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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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OFFICE OF THE SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.)
(Independent Spent Fuel Storage)
Installation))

Docket No. 72-22-ISFSI

In the Matter of)
)
DUKE COGEMA STONE & WEBSTER)
(Savannah River Mixed Oxide Fuel)
Fabrication Facility))

Docket No. 070-03098

In the Matter of)
)
DOMINION NUCLEAR)
CONNECTICUT, INC.)
(Millstone Nuclear Power Station,)
Unit No. 3))

Docket No. 50-423-LA-3

In the Matter of)
)
DUKE ENERGY CORPORATION)
(McGuire Nuclear Station,)
Units 1 and 2,)
Catawba Nuclear Station,)
Units 1 and 2))

Docket Nos. 50-369-LR
50-370-LR
50-413-LR
50-414-LR

AMICUS BRIEF OF NUCLEAR ENERGY INSTITUTE IN RESPONSE TO
THE COMMISSION'S MEMORANDUM AND ORDERS DATED
FEBRUARY 6, 2002, REGARDING THE COMMISSION'S CONSIDERATION
OF POTENTIAL INTENTIONAL MALEVOLENT ACTS

In Orders issued February 6, 2002, (CLI-02-03, CLI-02-04, CLI-02-05, and CLI-02-06), the Commission requested that the parties to those proceedings¹ file briefs regarding whether the Commission's responsibility under the National Environmental Policy Act (NEPA)² requires consideration of intentional malevolent acts, such as those directed at the United States on September 11, 2001. Pursuant to the provisions of 10 C.F.R. § 2.715(d), the Nuclear Energy Institute ("NEI")³ has filed a motion for leave to submit this Amicus Brief for the Commission's consideration because of the importance of this matter to the nuclear energy industry generally.

I. NRC regulations establish the level of and standards for the physical protection of nuclear facilities

10 CFR 50.13⁴ sets the standard for the level of physical protection that is not the responsibility of the licensee of a production or utilization facility. The

¹ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-03, 55 NRC __ (slip op., Feb. 6, 2002) (accepting certification of terrorism issues raised in Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC __ (slip op., Dec. 13, 2001)); Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-04, 55 NRC __ (slip op., Feb. 6, 2002) (granting applicant's petition to review the licensing board's ruling admitting contentions on terrorism in Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 55 NRC __ (slip op., Dec. 6, 2001)); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), CLI-02-05, 55 NRC __ (slip op., Feb. 6, 2002); and Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-02-06, 55 NRC __ (slip op., Feb. 6, 2002) (accepting certification of radiological sabotage issue raised in Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), LBP-02-04, 55 NRC __ (slip op., Jan. 24, 2002)).

² *National Environmental Policy Act*, Section 102(2)(C), 42 U.S.C. § 4332.

³ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

⁴ *Attacks and destructive acts by enemies of the United States; and defense activities*, (32 Fed. Reg. 13445; September 26, 1967).

regulation provides that such licensees “. . . [are] not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by *an enemy of the United States*, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.” (emphasis added.)

The Commission first considered the need for NRC licensees to protect against hostile attacks occurred in the construction permit proceeding for the Turkey Point nuclear power plant. Florida Power & Light Co. (Turkey Point Nuclear Generating Units No. 3 and No. 4), Commission Memorandum and Order, 3 AEC 173 (1967). The Commission referred to the notice of proposed rulemaking for what became Section 50.13 and deliberately and objectively concluded that the Commission will “not requir[e] applicants for facility licenses to provide for special design features or other measures for protection against the effects of attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States.” Id.

On appeal from the Turkey Point licensing decision, the Commission explained that protection against hostile enemy acts is a responsibility of the nation’s defense establishment, that facility design features to protect against the full range of the modern arsenal of weapons are simply not practicable, and that this is a risk that is shared by the nation as a whole. Florida Power & Light Co. (Turkey Point Nuclear Generating Units No. 3 and No. 4, 4 AEC 9, 13 (1967). As

discussed below, this decision was affirmed the U.S. Court of Appeals for the D.C. Circuit in Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968).

10 CFR Part 73⁵ establishes regulatory requirements for the physical protection of plants and materials. Section 73.1 explicitly prescribes “design basis threats” for nuclear power plants that are to be used “to design safeguard systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material.” With respect to radiological sabotage, the design basis threat assumes well-trained (including military training and skills) and dedicated individuals; inside assistance by a knowledgeable individual in either a passive or active role (or both); suitable weapons, up to and including hand-held automatic weapons, equipped with silencers and having effective long-range accuracy; hand-carried equipment, including incapacitating agents and explosives; and a four-wheel drive land vehicle used for transporting personnel and their hand-carried equipment to the proximity of the plant or to serve as a vehicle bomb.

