

September 19, 2002

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSIONDOCKETED  
USNRC

September 24, 2002 (3:11PM)

BEFORE THE COMMISSIONOFFICE 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

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO PETITION OF  
SAN LUIS OBISPO MOTHERS FOR PEACE ET AL.I. INTRODUCTION

Pacific Gas and Electric Company ("PG&E") hereby responds to the Petition filed by the San Luis Obispo Mothers for Peace, et al. ("SLOMFP") on September 9, 2002, in connection with this Part 72 licensing proceeding related to PG&E's application for a site-specific license for an independent spent fuel storage installation ("ISFSI") to be sited at the Diablo Canyon Power Plant ("DCPP").<sup>1</sup> As discussed below, SLOMFP seeks either to suspend the proceeding pending development of more stringent security requirements for both power reactors and ISFSIs, or alternatively, to expand the proceeding to encompass generic issues

<sup>1</sup> See Petition by Avila Valley Advisory Council, San Luis Obispo Mothers for Peace, 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, Santa Lucia Chapter of the Sierra Club, San Luis Obispo Chapter of the Surfrider Foundation, and Ventura County Chapter of the Surfrider Foundation, For Suspension of ISFSI Licensing Proceeding Pending Comprehensive Review of Adequacy of Design and Operation Measures to Protect Against Terrorist Attack and Other Acts of Malice or Insanity, dated September 9, 2002 ("Petition"). As the Petition does not fall squarely under a particular procedural regulation, PG&E is treating it as a motion filed pursuant to

related to power plant and ISFSI security. However, contrary to the tone of the Petition, power plant and ISFSI security issues are not being ignored; they are already being addressed by the Commission in generic forums. Indeed, the Commission has already required power plant security enhancements, and will soon be requiring security enhancements for ISFSIs. The Commission has concluded that continued operation of plants and ISFSIs does not pose an imminent risk and is not inimical to common defense and security. Accordingly, the Commission should deny the Petition, just as it has denied several similar requests in other proceedings.

## II. BACKGROUND

On December 21, 2001, PG&E submitted to the U.S. Nuclear Regulatory Commission ("NRC") an application for a site-specific license under 10 C.F.R. Part 72 to possess spent fuel, and other radioactive materials associated with spent fuel, in an ISFSI. If granted, the license will authorize PG&E to store spent fuel and associated materials generated at DCPD in a dry cask storage system at the DCPD site. A notice of opportunity for hearing was published in the *Federal Register* on April 22, 2002.<sup>2</sup>

In response to this notice, SLOMFP, on behalf of itself and several other groups, submitted a petition to intervene and request for hearing on May 22, 2002,<sup>3</sup> as well as an

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10 C.F.R. § 2.730, and is responding within the time period prescribed in Section 2.730(c).

<sup>2</sup> See Pacific Gas and Electric Co.; Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for Hearing for a Materials License for the Diablo Canyon Independent Spent Fuel Storage Installation, 67 Fed. Reg. 19,600 (Apr. 22, 2002).

<sup>3</sup> See Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace, 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

amended petition setting forth its proposed contentions on July 18, 2002.<sup>4</sup> PG&E and the NRC Staff responded to these filings accordingly.<sup>5</sup> Most recently, a prehearing conference on the issues of standing and admissibility of contentions was held in Shell Beach, California, on September 10 and 11, 2002. The Atomic Safety and Licensing Board has yet to rule on the matters discussed at the prehearing conference. However, on September 9, 2002, on the eve of the prehearing conference, SLOMFP filed the Petition here at issue.

### III. DISCUSSION

The SLOMFP Petition specifically requests that the Commission suspend the Part 72 licensing proceeding “pending the implementation of new and more rigorous measures to protect the public from the threat of a terrorist attack or other acts of malice or insanity against the Diablo Canyon nuclear complex.” (Petition at 1.) If the Commission declines to suspend the proceeding, SLOMFP requests that the Commission then expand the scope of the proceeding to

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Now, Santa Margarita Area Residents Together, Santa Lucia Chapter of the Sierra Club, and Ventura County Chapter of the Surfrider Foundation, dated May 22, 2002.

