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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	February 27, 2002

STATE OF UTAH'S BRIEF IN RESPONSE TO CLI-02-03 AND IN SUPPORT OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTION UTAH RR (SUICIDE MISSION TERRORISM AND SABOTAGE)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

BACKGROUND 1

ARGUMENT 3

POINT I NEPA Requires Consideration of All Reasonably Foreseeable Environmental Impacts, Including Those That May Be Caused by Intentional Malevolent Acts 3

POINT II An Airborne Assault by Terrorists on Applicant's Project Is Reasonably Foreseeable under NEPA and must Be Addressed in the EIS 5

POINT III The Rationale Underlying 10 CFR § 50.13 Does Not Support the Board's Rejection of Utah RR as a NEPA Issue 9

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Friends of Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115 (8th Cir. 1999) 3, 4

Limerick Ecology Action, Inc. v. United States N.R.C., 869 F.2d 719 (3rd Cir. 1989) 9, 11

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 4

Siegel v. Atomic Energy Commission, 400 F.2d 778 (D. C. Cir. 1968) 11

Sierra Club v. Marsh, 976 F.2d 763 (1st Cir. 1992) 4-7

NRC CASES

Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-02-03, __ N.R.C.__ 1, 3

Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-01-37, 54 N.R.C. __ 2, 3, 9

Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 N.R.C. __, 2001 WL 1598621 (N.R.C.) 9

FEDERAL STATUTES

Atomic Energy Act (AEA) 1, 11, 13, 15

National Environmental Policy Act (NEPA) 1-5, 7, 9-11, 13-16

42 U.S.C. § 2133 11

42 U.S.C. § 4332 3

FEDERAL REGULATIONS

10 C.F.R. § 50.13 ..... 2, 9, 10, 12-15

10 C.F.R. § 51.45 ..... 2, 16

10 C.F.R. § 51.61 ..... 2, 16

10 C.F.R.§ 51.71 ..... 2, 16

10 C.F.R. § 72.34 ..... 2, 16

10 C.F.R. § 72.94 2

10 C.F.R. Part 73 14

10 C.F.R. § 73.1 12

10 C.F.R. § 73.51 2

32 Fed. Reg. 13445 (1967) 10, 13-15

56 Fed.Reg. 26782 (1991) 15

58 Fed.Reg. 58804 (1993) 5

59 Fed. Reg. 38889 (1994) 6

67 Fed. Reg. 2702 (2002) 1

OTHER

Nuclear Issues in the Post-September 11 Environment, Dr. Richard A. Meserve, November 8, 2001, No. S-01-029 8

Commission's Order Modifying Licenses (Effective Immediately), 7590-01-P (February 25, 2002) 12-13

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BACKGROUND

Following the terrorist attacks on the World Trade Center on September 11, 2001, the State of Utah requested the Atomic Safety and Licensing Board to admit its Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage) (October 10, 2001) ("Utah RR"). Because of the attacks, Utah asserted that, among other things, "a suicide mission to crash a hijacked commercial airliner loaded with jet fuel into a nuclear facility is a reasonably foreseeable event" (Utah RR at 3), and noted that such a mission had not been taken into account in the licensing proceeding either in the safety analyses that were prepared pursuant the Atomic Energy Act ("AEA") or in the Draft Environmental Impact Statement ("EIS") that was prepared pursuant to the National Environmental Policy Act ("NEPA").[1] Utah RR

[1]The draft EIS was published in final form on January 18, 2002. 67 Fed. Reg. 2702 (2002). Like the DEIS, the FEIS did not address terrorism. In light of the subsequent issuance of the FEIS without addressing the problem, the Commission can and should treat Contention Utah RR as applying to the FEIS. To incorporate the analysis requested by Utah RR, the Staff would need to prepare a supplemental EIS.

states:

> The Applicant, in its Safety Analysis Report, and the Staff, in its Safety Evaluation Report, have failed to identify and adequately evaluate design basis external man-induced events such as suicide mission terrorism and sabotage, "based on the current state of knowledge about such events" as required by 10 CFR § 72.94 (*emphasis added*). In addition, the scope of the Applicant's Environmental Report and the Staff's Draft Environmental Impact Statement is too limited to comply with the National Environmental Policy Act and 10 CFR §§ 72.34, 51.45, 51.61 and 51.71 because they do not adequately identify and evaluate any adverse environmental effects which cannot be avoided from attacks by suicide mission terrorism or sabotage.

