

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 5093
COMMISSIONERS

DOCKETED 12/18/02

SERVED 12/18/02

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In the Matter of)
)
)
DUKE ENERGY CORP.)
)
(McGuire Nuclear Station, Units 1 & 2, and)
Catawba Nuclear Station, Units 1 & 2)
_____)

Docket Nos. 50-369-LR, 50-370-LR,
50-413-LR, & 50-414-LR
(consolidated)

CLI-02-26

MEMORANDUM AND ORDER

This order addresses 14 security- and terrorism-related contentions which the Nuclear Information and Resource Service (NIRS) submitted to the Atomic Safety and Licensing Board and which the Board subsequently certified to the Commission.¹ In submitting these contentions for litigation, NIRS (with supporting briefs from its fellow-intervenor, the Blue Ridge Environmental Defense League (BREDL)) asserts that Commission approval of the proposed license renewals would increase the risks of terrorist attacks on the McGuire and Catawba plants. Duke Energy Corporation (Duke) and the NRC staff disagree. For the legal and policy

¹ LBP-02-04, 55 NRC 49, *certification accepted*, CLI-02-06, 55 NRC 164 (2002). These contentions raise issues involving possible terrorist attacks using airplanes, boats, and truck bombs; the destruction of dams which hold the water used to cool the reactors; attacks on spent fuel or the facilities outside the containment structure; attacks using multiple teams and multiple insiders; the increased attractiveness of the plants as terrorist targets if they use mixed-oxide (MOX) fuel; the vulnerability of the electrical grid systems and station switchyards to sabotage; the impacts of fire as well as direct physical destruction on combustible fire penetration seals, and the loss of major pieces of infrastructure such as drinking water and access to emergency telephone numbers (911).

reasons set forth below, we decline to consider these contentions and we instruct the Board to do the same.

I. PROCEDURAL BACKGROUND²

This proceeding stems from Duke's application of June 13, 2001, to renew the operating licenses for four nuclear power plants for an additional 20 years of operation, effective at their licenses' respective expiration dates in the 2020s. On October 23, 2001, BREDL filed a petition asking the Commission to dismiss Duke's application or hold this adjudication in abeyance pending major anticipated changes in the plants' current licensing bases, including changes to address increased terrorism-related security threats. On December 28, 2001, we issued CLI-01-27, denying BREDL's petition on the grounds that the instant adjudication would address many contentions entirely unconnected to terrorism, would result in no immediate licensing action, and would cause BREDL no injury other than litigation costs.³

On January 24, 2002, the Board issued LBP-02-04 in which it concluded that petitioners had demonstrated standing and had offered admissible contentions concerning risks associated with the plants' anticipated use of MOX fuel, the plants' ice condensers, and the likelihood of station blackouts. However, the Board declined to rule on the admissibility of NIRS's contentions relating to terrorism risks, and instead certified those contentions to the Commission. On February 6, 2002, the Commission issued CLI-02-6, accepting certification of the terrorism contentions and setting a briefing schedule.⁴ On February 25 and March 12,

² For a more detailed procedural background, we refer the reader to our recent order rejecting petitioners' MOX fuel contentions. See CLI-02-14, 55 NRC 278 (2002).

³ 54 NRC at 389-91.

⁴ 55 NRC 164. The Commission simultaneously issued similar orders agreeing to address terrorism contentions in three other proceedings: See *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-03, 55 NRC 155 (2002), *accepting referral of LBP-01-37*, 54 NRC 476 (2001) (denying admission of terrorism contention and

(continued...)

2002, the parties filed the requested briefs. The Nuclear Energy Institute (NEI), stating that its interests were aligned with those of the applicant, also requested permission to file a brief *amicus curiae* regarding terrorism issues.⁵

II. DISCUSSION

The Commission recognizes that it cannot rule out the possibility of a terrorist threat to NRC-regulated facilities. Indeed, the NRC Staff is conducting a comprehensive review of the potential effects of terrorist attacks and of our security and safeguards rules and procedures. In addition, we continue to work with other responsible agencies to combat the terrorism threat, and we have already upgraded security requirements, with additional adjustments in the offing.⁶

As detailed below, a license renewal review is narrow in scope, confined to aging analyses of the plant's structures, systems and components. Thus, contentions related to terrorism are beyond the scope of the NRC Staff's safety review under the Atomic Energy Act and this proceeding. We also find that the NRC has no responsibility under NEPA to consider intentional malevolent acts in conjunction with Duke's license renewal applications.

