

August 31, 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of:) Docket No. 72-7
The Detroit Edison Company) EA-09-072
(Fermi Nuclear Power Plant,) NRC 2009-0169
Unit 2 ISFSI, Order Modifying
License))

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**Petition of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley
Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard
Mandeville and Marilyn R. Timmer for Review
of August 21, 2009 ASLB Order**

Now come Petitioners Beyond Nuclear, Keith Gunter, Michael J. Keegan, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, Mark Farris and Shirley Steinman ("Petitioners"), by and through counsel, and pursuant to 10 C.F.R. 2.311, petition the Commission to review the Atomic Safety and Licensing Board's August 21, 2009 "Memorandum and Order (Ruling on Standing and Contention Admissibility)" in this case, to reverse the determination that Petitioners do not have standing to pursue contentions in this license modification proceeding, and to remand to the ASLB for hearing on the merits.

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. 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. In that letter, DTE acknowledges a history of quality assurance at Fermi 2 dating back to 1974 and NRC approval in 1981, with those technical specifications being relocated in 1997 into an Updated Final Safety Analysis Report (UFSAR). However, there is neither an acknowledgment of, nor an accounting for, allegations of quality assurance violations and failures with the selected cask type, Holtec.¹

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.² 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. The Commission justified additional security measures by asserting that "these actions must be embodied in a legally binding order because the current threat environment continues to persist." 74 Fed. Reg. 17,891. Moreover, at p. 17,891 of the April 7 order, the Commission states:

[The Commission] recognizes that licensees may have already

¹In 1999 and 2000, Oscar Shirani, as a lead quality assurance (QA) auditor for Exelon, identified numerous "major design and fabrication issues" during a QA inspection of Holtec International (the cask designer), Omni Fabrication, and U.S. Tool & Die (the subcontractors responsible for manufacturing the casks). In fact, he identified a "major breakdown" in the QA program itself. The problems were so severe that Shirani sought a Stop Work Order against the manufacturer of the casks until the problems were addressed. Instead, he was run out of Exelon. The quality assurance violations which Shirani uncovered, and the NRC's inconsistent handling of those documented problems, is discussed at pp. 16-21 of the May 7, 2009 "Petition to Intervene" in this case.

²*Fermi Power Plant; Order Modifying License*, 74 Fed. Reg. 17,890 (Apr. 17, 2009) [hereinafter "April 7 order"].

initiated many of the measures set forth in Attachments 1 and 2 to this Order, in response to previously issued advisories, or on their own. *It also recognizes that some measures may not be possible nor necessary at some sites, or may need to be tailored to accommodate the specific circumstances existing at DTE's facility, to achieve the intended objectives and avoid any unforeseen effect on the safe storage of spent fuel.* (Emphasis supplied)

The order accorded DTE 180 days to implement most of the ASMs and twenty days to register any objections to the order's requirements, and to submit a schedule for achieving compliance.

The April 7 order also provided an opportunity for hearing if sought by "any person adversely affected" "within 20 days of the date of the order" who submitted an answer to the order and requested a hearing. 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. Then, on May 7, 2009, Petitioners filed for leave to intervene and requested a hearing, seeking admission of three contentions in which they demanded that the Commission undertake a full environmental impact statement (EIS), which should include "a vulnerability assessment" of DTE's on-site storage plan, given a major security breach that was discovered in 2007, involving the chief of security at the Palisades Nuclear Power Plant³; an identification of

³In May 2007, Esquire Magazine revealed a major security breach at the Palisades nuclear power plant in southwest Michigan. <http://www.esquire.com/features/mercenary0607>. Nuclear Information and Resource Service called for a congressional investigation of the grave incident: see <http://www.nirs.org/press/05-15-2007/1>. Congressman Ed Markey (D-MA) immediately questioned NRC Chairman Dale Klein about the incident, see http://markey.house.gov/index.php?option=com_content&task=view&id=2836. Chairman Klein's initial and final responses to Congressman Markey's inquiry essentially downplayed the security significance of the breach, indicating a lack of NRC interest in learning lessons from the incident. The lessons not learned included major failures with both nuclear power industry and NRC vetting procedures for security

"alternatives to the current ISFSI general license," and an analysis of "sociological, civil liberties and societal costs" of implementation of the security measures which had been ordered by the Commission.

