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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DUKE ENERGY CORPORATION	)	Docket Nos. 50-369, 370, 413 AND 414
	)	
(McGuire Nuclear Station,	)	
Units 1 and 2, and	)	
Catawba Nuclear Station,	)	
Units 1 and 2)	)	

NRC STAFF'S BRIEF IN REPLY TO RESPONSES TO CLI-02-06

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Counsel for NRC staff

March 12, 2002

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INTRODUCTION

On February 6, 2002, the Commission issued a Memorandum and Order accepting the certification of issues from the Licensing Board relating to the risks from acts of terrorism.[1] On February 27, 2002, the Nuclear Regulatory Commission staff (Staff) filed its brief addressing issues relevant to the question certified to the Commission regarding the risks from acts of terrorism.[2] On the same date briefs were filed by the applicant, Duke Energy Corporation (Duke),[3] the Nuclear Information and Resource Service (NIRS),[4] and the Blue Ridge Environmental Defense League (BREDL).[5] In addition, the Nuclear Energy Institute (NEI) filed a motion for leave to file an *amicus*

[1] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-06, 55 NRC __ (2002), slip op. at 2.

[2] NRC Staff's Brief in Response to CLI-02-06, February 27, 2002 (Staff's Brief).

[3] Brief of Duke Energy Corporation in Response to Commission Memorandum and Order CLI-02-06, February 27, 2002.

[4] Nuclear Information and Resource Service Brief in Response to CLI-02-06 Regarding Admissibility of NEPA Issues Relating to Terrorism and Sabotage, February 27, 2002 (NIRS' Response).

[5] Blue Ridge Environmental Defense League, Inc.'s response, February 27, 2002 (BREDL's Response).

brief and *amicus* brief in this case and in the three other matters now pending before the Commission addressing similar issues related to the risks of terrorism.[6] Pursuant to the Commission's Memorandum and Order in this matter, the Staff hereby files its reply to the briefs filed by NIRS and BREDL.

BACKGROUND

The relevant background of this case has been fully described in the Staff's Brief and will not be repeated herein.

DISCUSSION

In its February 27, 2002 Brief, the Staff concluded that: 1) under NEPA, the NRC is not required to consider intentional acts of malevolence; 2) such acts are beyond the scope of 10 C.F.R. Part 54; 3) 10 C.F.R. § 50.13 precludes consideration of such acts under the Atomic Energy Act; and 4) NIRS' contention on terrorism is an impermissible attack on the Commission's regulations and should not have been admitted.

In its February 27, 2002 response, BREDL argues that under NEPA "[t]errorist activity cannot be avoided. Therefore, to comply with the law, NRC must develop a 'detailed statement' on the impacts of terrorist acts upon both operating reactors and on the transport of irradiated and fresh fuels, including plutonium fuel slated for use in McGuire and Catawba, before granting a license extension." BREDL's Response at 4. BREDL's Response, by and large, consists of generic statements and recommendations, most of which relate to transportation, rulemaking and other issues not relevant to the Commission's question or to the license renewal application under

[6] 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, February 27, 2002.

consideration in this case.[7] BREDL's Response does not raise any issues that require a reply from the Staff.

In its February 27, 2002 response, NIRS argues that the Atomic Safety and Licensing Board (Board) improperly denied admission of portions of the contention based on the incorrect conclusion that the issues raised are generic, the Commission must take new information and changed circumstances regarding the foreseeability of the threat of terrorism into account and NIRS' contention is admissible because it raises new information and changed circumstances, and requiring it to meet the criteria of 10 C.F.R. § 2.758 in order to raise new information or changed circumstances in the context of NEPA is unlawful and unduly burdensome. NIRS' Response at 2.[8] The Staff's reply to NIRS' Response is discussed below. The Staff also relies upon the arguments made in its February 27th Brief.

