

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PACIFIC GAS & ELECTRIC CO.)	Docket No. 72-26-ISFSI
)	
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation))	ASLBP No. 02-801-01-ISFSI

NRC STAFF'S RESPONSE TO MOTIONS
FOR STAY OF THE DIABLO CANYON ISFSI PROCEEDING

INTRODUCTION

The Nuclear Regulatory Commission staff ("Staff") hereby responds to the June 11, June 12, and June 25, 2002, motions for stay of the Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI) proceeding filed by (1) Lorraine Kitman, (2) Klaus Schumann and Mary Jane Adams, and (3) San Luis Obispo Mothers for Peace and other petitioners ("SLOMFP")¹, respectively.² As more fully set forth below, the Staff finds no basis for staying the Diablo Canyon ISFSI proceeding and, thus, respectfully asserts that such motions should be denied.

¹ In the Request for Hearing and Petition to Intervene, SLOMFP was joined by Cambria Legal Defense Fund; Central Coast Peace and Environmental Council; Environmental Center of San Luis Obispo; Nuclear Age Peace Foundation; San Luis Obispo Chapter of Grandmothers for Peace International; San Luis Obispo Cancer Action Now; Santa Margarita Area Residents Together; Santa Lucia Chapter of the Sierra Club; and Ventura County Chapter of the Surfrider Foundation.

² See Correspondence from Lorraine Kitman to Chairman Meserve requesting a stay of the proceedings, dated June 11, 2002 ("Kitman Motion"); Correspondence from Klaus Schumann and Mary Jane Adams to Chairman Meserve, dated June 12, 2002 ("Schumann and Adams Motion"); and Petitioners' Motion for Stay of Licensing Proceeding, filed June 25, 2002, on behalf of SLOMFP and other petitioners ("SLOMFP Motion").

BACKGROUND

On December 21, 2001, Pacific Gas and Electric (“PG&E”) applied for a license, pursuant to 10 C.F.R. Part 72, to possess spent fuel and other radioactive materials associated with spent fuel in an ISFSI, to be constructed and operated at the applicant’s Diablo Canyon Power Plant (“DCPP”) site. On April 22, 2002, the Commission published in the *Federal Register* a “Notice of Docketing; Notice of Proposed Action, and Notice of Opportunity for a Hearing for a Materials License for the Diablo Canyon Independent Spent Fuel Storage Installation.” 67 Fed. Reg. 19,600 (April 22, 2002). In response to the Notice, requests for hearing and petitions for leave to intervene were filed by Ms. Kitman on May 10, 2002, and SLOMFP and Peg Pinard and the Avila Valley Advisory Council on May 22, 2002.³ The Applicant and Staff filed timely responses to the requests for hearing and petitions for leave to intervene. Subsequently, on June 11, 12, and 25, 2002, motions for stay of this proceeding were filed by Ms. Kitman, Mr. Schumann and Ms. Adams, and SLOMFP, respectively (hereinafter collectively referred to as “Movants”).⁴

³ On May 22, 2002, petitioners SLOMFP, *et al.*, and Peg Pinard and Avila Valley Advisory Council (AVAC) filed separate petitions to intervene. Subsequently, on June 25, 2002, SLOMFP filed a Motion for stay that included a notice of appearance for Diane Curran to represent Ms. Pinard and AVAC, in addition to SLOMFP. Consistent with 10 C.F.R. § 2.713, additional information verifying Ms. Pinard’s and AVAC’s authorization should be filed (*e.g.*, affidavits from Ms. Pinard and AVAC authorizing Ms. Curran to act on their behalf). The Staff does not doubt the veracity of Ms. Curran’s statement of representation, but in this situation, where parties previously filed separate motions for intervention, verifications from Ms. Pinard and AVAC are warranted. See *e.g.*, *Houston Lighting and Power Co.* (South Texas Project, Unites 1 and 2) LBP-79-10, 9 NRC 439, 444 (1979).

⁴ Because Mr. Schumann and Ms. Adams have not previously requested intervenor status in this proceeding, and because their current Motion, in the form of correspondence, does not address the five factors for late-filed intervention petitions, the Staff submits that their Motion cannot properly be considered in this proceeding. See *Texas Utilities Electric Company, et al.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55 (1993). The Staff notes, however, that because the arguments are similar, if not identical, to those raised in the Motion filed by Ms. Kitman, who previously filed a request for hearing and petition for leave to intervene in the present proceeding, Mr. Schumann’s and Ms. Adams’ arguments have been effectively addressed nonetheless.

DISCUSSION

The Movants in this matter have all offered similar reasons for their stay motions, namely that ongoing parallel proceedings involving PG&E, such as those before the United States Bankruptcy Court and the license transfer proceeding pending before the Commission, could potentially result in a different entity being the licensee for DCPD and the applicant for the ISFSI. SLOMFP cites PG&E's involvement in a "federal bankruptcy proceeding and related litigation in the state courts of California" and continues by claiming that, because of the ongoing bankruptcy proceeding, "fundamental factual issues bearing on PG&E's compliance with NRC safety and environmental licensing requirements have been thrown into doubt... ." SLOMFP Motion, pp. 1-2. Ms. Kitman, Mr. Schumann, and Ms. Adams assert that the Diablo ISFSI proceeding should be stayed because, until the resolution of PG&E's bankruptcy and the finalization of a reorganization plan, California would not know such things as the state agency responsible for the oversight of the decommissioning funds; whether funds will be adequate to assure safe and secure storage and transport of the material; or which company will have ownership of Diablo Canyon.

