September 11, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| NUCLEAR FUEL SERVICES, INC | ) | Docket No. 70-143-CO |
| | ) | |
| Special Nuclear Materials Facility (Confirmatory Order) | ) | ASLBP No. 07-857-01-CO-BD01 |
| | ) | |

NRC STAFF'S RESPONSE TO HEARING REQUEST OF KEN SILVER

INTRODUCTION

On February 20, 2007, the Nuclear Regulatory Commission (NRC) Staff issued a Confirmatory Order to Nuclear Fuel Services, Inc., an NRC licensee.[1] The Confirmatory Order was the result of an agreement reached during alternative dispute resolution (ADR) between the Staff and the Licensee to resolve apparent violations at the Licensee's facility in Erwin, Tennessee. Part VI of the Confirmatory Order states, "Any person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance." Although the Confirmatory Order was originally designated Official Use Only, the Staff later determined that the Order could be released publicly and published notice of the Order in the Federal Register. The Federal Register Notice, published July 30, 2007, states, "Requests for hearing from anyone other than the Licensee must be filed within 20 days of the date of publication of this Notice in accordance with Section VI of the Confirmatory Order."

[1] "Nuclear Fuel Services, Inc.; Notice of Publication of Confirmatory Order and Opportunity for Hearing," 72 Fed. Reg. 41,528 (July 30, 2007) ("Confirmatory Order").

On August 17, 2007, the Petitioner filed a timely request for hearing on the Confirmatory Order.[2] The Board should deny this hearing request. As the Staff will explain, the Petitioner fails to demonstrate he will be adversely affected by the Confirmatory Order. For that reason, the Petitioner fails to establish he has either standing to participate in a hearing or any contention that would be admissible.

## BACKGROUND

The Licensee is the holder of Special Nuclear Materials License No. SNM–124, issued by the NRC on July 2, 1999, pursuant to 10 C.F.R. Part 70. The license authorizes the possession and use of nuclear materials associated with operation of the Licensee's facility, in accordance with the conditions specified therein. The facility is located on the Licensee's site in Erwin, Tennessee.

NRC inspections at the Licensee's facility identified a number of apparent violations during the years 2005 and 2006. These violations involved failures to comply with numerous NRC requirements, including requirements pertaining to the use of personal protective equipment, the transfer and security of radiological materials, and physical security at the Licensee's facility. Based on these apparent violations, the Staff considered escalated enforcement actions against the Licensee. Subsequently, the Licensee accepted the option of entering into alternative dispute resolution (ADR). As the result of ADR sessions conducted on September 28 and November 30, 2006, the Staff and the Licensee agreed to a Confirmatory Order addressing the apparent violations.

Pursuant to the Confirmatory Order, the Licensee agreed to conduct, via a third party, independent safety culture assessments within the parameters described in Section V of the

---

[2] "Request for Hearing Submitted by Kenneth Silver," August 17, 2007 (ADAMS ML0724002390).

Order. The Licensee also agreed that within 60 days of the date of the Order it would submit for NRC approval a request to amend its license to revise its configuration management (CM) program. The amendment request would include a plan and schedule for implementation of the revised CM program. The Staff, for its part, agreed that enforcement discretion is warranted for the enforcement actions listed in Section II.A through F of the Confirmatory Order and that Notices of Violation would not be issued for those actions.[3]

LEGAL STANDARD

An individual who requests a hearing before the Commission must demonstrate that he or she has standing to do so. 10 C.F.R. § 2.309(a). The individual must also set forth at least one admissible contention. *Id.* Where an enforcement order is at issue, as in the present case, "the threshold question—related to both standing and admissibility of contentions—is whether the hearing request is within the scope of the proceeding as outlined in the order." *See Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 n.23 (1980). ("In an enforcement proceeding, the issues are limited to those set out in the show cause order."). The Commission has the authority to define the scope of the hearing, and this authority includes limiting the hearing to the question of whether the order should be sustained. *Bellotti v. N.R.C.*, 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). *See also State of Alaska Dept. of Transp. and Public Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 405 (2004) ("ADOT"); *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157–58 (2004); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-05-5, 59 NRC 52,

[3] 72 Fed. Reg. at p. 41,529.

56 (2004).

An individual may intervene in an enforcement action only by showing that he or she would be injured by the contemplated action set out in the enforcement order. *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994); *aff'd*, CLI-94-12, 40 NRC 64 (1994). An individual cannot establish standing by arguing that the Staff should impose a stricter penalty on the licensee, because "allowing NRC hearings on claims for stronger enforcement remedies risks 'turning focused regulatory proceedings into amorphous public extravaganzas.'" *ADOT*, CLI-04-26, 60 NRC at 404, *citing Bellotti*, 725 F. 2d at 1381. Further, an individual may not request a hearing in order to impose a stricter penalty on the licensee, because the individual is not injured by the lesser penalty in the Staff's order. *Marble Hill*, CLI-80-10, 11 NRC at 442.

The mere fact that the Staff's order does not improve the individual's personal position does not establish standing. *ADOT*, CLI-04-26, 60 NRC at 406. To decide whether an individual's hearing request should be granted, the relevant points of comparison are the individual's positions with and without the Staff's order—the question is not whether the individual's position would be improved by some hypothetical substitute order. *Id*. An individual "simply is not adversely affected by a Confirmatory Order that improves the safety situation over what it was in the absence of the order." *Id*. In essence, requests for relief going beyond the actions in an enforcement order are requests for relief that are outside the scope of the proceeding.

Because an individual must show he or she would be adversely affected by the Staff's enforcement order, it should not be expected that individuals will routinely be made parties to hearings on such orders:

> In practicality it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders. That's because such orders presumably enhance rather than diminish public safety. Nevertheless, the notice of opportunity for hearing provides the public a "safety valve" because an order conceivably may remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation.

