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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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 INTERVENORS' PETITION
FOR REVIEW OF LBP-02-23 AND LBP-03-011

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September 2, 2003

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In the Matter of)
PACIFIC GAS & ELECTRIC CO.) Docket No. 72-26-ISFSI
(Diablo Canyon Independent Spent Fuel)) ASLBP No. 02-801-01-ISFSI
Storage Installation))

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b)(3), the staff of the Nuclear Regulatory Commission (“Staff”) hereby files its response to the petition seeking Commission review of the Licensing Board’s decisions in LBP-02-23 and LBP-03-11,¹ filed by Intervenors’ San Luis Obispo Mothers for Peace, *et al.* (“SLOMFP”).² For the reasons set forth herein, the Staff submits that SLOMFP fails to demonstrate that Commission review of the Board’s decisions is warranted under 10 C.F.R. § 2.786(b)(4). SLOMFP’s Petition, therefore, should be denied.

BACKGROUND

On December 21, 2001, Pacific Gas & Electric Company (“PG&E” or “Applicant”) filed an application for a Part 72 license that would permit PG&E to construct and operate an aboveground

¹ See *Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-02-23, 56 NRC 413 (2002); see *Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-03-011, 58 NRC ___ (August 5, 2003) (“Memorandum and Order, Denying Request for Evidentiary Hearing and Terminating Proceeding”).

² See “Intervenors’ Petition for Review of LBP-02-23 and LBP-03-11” dated August 18, 2003, (“SLOMFP’s Petition”). Pursuant to 10 C.F.R. §§ 2.786(b)(3) and 2.710, Staff’s response is filed today, September 2, 2003, 15 days following service by U.S. mail.

dry cask storage facility at its Diablo Canyon Power Plant (“DCPP”) site. Following the requests of various intervenors and interested governmental participants (“IGP”) to participate in a hearing and the filing of issues and contentions, a sole contention of intervenors San Luis Obispo Mothers for Peace, et. al, (“SLOMFP”) was admitted by the Board in LBP-02-23, SLOMFP’s Technical Contention 2 (“TC-2”). SLOMFP Contention TC-2 alleged that “PG&E has failed to demonstrate that it meets the financial qualifications requirements of 10 C.F.R. § 72.22(e).” In admitting this contention, the Board found that SLOMFP raised “relevant and material concerns regarding the impact of PG&E’s bankruptcy on its continuing ability to undertake the new activity of constructing, operating, and decommissioning an ISFSI by reason of its access to continued funding as a regulated entity or through credit markets.” The Board, however, excluded from the contention any matters relative to either the Attorney General’s unresolved lawsuit against PG&E Corporation for alleged fraud or the financial qualifications of any entities that might in the future construct or operate the ISFSI. The Board denied the admission of SLOMFP’s remaining proffered contentions.

Subpart K of the Commission’s regulations was subsequently invoked, after which the parties provided the Board with the necessary Subpart K filings and oral argument was held on May 19, 2003. During the oral argument, interested governmental participants (“IGP”) San Luis Obispo County (“SLOC”), the Avila Beach Community Services District (“ABCSD”) and the California Public Utilities Commission (“CPUC”) argued that further exploration of the issues in an evidentiary hearing was warranted. On the other hand, SLOMFP, the California Energy Commission (“CEC”), PG&E and the Staff, while disagreeing on the merits of the contention, contended that there was no need for an adjudicatory hearing.

Following the Board’s decision In LBP-03-011, in which the Board determined that an evidentiary hearing on Contention TC-2 was unnecessary, SLOMFP petitioned the Commission for review of the Board’s decision in LBP-03-11, as well as the Board’s earlier decision in LBP-02-23, alleging various Board rulings in the decisions were legally erroneous and raise

substantial questions of NRC policy and discretion. See SLOMFP Petition at 2, 5, 6 & 8. Specifically, SLOMFP contends that the Board erred in LBP-02-23 when it denied admission of SLOMFP Contention TC-1 regarding the inadequacy of PG&E's seismic analysis; when it denied admission of SLOMFP Contention EC-2 regarding the failure of the environmental report to disclose a purpose of the proposed ISFSI; and when it denied admission of SLOMFP Contention EC-3 which challenged the adequacy of the ER to consider transportation-related impacts. See SLOMFP's Petition at 2, 8 & 10. Additionally, SLOMFP claims the Board erred in LBP-03-11 when it concluded that PG&E is financially qualified. See SLOMFP Petition at 5. The Staff submits that none of these claims raise a substantial question with respect to the considerations set forth in 10 C.F.R. § 2.786(b)(4) and SLOMFP's Petition should, therefore, be denied.

