

RAS14154

September 19, 2007

DOCKETED
USNRC

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

September 20, 2007 (8:00am)

Before the Presiding Officer

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
NUCLEAR FUEL SERVICES, INC.) Docket No. 70-143
)
)

**LICENSEE'S ANSWER TO REQUEST FOR A HEARING
OF BARBARA A. O'NEAL**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205(g), Nuclear Fuel Services, Inc. ("Licensee" or "NFS") hereby answers and opposes the request for a hearing of Barbara A. O'Neal ("Ms. O'Neal"), dated August 27, 2007 ("O'Neal Hearing Request") regarding the Confirmatory Order published by the United States Nuclear Regulatory Commission ("Commission" or "NRC") in the above-captioned docket. The O'Neal Hearing Request should be denied because Ms. O'Neal did not file within the time allowed, has not demonstrated standing, raises issues entirely beyond the scope of the Confirmatory Order and has identified no admissible contentions.

II. PROCEDURAL BACKGROUND

On July 30, 2007, the Commission published a Confirmatory Order in the above-captioned docket based on an agreement between NFS and NRC, which resolved several pending apparent violations. Notice of Publication of Confirmatory Order and Opportunity for Hearing, 72 Fed. Reg. 41,528, 41,529 (July 30, 2007) ("Federal Register Notice"). The Federal Register Notice states that any person adversely affected by the Order could request a hearing within 20 days of its issuance. *Id.* at 41,530. The NRC defined the scope of the hearing opportunity as follows: "the issue to be considered at

TEMPLATE = SECY-037

SECY-002

such hearing shall be whether this Confirmatory Order should be sustained.” Id. at 41,531. The Federal Register Notice further requires that any person filing a request for hearing “shall set forth with particularity the manner in which his interest is adversely affected by [the Confirmatory] Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f). Id.

III. THE O’NEAL HEARING REQUEST WAS UNTIMELY¹

The NRC, in the Federal Register Notice, required all requests for hearing on this Confirmatory Order to be filed within 20 days of the issuance of the notice. 72 Fed. Reg. at 41,530. Because the Federal Register Notice was issued on July 30, 2007, the deadline for requests for hearing was August 20, 2007.² Ms. O’Neal filed her request for hearing on August 27, 2007—seven days after the deadline. Under 10 C.F.R. § 2.309(c)(1), nontimely requests for hearing are not to be considered absent a determination that the request should be granted based on the balancing of eight factors. The regulations require that a petitioner who files an untimely request address these factors. 10 C.F.R. § 2.309(c)(2); see also Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-00-16, 51 N.R.C. 320, 325 (2000); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 N.R.C. 461, 446 n.22 (1985). Unlike another pro se requestor, Ms. O’Neal did not request permission to file after the deadline or address the required

¹ Licensee acknowledges that Ms. O’Neal has filed her request for hearing *pro se* and therefore may be granted some lenience on the technical aspects of her pleading. However, Ms. O’Neal still must comply with the requirements in the opportunity for hearing and all other NRC regulations. See, e.g., Consolidated Edison Co. of N.Y. (Indian Point, Unit 2) and Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-83-5, 17 N.R.C. 134, 136 (1983) (holding that although *pro se* intervenors are not held to a high degree of technical compliance, they must satisfy the requirements for each contention).

² Twenty days from July 30, 2007 is August 19, 2007, but because August 19 was a Sunday, the deadline for the requests was Monday, August 20, 2007. See 10 C.F.R. § 2.306.

factors for so doing. She states only that she understood the 20 day requirement to be “20 working days” and that her understanding was purportedly confirmed by an “NRC Ref Librarian.” O’Neal Hearing Request at 1. Therefore, the hearing request must be dismissed as untimely.

