

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 ISFSI))	ASLBP No. 02-801-01-ISFSI
)	

NRC STAFF'S RESPONSE TO CONTENTIONS
 SUBMITTED BY SAN LUIS OBISPO MOTHERS FOR PEACE, *et al.*,
PEG PINARD AND AVILA VALLEY ADVISORY COUNCIL

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the Contentions submitted by San Luis Obispo Mothers for Peace ("SLOMFP"), Avila Valley Advisory Council ("AVAC"), Peg Pinard, Cambria Legal Defense Fund, Central Coast Peace and Environmental Council, Environmental Center of San Luis Obispo, Nuclear Age 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 (hereinafter collectively referred to as "Petitioners") on July 19, 2002. As more fully set forth below, the Staff submits that the Petitioners' Contentions TC2 and TC5, as labeled by Petitioners, are admissible in this proceeding. The Staff concludes that the rest of Petitioners' contentions should be rejected by the Board.

BACKGROUND

On December 21, 2001, Pacific Gas and Electric ("PG&E" or "applicant") 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 independent spent fuel storage installation ("ISFSI"), to be

constructed and operated at the applicant's Diablo Canyon Power Plant ("DCPP") site. The Commission published 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). The Notice stated that the license, if granted, would authorize PG&E to store spent fuel in a dry cask storage system at the applicant's DCPP site, for a license term of 20 years. In response to the Notice, requests for hearing and petitions to intervene were filed on May 8, 2002 by Lorraine Kitman; on May 22, 2002 and July 8, 2002 by Peg Pinard and Avila Valley Advisory Council; and on May 22, 2002 by SLOMFP as lead intervenor for Cambria Legal Defense Fund, Central Coast Peace and Environmental Council, Environmental Center of San Luis Obispo, Nuclear Age Peace Foundation, San Luis Obispo Cancer Action Now, Santa Margarita Area Residents Together, Santa Lucia Chapter of the Sierra Club and the Ventura County Chapter of the Surfrider Foundation, ("SLOMFP, et al."). Following Staff's and PG&E's responses to the petitions, and in accordance with the Atomic Safety and Licensing Board's ("Board") Initial Prehearing Conference Order of June 6, 2002 ("June 6 Order"), the Petitioners, acting with SLOMFP as their lead, submitted contentions on July 19, 2002, challenging the adequacy of PG&E's application for a license for an ISFSI at the DCPP. Staff, in accordance with the Board's June 6 Order, now submits its response to Petitioners' contentions.

DISCUSSION

I. Contention Requirements in NRC Proceedings

Pursuant to 10 C.F.R. § 2.714, a contention must specify the particular issue of law or fact which the hearing petitioner seeks to litigate, and must contain: (1) "a brief explanation of the bases of the contention"; (2) "a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing"; (3) references to specific documents or other sources of information within the petitioner's knowledge "on which the petitioner intends to rely" in establishing the contention's validity; and (4)

sufficient information to show that a genuine dispute exists between the petitioner and the NRC applicant “on a material issue of law or fact.”¹ 10 C.F.R. § 2.714(b)(2)(i-iii). Regarding this fourth component of the contention rule, the regulation further specifies that the petitioner must either (a) reference “the specific portions of the application” that the petitioner disputes “and the supporting reasons for each dispute”; or (b) identify each instance where the petitioner “believes that the application fails to contain” relevant information. 10 C.F.R. § 2.714(b)(2)(iii).² If the contention pertains to environmental issues, the rule states that the petitioner is to reference “the applicant’s environmental report.” *Id.* Additionally, the contention must be one which, if proven, would entitle the petitioner to relief. See 10 C.F.R. § 2.714(d)(2)(ii). These requirements are not intended to force a hearing petitioner to prove its case at the contention stage of a proceeding.³ But while a proffered contention may be viewed by a licensing board in a light favorable to the

¹ In its 1989 statement of considerations (SOC) discussing changes made to the contention requirements of 10 C.F.R. § 2.714, the Commission stated that disputes under the rule should be considered “material” if their resolution would “make a difference in the outcome of the licensing proceeding.” 54 Fed. Reg. 33,168, at 33,172, col.2 (August 11, 1989) (rulemaking amending 10 C.F.R. § 2.714), *aff’d. sub nom. Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990). Hearing petitioners must make at least “a minimal showing that material facts are in dispute,” and that further inquiry is thus appropriate. 54 Fed. Reg., *supra*, at 33,171, col. 3. See also *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995).

