RAS 3761

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
Dominion Nuclear Connecticut, Inc.	)	Docket No. 50-423-LA-3
	)	
(Millstone Nuclear Power Station, Unit No. 3)	)	ASLBP No. 00-771-01-LA-R

DOMINION NUCLEAR CONNECTICUT, INC.'S RESPONSE TO CONNECTICUT COALITION AGAINST MILLSTONE AND LONG ISLAND COALITION AGAINST MILLSTONE MOTION TO REOPEN THE RECORD AND REQUEST FOR ADMISSION OF LATE-FILED ENVIRONMENTAL CONTENTION AND MOTION FOR DIRECTED CERTIFICATION

I. Introduction

Dominion Nuclear Connecticut, Inc. ("DNC") herein responds to the Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention ("Motion"), dated November 1, 2001. In their Motion, the Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM") (collectively, "Intervenors") request that the Atomic Safety and Licensing Board ("Licensing Board") reopen the record for the purpose of admitting a late-filed contention very similar to proposed contentions previously rejected in this matter. The Motion, accompanied by a declaration from Dr. Gordon Thompson, proposes a contention — like the contentions proposed almost two years ago — asserting the need to analyze alternatives to the license amendment at issue in this matter in light of the postulated environmental consequences of a loss of spent fuel pool water. This time the contention is that

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the loss of water will be specifically caused by a deliberate aircraft crash into the spent fuel pool at Millstone Unit 3.

For the reasons discussed below, DNC concludes that the Motion should be dismissed because jurisdiction properly lies with the Commission, not the Licensing Board. In the alternative, DNC moves that the Motion be certified to the Commission in accordance with 10 C.F.R. § 2.718(i). If, however, the Motion is not dismissed or certified to the Commission, DNC concludes that the Motion should be dismissed because it fails to meet the standards for reopening and for admitting a late-filed contention. There is no basis in the National Environmental Policy Act ("NEPA") to require an environmental assessment of the consequences of an act of terror or war, or to consider alternatives to a project in light of potential attacks by enemies of the United States.

II. Procedural Background

This proceeding arises out of a request by Northeast Nuclear Energy Company[1] for a license amendment to increase the storage capacity of the Millstone Unit No. 3 spent fuel pool from 756 assemblies to 1,860 assemblies (the "License Amendment").[2] The Licensing Board granted standing to CCAM and CAM as intervenors and admitted three of their

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1 At the time this proceeding began, Northeast Nuclear Energy Company was the licensee for Millstone Unit 3. On March 31, 2001, DNC became the operating licensee and party in interest in this matter.

2 The NRC issued the License Amendment on November 28, 2000, after finding that it posed "no significant hazards considerations" under 10 C.F.R. § 50.92. *See* 65 Fed. Reg. 75736 (2000).

contentions for adjudication in a proceeding under 10 C.F.R. Part 2, Subpart K.[3] On October 26, 2000, the Licensing Board issued a Memorandum and Order that adopted an agreed-upon license condition resolving Contention 5, denied the request for an evidentiary hearing on the other issues, and terminated the proceeding. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-26, 52 NRC 181 (2000).

On November 13, 2000, the Intervenors filed a joint petition for Commission review of LBP-00-26 concerning Contentions 4 and 6. The Commission denied review regarding Contention 4, but granted review of Contention 6, directing the parties to submit briefs addressing whether GDC 62 permits a licensee to take credit in criticality calculations for fuel enrichment, burn-up, and decay time limits. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-01-3, 53 NRC 22, 25-27 (2001). On May 10, 2001, the Commission issued a Memorandum and Order that affirmed the Licensing Board's ruling in LBP-00-26 regarding Contention 6. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-01-10, 53 NRC 353 (2001).

On December 18, 2000, the Intervenors filed a motion to stay appellate proceedings and reopen the record on Contention 4 based upon the licensee's notification to the NRC regarding a loss of accountability for two Millstone Unit 1 spent fuel rods. The Commission subsequently issued a Memorandum and Order that remanded the motion to reopen the record to the Licensing Board "for its consideration in the first instance." *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-00-25, 52 NRC 355,

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3 *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25 (2000). The Board admitted Contentions 4, 5, and 6 — all dealing with criticality questions — and rejected eight other proposed contentions.