The specific alternatives posited were hardened on-site storage ("HOSS") and construction of a "wet well"/waste storage, transfer, and handling pool at ground level of the Fermi 2 site. The former would leave the ISFSI considerably more resistant to "insider" or "outsider" attacks using military-grade ordinance, while the latter would allow for future re-packaging of waste storage containers as their integrity breaks down over time and serve as an emergency storage and handling location in the event of problems with dry storage casks.

Petitioners also called for an independent quality assurance inspection on the design and manufacture of Holtec International high-level radioactive waste storage/transport containers be required before their deployment at Fermi and for analysis of the civil liberties implications for the public living near Fermi as a consequence of implementing the April 7 NRC order.

On May 13, 2009, the NRC referred Petitioners' hearing request to the Atomic Safety and Licensing Board Panel (ASLBP), which established a Licensing Board on May 15, 2009.

related personnel, another matter of direct relevance to this Fermi 2 dry cask storage proceeding. In fact, the Palisades security breach's lessons went so "un-learned" that the Federal Bureau of Investigation and Michigan State Police continued an emergency security response program a full year later that was instituted and conceived of by the head of Palisades security that Esquire Magazine revealed to be a hoax, pathological liar, and entirely unqualified for such a significant security chief position. Incredibly, this "viper squad" security program was highlighted by NRC at its March 2008 Regulatory Information Conference as a model to be implemented at nuclear power plants across the U.S.

Both DTE and the NRC Staff filed answers to the petition on June 1, 2009, and on June 9, Petitioners filed a combined reply to those answers.

On August 21, 2009, the ASLB overruled objections by DTE and the NRC staff as to the timeliness of Petitioners' May 7 filing, but denied Petitioners standing because they had not shown the element of redressability of their grievances through any decision the ASLB might make.

SCOPE OF APPEAL

Petitioners do not appeal nor question the determination made by the ASLB that their petition was timely.⁴ Rather, they challenge the determination that "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." Memorandum and Order, p. 17.

ARGUMENT AS TO STANDING

a. A Porous And Partly-Undisclosed Order

The April 7 order which underlies this proceeding is diffuse and optional in its wording:

[The Commission]. . . also recognizes that *some measures may not be possible nor necessary at some sites, or may need to be tailored to accommodate the specific circumstances existing at DTE's facility*, to achieve the intended objectives and avoid any

⁴In 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 possible thereafter. . . .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." ASLB Memorandum and Order, August 21, 2009, pp. 9-10.

unforeseen effect on the safe storage of spent fuel. (Emphasis supplied)

Although predicated upon the ASLB's notation of a persistent "current threat environment" from terrorism, Petitioners do not concur that there is an inevitably positive outcome from imposing requirements for background checks concerning employment, citizenship, fingerprinting, criminal history and references. The April 7 order also did not disclose the contents of a second attachment, but presumably it contains ISFSI-specific security procedures also.

Petitioners submit that the NRC has not made any formal findings that the imposition of new procedures, requiring in some circumstances new software and even new hardware, represent a net positive or gain in nuclear power plant security. In the April 7 order, there is even a formal means of achieving relaxation of an already-vapid standard: "The Director, Office of Nuclear Material Safety and Safeguards, may, in writing, relax or rescind any of the above conditions, for good cause." 74 Fed.Reg. 17,891, last line of Section III. This provision does not appear to require public notice nor an opportunity for request of a hearing.

The overall effect of using plant-by-plant orders to standardize practices, where local-option leeway is built into those orders, results in *ad hoc* rulemaking. Where the rule being imposed has a substantive legal effect and is not merely interpretative, it must be promulgated against 5 U.S.C. Sec. 553. The District of Columbia Circuit has stated: "An interpretative rule simply states what the administrative agency thinks the statute means, and only 'reminds' affected parties of existing duties. ... On the other hand, if by its

action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule...." *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C.Cir.1984), cert. denied, 471 U.S. 1074, 105 S.Ct. 2153, 85 L.Ed.2d 509 (1985) (citations omitted). Rules adopted on a case-by-case basis without due consideration of the reality of practice can create unfortunate and unintended consequences.