<sup>4</sup> 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, Santa Margarita Area Residents Together, Santa Lucia Chapter of the Sierra Club, and Ventura County Chapter of the Surfrider Foundation, dated July 18, 2002.

<sup>5</sup> See NRC Staff’s Response to Requests for Hearing and Petitions to Intervene Filed by Lorraine Kitman, San Luis Obispo Mothers for Peace, and San Luis [Obispo] County Supervisor Peg Pinard and Avila Valley Advisory Council, dated May 30, 2002; Answer of Pacific Gas and Electric Company to the Petitions for Leave to Intervene and Requests for Hearing of Lorraine Kitman and the San Luis Obispo Mothers for Peace et al., dated June 3, 2002; NRC Staff’s Response to Contentions Submitted by San Luis Obispo Mothers for Peace, et al., Peg Pinard and Avila Valley Advisory Council, dated August 19, 2002; Response of Pacific Gas and Electric Company to Supplemental Request for Hearing and Petition to Intervene of San Luis Obispo Mothers for Peace et al., dated August 19, 2002.

permit consideration of “interim” security measures at DCPD to “provide adequate protection to public health and safety and the common defense and security while longer-term measures are put in place.” (Petition at 12.) SLOMFP contends that NRC security regulations are presently insufficient and that the NRC cannot license the proposed ISFSI under the current regulatory scheme without violating its statutory mandate under the Atomic Energy Act of 1954, as amended (“AEA”), to protect the public health and safety and common defense and security.

As discussed further below, SLOMFP’s Petition raises the generic issue of the NRC-required “design basis threat” (“DBT”) for power plants and ISFSIs, as well as the issues of the required security measures to be implemented at plants and ISFSIs, and the division of responsibility between the licensee and the government for the protection of these facilities from enemy attack. These are all issues that are already being addressed by the agency through its generic initiatives. In the meantime, the Commission has concluded that continued operation of power plants and ISFSIs is appropriate. Accordingly, the existence of the generic issues and the generic review provide no basis for a suspension of this site-specific licensing proceeding. Moreover, SLOMFP’s alternative request to include the generic issues in an individual Part 72 licensing case and to include Part 50 power plant issues in a Part 72 licensing case are both unnecessary to assure safety and barred by Commission rules and precedent.

A. A Suspension of this Proceeding is Not Appropriate

The Petition fundamentally challenges NRC physical security requirements in their entirety, on the basis that existing NRC requirements “afford limited and inadequate protection against acts of malice or insanity at nuclear facilities.” (Petition at 18.) Specifically,

SLOMFP argues that the DBT is “inadequate in light of the present threat environment.”<sup>6</sup> (Petition at 21.) SLOMFP also argues that the NRC should “explicitly abandon its reliance on 10 C.F.R. § 50.13 as a justification for refusing to require nuclear facility licensees to implement measures to protect against terrorist attacks or other acts of malice or insanity.”<sup>7</sup> (Petition at 24.) SLOMFP’s challenges apply not only to the security requirements for the proposed DCPPI ISFSI, but to the NRC’s entire regulatory scheme for physical protection of NRC-regulated facilities and materials.

As even SLOMFP acknowledges, broad challenges to the Commission’s regulations are not appropriate in a site-specific licensing proceeding such as this. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 394-95 (1987)(finding an impermissible challenge to NRC regulations where an intervenor sought to impose requirements in addition to those set forth in the regulations); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 484-87 (2001), *review accepted*, CLI-02-3, 55 NRC 155 (2002)(dismissing a contention in which the intervenor sought to litigate safety and environmental challenges related to terrorism, in part because the contention constituted an impermissible challenge to existing NRC requirements governing ISFSI security requirements).

Instead, the NRC has — outside the hearing context — undertaken a comprehensive review of its physical protection and security requirements. *See, e.g.,* Letter,

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<sup>6</sup> The DBT is used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material. *See* 10 C.F.R. § 73.1.

<sup>7</sup> 10 C.F.R. § 50.13 provides that an applicant for a Part 50 power reactor 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; or (b) use or deployment of weapons incident to U.S. defense activities.