Part 73 also establishes specific security requirements for other types of NRC-licensed facilities, including independent spent fuel storage installations (ISFSIs) and fuel fabrication facilities. For example, specific requirements for ISFSI physical protection requirements are set forth in 10 CFR 73.51.

II. NEPA does not require the consideration of intentional malevolent acts of the type that occurred on September 11, 2001

Under NEPA, federal agencies must evaluate the impacts of a major Federal action significantly affecting the quality of the human environment. Section

⁵ *Physical Protection of Plants and Materials*, (38 Fed. Reg. 35430; December 28, 1973).

102(2)(c) of NEPA requires agencies to analyze significant, adverse impacts on the physical environment resulting from major federal actions as well as proximately related secondary, socio-economic impacts. As part of that evaluation, each federal agency also must determine what alternatives are reasonable and thus should be considered under NEPA.

Analysis of the issue before the Commission in these proceedings--evaluation of impacts--should be guided by established legal precedent applicable to evaluation of the alternatives to a proposed action. A "rule of reason" is to be applied in each of these cases.

The Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 551 (1978), concluded that the term "alternatives" is not self-defining. Id. Rather, the court opined "[t]o make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility." Id. So too did the Court in City of Aurora v. Hunt, 749 F.2d 1457 (10th Cir. 1984) make this point. There the Tenth Circuit ruled an agency need not analyze alternatives that are "too remote, speculative or ... impracticable or ineffective". Id. at 1467. In the context of a federal agency's assessment of potential impacts of a proposed major Federal action, the Third Circuit held that NEPA does not require the assessment of "remote and speculative impacts." Limerick Ecology Action v. NRC, 869 F.2d 719, 739 (3rd Cir. 1989). The court in Limerick held that NEPA does not require the NRC to consider sabotage risk because the assessment of such risk is subject to a

great deal of uncertainty and thus cannot be meaningfully considered in the decision-making process. Id. at 743.

In this proceeding, the issue is whether the events of September 11 inform the evaluation of direct and indirect impacts of a proposed licensing action that the NRC must consider in its NEPA evaluation. Consistent with the decisions in Vermont Yankee and Limerick Ecology Action, the controlling principle is that federal agencies are not required under NEPA to evaluate matters that do not comport with a “rule of reason” but instead require speculation that is not founded on a rational basis.

III. NRC precedent confirms the validity of an NRC licensee’s physical security responsibilities

The Commission’s ruling in the Turkey Point proceeding that facility licensees were not required to protect against hostile attacks, along with Section 50.13, was challenged on appeal. The U.S. Court of Appeals for the D.C. Circuit upheld the Commission’s ruling and the regulation. Siegel v. AEC, 400 F.2d 778 (DC Cir. 1968). The court affirmed the Commission’s conclusion that the intent of Congress was that an applicant for a license should “bear the burden of proving the security of [the licensee’s] proposed facility as against his own treachery, negligence, or incapacity. It did not expect him to demonstrate how his plant would be invulnerable to whatever destructive forces a foreign enemy might be able to direct against it in 1984.” Id. at 784. The court agreed with the principles underlying the Commission’s decision in the underlying Turkey Point proceeding:

(1) the impracticality, particularly in the case of civilian industry, of anticipating accurately the nature of enemy attack and of designing defenses against it, (2) the settled tradition of looking to the military to deal with this problem and the consequent sharing of its burdens by all citizens, and (3) the unavailability, through security classification and otherwise, of relevant information and the undesirability of ventilating what is available in public proceedings.

Id. at 782.

In 1974, a challenge was brought alleging that nuclear facilities must be protected from “sabotage by a determined group of domestic saboteurs.” In Consolidated Edison Company of New York, Inc. (Indian Point Station Unit No. 2), ALAB-202, 7 AEC 825 (1974), an Atomic Safety and Licensing Appeal Board specifically addressed the issue of “whether the applicant’s security plan must provide for forces which will be strong enough to handle an attack by an armed group which is not an enemy of the United States.” The Appeal Board held that it did not. The Board concluded that “[a]s in the case of defending against the threat of an attack by an enemy of the United States, it seems that an applicant should be entitled to rely on settled and traditional governmental assistance in handling an attack by an armed band of trained saboteurs. Without such reliance, each facility could indeed become an armed camp.” Id.

