

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
The Detroit Edison Company)	Docket No. 72-71-EA
)	
(Fermi Nuclear Power Plant,)	ASLB No. 09-888-03-EA-
Unit 2 ISFSI, Order Modifying)	BD01
License))	
)	

NRC STAFF'S RESPONSE TO PETITION FOR REVIEW OF LBP-09-20 BY BEYOND NUCLEAR, MARK FARRIS, MICHAEL KEEGAN, SHIRLEY STEINMAN, KEITH GUNTER, FRANK MANTEI, MARCEE MEYERS, LEONARD MANDEVILLE, AND MARILYN R. TIMMER

INTRODUCTION

Staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the August 31, 2009, "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" (hereinafter, "Appeal"). For the reasons discussed below, Petitioners' Appeal should be denied.

BACKGROUND

In accordance with the Atomic Energy Act of 1954, as amended, and Title 10 of the *Code of Federal Regulations* (10 C.F.R.) Part 72, the NRC issued to Detroit Edison Company ("DTE") a general license authorizing the operation of an Independent Spent Fuel Storage Installation ("ISFSI"). DTE has identified near-term plans to store spent fuel in an ISFSI under the general license provisions of 10 C.F.R. Part 72.

On April 7, 2009, the Director, Office of Nuclear Materials Safety and Safeguards, issued

an Order Modifying License (“Order”), in the matter of Detroit Edison Company, Fermi Power Plant, Independent Spent Fuel Storage and Installation.¹ The Order requires DTE to implement certain additional security measures (“ASMs”), effective immediately, to address the current threat environment, consistent throughout the nuclear ISFSI community, which will provide the Commission with “reasonable assurance that the public health and safety, the environment, and common defense and security continue to be adequately protected in the current threat environment.”²

On May 7, 2009, Petitioners filed for leave to intervene and requested a hearing, seeking admission of three contentions. On May 13, 2009, the petition was referred to the Atomic Safety and Licensing Board Panel which established a Board (“Board” or “ASLB”) on May 15, 2009. Staff and DTE individually filed answers to the petition on June 1, 2009, and, on June 9, 2009, Petitioners filed a response to those answers. On August 21, 2009, the ASLB issued a Memorandum and Order (“Board Decision”) finding the petition was timely but that Petitioners failed to establish standing.³ Accordingly, the Board denied Petitioners’ hearing request and terminated the proceeding. On August 31, 2009, Petitioners filed with the Commission a petition for review of the Board’s Decision.

DISCUSSION

In its August 21, 2009, decision, the Board held that Petitioners “failed to demonstrate both organizational and representational standing,” stating that “an order imposing additional security measures on DTE would actually further, not injure, Beyond Nuclear’s organizational

¹ *Order Modifying License* (“Order”), 74 Fed. Reg. 17,890 (April 7, 2009).

² *Id.*, at 17,891.

³ *Detroit Edison Company (Fermi Nuclear Power Plant, Unit 2 ISFSI)*, LBP-09-20 (August 21, 2009).

mission.”⁴ Similarly, the Board rejected Petitioners’ claim of presumptive standing on the basis of the individual petitioners’ proximity to the Fermi ISFSI site.⁵ The Board concluded that Petitioners failed to substantiate their allegations of potential injury based on their proximity to the Fermi ISFSI site by making “no attempt to draw a causal link between these alleged effects and the Commission’s order modifying DTE’s license to operate an ISFSI,”⁶ and terminated the proceeding.

On appeal, Petitioners raise three issues: (1) the April 7 Order imposing increased security measures on the Fermi ISFSI is “porous and partly-undisclosed,” resulting in *ad hoc* rulemaking,⁷ (2) a “recalculation” shows that individual petitioners live within six to eight miles of the Fermi ISFSI, thus they should be granted standing,⁸ and (3) a site-specific licensing action is necessary because Petitioners have not had an opportunity to critique DTE’s choice of the Holtec cask for its ISFSI.⁹ For the reasons set forth below, these arguments should be denied.

With respect to Petitioners first argument concerning the Order imposing increased security measures on the Fermi ISFSI facility, Petitioners attack what they perceive to be issuance of plant-specific orders resulting in *ad hoc* rulemaking. Petitioners claim that “rules adopted on a case-by-case basis without due consideration of the reality of practice can create

⁴ Appeal at 13.

⁵ Although hearing requests will be construed in favor of a petitioner on issues of standing, a petitioner nonetheless bears the burden of establishing standing. In its decision, the Board stated that “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,’” and that the petitioner “cannot rely on ‘conclusory allegations about potential radiological harm,’ but must show ‘how these various harms might result from the proposed action.’” Board Decision at 15 (emphasis in original).

⁶ Board Decision at 15.

⁷ Appeal at 5-6.

⁸ *Id.* at 10.

⁹ *Id.* at 11-13.

unfortunate and unintended consequences.”¹⁰ Petitioners further claim that the Order fails to take into consideration “the Palisades security debacle of 2007.”¹¹

It is well settled that agencies may proceed by either rulemaking or on a case-by-case basis; such decision is entirely within the agency’s discretion.¹² Petitioners provide no basis for disturbing this settled caselaw. Thus, Petitioners’ argument is without merit and must be rejected.