⁴(...continued)

referring contention to the Commission); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), CLI-02-05, 55 NRC 161 (2002), *accepting referral of* LBP-02-05, 55 NRC 131 (2002) (denying admission of terrorism contention and referring contention to the Commission); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-04, 55 NRC 158 (2002), *granting in part petition for interlocutory review of* unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002) (denying reconsideration of admission of terrorism contention). Today, we likewise issue orders on the admissibility of the terrorism contentions in those same three proceedings.

⁵ We grant NEI's request.

⁶ See *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-___, 56 NRC ___, ___, slip op. at 2-4 (Dec. 18, 2002).

A. AEA Contentions.

The Commission's rules governing licensing proceedings require that a petitioner to intervene raise at least one admissible contention.⁷ To be admissible, a contention must be supported by "sufficient information ... to show that a genuine dispute exists with the applicant on a material issue of law or fact."⁸ For a contention to satisfy this requirement, it must fall within the scope of the proceeding, as that scope is defined by the Commission in its Referral Order and the relevant regulatory provisions (here, 10 C.F.R. §§ 51.71(d), 51.95(c), 54.4, 54.21(a) & (c), 54.29, and 54.30).⁹ This is because the referral order and relevant regulations determine what contentions are "material" to a proceeding.¹⁰

The scope of the AEA portion of a license renewal proceeding is narrow.¹¹ In our order referring this proceeding to the Licensing Board, we specifically limited the case's scope under the AEA to "a review of the plant structures and components that will require an *aging* management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited *aging* analyses."¹² This scope

⁷ 10 C.F.R. § 2.714(b)(1).

⁸ Regarding other admissibility requirements, see 10 C.F.R. § 2.714(b)(2)(i), (ii), (iii); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 1 and 3), CLI-01-24, 54 NRC 349, 361-62 (2001).

⁹ Regarding referral orders, see *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 212-13 (2001). Regarding pertinent regulations, see *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000). Regarding both, see *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

¹⁰ 10 C.F.R. § 2.714(d)(2)(ii). In addition, a factual or legal issue is material to a proceeding only if it would entitle petitioner to relief.

¹¹ Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,465, 22,481 (May 8, 1995) (1995 Final Rule).

¹² *McGuire*, CLI-01-20, 54 NRC at 212-13 (emphasis added), citing 1995 Final Rule and (continued...)

limitation derives from our rules governing license renewal applications. In developing those rules, we concluded that the AEA issues to be addressed in determining whether to renew a reactor operating license for 20 additional years should be far more limited than the AEA issues that we address when reviewing an initial operating license application. This agency's ongoing regulatory oversight programs routinely address many safety issues and will continue to address them in years 41 through 60 of a plant's life (assuming a grant of the renewal application).¹³ Therefore, consideration of those issues in a license renewal proceeding would be unnecessary and wasteful.¹⁴

The threshold AEA-related question before us is whether NIRS's terrorism contentions are sufficiently related to the effects of plant aging to fall within the scope of the AEA portion of this proceeding. They are not, and we therefore conclude that they are inadmissible in the AEA portion of the proceeding. As we stated in the Statement of Consideration for our 1995 License Renewal Final Rule:

[T]he portion of the [current licensing basis] that can be impacted by the detrimental effects of aging is limited to the design-bases aspects of the [current licensing basis]. All other aspects of the [current licensing basis], e.g., ... *physical protection (security)*..., are not subject to physical aging processes....¹⁵

and similarly in the Statement of Consideration for our earlier 1991 License Renewal Final Rule:

¹²(...continued)
10 C.F.R. §§ 54.4, 54.21(a), (c). See also *McGuire*, CLI-01-27, 54 NRC at 391 ("License renewal, by its very nature, contemplates a limited inquiry -- *i.e.*, the safety and environmental consequences of an additional 20-year operating period. License renewal focuses on *aging* issues, not on everyday operating issues") (emphasis in original; footnotes omitted), citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Station, Units 3 & 4), CLI-01-17, 54 NRC 3, 6-13 (2001).

¹³ CLI-01-17, 54 NRC at 7-9. See also 1995 Final Rule, 60 Fed. Reg. at 22,464.

¹⁴ CLI-01-17, 54 NRC at 8.

