

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 LEAVE TO INTERVENE AND REQUEST FOR HEARING FILED BY BEYOND NUCLEAR, MARK FARRIS, MICHAEL KEEGAN, SHIRLEY STEINMAN, KEITH GUNTER, FRANK MANTEI, MARCEE MEYERS, LEONARD MANDEVILLE, AND MARILYN R. TIMMER

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff at the Nuclear Regulatory Commission ("Staff") hereby responds to the May 7, 2009, "Petition of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville and Marilyn R. Timmer for Leave to Intervene in, and/or Request a Hearing Upon, DTE Order Modifying License of ISFSI Security Provisions" (hereinafter, "Hearing Request"). As discussed below, the Hearing Request should be denied because it is untimely, fails to demonstrate standing, seeks to litigate concerns that are outside the scope of the issues which may be raised in a hearing on the Order it challenges, and fails to meet the contention admissibility requirements.

## 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 Safety and Safeguards, issued the subject Order Modifying License (“Order”), in the matter of Detroit Edison Company, Fermi Power Plant, Independent Spent Fuel Storage and Installation.<sup>1</sup> 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, that 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.”<sup>2</sup>

## DISCUSSION

A. Petitioners Failed to Timely File the Petition for Leave to Intervene and Request for Hearing

Petitioners’ May 7, 2009, Hearing Request was untimely and should be rejected. The Order was issued on April 7, 2009, and was published in the Federal Register on April 17, 2009. The Federal Register clearly states that “any other person adversely affected by this Order may submit an answer to this Order within 20 days of the date of the Order,” and that requests for

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<sup>1</sup> *Order Modifying License* (“Order”), 74 Fed. Reg. 17890 (April 7, 2009).

<sup>2</sup> *Id.*, at 17891.

hearing must be requested “within 20 days of the date of the Order.”<sup>3</sup> Thus, pursuant to the explicit language of the Order, the deadline for submitting answers and/or requests for hearing was April 27, 2009.

On May 6, 2009, Petitioners submitted a request for extension of time to the Director of the Office of Nuclear Material Safety and Safeguards, to submit a request for hearing in this proceeding.<sup>4</sup> In their request, Petitioners incorrectly stated that the deadline for submitting such requests was midnight of May 7, 2009, when in fact the deadline had already passed nine days earlier, on April 27, 2009. Moreover, Petitioners explained that “good cause” existed for granting the requested extension based on the fact that on May 5, 2009, they completed “the oral pre-hearing before the Atomic Safety Licensing Board Panel regarding the Fermi 3 new reactor proposal,” and that “[u]pon completion of that very demanding hearing [ ], we immediately have turned our attention to this matter.”<sup>5</sup> On May 7, 2009, the Director, Office of Nuclear Material Safety and Safeguards, denied Petitioners’ request for an extension based on the fact that the deadline to request a hearing was 11:59 p.m., Eastern Time on Monday, April 27, 2009.<sup>6</sup>

10 C.F.R. § 2.309(c)(1) sets forth eight factors for nontimely intervention petitions, hearing requests and contentions:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the [petitioner’s] right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the [petitioner’s] property, financial or other interest in the proceeding;

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<sup>3</sup> *Id.*

<sup>4</sup> Letter to Director, Office of Nuclear Material Safety and Safeguards from Kevin Kamps (May 6, 2009) (ADAMS ML091380203) and email request to Raynard Wharton from Terry Lodge (May 6, 2009) (ADAMS ML091390250).

<sup>5</sup> *Id.*

<sup>6</sup> Denial of Request to Terry Lodge (May 7, 2009) (ADAMS ML091280321) and Kevin Kamps (ADAMS ML091280294).

- (iv) The possible effect of any order that may be entered in the proceeding on the [petitioner's] interest;
- (v) The availability of other means whereby the [petitioner's] interest will be protected;
- (vi) The extent to which the [petitioner's] interests will be represented by existing parties;
- (vii) The extent to which the [petitioner's] participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the [petitioner's] participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(2) clearly states that the petitioner “shall address” all eight factors set out in § 2.309(c)(1).