R.A. Meserve, Chairman, NRC, to the Honorable Edward J. Markey, Encl. 1, at 34 (Mar. 4, 2002)(“As a result of the terrorist attacks of September 11, 2001, the Chairman directed the staff to thoroughly reevaluate the NRC’s safeguards and physical security programs. This reevaluation will be a top-to-bottom analysis involving all aspects of the Agency’s safeguards and physical security programs. . .”). In connection with this ongoing review, since September 11, 2001, the Commission has issued orders to various classes of licensees mandating certain Interim Compensatory Measures (“ICMs”) to enhance security at nuclear facilities.<sup>8</sup> PG&E has already implemented the ICMs for DCCP.<sup>9</sup> That the compensatory measures are considered “interim” reflects at least the potential, if not the likelihood, for further requirements and rulemaking. In addition, specific ICMs for ISFSIs are expected to be issued shortly. PG&E will comply with any ICMs, as applicable, for the proposed ISFSI, in a timely fashion and certainly before the ISFSI becomes operational.

The NRC’s decision to proceed with a generic review of security issues, likely to culminate in a rulemaking, is a choice clearly within its discretion. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203, *reh’g denied*, 332 U.S. 747 (1947)(“[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed

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<sup>8</sup> *See, e.g., All Operating Power Reactor Licensees*, Order Modifying Licenses (Effective Immediately), EA-02-026, slip op. Feb. 25, 2002; *All Decommissioning Power Reactor Licensees*, Order Modifying Licenses (Effective Immediately), EA-02-077, slip op. Mar. 25, 2002; *Honeywell Int’l, Inc.* (Metropolis Works Facility, Metropolis, Ill.), Order Modifying License (Effective Immediately), EA-02-025, slip op. Mar. 25, 2002; *Gen. Elec. Co.* (Morris Operation), Order Modifying License (Effective Immediately), EA-02-078, slip op. May 23, 2002; *United States Enrichment Corp.* (Portsmouth Gaseous Diffusion Plant, Portsmouth, Oh.), Order Modifying License (Effective Immediately), EA-02-018, slip op. June 17, 2002.

<sup>9</sup> *See* PG&E Letter DCL-02-17, from D.H. Oatley, PG&E, to S.J. Collins, NRC, “Report of Full Compliance with NRC Order for Interim Safeguards and Security Compensatory Measures,” dated August 30, 2002.

discretion of the administrative agency”); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 467 (1999). Accordingly, when an agency is deciding between rulemaking and adjudication, the agency decision will not be overruled unless there has been an abuse of discretion. *See, e.g., Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm’n*, 539 F.2d 824, 838 (2d Cir. 1976), *vacated on other grounds sub nom. Allied Gen. Nuclear Serv. v. Natural Resources Defense Council, Inc.*, 434 U.S. 1030 (1978); *Nicholson v. Brown*, 599 F.2d 639, 648 (5th Cir.), *reh’g denied*, 605 F.2d 209 (1979); *cf. FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 808 n.29 (1978). Indeed, the Commission has itself held that rulemaking is particularly appropriate for the resolution of generic issues. *Fire Protection for Operating Nuclear Power Plants (10 CFR 50.48)*, CLI-81-11, 13 NRC 778, 801 (1981), *citing Minn. v. Nuclear Regulatory Comm’n*, 602 F.2d 412 (D.C. Cir. 1979). The Commission’s decision to evaluate the sufficiency of its security requirements on a generic basis does not constitute an abuse of discretion, particularly where the issues raised affect most — if not all — NRC power plant and ISFSI licensees. *See Minnesota*, 602 F.2d at 416-17.