Utah RR at 3.

On December 13, 2001, the Board denied Utah's request to admit Utah RR. LBP-01-37, 54 NRC __ (2001). The Board denied the contention as a safety issue because the "Commission seems clearly to have excluded the malevolent use of an airborne vehicle as part of any sabotage/terrorist threat that must be evaluated for these facilities" under 10 CFR § 73.51. LBP-01-37, slip op. at 12. The Board denied the contention as a NEPA issue because, in its view, even though the issue was "a close one," "'the rationale for 10 CFR § 50.13,'" which purportedly relieves license applicants of the responsibility of protecting "against the effects of .. attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States" is "'as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities.'" Id. at 12-13. The Board then referred its decision to the Commission for review, noting that "things are not – and may never be – the same in the wake of the catastrophic events of" September 11, and that "the Commission currently is considering whether, and to what degree, the agency's regulatory regime, including physical security requirements, should be changed to reflect what

transpired on that fateful day." Id. at 14.

On February 6, 2002, the Commission accepted review of the rulings in section II B. of the Board's decision, the section in which the Board applied the Commission's contention admissibility standards to Utah RR. CLI-02-03, __ NRC __ (2002). In its Memorandum and Order, the Commission requested that the parties address all issues pertaining to section II.B. that they deem relevant, but that they "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, 2002?

CLI-02-03, p. 3.[2]

ARGUMENT

I. NEPA Requires Consideration of all Reasonably Foreseeable Environmental Impacts, Including Those That May Be Caused by Intentional Malevolent Acts.

The central and most important requirement of NEPA is that federal agencies prepare "a detailed statement ... on the environmental impact" of any proposed major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C)(i). The environmental impact statement that NEPA requires is intended to provide "sufficient information to allow a decision maker to consider alternatives [to the proposed action] and make a reasoned decision after balancing the risks of harm to the environment against the benefits of the proposed action." Friends of Boundary Waters Wilderness v.

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[2]Utah has chosen not to pursue its contentions with respect to the deficiencies in the Safety Analysis Report and the Safety Evaluation Report. Accordingly, this Brief is confined to answering the NEPA-related question posed by the Commission.

Dombeck, 164 F.3d 1115, 1128 (8th Cir. 1999) (*citation omitted*). NEPA does not impose any substantive requirements on the decision maker. In other words, as long the agency has made an appropriate statement of the impacts, it is free under NEPA to choose from among the various alternatives that have been studied. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

In imposing the requirement that an EIS be prepared, NEPA does not distinguish between environmental impacts caused by intentional malevolent acts and environmental impacts caused by other types of acts. NEPA is not concerned with the motive behind the acts; it is concerned only that the environmental impacts resulting from those acts be identified and appropriately considered in the decisionmaking process.

Courts have uniformly held that only those impacts that are "reasonably foreseeable" need be discussed in the EIS. Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992). Thus, the proper inquiry under NEPA is not whether an act is intentional and malevolent, but whether it – and any resulting environmental impact – is a reasonably foreseeable consequence of the proposed action or one of its alternatives.

Whether a particular act is reasonably foreseeable for purposes of NEPA depends on the facts. Some acts, even if they are intentional and malevolent, will be eminently foreseeable, while others will be utterly impossible to predict. For example, if a perpetrator announces in advance his intention to commit a certain act and has the capacity to do so, that act is obviously reasonably foreseeable for purposes of NEPA. The fact that the act may be malevolent is irrelevant. The answer to the Commission's question is therefore simple: NEPA requires consideration of all reasonably foreseeable environmental impacts,

including those that may be caused by intentional malevolent acts.

II. An Airborne Assault By Terrorists on Applicant's Project Is Reasonably Foreseeable Under NEPA and Must Be Addressed in the EIS.

NEPA itself gives no guidance on the question of how to determine if impacts are "reasonably foreseeable." In applying NEPA, however, courts have taken a common sense approach to the question. In Sierra Club, 976 F.2d 763, the court concluded that a "reasonably foreseeable" impact is one that "is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." Sierra Club, 976 F.2d at 767. The court did not require some sophisticated analysis of the probability of the impact, but instead found that the "likelihood of occurrence" is to be "determined from the perspective of the person of ordinary prudence in the position of the decisionmaker at the time the decision is made about what to include in the EIS." Id.