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[7] In addition, BREDL attached seven documents, designated Attachment A through G, to its Response. None of the attachments were introduced into the record below and, thus, represent an unauthorized attempt to expand the record. Moreover, the brief plus the attachments consist of 120 pages and therefore exceed the Commission's explicit page limits by 80 pages. Finally, none of the attachments are relevant to this case. They should, therefore, be stricken. *See Toledo Edison Co. and Cleveland Electric Illuminating Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-430, 6 NRC 457 (1977).

[8] NIRS makes several unsupported and incorrect statements in its response. For the first time, NIRS raises the concept of acts of "insanity" in conjunction with acts of terrorism. NIRS Response at 2, 17-18. NIRS' introduction of a wholly new concept at this late date should not be permitted. In addition, NIRS' argument that the "NRC will be compelled to evaluate vulnerability of the plants to sabotage and terrorism now, when design changes can be more easily made, rather than waiting for new security regulations that may take years to develop" is without basis and contrary to the factual posture of this case. *See* NIRS Response at 4. There is no showing that, if any changes were to be required by the NRC, it will be necessary to make them now rather than later. Duke is not seeking a construction permit. There are no design changes to be made or construction to be commenced in connection with the renewal application. Therefore, the claim is unfounded. Finally, NIRS states that the Licensing Board admitted a portion of the terrorism contention. NIRS Response at 10. This is incorrect. The Board merely engaged in speculation regarding what evidence may be adduced during an evidentiary hearing on the mixed oxide fuel (MOX) contention admitted in LBP-02-04 and opined that some information adduced could be relevant to a finding of special circumstances, under 10 C.F.R. § 2.758, to support a rule waiver with regard to the rejected the terrorism contention. *See* LBP-02-04, slip op. at 77; Staff Brief at 25-26. Such *dictum* does not reflect an enlargement of the scope of the admitted contention.

At the outset, it is important to reiterate that security and protection against terrorist acts and sabotage are current operating issues and, as such, are beyond the scope of license renewal. Therefore, irrespective of whether an EIS for some other action must address such acts, an EIS relating to license renewal does not have to consider them. *See* Staff's Brief at 19-21.

A. NEPA Does Not Require the Consideration of Terrorist Acts

NIRS contends that malevolent acts against the United States are "credible" and "foreseeable." NIRS Response at 3. NIRS also states that the threats are "real," that NIRS has presented information that is significant and new, and that changed circumstances exist. *Id.* at 16-17. But, although NIRS alludes to the concept of foreseeability, it fails to substantively support its argument that terrorist acts are "foreseeable" or refute the Staff's conclusion that they are not reasonably foreseeable. *See* Staff Brief at 9-19. As the Staff discussed at length in its Brief, intentional, malevolent acts such as the attacks of September 11 are not reasonably foreseeable and need not be evaluated in an EIS. *See* Staff Brief at 9-19. Such acts are not quantifiable.[9] *Id.* NIRS has produced nothing that points to any credible scientific information or analysis that would support a determination that a terrorist attack is the reasonably foreseeable consequence of the pending licensing action - renewal of the operating licenses for the McGuire and Catawba facilities. Nor has NIRS pointed to anything that would require the NRC to consider the impacts of wholly independent and intentional actions by third parties, such as terrorists.[10]

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[9] NIRS cites the language of 10 CFR § 51.71(d) for the proposition that if the "likelihood of an impact" cannot be easily quantified, "that is no excuse for failing to address it in an EIS." NIRS Brief at 13. But, there is nothing in § 51.71 that vitiates the "rule of reason" or the requirement that such events be "reasonably foreseeable" before § 51.71(d) is applicable.

[10] As the Staff pointed out in its Brief, an impact must be "proximately related" to agency action. Staff Brief at 12-13. In addition, case law indicates that the intentional acts of third parties should not be viewed as reasonably foreseeable impacts of an agencies action, where causation is tenuous *See e.g., Glass Packaging Institute v. Regan,* 737 F. 2d 1083, 1092 (D.C. Cir.), *cert. denied,* 469 U.S. 1035 (1984) (NEPA did not require the Bureau of Alcohol, Tobacco and Firearms to consider the effects of criminal tampering with liquor packaged in plastic bottles); *Sierra Club v.*

(continued...)