DISCUSSION

I. Legal Standards Governing Petitions for Review

In determining whether to grant, as a matter of discretion, a petition for review of a licensing board order, the Commission gives due weight to the existence of a substantial question with respect to the considerations set forth in 10 C.F.R. § 2.786(b)(4). See *Babcock and Wilcox Company* (Pennsylvania Nuclear Service Operations, Parks Township, Pennsylvania), CLI-95-04, 41 NRC 248, 250-251. Those considerations are: (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion that is without governing precedent or is a departure from or contrary to established law; (iii) a substantial and important question of law, policy, or discretion has been raised; (iv) the conduct of the proceeding involved a prejudicial procedural error; or (v) any other consideration which the Commission may deem to be in the public interest. 10 C.F.R. § 2.786(b)(4); see also, *Babcock and Wilcox Company*, 41 NRC at 250-251. Although Subpart K has no reviewability rules of its own, the general reviewability standards set out in 10 C.F.R. § 2.786 apply to subpart K by virtue of 10 C.F.R. § 2.1117, which makes the general Subpart G rules applicable "except where

inconsistent" with Subpart K. *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27, n. 6 (2001).

II. SLOMFP's Petition Fails to Demonstrate that Commission Review is Warranted in Accordance with the Requirements of 10 C.F.R. § 2.786(b)(4)

The Staff submits that none of the alleged errors identified by SLOMFP in the Board's LBP-02-23 or LBP-03-011 decisions raise a substantial question with respect to the considerations set forth in 10 C.F.R. § 2.786(b)(4). The Staff will address each of the alleged Board errors raised by SLOMFP in turn.

A. The Board Properly Excluded SLOMFP Contention TC-1

SLOMFP contends that the Board's decision to reject Contention TC-1 regarding the inadequacy of PG&E's seismic analysis for the independent spent fuel storage installation ("ISFSI") site was based upon legal error because the decision has no support in 10 C.F.R. § 72.102(f) or § 72.40(c). See SLOMFP Petition at 2. Contrary to SLOMFP's assertion, however, the Board's thorough review of the regulations in question, as well as a review of proposed changes to the regulations, reveals that the Board precisely followed the intent of the regulations. As the Board explained in rejecting SLOMFP Contention TC-1:

As the Part 72 regulations quoted above make clear, for a co-located ISFSI, the applicant does not write on a clean slate relative to any seismic requirements. Absent an exemption or new information sufficient to alter the original site evaluation finding, the [design earthquake ("DE")] for a nuclear facility is what the ISFSI applicant must use. As a consequence, a contention challenging the seismic qualifications of such a co-located ISFSI facility must necessarily provide not only a basis to indicate that there are specific concerns about the elements used to calculate the nuclear power plant seismic design criteria, but also a showing that, given those concerns, the reactor facility DE itself is now inaccurate to some meaningful degree. In this instance, despite having provided information concerning the first consideration, by failing to make any showing regarding the latter point, SLOMFP has failed to put forth an admissible contention.

LBP-02-23, 56 NRC at 440 - 441 (footnotes omitted). The Board's rationale is supported in the Statement of Consideration for the Final Rule adding the Part 72 regulations which states that "[f]or an ISFSI that is located on a power plant site that has been evaluated by the criteria and level of investigations of Appendix A of 10 CFR Part 100, the ISFSI DE for structures shall be equivalent to the safe shutdown earthquake (SSE) for a nuclear power plant." 45 Fed. Reg. 74693, 74697. Because PG&E's seismic analysis relied upon the SSE for the DCPP site, the analysis complied with the NRC regulations. SLOMFP, in asserting this claim, fails to identify any additional argument that would reveal any error in the Board's regulatory interpretation, but instead, SLOMFP simply disagrees with the Board's conclusion. Without directing the Commission's attention to any substantial question with respect to the considerations outlined in section 2.786(b)(4), the Staff contends SLOMFP has failed to state an adequate basis for the necessity of Commission review regarding the exclusion of SLOMFP contention TC-1.

