

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 5019

COMMISSIONERS

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DOCKETED 11/21/02
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In the Matter of)
)
PACIFIC GAS & ELECTRIC CO.)
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))
_____)

Docket No. 72-26-ISFSI

CLI-02-23

MEMORANDUM AND ORDER

This proceeding stems from Pacific Gas & Electric Company’s (“PG&E”) application to construct an independent spent fuel storage installation (“ISFSI”) at the site of its two Diablo Canyon nuclear power plants. Several intervention petitioners have directly requested the Commission to suspend the proceeding pending the Commission’s comprehensive review of measures to protect against terrorist attack. We deny the petition.

I. BACKGROUND

On December 21, 2001, PG&E filed an application for a materials license authorizing storage of spent nuclear fuel in a dry storage cask system at its Diablo Canyon Power Plant (“DCPP”) site. The NRC published notice of the application and opportunity for a hearing.¹ The

¹ See “Pacific Gas and Electric Co.; 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 (Apr. 22, 2002).

Secretary of the Commission received three petitions to intervene from the following individuals and groups: Lorraine Kitman; San Luis Obispo County Supervisor Peg Pinard and the Avila Valley Advisory Council; and the San Luis Obispo Mothers for Peace, representing itself and eight other organizations.²

Twelve of the petitioners filed a motion to stay the licensing proceeding on June 25, 2002.³ The motion was based on PG&E's pending bankruptcy proceeding, California's claims of fraud against PG&E's parent corporation, and PG&E's application to transfer the Diablo Canyon power plant licenses in accordance with its bankruptcy plan of reorganization.⁴ The petitioners asserted, in essence, that there are too many uncertainties requiring resolution before it is sensible to proceed with the ISFSI application. The Board, noting that all of the petitioners' concerns "involve PG&E's bankruptcy and the impacts that flow from that action *vis-a-vis* various other federal and state judicial and/or administrative proceedings," denied the motion.⁵

The Board heard oral argument on the issues of standing of the petitioners and admissibility of their contentions on September 10-11, 2002, but has not yet decided these matters.

On September 9, 2002, a group of 11 intervention petitioners and one additional group filed, directly with the Commission, a petition to suspend this proceeding pending

²After these petitions were filed, various amendments and realignments, not relevant to our decision today, have occurred.

³By email, two other individual requests, from persons who are not intervention petitioners, were addressed to the Commission's Chairman.

⁴PG&E filed for protection under Chapter 11 of the United States Bankruptcy Code prior to filing its ISFSI license application with the NRC.

⁵See *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-15, 56 NRC __, __, slip op. at 5 (July 15, 2002).

comprehensive review of the adequacy of design and operation measures to protect against terrorist attack and other acts of malice or insanity.⁶ The Commission denies the petition for the reasons we give below.

II. DISCUSSION

SLOMFP has requested that the Commission suspend the ISFSI 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.”⁷ In the alternative, it requests expansion of the scope of the ISFSI license proceeding to consider what interim measures should be imposed during the Commission’s deliberation about longer-term measures. The gravamen of the petition, according to SLOMFP, “is that the Commission may not license the ISFSI unless and until it improves protection of the entire Diablo Canyon nuclear complex from terrorist attacks or other acts of malice or insanity.”⁸ SLOMFP declares an urgent need for protective measures because it sees the risk already posed as significant and unacceptable, and the planned ISFSI, SLOMFP maintains, would compound the attractiveness and vulnerability of the Diablo Canyon complex to attacks. The ISFSI, in SLOMFP’s estimation, cannot be viewed in isolation from the existing operation of the

⁶The eleven intervention petitioners who joined in the motion are: 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 Chapter of Cancer Action Now, Santa Lucia Chapter of the Sierra Club, and Ventura County Chapter of the Surfrider Foundation. We shall refer to these groups collectively as “SLOMFP.” The San Luis Obispo Chapter of the Surfrider Foundation also joined in the September 9 filing. Since that organization has never made a hearing request or sought permission to participate in this adjudication on any other basis, it has no legitimate place in this proceeding. See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 398 (2001), *reconsideration denied*, CLI-02-02, 55 NRC 5 (2002). We shall hereafter refer to SLOMFP’s filing as “Petition.”

⁷Petition at 1.

