

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Michael F. Kennedy
Randall J. Charbeneau

In the Matter of

DETROIT EDISON COMPANY, FERMI
POWER PLANT

(Independent Spent Fuel Storage Installation)

Docket No. 72-71-EA

ASLBP No. 09-888-03-EA-BD01

August 21, 2009

MEMORANDUM AND ORDER
(Ruling on Standing and Contention Admissibility)

This proceeding involves an order of the Nuclear Regulatory Commission (NRC or Commission) modifying Detroit Edison Company's (DTE) general license to operate an independent spent fuel storage installation (ISFSI) at its Fermi Power Plant (Fermi), located in Monroe County, Michigan. Before the Licensing Board is a petition to intervene and request for hearing filed on behalf of Beyond Nuclear, Keith Gunter, Michael J. Keegan, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, Mark Farris, and Shirley Steinman (Petitioners). Both DTE and the NRC Staff oppose the petition, arguing that it is untimely, raises issues outside the scope of the proceeding, fails to demonstrate standing, and fails to articulate an admissible contention.

For the reasons set forth below, we find that the petition was timely but that Petitioners have failed to establish standing. Accordingly, we deny Petitioners' request for a hearing.

II. Background

The Commission has issued a general license for the storage of spent fuel at an on-site ISFSI to all persons authorized to possess or operate nuclear power reactors under 10 C.F.R. Part 50 or Part 52.¹ DTE owns and is licensed to operate Fermi Unit 2 under Part 50, and it thus holds such a general license. On December 10, 2007, DTE informed the Commission of its intent to “create and use” an ISFSI at the Fermi site using the Holtec HI-STORM 100 dry cask storage system.²

On April 7, 2009, pursuant to 10 C.F.R. § 2.202(a), the Commission issued an order, effective immediately, modifying DTE’s general license to operate an ISFSI.³ The order requires DTE to implement a number of additional security measures (ASMs), including fingerprinting and background checks of unescorted individuals who wish to enter a protected ISFSI area.⁴ These measures, which were developed by the Commission in the wake of the September 11 terrorist attacks, have been deemed necessary to protect the public health and safety in the “current threat environment” and are intended “to strengthen licensees’ capabilities and readiness to respond to a potential attack on a nuclear facility.”⁵ The order allows DTE 180 days to implement most of the ASMs. It also allows DTE twenty days to notify the Commission

¹ See 10 C.F.R. § 72.210.

² Letter from Joseph H. Plona, Site Vice President, Nuclear Generation, to NRC Document Control Desk (Dec. 10, 2007) (ADAMS Accession No. ML073521312).

³ Fermi Power Plant; Order Modifying License, 74 Fed. Reg. 17,890 (Apr. 17, 2009) [hereinafter April 7 order]. The Commission has issued similar orders directed at other licensees over the past several years. See, e.g., LaSalle County Station; Order Modifying License, 74 Fed. Reg. 12,155 (Mar. 23, 2009); Catawba Nuclear Station; Order Modifying License, 70 Fed. Reg. 25,116 (May 12, 2005).

⁴ 74 Fed. Reg. at 17,892-95.

⁵ Id. at 17,890.

of any objections to the order's requirements and to submit a schedule for achieving compliance.⁶

In addition, the Commission's order provides an opportunity for hearing. Specifically, it states that either DTE or "any person adversely affected" by the order may, "within 20 days of the date of the order," submit an answer to the order and, if desired, request a hearing.⁷ Such a person "shall 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 C.F.R. § 2.309(d)."⁸ The order limits the issue to be considered at any hearing to "whether this Order should be sustained."⁹

On April 22, 2009, DTE filed a timely response to the order, raising no objections to the order's requirements, and establishing a schedule for achieving compliance with those requirements by October 4, 2009.¹⁰ On May 7, 2009, Petitioners filed a petition to intervene and request for hearing, seeking admission of three contentions.¹¹ Petitioners proffer three contentions in this proceeding. All three contentions, at their core, seem to allege some failure to comply with the National Environmental Policy Act (NEPA).¹² Petitioners demand that the Commission undertake a full environmental impact statement (EIS), which should include "a vulnerability assessment" of DTE's on-site storage plan, an identification of "alternatives to the

⁶ Id. at 17,891.