IV. MS. O’NEAL LACKS STANDING

Even if Ms. O’Neal’s late-filed request is considered, it must be dismissed for lack of standing. In determining whether to grant a petitioner’s request to hold a hearing, the Presiding Officer must first determine whether the petitioner meets the judicial standards for standing and must consider, among other factors:

- 1) the nature of the requestor’s right under the [Atomic Energy] Act to be made a party to the proceeding;
- 2) the nature and extent of the requestor’s property, financial, or other interest in the proceeding; and
- 3) the possible effect of any order that may be entered in the proceeding on the requestor’s interest.

10 C.F.R. § 2.309(d) (formerly 10 C.F.R. § 2.1205(h)). The Commission has stated that to demonstrate standing in materials licensing cases, a petitioner must allege:

- (1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act (or other applicable statute such as the National Environmental Policy Act) and (4) is likely to be redressed by a favorable decision.

See Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53

N.R.C. 9, 13 (2001). The burden of establishing the alleged injury is on the petitioner.

Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility – Decommissioning Plan), LBP-93-4, 37 N.R.C. 72, 81 (1993).

Ms. O'Neal argues that she has standing to request a hearing because she is "a concerned citizen living less than one-half mile from the Nuclear Fuel Services Plant in Erwin, TN," and she believes that her property value will be adversely affected by the March 2006 spill and the "myriad of recurring violations and their wide-spread publicity." O'Neal Hearing Request at 2.

Ms. O'Neal's proximity to NFS alone does not confer standing. Unlike nuclear power reactor licensing proceedings, in materials licensing proceedings there is no presumption that a petitioner has standing merely because he or she lives in or frequents a location at a particular distance from a facility. Atlas Corp. (Moab, Utah Facility) LBP-97-9, 45 N.R.C. 414, 426 (1997); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 N.R.C. 179, 193 (1991).

Therefore, Ms. O'Neal must demonstrate injury-in-fact. To show injury-in-fact, a petitioner "must provide some evidence of a causal link between the distance they reside from the facility and injury to their legitimate interests." Babcock & Wilcox, LBP-93-4, 37 N.R.C. at 83-84, 87 (rejecting per se standing for petitioners living as close as one-eighth of a mile from and visiting an apartment "within one foot" of the facility). The petitioner must demonstrate that the subject licensing action "is defective in a manner so as to cause the injuries described." Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 N.R.C. 40, 44 (1990). Ms. O'Neill has failed to meet this requirement. With respect to her "injury-in-fact," Ms. O'Neal's allegations regarding hypothesized decreases in property value do not provide Ms. O'Neal standing. As Ms. O'Neal concedes, any decrease in property value would not be caused by the Confirmatory Order

but by publicity associated with ongoing operations at the plant. O’Neal Request at 2. There is, therefore, no causal connection between the Confirmatory Order and Ms. O’Neal’s alleged injuries and Ms. O’Neal lacks standing. See Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 N.R.C. 271, 276 (1998) (requiring a causal connection between the injury and the proposed action); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 N.R.C. 149, 155 (1998) (same). Moreover, because any decrease in Ms. O’Neal’s property value is not traceable to the Confirmatory Order, such an injury could not be redressed by a hearing in this proceeding and Ms. O’Neal has failed to demonstrate her standing.

V. THE ISSUES RAISED IN THE O’NEAL HEARING REQUEST ARE OUTSIDE THE SCOPE OF THIS PROCEEDING

The NRC has the authority to define the scope of an enforcement proceeding, including proceedings on confirmatory orders. See Bellotti v. U.S. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983); see also In re Alaska Dep’t of Transp. & Pub. Facilities, 60 N.R.C. 399, 405 (2004). In the Federal Register Notice, the Commission defined the scope of this proceeding as follows: “the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.” 72 Fed. Reg. at 41,531.