Notwithstanding the fact that the Commission is currently evaluating its security processes in a generic fashion, a suspension of this proceeding is neither necessary nor appropriate. Indeed, the Commission has denied substantively similar petitions and stay requests filed in other ongoing licensing proceedings following the events of September 11, 2001. In *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), the Commission declined to suspend an ISFSI licensing proceeding while conducting its comprehensive review of security regulations, in part because the ISFSI posed no immediate threat to the public health and safety, as it would not contain any spent fuel for at least two years. CLI-01-26, 54 NRC 376,

380-81 (2001). Moreover, the Commission reiterated its commitment to efficient and expeditious processing of adjudications, noting that, while the Commission may postpone adjudicatory cases in the “unusual” case where moving forward would “clearly amount to a waste of resources,” the Commission disfavors holding proceedings in abeyance where the relief “is not narrowly tailored to the goal of promoting adjudicatory efficiency.” *Id.* at 383. There is no basis to “freeze” an adjudicatory proceeding where other safety and environmental issues must be resolved. *Id.* at 381. These same considerations apply with equal force to the licensing of the proposed Diablo Canyon ISFSI. This proceeding involves safety and environmental issues wholly unrelated to terrorism; hence, there is no basis to suspend the proceeding and delay resolution of these matters.

Similarly, in *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2); Catawba Nuclear Station, Units 1 & 2), the Commission denied a request to hold in abeyance a license renewal proceeding pending the resolution of the ongoing security review. In rejecting the petition, the Commission again noted the remoteness of any possible ill effects, given that the proceeding had just begun, and that any renewed licenses would not take effect for 20 years or more. CLI-01-27, 54 NRC 385, 390 (2001). The Commission also indicated its reluctance to suspend an adjudication to await the outcome of a separate proceeding, and its continuing interest in “regulatory finality.” *Id.* at 390-91. *See also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 400 (2001)(in denying a similar request to suspend a Part 70 licensing proceeding, the Commission stated, “[o]ur hearing rules . . . contain sufficient flexibility to deal with any new developments that occur during the pendency of this proceeding”). As in these cases, PG&E is some time away from storing spent fuel in the proposed ISFSI; any ISFSI ICMs or additional security



requirements can be applied at an appropriate time. Consequently, there is no threat of imminent harm if the proceeding is not held in abeyance.<sup>10</sup>

With respect to SLOMFP's argument that the ISFSI cannot be licensed prior to the resolution of the generic security review, the argument is both premature and incorrect. First, it is not clear that the NRC's generic review will not be complete by the time the Part 72 license is issued. Second, the NRC must, when it issues the Part 72 license, make the finding required by the AEA that operation of the facility will not be inimical to common defense and security. The generic facts presented by SLOMFP do not indicate that operation of the DCPPI ISFSI would be "inimical to the common defense and security" or constitute "an unreasonable risk to the public health and safety." Regardless of whether the generic initiative is complete, the NRC can and should make the required finding for the DCPPI ISFSI, just as it has for every current ISFSI that is continuing to store fuel in the current "threat environment." Issuance of the license subject to the possibility of further requirements also would not be a violation of the AEA.

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<sup>10</sup> It appears to PG&E that 10 C.F.R. § 2.788 does not apply to the instant Petition, as SLOMFP is not requesting to stay a decision or action of the Licensing Board. However, to the extent that the Commission would apply the procedural standards governing issuance of a stay set forth at 10 C.F.R. § 2.788(e), SLOMFP has satisfied none of the four factors set forth therein. SLOMFP has not demonstrated that it would be irreparably injured in the absence of a stay. Indeed, as discussed below, the ISFSI is some time away from being operational. SLOMFP also has not made the requisite "strong showing" that it will succeed on the merits in this proceeding. Moreover, SLOMFP has not shown that granting a stay would not be detrimental to other parties, and has not demonstrated that the public interest weighs in favor of granting a stay. Indeed, with respect to the last factor, SLOMFP has not shown that its interest outweighs the public interest in the timely completion of adjudicatory proceedings. See *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-02-15, 56 NRC \_\_\_, slip op. July 15, 2002.