⁷ Id.

⁸ Id.

⁹ Id. at 17,893.

¹⁰ Letter from Joseph H. Plona, Site Vice President, Nuclear Generation, to NRC Document Control Desk (Apr. 22, 2009) at 2 (ADAMS Accession No. ML091210197).

¹¹ Petition of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville and Marilyn R. Timmer for Leave to Intervene in, and/or Request a Hearing Upon, DTE Order Modifying License of ISFSI Security Provisions (May 7, 2009) [hereinafter Petition].

¹² 42 U.S.C. §§ 4321-47 (2006).

current ISFSI general license,” and an analysis of “sociological, civil liberties and societal costs.”¹³

On May 13, 2009, the NRC referred Petitioners’ hearing request to the Atomic Safety and Licensing Board Panel (ASLBP),¹⁴ which established this Licensing Board on May 15, 2009.¹⁵ Both DTE and the NRC Staff filed answers to the petition on June 1, 2009,¹⁶ and on June 9, Petitioners filed a combined reply to those answers.¹⁷

III. Timeliness of Petitioners’ Hearing Request

At the outset, we address DTE’s and NRC Staff’s argument that we should dismiss Petitioners’ hearing request as untimely. We decline to dismiss the petition on that ground.

As both DTE and NRC Staff point out, the Commission’s order requires that any interested party file a hearing request within twenty days of the date of the order.¹⁸ Because the order was issued on April 7, 2009, Petitioners’ hearing request would appear to have been due on April 27. Petitioners did not file their request until May 7, 2009. But the facts are not so simple. In their reply, Petitioners explain that the first public notice of the April 7 order was a

¹³ Petition at 7.

¹⁴ Memorandum from Annette L. Vietti-Cook, NRC Secretary, to E. Roy Hawkens, ASLBP Chief Administrative Judge (May 13, 2009).

¹⁵ Corrected Notice of Establishment of Atomic Safety and Licensing Board, 74 Fed. Reg. 25,282 (May 15, 2009).

¹⁶ Answer of Detroit Edison Company to Petition to Intervene and Request for Hearing Filed on Behalf of Beyond Nuclear and Eight Individual Petitioners (June 1, 2009) [hereinafter DTE Answer]; NRC Staff’s Response to Petition for Leave to Intervene and Request for Hearing Filed by Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville, and Marilyn R. Timmer (June 1, 2009) [hereinafter NRC Staff Answer].

¹⁷ Combined Reply of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville and Marilyn R. Timmer to DTE and NRC Staff Responses in Opposition to Petition for Hearing in ISFSI (June 9, 2009) [hereinafter Combined Reply].

¹⁸ DTE Answer at 10-12; NRC Staff Answer at 2-4.

Federal Register notice published on April 17, ten days after the date of the order. This belated public notice left only ten days of the twenty-day window provided by the Commission for the preparation and filing of a petition to intervene. Petitioners contend that they reasonably believed that their hearing request was due twenty days after the Commission's order was published in the Federal Register on April 17, 2009.¹⁹ Petitioners further maintain that "there are serious notice defects surrounding the means by which the April 7, 2009 order of the Commission came to the notice of the public; that the April 17, 2009 publication of it in the Federal Register was the only public advice of the order's existence; [and] that the law and equities of the situation require that the Commission deem the 20-day period to have commenced April 17, and not April 7, 2009."²⁰

The intent of the April 7 order was that those aggrieved by the order should have twenty days to prepare and submit a petition to intervene. The ten-day delay between the signing of the order and its publication in the Federal Register effectively thwarted that intent by cutting in half the time available for preparing and filing a petition. The delay in publication was obviously not the fault of the Petitioners, who have no control over the publication process. The delay appears to have resulted from the agency's belated submission of the order for publication; the Federal Register notice indicates that the order was not received for publication until April 16, nine days after it was signed.²¹ We agree with the Petitioners that it would be inequitable to permit the agency's delay in publishing the order to have the effect of cutting in half the time available to file a petition challenging the order.

