

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	Docket No. 50-346-CO
FIRSTENERGY NUCLEAR)	
OPERATING COMPANY)	ASLBP No. 04-825-01-CO
)	
(Davis-Besse Nuclear Power Station,)	
Unit 1))	

NRC STAFF RESPONSE TO PETITIONERS' APPEAL OF
MEMORANDUM AND ORDER DENYING INTERVENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311, the NRC Staff ("Staff") responds to the appeal of the Memorandum and Order (Denying Intervention Petition), LBP-04-11, 60 NRC ____, June 2, 2004 ("Memorandum and Order") filed by individual petitioners Michael Keegan, Joanne DiRando, Donna Lueke, and Nuclear Information and Resource Service (collectively, "Petitioners"). In that decision, the Licensing Board denied the Petitioners' request for a hearing to challenge a Confirmatory Order issued to FirstEnergy Nuclear Operating Company ("FENOC")¹. As discussed below, Petitioners have not identified any errors in the Memorandum and Order and, therefore, the appeal should be denied.

BACKGROUND

FENOC owns and operates the Davis-Besse Nuclear Power Station located in Ottawa County, Ohio. As relevant to this matter, in March, 2002, during a refueling outage, FENOC discovered a cavity in the reactor pressure vessel head which had been caused by corrosion from

¹Confirmatory Order Modifying License (Effective Immediately), March 8, 2004 ("Confirmatory Order") ADAMS Accession No. ML033360599.

long-term exposure to leakage of the reactor coolant from small cracks in one of the nozzles that penetrates the reactor pressure vessel.

The Staff determined that the leakage had resulted from FENOC's failure to properly implement boric acid corrosion control and corrective action programs and that these performance deficiencies were of high safety significance.² To address these deficiencies, FENOC committed to take a number of corrective actions to be implemented before restart of the facility³ and to develop an operational improvement plan to ensure that the corrective actions remain in place once operations resume and are thereafter relied upon to further improve performance.⁴ The Staff instituted enhanced oversight of the Davis Besse facility, which included the creation of a panel comprised of NRC Staff members to oversee activities during plant shutdown and during and after restart until the Staff determines that the plant is ready to return to the normal reactor oversight process.⁵

FENOC subsequently performed a number of self assessments to determine the effectiveness of the corrective actions. While many were thorough, the Staff found that some of FENOC's assessments failed to identify deficiencies which were identified during an NRC inspection. Based on the weaknesses of FENOC's assessments, the Staff determined that it was necessary to require independent, outside assessments of operational performance, organizational

²Letter from J.E. Dyer to Lew Myers, dated May 29, 2003, (ADAMS Accession No. ML031490778)

³The corrective actions are detailed in a Confirmation Action Letter issued March 13, 2002 (ADAMS Accession No. ML020730225).

⁴Davis-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. ML021190661).

⁵Letter to H. Bergendahi from J. E. Dyer, April 29, 2002 (ADAMS Accession No. ML021190661).

safety (including the safety conscious work environment), corrective action implementation, and engineering program effectiveness. 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.⁶ These actions were imposed in the Confirmatory Order which is the subject of Petitioners hearing request. By the terms of the Confirmatory Order, the issue to be considered in a hearing, if granted, is “whether this Confirmatory Order should be sustained.” Confirmatory Order at 11.

Petitioners filed a request for hearing on March 29, 2004, in which they identified the issues they wished to address.⁷ Petitioners alleged that the Staff has failed to take adequate action to address fire protection issues, has engaged in a pattern of regulatory indifference with regard to the Davis Besse facility, and has failed to take adequate enforcement action against FENOC for violations which led to the corrosion of the reactor vessel head. Petition at 3-10. For relief, Petitioners asked that a hearing be granted in order to air these allegations, and that FENOC be required to suspend operation of Davis Besse until all licensing criteria are satisfied. *Id.* at 10.

Both the Staff and FENOC responded that the hearing request should be denied.⁸ Central to the Staff’s position is the fact that the matters sought to be raised by the Petitioners are clearly beyond the scope of the order giving rise to this proceeding. Petitioners replied to the arguments

⁶The midcycle outage is expected to be during February 2005, but will commence no later than March 31, 2005.

