

June 9, 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

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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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 (RE-FILE - MISFILED IN DOCKET NO. 52-033 ON JUNE 8, 2008)

Now comes Beyond Nuclear, Keith Gunter, Michael J. Keegan, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, Mark Farris and Shirley Steinman, Petitioners herein, by and through counsel, and reply to the "Answer of Detroit Edison Company" and "NRC Staff's Response" to Petitioners' May 7, 2009 request for a hearing and for intervenor status.

REPLY TO CLAIMED UNTIMELINESS OF PETITION FILING

Both Respondents object to the May 7, 2009 filing date of the Petition for Leave to Intervene on the grounds that the April 17, 2009 Federal Register notice stated that petitions would have to be filed within 20 days of the date of the NRC order which underlies this proceeding (April 27, 2009).

Petitioners 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; 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.

As Petitioners stated in their initial filing, their good faith review of the Federal Register forward from July 1, 2006 reveals no documents in the publicly-accessible NRC website which would have put the public on notice of the decision by DTE to deploy Holtec casks or any alternative means of spent fuel storage other than Holtec casks. Hence the only means of notification of the public of the NRC orders concerning security of the ISFSI program at Fermi was the April 17 Federal Register notice, which at the time it was filed, only left ten (10) days of the 20-day window opened by the Commission for filing of intervention petitioners. As a consequence of the inexplicable delay from April 7 to 17, 2009 for publication of the Federal Register notice, it appears that federal law was violated. A statute, 44 U.S.C. § 1507, states that:

A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title.

Since Petitioners could not have had actual knowledge of the April 7 Order until April 17, the April 7 document was not valid as against them until at least April 17. There were no postings on the NRC web site under any heading. The Petitioners became aware of the April 7 Order on April 30, 2009 after reviewing an email exchange

between Michael Farr, DTE's manager of the ISFSI program, and Phil Brochman of the NRC (attached), where Farr inquired where he might find documents related to the NRC's ISFSI security rulemaking were being posted. In his April 15, 2009 email, Michael Farr referenced DTE's receipt of "the ISFSI Security Order directed specifically to Fermi (which we received last week)". Only after considerably more research was Michael Keegan, one of the Petitioners, finally able to identify a new NRC adjudicatory docket number created relative to the proposed ISFSI at Fermi. It was under this new docket (07200071) that Petitioners first learned of the existence of the April 7, 2009 Order. Petitioners could not have known of the Order or of the existence of the new docket number without the serendipitous discovery of the Farr email. The Order was never filed in view of the public until the April 17, 2009 Federal Register notice.

The Federal Register Act, 44 U.S.C. § 1508, imposes a minimum time requirement of 15 days, which the April 17 notice publication, assuming an April 27, 2009 deadline, fails:

A notice of hearing or of opportunity to be heard, required or authorized to be given by an Act of Congress, or which may otherwise properly be given, shall be deemed to have been given to all persons residing within the States of the Union and the District of Columbia, except in cases where notice by publication is insufficient in law, 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 -

- (1) ***;
- (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.* (Emphasis supplied)

Indisputably, the April 7 Commission Order was, on its face, a modification of DTE's general license for an ISFSI, and license

modifications are accorded a hearing under § 189a of the Atomic Energy Act.¹ Clearly, the Commission had ruled that 20, not 10, days' notice for the filing of petitions was "reasonable." The inexplicable delay in publication from April 7 to 17 cut off half of that period. The result was that the notice as published/when published was violative of the Federal Register Act and Administrative Procedure Act, and must be treated as a nullity. "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552.

The upshot is, the license modification proceeding must be turned back to "0" and a new, lawful public notice should be re-published in the Federal Register, specifying a new window during which intervention petitions can be submitted.

