

RAS 4833

August 30, 2002

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

September 10, 2002 (3.23PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of: )  
 )  
Pacific Gas and Electric Co. )  
 )  
(Diablo Canyon Power Plant Independent )  
Spent Fuel Storage Installation) )

Docket No. 72-26-ISFSI

ASLBP No. 02-801-01-ISFSI

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION BY SAN LUIS  
OBISPO MOTHERS FOR PEACE, AVILA VALLEY ADVISORY COUNCIL, AND PEG  
PINARD TO HOLD EVENING SESSION OF PREHEARING CONFERENCE

On August 30, 2002, Petitioners San Luis Obispo Mothers for Peace et al. ("SLOMFP") filed a motion ("SLOMFP Motion") requesting that the Atomic Safety and Licensing Board ("Licensing Board") schedule an evening session during the upcoming prehearing conference, scheduled for September 10-11, 2002. Pacific Gas and Electric Company ("PG&E") opposes the motion.

The prehearing conference in this matter has been scheduled since June 26, 2002.<sup>1</sup> The dates for the prehearing conference were specifically suggested by SLOMFP and acceded to by the Licensing Board and other participants.<sup>2</sup> The Licensing Board has also specifically

<sup>1</sup> *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), Memorandum and Order (Schedule for Initial Prehearing Conference), slip op. June 26, 2002.*

<sup>2</sup> *See Joint Filing on Behalf of NRC Staff, Pacific Gas & Electric Company, Lorraine Kitman, San Luis Obispo Mothers for Peace, and San Luis County [sic] Supervisor Peg Pinard and Avila Valley Advisory Council, dated June 12, 2002.*

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determined that it would not hold a session for limited appearances (usually evening sessions) during the upcoming prehearing conference.<sup>3</sup>

The ostensible basis for the current SLOMFP request is the availability of a technical advisor, Dr. Mark R. Legg. Dr. Legg is apparently at a “professional meeting, at which he has substantial responsibilities.” (SLOMFP Motion at 1-2.) Presumably, for such a meeting and with such responsibilities, Dr. Legg would have known of the commitment for some time. SLOMFP has provided no basis whatsoever, at this late date, to justify a departure from the previously determined schedule for the prehearing conference.<sup>4</sup> All parties in NRC proceedings, including SLOMFP, are expected to meet their obligations in the NRC hearing process.<sup>5</sup> Neither SLOMFP nor Dr. Legg has any privileged status with respect to scheduling.

SLOMFP claims that Dr. Legg’s presence is necessary to “advise counsel during the oral argument” and to “ensure that the record is adequate to make an informed decision on the admissibility of the contentions.” (SLOMFP Motion at 2.) This argument is also baseless.

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<sup>3</sup> See *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation), slip op. Aug. 7, 2002.

<sup>4</sup> See *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 & 2), LBP-82-92A, 16 NRC 1387, 1389 (1982).

<sup>5</sup> See, e.g., *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981) (“Fairness to all involved in NRC’s adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations.”); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998) (“Although the Commission expects its licensing boards to set and adhere to reasonable schedules for the various steps in the hearing process, the Commission recognizes that the boards will be unable to achieve the objectives of this policy statement unless the parties satisfy their obligations”).

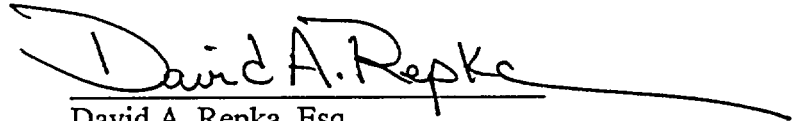
The purpose of the prehearing conference is legal argument on the admissibility of previously proposed contentions. Dr. Legg has already filed his declaration in this case, in support of proposed Contention TC-1. The prehearing conference is not a hearing. Dr. Legg is not being called on to testify; this is not an opportunity to embellish previously proposed contentions; and this is not a hearing to develop a record. With respect to advising counsel, this may be a valid role for a prehearing conference, but by no means a “necessary” one — particularly given that the problem is of SLOMFP’s own making as discussed above. Moreover, the argument on proposed Contention TC-1 is a simple *legal* one: the issues raised in the proposed contention are barred in this Part 72 licensing proceeding by 10 C.F.R. §§ 72.40(c) and 72.102(f). This is not an issue that invites detailed technical discussion, or one that requires substantial technical expertise.

Finally, PG&E does not agree that an evening session would not cause “any undue inconvenience.” (SLOMFP Motion at 2.) In fact, this unnecessary accommodation would significantly extend the prehearing conference day and therefore significantly inconvenience numerous individuals, including counsel, advisers, support staff, the Licensing Board members, and others. These individuals, all of whom have professional and personal schedules of their

own, should not be put to this inconvenience merely because of Dr. Legg's prior commitment.<sup>6</sup>

For all of these reasons, PG&E strongly opposes the request.

Respectfully submitted,



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ATTORNEYS FOR PACIFIC GAS &  
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Dated in Washington, District of Columbia  
this 30th day of August 2002

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<sup>6</sup> For these same reasons the option given by SLOMFP of waiting until Wednesday, September 11, at 3:00 p.m., to take up proposed Contention TC-1 is neither necessary nor tenable. This option simply invites inefficiency and delay by lengthening the conference. It also would inconvenience PG&E's witnesses and undersigned counsel (who will be leaving San Luis Obispo on Wednesday at 5:45 p.m. to attend another hearing in Rockville, Maryland, on Thursday morning), who have made arrangements in reliance upon the schedule as set by the Licensing Board. However, if the Licensing Board should determine in its discretion that it wishes to accommodate Dr. Legg, PG&E would agree to deferring the entire prehearing conference for a week or two, when Dr. Legg might be available.

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Pacific Gas and Electric Co. ) Docket No. 72-26-ISFSI  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION BY SAN LUIS OBISPO MOTHERS FOR PEACE, AVILA VALLEY ADVISORY COUNCIL, AND PEG PINARD TO HOLD EVENING SESSION OF PREHEARING CONFERENCE" have been served as shown below by electronic mail, this 30th day of August 2002. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

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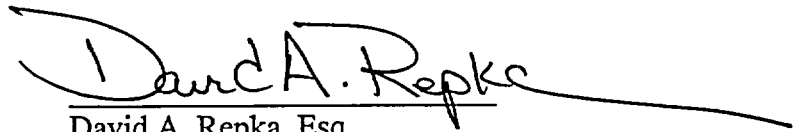
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A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right from the end of the name.

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& Electric Company