Finally, NIRS' argument that an EIS must be updated based upon new, significant and relevant information regarding the threat of terrorism (NIRS Response at 13-15, 16-19), fails to address the fact that such obligation is tempered by the rule of reason and the requirement that impacts be reasonably foreseeable.[11] *See* Staff Brief at 5-9.

NIRS also claims that the NRC's policy of not addressing sabotage or terrorism in EISs has been discredited by recent events, such as the September 11 attacks. NIRS' Response at 17-19. NIRS states that these events amount to "new information" regarding "changed circumstances" that must be addressed in an EIS. *Id.* One of the examples of recent events cited by NIRS is the Final Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889 (1994). It is cited for the proposition that the Commission has recognized that it must address the threat of terrorism even though a number cannot be attached to its likelihood. NIRS Response at 17. NIRS' statement is incorrect. NIRS supplies no support for its proposition but merely refers to CCAM/CAM's pleading in the *Millstone* case in which the 1994 rulemaking is discussed. In the rulemaking, the Commission *reaffirmed* its long held position that attempts to use probabilistic risk assessment techniques to quantify or estimate the risk if terrorist attacks was not valid because terrorist acts cannot be quantified:

> The . . . use of probabilistic risk assessment (PRA) as a tool for estimating risk is sound when based on results from demonstrable, repeatable events and test data

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[10](...continued)
U.S. Forest Service, 878 F.Supp 1295, 1307-08 (D. S.D. 1993), *aff'd,* 46 F. 3d 835, 839 (8th Cir. 1995) (NEPA requires consideration of impacts resulting from agency's action, rather that the impacts resulting from independent decisions of third parties, such as whether adjacent private land owners would decide to clearcut their land following a timber harvest on federal lands).

[11] NIRS' discussion of *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) misses the point. NIRS' Response at 14-15. NIRS cites no authority, nor points to any language in the case, for its conclusion that cases addressing environmental impacts are entitled to less precedential weight than cases addressing safety issues. In fact, the legal principles and regulatory interpretation in those cases are entitled to the same weight as decisions involving other matters. The Staff's Brief contains lengthy and detailed discussions regarding the application of the facts to precedent and law.

> . . . . The NRC has examined the use of PRA to predict sabotage as an initiating event and concluded that to do so would not be credible or valid because terrorist attacks, by their very nature, may not be quantified. Past attempts to apply PRA techniques to acts of sabotage have resulted in similar findings. For example, in 1978, NUREG/CR-0400, the "Risk Assessment Review Group Report to the U.S. Nuclear Regulatory Commission" stated, "it was recognized that the probability of sabotage of a nuclear power plant cannot be estimated with any confidence." . . .

59 Fed. Reg. At 38,890. The Commission also found that this conclusion was not altered by the events which preceded the rulemaking (*Id.*):

> The Commission continues to believe that arbitrary selection of numbers to "quantify" threat probability without demonstrable, actual, supporting event data would yield misleading results at best. Knowledgeable terrorism analysts recognize the danger and are unwilling to quantify the risk. . . .The NRC continues to believe that, although in many cases considerations of probabilities can provide insights into the relative risk of an event, in some cases it is not possible, with current knowledge and methods, to usefully quantify the probability of a specific vulnerability threat.

Id. That finding is consistent with the Commission's position regarding the analysis of acts of terrorism. Although the Commission in 1994 adopted vehicle protection requirements for nuclear power plants, for the reasons described fully in connection with that rulemaking, the Commission did not find a vehicle bomb attack to be reasonably foreseeable. This same conclusion applies today in that, despite the occurrence of the September 11 attacks,[12] no reason has been shown to exist that would allow the Commission to reliably predict the probability that a terrorist attack of any particular nature or magnitude will be directed against a specific facility or type of facility, or the extent to which such an attack would succeed in the face of existing plant security, safeguards, and defense establishment protection.[13]

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[12] In discussing these events, the Staff notes there is no basis to conclude that the events of September 11 are in any way comparable to those which gave rise to the 1994 rulemaking.