The Commission itself has applied this common sense rule of "ordinary prudence" to its consideration of the threat posed by terrorists to nuclear facilities, albeit not in the context of NEPA. In 1993, the Commission proposed to "modify the design basis threat for radiological sabotage [at nuclear facilities] to include use of a land vehicle by adversaries for transporting personnel, hand-carried equipment, and/or explosives." 58 Fed. Reg. 58804 (1993). The Commission was responding to concerns raised by a vehicular "intrusion at the Three Mile Island nuclear power station" and to the car "bombing at the World Trade Center." Id. Commenters on the proposed amendments argued that the amendments were not justified because the risk of a terrorist attack could not be quantified. The Commission prudently set aside this objection and adopted the amendments. While acknowledging that

"terrorist attacks, by their very nature, may not be quantified," it nonetheless concluded that "quantifying the probability of an actual attack is [not] necessary to a judgment" that the proposed amendments would provide "a substantial increase in overall protection of the public health and safety." 59 Fed. Reg. 38889, 38890-91 (1994). Rather than rely on probabilistic risk assessments to determine what was necessary to protect the public health and safety, the Commission simply did the prudent thing in light of the new facts about terrorist threats revealed by the incident at Three Mile Island and the bombing of the World Trade Center. As the Commission explained:

> The vehicle bomb attack on the World Trade Center represented a significant change to the domestic threat environment that ... eroded [our prior] basis for concluding that vehicle bombs could be excluded from any consideration of the domestic threat environment. For the first time in the United States, a conspiracy with ties to Middle East extremists clearly demonstrated the capability and motivation to organize, plan and successfully conduct a major vehicle bomb attack. Regardless of the motivations or connections of the conspirators, it is significant that the bombing was organized within the United States and implemented with materials obtained on the open market in the United States. Accordingly, the Commission believes that the threat characterized in the final rule is appropriate.

59 Fed. Reg. at 38891.

These words, written by the Commission in 1994, are eerily prescient of the situation in which the Commission finds itself in the wake of the events of September 11. Once again, an "attack on the World Trade Center" has "eroded" the Commission's prior basis for concluding that airborne attacks "could be excluded from any consideration of the domestic threat environment." Once again, "a conspiracy with ties to Middle East extremists [has] clearly demonstrated the capability and motivation to organize, plan and successfully conduct" a deadly attack on American soil using a heretofore unimagined weapon – *i.e.*, a

fully-fueled aircraft piloted by suicide bombers. Once again, members of the nuclear industry are resisting taking the newly-revealed threat seriously in terms of their own facilities on the grounds that the risk of such an attack on their particular facility is not quantifiable. *See, e.g.* PFS's Response to State of Utah's Request for Admission of Late-filed Contention Utah RR (October 24, 2001). And once again, just as it did in 1994, the Commission should set those objections aside and take appropriate and prudent actions to protect the public health and safety.

All that Utah is requesting in its Contention Utah RR is that the Commission decide, in light of the events of September 11, that NEPA requires a discussion in the EIS of the reasonably foreseeable impacts of a September 11-like attack on Applicant's facility.[3] Requiring such a discussion, based simply on the public knowledge of the events of September 11 and the organization of and intent of the terrorist group responsible for the events, would be fully consistent with the NEPA test of "ordinary prudence" enunciated by the courts and could not possibly be second-guessed by them. Sierra Club v. Marsh, *supra.* After all, what "person of ordinary prudence" would not want to know, before deciding to license a facility that might some day house the nation's entire current inventory of spent nuclear fuel, what the reasonably foreseeable environmental impacts would be of an airborne assault on the facility? In deciding what NEPA requires in the present circumstances, the

[3]Utah is not requesting a redesign of the facility or the imposition of expensive new safeguards to guard against such an attack Those are issues that obviously require a somewhat different analysis than the one required under NEPA to determine what environmental impacts must be discussed in the EIS.