357 (2000). On January 17, 2001, the Licensing Board issued a Memorandum and Order that denied the motion. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), LBP-01-1, 53 NRC 75 (2001). Thereafter, the Intervenors submitted an affidavit to the Licensing Board in support of the motion to reopen the record, and requested reconsideration of the decision. On May 10, 2001, the Licensing Board issued a Memorandum and Order that granted the Intervenors' motion to reopen the record. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3), LBP-01-17, 53 NRC 398 (2001). Specifically, the Licensing Board decided to:

> to reopen the record on Contention 4, to the extent it bears upon both the adequacy of administrative controls at the Millstone-3 SFP and DNC's ability or willingness to implement such controls successfully. The scope of this reconsideration is limited to the procedures or controls for management of the SFPs and their modes of execution that may be common to Millstone-1 and Millstone-3.

LBP-01-17, 53 NRC at 408. This issue remains before the Licensing Board in a Subpart K proceeding.

III. Motion to Refer the Intervenors' Motion to the Commission

At the outset of its Motion, the Intervenors claim a lack of clarity in the Commission precedents with respect to the Licensing Board's jurisdiction to entertain its Motion. In this perceived void, the Intervenors argue that it is "commonsensical and realistic" that the Licensing Board should take jurisdiction. Motion, at 3. For the reasons discussed below, DNC finds no lack of clarity in the Commission's precedents and concludes that jurisdiction over the Motion properly resides with the Commission. Moreover, given the generic and policy nature of the issues presented in the Motion, DNC believes that this is properly a matter for Commission resolution. Therefore, if not dismissed for a lack of jurisdiction, DNC

moves that the Licensing Board certify the matter without decision to the Commission in accordance with 10 C.F.R. § 2.718(i).

A. Jurisdiction Under NRC Precedents Properly Lies With the Commission

The Licensing Board in this Subpart K proceeding issued its initial decision resolving all matters in controversy on October 26, 2000. *Millstone*, LBP-00-26, 52 NRC 181 (2000). Exceptions were taken by the Intervenors in the form of a petition for review filed on November 13, 2000, and the Commission has since ruled on the petition for review in the two decisions earlier this year. *See Millstone*, CLI-01-3, 53 NRC 22 (2001); and *Millstone*, CLI-01-10, 53 NRC 353 (2001). The only matter still pending in this proceeding concerns the relevance to Contention 4 of the two Unit 1 spent fuel rods that were the subject of the prior motion to reopen and the Commission's remand in December 2000. CLI-00-25, 52 NRC at 357. The Licensing Board specifically limited its reopening of the record to address "the extent to which failure of administrative controls at the Millstone-1 SPF could carry over to the successful implementation of administrative controls at the Millstone-3 SPF" associated with the License Amendment. LBP-01-17, 53 NRC at 408.

Commission precedents clearly establish that jurisdiction to rule on a motion to reopen the record after an appeal has been taken with respect to an initial decision rests with the Commission rather than the Licensing Board. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1327 (1982);[4] *Millstone*, CLI-00-25, 52

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[4] This case refers to "exceptions" filed with the Appeal Board under the NRC appeal process as it existed at the time. The Commission today plays a role analogous to that of the Appeal Board — now under the petition for review process of 10 C.F.R. § 2.786. For purposes of the jurisdictional issue before us, "exceptions" and a "petition for review" are analogous.

NRC at 357, n.3. Moreover, this principle applies regardless of whether the appeal relates to a decision on some issues or on all issues. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 757 at n.4 (1983) (the Appeal Board holding that, in this regard, a reference to an "initial decision" encompasses a "partial initial decision"). Thus, regardless of the specific narrow question still before the Licensing Board, jurisdiction over the present Motion properly resides with the Commission.[5]

This conclusion is entirely consistent with the Commission's narrow remand in CLI-00-25. That remand was limited, by its terms, to a ruling on the Intervenors' prior motion to reopen based upon the reports regarding the two Millstone Unit 1 fuel rods. *See Millstone*, CLI-00-25, 52 NRC at 357 (2000) (remand expressly limited to the motion to reopen for the Licensing Board's "consideration in the first instance").[6] Accordingly, the Licensing Board now has very limited jurisdiction and must refer the present Motion to the Commission without decision.

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5 The Intervenors base their statement of jurisdiction on the outdated guidance of *Wisconsin Electric Power Co.* (Point Beach Nuclear Power Plant, Unit 2), ALAB-86, 5 AEC 376 (1972). The Licensing Board in *Limerick* concluded that *Point Beach* does not remain the law, *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 685 (1983), and this conclusion seems confirmed by the subsequent cases. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983); *cf. Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 93-94 (1995).

