UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

SERVED 05/16/03

Nils J. Diaz, Chairman
Greta Joy Dicus
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Jeffrey S. Merrifield

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

CLI-03-04

MEMORANDUM AND ORDER

This proceeding arises from the application of Pacific Gas & Electric Company ("PG&E") to construct an independent spent fuel storage installation ("ISFSI") at the site of its two Diablo Canyon nuclear power plants. The San Luis Obispo Mothers for Peace ("MFP"), the lead intervenor in this proceeding, recently filed a rulemaking petition jointly with the Union of Concerned Scientists ("UCS"). This order denies a request to suspend this proceeding while the Commission considers the rulemaking petition.

I. BACKGROUND

We have described the history of this 10 C.F.R. Part 2, Subpart K proceeding elsewhere and see no need to repeat it in detail.[1] On December 21, 2001, PG&E filed an application for a materials license authorizing storage of spent nuclear fuel in a dry cask

[1] *See Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 234-35 (2002); CLI-03-01, 57 NRC 1, 3-4 (2003).

storage system at its Diablo Canyon site. Several intervenors and interested governmental entities have been participating in the adjudication of one admitted contention, which deals with the financial qualifications of PG&E in light of its Chapter 11 bankruptcy. The Licensing Board will hear oral arguments on May 19, 2003, and thereafter will rule on whether a further evidentiary hearing is warranted.

MFP is the lead intervenor in this proceeding, and UCS describes itself as "a nonprofit partnership of scientists and citizens" who seek "practical environmental solutions."[2] Together, the organizations filed a petition for rulemaking ("Petition") on April 28, 2003. MFP requested that the Commission suspend this licensing proceeding while it considers the Petition. Pursuant to 10 C.F.R. § 2.802(d), a petitioner for rulemaking "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."[3]

II. DISCUSSION

The stated purpose of the Petition is to provide better protection against radiological sabotage at nuclear power plants.[4] MFP and UCS propose that 10 C.F.R. §§ 50.59[5] and 50.54(p)[6] be revised "to require plant owners to formally evaluate whether proposed changes,

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[2]*See* Petition at 1.

[3]10 C.F.R. § 2.802(d).

[4]*See* Petition at 1.

[5]This section describes the circumstances under which a licensee may make changes in the facility or procedures as described in the final safety analysis report and conduct tests or experiments not described in the final safety analysis report without obtaining a license amendment.

[6]This section describes conditions under which a licensee may make changes in its safeguards contingency plan without prior approval of the Commission and requires a licensee to provide for the development, revision, implementation, and maintenance of its safeguards contingency plan.

tests, and experiments cause protection against radiological sabotage to be decreased and, if so, that such actions only be conducted with prior NRC approval."[7]

Further, MFP and UCS propose that 10 C.F.R. Part 50 be revised to require nuclear power plant owners "to formally evaluate their facilities against specified aerial hazards and make changes as necessary to provide reasonable assurance that the ability of the facility to reach and maintain safe shutdown would not be compromised by an aerial assault."[8] Petitioners assert that the requested changes for aerial hazards are analogous to regulations promulgated by the NRC to rectify the fire protection regulation shortcomings after a fire at the Browns Ferry power station in 1975.[9] The Petition focuses on the effect of an aerial attack on the control building, which is located outside the heavily reinforced containment surrounding the nuclear reactor itself.

In a letter accompanying the Petition, MFP requests that the Commission suspend the Diablo Canyon ISFSI proceeding while it considers the Petition and advances two reasons for doing so. First, according to MFP, the petition has the "potential to bring about a significant redefinition of the fundamental design requirements that are considered adequate to protect independent spent fuel facilities [] against radiological sabotage."[10] Second, the Petition seeks to upgrade the 10 C.F.R. § 50.59 safety evaluation process, which the licensee would likely use in developing and revising procedures for dry cask loading and movement. To ensure that the

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[7]Petition at 5.

[8]*Id.*

[9]*See id.*

[10]Petition cover letter, David Lochbaum to Annette L. Vietti-Cook (Apr. 28, 2003).

ISFSI is adequately designed to accommodate the changes, MFP asserts that conclusion of the licensing proceeding should await the outcome of the rulemaking proceeding.[11]

Although the Commission will evaluate the MFP-UCS rulemaking proposal carefully, we do not find it necessary to stay further licensing proceedings in this case. We denied a similar stay request earlier in this proceeding when MFP, 10 other intervention petitioners, and one outside organization petitioned the Commission directly to suspend the proceeding pending the NRC's ongoing comprehensive review of the adequacy of design and operation measures to protect against terrorist attack and other acts of malice or insanity.[12] Then as now, MFP contended, among other things, that NRC's "design basis threat" is inadequate.[13]

We evaluate MFP's current request under the same standard we used for its earlier request:

> [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.[14]

MFP has advanced no new arguments that warrant suspension of this proceeding. Again, we find that there "is no reason to believe that any danger to public health and safety would result

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[11]*See id.*

[12]*See* CLI-02-23, 56 NRC 230 (2002).

[13]The "design basis threat" is the postulated threat that the physical protection system must be able 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). The Commission recently revised the design basis threat for the 103 operating U.S. nuclear power plants by issuing a security order on April 29, 2003. The order, classified as safeguards information, is not available to the public.

[14]CLI-02-23, 56 NRC at 238, *quoting Private Fuel Storage* (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); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399.

from *mere continuation of this adjudicatory proceeding."*[15] And, given the current posture of the ISFSI proceeding, suspending the proceeding would prove "an obstacle to fair and efficient decisionmaking." The sole contention under consideration by the Licensing Board is the licensee's financial qualifications in view of its bankruptcy. Subpart K oral arguments, the culmination of months of discovery, preparation, and written presentations to the Licensing Board, are imminent -- scheduled for May 19, 2003. It is not sensible to postpone resolution of this single issue at this late stage in the proceeding. Finally, conclusion of the licensing proceeding need not await the outcome of the filing of the rulemaking petition to ensure that the proposed ISFSI is adequately designed to accommodate any changes resulting from consideration of the rulemaking proposal. As "every license the Commission issues is subject to the possibility of additional requirements,"[16] moving forward with the current Diablo Canyon licensing proceeding does not foreclose implementation of any new rules originating from the pending rulemaking petition.

III. CONCLUSION

The Commission *denies* MFP's request to suspend this proceeding while it is considering MFP's and UCS's rulemaking petition.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of May, 2003.

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[15]CLI-02-23, 56 NRC at 239.

[16]*Id.* at 240.

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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-03-04) 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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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of May 2003