The Federal Register Act, in tandem with the federal Administrative Procedure Act (5 U.S.C. § 552), has consistently been strictly interpreted in favor of notice to the public as a prerequisite to the enforceability of certain administrative acts or promulgations. *Cf. Hotch v. United States*, 212 F.2d 280, 283 (9th Cir. 1954) (defendant prosecuted for violation of unpublished regulation which banned commercial fishing in Taku Inlet on the Alaskan coast secured reversal of conviction because rule held ineffective);

¹Section 189a of the AEA, 42 U.S.C. § 2239(a)(1)(A), states in relevant part: "In any proceeding under this chapter, 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, and shall admit any such person as a party to such proceeding."

Gonzalez v. Freeman, 334 F.2d 570, 578 (D.C.Cir. 1964) (there were no regulations, published or unpublished, which authorized debarment of a firm from conducting business with the Commodity Credit Corporation; court observed that "The command of the Administrative Procedure Act is not a mere formality.... Neither appellants nor others similarly situated can turn to any official source for guidance as to what acts will precipitate a complaint of misconduct, how charges will be made, met or refuted, and what consequences will flow from misconduct if found").

See also *Berends v. Butz*, 357 F.Supp. 144 (D.Minn. 1973) (Secretary of Agriculture terminated emergency farm loan program 6 months before its official terminus; court held the program could not be terminated by an unpublished order of the Secretary because "inherent in these provisions is the concept that the public is entitled to be informed as to the procedures and practices of a government agency, so as to be able to govern their actions accordingly"); *Northern California Power Agency v. Morton*, 396 F.Supp. 1187 (D.D.C. 1975) (failure to conduct agency hearings according to published rules of procedure in favor of informal, *ad hoc* and unpublished rules of procedure violated 5 U.S.C. § 552); *Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975) (final regulations were published in Federal Register but the earlier version of the regs not published there for notice and comment phase of the process of promulgation; final regulations held to be void and unenforceable); *Appalachian Power Company v. Train*, 566 F.2d 451, 455 (4th Cir. 1977) (USEPA omitted to publish a very lengthy "Development Document" in the Federal Register which purported to establish standards for effluent

emissions; it was deemed to constitute a substantive agency regulation which had not been published, and so it was held invalid:

Any agency regulation that so directly affects pre-existing legal rights or obligations . . . , indeed that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence,' is within the publication requirement.... As the substance of a regulation imposing specific obligations upon outside interests in mandatory terms . . . , the information in the Development Document is required to be published in the Federal Register in its entirety, or, in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register.

Id.; *Vigil v. Andrus*, 667 F.2d 931, 938 (10th Cir. 1982), (school lunch program for Native American children was curtailed; the transfer of the program to the Dept. of Agriculture had not been published in the Federal Register, was challenged, which challenge was upheld and unpublished transfer was declared void: "If a substantive rule or general policy is not published, parties without actual notice cannot be adversely affected by it").

The Federal Register notice was fatally defective when published only on April 17, 2009, and Petitioners' pleading must be deemed to have been timely filed.

REPLY TO ASSERTED LACK OF STANDING

Both DTE (Answer p. 15) and the NRC Staff (Response at 7-8) urge that mere 50-mile proximity to the Fermi 2 ISFSI is insufficient proximity to confer standing. However, all but 1 of the 8 individually-named Petitioners (Keith Gunter) live within the 17-mile radius asserted by DTE in its reference (Answer at 17) to the Shearon Harris and Diablo Canyon decisions. And the Petitioners alleged in their May 7, 2009 filing (pp. 12-13) an authoritative 2003 analysis:

...Alvarez *et al.* summed up the potential consequences [of a

waste storage pool fire caused by a cooling water drain down caused by an attack]: 'A 1997 study done for the NRC estimated (sic) the median consequences of a spent-fuel fire at a pressurized water reactor that released 8 to 80 mega-curies of cesium-137. The consequences included 54,000-143,000 extra cancer deaths, 2,000-7,000 square kilometers of agricultural land condemned, and economic costs due to evacuation of US\$117-566 billion. It is obvious that all practical measures must be taken to prevent the occurrence of such an event.' In short, 'The long-term land-contamination consequences of such an event could be significantly worse than those from Chernobyl,' they concluded.

