RAS 3815

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'S RESPONSE TO CONNECTICUT COALITION AGAINST MILLSTONE AND LONG ISLAND COALITION AGAINST MILLSTONE REPLY TO OPPOSITIONS TO MOTION TO REOPEN THE RECORD AND REQUEST FOR ADMISSION OF LATE-FILED ENVIRONMENTAL CONTENTION

I. INTRODUCTION

Pursuant to the schedule established by the Atomic Safety and Licensing Board ("Licensing Board") in its December 10, 2001 "Memorandum and Order (CCAM/CAM Motion for Leave to Reply to Responses of Licensee and Staff)" ("Memorandum and Order"), Dominion Nuclear Connecticut, Inc. ("DNC") herein responds to the "Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Reply to Oppositions to Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention," dated December 21, 2001 ("Intervenors' Reply"). DNC continues to oppose the Intervenors'

November 1, 2001 Motion to Reopen the Record and Request for Admission of Late Filed Environmental Contention in this proceeding.[1]

In their Reply, the Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM") (collectively, "Intervenors") attempt to respond to alleged "factual errors" in the Oppositions filed by DNC and the Nuclear Regulatory Commission ("NRC") Staff on November 13 and 16, 2001, respectively.[2] The Intervenors also respond to two questions posed by the Licensing Board in its December 10 Memorandum and Order. DNC addresses these matters below. For the reasons discussed below and in the prior DNC Opposition, the Licensing Board should conclude that it does not have jurisdiction over the Motion to Reopen; should deny the Motion to Reopen for failure to meet the reopening and late-filed contention standards; and should deny the Motion to Reopen for lack of legal basis for the contention that the consequences of terrorist attacks must be analyzed under the National Environmental Policy Act ("NEPA").

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1 Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention (November 1, 2001) ("Motion to Reopen"). The proposed contention is based on the views of Dr. Gordon Thompson, similar to those reflected in the original proposed environmental contentions 8 through 11.

2 *See* 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 (November 13, 2001) ("DNC Opposition"); NRC Staff Response Opposing the Motion of Connecticut Coalition Against Millstone/Long Island Coalition Against Millstone to Reopen the Record to Admit a Late-filed Environmental Contention (November 16, 2001) ("Staff Opposition").

II. DISCUSSION

Intervenors' right to reply to the DNC and NRC Staff Oppositions was specifically limited by the Licensing Board to alleged "factual errors" in those Oppositions. In addition, the Licensing Board requested that CCAM/CAM address:

> (1) The applicability of 10 C.F.R. § 50.13 to the issue of the acceptability of the proposed environmental contention, in light of the Appeal Board decision in *Philadelphia Electric Company* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985), *review declined*, CLI-86-5, 23 NRC 125, *aff'd sub nom. Limerick Ecology Action Inc. v. NRC*, 869 F.2d 719, 744 (3d Cir. 1989); *see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1); ALAB-156, 6 AEL 831, 851 (1973).
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> (2) Whether "special circumstances" are presented by the current situation within the meaning of 10 C.F.R. § 2.758.

DNC below first addresses the alleged factual "errors" and then responds to the two matters raised by the Licensing Board.

A. Intervenors have Identified No Factual Errors that Alter the Outcome of the Analysis in the Prior DNC Opposition

The Intervenors' Reply devotes 13 pages to identifying various alleged "factual errors" in the DNC and Staff Oppositions. However, these alleged "errors," even if true, predominantly concern matters on the periphery of the relevant legal analysis. The Intervenors identify no "errors" that would establish the Licensing Board's jurisdiction to rule on the Motion to Reopen. The Intervenors identify no "errors" that establish the timeliness of the Motion to Reopen. And they identify no "errors" that would demonstrate a basis in NEPA, NRC regulations, or NRC case law for the proposition that the environmental consequences of acts of war must be analyzed in connection with the license amendment at issue in this case. DNC stands by its prior Opposition and concludes that the Motion to Reopen should be dismissed.

CCAM/CAM first allege (at 2-3) an "error" in DNC's characterization of the proposed contention. Intervenors would include in their proposed environmental contention the consequences of a loss of spent fuel water as a result of "acts of malice or insanity" generally, not limited to such a loss caused by an attack by "heavy aircraft." So noted. DNC still opposes the Motion to Reopen for the reasons previously given. DNC's argument was not in any way limited to terrorist attacks by aircraft. DNC's argument applies to all acts of terror or war.

