RAS 12336

September 28, 2006

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)	)	

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION FOR PARTIAL RECONSIDERATION OF CLI-06-23

I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.323 and 2.345, Pacific Gas and Electric Company ("PG&E") responds in opposition to the September 18, 2006, motion for partial reconsideration of CLI-06-23 filed by the San Luis Obispo Mothers for Peace ("SLOMFP") et al. (collectively, "Petitioners").[1] In CLI-06-23, the Commission denied — as "unnecessary and premature" — Petitioners' July 5, 2006, motion[2] for declaratory and injunctive relief with respect to Materials License No. SNM-2511.[3] That license, issued under 10 C.F.R. Part 72, authorizes PG&E to possess spent fuel and related radioactive materials generated at the Diablo Canyon Power Plant ("DCPP") at an onsite independent spent fuel storage installation ("ISFSI").

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1 *See* "Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard for Partial Reconsideration of CLI-06-23" (Sept. 18, 2006) ("Reconsideration Motion").

2 *See* "Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard for Declaratory and Injunctive Relief With Respect to Diablo Canyon ISFSI" (July 5, 2006) ("July 2006 Motion").

3 *See Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-23, 64 NRC __ (slip op. Sept. 6, 2006) at 2.

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In the Reconsideration Motion, Petitioners ask the Commission — for a second time — to "declare" PG&E's Part 72 license "invalid" and to enjoin PG&E from loading spent fuel into the planned ISFSI[4] based on the recent Ninth Circuit Court of Appeals decision.[5] Petitioners' Reconsideration Motion improperly re-argues previously *rejected* positions, improperly introduces a new argument, and is riddled with factual and legal errors. Accordingly, the Reconsideration Motion should be denied.

II. BACKGROUND

In CLI-06-23, the Commission rejected Petitioners' July 2006 Motion on several independent grounds. First, the Commission concluded that the motion was premature because the Court of Appeals had yet to issue its "mandate" and formally return the ISFSI proceeding to the Commission.[6] Second, the Commission stated that "we see no urgent reason now to consider the validity of PG&E's ISFSI license and PG&E's right to load spent fuel into its ISFSI."[7] Specifically, in view of PG&E's express representation that it will not transfer spent fuel to the ISFSI until at least November 2007, the Commission found neither issue presently to be of "practical significance."[8] Finally, the Commission concluded that under the current circumstances — *i.e.*, ongoing construction of the ISFSI but no loading of spent fuel — "there is

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4 Reconsideration Motion at 7.

5 *See San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006).

6 CLI-06-23, slip op. at 2. The Commission also noted that the U.S. Supreme Court had extended the deadline for requesting certiorari review of the Ninth Circuit's decision until September 29, 2006. *See id.* PG&E will file a petition by that date.

7 *Id.*

8 *Id.*

no imminent or irreparable harm justifying immediate Commission action."[9] The Commission expressly recognized such harm as "the *sine qua non* of the kind of equitable relief SLOMFP seeks."[10]

III. LEGAL STANDARD FOR RECONSIDERATION

A petition for reconsideration "must demonstrate a *compelling circumstance*, such as the existence of a *clear and material error* in a decision, which could not have been reasonably anticipated, which renders the decision invalid."[11] This standard is a strict one, as the Commission does "not lightly revisit [its] own already-issued and well-considered decisions."[12] The Commission will "do so only if the party seeking reconsideration brings *decisive* new information to [the Commission's] attention or demonstrates a fundamental Commission misunderstanding of a key point."[13] Reconsideration petitions, therefore, "must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or factual clarification."[14] As such, rehashing previously rejected arguments or presenting new arguments is improper.[15]

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9 *Id.* at 3.

10 *Id.* PG&E has also previously demonstrated that a balancing of the equities strongly militates against such relief. *See* "Answer of [PG&E] to Motion for Declaratory and Injunctive Relief" (July 17, 2006) ("PG&E July 17th Answer") at 16-17.

11 10 C.F.R. § 2.345(b) (emphasis added). *See also* 10 C.F.R. § 2.323(e).

12 *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004) (citation omitted).

13 *Id.* (emphasis added).

14 *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station), CLI-03-18, 58 NRC 433, 434 (2003) (citation omitted).

15 *See id.* (citations omitted); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-2, 55 NRC 5, 7 (2002) (citations omitted).

IV. ARGUMENT

As shown below, Petitioners' Reconsideration Motion should be denied. First, the issuance of the Ninth Circuit's mandate is not a "compelling circumstance" that would justify reconsideration of CLI-06-23. Second, Petitioners continue to ignore controlling precedent and misrepresent the legal effect of the Court's decision, which did *not* invalidate the ISFSI license. Finally, Petitioners' new argument that 10 C.F.R. Part 51 "requires" the agency to revoke the ISFSI license is untimely and erroneous.