Moreover, in this instance the delay in publication of the order raises serious questions about whether the Federal Register notice was legally sufficient to provide constructive notice to

¹⁹ Combined Reply at 1-6.

²⁰ Id. at 1-2.

²¹ 74 Fed. Reg. at 17,895 (indicating that the order was filed on April 16, 2009, at 8:45 AM).

the public of the date by which a petition must be filed. It is true that, for an order issued under 10 C.F.R. § 2.202, the time for filing a hearing request runs from the date of the order, not the date of publication of the order in the Federal Register.²² The April 7 order so provided.²³ Also, as a general matter, “[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance, except those who are legally entitled to personal notice.”²⁴ Thus, publication of notice of the opportunity to request a hearing in the Federal Register will generally be sufficient to provide constructive notice to aggrieved persons, even if they lack actual notice. But, as Petitioners point out,²⁵ certain minimal requirements must be met before a Federal Register notice will be deemed to provide constructive notice. In particular, a provision of the Federal Register Act, 44 U.S.C. § 1508, requires that agency notices provide at least fifteen days before the opportunity for a hearing is forfeited unless a shorter period is reasonable:

A notice of hearing or of opportunity to be heard, required or authorized to be given by an Act of Congress . . . shall be deemed to have been given to all persons residing within the States of the Union and the District of Columbia . . . when the notice is published in the Federal Register at such a time that the period between the publication and the date fixed in the notice for the hearing or for the termination of the opportunity to be heard is

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* * * *

(2) not less than fifteen days when time for publication is not specifically prescribed by the Act, without prejudice, however, to the effectiveness of a notice of less than fifteen days where the shorter period is reasonable.

²² 10 C.F.R. § 2.202(a)(3).

²³ 74 Fed. Reg. at 17,891.

²⁴ Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 n.60 (2005) (quoting California v. FERC, 329 F.3d 700, 707 (9th Cir. 2003)).

²⁵ Combined Reply at 3.

Section 1508 governs the validity of the constructive notice allegedly provided by the April 17 Federal Register notice. The NRC's notice of the opportunity to be heard concerning an order issued pursuant to 10 C.F.R. § 2.202(a) is certainly "authorized to be given" by an Act of Congress -- namely the Atomic Energy Act (AEA).²⁶ Indeed, the Commission's regulations require that such notice be provided, which would make no sense if the notice was not at least authorized by the AEA.²⁷ Thus, for the April 17 Federal Register notice to provide constructive notice of the opportunity to request a hearing concerning the April 7 order, the time period between the date the notice was published in the Federal Register and the date fixed in the notice for the termination of the opportunity to be heard must have been at least fifteen days, unless it was reasonable to provide a shorter period. Since only ten days remained to request a hearing when the April 17 notice was published, the agency failed to allow the minimum number of days that Section 1508 generally requires. And this was not an instance in which a period shorter than fifteen days was reasonable. On the contrary, the April 7 order allowed aggrieved persons twenty days in which to request a hearing. That is the minimum required by the agency's regulations for orders issued under 10 C.F.R. § 2.202(a). Thus, the agency itself has determined that aggrieved persons require twenty days, not ten, to prepare and file a hearing request concerning an order issued under Section 2.202(a). It was only because the agency delayed in forwarding the April 7 order to the Federal Register that aggrieved persons had only ten days after the Federal Register publication date in which to request a hearing.

Section 1508 implies that, if the period between publication of the Federal Register notice and the date fixed for termination of the opportunity to be heard is less than the minimum

²⁶ 42 U.S.C. §§ 2011-2297h-13.

