RAS 14161

September 19, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Presiding Officer

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

LICENSEE'S ANSWER TO REQUEST FOR A HEARING OF THE SIERRA CLUB NATIONAL RADIATION COMMITTEE

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 the Sierra Club National Radiation Committee ("Sierra Club"), dated August 20, 2007 ("Sierra Club Hearing Request") regarding the Confirmatory Order published by the United States Nuclear Regulatory Commission ("Commission" or "NRC") in the above-captioned docket. The Sierra Club Hearing Request should be denied because the Sierra Club 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

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SECY-02

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 SIERRA CLUB LACKS STANDING[1]

The Sierra Club asserts that because it was granted standing in a different proceeding and continues to serve "the general public's interests where clean air, clean water and clean energy are threatened by Nuclear Regulatory Commission (NRC) licensees," that it has standing in this proceeding. Sierra Club Hearing Request at 1. This assertion fails to meet the Commission's standards for standing.

To determine whether a petitioner's interest provides a sufficient basis for intervention, "the Commission has long looked for guidance to current judicial concepts of standing." Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 N.R.C. 1, 5-6 (1998) (citation omitted). Judicial concepts of standing require a petitioner to establish that:

> (1) it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute; (2) that the injury can be fairly traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision.

[1] Licensee acknowledges that the Sierra Club has filed its request for hearing *pro se* and therefore may be granted some lenience on the technical aspects of its pleading. However, the Sierra Club 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 NRC 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).

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 N.R.C. 1, 6 (1996) (citation omitted).

The required injury may be either actual or threatened. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 N.R.C. 185, 195 (1998) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-04 (1998); Kelley v. Selin, 42 F.3d 1501, 1508 (6th Cir. 1995)). However, the injury must lie within the "zone of interests" protected by the statutes governing the proceeding. Id. at 195-96 (citing Ambrosia Lake Facility, CLI-98-11, 48 N.R.C. 1, 6 (1998)).

First, having been granted standing in one proceeding does not automatically grant standing in a second proceeding involving the same facility. See, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 N.R.C. 196, 198 (1992), citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 N.R.C. 114, 125-26 (1992).

Second, an organization seeking to obtain standing in a representative capacity must demonstrate "at least one of its members, who has authorized the organization to represent his or her interests." Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 N.R.C. 64, 72 (1994); PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-04, 65 N.R.C. 281, 294-96 (2007). The Sierra Club Hearing Request mentions only one member: Linda Modica, who "lives with her family and pets in the Nolichucky River watershed only 10 miles downwind and downstream from NFS." Sierra Club Hearing Request at 3. Ms. Modica's proximity to NFS alone, however, does not confer standing upon the Sierra

Club, because the Sierra Club has not demonstrated that Ms. Modica herself has standing. The Sierra Club does not demonstrate any injury from the Confirmatory Order that would accrue to Ms. Modica.

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). To show injury-in-fact, petitioners "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). However, the Sierra Club provides no such evidence and demonstrates neither that Ms. Modica or any other member suffers any injury in fact; nor that any claimed injury is redresssable by this proceeding. As discussed below, none of the Sierra Club's conclusions are within the scope of the proceeding and therefore are not redressable. Thus, Ms. Modica's mere proximity to the NFS facility does not show an injury-in-fact and thus cannot confer standing upon the Sierra Club.

Third, Sierra Club has also failed to meet the standards for organizational standing. In order for an organization to demonstrate organizational standing, it must show a discrete injury to the organization itself. See International Uranium (USA) Corp. (White Mesa Uranium Mill, CLI-01-21, 54 N.R.C. 247, 252 (2001). As discussed herein, the Sierra Club has failed to allege any particularized injury to the Sierra Club, much less one that is fairly traceable to the Confirmatory Order or could be redressed in a hearing on the Confirmatory Order.

Fourth, the Sierra Club's claim to "serve the general public's interest in clean air, water, and energy" is insufficient to confer standing. See Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) ; see also International Uranium, 54 N.R.C. at 252 (2001). Therefore, Sierra Club has not demonstrated that it has standing to request a hearing on the Confirmatory Order.