⁸*Id.* at 10.

two power plants. Moreover, SLOMFP contends that the NRC's "design basis threat" is inadequate and the compensatory measures the Commission has recently required do not correct this deficiency.⁹

The relief SLOMFP seeks from the Commission is fourfold: (1) complete a comprehensive review of the adequacy of NRC safety requirements to protect against the terrorist threat; (2) suspend the pending ISFSI license proceeding while the NRC conducts its review; (3) expand the scope of the pending proceeding to allow consideration of interim measures (if the Commission declines to suspend the proceeding); and (4) provide for public participation in considering new requirements. SLOMFP provides a list of interim measures it requests that we adopt.

Below we consider and reject SLOMFP's request to suspend the Diablo Canyon ISFSI proceeding. As for SLOMFP's other requests, we consider them beyond the scope of this adjudication. We note, however, that some of what SLOMFP seeks already has taken place. For example, we have undertaken a comprehensive review of our security rules and policies. Consequently, we have adopted (recently) interim security measures for ISFSIs.¹⁰ SLOMFP

⁹The "design basis threat" is the postulated threat that the physical protection system must have the capability to withstand. Design basis threats are "used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material." 10 C.F.R. § 73.1(a). Current design basis threats for radiological sabotage and for theft or diversion of formula quantities of strategic special nuclear material are described in 10 C.F.R. § 73.1(a)(1) and 10 C.F.R. § 73.1(a)(2), respectively.

¹⁰ See "Order Modifying Licenses (Effective Immediately)," 67 Fed. Reg. 65,150 (Oct. 23, 2002) (affecting 10 C.F.R. Part 50 licenses) and "Order Modifying Licenses (Effective Immediately)," 67 Fed. Reg. 65,152 (Oct. 23, 2002) (affecting 10 C.F.R. Part 72 licenses). SLOMFP is not free to use an adjudication as a means to enhance existing NRC orders or regulations. See *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983) (hearing petitioners may not seek requirements more extensive than those imposed by NRC order); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 470 (2001) (hearing petitioners may not challenge NRC rules). See also 10 C.F.R. § 2.758. Thus, we decline SLOMFP's request to expand the current ISFSI proceeding to litigate the usefulness of the particular security measures that SLOMFP suggests.

also seeks public participation on security-related issues, but the Atomic Energy Act already provides for appropriate public participation, for both licensing actions and rulemakings.¹¹

SLOMFP is free to make its positions known during this adjudication (as they relate to this proceeding) and in any rulemakings that emerge from our comprehensive security review. We are referring SLOMFP's current petition (and attachments) to the NRC staff for appropriate consideration as the staff continues its review of security measures.

A. Nature of the Petition

Before responding to the merits of the filing that is now before us, we shall attempt to characterize it. The petitioners themselves reject characterization of their request as a petition for rulemaking or enforcement.¹² Although SLOMFP desires that we ultimately strengthen our physical protection regulations -- a matter more appropriate for a generic rulemaking petition -- SLOMFP's immediate objectives are site-specific, rather than generic, and thus inappropriate for a rulemaking petition.¹³ We also take SLOMFP at its word that it is not requesting enforcement relief under 10 C.F.R. § 2.206.¹⁴

SLOMFP also requested relief extending to the two Diablo Canyon power plants and to power plants and ISFSIs at other sites. The 10 C.F.R. Part 50 Diablo Canyon power plant licenses are not at issue in this 10 C.F.R. Part 72 proceeding. And SLOMFP's even broader

¹¹ See AEA, § 189.a., 42 U.S.C. § 2239(a).

¹² See Petition at 7.

¹³ See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345-46 (1999) (remedy for petitioners dissatisfied with Commission's generic approach lies in rulemaking process, not specific adjudication).

¹⁴ "Any person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper." 10 C.F.R. § 2.206(a). The Commission's vehicle to institute such a proceeding is 10 C.F.R. § 2.202.

requests involving other licensees are also not cognizable in this individual adjudicatory proceeding.¹⁵

According to SLOMFP, it brings its petition “under the Atomic Energy Act’s provisions which prohibit licensing actions that would pose unreasonable risk to public health and safety or be inimical to the common defense and security.”¹⁶ SLOMFP states that it has brought the Petition directly to the Commission because only the Commission has the authority to determine what measures, beyond current regulatory requirements, must be imposed to meet the AEA’s standard for protection of the public.¹⁷

Because SLOMFP’s request does not fit comfortably in any specific category, we will treat it as a general motion brought under the procedural requirements of 10 C.F.R. § 2.730. Such a motion should initially be addressed to the Presiding Officer when a proceeding is pending,¹⁸ and the Commission does not encourage participants in adjudicatory proceedings to attempt to bypass the Board by filing motions or petitions directly with the Commission.¹⁹ Nevertheless, because we have ultimate supervisory control over our proceedings, we choose here to address the merits of SLOMFP’s petition.