With respect to Petitioners’ second claim regarding standing, the Board properly rejected Petitioners’ reliance on proximity in proposed nuclear power plant proceedings as failing to satisfy the presumptive standing requirement with respect to an order imposing safeguards requirements on an ISFSI.¹³ In their appeal, Petitioners claim for the first time that a “recalculation” shows that “several of the individual Petitioners . . . live within . . . 6 to 8[] miles of the Fermi 2 ISFSI”¹⁴ Absent from Petitioners’ Appeal, however, is any basis on which the Commission could reverse the Board’s determination on standing, including a substantive

¹⁰ *Id.* at 7.

¹¹ *Id.* Petitioners summarize an article from *Esquire Magazine* regarding an employee at Palisades Nuclear Plant, and claim that the “realities of practice not reflected in the *ad hoc* rule under challenge are those from the Palisades security debacle of 2007.” *Id.* It is not clear to Staff, however, what exact “realities of practice” Petitioners claim should have been to have included in the Order, based on Staff’s reading of the *Esquire Magazine* article.

¹² *In the Matter of Amergen Energy Company* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-08, 2007 WL 595084 (NRC) (February 26, 2007). *See also, States of Washington and Oregon: Denial of Petition for Rulemaking*, 1993 WL 113431 (NRC) (February 26, 1993); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

¹³ Board Decision at 12. Commission precedent is clear that the proximity presumption in ISFSI proceedings is “determine[d] on a case-by-case basis . . . considering the ‘obvious potential for offsite [radiological] consequences,’ or lack thereof, from the application at issue, and specifically ‘taking into account the nature of the proposed action and the significance of the radioactive source.’” *In the Matter of Consumers Energy Company* (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).

¹⁴ Appeal at 10. Petitioners should not be permitted to provide shifting proximity approximations. It is “well-established in NRC proceedings that, absent ‘a serious substantive issue as to which a genuine problem has been demonstrated,’ arguments that could have been presented below, but were not, will not be entertained on appeal.” *In the Matter of Georgia Power Company, et al.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 133 (1987) (citing *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B) ALAB-463, 7 NRC 341, 348 (1978)).

demonstration of how “various harms might result from the [proposed action].”¹⁵ General references to members’ proximity to the Fermi ISFSI facility, which is what was provided here, are “too imprecise to meet [the Commission’s] requirements for proximity-based standing.”¹⁶ As such, the individual petitioners’ claim of presumptive standing based on proximity was properly denied.

In addition, the Board was correct in applying the *Bellotti* standard to Petitioners’ claims of standing.¹⁷ A petitioner must, in challenging an order imposing increased security measures, provide substantive evidence regarding how they would be better off in the absence of such an order, *i.e.*, petitioners must prove that the *status quo* is preferable to heightened security, and that the injury must be “concrete and particularized, and not “conjectural” or “hypothetical.”¹⁸ As the Board stated in its Decision, “[i]n general, petitioners will rarely be able to demonstrate standing in cases such as this, where the Commission issues an order intended to improve safety conditions.”¹⁹

Petitioners’ Appeal did not show they would be better off in the absence of the order imposing additional security requirements on the Fermi ISFSI. Moreover, Petitioners did not set forth with particularity how the increased security measures would lead to a degradation of the

¹⁵ Order at 15, citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-04, 49 NRC 185, 192 (1999).

¹⁶ *In the Matter of Consumers Energy Co., Nuclear Management Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-22, 2007 WL 1881539 (NRC) (June 28, 2007).

¹⁷ Board Decision at 12-17.

¹⁸ *In the Matter of Crowe Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), 67 NRC 241, 2008 WL 4790123 (NRC May 21, 2008). See also, *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). It is well established that petitioners may not challenge enforcement orders on the grounds that the order is “too weak or otherwise insufficient;” rather, “the only issue in an NRC enforcement proceeding is ‘whether this order should be sustained.’” *Alaska Dep’t of Transportation & Public Facilities*, CLI-04-26, 60 NRC 399 (2004).

¹⁹ Board Decision at 17, citing *Bellotti v. NRC*, 725 F.2d 1380, 1383 (1983) (“[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 addition or better safety measures.”).

status quo. Petitioners thus fail to meet the threshold *Bellotti* requirement²⁰ of “request[ing] a remedy that falls within the scope of the proceeding, as articulated in the notice of hearing.”²¹ In order to satisfy *Bellotti*, Petitioners must provide factual support for their claim that any “injury” could be redressed by a favorable ruling from the Board, *i.e.*, that they would be better off in the absence of the underlying Order.²² Petitioners set forth claims without support that “the NRC has not made any formal findings that the imposition of new procedures . . . represent a net positive or gain in nuclear power plant security,”²³ and that the April 7 Order “might have zero positive effect, or even negative effects.”²⁴ Petitioners’ failure to provide proof of a “concrete and particularized” injury, including support of their claims that the imposition of increased security measures at the Fermi ISFSI facility would result in a negative effect on the individual petitioners, does not satisfy the Commission’s threshold requirements in challenging an order imposing increased security measures, and their Appeal should be denied.