The realities of practice not reflected in the *ad hoc* rule under challenge are those from the Palisades security debacle of 2007. The NRC has, to this day, demonstrated neither the identification nor internalization of any lessons in security learned from the shocking 2007 revelations of Esquire Magazine that the head of Palisades security held his powerful position as a result of perpetrating hoaxes, that he was a thoroughly-unqualified, pathological liar. There were in place in 2007 at Palisades vetting features similar to those ordered here by the Commission which were imposed by the industry and NRC to be implemented by personnel and which clearly were not utilized. Even a year after Palisades' fraudulent security chief was terminated, the "viper" response plan he had set up was lauded at the NRC's 2008 Regulatory Conference as an idealized arrangement.

**b. Denial Of Organizational Standing Of Beyond Nuclear
And Standing To Individual Petitioners**

In determining whether a petitioner has sufficient interest to intervene in a proceeding, the Commission has traditionally applied judicial concepts of standing. See *Metropolitan Edison Co.* (Three Mile Island Nuclear station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983) (citing *Portland General Electric Co.* (Pebble Springs Nuclear Plant,

Units 1 and 2), CLI-76-27, 4 NRC 610 (1976)). Contemporaneous judicial standards for standing require a petitioner to demonstrate that (1) it has suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA) and the National Environmental Policy Act of 1969 (NEPA)); (2) the injury can be fairly traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See *Carolina Power & Light Co. (Shearon Harris Nuclear Power Plants)*, LBP-99-25, 50 NRC 25, 29 (1999).

An organization that wishes to intervene in a proceeding may do so either in its own right by demonstrating harm to its organizational interests, or in a representational capacity by demonstrating harm to its members. See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998). To intervene in a representational capacity, an organization must show not only that at least one of its members would fulfill the standing requirements, but also that he or she has authorized the organization to represent his or her interests. See *Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 168, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 426 (2002).

Two tests must be satisfied to acquire standing: (1) the petitioner must allege "injury-in-fact" (that some injury has occurred or will probably result from the action involved); (2) the petitioner

must allege an interest "arguably within the zone of interest" protected by the statute. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 983 (1982), citing *Warth v. Seldin*, 422 U.S. 490 (1975); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19 (1996).

For purposes of assessing injury-in-fact, care must be taken to avoid "the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits." *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81, 82 (1993), citing *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478, 495 (D.C. Cir. 1990) (citations omitted), *cert. denied*, 117 L. Ed. 2d 460 (1992); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 2, 15 (2001).

The existence of judicial standing hinges upon a demonstration of a present or future injury-in-fact that is arguably within the zone of interests protected by the governing statute(s). *International Uranium (USA) Corporation* (White Mesa Uranium Mill) LBP-01-15, 53 NRC 344, 347 (2001). To constitute an adequate showing of injury-in-fact within a cognizable sphere of interest, "[a] plaintiff must allege that he has or will in fact be perceptibly harmed by the challenged agency action. . . ." *International Uranium (USA) Corporation* (White Mesa Uranium Mill) LBP-01-15, 53 NRC 344, 349 (2001) citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973).

The ASLB in the present matter rejected the proximity test for

standing despite the fact that several of the individual Petitioners demonstrated that he or she live within 17 (actually, recalculation shows only 6 to 8) miles of the Fermi 2 ISFSI, and that they had concerns about effects on public health and the environment from any ISFSI accident. "Combined Reply of Petitioners," p. 6. The Petitioners alleged in their May 7, 2009 Petition (pp. 12-13) the authoritative 2003 analysis by Alvarez *et al.* which summed up the potential consequences [of a waste storage pool fire caused by a cooling water drain down caused by a terrorist or sabotage attack], which could affect thousands of square miles of agricultural land and human health effects, with concomitant massive economic costs. They also mentioned the prospective damage that would flow from a serious cask fire and breach. Combined reply pp. 7-8.

The ASLB, however, restricted its analysis of potential harm to the ends of the new rules being imposed by the April 7 order (*i.e.*, putting new background vetting practices into effect), instead of the possibility that those rules, following the serious apparent vetting lapses at Palisades in 2006-07, might have zero positive effect, or even negative effects through bungling or incompetence, on Fermi 2 ISFSI security. In that case, security could be breached and either through inadvertence or deliberate terrorism or sabotage, a massive radiological accident could occur at Fermi 2's ISFSI.