A. Ms. O’Neal’s Proffered Contentions Are Unrelated to the Confirmatory Order

Ms. O’Neal requests a hearing for three reasons: (1) she wants the NRC to explain to the public why the its Official Use Only (“OUO”) designation was applied to the March 2006 spill, (2) she believes that the NFS facility does not have “adequate protection from attack” and (3) she contends that the Confirmatory Order’s statement that

health and safety are reasonably assured is insufficient. O’Neal Hearing Request at 1-3. Because none of these concerns are related to the Confirmatory Order, they are all outside the scope of this proceeding.³ Neither the Commission’s OUO policies nor its security regulations and orders are at issue in the Confirmatory Order. Likewise, Ms. O’Neal’s belief that the statutory standard requiring the NRC to find that public health and safety are reasonably assured is an inadequate standard is unrelated to the Confirmatory Order itself. Accordingly, the proffered contentions must be rejected.

B. Ms. O’Neal’s Proffered Contentions Do Not Address Whether the Confirmatory Order Should be Sustained

Not only are the proffered contentions beyond the scope of the proceeding in that they involve issues wholly unrelated to the Confirmatory Order, but where they do try to address the Confirmatory Order by reference, they further fail to address the only issue relevant to this proceeding – “whether this Confirmatory Order should be sustained.” – and, therefore, must be rejected.

In 1983, the U.S. Court of Appeals for the D.C. Circuit addressed what a petitioner requesting a hearing must demonstrate in order for a hearing to be granted in Bellotti v. U.S. NRC. In Bellotti, the court affirmed the NRC’s decision to deny a petition to intervene in an enforcement proceeding because the petitioner did not oppose the order but instead asserted that the order should be more stringent. Bellotti, 725 F.2d at 1382. In Bellotti, the proceeding was the result of an enforcement order issued against Boston Edison’s Pilgrim Nuclear Power Station (“Pilgrim”) that required development of

³ To the extent Ms. O’Neal seeks open public discussion regarding the NFS Nuclear Fuel Plant Performance, the NRC has already addressed those concerns by scheduling public meetings in Erwin,

a plan for reappraisal and improvement of management functions at Pilgrim. Id. at 1381.

The Massachusetts Attorney General, Francis X. Bellotti, filed a request for a hearing that addressed “the plant’s continued operation, the adequacy of Boston Edison’s reappraisal plan, the nature of necessary improvements at the plant and the adequacy of Boston Edison’s implementation of required changes.” Id. The Court noted:

The Order Modifying License provides that the issue at any hearing held pursuant to it shall be “whether, on the basis of the matters set forth in Sections II and III of this Order, this Order should be sustained.” J.A. at 13. As [the NRC] interpret[s] it, this language limits possible intervenors to those who think the Order should not be sustained, thereby precluding from intervention persons such as petitioner who do not object to the Order but might seek further corrective measures.

Id. at n.2. The Court agreed with this interpretation, holding further that:

We are reinforced in this view by an examination of the larger regulatory structure. Petitioner Bellotti is in no sense left without recourse by the NRC's denial of intervention in the Boston Edison proceeding. Commission regulations provide for public petitions to modify a license, which may lead to license modification proceedings if the Commission finds that appropriate. 10 C.F.R. § 2.206 (1983). Moreover, Commission denials to institute proceedings under section 2.206 are subject to judicial review.

Id. (citations omitted).

The court explained that because the NRC has the authority to limit the scope of a proceeding, and because the NRC limited the scope to “whether the order should be sustained,” only petitioners who contended that the order should not be sustained offered contentions within the scope of the proceeding. Id. at 1381-82. For example, if the Confirmatory Order had changed NFS’s discharge limits into the Nolichucky River and a petitioner could demonstrate an injury as a result of that change, then that petitioner could

including two meetings on September 17, 2007 to discuss the facility’s safety performance.

contend that the Confirmatory Order should not be sustained and that contention would be within the scope of the proceeding.

It is well-established that “NRC hearing petitioners may not seek additional measures going beyond the terms of the enforcement order triggering the hearing request.” In re Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 N.R.C. 52, 58 (2004). Maine Yankee involved a post-September 11 order modifying the licenses of licensees that stored ,or had near-term plans to store, spent fuel in an independent spent fuel storage installation. The NRC order defined the scope of the proceeding as “whether this Order should be sustained.” 50 N.R.C. 52, 54 (2004). The petitioner stated that it opposed the order unless it was 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.” Id. at 56. Because the petitioner sought additional measures in the form of modifications to the order, the Commission affirmed the Board’s denial of its request for a hearing. Id. at 61.

