

September 21, 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 WANDA SUE KELLEY

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" or "Order").

On August 26, 2007, Wanda Sue Kelley (Petitioner) filed a hearing request.² The Board should deny this hearing request because the Petitioner fails to demonstrate she will be adversely affected by the Confirmatory Order and, for that reason, is unable to establish she has either standing to participate in a hearing or any 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 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,

² "Request for Hearing Submitted by Wanda Sue Kelley," August 26, 2007 (ADAMS ML072410182). Although the deadline for filing hearing requests would have been 20 days after the July 30, 2007 Federal Register Notice, *i.e.*, August 20, 2007, the Petitioner requested an extension of time in which to file a hearing request in this matter, and on August 22, 2007, pursuant to her authority under 10 C.F.R. § 2.346(b), the Secretary of the Commission extended the time for filing the Petitioner's hearing request through August 27, 2007. (ADAMS ML072340685).

independent safety culture assessments within the parameters described in Section V of the 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.³

LEGAL STANDARD

An individual who requests a hearing before the Commission must demonstrate that 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,

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

157–58 (2004); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004).

To establish standing in an enforcement proceeding, an individual must also show that she has 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), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). 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 that she 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 her request for hearing under the *Bellotti* doctrine.

DISCUSSION

The Board should deny the Petitioner's hearing request because the Petitioner neither demonstrates she has standing to intervene in this proceeding nor sets forth an admissible contention. In her hearing request the Petitioner raises numerous concerns relating to the Licensee's facility. The Petitioner's concerns include: (1) the NRC's classification of documents pertaining to a chemical spill at the facility in March 2006; (2) the Licensee's history of violations involving NRC regulations; (3) whether the Licensee is a privately operated company, or whether it is government-operated; (4) a claim that the NRC is failing in its core missions, including its mission to protect public health and safety; (5) a claim that there have been "little or no consequences" to the Licensee from past violations of NRC regulations; (6) an allegation that a component of the Centers for Disease Control was unable to perform an adequate health assessment recently; and (7) speculation over health effects related to the March 2006

chemical spill and another chemical spill in 2000. The Petitioner also alleges a “cover-up” of chemical spills at the Licensee’s facility, and states, “I believe the commission needs to hold a public hearing in this community and explain this obvious cover up and classification, what the commission is doing about it now, and what the commission intends to do about it in the future.”

Despite her numerous concerns, nowhere does the Petitioner claim she would be adversely affected by the Confirmatory Order. Rather, as made clear toward the end of her request, the Petitioner is seeking a hearing primarily to obtain additional information about chemical spills at the Licensee’s facility and the NRC’s responses to those incidents. In this sense, the Petitioner seems to be advocating that the Commission hold something more in the style of a public legislative hearing involving NRC policy issues than an adjudicatory hearing focused on any perceived harm to the Petitioner resulting from the Confirmatory Order. Because the Petitioner has not established that her hearing request is within the scope of the present proceeding, the Board should find the Petitioner has neither standing to intervene nor any admissible contention. *ADOT*, CLI-04-26, 60 NRC at 405. Further, although the Petitioner refers in passing to certain sections of the Confirmatory Order, nowhere does she allege an injury that is traceable to the Order. For that reason as well, the Petitioner fails to show she has standing to intervene in this matter. *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 71-72.

The Petitioner states that she lives three miles from the Licensee’s facility. However, the Petitioner’s geographic proximity to the Licensee’s facility, even considered along with her alleged injuries from the Licensee’s activities, is not sufficient to establish standing in this type of proceeding. 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. Here, the Confirmatory Order lists a number of steps the Licensee will take to improve its safety culture. The Petitioner fails to show, nor does she even allege, that the contemplated actions—changes to improve the licensee’s safety culture—

will cause her injury.⁴

CONCLUSION

The Petitioner fails to explain how she would be adversely affected by the Confirmatory Order. The Petitioner raises a number of concerns relating to the Licensee's operation of its facility and the NRC's regulation of the Licensee, but those concerns are outside the scope of this proceeding. Therefore, the Board should deny the Petitioner's request for a hearing.

Respectfully submitted,

/RA by Michael J. Clark/

Michael J. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 21st day of September, 2007

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 her. *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 her personally. Thus, despite the Petitioner's proximity to the Licensee's site, she would be unable to establish standing even under a "proximity-plus" theory.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO HEARING REQUEST OF WANDA SUE KELLEY." 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 21st day of September, 2007.

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