As an alternative to the request for a suspension, SLOMFP would have the Commission expand the Part 72 proceeding to address security requirements at DCPD generally (both the power plant and the ISFSI). This relief would impermissibly broaden the scope of this proceeding. First, the DCPD Part 50 license is not at issue in this Part 72 case. *Cf. Gulf States Utils. Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994) (to be admissible in a proceeding, 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). Second, the current NRC security requirements and appropriate ICMs have been met at DCPD. DCPD, like every other power plant in the country, has been allowed to continue to operate post-September 11, 2001. Adequate basis exists to conclude that operation of both the plant and the ISFSI will not be inimical to common defense and security. *Compare Nuclear Regulatory Comm'n* (Licensees Authorized to Possess or Transport Strategic Quantities of Special Nuclear Materials), CLI-77-3, 5 NRC 16, 29 (1977)(in upholding a Director's Decision declining to take emergency action to implement emergency safeguards measures for strategic special nuclear material ("SSNM"), the Commission stated, "existing safeguards programs, including the extensive and continuing activities of the staff and the SSNM licensees along with the planned safeguards policy activities, are adequate to provide a reasonable assurance that the current SSNM activities of NRC licensees are not inimical to the common defense and security, and do not constitute an unreasonable risk to the public health and safety"). Finally, even as it relates to Part 72 requirements, SLOMFP's Petition raises issues that the Commission has chosen to address by the generic review already under way. Therefore, the Commission should not and need not expand this Part 72 proceeding to encompass either Part 50 security requirements or additional Part 72 requirements.

B. SLOMFP Correctly States that the Petition Cannot Be Treated as a Request for Waiver

SLOMFP styles its Petition as a request to suspend the Part 72 licensing proceeding. SLOMFP specifically asserts that the Petition is *not* any of the following: (1) a request for rulemaking pursuant to 10 C.F.R. § 2.802, (2) a request for enforcement action under 10 C.F.R. § 2.206, (3) a request for waiver pursuant to 10 C.F.R. § 2.758, or (4) a request for exemption pursuant to 10 C.F.R. § 72.7. (See Petition at 7-9.) Of these vehicles, however, Section 2.758 would be the only one to potentially provide a basis to bring generic security issues into an individual licensing proceeding such as this.<sup>11</sup> However, SLOMFP specifically disclaims this avenue, stating that such a waiver would not provide it with the relief requested. (Petition at 9.) Moreover, SLOMFP has not provided any basis to support a waiver request under Section 2.758.

The NRC's licensing boards have articulated three showings a petitioner must make to establish a *prima facie* case of "special circumstances" such that a waiver under Section 2.758 is appropriate. First, "the circumstances alleged must be unique to the particular facility at issue." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 238 (1998) ("*PFS*"); see *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-653, 16 NRC 55, 72-74 (1981). Second, as reflected in the regulation, the petitioner must show that application of the generic rule to be waived (here, the current security regulations) will not serve the purposes for which it was adopted. *PFS*, LBP-98-7, 47 NRC at 239; see *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30

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<sup>11</sup> Section 2.758(b) provides that a party to an adjudicatory proceeding may petition that the application of a specific regulation be waived, or an exception made for a particular proceeding. The sole ground for such a waiver is that "special circumstances with respect to the subject matter of the particular proceeding are such that the application of

NRC 231, 235 (1989). Third, the petitioner must show that the circumstances involved are “unusual and compelling” such that it is evident from the petition and other allowed papers that a waiver is necessary to address the merits of a “significant safety problem.” *PFS*, LBP-98-7, 47 NRC at 239; *see Seabrook*, CLI-89-20, 30 NRC at 235.

SLOMFP does not attempt a showing that “special” or “unique circumstances” exist at the DCPD facility. Although SLOMFP does contend that DCPD is a “particularly attractive and vulnerable target” for terrorist activities, it makes only bare allegations that do not provide a basis for such a conclusion. The basis for SLOMFP’s Petition appears to originate principally in generic press accounts, none of which specifically implicates DCPD. (Petition at 14; Petition, Exh. 1, at § IV.) Indeed, contrary to SLOMFP’s assertions, by virtue of its geography, DCPD is a uniquely protected site in many ways.<sup>12</sup> Therefore, even had SLOMFP sought a waiver, one is plainly not appropriate in this proceeding.

C. The Petition Could Be Treated as a 10 C.F.R. § 2.206 Petition

The Commission’s regulations also provide other vehicles to address the SLOMFP concerns that are more appropriate than case-specific litigation. For example, contrary to SLOMFP’s claims, its concerns could be addressed as a petition for NRC action under 10

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the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.”