The Staff respectfully submits that Movants are incorrect in their assertions that the answers to these questions require a stay of the current proceeding. To the contrary, the Staff's review of the ISFSI license application is focused on the protection of the public health and safety from licensed radioactive material and is performed against 10 C.F.R. Part 72 of the Commission's regulations. None of the other agencies or courts mentioned in the Motions have this regulatory focus.

The Staff is presently reviewing the application based upon the information provided by PG&E in the license application. Should any of the information in PG&E's application change as a result of the parallel proceedings with respect to matters material to the NRC review, the continuing review will be based upon the new information. If a material change in circumstances should occur after a license were granted for the ISFSI, that information would have to be reviewed

by the NRC and might provide a basis for new proceedings before the NRC to determine whether approval should be granted. Although Movants believe that the possibility of some future changes to PG&E provides a current basis for staying this proceeding, the Staff does not agree. There is no basis for an informed position at this time as to the capabilities of any new licensee of DCPD and applicant for the ISFSI to meet NRC requirements. Any such positions stated in the Motions are purely speculation.

This scenario is not uncommon in NRC licensing proceedings where changes occurring outside of the NRC licensing process might result in changes to the licensee or applicant. Regardless of any of these changes, it will be the NRC's responsibility to ensure that the new licensee or applicant meets all of the Commission's requirements. As stated in the *Federal Register* notice regarding this application:

“[p]rior to the issuance of the requested license, the Commission will have made the findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations. The issuance of the materials license will not be approved until the NRC has reviewed the application and has concluded that approval of the license will not be inimical to the common defense and security and will not constitute an unreasonable risk to the health and safety of the public.”

67 Fed. Reg. 19600-19601.

In fact, the Commission has recently spoken on the issue of parallel proceedings, and the lack of necessity for stays in such proceedings, in the ongoing PG&E license transfer proceeding. This transfer proceeding, wherein PG&E seeks to transfer its licenses for the DCPD to reflect its Plan of Reorganization filed under Chapter 11 of the United States Bankruptcy Code,⁵ is one of the parallel proceedings mentioned by Movants in support of their motions for stay. Regarding this transfer proceeding, the Commission issued a Memorandum and Order on June 25, 2002, and therein refused to hold the transfer proceeding in abeyance when faced with the same sort of

⁵ See PG&E Application for Transfer of License, filed November 30, 2001.

arguments which Movants currently raise - that parallel proceedings are ongoing in the bankruptcy court. *Pacific Gas and Electric Co.*, (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC ____, (June 25, 2002).

The Commission's logic in denying the stay in PG&E's transfer proceeding equally applies in this instance where Movants seek to stay the ISFSI license proceeding because of ongoing parallel actions. In noting its usual refusal to suspend proceedings merely because of related proceedings at the NRC, in state court, or in state or other federal agencies,⁶ the Commission stated that, "[i]t would be productive of little more than untoward delay were each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval." *Citing Nine Mile Point*, CLI-99-30, 50 NRC 333 at 344 (*quoting Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, ALAB-171, 7 AEC 37, 39 (1974)). The Commission continued by noting that, because PG&E's bankruptcy proceeding was moving forward in due course, it saw no reason to deviate from its usual practice of completing license transfer reviews promptly despite the pendency of related matters elsewhere. *Pacific Gas and Electric Co.*, CLI-02-16, 55 NRC ____, slip op. at 5.

The same line of reasoning is equally persuasive here and, in fact, the Movants have offered no reason, other than the aforementioned uncertainties, for holding the current ISFSI license proceeding in abeyance. None of the issues raised by Movants provides an adequate basis for a stay. Regardless of (1) who the holder of the NRC ISFSI license may one day be or (2) which agencies eventually have rate and service regulatory jurisdiction over the licensee (or the licensee

⁶ The Commission cited *Indian Point 3*, CLI-00-22, 52 NRC 266 at 288-90 (denying motions for stay pending decisions by New York courts, Internal Revenue Service, FERC, and New York State Department of Environmental Conservation); *Indian Point 2*, CLI-01-8, 53 NRC 225, 228-30 (2001) (denying request to suspend proceeding until completion of *Indian Point 3* license transfer and decision on 10 C.F.R. § 2.206 enforcement petition); and *Nine Mile Point*, CLI-99-30, 50 NRC 333 at 343-44 (granting short suspension pending decisions on rights of first refusal, but denying further suspension until conclusion of New York Public Service Commission proceeding).

is “deregulated”), the holder of the NRC ISFSI license will be required to meet all applicable NRC requirements.

Turning to what appear to be the Movants principal points, the current license application presented by PG&E includes, as required by 10 C.F.R. §§ 72.22(e) and 72.30, data regarding the financial arrangements in support of the application. The parallel proceedings in no way hinder the Staff from conducting its usual review on the information provided in the license application and reaching a determination on whether to grant the license requested.

CONCLUSION

For the reasons set forth above, the Staff submits that the Motions for Stay of the Diablo ISFSI proceeding should be denied.

Respectfully submitted,

/RA/

Stephen H. Lewis
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of July, 2002

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Spent Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO MOTIONS FOR STAY OF THE DIABLO CANYON ISFSI PROCEEDING" have been served upon the following persons by United States mail, first class, or through the Nuclear Regulatory Commission's internal mail distribution as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 2nd day of July, 2002.

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