Petitioners raised not only ISFSI contentions, but also storage pool contentions. The two actually overlap - the 2001 NRC study, and its precursor, the 1997 NRC study mentioned above, were studying storage pool accidents, not attacks. But an attack could cause the same kind of drain down studied in those accident studies of NRC.

Two thousand to 7,000 square kilometers of agricultural land condemned translates to 770 to 2,700 square miles. Depending on the wind direction, that's a 10 mile wide by 77 mile long area of land, at a minimum. That would be big enough, at the low end, to encompass the homes of every single one of the Petitioners, including Keith Gunter in Livonia, Michigan. That's for a pool fire -- and Petitioners alleged pool security concerns in their May 7 filing.

But even a cask fire could cause radioactive fallout to be distributed over a large area, easily endangering those Petitioners who live within five to ten miles of the Fermi 2 ISFSI with radioactive contaminated smoke borne on the wind. Although a single dry cask contains a small fraction of the irradiated nuclear fuel present in huge quantity in Fermi 2's storage pool, it is conceivable that terrorists or insider saboteurs could attack with multiple explosives and incendiaries, releasing the contents of one or more casks onto the wind, to disperse lethally downwind. Petitioners quantified in their

May 7 filing (pp. 8-9) how much harmful radioactivity is contained in each and every single dry cask.

Michigan's federal courts are familiar with standing issues in ISFSI cases. 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 at 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).

REPLY AS TO LACK OF SITE-SPECIFIC CONTENTIONS

DTE and the NRC Staff insist that this is a general license

proceeding with only generic concerns in the sustaining of the tinkering that was directed by the April 7 Order. Petitioners maintain that this is the first and only opportunity they have had to request a hearing to critique the December 10, 2007 nonpublic notice² sent by DTE to the NRC, indicating the choice of Holtec casks. 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 raised 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 high-powered “cigarette” boats. As noted in their 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 emit into the environment. Petitioners also brought to the NRC’s attention the remarkable and disturbing story from Esquire Magazine in 2007, wherein the head of security at the Palisades nuclear plant was shown to have thoroughly misrepresented his qualifications and ability to undertake genuine plant protection. This expose’ uncovered serious flaws in vetting procedures for security-related personnel, certainly a matter of direct relevance to this Fermi 2 dry

²DTE acknowledges on the first page of its Answer that it notified the NRC of its cask choice by letter dated December 10, 2007. This letter does not appear on the NRC website at this writing (June 8, 2009), but was decontrolled only on June 8, 2009 at the request of Petitioners.

cask storage proceeding.

Another plant-specific concern has to do with Fermi 2's design. 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.

Finally, a full Environmental Impact Statement (EIS) regarding the safety, security, and environmental impacts of the Fermi 2 dry cask storage installation, and on-site high-level radioactive waste storage risks more generally (including waste pool storage), should be undertaken which considers worst case impacts in terms of safety, security, and environmental risks associated with Fermi 2's on-site storage of irradiated nuclear fuel, including both within waste storage pools, as well as in dry cask storage.

CONCLUSION

An alleged injury to a purely legal 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 has seen violations of the Federal Register Act and the Administrative Procedure Act which have deprived the public of lawful notice. Petitioners have standing by virtue of claiming a constitutional right to proper notice and the opportunity to request a hearing. They have demonstrated procedural 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. The conservative possibility of the further economic evisceration of the greater Detroit or Toledo regions with a 770-square-mile area of made so radioactive that is uninhabitable and permanently lost for any productivity certainly warrants allowing the Petitioners to explore issues asserted relative to the Fermi 2 ISFSI for the very first time.

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

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The Detroit Edison Company) EA-09-072
(Fermi Nuclear Power Plant,) NRC 2009-0169
Unit 2 ISFSI, Order Modifying)
License))

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CERTIFICATE OF SERVICE OF COMBINED REPLY OF PETITIONERS
(REFILING - MISFILED IN DOCKET NO. 52-033 ON June 8, 2008)

I hereby certify that a copy of the "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 Petition" has been served on the following persons via Electronic Information Exchange this 9th day of June, 2009:

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