²⁷ NRC regulations require the agency, when issuing an order modifying a license, to "[i]nform the licensee or any other person adversely affected by the order of his or her right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing" 10 C.F.R. § 2.202(a)(3) (emphasis added).

number of days required, then the notice is legally ineffective to provide constructive notice of the right to be heard. Thus, the NRC may not rely upon publication of the April 17 Federal Register notice to provide constructive notice of the right to request a hearing. Of course, even in the absence of constructive notice, the possibility remains that a petitioner had actual notice of the right to request a hearing.²⁸ But here Petitioners state that they first learned of the April 7 order on April 30, “after reviewing an email exchange between Michael Farr, DTE’s manager of the ISFSI program, and Phil Brochman of the NRC”²⁹ Neither the NRC Staff nor DTE has presented evidence to show that Petitioners had actual notice of the April 7 order before the date Petitioners allege. We therefore conclude that Petitioners lacked constructive notice of their right to request a hearing concerning the April 7 order, and that they lacked actual notice of that right until April 30. By that date, the twenty-day period for filing a hearing request had expired.

In Sequoyah Fuels, the board considered the timeliness of a request to intervene in an adjudicatory hearing convened pursuant to 10 C.F.R. § 2.202. After ruling that the petitioner lacked constructive notice of the opportunity to request a hearing, the board ruled that the petitioner “acted seasonably” when it filed its hearing request within ten days of its receipt of actual notice.³⁰ Here the Petitioners acted even more seasonably, filing their hearing request seven days after they received actual notice. This is substantially less than the twenty days allowed by the April 7 order, and even less than the ten day period that the NRC Staff and DTE would have us allow. We therefore decline to find the hearing request untimely.

²⁸ See Sequoyah Fuels Corp. & Gen. Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-05, 39 NRC 54, 74, aff’d, CLI-94-12, 40 NRC 64 (1994).

²⁹ Combined Reply at 2-3.

³⁰ LBP-94-05, 39 NRC at 74.

DTE and the NRC Staff argue that the hearing request is necessarily untimely because it was filed after April 27, and that we may only consider the petition if Petitioners satisfy the late-filing factors listed in 10 C.F.R. § 2.309(c)(i)-(viii).³¹ For the reasons just explained, we conclude that a hearing request is timely when the petitioner lacks both actual and constructive notice of its opportunity to request a hearing as of the deadline specified by the agency, and the petitioner files the hearing request promptly upon receipt of actual notice. Even if, however, the Petitioners' hearing request must be deemed untimely, we conclude that the Petitioners have, on balance, satisfied the § 2.309(c) factors.³² In the recent Crow Butte ruling, the Commission upheld the licensing board's finding that the petitioner demonstrated "good cause" for its late filing.³³ The Commission affirmed that "[g]ood cause" is the most significant of the late-filing factors in § 2.309(c).³⁴ In this case, the Petitioners have shown good cause because, due to the lack of constructive or actual notice before the filing deadline, they "could not have filed within the time specified in the notice of opportunity for hearing," and they "filed as soon as

³¹ DTE Answer at 11-12; Staff Answer at 3-4.

³² 10 C.F.R. § 2.309(c)(1) sets forth eight factors for nontimely intervention petitions, hearing requests, and contentions:

- (i) Good cause, if any, for the failure to file on time;
- (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;
- (iv) The possible effect of any order that may be entered in the proceeding on the [petitioner's] interest;
- (v) The availability of other means whereby the [petitioner's] interest will be protected;
- (vi) The extent to which the [petitioner's] interests will be represented by existing parties;
- (vii) The extent to which the [petitioner's] participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the [petitioner's] participation may reasonably be expected to assist in developing a sound record.

³³ Crow Butte Resources, Inc. (North Trend Expansion Area), CLI-09-12, 69 NRC ___, ___ (slip op. at 17) (June 25, 2009).