B. Merits of the Petition

By not suspending operating licenses in the 14 months that have elapsed since the terrorist attacks of September 11, 2001, the Commission has implicitly concluded that *continued*

¹⁵See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility, CLI-01-28, 54 NRC 393, 399 n. 9.

¹⁶Petition at 7. See also AEA, 42 U.S.C. § 2011 *et seq.*

¹⁷See Petition at 8.

¹⁸“All motions shall be addressed to the Commission or, when a proceeding is pending before a presiding officer, to the presiding officer.” 10 C.F.R. § 2.730(a).

¹⁹See *Savannah River*, CLI-01-28, 54 NRC at 398 n. 7.

operation of power plants and ISFSIs does not pose an imminent risk to the public health and safety and is not inimical to the common defense and security. Last year we enunciated the considerations we apply to *pending licensing proceedings* to decide whether to postpone them to await ongoing review of the agency's terrorism-related policies.

[W]e consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies.²⁰

We have expressly denied direct requests for suspensions and/or dismissals of licensing actions in *Private Fuel Storage*,²¹ *Savannah River*,²² and *McGuire*.²³ *Private Fuel Storage* is a 10 C.F.R. Part 72 proceeding involving an application to build an ISFSI much larger than the proposed Diablo Canyon ISFSI. An intervenor, the State of Utah, requested that the "licensing proceeding be stopped until applicable laws and regulations can be brought into 'conformity with present realities.'"²⁴ Utah asked the Commission to stay proceedings until

²⁰*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001); *accord Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 389-90 (2001); *Savannah River*, CLI-01-28, 54 NRC at 399.

²¹See *Private Fuel Storage*, CLI-01-26, 54 NRC 376.

²²See *Savannah River*, CLI-01-28, 54 NRC 393. Like SLOMFP here, the intervenor in the *Savannah River* mixed oxide fuel fabrication facility proceeding made a broad request. It maintained that current NRC regulations are inadequate and the Commission should "suspend proceedings in which applicable standards are inadequate to ensure protection of public health and safety until the regulatory review the Commission has mandated is complete." *Id.* at 399. The *Savannah River* intervenor also made the request, not cognizable in an individual adjudicatory proceeding, that we suspend *other* proceedings. See *id.*

²³See *McGuire*, CLI-01-27, 54 NRC 385. In *McGuire*, the intervenor sought to dismiss a reactor license renewal proceeding because it considered major changes in security and safeguards requirements to be inevitable after the September 11, 2001, terrorist attacks. The intervenor claimed that meaningful review of the application would require consideration of future increased security costs. See *id.* at 390.

²⁴*Private Fuel Storage*, CLI-01-26, 54 NRC at 380, *citing* intervenor's brief.

Congress and the Commission revise the law and regulations to account for the increased threat of domestic terrorism. We denied Utah's request. The Commission determined that moving forward with the proceeding "would neither present a threat to public health and safety nor interfere with our ongoing regulatory review, and halting it would interfere with our goal of adjudicatory efficiency."²⁵

Here, SLOMFP has not advanced any arguments that alter our perception that immediate suspension of licensing proceedings is unwarranted. Indeed, we continue to believe that licensing proceedings can move forward in parallel with our security review and the interim compensatory measures²⁶ we have ordered:

The Commission believes that its response to [the September 11, 2001 terrorist attacks] has been expeditious and that the current safeguards and physical security programs provide for a very high level of security at NRC-licensed facilities. However, in the aftermath of the terrorist attacks and the continuing uncertainty about future terrorist intentions, we have commenced a thorough review of our safeguards and physical security programs, from top to bottom, including those applicable to independent spent fuel storage installations. The review will include a comprehensive examination of the programs' basic underlying assumptions.²⁷

There certainly is no reason to believe that any danger to public health and safety would result from *mere continuation of this adjudicatory proceeding*. The instant licensing proceeding is in its early stages and, even if the NRC approves the requested ISFSI license, construction is not scheduled to begin until early 2004 and loading of the first casks will not occur until 2006.²⁸

On the other hand, suspending this proceeding would prove an obstacle to fair and efficient decisionmaking. As always, we balance the applicants' and licensees' interest in a

²⁵*Id.* at 384.