⁷“Objections to Confirmatory Order Modifying License” (“Petition”)

⁸“NRC Staff Response to Objections to Confirmatory Order Modifying License,” April 23, 2004; “Firstenergy Nuclear Operating Company’s Answer to Objections to Confirmatory Order and Request for Hearing,” April 23, 2004.

raised by the Staff and FENOC⁹ and submitted additional filings in support of their standing.¹⁰ Upon consideration of all these filings, the Licensing Board denied the hearing request based on the a determination that Petitioners were attempting to litigate matters beyond the permissible scope of a hearing on the Confirmatory Order being challenged.

DISCUSSION

The Licensing Board's decision to deny the Petitioners hearing request is predicated upon the inherent authority of the Commission to define the scope of a hearing, including the authority to limit the scope of a hearing on an enforcement order to whether the order should be sustained. Memorandum and Order at 4-5, *citing, Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983), *aff'g, Boston Edison Co.* (Pilgrim 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; *Public Serv. Co. of Indiana* (Marble Hill Nuclear Generation Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980). *Bellotti* is especially instructive in this matter. In that case, the Attorney General for the Commonwealth of Massachusetts challenged an NRC order requiring the holder of a license to operate a power reactor to implement a plan for reappraisal and improvement of management functions, arguing that additional corrective actions were needed. The Commission rejected the hearing request on the grounds that it sought to litigate issues beyond the scope of the only issue permitted under the order - whether it should be sustained. 16 NRC at 45-46. The Court sustained that decision, finding that the Commission had acted within its authority in limiting the issues subject to hearing. 725 F.2d at 1381. As the Court noted, "[t]o read the [Atomic Energy Act] very broadly so that any proceeding necessarily implicates all issues that might be raised concerning

⁹"Petitioners' Combined Reply in Opposition to the 'NRC Staff Response to Objections' and FENOC's 'Answer to Objections,'" May 13, 2004.

¹⁰"Notice of Filing of Declarations in Support of Petitioners' Standing to Sue," April 29, 2004; "Notice of Filing of Michael Keegan's Declaration in Support of Standing to Sue," May 14, 2004.

the facility in question would deluge the Commission with intervenors and expand many proceedings into virtually interminable, free-ranging investigations. . . . Such a reading of the statute is plainly untenable and cannot be what Congress intended.” *Id.*

The Commission recently applied this reasoning when the State of Maine requested a hearing to challenge an NRC order imposing additional security measures at a reactor site within the State. In that case, the Commission upheld the Licensing Board's decision to deny the hearing request on the grounds that the State was not challenging the provisions of the order but instead was seeking to impose additional measures. *Maine Yankee*, CLI-04-5, 59 NRC at 57.

The Licensing Board in this case properly found these decisions to be controlling precedent. Memorandum and Order at 5-6. Like the petitioners in those cases, the Petitioners here are not claiming that the actions required by the Confirmatory Order should not be imposed. Rather, they are claiming that the NRC should require additional corrective actions to address fire protection and the conditions which allowed corrosion of the reactor vessel head. The Licensing Board correctly found that these issues are outside the permissible scope of a hearing on the Confirmatory Order, which is limited to the issue of whether the Confirmatory Order should be sustained. Specifically, the Board determined that the Petitioners had failed to allege that they would suffer any “injury in fact” as a consequence of imposition of the Confirmatory Order, a necessary element in establishing standing to request a hearing. Memorandum and Order at 7-8. Additionally, the Board concluded that Petitioners had failed to raise an admissible contention because the issues they stated they wish to raise in the hearing were not within the permissible scope of a hearing on the Confirmatory Order. *Id.* at 7. Because the Commission’s regulations require that a petitioner must establish standing and proffer at least one admissible contention in order to participate in a hearing¹¹, the Licensing Board acted properly in dismissing the hearing request.

¹¹See 10 C.F.R. § 2.309(a).