³⁴ Id. at ___ (slip op. at 17 n.61).

possible thereafter.”³⁵ Other Section 2.309(c) factors, including factors (ii), (iv), (vii), and (viii), weigh against Petitioners, primarily for the reasons we explain in our standing analysis, *infra*. But factors (v) and (vi) weigh in favor of Petitioners. On balance, we conclude that Petitioners’ strong showing on the “good cause” issue, the most important factor, combined with the other factors that weigh in their favor, is sufficient to allow us to consider the petition even if it was untimely.³⁶

Thus, we will not dismiss Petitioners’ hearing request on the ground that it was untimely.

IV. Standing

A petitioner’s right to participate in a licensing proceeding stems from Section 189a of the AEA.³⁷ That section provides for a hearing “upon the request of any person whose interest may be affected by the proceeding.”³⁸ The Commission has promulgated regulations to help licensing boards determine whether a petitioner has an interest potentially affected by the

³⁵ Millstone, CLI-05-24, 62 NRC at 564-65 (footnote and citation omitted).

³⁶ The Section 2.309(c) factors, DTE maintains, should have been addressed in Petitioners’ hearing request. DTE Answer at 12. But we can hardly expect the Petitioners to have addressed the late-filing factors in their hearing request if they were not aware of its alleged untimeliness when they filed it. And we can safely assume that Petitioners were not so aware, because on May 6, 2009, they filed a request for an extension of the time to file a hearing request, under the mistaken belief that “the deadline for our petition for an intervention hearing is currently tomorrow night at midnight.” Email request from Terry Lodge to Raynard Wharton (May 6, 2009) (ADAMS Accession No. ML091390250). The Commission denied Petitioners’ extension request on May 8, one day after the petition was filed. Letter from David W. Pstrak to Terry Lodge (May 8, 2009) (ADAMS Accession No. ML091280321). Thus, in all likelihood, Petitioners were unaware that their petition was due on April 27 when they filed the Petition on May 7. Petitioners’ belief that the hearing request was not due until May 7 is understandable, albeit mistaken, given that the Commission’s order was published in the Federal Register on April 17 and the order allowed aggrieved persons twenty days to file a hearing request.

³⁷ 42 U.S.C. § 2239(a)(1)(A) (2006). Section 189a provides that “[i]n any proceeding under this Act, for the granting, suspending, revoking, 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.” *Id.* (emphasis added).

³⁸ *Id.* § 2239(a)(1)(A).

proceeding.³⁹ Under those regulations, a petitioner must state (1) the nature of its right under the AEA to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest.⁴⁰

When assessing whether a petitioner has set forth a sufficient interest to intervene under 10 C.F.R. § 2.309, licensing boards apply judicial concepts of standing, requiring a petitioner to “(1) allege a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.”⁴¹ When an organization petitions to intervene in a proceeding, it must demonstrate either organizational or representational standing. To demonstrate organizational standing, the petitioner must show an “injury-in-fact” to the interests of the organization itself.⁴² Where an organization seeks to establish representational standing, it must demonstrate that at least one of its members would be affected by the proceeding and identify that member by name and address. Moreover, the organization must show that the members would have standing to intervene in their own right, and that the identified members have authorized the organization to request a hearing on their behalf.⁴³ In addition, the interests that the representative organization seeks to protect must be

³⁹ 10 C.F.R. § 2.309(d).

⁴⁰ Id. § 2.309(d)(1)(ii)-(iv).

⁴¹ Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-04 (1998); Kelley v. Selin, 42 F.3d 1501, 1508 (6th Cir. 1995)).

⁴² See Shaw AREVA MOX Servs. (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 183 (2007) (citation omitted).

