

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

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SERVED 02/06/02

Richard A. Meserve, Chairman  
Greta Joy Dicus  
Nils J. Diaz  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield

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In the Matter of )  
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PRIVATE FUEL STORAGE L.L.C. )  
(Independent Spent Fuel Storage Installation) )  
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Docket No. 72-22-ISFSI

CLI-02-03

MEMORANDUM AND ORDER

In a December 13, 2001 order, the Atomic Safety and Licensing Board referred to the Commission its decision denying admission of a late-filed contention relating to the threat of a terrorist attack on Private Fuel Storage, L.L.C.'s proposed independent spent fuel storage installation (ISFSI).<sup>(1)</sup> Consistent with our policy to accept Board certifications and referrals where "early resolution" of issues is desirable,<sup>(2)</sup> we grant review and set the case for briefing.

The applicant, Private Fuel Storage, L.L.C., seeks a license to operate an ISFSI on the Skull Valley Goshute Indian Reservation in Utah. In response to the terrorist attacks of September 11, 2001, intervenor Utah asked the Board to admit its late-filed contention Utah RR, Suicide Mission Terrorism and Sabotage. Utah contends that the events of September 11 show that a terrorist attack is both more likely and potentially more dangerous than previously contemplated, and that PFS has not shown that its physical protection plan is capable of coping with this credible threat. In addition, Utah argues that PFS's Environmental Report and the NRC staff's Draft Environmental Impact Statement<sup>(3)</sup> fail to comply with the National Environmental Policy Act (NEPA) because these studies do not evaluate possible environmental effects of such an attack. The Board rejected admission of this proposed contention as a safety issue and as a NEPA issue.<sup>(4)</sup>

In rejecting the contention as a safety issue, the Board relied on the statement of consideration for 10 C.F.R. § 73.51. The Board stated that the "Commission seems clearly to have excluded malevolent use of an airborne vehicle as part of any sabotage/terrorist threat that must be evaluated for these facilities [SNF and high-level radioactive waste storage sites]."<sup>(5)</sup> Thus, the Board rejected the contention as an impermissible challenge to Commission regulations that delineate the physical protection requirements at such facilities. The Board found this "an appropriate result under the agency's current regulatory regime" of excluding acts by an enemy or enemies of the United States, citing 10 C.F.R. § 50.13 and *Florida Power and Light Co.*<sup>(6)</sup>

The Board also rejected admission of the contention as a NEPA issue, stating that, "at this juncture we [the Board members] are persuaded, as the Appeal Board observed a number of years ago, that 'the rationale for 10 C.F.R. §50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities.'"<sup>(7)</sup> But, in view of the Commission's ongoing "top-to-bottom" review of terrorism-related policies and rules, the Board found its rulings "particularly suited for early review by the Commission," and hence referred them to us.<sup>(8)</sup>

We accept the referral of the matters discussed above.<sup>(9)</sup> The parties to this proceeding shall file briefs that address all issues that the parties determine are relevant, and shall 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, 2001? The parties should cite all relevant cases, legislative history or regulatory analysis.

Pursuant to 10 CFR §2.786(d), the Commission sets the following briefing schedule:

- The parties shall file their briefs on or before February 27, 2002. Each brief shall be no longer than 40 pages.
- Reply briefs should be submitted no later than March 12, 2002 and shall not exceed 20 pages in length.
- The parties shall submit briefs electronically (or by other means to ensure that receipt by the Secretary of the Commission by the due date), with paper copies to follow.

Briefs in excess of 10 pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, etc.

Finally, the Commission is aware that its decisions on the matters raised in the Private Fuels Storage case may decide similar issues raised in other proceedings.<sup>(10)</sup> In separate orders issued today, we accept review of those rulings and grant interlocutory review of the Duke Cogema Board's decision relating to NEPA. The Commission is taking this extraordinary step to ensure that all interested parties are afforded an opportunity to provide their views to the Commission before the Commission finally decides these important and substantial matters.

IT IS SO ORDERED.

For the Commission

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, MD  
This 6<sup>th</sup> day of February, 2002

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1. LBP-01-37, 54 NRC \_\_\_ (2001).
  2. See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998); see also *Private Fuel Storage*, CLI-00-03, 52 NRC 23, 28-29 (2000).
  3. The Final Environmental Impact Statement, dated December 2001, was not yet available at the time Utah submitted its contention and the Board made its ruling.
  4. Slip op. at 9-13.
  5. *Id.* at 11.
  6. (Turkey Point Nuclear Generating Units 3 and 4), 4 AEC 9, 13 (1967), *aff'd sub nom, Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968).
  7. *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973); see also *Limerick Ecology Action v. NRC*, 869 F.2d 719, 743-44 (3rd Cir. 1989) (sabotage risk need not be considered in environmental impact statement[s] because uncertainty in current risk assessment techniques would not allow meaningful risk assessment). Slip op. at 13.
  8. See 10 C.F.R. §2.730(f).
  9. Specifically, we accept review of the rulings in section II.B of the Board's December 13, 2001 Order. We decline referral of the rulings in section II.A of that Order (section 2.714(a)(1) late filing factors.)
  10. As the Board in this proceeding noted, in the context of the agency's NEPA responsibilities, another Licensing Board recently reached a somewhat different conclusion, see *Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC \_\_\_, \_\_\_ (slip op. at 50-55) (Dec. 6, 2001); *reconsideration denied* Memorandum and Order (Ruling on Motion to Reconsider)(Jan. 16, 2002). Subsequently, a party to that proceeding petitioned for interlocutory Commission review of that Board's decision. Several other Boards have asked the Commission's guidance on similar issues. See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2), LBP-02-04, 55 NRC \_\_\_ (Jan. 24, 2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3), LBP-02-05, 55 NRC \_\_\_ (Jan. 24, 2002).