¹⁵ 1995 Final Rule, 60 Fed. Reg. at 22,475 (emphasis added).

[T]he Commission concludes that a review of the adequacy of *existing security plans* is not necessary as part of the license renewal review process.¹⁶

Terrorism contentions are, by their very nature, directly related to security and are therefore, under our rules, unrelated to “the detrimental effects of aging.” Consequently, they are beyond the scope of, not “material” to, and inadmissible in, a license renewal proceeding.

B. NEPA Contentions.

For the reasons we set out today in *Private Fuel Storage*, we find that NEPA imposes no legal duty on the NRC to consider intentional malevolent acts, such as the recent attacks on New York City and the Pentagon, on a case-by-case basis in conjunction with commercial power reactor license renewal applications.¹⁷ The “environmental” effect caused by third-party miscreants “is ... simply too far removed from the natural or expected consequences of agency action to require a study under NEPA”¹⁸

An environmental impact statement is not the appropriate format in which to address the challenges of terrorism. We reached this conclusion for a number of interlocking reasons:

(1) the likelihood and nature of postulated terrorist attack are speculative and not “proximately caused” by an NRC licensing decision;¹⁹ (2) the risk of a terrorist attack cannot be meaningfully determined;²⁰ (3) NEPA does not require a “worst case” analysis and such an analysis would

¹⁶ Final Rule, “Nuclear Power Plant License Renewal,” 56 Fed. Reg. 64,943, 64,967 (Dec. 13, 1991) (1991 Final Rule) (emphasis added).

¹⁷ See *Private Fuel Storage*, CLI-02-___, 56 NRC ___; accord *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-___, 56 NRC ___ (Dec. 18, 2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-___, 56 NRC ___ (Dec. 18, 2002).

¹⁸ See *Private Fuel Storage*, CLI-02-___, 56 NRC at ___, slip op. at 11.

¹⁹ See *id.* at ___, slip op. at 7-8, 9-12.

²⁰ See *id.* at slip op. at 13-14.

not enhance the agency's decision-making process;²¹ and (4) a terrorism review is incompatible with the public character of the NEPA process.²² Particularly in the case of a license renewal application, where reactor operation will continue for many years regardless of the Commission's ultimate decision, it is sensible not to devote resources to the likely impact of terrorism during the license renewal period, but instead to concentrate on how to prevent a terrorist attack in the near term at the already licensed facilities.²³ As there appears to be little practical benefit in conducting a license renewal terrorism review, the Commission has no duty under NEPA to do so.²⁴

Moreover, our decision today not to use NEPA as a vehicle for a terrorism review hardly means that we are ignoring the issue. As detailed in today's *Private Fuel Storage* decision, we are closely examining our current security and protective framework and already have ordered interim improvements at licensed nuclear facilities, including reactors.²⁵ We expect further improvements as our internal comprehensive review moves forward.

²¹ See *id.* at ___, slip op. at 7-8, 15-18.

²² See *id.* at ___, slip op. at 18-22.

²³ Cf. *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plants, Units 1 and 2), CLI-02-16, 55 NRC 317, 343 (2002) (terrorist attacks are neither caused by nor result from the proposed license transfers).

²⁴ Because the McGuire and Catawba plants are already licensed to operate until the 2020s, an immediate site-specific analysis of the potential for terrorist attacks would not alleviate the intervenor's articulated concerns.

Even if we were required by law to consider terrorism under NEPA, the NRC has already issued a Generic Environmental Impact Statement ("GEIS") that considers sabotage in connection with license renewal. See NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (May 1996) ("GEIS"). The GEIS concluded that, if such an event were to occur, the resultant core damage and radiological releases would be no worse than those expected from internally initiated events. See *id.*, Vol. 1 at p. 5-18.

²⁵ See *Private Fuel Storage*, CLI-02-___, 56 NRC at ___, slip op. at 2-4.

III. CONCLUSION

We decline in this proceeding to consider NIRS's AEA- and NEPA-related contentions regarding terrorist threats to the McGuire and Catawba plants, and we therefore direct the Board to reject those contentions.

IT IS SO ORDERED.

For the Commission²⁶

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of December, 2002.

²⁶ Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-26) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

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Docket Nos. 369/370/413/414-LR
COMMISSION MEMORANDUM AND ORDER
(CLI-02-26)

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[Original signed by Evangeline S. Ngbea]

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Dated at Rockville, Maryland,
this 18th day of December 2002