A. Issuance of the Ninth Circuit's Mandate Does Not Constitute a "Compelling Circumstance" Warranting Reconsideration of CLI-06-23

Petitioners argue that reconsideration is warranted "because the Ninth Circuit has issued its mandate," allegedly reversing the NRC's decision to issue the license to PG&E.[16] Petitioners also claim that issuance of the mandate "has eliminated any reason that may have existed for postponing the granting of Petitioners' motion for declaratory and injunctive relief."[17] Apart from the fact that the Ninth Circuit's mandate has issued (on September 12, 2006), these statements are patently incorrect.

In CLI-06-23, the Commission cited the then-pendency of the Court's mandate as one independent basis for its denial of Petitioners' July 5th Motion. However, as set forth above, the Commission provided other, additional bases for rejecting that motion. In particular, the Commission found the concerns expressed by Petitioners to be of no "practical significance" and to fall far short of any "imminent or irreparable harm," even assuming that the mandate had issued.[18] The Commission plainly understood the effect (or lack thereof) of the Ninth Circuit's

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16 Reconsideration Motion at 1-2.

17 *Id.* at 4.

18 CLI-06-23, slip op. at 3.

decision. Thus, while issuance of the mandate is a subsequent development, it was "reasonably anticipated" and does *not* constitute "decisive new information" or a "factual clarification" that could give the Commission "a reason for changing its mind."[19]

B. The Court of Appeals Decision Did Not "Invalidate" PG&E's License

Petitioners again mistakenly assert that the Ninth Circuit's NEPA-related ruling in *Mothers for Peace* "effectively revoked PG&E's license."[20] In this regard, Petitioners re-argue a position that was clearly rejected by the Commission. Petitioners do not establish any "fundamental misunderstanding" or "clear and material error" on the part of the Commission. Indeed, it is Petitioners who continue to suffer from a misunderstanding of the Ninth Circuit's decision and the principles governing injunctive relief.

As the Commission noted, the Ninth Circuit held only that the NRC's "'categorical refusal to consider the environmental effects of a terrorist attack' [was] unreasonable under [NEPA]," and "remanded the NEPA-terrorism question to the Commission for 'further proceedings consistent with this opinion.'"[21] The Commission also observed that the Court of Appeals "did not impose any interim remedy, direct the Commission to impose one, or specify the procedures the Commission must follow on remand."[22] The Ninth Circuit decision, by its terms, does *not* enjoin, set aside, or suspend any Commission order or PG&E's Part 72 license. In contending otherwise, Petitioners wishfully read too much into the Court's decision.

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19 *Ahmed v. Ashcroft*, 388 F.3d 247, 249 (7th Cir. 2004).

20 Reconsideration Motion at 5.

21 CLI-06-23, slip op. at 1 (quoting *Mothers for Peace*, 449 F.3d at 1028, 1035).

22 CLI-06-23, slip op. at 2.

Moreover, contrary to Petitioners' suggestion (in footnote 3 of their motion), the Third Circuit and Commission precedent in the *Limerick* proceeding *is* directly applicable here. In *Limerick Ecology Action*, the Third Circuit expressly noted the failure of the petitioner in that case to ask the court to "enjoin, set aside, suspend, or determine the validity of the grant of an *operating license* to Limerick Units 1 and 2."[23] The Third Circuit contrasted such relief with the type of relief *actually* sought by the petitioner in the *Limerick* case — and by SLOMFP in this case — *i.e.*, a remand to the Commission for evidentiary hearings on issues the Commission allegedly "should have, but failed to, consider under NEPA."[24] The Commission, for its part, and with an understanding of the distinction, found that the Third Circuit's decision had no impact upon the effectiveness of the Limerick operating license.[25] The same can be said of Ninth Circuit's decision here, *i.e.*, it has no impact on PG&E's ISFSI license.[26]

Petitioners implicitly — and quite wrongly — equate the Ninth Circuit's remand for further proceedings with a grant of injunctive relief. The distinction, however, is a crucial one.[27] To be sure, the Commission must proceed to implement the mandate; however, this does

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23 *Limerick Ecology Action v. NRC*, 869 F.2d 719, 741 n.27 (3d Cir. 1989).

24 *Id.*

25 *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), CLI-89-15, 30 NRC 96, 101 (1989).

26 *See also Minnesota v. NRC*, 602 F.2d 412, 418 (D.C. Cir. 1979) (remanding for further consideration "the specific problem isolated by petitioners" but declining to stay or vacate license amendments so as not to "effectively shut down the plants"); *Massachusetts v. NRC*, 924 F.2d 311, 336 (D.C. Cir. 1993) (remanding the case because of an unsatisfactory analysis of the results of a safety exercise, but allowing the license to remain in effect because voiding the license would be "immensely disruptive").

27 *See* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 291-92 (2003) (discussing "remand without vacation," *viz.*, "the practice whereby a court remands an agency action for further work but allows the action to remain in place during the further proceedings").

mean that the ISFSI license is invalid or that the Commission must declare it so. Significantly, Petitioners did not argue to the Ninth Circuit — as they argue to the NRC — that PG&E's license is invalid and that injunctive relief is warranted. Instead, Petitioners sought only additional hearings at the NRC to address, *inter alia*, an alleged procedural violation of NEPA. Petitioners' argument that "repeatedly ask[ing] the Court to reverse the NRC's licensing decisions for the Diablo Canyon ISFSI" is tantamount to requesting injunctive relief is contrived and incorrect. The license remains in effect.