6 As is also discussed below, the Intervenors in this proceeding almost two years ago proposed several contentions regarding the alleged inadequacy of the NRC Staff's environmental review of a "partial or total uncovery of fuel assemblies and exothermic reaction of fuel cladding" and the environmental analysis of alternatives to high-density wet storage of spent fuel. Those contentions were dismissed and no exceptions or appeal was ever taken. Given the finality of this resolution to the proposed contentions, it is unconceivable that jurisdiction over very similar issues could now reside with the Licensing Board.

B. The Intervenors' Motion Meets the Standard for Directed Certification

Under 10 C.F.R. § 2.718(i), the presiding officer has the authority to "[c]ertify questions to the Commission for its determination, either in his discretion or on direction of the Commission." A question so certified to the Commission under § 2.718(i) must meet one of two alternative standards to merit Commission review.

> A certified question or referred ruling will be reviewed if it *either* —
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> (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; *or*
>
> (2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.786(g) (emphasis added).[7] As discussed below, the Intervenors' proposed late-filed contention raises a generic issue as to how beyond-design-basis terrorist attacks must be addressed in licensing cases. Admission of the proposed issue in this proceeding would quite obviously affect the "basic structure of the proceeding." Admission of such a generic issue in this proceeding on a specific license amendment for one plant also would be "unusual." Accordingly, the Licensing Board should certify the Motion to the Commission.

The Intervenors' Motion cites the September 11, 2001, terrorist attacks on the United States as evidence that such attacks are not "remote and speculative" and that the NRC should prepare an Environmental Impact Statement ("EIS") to address the environmental

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[7] The Commission has not ruled on the question of whether the alternate standards of Section 2.786(g) are applicable to Subpart K proceedings. DNC believes that the Section 2.786(g) criteria are applicable to Subpart K. However, even if they were not applicable, and as discussed below, the Commission has the plenary power to review the Motion. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 at n.2 (2000).

impacts of such a terrorist act directed against the Millstone Unit 3 spent fuel pool. Motion, at 6. While this claim should not be admitted to this proceeding (for the reasons discussed further below), it does present a legal and/or policy issue with a novel factual premise and with potential generic implications. The significance and generic nature of physical security issues in the aftermath of September 11 is evidenced by the recent actions of Congress and the Commission. For example, Congress has proposed several legislative initiatives based on the September 11 terrorist attacks and the threat posed to the national security and foreign policy of the United States.[8] Moreover, the Commission is assessing whether those events affect the licensing and regulation of nuclear facilities and materials generally.[9] Also, issues similar to the Intervenors' have already been raised in several licensing cases.[10] Resolution of common issues by the Commission at the earliest possible time would promote efficiency in the NRC licensing hearing process.

Several Appeal Board cases granting discretionary interlocutory review involved, as the instant Motion does, unaddressed legal questions having immediate, significant generic

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8 *See, e.g.*, S.J. Res. 23, enacted as P.L. 107-40, 115 Stat. 224 (September 20, 2001) (authorizing the use of United States armed forces against those responsible for the recent attacks launched against the United States).

9 *See* letter from Richard A. Meserve, U.S. Nuclear Regulatory Commission, to Edward J. Markey, United States House of Representatives (October 16, 2001), responding to Congressman Markey's letter of September 20, 2001, regarding: (1) the actions of the NRC and the nuclear industry in response to the terrorist attacks on September 11, 2001; and (2) security at nuclear power plants.

10 *See, e.g.*, "Petition by Georgian Against Nuclear Energy and Nuclear Control Institute to Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility," Docket No. 0-70-03098-ML (October 10, 2001); "State of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage)," Docket No. 72-22-ISFSI (October 10, 2001).

implications for other NRC proceedings then under way or at the threshold of commencement. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 263-64 (1988); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 465 (1982). For similar reasons, the Licensing Board should certify the Motion to the Commission. For the Licensing Board to attempt to address these generic issues in the context of a single spent fuel pool license amendment proceeding, a proceeding that has been remanded to the Licensing Board on only one specific question, would be inappropriate.

In addition to the specific discretionary review criteria of 10 C.F.R. § 2.786(g), the Commission is authorized to review issues in NRC proceedings "in accordance with its plenary power to oversee the conduct of agency adjudications."[11] Moreover, the Commission recently encouraged licensing boards:

> to refer rulings or certify questions on proposed contentions involving novel issues to the Commission in accordance with 10 CFR 2.730(f) early in the proceeding. In addition, boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding.

Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998) ("Policy Statement").[12] Commission action at this time on the Motion would promptly resolve significant legal and policy issues, resolve the Intervenors' argument, and determine the

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11 *Oncology Services Corp.* (Order Suspending Byproduct Material License No. 37-28540-01), LBP-93-10, 37 NRC 455, 458 at n.1 (1993). *See also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977); and *United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, NRCI-76/8 67, 75-76 (1976)("in the interest of orderly resolution of disputes, there is every reason why the Commission should be empowered to step into a proceeding and provide guidance on important issues of law or policy").

12 *See, e.g.*, Hydro Resources Inc., CLI-98-16, 48 NRC 119 (1998).

appropriate forum to address design basis security concerns. Prompt certification would be in keeping with the intent of the Commission's Policy Statement.[13]

IV. The Intervenors' Motion to Reopen and to Add a New Contention Should Be Denied

A party that would seek to add a new contention after the record in a proceeding has closed must satisfy both the standards for admitting a late-field contention and the Commission's standard for reopening the record. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1136 (1983), *citing Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714-15 (1982).[14] Here, the Intervenors fail to meet either standard. In addition, as with any proposed contention, the Intervenors must raise an issue with a specific basis sufficient to show that a "genuine dispute exists ... on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2)(iii). A contention should not be admitted where it "would be of no consequence in the proceeding because it would not entitle petitioner to relief." 10 C.F.R. § 2.714(d)(2)(ii). Here, the Intervenors have raised an issue that lacks legal basis and would not entitle them to any relief with respect to the specific Millstone Unit 3 License Amendment here at issue.

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13 For the same reasons, if the Licensing Board does not now certify this matter to the Commission, any ruling on the Motion by the Licensing Board should be referred to the Commission in accordance with 10 C.F.R. § 2.730(f).

14 As discussed above, DNC recognizes that the record is open with respect to the narrow issue of the two Unit 1 spent fuel rods and the relationship of that issue to Contention 4. However, the present situation is analogous to that in *Shoreham*, where the record was "closed with the exception of two subjects unrelated to the ... proposed new contention." LBP-83-30, 17 NRC at 1135. Likewise, in *Diablo Canyon*, the Commission held that where a motion to reopen relates to a previously uncontested issue, both standards must be met. The present Motion relates to matters outside the scope of the three admitted contentions and therefore relates to "a previously uncontested issue."

A. The Motion Does Not Meet the Standards of 10 C.F.R. § 2.714(a)(1) for a Late-Filed Contention

Under 10 C.F.R. § 2.714(a)(1), a new contention can only be considered based upon a balancing of five factors:

(i) good cause, if any, for failure to file on time;

(ii) the availability of other means whereby the petitioner's interest will be protected;

(iii) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;

(iv) the extent to which the petitioner's interest will be represented by existing parties; and

(v) the extent to which petitioner's participation will broaden the issues or delay the proceeding.

The Intervenors' Motion fails because it is late without good cause; it would introduce into this proceeding issues that can best be addressed in other forums with appropriate participation in that context by the Intervenors and Dr. Thompson, if they so choose; and it would clearly broaden and delay this proceeding, one that was reopened to address only one narrow question.

First, the Intervenors' Motion is untimely without good cause. Of course the Motion invokes the tragic events of September 11, 2001, as the basis for filing at this time. However, if this is their basis, the Intervenors have waited over 50 days to file their Motion. In contrast, intervenors or petitioners in at least two other ongoing NRC proceedings were able to file petitions at the NRC concerning terrorist issues as early as October 10, 2001.[15]

Moreover, the Intervenors in this proceeding previously proposed contentions related to: (a) the probability and consequences of accidents involving the "partial or total

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15 *See* footnote 10, *supra*.

uncovering of fuel assemblies and exothermic reaction of fuel cladding" in the spent fuel pool; (b) the analysis under NEPA of alternatives to wet storage; (c) the need to consider "severe accident implications of alternative options"; and (d) the need for a Full Environmental Impact Statement based upon the same considerations.[16] All of these contentions were "supported" by the work of Dr. Thompson and his concern regarding spent fuel pools losing their cooling water. The contentions were not admitted by the Licensing Board. LBP-00-2, 51 NRC at 43-46. Intervenors' arguments are now, fundamentally, the same. The September 11 attacks are offered as a purported indication of the likelihood of a specific initiating event for the prior alleged, speculative scenario of a loss of cooling water. However, speculative scenarios could have been raised in the past in the same way they are now. The recent events do not provide good cause for renewal of the prior proposed contentions.