Finally, with respect to Petitioners’ third claim calling for a site-specific licensing action regarding the use of the Holtec casks by DTE, Petitioners attempt to re-argue the contentions that were set forth in their initial petition. The Board, however, did not address the merits of Petitioners’ contentions in its Decision since it found that Petitioners failed to establish standing.²⁵ Accordingly, that issue is outside the scope of the appeal and should not be

²⁰ (1) would the petitioner be better off if the order were vacated, (2) would the petitioner’s concerns be alleviated if the order were vacated, and (3) does the petitioner in reality seek additional measures beyond those set out in the disputed order? *Maine Yankee*, 50 NRC 52 at 60. See also, *Bellotti*, 725 F.2d 1380, 1383 (D.C. Cir. 1983) (“automatic participation at a hearing may be denied only when the Commission is seeking to make a facility’s operation safer”). See also *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 n. 14 (2004) (“a person whose interest cannot be affected by the issues before the Commission in the proceeding lacks an essential element of standing”).

²¹ Board Decision at 12.

²² Board Decision at 16-17.

²³ Appeal at 6.

²⁴ *Id.* at 10.

²⁵ Board Decision at 17 (“Petitioners lack standing to challenge the April 7 order. We therefore need not reach the

entertained.

CONCLUSION

As set forth above, the issues raised in Petitioners' pleading do not fall within the limited scope of either the original Order – “whether this Order should be sustained,”²⁶ or the Board's Decision, e.g., the question of standing. Petitioners have not shown with requisite particularity that they are adversely affected by the Order (which is intended to increase safety at the ISFSI site), and their Appeal requests measures beyond the scope of the Board's Decision.²⁷ Thus, Petitioners appeal should be denied.

Respectfully submitted,

/ signed (electronically) by /

Carrie M. Safford
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-2995
Carrie.Safford@nrc.gov

Dated at Rockville, MD
this 10th day of September, 2009

arguments of DTE and the NRC Staff that Petitioners have not submitted an admissible contention.”)

²⁶ 74 Fed. Reg. at 17,892.

²⁷ “The Commission's power to define the scope of a proceeding will lead to the denial of intervention only when the Commission amends a license to require additional or better safety measures. Then, one who . . . wishes to litigate the need for still more safety measures . . . will be remitted to section 2.206's petition procedures.” *Bellotti*, 725 F.2d at 1383.

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO PETITION FOR REVIEW OF LBP-09-20 BY BEYOND NUCLEAR, MARK FARRIS, MICHAEL KEEGAN, SHIRLEY STEINMAN, KEITH GUNTER, FRANK MANTEI, MARCEE MEYERS, LEONARD MANDEVILLE, AND MARILYN R. TIMMER" in the above-captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 10th day of September, 2009:

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
Washington, DC 20555-0001

Ronald M. Spritzer, Chair
Administrative Judge
E-mail: rms4@nrc.gov

Michael F. Kennedy
Administrative Judge
E-mail: mfk2@nrc.gov

Randall J. Charbeneau
Administrative Judge
E-mail: Randall.Charbeneau@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings and Adjudication Staff
Mail Stop O-16C1
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-15D21
Washington, DC 20555-0001
Catherine L. Marco, Esq.
Carrie M. Safford, Esq.
E-mail: Catherine.Marco@nrc.gov
E-mail: Carrie.Safford@nrc.gov
E-mail: Michael.Clark@nrc.gov

OGC Mail Center: OGCMailCenter@nrc.gov

Detroit Edison Company
One Energy Plaza-688 WCB
Detroit, MI 48226-1279
Bruce R. Maters, Esq.
David G. Pettinari, Esq.
E-mail: pettinari@dteenergy.com
E-mail: matersb@dteenergy.com

Counsel for Detroit Edison Company
Winston & Strawn, LLP
1700 K Street, N.W.
Washington, DC 20006-3817
Rachel Miras-Wilson, Esq.
E-mail: rwilson@winston.com

Counsel for Detroit Edison Company
Hunton & Williams
Riverfront Plaza
951 East Byrd Street
Richmond, VA 23219
Donald Irwin, Esq.
E-mail: dirwin@hunton.com

Beyond Nuclear at Nuclear Policy
Research Institute
Radioactive Waste Watchdog
6930 Carroll Avenue, Suite 400
Takoma Park, MD 20912
Kevin Kamps
Paul Gunter
E-mail: paul@beyondnuclear.org
E-mail: kevin@beyondnuclear.org

Counsel for Beyond Nuclear
Terry J. Lodge, Esq.
316 N. Michigan Street, Ste. 520
Toledo, OH 43604-5627
E-mail: tjlodge50@yahoo.com

/ signed (electronically) by /
Carrie M. Safford
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-2995
Carrie.Safford@nrc.gov