Commission should be guided by the principles set forth by its own Chairman as he considered the impact of the events of September 11 on the Commission's work:

> [A] system of multiple protections [against sabotage] has long been in place. But that is not sufficient reason for assuming that 'business as usual' is an acceptable response [by the Commission] to the events of September 11. What occurred on that date was an attack by suicidal terrorists bent on maximizing damage in the course of their own self-destruction. September 11 has served as a wake-up call to America about the threat of terrorist attacks. . . .
>
> . . . We need to approach the issues systematically and thoughtfully. At the same time, this is not the occasion for any of us to put our heads in the sand and to ignore the ruthlessness and destructiveness of our terrorist adversaries or their capacity to attack in strength. In short, we need to be willing in these uncommon times to follow the path of common sense, without alarmism on the one hand or complacency on the other. That means being realistic and prudent in assessing both the dimensions of the potential threat and the strength of our system of defenses.

Nuclear Issues in the Post-September 11 Environment, Dr. Richard A. Meserve, November 8, 2001, No. S-01-029, at 1. What better or more appropriate first step on the "path of common sense" or in service of the cause of a "realistic and prudent" assessment of "the potential threat" than to require the Staff to disclose in the EIS the reasonably foreseeable environmental impacts of a September 11-like attack on Applicant's proposed facility? Indeed, how can the Commission even begin to make a realistic and prudent assessment of the "strength of our system of defenses" against such an attack if the Staff is unwilling to examine in the EIS the effects of an airborne assault on those defenses? The Savannah River Board demonstrated the appropriate common sense response to the events of September 11 when it stated:

> Regardless of how foreseeable terrorist acts that could cause a beyond basis accident were prior to the terrorist attacks of September 11 ... it can no

> longer be argued that terrorist attacks of heretofore unimagined scope and sophistication against previously unimaginable targets are not reasonably foreseeable. Indeed, the very fact these terrorist attacks occurred demonstrates that massive and destructive terrorist acts can and do occur and closes the door, at least for the immediate future, on qualitative arguments that such terrorist attacks are always remote and speculative and not reasonably foreseeable.

Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __, 2001 WL 1598621 (N.R.C.) at 29.[4]

III. The Rationale Underlying 10 CFR § 50.13 Does Not Support the Board's Rejection of Utah RR as a NEPA Issue.

The Board rejected Utah RR as a NEPA issue based on the rationale underlying 10 CFR § 50.13, rather than on an analysis of NEPA itself and what it requires. The Board stated:

> Although this question is a close one and another Licensing Board has recently reached a somewhat different conclusion, . . . at this juncture we are persuaded, as the Appeal Board observed a number of years ago, that "the rationale for 10 CFR § 50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its safety and health responsibilities." . . . As such, we find contention Utah RR inadmissible [as a NEPA contention.]

LBP-01-37, slip op. at 13 (*citations omitted*). For the reasons given below, it is clear that the Board's uncritical reliance on the rationale underlying 10 CFR § 50.13 as a basis for refusing to admit Utah RR as a NEPA contention was misplaced. By relying on section 50.13, the Board demonstrated that it has a seriously flawed understanding of the Commission's NEPA responsibilities and, indeed, even of the evolution of the Commission's own terrorism

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[4]In their opposition to the admission of Utah RR, both the Staff and the Applicant relied on Limerick Ecology Action, Inc. v. United States NRC, 869 F.2d 719 (3rd Cir. 1989).

policies since section 50.13 was adopted.

Section 50.13 was adopted in 1967. It was not intended to resolve whether environmental impacts from terrorist attacks on nuclear facilities were reasonably foreseeable for purposes of NEPA (indeed, NEPA was not then the law), but, rather, it was intended to resolve whether licensees would be required, pursuant to the safety provisions of the AEA, to provide design features that would protect against terrorist or other enemy attacks. Section 50.13 states:

> An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is 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 . . .

10 CFR § 50.13. In adopting section 50.13, the Commission gave four reasons why it was not requiring nuclear reactors to "provide design features" to protect against attacks by enemies of the United States. 32 Fed. Reg. 13445 (1967). None of those reasons supports the Board's denial of Utah RR as a NEPA contention. Indeed, the Commission itself has at least partially repudiated by its own actions all four of the reasons it cited in support of the adoption of section 50.13. The Commission's own policies and views on how to deal with terrorist threats to nuclear facilities have evolved considerably since 1967, a fact that the Board utterly fails to acknowledge.