SLOMFP additionally argues that the exclusion of SLOMFP Contention TC-1 is legally erroneous because, SLOMFP contends, 10 C.F.R. § 72.40(c) fails to apply to the Diablo Canyon ISFSI, but instead, section 72.40(c) only applies to an ISFSI licensed under Part 50 of the Commission's regulations.³ SLOMFP Petition at 4. This argument, in addition to being raised for the first time on appeal and, thus, procedurally defective, is also without merit. See *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82-83 (1985). SLOMFP's selective quotation of excerpts from the Federal Register notice fails to support its claim. Moreover, the plain language in section 72.40(c) does not *limit* its application to ISFSIs granted construction permits under Part 50, but instead states that it *includes* those facilities. See

³ 10 C.F.R. § 72.40(c) states:

(c) For facilities that have been covered under previous licensing including the issuance of a construction permit under part 50 of this chapter, a reevaluation of the site is not required except where new information is discovered which could alter the original site evaluation findings. In this case, the site evaluation factors involved will be reevaluated.

10 C.F.R. § 72.40(c). Accordingly, SLOMFP has failed to identify any legal error or contrary precedent that would require Commission review of the Board's decision regarding SLOMFP Contention TC-1.

B. The Board Properly Excluded SLOMFP Contention EC-2

SLOMFP next claims that the Board's decision to exclude SLOMFP Contention EC-2 was legally erroneous because it violated NEPA. See SLOMFP Petition at 8. SLOMFP Contention EC-2 asserts that the ER for the proposed ISFSI failed to disclose an apparent purpose of the proposed ISFSI, to provide spent fuel storage capacity during a license renewal term and, thus, results in an unreasonable narrowing of the alternatives considered in the ER. See *Id.* at 8-9. SLOMFP states that the real question here is "whether the purpose of the proposed action is reasonably described" and continues by alleging that the Board "ignore[d] the very real potential that the extra dry storage capacity at the proposed ISFSI will be used during license extension...". SLOMFP Petition at 10.

To the contrary, however, the Board, in ruling upon and rejecting the admissibility of SLOMFP Contention EC-2, considered this very argument and determined that it "fail[ed] to see how an application that accurately describes what the proposed capacity will be and provides a logical basis for that capacity is deficient so as to create a material dispute for contention admission purposes." LBP-02-23, 56 NRC at 450. SLOMFP's Petition fails to direct the Commission to any aspect of the Board's ruling regarding SLOMFP Contention EC-2 that was legally erroneous, contrary to established precedent or raises a substantial question regarding any of the other considerations in section 2.786(b)(4). Instead, SLOMFP simply restates its earlier arguments, which were properly rejected by the Board and, thus, should not be considered as adequate grounds to justify Commission review of LBP-02-23.

C. The Board's Conclusion that PG&E is Financially Qualified Does Not Raise Substantial Questions of NRC Policy and Discretion

SLOMFP asserts that the Board erred in concluding PG&E was financially qualified to construct and operate the proposed ISFSI “because [the Board] makes a safety finding regarding a time period that the ASLB itself excluded from consideration in the proceeding: the period following PG&E’s bankruptcy.” SLOMFP Petition at 5. Moreover, SLOMFP claims that the Board’s decision to allow the licensing of the ISFSI in the absence of a completed Staff review covering the post-bankruptcy period “raises substantial questions of NRC policy and discretion.” *Id.*