Late-filed petitions are routinely rejected by hearing tribunals where, as is the case here, the petitioner fails to state “good cause for the lateness and without strong countervailing reasons that override the lack of good cause.”<sup>7</sup> Moreover, the Commission has held that “[w]e cannot agree that [the petitioner's] failure to read carefully the governing procedural regulations constitutes good cause for accepting its late-filed petition.”<sup>8</sup> The absence of any justification for the lateness of Petitioners' filing, including their failure to address the requirements of 10 C.F.R. § 2.309(c), requires that Petitioners' untimely intervention and request for hearing be denied.

B. Petitioners' Standing to Intervene

Beyond Nuclear seeks to establish representational standing to intervene, based on the individual standing of the eight individual members named in the Hearing Request.<sup>9</sup> Eight individuals submitted affidavits stating that they reside within 50 miles of the Fermi of the proposed site of the independent spent fuel storage installation proposed to be deployed and

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<sup>7</sup> *In the Matter of North Atlantic Energy Service Corporation, et al.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999). See also *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 172-75 (1998) (collecting cases).

<sup>8</sup> *Id.*, Seabrook Station, CLI-99-6, 49 NRC 201, 223 (1999).

<sup>9</sup> See Hearing Request at 3-5.

operated by DTE at the site of the Fermi 2 nuclear power plant, that they are members of Beyond Nuclear, and would like Beyond Nuclear to represent their interests in this proceeding. The individual petitioners claim that they “seek to protect their lives and health by opposing the stated license-modifying orders to Fermi 2.”<sup>10</sup> Petitioners further allege that the ordered modification of the Fermi operating license will “not provide adequate safety and security for themselves and the environment,”<sup>11</sup> and that the “construction and operation of dry casks at Fermi 2 would present a tangible and particular harm to the health and well-being of members living within 50 miles of the site.”<sup>12</sup>

Although hearing requests will be construed in favor of the petitioner on issues of standing, the petitioner nonetheless bears the burden of establishing standing. As discussed further below, the individual petitioners and Beyond Nuclear have failed to provide sufficient information to carry the burden of demonstrating either the standing of an individual member or representational standing. Thus, Petitioners have failed to satisfy the applicable standing requirements and their petition for leave to intervene should be denied.

a. Applicable Legal Requirements

In accordance with the Commission's Rules of Practice,<sup>13</sup> “[a]ny person<sup>14</sup> whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing or petition for leave to intervene and a specification of the contentions that

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<sup>10</sup> Hearing Request at 5.

<sup>11</sup> Hearing Request at 6.

<sup>12</sup> Hearing Request at 5.

<sup>13</sup> See “Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders,” 10 C.F.R. Part 2.

<sup>14</sup> “Person” means (“1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission . . . ; any State or any political subdivision of, or any political entity within a state, any foreign government or nation . . . , or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.” 10 C.F.R. § 2.4.

the person seeks to have litigated in the hearing.”<sup>15</sup> The regulations further provide that the Licensing Board “will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)].”<sup>16</sup>

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a request for hearing or petition for leave to intervene must state:

- (1) the name, address and telephone number of the requestor or petitioner;
- (2) the nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding;
- (3) the nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (4) the possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.

The regulations further state that the Commission, presiding officer or Licensing Board “will determine whether the petitioner has an interest affected by the proceeding considering the factors enumerated in § 2.309(d)(1)-(2), among other things.”<sup>17</sup> In evaluating whether a petitioner has satisfied the general standing requirements of § 2.309(d), the Commission has stated that:

To demonstrate such a “personal stake,” the Commission applies contemporaneous judicial concepts of standing. Accordingly, a petitioner must (1) allege an “injury in fact” that is (2) “fairly traceable to the challenged action” and (3) is “likely” to be “redressed by a favorable decision.”<sup>18</sup>

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<sup>15</sup> 10 C.F.R. § 2.309(a).

<sup>16</sup> *Id.*

<sup>17</sup> 10 C.F.R. § 2.309(d)(3).