The NRC made a similar finding in In re FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 N.R.C. 154 (2004), which involved a confirmatory order that required certain additional safety-related measures at the Davis-Besse Nuclear Power Station. Id. at 156. Once again, the order set the scope of any hearing as “whether this Confirmatory Order should be sustained.” Id. at 157. Several petitioners filed a request for a hearing in which they asked the NRC to address

fire-protection issues, regulatory indifference, and all licensing criteria. Id. In its decision below, the Atomic Safety and Licensing Board denied the request for hearing, reasoning that

any issues the Petitioners seek to litigate 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 re[s]ciSSION (as opposed to supplementation).

In re FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), 59 N.R.C. 379, 385 (2004). The Commission affirmed the denial of the petition, quoting the Board's language. Davis-Bessie, 60 N.R.C. at 158-59.

In another confirmatory order proceeding, the Commission further clarified the scope of enforcement order hearings. In re Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 N.R.C. 399 (2004) (hereinafter "Alaska DOT"). In Alaska DOT, the NRC issued a confirmatory order requiring the licensee to take actions to comply with the Commission's employment discrimination regulations. Id. at 402. The NRC again defined the scope of the proceeding as "whether this Confirmatory Order should be sustained." Id. at 402-03. The petitioner's request for a hearing "sought to replace or supplement the order with civil penalties and enforcement actions against individual managers" at the Alaska DOT facility. Id. at 403. In denying the petitioner's request, the Commission held:

The critical inquiry under Bellotti in a proceeding on a confirmatory order is whether the order improves the licensee's health and safety conditions. If it does, no hearing is appropriate.

Id. at 408. Significantly, the Commission also held that

[If petitioner] believes the Confirmatory Order does not go far enough to remedy the whistleblower situation at ADOT, he can file a petition with the NRC under 10 C.F.R. § 2.206.

Id. at n.35.

The three issues raised by Ms. O’Neal – the use of the OUO designation by the NRC, the security of the NFS facility from attack and the statutory standard for assuring public health and safety – all request further action by the NRC regarding the NFS facility. Ms. O’Neal does not assert that the Confirmatory Order should not be sustained, but only that the Confirmatory Order did not go far enough. Thus, under Bellotti and its progeny, Ms. O’Neal’s concerns are outside the scope of this proceeding and no hearing should be granted.

VI. MS. O’NEAL HAS NOT PROFFERED AN ADMISSIBLE CONTENTION

The Federal Register Notice requires that any person filing a request for hearing “shall set forth with particularity the manner in which his interest is adversely affected by [the Confirmatory] Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f). 72 Fed. Reg. at 41,531.

A. Standards for the Admissibility of Contentions

1. Contentions Must Be Within the Scope of the Proceeding and May Not Challenge NRC Rules

As a fundamental requirement, a contention is only admissible if it addresses matters within the scope of the proceeding and does not seek to attack NRC regulations governing the proceeding. As discussed earlier in this Answer, Ms. O’Neal’s contentions are beyond the scope of this proceeding. As discussed below, they otherwise fail to meet the Commission’s standards for admissibility.

10 C.F.R. § 2.309(f)(1)(iii)-(iv) requires that a petitioner demonstrate that the issue raised by each of its contentions is within the scope of the proceeding and material to the findings that the NRC must make. Licensing boards “are delegates of the Commission” and, as such, they may “exercise only those powers which the Commission has given [them].” Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 N.R.C. 167, 170 (1976) (footnote omitted); accord Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 N.R.C. 287, 289-90 n.6 (1979). Accordingly, it is well established that a contention is not cognizable unless it is material to a matter that falls within the scope of the proceeding for which the licensing board has been delegated jurisdiction. Id.; see also Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 N.R.C. 419, 426-27 (1980); Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 N.R.C. 18, 24 (1980).