Michigan's federal court has already addressed the matter of judicial standing for those who challenge the viability of dry cask storage. In *Kelley v. Selin*, 42 F.3d 1501, 1510 (6th Cir. 1995), *cert. denied*, 515 U.S. 1159 (1995), the Court of Appeals discussed

standing of three petitioners who lived within a few miles of the proposed site of deployment of VSC-24 dry storage casks at the Palisades nuclear plant on Lake Michigan:

Petitioners Read, Perman, and Kimmelman have alleged sufficient injury to establish standing. Each owns land in close proximity to the Palisades plant and the proposed site for spent fuel storage. The petitioners have asserted a personal stake in the outcome of the litigation by virtue of their ownership and use of their property for residential and leisure pursuits. Not only do petitioners assert harm to their aesthetic interests and their physical health, but each also asserts that the value of his or her property will be diminished by the storage of nuclear waste in the VSC-24 casks at Palisades. Thus, petitioners' claims are sufficient to establish standing. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2142 (1992) (noting that the claim at issue was 'not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., . . . the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)'). Petitioners are clearly asserting a threatened injury. The injury can be fairly traced to respondents' actions since petitioners allege that it is the storage of spent nuclear fuels in the VSC-24 cask that has the potential to interrupt enjoyment of their lakefront property and to diminish its value. Finally, a decision in their favor could redress the threatened harm.

A petitioner need not establish that injury will inevitably result from the proposed action to show an injury in fact, but only that it may be injured in fact by the proposed action. *Gulf States Utilities Co., et al.* (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, aff'd, CLI-94-10, 40 NRC 43 (1994).

**c. This Case Calls For A Site-Specific Licensing Action
Because Of The Use Of Holtec Casks**

Petitioners maintain that this is the first and only opportunity they have had to request a hearing to critique the December 10, 2007 nonpublic notice sent by DTE to the NRC wherein the utility asserted its choice of Holtec casks for its ISFSI. When the NRC published its final rule setting up general licenses for dry cask storage in August

1990, the Commission admitted that "[t]here is a possibility that the use of a certified cask at a particular site may entail the need for site-specific licensing action.... In this event the usual formal hearing requirements would apply."

Petitioners have raised quality assurance problems in Holtec's history, and site-specific concerns in their May 7 filing. The location of Fermi 2, across the narrow northwestern corner of Lake Erie from Ontario, exposes the facility to a fast-moving terrorist attack from the somewhat remote Ontario, Canada shoreline using powerful boats. As noted in the May 7 petition, antitank weaponry is more than capable of doing substantial damage to the integrity of cask storage systems and causing breaches which allow radiation to escape into the environment. Petition for Review pp. 9-15.

Petitioners also demonstrated that Fermi 2's design could be of concern. It is a General Electric Mark I reactor, and the spent fuel storage facility is located on the fifth story of the reactor building. So once the spent fuel is at ground level, should there be a breach in a loaded basket or canister, it cannot be relocated back to the fifth floor storage pool. A "wet well" or waste storage, transfer, and handling pool, should be required at ground level on the site, in order to allow for future re-packaging of waste storage containers as their integrity breaks down over time, as well as to serve as an emergency storage and handling location in the event of problems with dry storage casks. Imposition of new background vetting rules can create the negative of a false sense of security by emphasizing the formation of human security workforce over the substance of putting

into place physical barriers and important technologies to protect the plant itself and significant public interests.

CONCLUSION

An alleged injury to a procedural interest is sufficient to support standing. Thus, a petitioner derived standing by alleging that a proposed license amendment would deprive it of the right to notice and opportunity for hearing provided by § 189a of the Atomic Energy Act. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-90-15, 31 NRC 501, 506 (1990), *reconsid. denied*, LBP-90-25, 32 NRC 21 (1990). This case demonstrates potential violations of the Federal Administrative Procedure Act which could deprive the public of lawful notice even as open-ended, *ad hoc* security measures are initiated. Petitioners shown the proper prerequisites of standing, based upon the very real public health and safety risks posed by a complex of storage for many of the most toxic and lethal substances on earth from which they are to be protected by a porous tissue of administrative regulations that have not all been worked out yet, and which might be waived. The conservative possibility of the further economic evisceration of the greater Detroit or Toledo regions with a large area made radioactive and uninhabitable by a security breach augurs in favor of allowing the Petitioners to explore issues asserted relative to the Fermi 2 ISFSI for the very first time.

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Certification of Service of 'Petition of Beyond Nuclear, Mark Farris,
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of August 21, 2009 ASLB Order'

I hereby certify that a copy of the "Petition of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville and Marilyn R. Timmer for Review of August 21, 2009 ASLB Order" has been served on the following persons via Electronic Information Exchange this 31st day of August, 2009:

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