CCAM/CAM next allege (at 3-6) various "errors" regarding the timeliness of the Motion to Reopen. Intervenors would have the timeliness of the Motion to Reopen assessed from some date later than September 11, 2001, presumably based on subsequent newspaper articles describing government responses to the terrorist attacks. This is not really a "factual error" at all. It is a difference in opinion. The facts germane to the "good cause" standard of timeliness under 10 C.F.R. §2.714(a)(1)(i) remain: (1) NUREG-1738, the decommissioning plant risk study now referenced by the Intervenors (indeed, now characterized as "an important part of the basis for CCAM/CAM's late-filed contention") was available publicly in draft form in October 2000 (and in final in January 2001); and (2) the attacks that are the other premise for the contention were September 11, 2001. The Motion to Reopen was filed over a year after the draft NUREG and approximately 50 days after September 11, 2001. Neither Intervenors nor Dr. Thompson should have needed post-September 11 newspaper articles to spur their thinking and actions on these issues.[3]

Next, CCAM/CAM argue (at 7-9) with the NRC Staff regarding characterizations of the conclusions of NUREG-1738. While perhaps of some entertainment value, this discussion

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[3] This is particularly true given that the concern regarding a spent fuel pool drain-down is not new to either CCAM/CAM or Dr. Thompson.

never establishes any factual "error" or any real relevance to the issue now before the Licensing Board. The Intervenors seem to want to argue the technical significance of NUREG-1738. However, the discussion establishes neither: the Licensing Board's jurisdiction over the Motion to Reopen; the timeliness of the Motion to Reopen; nor the legitimacy of the NEPA argument at the core of the proposed environmental contention.

Next, CCAM/CAM argue (at 9-11) with DNC's and the NRC Staff's characterizations of the hypothetical terrorist attacks that form the basis for the proposed contention as "speculative." Clearly this also is not a "factual" error within the meaning of the Licensing Board's December 10 Memorandum and Order. Regardless of how the Intervenors wish to characterize the threat to Millstone Unit 3 spent fuel, that threat remains at this time "speculative." Moreover, the Intervenors' challenge to the Staff's characterization of the threat as "not capable of being quantified" is, at best, perplexing. Certainly the musings of Dr. Thompson as cited, regarding his "qualitative perspective" on the probability of a terrorist attack, do not make the Staff's assessment regarding the lack of a "quantitative" assessment an "error."

Regarding the alleged "errors" in the NRC Staff's characterization of Dr. Thompson's qualifications (at 11-13), DNC has no comment. DNC's analysis of the issues now before the Licensing Board, as reflected in the prior DNC Opposition, in no way turns on Dr. Thompson's qualifications or lack thereof.

Finally, CCAM/CAM take issue (at 13-14) with DNC's and the NRC Staff's arguments regarding the showing required by 10 C.F.R. § 2.714(a)(1). Certainly, these CCAM/CAM arguments again are not "factual errors" within the meaning of the Licensing Board's December 10 Memorandum and Order. They are arguments. In any event, however, the "facts" as DNC sees them remain the same:

- Consistent with 10 C.F.R. § 2.714(a)(1)(ii), other forums are available to address the generic security issues raised by CCAM/CAM and Dr. Thompson. *See* DNC Opposition at 12-13. Notwithstanding Intervenors' protestations otherwise, longstanding NRC precedent holds that rulemakings are the appropriate forum for challenging NRC rules and addressing generic unresolved issues.[4]

- With respect to CCAM/CAM's confusion (at page 14 of their Reply) regarding DNC's "nexus" argument in the DNC Opposition at 13, DNC's point is that fuel would be in wet storage at Millstone Station even if the Unit 3 License Amendment in this case had not been granted. The scope of this proceeding is the License Amendment — not all wet storage at Millstone.[5] Therefore, CCAM/CAM's attempt to broaden this hearing to all wet storage at the station (an attempt now self-proclaimed by virtue of the discussion in Intervenors' Reply) clearly works against its showing under 10 C.F.R. § 2.714(a)(1)(v).

For all of these reasons, the Intervenors have not demonstrated any "factual error" in the DNC and Staff Oppositions to the Motion to Reopen that would undermine the analysis and conclusions in those papers.

B. The Regulation and Cases Cited by the Licensing Board Preclude Admission of the Intervenors' Proposed Environmental Contention

1. *The Applicability of 10 C.F.R. § 50.13 and the Limerick Decisions*

The Licensing Board requested that CCAM/CAM first address the applicability of 10 C.F.R. § 50.13 and the *Limerick* case to the issue of the acceptability of their proposed environmental contention. The Licensing Board also cited the *Shoreham* Appeal Board decision. The Intervenors in their Reply (at 15-20) attempt vainly to argue that neither the regulation nor the precedents apply to the present circumstances. However, they are wrong.

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4 *See, e.g., Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981); *Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 345 (1999).

5 *See also* DNC Opposition at 15.