It is also well established that a petitioner is not entitled to an adjudicatory hearing to attack generic NRC requirements or regulations. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). “[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process.” Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20, aff’d in part on other grounds, CLI-74-32, 8 A.E.C. 217 (1974) (footnote omitted). Thus, a contention which collaterally attacks a Commission rule or regulation is not appropriate for litigation and must be rejected. 10 C.F.R. § 2.335; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1

and 2), ALAB-218, 8 A.E.C. 79, 89 (1974). A contention which “advocate[s] stricter requirements than those imposed by the regulations” is “an impermissible collateral attack on the Commission’s rules” and must be rejected. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1656 (1982); see also Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 N.R.C. 397, 410, aff’d in part and rev’d in part on other grounds, CLI-91-12, 34 N.R.C. 149 (1991). Likewise, a contention that seeks to litigate a generic determination established by Commission rulemaking is “barred as a matter of law.” Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 N.R.C. 5, 30 (1993).

2. Contentions Must Be Specific and Supported By a Basis Demonstrating a Genuine, Material Dispute

In addition to the requirement to address issues within the scope of the proceeding, a contention is admissible only if it provides:

- a “specific statement of the issue of law or fact to be raised or controverted;”
- a “brief explanation of the basis for the contention;”
- a “concise statement of the alleged facts or expert opinions” supporting the contention together with references to “specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;” and
- “[s]ufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact,” which showing 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)(i), (ii), (v) and (vi). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. Palo Verde, CLI-91-12, 34 N.R.C. at 155-56.

These pleading standards governing the admissibility of contentions are the result of a 1989 amendment to 10 C.F.R. § 2.714, now § 2.309, which was intended "to raise the threshold for the admission of contentions." 54 Fed. Reg. 33,168 (Aug. 11, 1989); see also Oconee, CLI-99-11, 49 N.R.C. at 334; Palo Verde, CLI-91-12, 34 N.R.C. at 155-56. The Commission has stated that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'" Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 358 (2001) (citation omitted). The pleading standards are to be enforced rigorously. "If any one . . . is not met, a contention must be rejected." Palo Verde, CLI-91-12, 34 N.R.C. at 155 (citation omitted). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Id.

The Commission has explained that this "strict contention rule" serves multiple purposes, which include putting other parties on notice of the specific grievances and assuring that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions. Oconee, CLI-99-11, 49 N.R.C. at 334. By raising the threshold for admission of contentions, the NRC

intended to obviate lengthy hearing delays caused in the past by poorly defined or supported contentions. Id. As the Commission reiterated in incorporating these same standards into the new Part 2 rules, “[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues.” 69 Fed. Reg. 2,182, 2,189-90 (Jan. 14, 2004).

Under these standards, a petitioner is obligated “to provide the [technical] analyses and expert opinion” or other information “showing why its bases support its contention.” Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 N.R.C. 281, 305, vacated in part and remanded on other grounds, CLI-95-10, 42 N.R.C. 1, aff’d in part, CLI-95-12, 42 N.R.C. 111 (1995). Where a petitioner has failed to do so, “the [Licensing] Board may not make factual inferences on [the] petitioner’s behalf.” Id., citing Palo Verde, CLI-91-12, 34 N.R.C. 149. See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 180 (1998) (a “bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient”; rather “a petitioner must provide documents or other factual information or expert opinion” to support a contention’s “proffered bases”) (citations omitted).

Further, admissible contentions “must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application].” Millstone, CLI-01-24, 54 N.R.C. at 359-60. In particular, this explanation must demonstrate that the contention is “material” to the NRC findings and that a genuine dispute on a material issue of law or

fact exists. 10 C.F.R. § 2.309(f)(1)(iv), (vi). The Commission has defined a “material” issue as meaning one where “resolution of the dispute would make a difference in the outcome of the licensing proceeding.” 54 Fed. Reg. at 33,172 (emphasis added).

