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NUCLEAR REGULATORY COMMISSION

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Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
	)	
MAINE YANKEE ATOMIC POWER COMPANY	)	Docket Nos. 50-309-OM; 72-30-OM
	)	
(Maine Yankee Atomic Power Station)	)	
	)	

CLI-04-05

MEMORANDUM AND ORDER

The State of Maine sought a hearing on an NRC Staff order regarding security measures at the independent spent fuel storage installation ("ISFSI") at Maine Yankee Atomic Power Station in Wiscasset, Maine. The Licensing Board denied Maine's intervention petition. The Commission today affirms the Board's decision.

I. BACKGROUND

As a result of terrorist attacks in New York City and Washington, D.C., on September 11, 2001, the Commission conducted a comprehensive review of its safeguards and security programs. The Commission determined that licensees must implement certain interim compensatory measures "to address the current threat environment in a consistent manner throughout the nuclear ISFSI community."[1] Consequently, on October 23, 2002, the NRC Staff issued an order modifying the licenses of all 10 C.F.R. Part 50 licensees that currently stored or

[1] *See* "Order Modifying Licenses (Effective Immediately)," 67 Fed. Reg. 65,150 (Oct. 23, 2002).

had near-term plans to store spent fuel in an ISFSI.[2] A separate attachment[3] to the order described specific requirements which are to remain in effect until the Commission provides notice of a significant change in the threat environment or determines that other changes are needed.

The Commission recognized that some measures "may not be possible or necessary at some sites, or may need to be tailored to accommodate the specific circumstances existing at the licensee's facility to achieve the intended objectives."[4] Pursuant to 10 C.F.R. § 2.202, the Commission invited any person adversely affected by the order to request a hearing. The issue to be considered at such a hearing would be "whether this Order should be sustained."[5]

The State of Maine and Friends of the Coast - Opposing Nuclear Pollution each submitted a petition to intervene. The Maine Yankee Atomic Power Co. and the NRC Staff opposed both petitions.[6]

Maine requested a broad hearing to evaluate: (1) the implications of the interim compensatory order and the costs to the public of providing resources; (2) the environmental and financial impact of storing spent fuel; and (3) the efficacy of indefinite, long-term spent fuel

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[2]*See id.* Part 50 applies to production and utilization facilities such as commercial nuclear power plants. A similar order applies to 10 C.F.R. Part 72 licensees (ISFSIs not licensed under Part 50). *See* "Order Modifying Licenses (Effective Immediately)," 67 Fed. Reg. 65,152 (Oct. 23, 2002).

[3]The attachment contains safeguards information and thus will not be released to the public.

[4]67 Fed. Reg. at 65,150.

[5]*Id.* at 65,151.

[6]The Board denied the hearing request of Friends of the Coast. *See Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), LBP-03-23, 58 NRC 372 (2003). Specifically, the Board found the request untimely and stated that Friends of the Coast did not show any affected interest within the scope of the interim compensatory order. Friends of the Coast did not appeal.

storage at Maine Yankee. Maine also requested that the Department of Energy ("DOE") participate in the hearing. Further, Maine wanted the NRC to evaluate alternatives that will enhance the public health and safety without unreasonably taxing State resources. The State also felt that "a full and complete adjudicatory hearing on all the safety, technical, and environmental requirements of Maine Yankee's ISFSI is required and appropriate."[7]

The NRC Staff maintained that the disputed order does not place any new burden on the State of Maine and that Maine's challenge was outside the scope of the proceeding. Maine Yankee's position was similar. Maine Yankee added that the off-site response provisions of the order exactly reflect the commitments with State and local law enforcement agencies that have been in place for years.

In its reply Maine narrowed its hearing request and asked for a determination whether the order should be sustained in light of the burden placed on the State to provide the open-ended resources it says are mandated by the order. The State said that it wants to voice its view on whether the order should be sustained in light of indefinite spent fuel storage at the Maine Yankee ISFSI. Maine also stated that it wants the order reevaluated to tailor security requirements to the "realities" at Maine Yankee. To ensure efficacy of the interim compensatory measures, the State demanded clarification of the extent to which Maine Yankee will rely on State and local protection and emergency response capabilities and the extent to which these resources will be reasonably available. The threat of injury, said the State, is traceable to insufficient funding. Maine contended that "it is clear that the order creates a sea

[7]"State of Maine's Petition for Hearing and Request for Commission Action," at 10, n.4 (Nov. 15, 2002).

change in security requirements imposed on the State and dictates substantial new investments in equipment and personnel."[8]

