

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

DOCKETED 02/06/02

SERVED 02/06/02

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
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DOMINION NUCLEAR CONNECTICUT, INC.)
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(Millstone Nuclear Power Station, Unit No. 3;
Facility Operating License NPF-49))

070-03098-ML

Docket No.

CLI-02-05

MEMORANDUM AND ORDER

This is a proceeding for a license amendment to expand the spent fuel pool at the Millstone Nuclear Power Station, Unit 3. On November 1, 2001, the intervenors filed a proposed new contention, Contention 12, that pointed to the September 11 terrorist attacks and, in essence, maintained that the NRC now needed to prepare an environmental impact statement discussing the risks and consequences of terrorism affecting the Millstone spent fuel pool. On January 24, 2002, the Licensing Board found the contention procedurally valid, but found it inadmissible under a Commission substantive rule, 10 C.F.R. § 50.13. See LBP-02-05, 55 NRC __ (2002). The Board referred the question of section 50.13's applicability to the Commission. *Id.*, slip op. at 19.

Section 50.13 provides that reactor licensees are "not required to provide for design features or other measures for the specific purpose of protection against the effects of ... attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States." The Board stated that "[t]his provision is part of the safety regulations of the NRC, but its substantive terms appear to have been applied as well to environmental issues, such as is presented by ... Contention 12." *Id.*, at 14. The Board indicated that "[although calculating the risk of sabotage or terrorism may fall within the purview of current analytical methodologies, a matter that would be litigated in resolving proposed Contention 12 if it were admitted, we conclude that the Commission's current policy is to apply 10 C.F.R. § 50.13 to environmental contentions." *Id.*, at 18. Hence, the Board "perforce" rejected proposed Contention 12, but referred its ruling to the Commission. *Id.*, at 18-19.

As is our customary practice, the Commission accepts the Board's referral pursuant to 10 C.F.R. § 2.730(f).⁽¹⁾ The parties to this proceeding shall file briefs that address all issues that the parties determine are relevant to the matters discussed above,⁽²⁾ and in addition shall address in particular the following question:

What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001? The parties should cite all relevant cases, legislative history or regulatory analysis.

Pursuant to 10 CFR §2.786(d), the Commission sets the following briefing schedule:

- The parties shall file their briefs on or before February 27, 2002. Each brief shall be no longer than 40 pages.
- Reply briefs should be submitted no later than March 12, 2002 and shall not exceed 20 pages in length.
- The parties shall submit briefs electronically (or by other means to ensure that receipt by the Secretary of the Commission by the due date), with paper copies to follow.

Briefs in excess of 10 pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, etc.

IT IS SO ORDERED.⁽³⁾

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD

This 6th day of February, 2002

1. See *Private Fuel Storage*, CLI-00-03, 52 NRC 23, 28-29 (2000).
2. The briefs shall not address the "procedural" issues discussed by the Board. See LBP-02-05, slip op. at 5-13.
3. Today the Commission also agrees to review terrorism contentions in three other cases. See *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC __ (Dec. 13, 2001) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-__, 55 NRC __ (Feb. 6, 2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-04, 55 NRC __ (Jan. 24, 2002) (certifying terrorism issue to the Commission), *certification accepted*, CLI-02-__, 55 NRC __ (Feb. 6, 2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __ (Dec. 6, 2001), *reconsideration denied*, Unpublished Memorandum and Order (Jan. 16, 2002), *petition for Commission review granted in part*, CLI-02-__, 55 NRC __ (Feb. 6, 2002).