As discussed in PG&E's July 17th Answer, a grant of injunctive relief is within a court's *equitable* discretion. In *Amoco Production Co. v. Village of Gambell*, the Supreme Court emphasized that injunctive relief is an "extraordinary" equitable remedy that "does not issue as of course," but instead requires a finding of "irreparable injury and inadequacy of legal remedies."[28] The Court rejected a *presumption* of irreparable damage as "contrary to traditional equitable principles" and concluded that the environment "can be fully protected without this presumption."[29] As another court put it, "a threat of irreparable injury must be proved, not assumed, and may not be postulated *eo ipso* on the basis of procedural violations of NEPA."[30] Indeed, the Commission itself has observed that "[n]umerous cases hold that a *plaintiff* seeking injunctive relief must prove irreparable harm, and that mere violation of NEPA or other environmental statues is insufficient to merit an injunction."[31] Petitioners simply ignore *Amoco*

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28 *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982)).

29 *Id.* at 545.

30 *Town of Huntington v. Marsh*, 884 F.2d 648, 651-54 (2d Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

31 *See Hydro Res., Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 n.13 (1998) (citations omitted) (emphasis added).

and its NEPA-specific progeny.[32] The Reconsideration Motion is based on a premise that remains flawed and should therefore be denied.[33]

C. Petitioners' New Argument Concerning 10 C.F.R. § 51.101(a) is Untimely and Incorrect

Petitioners argue, in the alternative, that 10 C.F.R. § 51.101(a) "requires" that PG&E's license be revoked, insofar as the issuance of a license must be "predicated on the lawful completion of a NEPA review."[34] This argument is new and therefore exceeds the proper scope of a reconsideration petition.[35]

In any event, the new argument is clearly rebutted by Commission precedent and the case law discussed above. Again, in *Limerick* the Commission specifically held that "NEPA itself does not always require resolution of all contested environmental issues and completion of the entire NEPA review process before the license can issue."[36] Nothing in Section 51.101(a) should be read to the contrary. Furthermore, Petitioners' new reading of Section 51.101(a) is overly broad. Section 51.101 was implemented to "discourage premature construction" that

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32 *See, e.g., Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991); *Sierra Club v. Marsh*, 872 F.2d 497, 502-504 (1st Cir. 1989); *Nat'l Audubon Soc'y v. Navy*, 422 F.3d 174, 201 (4th Cir. 2005), *Charter Township of Huron v. Richards*, 997 F. 2d 1168, 1175 (6th Cir. 1993); *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1158 (9th Cir. 1988).

33 Petitioners' unsupported assertion (Reconsideration Motion, at 6) that a "balancing of the equities" would be relevant only if the *NRC or PG&E* requested a stay of the mandate seeks improperly to reallocate the customary burden of proof and must also be rejected.

34 Reconsideration Motion at 6.

35 Petitioners' additional new argument (Reconsideration Motion, at 6 n. 4) that fuel loading would "foreclose the consideration of alternatives" by irradiating the storage casks is unsupported.

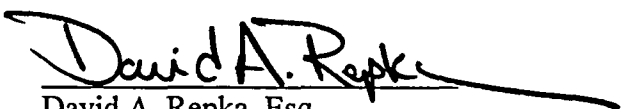
36 CLI-89-17, 30 NRC 105, 110 (1989) (citing 40 C.F.R. § 1506.1). *Accord Nat'l Audubon,* 422 F.3d at 201 (4th Cir. 2005) ("Violation of NEPA is not always cause to enjoin all agency activity while the agency completes its required environmental analysis. If this were the case, 40 C.F.R. § 1506.1(a) would be rendered superfluous.").

might result in adverse environmental impacts.[37] The provision is irrelevant to PG&E's right to use its already-issued and still valid license. Moreover, nothing in the remanded issue relates to construction impacts. And, the Commission has noted that "[a]s a legal matter, PG&E does not need an NRC license for construction activity."[38] Therefore, the argument does not support reconsideration of CLI-06-23.

V. CONCLUSION

For the foregoing reasons, the Commission should deny Petitioners' Reconsideration Motion.

Respectfully submitted,



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Dated in Washington, District of Columbia
this 28th day of September 2006

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37 *Nuclear Fuel Servs., Inc.* (Erwin, Tennessee), CLI-03-3, 57 NRC 239, 250 (2003) (emphasis added). *See also* 45 Fed. Reg. 13,739, 13,741 col. 2 (Mar. 3, 1980) (Part 51 proposed rulemaking).

38 CLI-06-23, slip op. at 3 n.9.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION FOR RECONSIDERATION OF CLI-06-23" has been served as shown below by electronic mail, this 28th day of September 2006. 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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