IV. THE ISSUES RAISED IN THE SIERRA CLUB 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. The Sierra Club's Proffered Contentions Are Unrelated to the Confirmatory Order

The Sierra Club Hearing Request enumerates six proffered contentions. On their face, none of them actually relate to the Confirmatory Order itself. The Sierra Club's concerns center around three allegations: (1) the Commission has not properly followed procedural rules regarding environmental assessments concerning the licensee (first and third); (2) the Commission has failed to properly regulate the licensee (second, third and fifth); and (3) the Commission has improperly applied its Official Use Only ("OUO") policy to the licensee (fourth and sixth). Sierra Club Hearing Request at 1-2. In short, none of these concerns address any substantive issue in the Confirmatory Order.[2]

1. The Sierra Club's Assertions Regarding the Lack of an Environmental Assessment Are Not Within the Scope of the Confirmatory Order

In its first and third proffered contentions, the Sierra Club asserts that the NRC did not properly conduct an environmental assessment of the impact of the Confirmatory Order. Sierra Club Hearing Request at 1. However, no environmental assessment is required for a Confirmatory Order. The Confirmatory Order here is an enforcement action wherein the NRC is not approving any additional activity by the Licensee. Rather, the Licensee has made additional commitments to address the NRC's concerns, in order to ensure that the public health and safety are reasonably assured. See, e.g., 72 Fed. Reg. at 41,530. The Confirmatory Order does not meet the definition of "major federal action" under 40 C.F.R. § 1508.18. "Actions do not include bringing judicial or administrative

civil or criminal enforcement actions." 10 C.F.R. § 1508.18(a). In other words, an administrative enforcement action is outside of review under the National Environmental Policy Act of 1969. 42 U.S.C. § 4321 et seq. ("NEPA").

2. The Sierra Club's Allegations Regarding the NRC's Regulation of Licensee Are Beyond the Scope of the Confirmatory Order

In its second, third and fifth proffered contentions, the Sierra Club alleges that the Licensee "despite the Confirmatory Order, is in serial non-compliance with NRC regulations," and "continues to fail to follow NRC directives and regulations." Sierra Club Hearing Request at 2. Sierra Club further alleges that "the Compensatory [sic] Order fails to protect the public's interest in protection from terrorist attacks . . . ." Id. These allegations regarding the NRC's regulation of NFS are not related to the Confirmatory Order. The proper venue for any such a complaint about the current operating basis of an NRC-licensed facility is a petition filed under 10 C.F.R. § 2.206, not a request for hearing on the Confirmatory Order.

3. The Sierra Club's Allegations Regarding the NRC's OUO Policy Is Beyond the Scope of the Confirmatory Order

In its first, fourth and sixth proffered contentions, the Sierra Club alleges that the NRC's OUO policy has caused it injury through being "wrongly applied to NFS's non-Navy, commercial downblending operations . . . ." Sierra Club Hearing Request at 2. The Sierra Club alleges that this may have resulted in an Environmental Assessment of

[2] To the extent the Sierra Club seeks open public discussion regarding the NFS Nuclear Fuel Plant Performance, the NRC has already addressed those concerns by scheduling public meetings in Erwin, including two meetings on September 17, 2007 to discuss the facility's safety performance.

the Confirmatory Order being withheld (Id.), the Agency for Toxic Substances and Disease Registry ("ATSDR") not obtaining information on NFS when it conducted a health assessment (Id.), and has resulted in a violation of "the public trust," requiring the disclosure of a variety of documents. Id. at 2-3. Again, this request is wholly unrelated to the Confirmatory Order, which has no effect on and does not concern the NRC's OUO policy. The proper venue for the Sierra Club to raise any concerns about the Commission's policies regarding the Official Use Only policy would be through a petition for rulemaking under 10 C.F.R. § 2802. Accordingly, each of the proffered contentions is beyond the scope of this proceeding and must be rejected.

B. The Sierra Club'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 invoke 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 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

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. 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.