The Intervenors also reference the NRC's publication of NUREG-1738, "Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants." This document (notwithstanding the Intervenors' assertions otherwise) was released in October 2000. And even if it was not available to the Intervenors until January 2001, as the intervenors claim, that was 11 months ago. This document discussed risks associated with spent fuel pools, including zirconium fire. It is unclear how the timing of the release of this document advances a timeliness claim.

Next, there can be no doubt that there are other forums available to the Intervenors and Dr. Thompson to address their terrorism and spent fuel pool risk concerns. The Intervenors allude to at least one: the Commission's ongoing generic technical and policy

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16 *See* "Supplemental Petition to Intervene in Behalf of Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone," at 21-34 (November 17, 1999).

evaluation of the spent fuel pool accident risk at decommissioning plants, based in part on a review of NUREG-1738.[17] With respect to concerns regarding terrorism, other petitioners have chosen other, more appropriate generic regulatory approaches to address these matters, such as a petition for rulemaking.[18] These available avenues certainly present a means for the Intervenors and Dr. Thompson to be heard on important generic regulatory matters such as spent fuel pool risks and the terrorist threat. Any actions taken following the generic initiatives and evaluations will help to assure that airline attacks on spent fuel pools will remain remote and speculative scenarios beyond the scope of NEPA, as discussed further below.

Finally, there can be no question that a new contention on these issues in this proceeding would broaden the issues and delay the proceeding — without the justification of a clear nexus to the License Amendment here at issue. As is discussed further below, the Motion in reality is an attack on the current NRC regulatory scheme regarding design basis security threats. Regardless of the License Amendment, spent fuel will of necessity continue to be stored in high-density wet storage at Millstone Station and other nuclear stations nationwide. This approach to spent fuel storage is in keeping with the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101, *et seq.* Therefore, it is unclear how the relief requested is germane to the License Amendment. To the extent additional security measures are warranted to protect spent

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17 *See also* SECY-00-145, "Integrated Rulemaking Plan for Nuclear Power Plant Decommissioning" (June 28, 2000); "September 2001 Update of the Staff's Response to the Chairman's Tasking Memorandum" (October 15, 2001), and NUREG-0586, Draft Supplement 1, "Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities" (October 2001).

18 *See, e.g.*, National Whistleblower Center's Petition for Rulemaking, "Failure to Adequately Assess Risk of Malevolent Airborne Attack - and - Failure to Adequately Assess Risk of Terrorist Attack at Spent Fuel Storage Facilities - and - Failure to Adequately Protect Nuclear Plants From a Terrorist Attack" (October 24, 2001).

fuel, these will be determined by generic NRC processes, and the generic issues should not be introduced into this licensing proceeding.

Ample Commission precedent holds that proposed contentions concerning generic issues that are (or are about to become) the subject of a rulemaking by the NRC should not be adjudicated in individual licensing proceedings. *See, e.g., Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993). There is no good reason that either the Licensing Board or the Commission should deviate from that approach now. Accordingly, on a balance of the five factors of 10 C.F.R. § 2.714(a)(1), a late contention should not be accepted.

B. The Motion Fails to Meet the Reopening Standard of 10 C.F.R. § 2.734 and Fails To Present an Admissible Contention

Under 10 C.F.R. § 2.734(a), a motion to reopen a closed record will not be granted unless, among other things, the motion demonstrates that "a materially different result would be or would have been likely had the newly proffered evidence been considered initially." It is often stated that a proponent of a motion to reopen has a "heavy" or "difficult" burden. *See e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 3 (1988); *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); and *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976). Here, the Intervenors cannot meet that burden. As is discussed below, NEPA does not require the analysis requested, and therefore the newly proffered evidence will not lead to a different result in this proceeding.

Moreover, the Intervenors' arguments transcend the scope of issues raised by the License Amendment. The present proceeding involves a very specific License Amendment related to the storage of additional spent fuel in a previously open area of the Millstone Unit 3 spent fuel pool. The License Amendment does not involve the siting of the nuclear plant, the operating authority for the nuclear plant, or even the otherwise authorized spent fuel storage at Millstone Units 1, 2 or 3. Regardless of the License Amendment, the plant can continue to operate and spent fuel can continue to be stored in the spent fuel pools — absent some regulatory action with respect to those authorities beyond the scope of this proceeding. Implicitly, pending the ongoing generic evaluation of plant security requirements, the NRC continues to conclude that the previously authorized activities at Millstone do not pose an undue risk to the public health and safety or to the common defense and security. A NEPA analysis of the risks of terrorism, in the context of the License Amendment, would not alleviate the Intervenors' concerns. Even rescission of the License Amendment would not eliminate those perceived risks.