² The Commission explained in its SOC adopting these provisions that hearing petitioners would thereby be required “to read the pertinent portions” of the application being reviewed by the Staff. 54 Fed. Reg., *supra*, at 33,170, col.2. The Commission also stated there that the “factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form” (*id.*, at 33,171, col.3), and that the contention rule does not shift the ultimate burden of proof on whether a license should be issued from an NRC applicant to a hearing petitioner. *Id.*, at 33,171, col.1.

³ See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996).

hearing petitioner, if any one of the above requirements is not met the contention must be rejected.⁴

As noted above, the contention requirements at issue were established in 1989, when 10 C.F.R. § 2.714 was amended. The revised contention rule raised “the threshold bar for an admissible contention” in order to “ensure that only intervenors with genuine and particularized concerns participate in NRC hearings,” and to help prevent “serious hearing delays caused in the past by poorly defined or supported contentions.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). To this end, the Commission has stated that the mere referencing of documents “does not provide an adequate basis for a contention.” *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998) (citation omitted).

The contention rule serves to put the other parties on notice as to the specific grievances sought to be litigated, and helps ensure that the hearings process will not continue in the absence of a petitioner “able to proffer at least some minimal factual and legal foundation” in support of the contentions asserted. *Oconee, supra*, CLI-99-11, 49 NRC at 334. The Commission noted that in the past, some licensing boards had admitted and litigated contentions “that appeared to be based on little more than speculation,” and stated that the revised rule was intended to prevent a contention from being admitted where a petitioner “has no facts to support its position and instead contemplates using discovery or cross-examination as a fishing expedition” to produce supporting facts. *Id.*, at 334-35.⁵ The toughened contention rule is designed to focus the hearing process “on

⁴ See *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

⁵ Similarly, the filing of vague contentions, to be fleshed out later through discovery against the applicant or Staff, is not permitted under the contention rule. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 427 (1990). Hearing petitioners thus do not have the right to take a wait-and-see approach as to what issues the Staff
(continued...)

real disputes susceptible of resolution in an adjudication,” and is meant to preclude consideration of disputes over NRC regulations or policies. *Id.*, at 334.

The Commission has also rejected attempts to base environmental and safety contentions solely on Staff requests for additional information (RAIs) -- rather than on the technical details in the applications themselves -- stating that under 10 C.F.R. § 2.714(b)(2), the fact that the Staff has issued RAIs to the applicant does not establish the presence of a material issue of law or fact.⁶ The issuance of RAIs does not suggest that an application is incomplete, and applications may qualify for docketing and be sufficiently complete to start the adjudicatory process even though the Staff later sends RAIs to the applicant.⁷ Thus, an admissible contention cannot be based solely on RAIs, as these Staff inquiries by themselves do not indicate the presence of any deficiencies in the application. *See Oconee, supra*, 49 NRC at 336. Instead, a contention must identify what deficiencies exist in the application, and explain why the alleged deficiencies raise material safety concerns. *Id.*, at 337. The extent to which an RAI can support a contention involves a case-by-case determination, but the Commission anticipates “that in almost all instances a

⁵(...continued)

identifies in its safety review of the application. *See Oconee, supra*, 49 NRC at 338, *citing Union of Concerned Scientists, supra*, 920 F.2d at 53-56. The Commission noted the long-standing interest of Congress in curbing these abuses of the NRC hearing process, stating as follows:

Congress therefore called upon the Commission to make ‘fundamental changes’ in its public hearing process to ensure that ‘hearings serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors.’