<sup>12</sup> SLOMFP also contends that “a key aspect” of DCPD’s “high degree of attractiveness and vulnerability” is the “large inventory of radioactive material that is either currently stored onsite or proposed to be stored there.” (Petition at 23.) However, this condition is not unique to DCPD. To the extent that SLOMFP argues against the practice of onsite fuel storage, it does so in direct contradiction to the Congressional mandate contained in the Nuclear Waste Policy Act of 1982 (“NWPAA”). 42 U.S.C. § 10101 *et seq.* The NWPAA directs that both the federal government and reactor owners have a responsibility to ensure that spent fuel is stored safely, and encourages the effective use of available and new storage, specifically including dry cask storage. *See* 42 U.S.C. §§ 10151(b)(1); 10152, 10154. There can thus be no cognizable claim that onsite spent fuel storage is barred by existing law.

C.F.R. § 2.206. That regulation provides that any person may file a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action "as may be proper." Even though the Petition requests actions beyond the current regulations, it could be addressed under Section 2.206 as a request for issuance of an order related to either the Part 50 power reactor or the proposed Part 72 facility. However, a Section 2.206 request, particularly one related to the Part 50 license, does not provide a basis to suspend or expand a parallel Part 72 licensing proceeding.<sup>13</sup>

Under 10 C.F.R. § 2.206, proceedings will not generally be instituted to consider an issue the Commission is treating generically through rulemaking. *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-83-21, 18 NRC 157, 160 (1983); *see also Petition Concerning Financial Qualifications of Nuclear Power Plant Licensees*, DD-81-23, 14 NRC 1807, 1810-11 (1981); *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), DD-80-20, 11 NRC 913, 914 (1980); *Pub. Serv. Elec. & Gas Co.* (Salem Nuclear Generating Station, Units 1 & 2), DD-80-19, 11 NRC 625, 627-28 (1980).

Moreover, as already discussed, the NRC has determined that continued operation of power plants and ISFSIs will not be inimical to the public health and safety and the common defense and security. While security across the nuclear industry has been enhanced, at no time has the Commission concluded that the public health and safety mandates immediate shutdown

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<sup>13</sup> The Commission has the authority to address a Section 2.206 petition. Under Section 2.206, requests for action are normally to be filed with the NRC Executive Director for Operations and referred to the appropriate office director. However, the Commission has held that it has the power to address such petitions where it believed there was a matter presented of sufficient public importance. *See Yankee Atomic Elec. Co.* (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 6 (1991).

of either type of nuclear facility.<sup>14</sup> *Compare Southern Calif. Edison Co.* (San Onofre Nuclear Generating Station, Unit 1), CLI-85-10, 21 NRC 1569, 1576 (1985)(request for an immediate shutdown can be granted (even if a license violation is demonstrated) only in cases of willfulness or of immediate threat to public health and safety); *Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400 (1978)(denying petitioner's request to shut down all operating reactors and suspend construction permits on the basis that current regulatory requirements with respect to environmental qualification and fire protection had been met and that no undue risks to the public health and safety from operation existed); *aff'd with revisions and clarification*, CLI-80-21, 11 NRC 707, 708-09 (1980)(upholding the denial and stating that current requirements "provide reasonable assurance that the public health and safety is being adequately protected during the time necessary for corrective action"). Contrary to SLOMFP's claims, the NRC has met, and continues to meet, its statutory and regulatory duties under the AEA with respect to security.<sup>15</sup>

At bottom, SLOMFP's Petition defies common sense in its conclusion that the NRC cannot even consider an ISFSI where the NRC has already decided to allow power plants and ISFSIs across the country to continue to operate pending the NRC's comprehensive review

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<sup>14</sup> See, e.g., Letter, R.A. Meserve, Chairman, NRC, to Governor Tom Ridge, Office of Homeland Security, dated September 5, 2002 ("[T]he steps taken by the NRC and our licensees were built on a longstanding, solid foundation of strong security and safeguards practices. We have the utmost confidence that our Nation's nuclear facilities remain among the most robust and well protected of any civilian facilities in the country").