Likewise, the Intervenors have not shown that a basis exists for an admissible contention. Under 10 C.F.R. § 2.714(b)(2)(iii), a contention must have a basis in fact or law, and under 10 C.F.R. §2.714(d)(2)(ii), a contention cannot be admitted if it would not entitle the petitioner to any relief in the proceeding. There is no basis for an argument that an analysis of the "use of weapons," including "large, fuel laden aircraft," on a nuclear plant or its spent fuel pool is required under the NEPA "rule of reason." The NRC has previously completed, in accordance with 10 C.F.R. § 51.30, an environmental assessment of the License Amendment that meets or exceeds NEPA's requirements.[19] In rejecting the Intervenors earlier proposed NEPA

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[19] *See* Northeast Nuclear Energy Company (NNECO), *et al.*, Millstone Nuclear Power Station, Unit No. 3; "Environmental Assessment and Finding of No Significant Impact,"
(Footnote continued on next page)

contentions, the Licensing Board previously recognized that a loss of spent fuel pool water is a "beyond design basis" accident and that the Intervenors were requesting an analysis "without adequate demonstration of the causation of such an accident or the likelihood that such an accident might occur at this facility."[20] The current Motion raises the same scenario, only this time specifically precipitated by an enemy attack. The severe consequences of such an extraordinary scenario are not something that must be evaluated under NEPA.

In the context of a NEPA analysis, the NRC has been required —subject to a "rule of reason"— to consider the potential consequences of accident conditions. *See, e.g., San Luis Obispo Mothers for Peace v. NRC,* 751 F.2d 1287, 1301 (D.C. Cir. 1984), *aff'd en banc,* 789 F.2d 26, *cert. denied,* 479 U.S. 923 (1986). However, this "rule of reason" does not extend to an analysis of the "worst case" accident that anyone can hypothesize. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333, 334 (NEPA does not require consideration of an accident merely because it presents a "worst case"); *see also* 40 C.F.R. § 1502.22.[21] Nor should the NEPA "rule of reason" extend to speculative (*albeit,*

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64 Fed. Reg. 48675 (1999). In addition, the NRC concluded that the License Amendment involves "no significant hazards consideration" (65 Fed. Reg. 75736), and therefore the License Amendment actually fell within the categorical exclusion from a NEPA review provided by 10 C.F.R. § 51.22(c)(9).

20 LBP-00-2, 51 NRC at 43, 45.

21 In the most recent version, Council on Environmental Quality guidelines on NEPA analyses suggested that an analysis of "reasonably foreseeable" impacts of a project should include low probability, high consequence events only if the scenarios are supported by "credible scientific evidence" and are not based on "pure conjecture," and are within the "rule of reason." A prior version of the guidelines requiring a "worst case analysis" was repealed in 1986. 50 Fed. Reg. 15846 (1986).

sensational) acts of terror and war that are not really "accidents" at all.[22] In *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 45-46 (1989), the Appeal Board specifically excluded a contention asserting a possibility of a zircalloy fire following a complete loss of spent fuel pool water. The contention was found to raise scenarios that were beyond the scope of the NEPA "rule of reason" for an environmental assessment. A postulated terrorist attack leading to a loss of spent fuel pool water is simply a more limited example (with the specific postulated initiator of an unpredictable, unquantifiable malevolent act) of the scenario previously proposed and determined to be beyond the scope of NEPA. Notwithstanding the events of September 11, 2001, a terrorist attack by air on the Millstone Unit 3 spent fuel pool remains a speculative event that need not be analyzed in the NRC environmental review in connection with the License Amendment.[23]

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22 *Compare Warm Springs Dam,* 621 F.2d 1017 (9th Cir. 1980). In that case, information about a potentially serious earthquake hazard came to the attention of the Army Corps of Engineers after the publication of a supplemental EIS. The study in question challenged a basic design assumption for a proposed dam. The Corps considered the information, conducted a study of their own, and concluded that their original assumptions were correct. The court found that the Corps' decision not to prepare and circulate a supplemental EIS reflecting the issues raised by the study was reasonable. The court stated, "[a]n impact statement need not discuss remote and highly speculative consequences ... [e]veryone recognizes the catastrophic results of the failure of a dam; to detail these results would serve no useful purpose." 621 F.2d at 1026-27, *citing, Trout Unlimited v. Morton,* 509 F.2d 1276, 1283 (9th Cir. 1974); *Environmental Defense Fund, Inc. v. Hoffman,* 566 F.2d 1060, 1067 (8th Cir. 1977).