After delays relating to illnesses and the litigants' access to the safeguards materials, the Board concluded that the central question in this proceeding is "whether Maine's petition falls within the ambit of *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983);" *i.e.,* whether the concerns Maine expressed are beyond the scope of the proceeding.[9] The Board pointed out that Maine attempted to stay within the defined scope of the hearing by opposing the order "nominally":

> Maine has indicated it opposes the order unless the order is modified to (1) define the time period during which the [interim compensatory measures] are necessary; (2) set forth what resources will be required from State and local law enforcement to implement the measures; and (3) delineate the funding mechanism that will ensure State resources are available to implement those measures.[10]

But the Board found that the State did not in reality oppose the substance of the order; *i.e.*, Maine sought "additional agency action," not the order's retraction.[11] The Board concluded that Maine sought to litigate concerns outside the permissible scope of the hearing.[12] Thus, the Board denied Maine's intervention petition and terminated the proceeding. Maine appealed. The Commission today affirms the Board's decision.

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[8]"State of Maine's Supplemental Statement on the Impact of Interim Compensatory Measures," at 5-6 (Mar. 24, 2003) ("Maine Supplement").

[9]LBP-03-26, 58 NRC 396, 400 (2003).

[10]*Id.* at 401 (citation omitted).

[11]*See id.*

[12]*See id.* at 398. One judge dissented, arguing that Maine provided "enough of a showing that certain provisions of the Interim Compensatory Order and measures adversely affect the State, in that they are based on the expected use of State and local law enforcement and emergency response resources ..." *Id.*, at 403 (Judge Young, dissenting)(internal quotations omitted).

II. DISCUSSION

As the Board recognized, the success of Maine's petition depends on whether the concerns it seeks to litigate bear on the only permissible question at issue in this proceeding -- whether to sustain the order. The controlling law on this point is *Bellotti v. NRC*,[13] which addressed the Commission's authority under section 189(a) of the Atomic Energy Act[14] to define the scope of a proceeding.

In *Bellotti*, the Commission, which had found deficiencies in management of the Pilgrim nuclear power plant, issued an enforcement order to Boston Edison, amending its license for Pilgrim to require development of a plan for reappraisal and improvement of management functions and imposing a civil penalty on the utility. As in the instant case, the order in *Boston Edison* limited the scope of the proceeding to the issue whether, on the basis of matters set forth in the order, the order should be sustained. Francis X. Bellotti, the Attorney General of Massachusetts, petitioned to intervene and requested a hearing to address the adequacy of the plan, the plant's continued operation, the nature of necessary improvements, and the adequacy of implementation of required changes. Noting its authority to limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts, the Commission denied the petition. On appeal, the court of appeals held that Massachusetts had no cognizable adverse interest in the license

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[13]*See also Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 46 (1982), the case *Bellotti* affirmed on appeal.

[14]42 U.S.C. § 2239(a). "In any proceeding under this chapter . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1). Thus, a person whose interest cannot be affected by the issues before the Commission in the proceeding lacks an essential element of standing. *See State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Commission*, 868 F.2d 810, 819 (1989) (*citing Bellotti)*. *See also Envirocare of Utah v. NRC*, 194 F.3d 72, 76 (D.C. Cir. 1999) (discussing AEA's "interest" requirement).

amendment proceeding, which involved only the issue of the Commission's order to the utility to develop a safety plan. The actual development of the plan took place outside the proceeding.

The *Bellotti* court upheld the Commission's authority under the Atomic Energy Act to limit the scope of its hearings to the precise issue at stake:

> To read the statute very broadly so that any proceeding necessarily implicates all issues that might be raised concerning the facility in question would deluge the Commission with intervenors and expand many proceedings into virtually interminable, free-ranging investigations. . . . [T]he Commission's substantive discretion to decide what is important enough to merit examination would be subverted by a procedural provision requiring the Commission to consider any issue any intervenor might raise. Such a reading of the statute is plainly untenable . . . [15]

Like Massachusetts in *Bellotti*, Maine does not genuinely oppose the order in the instant proceeding. On appeal, Maine concentrates on the alleged imposition on the State's resources. The order, Maine argues, places an unreasonable, unfunded burden on the State. Maine likens its position to that of a licensee who opposes an order because it creates excessive obligations. Since a licensee would have standing to challenge an order on those grounds, Maine reasons that the State also has standing.[16]

But Maine's analogy is erroneous. Unlike a licensee that challenges an enforcement order, Maine is not arguing that any provision of the staff's security order is unwarranted and thus ought to be relaxed. Maine nowhere suggests that the security provisions themselves are unnecessary. Instead, Maine seeks *additional* measures -- in the form of new financial commitments -- that it suggests are necessary "if the ICMs [interim compensatory measures]

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[15] *Bellotti* at 1381. *See also Sequoyah Fuels Corp.* (UF_6 Production Facility), CLI-86-19, 24 NRC 508, 513 (1986).