<sup>18</sup> *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994), *citing Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), and *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). See also *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), *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

The injury must be “concrete and particularized, and not “conjectural” or “hypothetical.”<sup>19</sup>

b. Presumptive Standing

Petitioners claim presumptive standing, and state that “[b]ecause they live near the proposed site, *i.e.*, within 50 miles, the individually-harmed Petitioners have presumptive standing by virtue of their proximity to the new nuclear plant that may be constructed on the site.”<sup>20</sup> Petitioners conclude that the 50-mile proximity radius applicable to “reactor construction permit and operating license cases” applies to the Fermi ISFSI because there is “an obvious potential for offsite consequences.”<sup>21</sup>

Petitioners’ reliance on proximity in proposed nuclear power plant proceedings as satisfying the “presumptive standing” requirement with respect to an order imposing safeguards requirements on an ISFSI is misplaced. The Commission has stated that “[w]e determine on a case-by-case basis whether the proximity presumption should apply, 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.’”<sup>22</sup> In particular, the Commission concluded that “an ISFSI is essentially a passive structure rather than an operating facility and there therefore is less chance of widespread radioactive release.”<sup>23</sup> Thus, “general references to members’ proximity” to a facility, which is what the individual petitioners provided here, are “too imprecise to meet [the

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<sup>19</sup> *Id. Crowe Butte*. See also *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).

<sup>20</sup> Hearing Request at 5.

<sup>21</sup> Hearing Request at 5 (citing *Pacific Gas & Electric Co.*, (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 426-27 (2002), citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff’d*, CLI-01-17, 54 NRC 3 (2001).

<sup>22</sup> *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).

<sup>23</sup> *Id.*

Commission's] requirements for proximity-based standing."<sup>24</sup> As such, the individual petitioners' claim of presumptive standing should be denied.

In addition, the bases for general standing put forth by Petitioners fail to allege an "actual or threatened" injury that is "traceable to the challenged action," e.g., how the Order's imposition of additional ASMs to the Fermi general license provisions of 10 C.F.R. Part 72 will place Petitioners at an increased risk of harm, and should therefore be denied.

c. Representational Standing

An organization may establish standing to intervene based on organizational standing (proof that its own organizational interests could be adversely affected by the proceeding) or representational standing (based on the standing of its members). When an organization seeks to establish representational standing, it must (1) show that at least one of its members may be affected by the proceeding, (2) identify that member by name and address, and (3) show that the member "has authorized the organization to represent him or her and to request a hearing on his or her behalf."<sup>25</sup>

By virtue of the individual petitioners' failure to meet the requirements for presumptive standing based on proximity, Beyond Nuclear also fails the first prong of the test for representational standing: that at least one member fulfills the standing requirements. As a result, Beyond Nuclear's claim of representational standing should also be denied.

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<sup>24</sup> *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).

<sup>25</sup> See, e.g., *Consumers Energy Co.*, (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007); *Oyster Creek*, LBP-06-07, 63 NRC at 195 (2006), *citing GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

C. Petitioners' Contentions

a. Applicable Legal Requirements

In addition to establishing standing, a hearing request must also include at least one admissible contention.<sup>26</sup> The legal requirements for contention admissibility are well established, and require that petitioners must “set forth with particularity,” the contentions sought to be raised. For each contention, the petition must:

- (1) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (2) Provide a brief explanation of the basis for the contention;
- (3) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (4) Demonstrate the issued raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (5) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (6) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). The six criteria set forth in § 2.309(f)(1) are inclusive, thus, a “[f]ailure to

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<sup>26</sup> 10 C.F.R. § 2.309(a).

comply with any of these requirements is grounds for dismissal of a contention.”<sup>27</sup>

The requirements governing the admissibility of contentions are strictly applied in NRC adjudicatory proceedings. The rules “require ‘a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention.’ Mere ‘notice pleading’ does not suffice. Contentions must fall within the scope of the proceeding . . . in which intervention is sought.”<sup>28</sup> The purpose of the basis requirements for contentions is (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose.<sup>29</sup> The Commission has held that a contention must be rejected if:

