ Letter from J. E. Dyer to Howard Bergendahl, April 29, 2002, (ADAMS Accession No. ML021190661).

determined that it was ready to discuss restart with the NRC on the basis that only a few, well-defined work activities remained when, in fact, self revealing equipment and operational problems identified during NRC inspections necessarily delayed those discussions with the NRC.⁴ *Id.*

Given the weaknesses in some of FENOC's self-assessments, the Staff determined that it was necessary to require independent, outside assessments of operational performance, organizational safety culture (including the safety conscious work environment), corrective action implementation, and engineering program effectiveness. Order at 8-9. In addition, the Staff determined that it was necessary to require FENOC to conduct a visual examination of the reactor pressure vessel upper head during the Cycle 14 midcycle outage and report the results to the Staff before restart from that outage.⁵ Order at 9-10. These requirements were imposed in the Order challenged in Petitioners' Objection.

The Order states that "[a]ny person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance." Order at 10. The Order further specifies the issue to be considered at hearing, stating "[i]f a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained." *Id.* at 11. The Order requires that the person requesting the hearing "set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d)." *Id.*⁶

⁴On February 12, 2004, a public meeting was held near the site at which FENOC discussed its readiness for restart. Thereafter, on March 11, 2004, Davis-Besse attained criticality, ending the outage that began on February 16, 2002.

⁵The mid-cycle outage is expected to be during February 2005, but will commence no later than March 31, 2005.

⁶10 C.F.R. § 2.309 requires that the Petitioner state: (i) The name, address, and telephone number of the petitioner, (ii) The nature of the petitioner's right under the Act to be made a party to the proceeding, (iii) The nature and extent of the petitioner's property, financial or other interest in the proceeding, and (iv) The possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

DISCUSSION

The Confirmatory Order requires FENOC to perform two distinct actions: (1) Obtain independent assessments of the Davis-Besse operations performance, the organizational safety culture (including safety conscious work environment), the corrective action program implementation and the engineering program effectiveness, and (2) conduct a visual examination of the reactor pressure vessel upper head during the cycle 14 midcycle outage and report the results to the Staff prior to restart from that outage. Order at 9-10. These are among the corrective actions that are being taken by FENOC in response to the discovery of a cavity in the reactor pressure vessel head. *Id.* at 6-8. The Staff ordered these actions based on a determination that they are necessary to ensure that the performance deficiencies which resulted in the discovery of a previously-undetected cavity in the vessel are corrected. *Id.*

When an order such as this one is issued by the Staff, it is well established that the right of any person to request a hearing and the scope of issues that may be considered at hearing are set forth by the terms of the Order. *Belloti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983). As stated in the Order, only persons adversely affected have the right to request a hearing. Order at 10. This requirement is premised upon the fundamental principle that any person who requests a hearing must demonstrate that he has standing to do so. Section 189a(1) of the Atomic Energy Act of 1954, as amended, provides:

In any proceeding under this Act, for the granting, suspending, or amending of any license. . . the Commission shall grant a hearing upon the request of *any person whose interest may be affected by the proceeding*, and shall admit any such person as a party to such proceeding.

(emphasis added).

In determining whether a petitioner has established the requisite interest, the Commission has applied contemporaneous judicial concepts of standing. *See, eg., Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); *Cleveland Electric Illuminating Co.*

(Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). Applying those concepts, the Commission has determined that the petitioner must establish (a) he personally has suffered or will suffer a "distinct and palpable" harm or "injury in fact", (b) the injury can fairly be traced to the challenged action, and (c) the injury is likely to be redressed by a favorable decision in the proceeding. *Dellums v. NRC*, 863 F.2d 986, 971 (D.C. Cir 1986); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993).

The Petitioners in this case include three individuals who state that they reside within 30 miles of the Davis-Besse nuclear power station and allege general concerns regarding the public, and their personal, health and safety. Objection at 1-3. While proximity to a plant has been found sufficient to establish standing in operating licensing proceedings, the scope of this proceeding is very different. The only matters addressed in this order are the imposition of specific actions to correct problems that lead to a boric acid leak and corrosion of the reactor pressure head. Petitioners have made no showing that requiring these additional measures would cause them any distinct harm, and therefore have failed to establish standing to request a hearing. See, *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90,98 (2000).

The remaining petitioner, Mr. Gunter, states that he is Director of the Nuclear Information and Resource Service ("NIRS") and in that capacity represents one of the other petitioners who is a member of the organization. He also states that NIRS as an organization dedicated to the development of safe alternatives to the use of commercial nuclear power for the generation of electricity. Mr. Gunter has, however, failed to provide any evidence showing that he has been authorized to represent the interest of any member of NIRS and therefore has not established representational standing. See, *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *Private Fuel Storage, L.L.C.*, CLI-99-10, 49 NRC 318, 323 (1999). Further, his statement that NIRS has a

generalized interest in nuclear energy generation is insufficient to establish standing on behalf of that organization. *Id.*

Thus, Petitioners have failed to establish the essential element of "injury in fact" and the hearing request should be denied on that basis. In addition, Petitioners have failed to meet the other essential elements in establishing standing; a showing that the alleged injury can be traced to the challenged action and is likely to be redressed by a favorable decision in the proceeding. In order to meet these requirements, a petitioner must advance concerns that fall within the scope of the hearing which would be initiated. Recently, the Commission squarely addressed this issue in a proceeding involving an enforcement order in *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station) CLI-04-05, 60 NRC ____ (February 18, 2004). In that case, the Commission found that the hearing petition could be granted only if the concerns sought to be litigated bore on "the only permissible question at issue in this proceeding -- whether to sustain the order." *Id.*, Slip op. at 5. In its decision, the Commission relied on the controlling precedent in *Belloti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), in which the court of appeals affirmed the Commission's decision to limit the scope of hearings on enforcement matters to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts. CLI-04-05, Slip op. at 5-6.