Oconee, supra, 49 NRC at 334, *citing* H.R. Rep. No. 97-177, at 151 (1981).

⁶ *See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-93-3, 37 NRC 135, at 147 (regarding environmental contentions), and 150 (regarding safety contentions), *reconsideration denied*, CLI-93-12, 37 NRC 355 (1993).

⁷ *See Calvert Cliffs, supra*, CLI-98-25, 48 NRC at 349-50. The basic issue in licensing proceedings is the adequacy of the application -- not the Staff’s review of it -- and the Staff resolves all safety questions regardless of whether a hearing takes place. *Id.*, at 350.

petitioner must go beyond merely quoting an RAI to justify admission of a contention into the proceeding.” *Id.*, at 341.

Finally, to be admissible, a contention must pertain to one or more issues falling within the scope of the matters set forth in the notice of opportunity for hearing. See *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994).

II. Scope of the Diablo ISFSI Proceeding

As stated above, the Notice initiating this proceeding was published in the *Federal Register* on April 22, 2002. The Notice explains that:

The [NRC] is considering an application dated December 21, 2001, for a materials license under the provisions of 10 CFR part 72, from [PG&E] ...to possess spent fuel and other radioactive materials associated with spent fuel in an ... ISFSI located in San Luis Obispo County. If granted, the license will authorize the applicant to store spent fuel in a dry storage cask system at the applicant's Diablo Canyon Power Plant (DCPP) site. Pursuant to the provisions of 10 CFR part 72, the term of the license for the ISFSI would be twenty (20) years.

67 Fed. Reg. 19,600. The Notice further specifies that any contentions submitted in support of a request for hearing and petition for leave to intervene would be expected to focus on the subject material license. Notice, *supra* at 19,601 col. 1. The Commission's June 6 Order emphasizes that any disputes a hearing petitioner seeks to litigate must pertain to matters relevant to the construction and operation of the ISFSI. (June 6 Order at 2-3).

With these points in mind, the Staff addresses the contentions below.

III. SLOMFP, et. al., Peg Pinard and AVAC's Contentions

On July 19, 2002, Petitioners submitted their contentions. See Supplemental Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace, Avila Valley Advisory Council, Peg Pinard, 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, Sant Margarita Area Residents Together, Santa Lucia Chapter of the Sierra Club, and Ventura County Chapter of the Surfrider Foundation, filed July 19, 2002 (“Petitioners’ Contentions”).⁸ The contentions submitted on behalf of the identified parties are discussed below.

Contention TC-1: Inadequate Seismic Analysis

Intervenors’ contention TC1 claims that, “... the seismic analysis presented by PG&E does not consider a number of significant seismic features in the area of the Diablo Canyon Plant. As a result, the design basis earthquake for the proposed ISFSI cannot be considered reasonable or conservative for purposes of protecting public health and safety against the effects of earthquakes.” (Petitioners’ Contentions at 2).

The Staff submits that Petitioners’ Contention TC1 fails to satisfy the admissibility requirements in 10 C.F.R. § 2.714, and thus, must be rejected. The basis of the contention, as explained by Petitioners, is that PG&E incorrectly assumes the Hosgri fault zone is a purely strike-slip fault; that PG&E incorrectly assumes that the fault is vertical; and that PG&E places the fault in a nonconservative location. (Petitioners’ Contention at 2-3). Nowhere, however, do Petitioners explain why the alleged deficiencies in the seismic analysis represent a health and safety issue appropriate for discussion in this ISFSI proceeding. Rather, Petitioners simply make broad statements that PG&E’s “oversight” of Petitioners’ expert’s view of the seismic analysis represents “serious shortcomings” and is a “serious understatement” of the seismic activity at the site. (Petitioners’ Contentions at 6). In other words, the contention, while detailing perceived

⁸ Although the submission identified SLOMFP, et. al, Peg Pinard and Avila Valley Advisory Council as sponsoring the contentions, Lorraine Kitman was not included in the list of participating Petitioners despite the recent Notice of Appearance entered on behalf of Ms. Kitman by SLOMFP’s counsel. See Amended Petition to Intervene filed by Peg Pinard and Avila Valley Advisory Council on July 8, 2002, pg. 1. With no contention filed on behalf of Lorraine Kitman, the Staff requests that the Board rule that Lorraine Kitman not be allowed to participate as a party in this ISFSI proceeding.

shortcomings in PG&E's seismic analysis, fails to assert how, even if the potential inconsistencies are accepted as fact, there is any correlation between this information and a health and safety issue with the proposed ISFSI.