- (i) it constitutes an attack on applicable statutory requirements;
- (ii) it challenges the basic structure of the Commission’s regulatory process or is an attack on the regulations;
- (iii) it is nothing more than a generalization regarding the petitioner’s view of what applicable policies ought to be;
- (iv) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (v) it seeks to raise an issue which is not concrete or litigable.<sup>30</sup>

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<sup>27</sup> *Nuclear Fuel Services, Inc.*, (Special Nuclear Facility (Confirmatory Order)), LBP-07-16, 66 NRC 277, 286 (2007) (“NFS”).

<sup>28</sup> *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-119 (2006) (footnotes omitted) (emphasis added).

<sup>29</sup> *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). See also, *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991).

<sup>30</sup> See, e.g., *Peach Bottom*, *supra*, 8 AEC at 20-21.

b. Petitioners' Contentions Do Not Meet the Requirements of 10 C.F.R. § 2.309(f)(1)

Petitioners raise three issues for consideration in this proceeding:

- (1) Physical Security: Petitioners seek to intervene in this proceeding to ensure that adequate security is instituted at the Fermi 2 nuclear power plant over its on-site stored irradiated nuclear fuel, both in the new storage pool and in dry casks.<sup>31</sup>
- (2) Quality Assurance: Before any Holtecs are deployed at Fermi nuclear power plant, Petitioners demand that an independent QA assessment should be carried out.<sup>32</sup>
- (3) Civil Liberties Impacts: Petitioners demand as part of the EIS that there be a sociological impacts analysis under NEPA which includes analysis of potential civil liberties infringements upon legal rights guaranteed by the First, Fourth, Fifth Amendments to the U.S. Constitution and state and federal laws governing surveillance.<sup>33</sup>

As discussed below, Petitioners have failed to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), thus, none of the contentions proffered by Petitioners are admissible. In addition, Petitioners' arguments do not satisfy the threshold requirements for hearing requests in enforcement proceedings set forth in *Bellotti v. NRC* and related cases:<sup>34</sup>

(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?<sup>35</sup>

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

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<sup>31</sup> Hearing Request at 15.

<sup>32</sup> Hearing Request at 15-16.

<sup>33</sup> Hearing Request at 20.

<sup>34</sup> 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"); *Alaska Dep't of Transportation & Public Facilities*, CLI-04-26, 60 NRC 399 (2004) ("ADOT").

<sup>35</sup> *Maine Yankee*, 50 NRC 52 at 60.

enforcement proceeding is whether the order should be sustained. Boards are not to consider whether such orders need strengthening.”<sup>36</sup> Moreover, Petitioners must show that:

[they] would be adversely affected by the enforcement order as it exists, rather than being adversely affected by the existing order as it might be compared to a hypothetical order that the petitioner asserts would be an improvement.<sup>37</sup>

Petitioners’ first contention, Physical Security, discusses studies addressing the vulnerabilities of dry cask storage, such as attacks by TOW anti-tank missiles, explosive and incendiary attacks, detonation of nuclear weapons at a nuclear power plant, among other scenarios. The security vulnerabilities alleged in Petitioners’ pleading do not, however, fall within the limited scope of the Order, e.g., “whether this Order should be sustained,”<sup>38</sup> and instead appear to be challenging the Order as being “too weak or otherwise insufficient.” Petitioners have not shown that they are adversely affected by the Order (which tightens the safety situation at the ISFSI site over what it was), and their contentions request additional measures beyond those imposed by the Order,<sup>39</sup> thus, Petitioners have failed to raise issues within the limited scope of the Order, thereby failing to satisfy the requirements of *Bellotti* and 10 C.F.R. § 2.309(f)(1). Accordingly, Petitioners’ first contention should be denied.

Petitioners’ second contention, Quality Assurance, attacks the Holtec International dry cask storage/transport containers and, as such, constitutes an impermissible challenge to the Commission’s regulations. As stated by the Petitioners, the “Holtec storage/transport casks are

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<sup>36</sup> *ADOT*, CLI-04-26, 60 NRC at 404.