*ADOT*, CLI-04-26, 60 NRC at 406 n.28. This opportunity to obtain a hearing, while carefully circumscribed, is consistent with the rationale underlying *Bellotti* : "when a licensee agrees to make positive changes or does not contest an order requiring remedial changes, it should not be at risk of being subjected to a wide-ranging hearing and further investigation." *Id.*

Accordingly, in the present case the only matters at issue are the measures listed in the Confirmatory Order, and the Petitioner must show he would be adversely affected by those measures. To the extent the Petitioner seeks additional measures as a substitute for those imposed by the Staff, the Board should reject his request for hearing under the *Bellotti* doctrine.

## DISCUSSION

The Petitioner does not claim he would be adversely affected by the Confirmatory Order. Rather, the Petitioner states at the outset that the "purpose of this letter is to voice my support for a public hearing on safety and health concerns at the Nuclear Fuel Services plant in Erwin, TN." In the body of his letter the Petitioner elaborates on his concerns, explaining that he is "[e]ndeavoring to lead a group of health professions students in a community needs assessment of environmental and occupational health concerns in Unicoi County[,]" where the Licensee's plant is located. However, the Petitioner does not mention the Confirmatory Order even in passing, and nowhere does he suggest that he would be adversely affected by the Order. The Petitioner's hearing request thus falls outside the scope of this proceeding.

*Marble Hill*, CLI-80-10, 11 NRC at 442 n.23.

Although the Petitioner states, "I believe I have standing to request a hearing[,]" he bases this claim on his substantial experience as an academician and his home's proximity to the Licensee's facility. It is clear that the Petitioner's conception of "standing" is not the same as that applied by the Commission in cases involving confirmatory orders. The Petitioner does not make any argument that he has standing in the sense he would be adversely affected by the Confirmatory Order at issue here.[4]

The Petitioner claims that "due to a gross abuse of the 'official use only' categorization scheme, I and many other stakeholders were denied . . . highly pertinent information" about a uranyl nitrate accident in March 2006. Here again, the Petitioner does not raise an issue related to the Confirmatory Order. To the extent the Petitioner has concerns about the NRC's categorization of documents related to the Licensee's facility, those concerns are not within the scope of this proceeding.[5]

---

[4] In licensing actions involving applicants and licensees other than reactors, the Commission has typically applied a "proximity-plus" theory of standing, under which "a presumption of standing based on geographical proximity may be applied . . . where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences." *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22. However, where the proposed action is an enforcement order, the petitioner must show that the order causes offsite consequences in the sense that it adversely affects him. *ADOT*, CLI-04-26, 60 NRC at 405. Here, the proposed action is the Confirmatory Order issued to the Licensee. The Petitioner does not explicitly or implicitly allege that the Confirmatory Order will cause any offsite consequences, nor any adverse consequences to him personally. Thus, despite the Petitioner's proximity to the Licensee's site, he would be unable to establish standing even under a "proximity-plus" theory.

[5] The Staff would note that there are other means by which the Petitioner may voice his concerns. For example, on September 4, 2007, the Staff announced that it intends to hold a public meeting to discuss the Licensee's performance on September 17, 2007, in the vicinity of the Licensee's facility. This would appear to be a more appropriate forum for the Petitioner's concerns.http://www.nrc.gov/reading-rm/doc-collections/news/2007/07-113.html (September 4, 2007).

## CONCLUSION

The Petitioner fails to explain how he would be adversely affected by the Confirmatory Order. To the extent the Petitioner raises concerns regarding the Licensee's operation of its facility and the NRC's release of associated documents, those concerns are outside the scope of this proceeding. Therefore, under *Bellotti,* the Board should deny the Petitioner's request for hearing, finding that he has neither established standing nor set forth any admissible contention.

Respectfully submitted,

***/RA by Tison A. Campbell for/***

Michael J. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 11th day of September, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| NUCLEAR FUEL SERVICES, INC. | ) | Docket No. 70-143-CO |
| | ) | |
| Special Nuclear Materials Facility (Confirmatory Order) | ) | ASLBP No. 07-857-01-CO-BD01 |
| | ) | |
| | ) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO HEARING REQUEST OF KEN SILVER" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk(*); and by electronic mail as indicated by a double asterisk (**) on this 11th day of September, 2007.

Lawrence G. McDade, Chair * **
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: lgm1@nrc.gov

Dr. Richard F. Cole * **
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: rfc1@nrc.gov

Dr. Peter S. Lam * **
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: psl@nrc.gov

Adjudicatory File *
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555

Office of Commission Appellate Adjudication * **
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555
E-mail: OCAAmail@nrc.gov

Office of the Secretary * **
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, D.C. 20555
E-mail: hearingdocket@nrc.gov

Jered Lindsay, Law Clerk * **
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: jjl5@nrc.gov

SherVerne R. Cloyd * **
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: src2@nrc.gov

Daryl M. Shapiro, Esq. **
John H. O'Neill, Esq. **
Blake J. Nelson, Esq. **
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
E-mail: daryl.shapiro@pillsburylaw.com
john.o'neill@pillsburylaw.com
blake.nelson@pillsburylaw.com

Ann M. Ward, Esq.
General Counsel
Nuclear Fuel Services, Inc.
1205 Banner Hill Road
Erwin, TN 37650

Ken Silver, DSc, SM
Assistant Professor of Environmental Health
East Tennessee State University
Department of Environmental Health
Box 70682
Johnson City, TN 37614-0682

***/RA by Tison A. Campbell/***

Tison A Campbell