As the Board has previously noted, a long and detailed list of omissions does not, without more, provide a basis for believing that there is a safety issue. Discovered issues are not in themselves grounds for admitting a contention. *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 n.6 (1983); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985). See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 240 (1986). Thus, without some corresponding claim that Petitioners' perceived deficiencies constitute a particular health and safety issue, applicant can not rely solely upon this list of omissions to support admissibility of its contention.

In the alternative, if the Board finds that the petitioners have satisfied the admissibility requirements in 10 C.F.R. § 2.714(b), it is at least necessary to delineate the limited scope of contention TC1. The contention must be limited to the scope of the issues specified in the Notice of Opportunity for Hearing. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 411-412 (1991), *appeal denied on other grounds*, CLI-91-12, 34 NRC 149 (1991); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273, 339 (2001). While the April 22, 2002, Notice of Opportunity for Hearing speaks to an evaluation of the safety of the ISFSI, it does not provide an opportunity for hearing on all safety issues (including seismic) associated with the Diablo Canyon Nuclear Power Plant. Therefore, the scope of this contention must not exceed the potential effect of seismic issues on the ISFSI.

For these reasons, the Staff submits that Petitioners' Contention TC1 must be rejected as it fails to meet the Commission's contention requirements. In the alternative, the Staff submits that

the proposed contention must be limited to correctly correspond to the limited scope of this ISFSI hearing.

Contention TC2: PG&E's Financial Qualification Not Demonstrated

Petitioners assert in Contention TC2 that "PG&E has failed to demonstrate that it meets the financial qualification requirements of 10 C.F.R. § 72.22(e)." With respect to contention TC2, the Staff submits that the Petitioners have satisfied the admissibility requirements in 10 C.F.R. § 2.714(b). Specifically, 10 C.F.R. § 2.714(b)(2)(iii) provides that if a petitioner believes an application fails to contain information on a relevant matter required by law, identification of each failure and the supporting reasons for the petitioners' belief, may constitute a valid contention. Accordingly, contention TC2 identifies a specific regulatory requirement (*i.e.*, 10 C.F.R. § 72.22(e)), which the Petitioners contend PG&E has not satisfied.

To support this belief, the Petitioners provided 5 specific reasons which they believe are demonstrative of PG&E's failure to meet 10 C.F.R. § 72.22(e): 1) PG&E "is currently in a contested bankruptcy and may or may not emerge from that bankruptcy intact;" 2) PG&E is incorrect in claiming "that since it is a regulated utility its financial qualification is assured;" 3) Because PG&E's plan is to have the ISFSI owned and operated by other non-utility entities, its "claim that since it is a regulated utility the NRC should assume financial qualification is disingenuous;" 4) "PG&E's current financial condition is dubious, with access to credit markets unreliable and very costly;" and, 5) PG&E "is currently the target of multi-billion dollar litigation for fraud by the California Attorney General." (Petitioners' Contentions at 12). While not all of these bases are appropriate for this ISFSI proceeding, at least some of the bases are directly tied to PG&E's financial qualifications as they relate to the proposed ISFSI. Thus, the Staff does not contest the admissibility of this contention.