<sup>15</sup> SLOMFP argues, in several different ways, that the risk of the power plant and the ISFSI must be addressed together. Obviously, this is not true. These are two separate licenses which can be addressed separately. If and when the NRC issues the Part 72 license for the ISFSI, the Commission must make its required finding under the AEA that operation of the ISFSI would not be inimical to common defense and security. SLOMFP's argument with respect to the Part 50 license is clearly more appropriate for a Section 2.206 petition than for the Part 72 licensing proceeding.

of security requirements.<sup>16</sup> There is no basis for requiring action at DCPD or the DCPD ISFSI beyond those required by the current Commission security requirements (including the orders requiring the ICMs) and any further requirements NRC identifies based on its ongoing generic review. Thus, even if the Petition were interpreted as a request for enforcement action or order pursuant to Section 2.206, no further action would be appropriate.

D. The Petition Could Be Treated as a Generic Request for Rulemaking

SLOMFP's Petition could also be treated as a rulemaking petition under 10 C.F.R. § 2.802(a). Section 2.802(a) provides that any interested person may petition the Commission to issue, amend, or rescind any regulation. Although SLOMFP contends that the Petition is not a request for rulemaking, SLOMFP is in fact requesting a re-review and the amendment of the NRC's generic requirements (including the DBT and 10 C.F.R. § 50.13), in that SLOMFP specifically argues that NRC physical security requirements are inadequate. (Petition at 18.) While SLOMFP believes these issues must be addressed for DCPD specifically, as discussed above the NRC's decision to address generic security issues through a generic process, as opposed to individual adjudications, is within its discretion. *Chenery*, 332 U.S. at 203; *Fire Protection for Operating Nuclear Power Plants*, CLI-81-11, 13 NRC at 801.

Accordingly, the SLOMFP Petition is most appropriately considered as a request for rulemaking or as comments related to the generic review already under way. Public participation should be provided as appropriate in the rulemaking context, in accordance with the

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<sup>16</sup> See also *Petition for Derating of Certain Boiling Water Reactors*, CLI-73-18, 6 AEC 567 (1973). In this case, a petitioner sought emergency derating of nine power reactors for alleged failure to comply with Interim Acceptance Criteria with regard to fuel densification. The Commission found that the real question posed by the petition was whether continued operation by the plants pending Staff review posed an undue risk to public health and safety; the Commission concluded that it did not, noting, *inter alia*, that

Administrative Procedure Act and safeguards considerations. In any event, however, pending such a review, this Part 72 licensing proceeding should not be suspended and should not be expanded for the reasons already discussed.<sup>17</sup>

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the Staff had found the plants in compliance with the Interim Acceptance Criteria at issue).

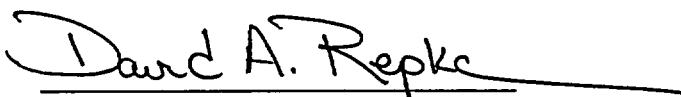
<sup>17</sup> 10 C.F.R. § 2.802(d) provides that a petitioner may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.



#### IV. CONCLUSION

For the reasons set forth above, the Commission should continue its comprehensive, generic review of the design basis threat and other security requirements related to both power plants and ISFSIs. However, the Commission should decline to suspend this DCPD Part 72 licensing proceeding. The Commission should also deny the alternative request that it expand the scope of the ongoing proceeding to consider interim or alternative security measures with respect to both the Part 50 power plant and the proposed Part 72 ISFSI.

Respectfully submitted,



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Dated in Washington, District of Columbia  
this 19th day of September 2002

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
Pacific Gas and Electric Co.	)	Docket No. 72-26-ISFSI
	)	
(Diablo Canyon Power Plant Independent	)	
Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO PETITION OF SAN LUIS OBISPO MOTHERS FOR PEACE ET AL." have been served as shown below by deposit in the United States mail, first class, this 19th day of September 2002. Additional service has also been made this same day by electronic mail, as shown below.

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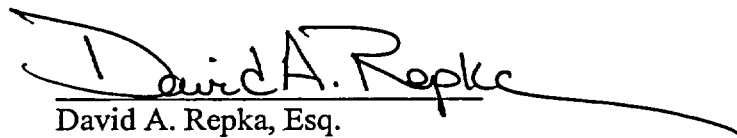
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