<sup>37</sup> *Nuclear Fuel Services, Inc.*, (Special Nuclear Facility (Confirmatory Order)), LBP-07-16, 66 NRC 277, 285 (2007).

<sup>38</sup> 74 Fed. Reg. at 17892.

<sup>39</sup> “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.

the first dual purpose container for irradiated nuclear fuel certified by the [NRC].”<sup>40</sup> When a dry cask storage/transport container is approved by the Commission, its Certificate of Compliance is incorporated into 10 C.F.R. § 72.214, and as such, its design certification becomes part of the Commission’s regulations. 10 C.F.R. § 2.335(a) states that “no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of . . . argument, or other means in any adjudicatory proceeding subject to this part.”<sup>41</sup> Petitioners have not sought such waiver or exemption with respect to 10 C.F.R. § 2.214, and on this basis Petitioners’ second contention should be denied.

Petitioners’ third contention, Civil Liberties Impacts, claims that the ASMs and related security improvements contemplated by the Order constitute “creation of a special security organization at Fermi . . . ,” with such “core security organization” being part of the “larger ‘nuclear priesthood’ . . . .”<sup>42</sup> Petitioners speculate that “adequate security against nuclear threats will be obtained only at the price of inexorable infringements of personal freedom,” and that the “security measures probably necessary to protect society could seriously affect personal liberties.”<sup>43</sup> Contention 3 is speculative, fails to provide specific concerns related to the substance of the Order, and is “nothing more than a generalization regarding the petitioner’s view of what applicable policies ought to be.”<sup>44</sup> For these reasons, Contention 3 should be denied.

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<sup>40</sup> Hearing Request at 16.

<sup>41</sup> In order to successfully bring a challenge to a rule or regulation, a petitioner must first submit a petition of waiver or exemption setting forth the following four criteria: (i) the rule’s strict application “would not serve the purposes for which [it] was adopted; (ii) the movant has alleged “special circumstances” that were “not considered, either explicitly or by necessary implication, in the rule-making proceeding leading the rule sought to be waived;” (iii) those circumstances are “unique” to the facility rather than “common” to a large class of facilities; and (iv) a waiver of the regulation is necessary to reach a “significant safety problem.” See *In the Matter of Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 1 and 2), CLI-05-24, 62 NRC 551, 562-63 (2005).

<sup>42</sup> Hearing Request at 21 (emphasis added).

<sup>43</sup> Hearing Request at 22.

<sup>44</sup> *In the Matter of Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998).

Petitioners have failed to demonstrate with sufficient clarity how any of their three contentions address a “material issue of law or fact” with respect to the Order and as such, have failed to meet the criteria of 10 C.F.R. § 2.309(f)(1). As demonstrated above, Petitioners’ contentions, *inter alia*, do not satisfy the requirements of *Bellotti*, fall outside the scope of the proceeding, fail to provide specific statements of the issue of law or fact to be raised or controverted, present generalizations, raise issues that are not concrete or litigable, and impermissibly attack Commission regulations. Therefore, Petitioners have failed to satisfy the requirements for contention admissibility, and their contentions should be rejected in their entirety and their request for hearing should be denied.

CONCLUSION

For the reasons stated above, Petitioners (1) have failed to timely submit a petition for intervention and request for hearing and demonstrate either individual or representational standing, (2) seek to impermissibly litigate concerns that are outside the scope of the issues which may be raised in a hearing on the Order they challenge, and (3) fail to meet the contention admissibility requirements. Therefore, Petitioners' Hearing Request should be denied.

Respectfully submitted,

**/ signed (electronically) by /**  
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Dated at Rockville, MD  
this 1<sup>st</sup> day of June, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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(Fermi Nuclear Power Plant,	)	ASLBP No. 09-888-03-EA-BD01
Independent Spent Fuel Storage	)	
Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING FILED 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 1<sup>st</sup> day of June 2009:

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