Contention TC3: PG&E May Not Apply for a License for a Third Party

The Staff submits that, with respect to contention TC3, the petitioners have failed to satisfy the admissibility requirements in 10 C.F.R. § 2.714(b). Petitioners' Contention TC3 states:

In its License Application, PG&E first asserts that it, as the applicant, is financially qualified. It then goes on to assert, however, that it has applied to transfer its Part 50 operating license to a yet-to-be-created limited liability company, Electric Generation LLC ("Gen"), which will then transfer it to yet another yet-to-be-created entity, Diablo Canyon LLC. ... The crux of the problem is that PG&E may not apply for a license for a third party that does not constitute the "applicant."

(Petitioners' Contentions at 18-19).

In this instance, the petitioners have failed to demonstrate that a genuine dispute exists with the application on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii). While the Petitioners do not have the burden of proving the contention, they must allege at least some credible foundation for the contention. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), NRC 449, 457 (1987), *remanded*, *Sierra Club v. NRC*, 862 F.2d 222 (9th Cir. 1988). Petitioners contend that PG&E's application is inadequate because PG&E will not be the future owner and operator of the ISFSI. However, the current application before the Staff identifies PG&E as the applicant and the Staff is reviewing the application accordingly.⁹ The language which Petitioners object to in the December 21, 2001 ISFSI application is factually correct information regarding PG&E's proposed license transfer. This ongoing proceeding does not, however, change the current applicant of the ISFSI application. PG&E, as the current applicant, will have to meet the Commission's financial qualification requirements. Any subsequent changes to the ISFSI applicant will be handled accordingly, and any new applicant would then be required to meet the

⁹ In addition, subsequent correspondence from PG&E regarding the December 21, 2001, application only serves to clarify the application, by explicitly referring to PG&E as "the applicant." See PG&E Letter DIL-02-008 (Supplemental General and Financial Information -10 CFR 72.22), June 7, 2002.

Commission's financial qualification requirements. However, in the meantime, Petitioners have failed to raise an admissible contention.

Moreover, Contention TC3 is inadequate because the basis for the contention is the "restructuring proposal" currently before the Commission as a separate License Transfer proceeding. (Petitioners' Contentions at 19). The information which Petitioners find troubling, particularly the details of PG&E's proposed transfer of its license, is simply an explanation by PG&E of a concurrent proceeding before a separate licensing board. In fact, the Commission has explained that PG&E's License Transfer proceeding involves the precise issues raised by Petitioners in Contention TC3, that of a "November 30, 2001 application seeking the Commission's authorization for ... PG&E to transfer its licenses for the Diablo Canyon Power Plant, Units 1 & 2 ... in connection with a comprehensive Plan of Reorganization which PG&E filed under Chapter 11 of the United States Bankruptcy Code." *Pacific Gas & Electric Co. (Diablo Canyon Power Plant, Units 1 and 2)*, CLI-02-16 (2002). NRC case law is clear that a licensing board will deny, without prejudice, a basis for a contention which involves an issue that is already under consideration by the Commission Staff. *Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, 34 NRC 332, 341 (1991).

Furthermore, Contention TC3 is outside the scope of this proceeding. As explained *supra*, the issues sought to be raised by a contention must fall within the scope of the issues specified in the Notice of Opportunity for Hearing. *Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3)*, LBP-91-19, 33 NRC 397, 411-12 (1991), *appeal denied on other grounds*, CLI-91-12, 34 NRC 149 (1991). Nothing in the Notice of Opportunity for Hearing regarding this ISFSI proposal indicated that PG&E's proposed license transfer would be an appropriate subject matter for this proceeding. See 67 Fed. Reg. 19,601 (April 22, 2002). In fact, PG&E's proposed license transfer proceeding was the subject of its own Notice of Opportunity for a Hearing. See 67 Fed. Reg. 2455 (January 17, 2002).

For the foregoing reasons, the Staff submits that Petitioners' Contention TC3 has failed to satisfy the Commission's admissibility requirements, and thus, Contention TC3 should be rejected by the Board.

