

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

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

In the Matter of)
DUKE COGEMA STONE & WEBSTER) Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication)
Facility)

)

CLI-02-04

MEMORANDUM AND ORDER

The Licensing Board in this construction authorization proceeding for a mixed oxide ("MOX") fuel fabrication facility recently denied Duke Cogema Stone & Webster's ("DCS's") request to reconsider its decision admitting four contentions. See LBP-01-35, 54 NRC ___ (Dec. 6, 2001); unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002). DCS asserts that the four contentions raise novel legal and policy issues which require the Commission's early review. Accordingly, DCS has petitioned for interlocutory review on the ground that the Commission should exercise its inherent supervisory authority to review the matters.

Today, we consider only the Board's ruling accepting a contention based on the terrorist acts of September 11, 2001.⁽¹⁾ Intervenor, Georgians Against Nuclear Energy ("GANB"), asserts that under the National Environmental Policy Act DCS and the NRC must evaluate the impacts of terrorist acts against the proposed MOX fuel facility. The Board found GANE's contention admissible because the September 11 terrorist attacks "close[] the door, at least for the immediate future, on qualitative arguments that such terrorist attacks are always remote and speculative and not reasonably foreseeable." LBP -01-35, slip op. at 53. The Board rejected arguments that a Commission rule barred GANE's contention (*id.* at 52)⁽²⁾ and that terrorist-caused accidents require no fresh NEPA analysis because their effects would be "similar to other types of accidents" already addressed (*id.* at 54). According to DCS's petition for interlocutory Commission review, the Board's admission of GANE's terrorism contention departs from both NRC and court cases and is inconsistent with three recent decisions by licensing boards in other proceedings.

In view of our decisions today to consider terrorism issues in three other cases,⁽³⁾

the Commission grants DCS's petition for review of the Board's terrorism ruling and directs the Board to proceed no further on GANE's terrorism contention, pending our merits decision on DCS's petition for review.⁽⁴⁾

The parties to this proceeding shall file briefs that address all issues that the parties determine are relevant to the matters discussed above, and in addition 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.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD

This 6th day of February, 2002

1. The other contentions deal with the controlled area boundary and with material control and accounting and physical security as principal systems.
2. The Commission rule at issue was 10 C.F.R. § 50.13, which states that NRC reactor licensees are "not required to provide for design features or other measures for the specific purpose of protection against the effects of ... attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States." The Board found this rule inapplicable to a MOX facility, which is licensed under [Part 70](#) of our rules. According to the Board, "to apply the rationale for 10 C.F.R. § 50.13 to the agency's responsibilities here requires a leap that is tantamount to writing a comparable regulation for [Part 70](#) facilities and then applying the rationale for that new regulation to the agency's NEPA responsibilities for the [MOX facility]." *Id. at 52.*
3. See *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC __ (Dec. 13, 2001) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-__, 55 NRC __ (Feb. 6, 2002); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), LBP-02-05, 55 NRC __ (Jan. 24, 2002) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-__, 55 NRC __ (Feb. 6, 2002); and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-04, 55 NRC __ (Jan. 24, 2002) (certifying terrorism issue to the Commission), *certification accepted*, CLI-02-__, 55 NRC __ (Feb. 6, 2002).
4. The Commission at this time makes no decision regarding the remainder of DCS's petition for interlocutory review. We will address DCS's other claims in a subsequent order.