[13] In a later Part 73 rulemaking regarding the requirements for protection of spent nuclear fuel storage facilities pursuant to Part 73 , the Commission noted that "protection from this type of threat [the malevolent use of an airborne vehicle] has not yet been determined appropriate . . . ." Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste; Final Rule, 63 Fed. Reg. 26,955, 26,956 (May 15, 1998). *See* also *Private Fuel Storage, L.L.C.,* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC_ , slip op. at 12 (2001).

While the Commission may be able to provide a best estimate of the consequences of some postulated attack -- assuming that the attack was to occur -- no reliable basis has been shown to exist upon which the agency can predict the likelihood of its occurrence. Accordingly, no basis has been shown to exist that could support a determination that a terrorist attack of any particular type or magnitude, or having any particular consequence, is "reasonably foreseeable" at a nuclear facility. *See* Staff Brief at 4, 11.[14] The fact that the Commission may find it to be prudent to protect against a threat from a health and safety perspective, does not render the risk of that threat reasonably foreseeable for NEPA purposes.

In sum, there is nothing in the 1994 rulemaking that contradicts the Commission's policy regarding the inability to quantitatively evaluate the threat of terrorist acts. NEPA requires that a threat be reasonably foreseeable. The terrorist acts of concern here are not reasonably foreseeable. The Commission has reiterated that terrorist acts cannot be predicted and cannot be quantified. Nothing in the rulemaking cited by CCAM/CAM obviates the Commission's position or renders such acts reasonable foreseeable under NEPA.

B. The Licensing Board was Correct in Denying Admission of NIRS Generic Claims

NIRS next argues that the Licensing Board erred in excluding portions of its terrorism contention based on a finding that those portions raised generic issues. NIRS' Response at 15- 16. While acknowledging the Commission's longstanding policy not to address the risks of sabotage

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[14] The Staff does not assert that a best estimate of the consequences of a postulated attack could not be hypothesized -- based, for example, upon an analytical model of the attack. However, any such "consequence" analysis would not meaningfully contribute to the agency's consideration of its licensing action under NEPA without some rational means to estimate the probability that the postulated event will occur at a specific facility, in that a probability estimate is needed to allow an agency to determine whether that attack (or its likely consequences) are "reasonably foreseeable." This view was stated as well in the Staff's Brief of February 27. *See* Staff Brief at 4, 9-12, and 14-19. To the extent that any statement therein may not have expressed this position clearly, it should be read in this context. *See* Staff Br. at 4 ("in the absence of any means to reasonably predict or evaluate the occurrence, magnitude, or consequences of such intentional, malevolent acts . . . . ").

or terrorism in EISs, NIRS asserts that the Licensing Board had no valid basis to exclude its generic claims. *Id.* NIRS provides no support for this assertion. In order for a contention to be admissible in an adjudicatory proceeding, it must raise issues within the scope of the action, that is, issues specific to the action and the facilities under review -- here, renewal of the McGuire and Catawba operating licenses. NIRS points to nothing that would permit the Commission or other fact-finder to evaluate the risk that any particular terrorist act might be directed against these facilities. And certainly the portions of the contention that the Licensing Board designated generic, raised issues common to all reactors and the Licensing Board properly excluded them from consideration. Such generic issues are more properly the subject of rulemaking and are beyond the scope of license renewal and beyond the scope of the Commission's Order referring this matter to the Board for hearing. See Staff Brief at 19-24.

C. A Rule Waiver Under 10 C.F.R. § 2.758 Is Required in Order to Address Environmental Issues Not Designated Category 2 Issues in Appendix B to 10 C.F.R. Part 51.