First, the Commission said that the "protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies having internal security functions." Id. By that it meant that in carrying out its

charge under the Atomic Energy Act to insure the safety of nuclear facilities, it was not required or expected to usurp the role of the nation's defense and internal security establishment in determining how best to defend the United States against enemy attacks. A court of appeals later agreed, concluding that "[w]e are unable to find any specific indication, within or without the corners of the [Atomic Energy Act], that the Commission was commanded to intrude the possibility of enemy action into" its responsibility to insure that "public health and safety" are not harmed by nuclear facilities. Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (D.C.Cir. 1968). The trouble with the Board's reliance on this reason for rejecting Utah RR is that Utah RR is not based on the Atomic Energy Act ("AEA"); it is based on NEPA. The AEA and NEPA are two quite different statutes that impose two sets of distinct responsibilities on the Commission. What one requires of the Commission is not necessarily what the other requires. As the court recognized in Limerick, 869 F. 2d at 729, "there is no language in NEPA itself that would permit its procedural requirements to be limited by the AEA. Moreover, there is no language in AEA that would indicate AEA precludes NEPA."

The AEA requires the Commission to impose substantive license conditions on the owners and operators of nuclear facilities to insure that the facilities do not pose a threat to public health and safety. *See, e.g.* 42 U.S.C. § 2133. NEPA, on the other hand, imposes no substantive requirements on the facilities that the Commission licenses. It simply requires the Commission to develop, consider and publicize a detailed statement of the environmental impacts of the facilities it is proposing to license. NEPA serves an informational purpose, not a regulatory one. Thus, by requiring a discussion of the

environmental impacts of an airborne terrorist attack on Applicant's proposed facility, the Commission would not be intruding on the prerogatives of the defense establishment or the agencies responsible for internal security. It would simply be fulfilling its duty under NEPA to inform itself and the public it serves of the environmental consequences of the decisions that it is making.

Moreover, it is apparent that regardless of section 50.13, the Commission now regularly makes decisions about the design features that must be provided to protect nuclear facilities from hostile enemy attacks. Since at least the mid-70s, when it first adopted the physical protection requirements that must be met at nuclear reactors to protect against "radiological sabotage," the Commission has been in the business that section 50.13 appears to cede completely to other agencies. 10 CFR § 73.1(a). This fact was graphically illustrated as recently as February 25, 2002 in the Commission's Order Modifying Licenses (Effective Immediately), 7590-01-P. In that Order the Commission stated as follows:

> On September 11, 2001, terrorists simultaneously attacked targets in New York, N.Y., and Washington, D.C., utilizing large commercial aircraft as weapons. In response to the attacks and intelligence information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees in order to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility. The Commission has also communicated with other Federal, State and local government agencies and industry representatives to discuss and evaluate the generalized high-level threat environment in order to assess the adequacy of security measures at licensed facilities. In addition, the Commission has commenced a comprehensive review of its safeguards and security programs and requirements.
>
> As a result of its initial consideration of current safeguards and security plan requirements, as well as a review of information provided by the intelligence community, the Commission has determined that certain compensatory measures should be required to be implemented by licensees as prudent,

> interim measures, to address the generalized high-level threat environment in a consistent manner throughout the nuclear reactor community. Therefore, the Commission is imposing requirements, as set forth in Attachment 2 [ ] of this Order, on all operating power reactor licensees. These interim requirements, which supplement existing regulatory requirements, will provide the Commission with reasonable assurance that the public health and safety and common defense and security continue to be adequately protected in the current generalized high-level threat environment. These requirements will remain in effect pending notification from the Commission that a significant change in the threat environment occurs, or until the Commission determines that other changes are needed following a comprehensive re-evaluation of current safeguards and security programs.

Order 7590-01-P, at 1-2. The aggressive actions, as described in the Order, are a far cry from the hands-off policy embodied in section 50.13, which the Board erroneously believes still controls the Commission in responding to the threats posed by terrorists to nuclear facilities. If the Commission itself, as is apparent, no longer strictly adheres to the policy announced in section 50.13, if it no longer considers the threat of "hostile enemy attacks" the exclusive preserve of other government agencies but is instead aggressively engaged in insuring the safety of nuclear facilities from terrorist threats, how can the Board possibly rely on that policy to avoid having the Staff consider, under NEPA, the environmental consequences of the action it is proposing to take?