SLOMFP’s argument, however, is not that the Board’s decision was legally erroneous, but, instead, SLOMFP simply disagrees with the Board’s decision when admitting contention TC-2 to exclude from litigation under this contention any matters relative to the financial qualifications of any entities that might in the future construct or operate the ISFSI post PG&E’s bankruptcy proceeding. See LBP-02-23, 56 NRC 413, 442-443 (2002). As such, this argument seeks to improperly expand the scope of this ISFSI proceeding. As the Board explained, “Petitioner concerns regarding entities that may or may not be created in the future to take over operations at DCPP, depending upon whether PG&E’s reorganization plan is approved by the bankruptcy court, are irrelevant to and/or outside the scope of the proceeding at this point.” 56 NRC at 444. The Board further elaborated that, “[i]n this regard, assuming that the bankruptcy court confirms PG&E’s reorganization plan, and that the Commission approves the license transfer of DCPP from PG&E to Gen,⁴ PG&E would then be required to amend its ISFSI license application to reflect the change in the applicant.” *Id.* at 444, fn. 8. Furthermore, the Board acknowledged that only if and

⁴ Under PG&E’s proposed bankruptcy reorganization plan, the majority of the assets and liabilities associated with the current generation business of PG&E, including DCPP, will be contributed to a new subsidiary, Gen, or its subsidiaries. See “Application for License Transfers and Conforming Administrative License Amendments”, submitted by PG&E on November 30, 2001, ML013370300.

when this chain of events is in fact realized, would issues regarding Gen's financial qualifications be ripe for litigation. *Id.*

Thus, any concern SLOMFP may have about any future entity which may assume control of DCPP and the ISFSI as a result of the bankruptcy reorganization is more appropriately addressed in the license transfer proceeding that would necessarily follow, but is not properly within the scope of the present proceeding. See 10 C.F.R. §§ 72.50 & 2.1300. Contrary to SLOMFP's assertion otherwise, the Board has made no finding, safety or otherwise, regarding any post-bankruptcy entity that may in the future assume control of the proposed ISFSI and it would be impossible to do so since the details of any potential post-bankruptcy organization are, at this point, unknown. This lack of knowledge, however, in no way calls into question the current applicant, PG&E's, financial qualifications to construct and operate the ISFSI. In fact, the Commission's regulations are designed to handle these contingencies if and when they arise. See 10 C.F.R. § 72.50. Consequently, the Board's decision to ensure the Commission's regulations are appropriately followed and, thus, to focus Contention TC-2 on the current applicant's financial ability to construct and operate an ISFSI was in no way contrary to established law or without governing precedent, nor does the ruling raise a substantial question regarding any of the other considerations in section 2.786(b)(4) which would require Commission review of the decision.

D. The Board Properly Excluded SLOMFP Contention EC-3

SLOMFP additionally asserts that the Board erred when excluding SLOMFP Contention EC-3 which challenged the adequacy of the applicant's environmental report to consider transportation-related impacts. See SLOMFP Petition at 10. SLOMFP's argument regarding Contention EC-3 is based upon the same mistaken argument SLOMFP asserted regarding Contention TC-1 - that section 72.40(c) does not apply to the proposed ISFSI, but only to ISFSIs licensed under Part 50 of the Commission's regulations. The Staff submits that this claim fails for the same reasons as those referenced above. Specifically, this argument, in addition to being

raised for the first time on appeal and thus procedurally defective, is also without merit. See *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82-83 (1985). The plain language in section 72.40(c) does not *limit* its application to ISFSIs granted construction permits under Part 50, but instead states that it *includes* those facilities. See 10 C.F.R. § 72.40(c). Accordingly, SLOMFP has failed to identify any legal error or contrary precedent that would require Commission review of the Board's decision regarding the inadmissibility of SLOMFP Contention EC-3.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Intervenors have failed to point out any substantial question with respect to the considerations outlined in section 2.786(b)(4) which would require Commission review of LBP-02-23 or LBP-03-011. Thus, SLOMFP's Petition for Review should be denied.

Respectfully submitted,

/RA

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Dated at Rockville, Maryland
this 2nd day of September, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Spent Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO INTERVENORS' PETITION FOR REVIEW OF LBP-02-23 AND LBP-03-011", 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 2nd day of September, 2003.

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