

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**RAS 8333**

**DOCKETED 08/17/04**

COMMISSIONERS

**SERVED 08/17/04**

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

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In the Matter of )

FIRSTENERGY NUCLEAR OPERATING CO. )

(Davis-Besse Nuclear Power Station, Unit 1) )  
\_\_\_\_\_ )

Docket No. 50-346-CO

**CLI-04-23**

**MEMORANDUM AND ORDER**

This proceeding arises from a challenge to a confirmatory order modifying the operating license of FirstEnergy Nuclear Operating Company (FENOC) for the Davis-Besse Nuclear Power Station, Unit 1. The Licensing Board denied an intervention petition, and the petitioners appealed that decision. We affirm the Board's order.

**I. BACKGROUND**

On March 6, 2002, FENOC discovered that small cracks in a nozzle that penetrates the reactor pressure vessel at the Davis-Besse Nuclear Power Station, Unit 1, had permitted reactor coolant to leak onto the reactor pressure vessel head. Boric acid in the coolant, undetected over time, had created a cavity in the reactor pressure vessel head. The Staff determined the cause of the problem to be "FENOC's failure to properly implement its boric acid

corrosion control and corrective action programs.”<sup>1</sup> The NRC attached high safety significance to FENOC’s performance deficiency.<sup>2</sup>

By Confirmatory Action Letter on March 13, 2002,<sup>3</sup> the NRC confirmed FENOC’s agreement to seek NRC approval before restarting Davis-Besse.<sup>4</sup> To this end, FENOC developed a return-to-service plan and, later, an operational improvement plan. Notwithstanding FENOC’s actions and plans, the NRC Staff considered additional measures necessary to improve FENOC’s ability to self-assess plant problems. Thus, on March 8, 2004, the Staff issued the Confirmatory Order at issue in this proceeding and approved the restart of Davis-Besse.<sup>5</sup> The agreed order modifies the operating license for Davis-Besse to require two additional actions: (1) FENOC must obtain comprehensive independent assessments of Davis-Besse’s operational performance, safety culture, corrective action program implementation, and engineering program effectiveness; and (2) FENOC must conduct a visual examination of the reactor pressure vessel upper head during the next midcycle outage and report the results to the Staff before restart from the outage.<sup>6</sup>

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<sup>1</sup>“Confirmatory Order Modifying License (Effective Immediately),” 69 Fed. Reg. 12,357 (Mar. 16, 2004) (“Confirmatory Order”).

<sup>2</sup>*Id.*

<sup>3</sup>See CAL No. 3-02-01 (Mar. 13, 2002).

<sup>4</sup>See Letter from J. E. Dyer (NRC) to Howard Bergendahl (FENOC), “NRC Oversight Efforts Regarding the Davis-Besse Nuclear Power Station,” (Apr. 29, 2002).

<sup>5</sup>See 69 Fed. Reg. at 12,357.

<sup>6</sup>The Confirmatory Order specifically provided:

1. FENOC shall contract with independent organizations to conduct comprehensive assessments of the Davis-Besse operations performance, organizational safety culture, including safety conscious work environment, the corrective action program implementation, and the engineering program effectiveness. . . . These outside independent assessments at Davis-Besse shall

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Pursuant to 10 C.F.R. § 2.202,<sup>7</sup> the Commission invited any person adversely affected by the Confirmatory Order to request a hearing within 20 days. Michael Keegan, Joanne DiRando, Paul Gunter of the Nuclear Information and Resource Service, and Donna Lueke (collectively, "Petitioners") requested a hearing. The Licensing Board denied the Petition,<sup>8</sup> and Petitioners appealed. FENOC and the NRC Staff opposed both Petitioners' hearing request and their appeal. For the reasons stated in LBP-04-11, we affirm the Board's decision.

## II. DISCUSSION

The Confirmatory Order provided that persons adversely affected by it could request a hearing within 20 days.<sup>9</sup> Significantly, the Confirmatory Order set the boundaries for the hearing: "If a hearing is held, the issue to be considered at such hearing shall be whether this

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<sup>6</sup>(...continued)

be completed before the end of the 4<sup>th</sup> calendar quarter of 2004 and annually thereafter for 5 years. Within 45 days of completion of the assessments, the Licensee shall submit . . . all assessment results and any action plans necessary to address issues raised by the assessment results.

2. FENOC shall conduct a visual examination of the reactor pressure vessel upper head bare metal surface, including the head-to-penetration interfaces; the reactor pressure vessel lower head bare metal surface, including the head-to-penetration interfaces; and the control rod drive mechanism flanges . . . during the Cycle 14 midcycle outage. The results and evaluation of the inspections will be reported by letter to the Regional Administrator, NRC Region III, prior to restart from the midcycle outage, and any evidence of reactor coolant leakage found during the inspections will be reported by telephone within 24 hours of discovery . . .