As the Commission observed, this threshold requirement is consistent with judicial decisions, such as Conn. Bankers Ass’n v. Bd. of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980), which held that:

[A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an “inquiry in depth” is appropriate.

Id. (footnote omitted); see also Calvert Cliffs, CLI-98-14, 48 N.R.C. at 41 (“It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions . . .”). A contention, therefore, is not to be admitted “where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.” 54 Fed. Reg. at 33,171.⁴ As the Commission has emphasized, the contention rule bars contentions where petitioners have what amounts only to generalized suspicions, hoping to substantiate them later, or simply a desire for more time and more information in order to identify a genuine material

⁴ See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 N.R.C. 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 N.R.C. 1041 (1983) (“[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the Act nor Section 2.714 [now 2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.”).

dispute for litigation. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2), CLI-03-17, 58 N.R.C. 419, 424 (2003).

Therefore, under the Rules of Practice, a statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for a contention.

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 246 (1993), review declined, CLI-94-2, 39 N.R.C. 91 (1994).

Similarly, a mere reference to documents does not provide an adequate basis for a contention. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 348 (1998).

B. Ms. O’Neal’s Contentions Are Beyond the Scope of this Proceeding, Are Collateral Attacks on the Commission’s Rules, Lack Basis, and Are Otherwise Inadmissible

As discussed above, the three issues raised by Ms. O’Neal – the use of the OUO designation, the security of the NFS facility from attack and the statutory standard for assuring public health and safety – are all beyond the scope of the Confirmatory Order. Indeed, the issues raised by Ms. O’Neal are collateral attacks on Commission regulations with respect to her allegations regarding the NRC’s OUO policy and site security. Ms. O’Neal’s opposition to the reasonableness standard for the assurance of public health and safety is also a collateral attack on the standard established by the Atomic Energy Act and on the Commission’s regulations promulgated thereunder. As such each of the contentions must be rejected. See, e.g., Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999).

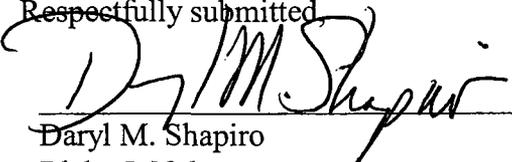
Moreover, the proffered contentions fail to meet the Commission's pleading requirements that require the Petitioner to provide a concise statement of the statement of the alleged facts or expert opinions" supporting the contention together with references to specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue. Ms, O'Neal provides no alleged facts or expert opinion, or any fact that would create a genuine issue of material fact regarding the Confirmatory Order. Indeed, Ms. O'Neal does not controvert any facts in the Confirmatory Order, nor does she provide factual support for her assertions that the she and the community were affected by the use of the OUO designation with respect to the Agency for Toxic Substances and Disease Registry investigation, or in any other regard. Likewise, Ms. O'Neal does not provide any factual support for her assertion that the security at the facility is inadequate or that the public health and safety are not reasonably assured by the Confirmatory Order. Finally, Ms. O'Neal provides no basis for her disagreement with the application of the statutory standard that public health and safety must be reasonably assured.

Absent any factual basis for Petitioner's allegations or any explanation as to how her allegations would support a determination that the Confirmatory Order should not be issued, Petitioner has failed to meet the Commission's requirements for an admissible contention and the O'Neal Hearing Request must be dismissed.

VII. CONCLUSION

For the foregoing reasons, the Presiding Officer should deny Ms. O'Neal's request for a hearing on the Confirmatory Order.

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Dated: September 19, 2007

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)
)
NUCLEAR FUEL SERVICES, INC.) Docket No. 70-143
)
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CERTIFICATE OF SERVICE

I hereby certify that copies of the Licensee's Answer to Request for a Hearing of Barbara A. O'Neal were served on the persons listed below by U.S. mail, first class, postage prepaid, and by electronic mail as indicated by an asterisk (*) on this 19th day of September, 2007.

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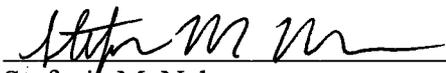
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