Subsequent Licensing Board decisions have continued to affirm this interpretation. In the case of Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1&2), LBP-81-42, 14 NRC 842 (1981), the Board ruled that a nuclear power plant need not be designed to protect against the “direct or indirect consequences resulting from [a hostile nation’s] use of a nuclear weapon,” even if

the detonation occurred at some other location. In 1985, in Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1&2), LBP -85-27, 22 NRC 126 (1985), the Board reached a similar conclusion, and added that “an applicant is entitled to rely on the government’s military or law enforcement agencies to handle such an attack.” The policy and logic underlying these decisions apply as well today as when the decisions were issued and apply equally to nuclear power plants and to other NRC licensed facilities, such as ISFSIs and fuel cycle facilities.

Notwithstanding the horrific events of September 11, 2001, no evidence has been introduced to suggest that the decisions discussed above are no longer applicable, or that the risk of a terrorist attack on or the sabotage of a nuclear power plant does not remain extraordinarily low. For example, worldwide experience remains that terrorists seldom attack defended targets. In fact, NUREG-0459, “Generic Adversary Characteristics Report,” has as its first conclusion that “one of the least likely methods of attack is an overt armed assault.” Further, even a suicidal attack on a nuclear reactor is unlikely to achieve a release of radioactive material that would adversely impact public health and safety.

Unfortunately, none of these hypothetical possibilities concerning the potential likelihood or nature of a terrorist attack are subject to proof in the context of an NRC licensing proceeding, with the result that almost an infinite number of possible assumptions could be made. The point remains that there is no credible way to determine the real risk of a terrorist attack to a nuclear power plant or, for that matter, to any other commercial or industrial facility in the United States. The

bald assertion that, because of what happened to our country on September 11, it must be assumed that terrorists intend to and will be able to hijack commercial airliners for the purpose of crashing them into nuclear power plants, or that terrorists are likely to attack a nuclear power plant armed with, for example, anti-tank weapons has no foundation in fact. Such an assumption involves the type of speculation that the Supreme Court in Vermont Yankee and the Third Circuit in Limerick Ecology Action concluded that the NRC is not required to engage in. Simply stated, the NRC is not legally required to consider the an accident or impact simply because it presents a “worst case.”⁶

In the aftermath of September 11, human nature may cause some to conclude that there is now a higher risk of a terrorist attack on an NRC licensed nuclear facility than before. However, the existence of that perception does require the NRC to consider differently the remote likelihood of such an attack or the speculative environmental consequences of such an attack.

Finally, the effects of such a terrorist attack would not be a consequence of an NRC licensing action – they would be the consequence of an act of war. As such, neither is the NRC required to evaluate such impacts as part of its NEPA responsibilities, nor would it be fruitful for the NRC to engage in groundless speculation about what acts of war might occur at some time in the future and what their implications might be.

⁶ Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

IV. Conclusion

Both as a matter of law and policy, the NRC should conclude that it need not and should not conduct any evaluation under NEPA that requires speculation about the risk of a terrorist attack against a nuclear facility or the likelihood of success of such an attack as a result of malevolent intentional acts executed by an "enemy of the state," as that term is defined in 10 CFR 50.13.

Respectfully submitted,

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Dated: February 27, 2002

CERTIFICATE OF SERVICE

I hereby certify that copies of the "MOTION BY THE NUCLEAR ENERGY INSTITUTE FOR LEAVE TO FILE AN AMICUS BRIEF IN RESPONSE TO THE COMMISSION'S MEMORANDUM AND ORDERS DATED FEBRUARY 6, 2002, REGARDING THE COMMISSION'S CONSIDERATION OF POTENTIAL INTENTIONAL MALEVOLENT ACTS," and "AMICUS BRIEF OF THE NUCLEAR ENERGY INSTITUTE IN RESPONSE TO THE COMMISSION'S MEMORANDUM AND ORDERS DATED FEBRUARY 6, 2002, REGARDING THE COMMISSION'S CONSIDERATION OF POTENTIAL INTENTIONAL MALEVOLENT ACTS" in the captioned proceeding have been served electronically to the parties listed this 27th day of February 2002. Pursuant to Commission's Orders governing this proceeding, paper copies will be provided by deposit in the United States mail, first class.

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