NIRS argues that it should not be required to meet the criteria for rule waiver under 10 C.F.R. § 2.758 in order to raise "new" information relating to the environmental impacts of the renewal of the McGuire and Catawba operating licenses. NIRS' Response at 19-21. In its argument, NIRS claims that the new information "regarding the potential for acts of terrorism and sabotage" is significant and "could have a profound effect on the RC's evaluation of the environmental impacts of license renewal." *Id.* at 19-20. NIRS asserts that the Licensing Board misinterpreted the Commission's statements in the *Turkey Point*[15] case and provides its interpretation of that case, concluding that the Commission did not intend to require a litigant to meet the requirements of 10 C.F.R. § 2.758 in seeking admission of an environmental contention. *Id.* at 20-21. NIRS' conclusion is incorrect. It is clear that the requirements of 10 C.F.R. § 2.758

[15] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & $), CLI-01-17, 54 NRC 3 (2001).

must be met for a waiver of 10 C.F.R. § 50.13.[16] Not only is NIRS required to meet the criteria of 10 C.F.R. § 2.758 if it seeks to waive a regulation in a specific case because the regulation ostensibly would not serve the purposes for which it was enacted if applied in that particular case, but if it is claiming new information renders a rule inapplicable generically, it must petition for rulemaking pursuant to 10 C.F.R. § 2.802. The Commission has made this abundantly clear on numerous occasions. *See, e.g., Turkey Point*, CLI-01-17, 54 NRC at 10.[17] Thus, if NIRS believes that 10 C.F.R. § 50.13 should not be applied in this case, it must seek a rule waiver. If, on the other hand, NIRS believes that 10 C.F.R. § 50.13 has lost its validity as to all Part 50 licensees, then it must file a petition for rulemaking.

The Commission has also specified procedures for addressing new and significant information regarding license renewal under 10 C.F.R. Part 51:

> The Commission recognizes that even generic findings sometimes need revisiting in particular contexts. Our rules thus provide a number of opportunities for individuals to alert the Commission to new and significant information that might render a generic finding invalid, either with respect to all nuclear power plants or for one plant in particular. In the hearing process, for example, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule. *See* 10 C.F.R. § 2.758; . . . . Petitioners with evidence that a generic finding is incorrect for all plants may petition the Commission to initiate a fresh rulemaking. *See* 10 C.F.R. § 2.802. Such petitioners may also use the SEIS notice-and-comment process to ask the NRC to forgo use of the suspect generic finding and to suspend license renewal proceedings,

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[16] Contrary to NIRS' conspicuously unsupported statement that 10 C.F.R. § 50.13 is "a safety design requirement, not a regulation," (NIRS' Response at 21 n. 7) it is, in fact, a regulation.

[17] The Commission held:

> On a case-by-case basis, if warranted by "special circumstances," the Commission may waive application of one or more of our license renewal rules or otherwise make an exception for the proceeding at issue. . . . Absent such a Commission ruling under [10 CFR] section 2.758, however, "the scope of Commission review determines the scope of admissible contentions in a renewal hearing.

Turkey Point at 10.

> pending a rulemaking or updating of the GEIS *See* 61 Fed. Reg. at 28,470; GEIS at 1-10 to 1-11.

Turkey Point, CLI-01-17, 54 NRC at 12-13. It is hard to envision a more explicit statement of the requirements for seeking to address new environmental information in the context of a license renewal proceeding.

Based upon the foregoing, the Licensing Board was correct in finding that NIRS must meet the criteria for rule waiver under 10 C.F.R. § 2.758 in order to address the alleged "new and significant" information under Part 51. Since NIRS did not request a waiver and since it has not demonstrated that it would have met the criteria for waiver in any event, the Licensing Board decision denying admittance of its terrorism contention was correct.

CONCLUSION

Based upon the foregoing, the Staff submits that under NEPA the NRC is not required to consider malevolent acts such as those directed at the United States on September 11, 2001; consideration of such acts is precluded pursuant to 10 C.F.R. § 50.13; consideration of such acts is beyond the scope of license renewal; a waiver of any regulation relating to this license renewal matter is not justified; and the Licensing Board's decision denying admission of NIRS's terrorism contention should be affirmed.

Respectfully submitted,

/RA/

Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of March 2002.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN REPLY TO RESPONSES TO CLI-02-06" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; as indicated by two asterisks (**), by electronic mail, this 12TH day of March 2002.

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