23 Similarly, in *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 282 (1987), the Appeal Board also emphasized that a NEPA analysis does not need to consider the environmental impacts of certain severe, beyond design basis spent fuel pool events. The Commission subsequently stated, in the context of technical design issues, that the probability of the scenario would be the key in applying the NEPA "rule of reason." *Vermont Yankee,* CLI-90-4, 31 NRC at 334-35. In light of the decisions discussed below, this same probabilistic "key" would not seem to apply to deliberate, human acts of sabotage and war. However, beyond newspaper

(Footnote continued on next page)

The Intervenors rely at length on the Third Circuit decision in *Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719 (3rd Cir. 1989), to support their argument for a NEPA analysis of the consequences of a deliberate attack. The *Limerick* decision, however, does not support the Intervenors' conclusion. As it relates to the present question, the *Limerick* court held, at most, that in an EIS for a reactor operating license, the agency must assess environmental impacts of risks that are not remote and speculative. The Third Circuit specifically found, however, that the NRC was not required to perform a "worst case" analysis and that the NRC did not err in excluding consideration of "sabotage risks." *Limerick,* 869 F.2d at 743. Like an act of a terrorist or an act of war, these acts involve an unpredictable, unquantifiable human component that defies any "meaningful analysis" of the risk. *Id.* at 744. The Commission's licensing boards have since rejected contentions similar to the Intervenors' present proposed contention. *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296 (1998) (rejecting contention concerning evaluation under NEPA of the potential impacts of terrorist attacks on the proposed spent nuclear fuel storage facility); *Private Fuel Storage,* LBP-98-7, 47 NRC at 179, 186, 199, and 201 (rejecting transportation sabotage issues under NEPA).[24]

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articles regarding current events, neither Intervenors nor Dr. Thompson offer any plausible probabilistic assessment of an attack on the Millstone Unit 3 spent fuel pool.

[24] The Intervenors also invoke the Court of Appeals decision in *Limerick* for the argument that the NRC must under that case consider Severe Accident Mitigation Damage Alternatives. However, nothing in that case or the Commission's regulations of 10 C.F.R. Part 51 would require severe accident mitigation measures for an operating license amendment, where that amendment is not a major federal action requiring an EIS. *See also* "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969," 45 Fed. Reg. 40101 (1980). The NEPA Severe Accident Policy provides for consideration of the risks of a beyond-design-basis scenario only where an EIS is already otherwise required. *Vermont Yankee,* ALAB-876, 26 NRC at 282.

While it may not be enough for NEPA to exclude an analysis of an event simply because the scenario is "beyond design basis," in ascertaining the scope of a NEPA "rule of reason" to define the scope of scenarios for NEPA review, the security design basis cannot be ignored. The Commission's regulation, 10 C.F.R. § 50.13, explicitly provides that NRC reactor licensees are not required to provide for design features or other measures to protect against the effects of attacks and destructive acts, including sabotage, by an enemy of the United States (including, but not limited to, foreign government). The NRC and federal case law have consistently held that the responsibility for defense against such acts lies with the United States Government. *See Siegel v. Atomic Energy Commission,* 400 F.2d 778, 783-84. (D.C. Cir. 1968). The court in *Siegel* explained that security requirements in place ensure that "an applicant for a license should bear the burden of proving the security of his proposed facility as against his own treachery, negligence, or incapacity ... [i]t did not expect him to demonstrate how his plant would be invulnerable to whatever destruction forces a foreign enemy might be able to direct against it in [the future]." *Id.* at 784. In licensing commercial reactors, the Commission's boards have recognized that the NRC is not required to take into account — or require a showing of effective protection against — the possibilities of attack or sabotage by foreign enemies. *See Carolina Power and Light Company* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2098 (1982), where the Licensing Board held that commercial reactors cannot be effectively protected against certain attacks (such as artillery bombardments, missiles with nuclear warheads, or kamikaze dives by large aircraft), without "turning them into virtually impregnable fortresses ...."; *see also, Pacific Gas and Electric Co.* (Diablo Canyon Nuclear