Second, the Commission noted "that reactor design features to protect against the full range of the modern arsenal of weapons are simply not practicable and that the defense and internal security capabilities of this country constitute, of necessity, the basic 'safeguards' as respects possible hostile acts by an enemy of the United States." 32 Fed. Reg. 13445. This reason, regardless of its relevance in 1967 to the Commission's substantive responsibilities under the AEA, is irrelevant to a determination of the Commission's NEPA

duties. NEPA does not dictate what design features must be incorporated into nuclear facilities and is therefore not concerned about the practicability of requiring their adoption. NEPA merely requires that information about the environmental impacts of such facilities be developed and considered before a license is issued. Moreover, the Commission has obviously retreated from its 1967 opinion that all protective measures against hostile attacks "are simply not practicable" and that therefore no design features to protect against such attacks should be required. *See* 10 CFR Part 73.

Third, the Commission took the view in 1967 that the "risk of enemy attack or sabotage against such structures, like the risk of all other hostile attacks which might be directed against this country, is a risk that is shared by the nation as a whole." 32 Fed. Reg. 13445. While this may have been an acceptable rationale in 1967 under the AEA for the Commission refusing to require design features to protect against hostile attacks, it is clearly not an acceptable rationale under NEPA for the Commission failing to inform itself and the public about those risks, if they are deemed reasonably foreseeable. NEPA does not apply to the "whole nation." It applies to federal agencies like the Commission proposing to take the actions that might expose the public and the environment itself to significant environmental risks. What NEPA requires is that the risks be considered and disclosed as part of the decisionmaking process, not that they be ignored on the theory that the risks are shared by the whole nation and therefore no one must take responsibility for them..

Finally, the Commission was concerned that "assessment of whether, at some time during the life of a facility, another nation actually would use force against that particular facility, the nature of such force and whether that enemy nation would be capable of

employing the postulated force against our defense and internal security capabilities are matters which are speculative in the extreme." 32 Fed. Reg. 13445. This reason, no matter how valid it may have been in 1967, is no longer consistent with the Commission's own practices or capabilities. Since 1967, the Commission has developed a sophisticated capacity to assess the seriousness and likelihood of terrorist threats against nuclear facilities, and regularly employs that capacity in deciding what threats need to be taken seriously. 56 Fed. Reg. 26782, 26786 (1991). While some threats undoubtedly remain speculative, others have been judged credible by the Commission, and the Commission has required owners and operators of nuclear facilities to protect against them. Far from disclaiming any ability to properly assess the risks presented by terrorism, as it did in section 50.13, the Commission now properly emphasizes its expertise in doing so to reassure the public it serves. If the Commission is engaged, as it claims, in an "ongoing daily analysis" of the "threat environment" for nuclear facilities in which "any report of a threat against a domestic nuclear facility receives immediate review," then it is obviously well-equipped to assess as a matter of "ordinary prudence" whether the threat of an airborne assault is reasonably foreseeable for purposes of NEPA. Id.

In sum, the rationale underlying section 50.13 is clearly an inappropriate basis for refusing to admit Utah RR as a NEPA contention. That rationale, even if it were still defensible under the AEA, has little or no relevance to a determination of what environmental impacts are reasonably foreseeable for purposes of NEPA.

CONCLUSION

For the foregoing reasons, the Commission must reverse the decision of the Board and admit Utah RR insofar as it contends that "the scope of the Applicant's Environmental Report and the Staff's Draft [and Final] Environmental Impact Statement is too limited to comply with the National Environmental Policy Act and 10 CFR §§ 72.34, 51.45, 51.61 and 51.71 because they do not adequately identify and evaluate any adverse environmental effects which cannot be avoided from attacks by suicide mission terrorism or sabotage."

DATED this 27th day of February, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S BRIEF IN RESPONSE TO CLI-02-03 AND IN SUPPORT OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTION UTAH RR (SUICIDE MISSION TERRORISM AND SABOTAGE) was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 27th day of February, 2002:

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