Contention TC4: Failure to Establish Financial Relationships Between Parties Involved in Construction and Operation of the ISFSI

Again, similar to Contention TC3, the Staff submits that Petitioners' Contention TC4 fails to satisfy the admissibility requirements in 10 C.F.R. § 2.714(b). Petitioners' Contention TC4 states that, "PG&E fails to demonstrate Gen's financial relationship with other corporate entities . . . for instance, it appears from the license transfer application that Diablo Canyon LLC, Gen's subsidiary, will own the assets of Diablo Canyon." (Petitioners' Contentions at 21). Thus, just as in Contention TC3, Petitioners attempt to have a contention admitted which is based on a separate NRC proceeding. The basis for contention TC4 is expressly rooted in PG&E's License Transfer Application. Therefore, based upon the arguments noted above in response to Petitioners' Contention TC3, the Staff submits that Petitioners' Contention TC4 is likewise inadmissible.

Contention TC5: Failure to Provide Sufficient Description of Construction and Operation Costs

The Staff submits that Petitioners' Contention TC5 is admissible in this proceeding. Petitioners' Contention TC5 states that, "PG&E has failed to provide a sufficient description or breakdown of costs for construction, and operation, and therefore it does not satisfy 10 C.F.R. § 72.22." The Commission's admissibility requirements for contentions, specifically 10 C.F.R. § 2.714(b)(2)(iii), provide that if a petitioner believes an application fails to contain information on a relevant matter required by law, identification of each failure and the supporting reasons for the petitioners' belief, may constitute a valid contention. Contention TC5 identifies a specific regulatory requirement (*i.e.*, 10 C.F.R. § 72.22(e)), and information in PG&E's ISFSI License Application which the Petitioners perceive as insufficient under NRC's regulatory requirements. Thus, the Staff does not contest the admissibility of Petitioners' Contention TC5.

Contention EC1: Failure to Address Environmental Impacts of Destructive Acts of Malice or Insanity

Petitioners' Contention EC1 asserts that the terrorist attacks on the World Trade Center on September 11, 2001, and other attacks, or threatened attacks, on United States facilities warrants admission of this contention. Looking through the proposed contention, the Staff believes that the focus of Petitioners' Contention EC1 is set forth in the following excerpts:

If the containment buildings are not designed to withstand an aircraft attack, then spent fuel storage facilities, which lack a containment, must be assumed to be at least as vulnerable as reactors. PG&E's proposal of 140 unprotected casks installed on concrete pads provides an inviting target. Supplemental Request at 25.

The ER should provide a full discussion of the potential consequences of a range of credible events involving destructive acts of malice or insanity against the proposed ISFSI. It should also include a range of reasonable alternatives to the proposed action, including dispersal of casks, protection of casks by berms or bunkers, and use of more robust storage casks than the Holtec HI-STORM 100 cask.

(Petitioners' Contentions at 25 and 28).

A very similar contention¹⁰ was posed in the *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Installation) proceeding. It was rejected, in part, as being an impermissible attack on the Commission's safety and physical protection regulations set forth in 10 C.F.R. Parts 72 and 73. LBP-01-37, 54 NRC 476, 484-487, CLI-02-3, 55 NRC 155 (2002). The licensing board in *Private Fuel Storage* also rejected that portion of the proposed contention that asserted that the implications of the September 11, 2001, event needed to be considered in that ISFSI proceeding

¹⁰ "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 is capable of coping with this credible threat. *Id.* In addition, Utah argues that PFS's Environmental Report and the NRC Staff's Draft Environmental Impact Statement fail to comply with the National Environmental Policy Act (NEPA) because these studies do not evaluate possible environmental effects of such an attack." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-3, 55 NRC 155, at 155-156 (2002).

under the NRC's NEPA responsibilities. In reaching that result, the board relied upon 10 C.F.R.

§ 50.13, which states:

An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

The board reasoned 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." LBP-01-37, 54 NRC at 487, *quoting from Long Island Lighting Co. (Shoreham Nuclear Power Station)*, ALAB-156, 6 AEC 831, 851 (1973).