69 Fed. Reg. at 12,359.

<sup>7</sup>NRC's new adjudicatory rules, which became effective on February 13, 2004, apply to this proceeding. See "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004).

<sup>8</sup>See *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-04-11, 59 NRC \_\_ (June 2, 2004).

<sup>9</sup>69 Fed. Reg. at 12,360.

Confirmatory Order should be sustained.”<sup>10</sup> The order dealt with improving FENOC’s ability to recognize and evaluate its own problems. Nevertheless, the Petitioners’ hearing request asked the NRC to hold an evidentiary hearing on fire-protection issues; to suspend FENOC’s operating license and halt the restart of Davis-Besse because of the NRC’s alleged “regulatory indifference;” and to require FENOC to satisfy all licensing criteria before allowing commercial generation of electricity at Davis-Besse. In essence, Petitioners sought a broad hearing in which to litigate concerns outside the permissible scope of the hearing.

To obtain a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention.<sup>11</sup> For an enforcement order, however, the threshold question, intertwined with both standing and contention admissibility issues, is whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself; *i.e.*, whether the Confirmatory Order should be sustained. The Commission has the authority to define the scope of the hearing, including narrowly limiting the proceeding.<sup>12</sup> Accordingly, the only matters at issue here are the measures -- described in the enforcement order -- intended to improve FENOC’s self-assessment efforts.

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<sup>10</sup>*Id.*

<sup>11</sup>See 10 C.F.R. § 2.309(d), (f). The Commission imposed similar requirements for obtaining a hearing under our old adjudicatory rules. See, *e.g.*, *Dominion Nuclear Connecticut Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 356-57 (2001); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 398 (2001).

<sup>12</sup>See *Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983), *aff’g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-05, 59 NRC 52, 56 (2004); *Public Serv. Co. of Indiana* (Marble Hill Nuclear Generation Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980). *Bellotti* is the controlling precedent for this case. The Board has discussed *Bellotti* and our recent decision in *Maine Yankee* and accurately applied these precedents to this proceeding. See LBP-04-11, 59 NRC at \_\_\_, slip op. at 4-8. We see no need to repeat or amplify the Board’s well-reasoned analysis here.

As the Board noted, the Petitioners did not make any effort to show how the corrective measures would cause them any harm. By itself, this failure to establish injury-in-fact defeated standing of the Petitioners and required the Board to reject the hearing request.<sup>13</sup>

In addition to their failure to establish standing, the Petitioners did not offer any admissible contentions. This omission independently doomed the Petitioners' hearing request. The Board correctly stated that issues would fall within the scope of the proceeding "only if they amount to matters that oppose the issuance of the order as unwarranted, so as to require relaxation, or affirmatively detrimental to the public health and safety, so as to require rescission (as opposed to supplementation)."<sup>14</sup> The Petitioners have no interest that would be adversely affected by the conditions imposed by the Confirmatory Order at issue in this proceeding; indeed, Petitioners did not argue the contrary. Likewise, the Petitioners did not contend that any provision of the Confirmatory Order is unwarranted and ought to be relaxed. Finally, they did not suggest that the additional requirements of the Confirmatory Order are unnecessary.

The appellant bears the responsibility of clearly identifying the asserted errors in the decision on appeal.<sup>15</sup> Here, however, the Petitioners did not identify any Board error. Instead, they merely reiterated their contentions and protested that they have not been allowed to litigate their concerns regarding FENOC's operation of the repaired Davis-Besse reactor. But injury alleged as a result of failure to grant *more extensive relief* is not cognizable in a proceeding on a Confirmatory Order<sup>16</sup> and thus does not constitute grounds for appeal.

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<sup>13</sup>See *Maine Yankee*, CLI-04-5, 59 NRC at 56, n.14.

<sup>14</sup>LBP-04-11, 59 NRC at \_\_\_, slip op. at 7.

<sup>15</sup>*Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994), *aff'd*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6<sup>th</sup> Cir. 1995).

<sup>16</sup>See *Bellotti*, 725 F.2d at 1383. Filing a petition pursuant to 10 C.F.R. § 2.206 is the  
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### III. CONCLUSION

As in *Maine Yankee*,<sup>17</sup> we ask whether the Petitioners seek additional measures beyond those set out in the disputed order. Unmistakably, the answer to this question is “yes.” Therefore, under the principles enunciated in *Bellotti* and appropriately applied by the Board in this case, we affirm the Board’s decision to deny Petitioners’ hearing request and terminate this proceeding.

IT IS SO ORDERED.

For the Commission

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 17<sup>th</sup> day of August 2004

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<sup>16</sup>(...continued)  
appropriate vehicle for the public to make requests to the NRC to modify a license.

<sup>17</sup>See *Maine Yankee*, CLI-04-5, 59 NRC at 60-61.