As the Licensing Board pointed out, this is not to say that Petitioners have no recourse to address the issues they raise. Order at 8-9. The Commission's regulations explicitly provide for the filing of petitions under 10 C.F.R. § 2.206. Under that provision, any person may file a request to institute a proceeding to modify, suspend or revoke a license, or for any other action as may be proper. Thus, Petitioners have an avenue to pursue their concerns. While it is evident that they are not satisfied with this option, this does not present a reason to overturn the Licensing Board's decision.

Indeed, the Petitioner's appeal is essentially a complaint that they have not been permitted to air their concerns regarding the operation of the Davis Besse reactor. This is not because their petition was improperly denied but because they have not chosen to raise their concerns in avenue open to them - a petition under section 2.206. Despite the extensive reasoning provided by the Board, Memorandum and Order at 4-8, Petitioners have made no argument that the Board has improperly interpreted the law or the substance of their petition. Rather, they simply allege that the Board adopted an overly constrained view of the scope of the Confirmatory Order, given the fact that the Oversight Panel took a much broader look at operations at the Davis Besse reactor, and repeat their desire to raise issues concerning fire protection and the inadequacy of the regulatory actions taken by the NRC. It is clear from the precedent cited by the Board, however, that the scope of the hearing is defined by the terms of the Confirmatory Order. Petitioners cite no basis on which to conclude that they may raise any issue which is within the purview of the oversight panel. Obviously, the NRC's regulatory authority to oversee operation of the Davis Besse facility is far broader than the scope of a hearing on the issuance of a Confirmatory Order.

The limited scope of the Licensing Board's authority is further evidenced by the fact that even if Petitioners could raise these arguments in a hearing based on their claim that fire protection "should fall under the penumbra of concerns covered by the Order," Petition at 6, and that root cause analysis remains incomplete, *Id.* at 12 - 13, the Board could not grant them the relief they

seek. The only remedy which the Board could provide is relaxation or rescission of the Confirmatory Order. Thus, even if Petitioners hypothetically prevailed in establishing their claims, the Board could not order additional corrective actions or impose enforcement sanctions in a hearing on the propriety of the Confirmatory Order.

Similarly, Petitioners' claims that the oversight panel failed to provide incriminating information to the NRC's Office of Investigations or the Department of Justice, *id.* at 17, for possible civil or criminal enforcement action, *see id.* at 13-17, would not, if proven, entitle them relief in a hearing initiated to determine the propriety of the Confirmatory Order. In contrast, Petitioners could seek such relief, including the imposition of additional corrective actions, by filing a petition under 10 C.F.R. § 2.206 as described above.

The case law cited by Petitioners is fully consistent with the decision reached by the Board. With respect to contentions, the cases cited by Petitioners simply represent examples of the application of the Commission's long-standing principles that to be admissible, contentions must set forth with sufficient specificity and basis the issues the petitioner seeks to litigate. *See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, LBP-82-106, 16 NRC 1649, 1654-56 (1982); *Georgia Tech Research Reactor, Atlanta, Ga.*, LBP-95-6, 41 NRC 281, 289-308 (1995). In regard to standing, the decision cited by Petitioners, *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1)* LBP-90-15, 31 NRC 501 (1980), held that an allegation of injury to a purely legal interest was sufficient to support standing in a case in which the Board concluded that the alleged injury would be a direct consequence of approving the amendment which was the subject of notice of opportunity for hearing. In this case, by contrast, the matters Petitioners wish to pursue could not be redressed by a decision on whether the Confirmatory Order should be sustained. As the Board recognized, the only possible outcome from a successful challenge would be relaxation or rescission of the Confirmatory Order, not the imposition of additional corrective

actions. See Memorandum and Order at 7. Petitioners have therefore alleged no error in the Board's decision which would warrant action by the Commission.

CONCLUSION

For the reasons discussed above, the Petitioners' appeal of the Memorandum and Order denying their hearing request on the Confirmatory Order should be denied and the Memorandum and Order should be affirmed.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of June, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITIONERS' APPEAL OF MEMORANDUM AND ORDER DENYING INTERVENTION" 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 24th day of June, 2004.

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