

September 14, 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	)	ASLBP No. 07-857-01-CO-BD01
(Confirmatory Order)	)	

NRC STAFF'S RESPONSE TO  
HEARING REQUEST OF R. FEHER

INTRODUCTION

On February 20, 2007, the Nuclear Regulatory Commission (NRC) Staff issued a Confirmatory Order to Nuclear Fuel Services, Inc., an NRC licensee.<sup>1</sup> 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."

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

On August 20, 2007, R. Feher (Petitioner) filed a timely request for hearing on the Confirmatory Order.<sup>2</sup> 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 and, for that reason, is unable to establish that he has either standing to participate in a hearing or is able to proffer an admissible contention.

#### 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 failure 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

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<sup>2</sup> "Hearing Request of R. Feher," August 20, 2007. (ADAMS ML072400354).

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. As part of the agreement reached in ADR, the Staff agreed that enforcement discretion is warranted for the apparent violations listed in Section II.A through F of the Confirmatory Order and that the apparent violations would not be cited.<sup>3</sup>

#### 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.” *State of Alaska Department of Transportation and Public Facilities* (Confirmatory Order Modifying License) CLI-04-26, 60 NRC 399, 405 (2004) (“ADOT”) *citing*, *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004). 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*, *ADOT*, CLI-04-26, 60 NRC at 405; *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

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<sup>3</sup> Nuclear Fuel Services, Inc.; Notice of Publication of Confirmatory Order and Opportunity for Hearing, 72 Fed. Reg. at 41,529.

Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004).

In order to intervene in an enforcement proceeding, an individual must show that he or she has standing to intervene, which requires a showing of an “injury in fact’ that is . . . ‘fairly traceable to the challenged action’ and . . . is likely to be ‘redressed by a favorable decision.’”. *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-94-12, 40 NRC 64, 71-72 (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 1382. 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. *See, Id.* at 405.

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.* at 405.

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

In his hearing request, the Petitioner raises four general areas of concern. The Petitioner states that he is concerned about the safety of his drinking water, the threat posed by the Licensee's allegedly "sloppy operations" to public health and safety, the training of the Licensee's security guards, and water pollution from activities at the Licensee's firing range. However, the Petitioner does not address the specific actions required of the Licensee by the Confirmatory Order, nor does he claim he would be injured by the Order. Further, rather than questioning the actions described in the Confirmatory Order, the Petitioner seeks to impose additional measures on the Licensee. Because the Petitioner does not allege any injury related to the Confirmatory Order and only seeks to impose additional measures on the Licensee, the Board should deny his hearing request.

The Petitioner argues that he has standing in this proceeding "because I live just over the mountain from NFS, and drink Jonesborough city water which comes from the Nolichucky

River which NFS pollutes.” The Petitioner’s geographic proximity to the Licensee’s facility and his alleged injury from the Licensee’s activities are not sufficient to establish standing in this proceeding.<sup>4</sup> In an enforcement proceeding, “without any injury *attributable to the Confirmatory Order*,” a petitioner cannot have standing. *ADOT*, CLI-04-26, 60 NRC at 406, *citing, Maine Yankee*, CLI-04-05, 59 NRC at 57 n.16. In this case, the contemplated actions listed in Part III of the Confirmatory Order are a number of steps the Licensee will take to improve its safety culture. The Petitioner fails to show, nor does he even allege, that the contemplated actions—changes to improve the licensee’s safety culture—will cause him injury. The Petitioner therefore cannot establish that he has either standing or any contention that would be admissible at a hearing, and his hearing request should be denied.

The Petitioner also fails to establish the right to a hearing because each of his concerns is outside the scope of this proceeding. The Petitioner does not argue the Confirmatory Order is in any way flawed, but only that it should be strengthened. The Commission has found such an allegation to be outside the scope of an enforcement proceeding: “The only issue in an NRC enforcement proceeding is whether the order should be sustained. Boards are not to consider whether such orders need strengthening.” *ADOT*, CLI-04-26, 60 NRC at 404.

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<sup>4</sup> 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.

The Petitioner suggests that the safety measures described in the Confirmatory Order are insufficient to address his interests. However, as the *Bellotti* court noted, a petitioner who “wishes to litigate the need for still more safety measures, perhaps including the closing of the facility, will be remitted to section 2.206’s petition procedures.” *Bellotti*, 725 F.2d at 1383. All of the Petitioner’s areas of concern—the safety of his drinking water, the alleged threat related to the Licensee’s “sloppy operations,” the training of the Licensee’s security guards, and water pollution from the firing range—could be properly brought to the NRC’s attention through the 2.206 petition process; an intervention petition in response to the Confirmatory Order is not the correct vehicle to raise these concerns.<sup>5</sup>

#### CONCLUSION

The Petitioner fails to explain how he would be adversely affected by the Confirmatory Order. The Petitioner seeks to impose on the Licensee measures beyond those described in the Confirmatory Order, but whether or not such measures should be imposed is outside the scope of this proceeding. Therefore, the Board should deny the Petitioner’s request for hearing.

Respectfully submitted,

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

Tison A. Campbell  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 14<sup>th</sup> day of September, 2007

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<sup>5</sup> Information on the Section 2.206 petition process and instructions for submitting a 2.206 petition can be found at: <http://www.nrc.gov/about-nrc/regulatory/enforcement/petition.html>.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO HEARING REQUEST OF R. FEHER" 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 14<sup>th</sup> day of September, 2007.

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