[16] To establish standing, a petitioner must show: (1) an "injury in fact;" (2) that is fairly traceable to the challenged action; and (3) is likely to be redressed by a favorable decision. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994).

are to be effective and to achieve their intended objectives in the current threat environment."[17]

Moreover, Maine's request for hearing seeks not only to add funding commitments, but also to limit the term of the Maine Yankee license or wrest a commitment from DOE to remove the spent fuel from the Wiscasset site. Again, these are additional measures well beyond the scope of the noticed opportunity for a hearing.[18] What's more, DOE's lack of a time-certain commitment to remove the spent fuel is not even a matter within the NRC's jurisdiction.

The Commission thus agrees with the Board, and with Maine Yankee and the NRC Staff, that this case falls squarely within the *Bellotti* framework. Indeed, it is difficult to imagine the State of Maine having an adverse interest in an increase in security requirements at the Maine Yankee ISFSI.[19] And although Maine has mentioned "tailoring" security requirements to the "realities" at the Wiscasset site, Maine has not specifed any circumstances at the Maine Yankee facility that would necessitate such "tailoring" of the order.[20]

Bellotti, in any event, holds that NRC hearing petitioners may not seek additional measures going beyond the terms of the enforcement order triggering the hearing request.[21]

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[17] Maine's Appeal of Atomic Safety and Licensing Board Panel's November 25, 2003 Order Denying Intervention and Hearing (Dec. 12, 2003)("Maine's Appeal") at 6.

[18]Any injuries to the State resulting from DOE's failure to take the spent fuel from the Maine Yankee site are not fairly traceable to the Commission order and are not redressable by the Commission in this proceeding; *i.e.,* the State does not have standing in this proceeding regarding any such injuries. *See* note 16.

[19]Unlike the situation here, when a hearing is requested by a target of an enforcement order, a petitioner who supports the order may be adversely affected by the proceeding because one possible outcome is that the order will not be sustained. *See Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC 64 (1994).

[20]Maine Supplement at 10-12.

[21]*See also Sequoyah Fuels Corp. & General Atomics*, CLI-97-13, 46 NRC 195, 206 & n.5 (1997). As we have pointed out, NRC licensees would be unlikely to acquiesce in enforcement actions if by doing so they subjected themselves "routinely . . . to formal proceedings possibly leading to more severe or different enforcement actions." *Public Service*

(continued...)

As Maine Yankee argues, "[i]f a petitioner could avoid the Commission's limitation on the scope of an enforcement order simply by characterizing its petition as opposing the order unless additional measures are granted, the Commission would never be able to limit its proceedings."[22] The dissent incorrectly makes much of the fact that Maine is not demanding "still more safety measures."[23] While Maine may not be proposing additional security requirements, it nonetheless seeks to add express new requirements to the staff's order, allegedly intended to assure the order's "effective[ness]."[24]

On appeal, Maine also argues that factual issues remain regarding how the order should be implemented and the nature of the response the order mandates. Maine's premise is that the order requires the State to commit scarce resources to support security at the Maine Yankee facility, and that a factual dispute remains over the impact of the order on the State's resources. The dissent apparently agreed, stating that Maine "has sufficiently shown that additional resources might well be required."[25]

The Commission, however, discerns no lingering factual issues that prevented the Board from concluding this proceeding. Maine's claim that the staff's order will require it "to

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[21](...continued)
Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980).

[22] Maine Yankee Atomic Power Co.'s Brief in Opposition to the Appeal by the State of Maine (Dec. 17, 2003) at 10.

[23] *See* LBP-03-26, 58 NRC at 403-07 (Judge Young, dissenting).

[24] *See* Maine's Appeal at 2; *see also id.* at 5; Transcript of Proceedings at 159-61, 254 (July 11, 2003).

[25] LBP-03-26, 58 NRC at 405 (Judge Young, dissenting).

spend millions of dollars"[26] simply does not comport with the terms of the disputed order. As the Board majority found, Maine's financial concerns are based on "assumptions about the need to respond to a postulated threat that goes beyond that which the Staff's October 2002 order is intended to address."[27] Repeatedly before the Board, Maine presented the need to respond to a threat scenario well beyond that delineated on the face of the order.[28] Maine reads into the order new State obligations that simply are not there. Not only are Maine's concerns beyond the scope of the hearing, but (contrary to Maine's position on appeal) there also is no "factual dispute" necessitating an evidentiary hearing.