⁴³ See id. accord Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (citing Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-400 (1979) (“An organization seeking representational standing on behalf of its members may meet the ‘injury-in-fact’ requirement by demonstrating that at least one of its members, who has authorized the organization to represent his or her interest, will be injured by the possible outcome of the proceeding.”)).

germane to its own purpose, and neither the asserted claim nor the required relief must require an individual member to participate in the organization's legal action.⁴⁴

The Commission has long recognized that, in certain types of cases, a petitioner may establish standing based entirely upon his geographical proximity to the facility at issue.⁴⁵ For example, in proceedings involving nuclear power reactors, the Commission has adopted a proximity presumption, whereby a petitioner who resides within fifty miles of the reactor is presumed to have standing without the need to plead injury, causation, and redressability.⁴⁶ In other cases, the Commission decides on a case-by-case basis whether the proximity presumption should apply, taking into account any "obvious potential for offsite [radiological] consequences," as well as "the nature of the proposed action and the significance of the radioactive source."⁴⁷

With respect to orders modifying a license, like the one giving rise to the petition before this Licensing Board, the standing analysis contains an added dimension. This dimension was first articulated in Bellotti v. NRC.⁴⁸ To begin, a petitioner must always request a remedy that falls within the scope of the proceeding, as articulated in the notice of hearing. In Bellotti, the court affirmed that the Commission holds the authority to define the scope of a proceeding, as

⁴⁴ Consumers Energy Co. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007).

⁴⁵ See Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

⁴⁶ See id. at 329 (stating that "living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto").

⁴⁷ Consumers Energy Co. (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (citing Exelon Generation Co. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005)).

⁴⁸ 725 F.2d 1380, 1381 (1983).

opposed to a petitioner.⁴⁹ Thus, where the notice of hearing limits the scope to “whether this Order should be sustained,” a petitioner’s sole remedy is rescission of the order. As the Bellotti court explained, “this language limits possible intervenors to those who think the Order should not be sustained, thereby precluding from intervention persons . . . who do not object to the Order but might see further corrective measures.”⁵⁰ In other words, a petitioner cannot obtain a hearing by simply suggesting that the order should be strengthened in some way. Rather, a petitioner must show that he would be better off in the absence of any order at all.

We conclude that Petitioners have failed to establish standing to participate in this proceeding. Beyond Nuclear has failed to demonstrate both organizational and representational standing. As to organizational standing, Petitioners characterize Beyond Nuclear as a “Maryland-based public education and advocacy group that aims to educate and activate the public on issues pertaining to the hazards of nuclear power, its connection to nuclear weapons and the need to abandon both.”⁵¹ While this description identifies some of Beyond Nuclear’s organizational interests, Petitioners make no attempt to demonstrate how the Commission’s order could result in any injury to those interests. Indeed, it seems logical that an order imposing additional security measures on DTE would actually further, not injure, Beyond Nuclear’s organizational mission. In any case, Beyond Nuclear does not identify any “discrete institutional injury to itself, other than general environmental and policy interests of the sorts the [federal courts and NRC] repeatedly have found insufficient for organizational standing.”⁵² Thus, we decline to grant Beyond Nuclear standing on an organizational basis.

⁴⁹ Id.

⁵⁰ Id. at 1382 n.2.

⁵¹ Petition at 2.

⁵² Palisades, CLI-07-18, 65 NRC at 411-12 (quoting International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)).

As to representational standing, Petitioners provide identical declarations of eight Beyond Nuclear members, all of whom claim to live within fifty miles of the Fermi Power Plant.⁵³ Each of those members is identified by name and address, and each member specifically authorizes Beyond Nuclear to represent him or her in this proceeding.⁵⁴ Thus, Petitioners assert, “[b]ecause they live near the proposed site, i.e., within 50 miles, the individually-named Petitioners have presumptive standing by virtue of their proximity to the new nuclear plant that may be constructed on the site.”⁵⁵ In addition, each of the individual Petitioners asserts that “if the NRC approves proposed installation and security measures for the Fermi 2 ISFSI in their present form, the construction and deployment of dry cask storage at Fermi 2 could adversely affect my health and safety and the integrity of the environment in which I live.”⁵⁶ Thus, Petitioners seek to establish standing on the basis of their proximity to an ISFSI at the Fermi site.