Section 50.13 specifies that power reactor licensees are not required to design their facilities to protect against the effects of attacks and destructive acts by an enemy of the United States, whether a foreign government or other person. In light of recent events, there can be no doubt that acts of terrorists fall into this provision, at least to the extent that those acts exceed the design basis security threat defined in 10 C.F.R. § 73.1(a)(1). While, as Intervenors claim, Section 50.13 may be a regulation promulgated under the Commission's health, safety, and security jurisdiction as established by the Atomic Energy Act, there is no principled or logical basis to ignore the regulation in the context of NEPA. Furthermore, the Appeal Board in *Shoreham*, ALAB-156, 6 AEC at 851, and more recently a Licensing Board in *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC ___, slip op. at 13 (December 13, 2001), have explicitly found the regulation to be applicable to assessing the scope of the NRC's NEPA responsibilities and have therefore rejected proposed environmental contentions similar to the Intervenors' proposed contention here. There is — quite simply — no NRC precedent that supports the Intervenors' contrary view.[6] Accordingly, the Intervenors' proposed contention should be rejected based on Section 50.13 and the *Shoreham* precedent alone.

The Intervenors proposed contention should also be rejected based on the slightly different analysis of the Appeal Board's decision in *Limerick* and the Third Circuit's subsequent decision in *Limerick Ecology Action* affirming the NRC's decision. As discussed in the prior DNC Opposition (at 16-17), the scope of a NEPA review of the environmental consequences of a

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6 In one recent case, *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC ___, slip op. at 50-55 (December 6, 2001), a Licensing Board accepted an environmental-terrorist contention. However, that case does not involve a Part 50 facility and therefore Section 50.13 did not apply.

proposed federal action is limited by a "rule of reason." The consequences of an act of war or a terrorist attack are not the result of "accidents" and are not the consequences of a federal licensing action. But even putting this key threshold point aside, in *Limerick Ecology Action*, 869 F.2d at 743-744, the Third Circuit specifically found, without relying on Section 50.13 of the Commission's regulations, that the NRC was not required by NEPA to entertain a NEPA contention on "sabotage risk." There the petitioner, like the Intervenor here, had offered "no meaningful method by which the NRC could either assess or predict sabotage risks." *Id.* at 743. The Third Circuit cited the NRC's conclusion that "sabotage risk analysis is beyond current probabilistic risk assessment methods." *Id.*[7] The *Limerick Ecology Action* case therefore directly addresses the acceptability of the CCAM/CAM proposed contention. As stated in the prior DNC Opposition, and consistent with *Limerick Ecology Action*, the NEPA "rule of reason" does not extend to considering the environmental consequences of acts of malice, insanity, terror, or war.

Intervenors argue (at 15-16) that Section 50.13 does not extend to NEPA (at 15-16); that *Limerick Ecology Action* is not applicable to the present Millstone case because it did not address the applicability of Section 50.13 to NEPA (at 17); and that the Appeal Board in *Shoreham* did not find that Section 50.13 applies to NEPA as a matter of law (at 18). The Intervenors, however, never manage to circumnavigate the plain language of the regulation and the clear import of the prior decisions. The Intervenors' arguments do not rebut either of the two approaches to analyzing the present issue based on the regulation and precedents as discussed above (that is, either the Section 50.13 approach or the NEPA "rule of reason" approach that

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[7] *See also Limerick*, ALAB-819, 22 NRC at 699.

does not rely on Section 50.13). With respect to Section 50.13, the attempt to limit this regulation to a non-NEPA context runs directly against the *Shoreham* and related precedents cited above (and the lack of contrary precedent). With respect to the "rule of reason" under NEPA, the argument that the applicability of Section 50.13 was not addressed in *Limerick* or *Limerick Ecology Action* is simply irrelevant given the outcome of those decisions under NEPA alone (that is without reliance on Section 50.13).

The Intervenors finally argue (at 19) that the precedents cited by the Licensing Board in its questions should, in any event, no longer apply. The argument is that times have changed since *Limerick* and *Shoreham* were decided and that acts of "malice or insanity" must now be considered. This argument, however, still runs directly against the fundamental problem acknowledged in *Limerick Ecology Action*. Such acts are not "accidents" and, as such, still defy any meaningful, quantitative risk analysis. Furthermore, in the end, in assessing this issue the Licensing Board cannot avoid considering Section 50.13 (a Commission rule) to evaluate the scope of the NEPA "rule of reason." The regulation reflects the Commission's sound, rational basis for drawing a line beyond which risks and environmental consequences need not be evaluated. Licensees and the NRC can and must credit the defense of the United States to react to threats and protect against attacks by foreign enemies. This is discussed fully in the prior DNC Opposition. *See* DNC Opposition at 19-21. Accordingly, the Motion to Reopen should be denied.