For example, Maine relies on four paragraphs of the order to support its view regarding the imposition on State resources.[29] But the plain words of the four paragraphs belie Maine's premise. They are not directed at the State. Three of the disputed paragraphs require the *licensee* to ensure that it maintains the ability to *notify* local law enforcement agencies. The fourth paragraph requires the *licensee* to develop a plan (with actual development of the plan to occur outside this proceeding). These paragraphs do not place any obligations, new or otherwise, on the State.

To bolster its position, Maine also cites an August 19, 2002 letter from Richard Meserve, former Chairman of the NRC, to the governor of Maine.[30] Because Chairman Meserve's letter stated that the NRC requested licensees to work with their states regarding requests for

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[26] Maine's Appeal at 2.

[27] LBP-03-26, 58 NRC at 402.

[28] *See generally, e.g.*, Transcript of Proceedings (July 11, 2003); Maine Supplement.

[29] Specifically, Maine questions paragraphs B.1.a(1), B.1.a(2), B.1.b, and B.3.f of the unpublished safeguards attachment to the order.

[30] *See* "State of Maine's Reply to Licensee's Answer and NRC Staff's Response to State of Maine's Petition for Hearing and Request for Commission Action," Attachment B, letter from Richard A. Meserve to Gov. Angus King, Jr., Aug. 19, 2002 (Dec. 5, 2002).

additional resources in the wake of the heightened terrorist threat, Maine infers that the order at issue here requires the State to take additional action. The letter, however, contained the express qualification that the choice of where to deploy limited State resources remained with the State. And the NRC order at issue here itself contains no provision imposing any new burden or obligation on Maine.

It goes without saying that NRC regulations have always relied on local law enforcement agencies to assist licensees in responding to unauthorized activities; the order does not change this. But Maine's current demand for funding additional equipment and law enforcement personnel as a result of the order is not tenable.[31] Maine Yankee has supplied copies of agreements with State and local law enforcement agencies regarding response times and response personnel.[32] It is uncontroverted that these agreements, which predate both Sept. 11, 2001, and the disputed order, commit to numbers of responders and response times that exceed the requirements of the order.[33] Although Maine now says that it has not renewed these earlier commitments, neither has the State revoked them. What's more, Maine's counsel, commenting on what would happen if the order were nullified, said, "[W]e wouldn't expect that

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[31]When Maine Yankee in January, 2001 requested a license amendment to change the site's physical security plan to reflect the addition of provisions related to the loading and storage of spent fuel into the ISFSI, the State of Maine did not file a hearing request. The NRC published notice of an opportunity for a hearing on the amendment request. *See* "Biweekly Notice; Applicantions and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations," 66 Fed. Reg. 13,797, 13,805-06 (Mar. 7, 2001).

[32]*See* "Licensee's Answer to State of Maine's Supplemental Statement on the Impact of Interim Compensatory Measures," attachments (Mar. 31, 2003).

[33]*See* "Maine Yankee Atomic Power Company's Brief in Opposition to the Appeal by the State of Maine," at 12 (Dec. 17, 2003).

the state would change its activities or its response to the order, whether or not the board grants its standing in this case."[34]

III. CONCLUSION

The Commission asks itself three questions that are fundamental to the determination whether Maine, under *Bellotti*, has standing in this enforcement proceeding. First, would the State be better off if the order were vacated? Second, would Maine's concerns about relatively long-term storage of spent fuel at the Wiscasset site be alleviated if the order were vacated? The answer to these first two questions is "no." Maine does not oppose security measures required of the licensee, and, despite Maine's claims to the contrary, we find nothing in the order that places any requirements on the State. The third question is: does Maine in reality seek additional measures beyond those set out in the disputed order? Based on the plain language of the safeguards attachment to the order, the answer to this question is "yes." Therefore, under *Bellotti*, we *affirm* the Board's decision to deny Maine's petition and terminate this proceeding.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of February, 2004.

[34]Transcript of Proceedings at 248 (July 11, 2003). In its appellate brief, Maine repeats this admission: "[T]he State will not change its actions in support of Maine Yankee security, regardless of the outcome of the hearing to sustain the Order." "Memorandum in Support of State of Maine's Appeal of Atomic Safety and Licensing Board Panel's November 25, 2003 Order Denying Intervention and Hearing," at 9-10 (Dec. 5, 2003).