As stated supra, the Commission applies the proximity presumption on a case-by-case basis. To our understanding, neither the Commission nor a licensing board has ever considered whether the presumption should apply in a case such as this – where a petitioner challenges an order modifying an ISFSI license.⁵⁷ Thus, we are left to analyze the governing

⁵³ Petition, Declaration of Frank Mantei ¶ 1 (May 7, 2009), Declaration of Keith Gunter ¶ 1 (May 7, 2009), Declaration of Michael J. Keegan ¶ 1 (May 7, 2009), Declaration of Leonard Mandeville ¶ 1 (May 7, 2009), Declaration of Marcee Meyers ¶ 1 (May 7, 2009), Declaration of Marilyn R. Timmer ¶ 1 (May 7, 2009), Declaration of Mark Farris ¶ 1 (May 7, 2009), Declaration of Shirley M. Steinman ¶ 1 (May 7, 2009) [hereinafter Petitioners’ Declarations].

⁵⁴ Petitioners’ Declarations ¶ 3.

⁵⁵ Petition at 5. We assume, for purposes of this decision, that when Petitioners reference their “proximity to the new nuclear plant,” they actually mean “proximity to the Fermi site,” where DTE would construct and operate any ISFSI subject to the Commission’s order.

⁵⁶ Petitioners’ Declarations ¶ 2.

⁵⁷ Indeed, although several such orders have been issued over the past eight years, not one has been challenged by a party other than the licensee.

case law and draw our own conclusion. As discussed supra, the Commission has clearly established a fifty-mile presumption in the context of reactor licensing cases, where the potential for offsite radiological consequences is obvious.⁵⁸ In nonreactor cases, however, the potential for offsite consequences is not always clear. Thus, the burden falls on the petitioner to demonstrate that “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”⁵⁹ In making this demonstration, the petitioner cannot rely on “conclusory allegations about potential radiological harm,” but must show “how these various harms might result from the [proposed action].”⁶⁰

The question facing this Licensing Board, therefore, is whether Petitioners adequately substantiate their allegations of potential injury, such that we should grant them standing on the basis of their proximity to the Fermi site. In our estimation, Petitioners do not. Petitioners provide only the bald statement, reiterated in each of the declarations, that the “proposed installation and security measures . . . could adversely affect my health and safety and the integrity of the environment in which I live.”⁶¹ Petitioners make no attempt to draw a causal link between these alleged effects and the Commission’s order modifying DTE’s license to operate an ISFSI.⁶² Moreover, as DTE points out, the Commission has already spoken to the

⁵⁸ Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-06, 53 NRC 138, 146-50 (2001).

⁵⁹ Ga. Inst. of Tech. (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995); see also Peach Bottom, CLI-05-26, 62 NRC at 581.

⁶⁰ Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-00-04, 49 NRC 185, 192 (1999) (emphasis added).

⁶¹ Petitioners’ Declarations ¶ 2.

⁶² Petitioners do make reference to various studies, including a 2003 article describing the dangers of a terrorist attack on a fuel-storage pool, Petition at 12-13; Combined Reply at 6-7, and a 1998 German study concluding that “dry casks were vulnerable to attacks, such as by TOW anti-tank missiles,” Petition at 8-9. But these studies have no bearing on the proceeding at hand. The instant proceeding involves dry cask storage in an ISFSI, not a fuel-storage pool, and it deals only with certain additional security measures imposed by the NRC. Petitioners do

radiological effects of ISFSIs. The Commission has explained that “an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release.”⁶³ Based on this observation, the Commission declined to adopt a proximity presumption in an ISFSI license transfer proceeding, where the petitioner had “not demonstrated that the mere transfer of the ISFSI somehow increases his risk of radiological harm.”⁶⁴ Similarly, in the instant case, we decline to adopt a proximity presumption where Petitioners have not shown how the Commission’s order creates any potential for offsite consequences.⁶⁵ Thus, we decline to grant Beyond Nuclear standing on a representational basis.⁶⁶

Moreover, even if Petitioners had established an actual or threatened injury related to the proposed ISFSI, Petitioners have failed to show that any such injury could be redressed by

not provide any support, relevant to the Fermi site, substantiating the notion that offsite radiological consequences may flow from the Commission’s order.