The Commission accepted the licensing board's referral in that proceeding of its order rejecting admission of the proposed contention. *Id.* at 156. The parties to that proceeding, and three others where similar issues had been raised, were directed to address 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." *Id.* Therefore, since the Commission has undertaken to directly address the admissibility of contention's like Petitioners' Contention EC1, and has not yet rendered its decision in the consolidated proceeding, the contention must be rejected at this time as an impermissible attack on current Commission regulations. See 10 C.F.R §§ 50.13 & 73.51. Once the Commission renders its decision in the consolidated proceeding, there may be cause to revisit the disposition of this contention.

Until that time, however, the Staff submits that Petitioners' Contention EC1 is inadmissible and should be rejected by the Board.

Contention EC2: Failure to Fully Describe Purposes of Proposed Action or to Evaluate All Reasonably Associated Environmental Impacts and Alternatives

The Staff submits that Petitioners' Contention EC2 fails to satisfy the admissibility requirements in 10 C.F.R. § 2.714(b). The Petitioners raise several diverse bases in support of this contention, none of which, however, aid the Petitioners with the contention's admissibility.

The primary basis noted in support of Petitioners' Contention EC2 is that PG&E's Environmental Report fails to meet 10 C.F.R. § 51.45(b), which requires a statement of the purpose of the proposed action. (Petitioners' Contentions at 28). Petitioners argue that PG&E fails to meet this requirement "because it does not completely disclose the purposes of the proposed ISFSI." (Petitioners' Contentions at 28-29).

Staff, however, submits that this basis fails to support an admissible contention. While Petitioners are correct that the Commission's regulations, specifically, 10 C.F.R. § 51.45(b), require an applicant's Environmental Report ("ER") to include a statement of the purpose of the proposed action, Petitioners are incorrect in asserting that PG&E's ER has failed to include the necessary information. To the contrary, PG&E's ER indicates that "[t]he expanded storage capacity provided by the use of dry casks at the ISFSI will be used to store aged spent fuel that has been stored for 5 years or longer in the DCPD spent fuel pools." (PG&E's ER, pg. 1.2-1).

Petitioners' argument that the applicant has failed to consider the potential use of the ISFSI for the DCPD license renewal and that the proposed ISFSI storage capacity exceeds the necessary capacity for the DCPD's current licensed life, is also contrary to PG&E's application. The applicant's ER states that, "[t]he Diablo Canyon ISFSI is designed to hold up to 140 storage casks (138 casks plus 2 spare locations). Based on the current fuel strategy and use of MPC-32, the ISFSI with a storage pad capacity of 140 casks will be capable of storing the spent fuel generated by DCPD Units 1 and 2 over the term of operating licenses (2021, and 2025, respectively)." (PG&E's ER, pg. 1.2-2). Therefore, this contention, as supported by the initial basis, at best is an impermissible challenge to the Commission's regulations, and moreover, fails to show that a

genuine dispute exists with the applicant on a material issue of fact or law as is required by 10 C.F.R. § 2.714(b)(2)(iii). Therefore, the contention should be rejected by the Board.

Petitioners' contend, in their second basis in support of this contention, that environmental analyses of spent fuel pools in general are inadequate, and specifically, that new information exists regarding an increased risk of spent fuel pool fires. (Petitioners' Contentions at 33, 36-37). However, Petitioners fail to relate this broad allegation to anything relevant to the proposed ISFSI application. As noted *supra*, the issue sought to be raised by a contention must fall within the scope of the issues specified in the Notice of Opportunity for Hearing. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Stations, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411-12 (1991), *appeal denied on other grounds*, CLI-91-12, 34 NRC 149 (1991). There is nothing in the Notice of Opportunity for a Hearing on the proposed ISFSI application that would bring spent fuel pool issues into the scope of this proceeding, nor is there anything in Petitioners' contention that provides the appropriate nexus between the spent fuel pool issues and the ISFSI application that is the subject of this proceeding. See 67 Fed. Reg. 19,600.