Under this clear Commission case law, the Sierra Club's contentions are not admissible in this proceeding. Each of the contentions is not only beyond the scope of the Confirmatory Order, as discussed above, but none asserts that the Confirmatory Order does not improve the licensee's health and safety conditions, only that the Confirmatory Order does not go far enough. For example, in its second, third and fifth proffered contentions, which reference the Confirmatory Order in passing, the Sierra Club alleges that the Confirmatory Order either does not address or does not go far enough to ensure public health and safety. Sierra Club Hearing Request at 2. The Sierra Club does not contend that the Confirmatory Order does not improve health and safety at all, nor does it contend that it or its members will be injured by the actions the licensee agrees to undertake in the Confirmatory Order. Thus, under well-established Commission case law and under Bellotti, the Sierra Club's allegations are outside the scope of this proceeding.

V. THE SIERRA CLUB 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, Sierra Club'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.[3] 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 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).

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[3] 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.").

B. Sierra Club'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, Sierra Club's proffered contentions fall into three categories: (1) the Commission has not properly followed procedural rules regarding environmental assessments (first and third); (2) the Commission has failed to properly regulate the licensee (second, third and fifth); and (3) the Commission has improperly applied its Official Use Only ("OUO") policy to the licensee (fourth and sixth). None of these proffered contentions meet the pleading requirements of 10 C.F.R. § 2.309(f)(1).

First, the Sierra Club's allegations regarding the lack of an environmental assessment and improper findings of no significant impact ("FONSI") (contentions one and three), are collateral attacks on the Commission's and the Council on Environmental Quality's regulations. These collateral attacks are not properly the basis for a contention, even if the contentions had otherwise been within the scope of the proceeding or met the specificity requirements for contentions.

Second, the Sierra Club's allegations regarding the NRC's failure to properly regulate the Licensee are not only beyond the scope of the proceeding, they lack the required specificity under the Commission's pleading requirements or collaterally attack the Commission's regulations. For example, Sierra Club's assertions in its second proffered contention that the "cumulative impacts" of "serial non-compliance" were not evaluated in the Confirmatory Order (Sierra Club Hearing Request at 2) is nothing more than an allegation, having no specificity as to what the alleged serial non-compliance or cumulative impacts are.[4] The statement does not dispute any material facts in the Confirmatory Order or provide an evidentiary basis for the allegations and does not provide a basis for a contention. See, e.g., Calvert Cliffs, CLI-98-14, 48 N.R.C. at 41.

[4] The third proffered contention is similarly infirm, including only broad allegations about "blatant disregard for public health and safety." Id. at 2.

Proffered contention five asserts that the NRC has failed to "consider the impacts of terrorist attacks to a licensed facility." Sierra Club Hearing Request at 2. In addition to being beyond the scope of the proceeding, such an allegation is clearly an impermissible attack on the Commission's regulations and orders regarding security at license facilities and not admissible. Moreover, it too fails to provide the requisite specificity under 10 C.F.R. § 2.309(f)(1) by failing to provide specific facts regarding how the Confirmatory Order fails to comply with the Commission's security regulations.

Finally, the Sierra Club's proffered allegations regarding the NRC's OUO policy, in addition to being beyond the scope of the proceeding, are a generic attack on the Commission's policies and are therefore inappropriate to raise in this proceeding. See, e.g., Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). Likewise, the contentions regarding the OUO designation lack the specificity required for a contention by failing to explain how the Sierra Club's complaints regarding the OUO relate to the Confirmatory Order. Rather, Sierra Club's complaints regarding the OUO relate to documents it apparently wants the NRC to produce to the Sierra Club. Accordingly, the Sierra Club Hearing Request does not contain any admissible contentions and, therefore, must be denied.

VI. CONCLUSION

For the foregoing reasons, the Presiding Officer should deny the Sierra Club's request for a hearing on the Confirmatory Order.

Respectfully submitted,

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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
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Licensee's Answer to Request for a Hearing of the Sierra Club National Radiation Committee 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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