Under the terms of the Confirmatory Order at issue in this proceeding, like the order in the *Maine Yankee* proceeding, the only issue to be considered at hearing is whether the Confirmatory Order should be sustained. *Id.* at 10-11. The Petitioners' Objection raises issues, however, that are unrelated to actions imposed by the Order. Specifically, Petitioners raise issues regarding fire protection, allege a pattern of regulatory indifference by the NRC and complain that the Staff has not imposed penalties against FENOC. As explained below, these concerns are clearly outside the scope of permissible issues for hearing. For this additional reason, the Petitioners' hearing request should be denied.

I. Issues Concerning Fire Protection

Petitioners first allege that FENOC committed violations of fire protection requirements beginning in 1991 by substituting manual operation actions for fire protection systems required by NRC regulations. Petition at 3. According to the Petitioners, FENOC has failed to correct the problem, notwithstanding NRC orders relating to fire protection issued in 1998, demonstrating a corporate indifference to fire protection and a failure by the NRC to enforce safety regulations. Petition at 5-6. In conclusion, Petitioners claim that they have been deprived of "the opportunity to examine and question the adequacy of fire protections at Davis-Besse within the context of a public license amendment proceeding." Petition at 6-7.

Thus, the Petitioners are clear that what they seek through this proceeding is the opportunity to examine what they perceive as a long-standing problem with fire protection at Davis-Besse in a license amendment proceeding. The Order which is the subject of this proceeding, however, does not address fire protection. Rather, it addresses a matter unrelated to fire protection - namely, boric acid corrosion of the reactor pressure vessel and the resulting need for visual inspections and independent assessments to ensure that corrective actions designed to address the underlying cause of the problem are being implemented. The purpose of the Order in requiring these actions is to provide additional assurance that the public health and safety will be protected from this type of problem recurring. If Petitioners believe that the NRC should also take action to address safety concerns related the use of manual operation actions for fire protection, they are free to seek them by filing a petition pursuant to 10 C.F.R. § 2.206, but they cannot be permitted to litigate whether fire protection measures may be warranted in this proceeding. *See, Public Service Co of Indiana* (Marble Hill Nuclear Generating Station, Units 1&2), CLI-80-10, 11 NRC 438, 442 (1980); *Sequoyah Fuels Corp.* (UFh Production Facility), CLI-86-19, 24 NRC 508, 513-14 (1986), *citing, Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1982).

II. Petitioners' Allegations of Regulatory Indifference

The Petitioners also claim that Staff has engaged in a pattern of regulatory indifference characterized by passive regulation both before and since issuance of the Confirmatory Order. Petition at 7. Specifically, Petitioners point to the fact that the Staff propounded questions to FENOC regarding a vent line problem which could impact the cracking assumptions for the new reactor pressure vessel head and will allow FENOC until May 25, 2004, to respond, and has extended the time for FENOC to inspect and plug worn steam generator tubes from March 4, 2004, until March 31, 2005.⁷ Petition at 7. Petitioners conclude that these actions demonstrate a lack of regulatory consistency and the absence of a culture change within the Commission. *Id.* at 7-8.

Again, Petitioners' claims are clearly outside the scope of this proceeding. Not only is this specific proceeding limited to the question of whether the Confirmatory Order at issue should be sustained, but it is a longstanding principle in NRC adjudications that issues concerning conduct of the Staff are not within the purview of the Licensing Boards. *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, slip op. at 11 and n.23 (February 18, 2004), *citing Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998), and *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121 (1995).

III. Petitioners' Allegations Regarding Civil Penalties and Suspension of the Operating License and Restart

Petitioners also complain that the NRC has not imposed sanctions against FENOC for violations underlying the discovery of the cavity in the reactor pressure vessel head. According to Petitioners, the failure of the NRC to impose sanctions minimizes the possibility that a criminal indictment may be made against the company. Petition at 10. Further, Petitioners allege that Davis-Besse should not be permitted to restart operations until after a grand jury has acted and civil

⁷The license amendment approving the extension was issued on February 26, 2004.

sanctions have been imposed. For relief, Petitioners ask that the Commission "suspend the operating license and halt the restart of Davis-Besse, and require FirstEnergy Nuclear Operating Company to satisfy all licensing criteria prior to being authorized to operate Davis-Besse Nuclear Power Station for the commercial generation of electricity." Petition at 11.

The actions Petitioners seek, however, are beyond the scope of this proceeding and therefore beyond the authority of this License Board. As discussed above, in enforcement proceedings a Petitioner may not seek to have the NRC impose actions or penalties beyond those that the Staff has proposed in the order which is the subject of the proceeding. The proper avenue to request that the Commission impose enforcement sanctions is, instead to file a petition pursuant to 10 C.F.R. § 2.206. *See Marble Hill, supra; UFh Production Facility, supra.* Accordingly, Petitioners' request should be denied.

CONCLUSION

For the reasons stated above, the Petitioners' hearing request should be denied and the proceeding terminated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lisa B. Clark". The signature is fluid and cursive, with the first name "Lisa" and last name "Clark" clearly distinguishable.

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of April, 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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Unit 1))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO OBJECTIONS TO CONFIRMATORY ORDER MODIFYING LICENSE" for Lisa B. Clark in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), by electronic mail as indicated by a double asterisk (**), and by facsimile as indicated by a triple asterisk (***) on this 23rd day of April, 2004.

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