2. *The Applicability of 10 C.F.R. § 2.758*

The Licensing Board requested that CCAM/CAM also address whether, if the regulation and precedent discussed above apply, and exclude the Intervenors' proposed contention, "special circumstances" exist "such that application of 10 C.F.R. § 50.13 and its environmental application would not serve the purpose for which the rule or regulation initially

was adopted, within the meaning of 10 C.F.R. § 2.758." Memorandum and Order at 3. CCAM/CAM simply respond (at 21) by stating that the recent events described in their papers "would operate to justify the issuance of a waiver." DNC disagrees.

Generally, under 10 C.F.R. §2.758(a), generic rules of the Commission are not subject to attack in individual licensing proceedings. However, 10 C.F.R. § 2.758(b) allows a party to petition for a waiver of a rule if "special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation ... would not serve the purposes for which the rule or regulation was adopted." By its terms, this regulation requires that a petitioner for a waiver demonstrate some unique, site-specific considerations justifying the waiver. The present case does not meet that threshold of 10 C.F.R. § 2.578 for two reasons, one more procedural in character and one more substantive.

First, the Intervenors' argument in this case is purely generic. The threat of terrorist attacks on nuclear facilities and spent fuel storage locations applies to all nuclear plants and fuel storage installations. The Intervenors have cited nothing unique about Millstone Unit 3 (and more particularly, nothing unique about the new Millstone Unit 3 storage racks that supplement the prior and still-used Unit 3 racks) or this particular proceeding. A 10 C.F.R. § 2.758 petition that raises purely generic issues does not meet the Commission's waiver standard. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-86-25, 24 NRC 141, 145 (1986) (rejecting a request for a Section 2.758 waiver of a regulation based on the then-recent Chernobyl accident because the concerns were "generic in nature" and "not unique to the Seabrook proceeding"). The proper approach for an intervenor to raise a generic issue challenging a rule (that is, challenging the design-basis security threat or the

scope of a NEPA review of the consequences of terrorist attacks) is a rulemaking petition under 10 C.F.R. § 2.802.[8]

Second, beyond the procedural problem, Section 2.758 does not apply to the present case and to the proposed environmental contention here because there has been no showing that applying Section 50.13 (or the precedents previously discussed) would not serve the purpose for which the rule was adopted. Indeed, if applied, Section 50.13 would serve exactly the purpose it always has, and exactly the purpose it was intended to have, and exactly the purpose it served in the *Shoreham* case. The regulation would, for good reason and pending further generic action by the Commission, eliminate any need for the licensee to design its plant and/or spent fuel storage facilities to protect against acts of war. In addition, for the reasons discussed above, the regulation (along with NEPA) would obviate additional environmental assessments of unpredictable, malicious, and heinous acts. Particularly, application of the regulation here would preclude unnecessary consideration, in this very limited, individual adjudicatory proceeding related to a Millstone Unit 3 license amendment, of the environmental consequences of war. There is nothing "special" about the Millstone situation that justifies a waiver of the longstanding rule.

Finally, the effect of a finding by the Licensing Board that the present circumstances somehow do meet Section 2.758 would be a referral to the Commission. *See* 10

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[8] The Commission recently discussed and underscored this dichotomy between Section 2.758 (plant-specific) and Section 2.802 (generic) in the context of explaining avenues available to intervenors to raise "new and significant" environmental information argued to be related to a license renewal application. *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001) (petitioners with "new information" related to a particular plant may seek a waiver under 10 C.F.R. § 2.758; petitioners with "evidence" that a generic environmental finding is incorrect may petition for rulemaking under 10 C.F.R. § 2.802).

C.F.R. § 2.758(d). As discussed in the prior DNC Opposition (at 7-10), DNC has already requested that the Licensing Board certify the Motion to Reopen to the Commission in accordance with 10 C.F.R. § 2.718(i) (or refer any ruling on the Motion to Reopen in accordance with 10 C.F.R. § 2.730(f)). DNC continues to conclude that these regulations are the proper vehicles for the Licensing Board to obtain Commission direction, not 10 C.F.R. § 2.758.

III. CONCLUSION

For the reasons discussed above and in the prior DNC Opposition, the Intervenors' Motion to Reopen should be dismissed for lack of jurisdiction or certified to the Commission, and in any event should be denied.

Respectfully submitted,

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Dated in Washington, D.C.
this 3rd day of January 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Dominion Nuclear Connecticut's Response to Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Reply to Oppositions to Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 3rd day of January 2002. Additional e-mail service has been made this same day as shown below.

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