²⁶Those measures include additional protections at ISFSIs. See note 10 *supra*.

²⁷*Private Fuel Storage*, CLI-01-26, 54 NRC at 379.

²⁸See "Opposition of Pacific Gas and Electric Company to Requests for Stay of Proceeding" at 2 (July 2, 2002) ("Opposition").

prompt decision on their application against the petitioners' interest in an opportunity for a hearing.²⁹ In the instant case, the petitioners have requested a hearing and have proffered eight contentions, including the contention that the applicant has failed to address the environmental impacts of destructive acts of malice or insanity. The other seven contentions have little or no relationship to terrorism. For example, the petitioners have advanced five technical contentions that are not linked to terrorism: (1) inadequate seismic analysis; (2) insufficient financial qualifications; (3) license applicant is not the real party in interest; (4) inadequate description of financial relationships between corporate entities; and (5) insufficient description of construction and operation costs. Further, they have presented two environmental contentions, failure to fully describe the purposes of the proposed action and failure to evaluate the environmental impacts of transportation at the end of the license term, that are, at most, peripherally related to terrorism. Nevertheless, SLOMFP asks the Commission to postpone action on all of the other issues while the Commission completes its thorough assessment of the post-September 11, 2001 implications of terrorism.

However, it is not sensible to postpone consideration and resolution of various safety and environmental issues having little or nothing to do with the Commission's ongoing review of security requirements. The Commission supervises its adjudicatory docket with a view toward "sound case management."³⁰ Efficient and expeditious decisionmaking is particularly important in this case, as PG&E has stated that, to preserve the capability for a full core off-load, it needs to operate the proposed ISFSI at the beginning of 2006. Accordingly, PG&E has requested issuance of the license by the end of 2003 and filed its license application two years ahead of

²⁹See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998).

³⁰*McGuire*, CLI-01-27, 54 NRC at 391, *quoting Hydro Resources, Inc.*, CLI-01-04, 53 NRC 31, 40 (2001).

its target date.³¹ Congress has recognized the need for and encouraged spent fuel storage at reactor sites and, to this end, has even mandated an *expedited* hearing process.³²

Lastly, moving forward with this adjudication will not prevent appropriate implementation of any rule or policy changes arising from our ongoing evaluation of terrorism-related policies. SLOMFP may have an opportunity to file late contentions in this proceeding or reopen the record, if policy or rule changes take place and the timing is appropriate.³³ And every license the Commission issues is subject to the possibility of additional requirements. The Commission can modify license requirements by rule, regulation, or order; and changes can be applicable to both applicants and licensees.³⁴ Thus, as in *Private Fuel Storage*, “holding up these proceedings is not necessary to ensure that the public will realize the full benefit of our ongoing regulatory review” at the Diablo Canyon facility.³⁵

In summary, the instant licensing proceeding neither conflicts with the Commission’s ongoing review of terrorism-related matters nor forecloses the implementation of potential new rules. And both national policy and the principles of sound case management militate against suspending this ISFSI proceeding in its early stages.

III. CONCLUSION

The Commission *denies* SLOMFP’s petition to suspend this proceeding or, in the alternative, to adopt interim safety measures.

³¹ See Opposition at 2.

³² See Nuclear Waste Policy Act, 42 U.S.C. § 10,151 *et seq.*

³³ See 10 C.F.R. §§ 2.714(a), 2.734.

³⁴ See, e.g., 10 C.F.R. § 72.62, the backfitting rule for ISFSIs. “The Commission will require backfitting of an ISFSI ... if it finds that such action is necessary to assure adequate protection to occupational or public health and safety, or to bring the ISFSI . . . into compliance with a license or the rules or orders of the Commission” 10 C.F.R. § 72.62(b).

³⁵ *Private Fuel Storage* at 383.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of November 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY 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 foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-23) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

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(CLI-02-23)

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Docket No. 72-26-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-02-23)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of November 2002