For these reasons, and because nothing in this contention shows that a genuine dispute exists with the applicant on a material issue of fact or law, as is required by 10 C.F.R. § 2.714(b)(2)(iii), the Staff submits that Petitioners' Contention EC2 is inadmissible.¹¹

Contention EC3: Failure to Evaluate Environmental Impacts of Transportation

The Staff submits that Petitioners' Contention EC3 is inadmissible in this proceeding. Petitioners' Contention EC3 states that, "... PG&E's [Environmental Report] fails to evaluate the reasonably foreseeable environmental impacts of transporting spent fuel away from the Diablo

¹¹ Petitioners additionally include several other bases under contention EC2, including: that the NRC has acknowledged the potential for sabotage-induced spent fuel pool fires; that new information shows that both spent fuel pools and casks are vulnerable to destructive acts of malice or insanity; and that there is the need to fully address impacts and alternatives regarding destructive acts of malice or insanity. To the extent that any of these bases apply to the proposed ISFSI application at issue in this proceeding, the Staff has addressed these bases under its response to Petitioners' Contention EC1.

Canyon ISFSI at the end of the license term of the ISFSI” in violation of 10 C.F.R. §§ 51.45(b)(1) and 72.108. (Petitioners’ Contentions at 39). The Staff contends, however, that this proceeding is limited to the construction and operation of the ISFSI, and therefore, subsequent transportation of the spent fuel is outside the scope of this proceeding. See 67 Fed. Reg. 19,600. As noted *supra*, the issue sought to be raised by a contention must fall within the scope of the issues specified in the Notice of Opportunity for Hearing. *Arizona Public Service Co. (Palo Verde Nuclear Generating Stations, Units 1, 2 and 3)*, LBP-91-19, 33 NRC 397, 411-12 (1991), *appeal denied on other grounds*, CLI-91-12, 34 NRC 149 (1991). There is nothing in the Notice of Opportunity for a Hearing on the proposed ISFSI application that would bring offsite transportation issues regarding spent fuel into the scope of this proceeding.

The Commission’s regulations provide further evidence that this issue concerns operation of the DCPD rather than the construction and operation of the ISFSI, and thus is an inappropriate contention for the current licensing action. Because all facilities, regardless of whether or not the facility has an ISFSI on site, have spent fuel on site and eventually will have to transport the spent fuel off site, Part 51 of the Commission’s regulations requires an analysis of the transportation of the spent fuel to and from the facility to be performed during the construction permit stage of the licensing process. See 10 C.F.R. § 51.52. Therefore, this analysis has already been performed for DCPD, and the Petitioners’ reliance on 10 C.F.R. § 72.108 that more is required of the applicant is mistaken. Section 72.108 falls within subpart E of the Commission’s part 72 regulations and thus, according to §72.40(a), is inapplicable in this instance as the site evaluation for DCPD was

covered under previous licensing actions.¹² See 10 C.F.R. § 72.40(a)&(c). Thus, the Staff submits that Petitioners' Contention EC3 is inadmissible as it is not within the scope of this licensing action.

CONCLUSION

For the reasons set forth above, the Staff submits that Petitioners' Contentions TC2, and TC5 meet the Commission's admissibility requirements and thus, should be admitted as valid contentions by the Board. However, the Staff contends that the remainder of Petitioners' Contentions fail to meet the admissibility requirements, and thus, should be rejected by the Board.

Respectfully submitted,

/RA/

Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of August, 2002

¹² Section 72.40(a) states that "except as provided in paragraph (c) of this section," the Commission will issue a part 72 license only if the requirements of subpart E, among others, are met. Section 72.40(c) then states that "facilities that have been covered under previous licensing actions, including the issuance of a construction permit under part 50 of this chapter," a reevaluation of the site is only necessary where new information is discovered which changes the evaluation findings. No new information has been provided in this instance.

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
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO CONTENTIONS SUBMITTED BY SAN LUIS OBISPO MOTHERS FOR PEACE, *et al.*, PEG PINARD AND AVILA VALLEY ADVISORY COUNCIL" 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 19th day of August, 2002.

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