Power Plant, Units 1 and 2), 16 NRC 55, 73-74 at n.75 (1981) (rejecting assertions regarding speculative threats to the facility by the Palestine Liberation Organization).[25]

Given that attacks by enemies of the United States are beyond the design basis external threat to a plant, the Intervenors cannot end-run that design basis by claiming that the consequences of acts of terrorism and acts of war must be considered under NEPA. The regulations and the law make clear that the federal government may be relied upon and must be expected to carry out its duty to defend the United States. The same would be true under a NEPA "rule of reason." It would be wrong to conclude that the consequences of what would be an act of war must be evaluated in a "reasonable" environmental assessment of a license amendment for an existing nuclear facility. Notwithstanding the attacks on the World Trade Center and Pentagon on September 11, an attack on a nuclear facility spent fuel pool remains a speculative proposition. The event has already caused substantial changes with respect to government anti-terrorism efforts generally, and protection of both commercial aircraft and nuclear plants specifically. It is precisely this government response which is intended to assure that the type of attack of concern to the Intervenors does not recur at all, much less at a nuclear plant or at Millstone Unit 3.

The Sixth Circuit, in *Kelley v. Selin,* 42 F.3d 1501 (6th Cir. 1995), ruled that the NRC had not violated NEPA nor acted arbitrarily or capriciously in determining that an EIS was

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25 Consistent with 10 C.F.R. § 50.13, the NRC has previously rejected other proposed contentions regarding the impacts of acts of war. In *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-42, 14 NRC 842, 845 (1981), an NRC Licensing Board rejected a contention regarding the need to address the effects on a plant if an electromagnetic pulse ("EMP") resulting from a detonation of a nuclear weapon. A board reached a similar conclusion in *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 NRC 566 (1982).

not required for approval of new casks for dry storage of nuclear waste and use of casks at a particular power plant. The petitioners in *Kelley* had argued that the NRC violated its obligations under NEPA by failing to address the effects of radiological sabotage in a site-specific environmental analysis concerning the use and operation of the casks. In its reasoning, the NRC concluded in the environmental assessment that "the potential risk to the public health and safety due to accidents or sabotage is extremely small." *Kelley,* 42 F.3d at 1518-19. Similarly, in a recent case, environmental groups brought an action against the Department of Energy seeking to enjoin shipments of weapons-grade plutonium from New Mexico to Canada arguing, under NEPA, that the environmental assessment failed to address "human initiated events." The argument was based on testimony of a Ph.D student who had taught classes on terrorism. *Hirt v. Richardson,* 127 F. Supp. 2d 833 (W.D. Mich. 1999). The court rejected the argument, taking notice of the "extreme caution" taken to avoid such criminal acts. *Id.* at 839. In the case of the Millstone spent fuel pool, similar "extreme caution" is taken, both in the design of the facility and in the government's defense of the country.

In sum, the NRC should reject the Intervenors' claim that terrorist attacks on Millstone Unit 3 are no longer remote and speculative and that the consequences of such attacks must therefore be evaluated under NEPA in the context of the License Amendment at issue in this proceeding. Given that licensees can and must credit the defense of the United States to protect their facilities from attacks by foreign enemies, specific threats remain speculative. Moreover, there is no precedent cited for the Intervenors' implicit proposition that a NEPA "rule of reason" must be extended to require the consideration of the environmental consequences of war. The proposed late-filed contention should be rejected as a matter of law.

V. Conclusion

For the reasons discussed above, the Intervenors' Motion should be dismissed for lack of jurisdiction. If not dismissed, DNC respectfully moves that this Licensing Board certify the Motion to the Commission in accordance with 10 C.F.R. § 2.718(i).

In any event, however, the Motion should be denied because there is no basis in law or fact for the argument that a NEPA analysis must consider the environmental consequences of an act of a terrorist or an act of war.

Respectfully submitted,

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Dated in Washington, D.C.
this 13th day of November 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
Dominion Nuclear Connecticut, Inc.	)	Docket No. 50-423-LA-3
	)	
	)	ASLBP No. 00-771-01-LA-R
(Millstone Nuclear Power Station, Unit No. 3)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Dominion Nuclear Connecticut, Inc.'s Response to Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention and Motion for Directed Certification" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 13th day of November 2001. Additional e-mail service has been made this same day as shown below.

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