⁶³ Big Rock Point ISFSI, CLI-07-09, 65 NRC at 426.

⁶⁴ Id.

⁶⁵ In their reply, Petitioners assert for the first time that, in fact, all but one of the Petitioners reside within seventeen miles of the Fermi site. Combined Reply at 6. Based on this statement, Petitioners imply that we should adopt a seventeen-mile proximity presumption, following the licensing board’s decision in the Diablo Canyon proceeding, a case cited by DTE in its answer. Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (2002); see also DTE Answer at 17. Indeed, the Diablo Canyon board adopted a seventeen-mile presumption in a case involving an application to construct and operate an ISFSI. LBP-02-23, 56 NRC at 429. But, as stated previously, the proximity presumption is applied on a case-by-case basis, taking into account the nature of the proposed action. We see no reason to follow another licensing board’s determination in a different type of proceeding, at a different location, based on a different set of facts. Indeed, in Diablo Canyon, the board relied on an agreement amongst the parties that seventeen miles was an appropriate radius upon which to presume standing. Id. at 428. To our knowledge, no such agreement has been reached in the instant case.

⁶⁶ Because we find that Beyond Nuclear has failed to demonstrate that any of its members would have standing to intervene in their own right, an element of representational standing, it follows that none of those members has demonstrated standing to intervene as an individual in this proceeding.

a favorable ruling from the Board. In general, petitioners will rarely be able demonstrate standing in a case such as this, where the Commission issues an order intended to improve safety conditions.⁶⁷ The Commission has issued an order intended to enhance security at the Fermi site and has limited the scope of any hearing to the question of “whether this Order should be sustained.”⁶⁸ Thus, the only relief available to Petitioners is rescission of the order and, to demonstrate standing, Petitioners must show that rescission of the order will redress their injury. Petitioners do allege various injuries related to a potential terrorist attack affecting on-site fuel storage at the Fermi site. But the Commission’s order is intended to reduce the possibility of a terrorist attack at the Fermi site; thus, rescinding the order will not likely redress Petitioners’ injuries. In fact, it will more likely aggravate those injuries, or at least maintain the status quo. Because Petitioners fail to explain why they will be better off in the absence of the Commission’s order, Petitioners have failed to demonstrate that a hearing will redress their injury.

Thus, Petitioners lack standing to challenge the April 7 order. We therefore need not reach the arguments of DTE and the NRC Staff that Petitioners have not submitted an admissible contention.

VI. Conclusion

Because Petitioners’ hearing request fails to demonstrate standing as required by 10 C.F.R. § 2.309(d), the Board must deny the hearing request and terminate this proceeding.

⁶⁷ Bellotti, 725 F.2d at 1383 (stating that “[The] Commission’s power to define the scope of a proceeding will lead to the denial of intervention . . . when the Commission amends a license to require additional or better safety measures”); see also Alaska Dep’t of Transp. (Confirmatory Order Modifying License), CLI-04-26, 60 NRC 399, 406 n.28. In Alaska Dep’t of Transp., the Commission explained that “it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders . . . because such orders presumably enhance rather than diminish public safety.” Although we do not deal with a confirmatory enforcement order in the present case, the same reasoning applies.

⁶⁸ 74 Fed. Reg. at 17,892.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DETROIT EDISON COMPANY) Docket No. 72-71-EA
)
)
(Fermi Power Plant,)
Independent Spent Fuel Storage)
Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON STANDING AND CONTENTION ADMISSIBILITY) (LBP-09-20) have been served upon the following persons by Electronic Information Exchange.

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Docket No. 72-71-EA
LB MEMORANDUM AND ORDER (RULING ON STANDING AND CONTENTION
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Dated at Rockville, Maryland
this 21st day of August 2009