RAS 13071

February 13, 2007

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)	)	

PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE TO INTERVENORS' "REQUEST FOR CLARIFICATION"

On February 5, 2007, the San Luis Obispo Mothers for Peace, et al. (collectively, "Intervenors") responded[1] to the Pacific Gas and Electric Company ("PG&E") Motion[2] seeking direction and prompt action in this proceeding. The Commission's regulations, 10 C.F.R. § 2.323(c), do not provide PG&E a right to reply to the Response (absent leave to do so).[3] However, the Intervenors have included in their Response a "Request for Clarification," which is effectively a cross-motion again asking the Commission to declare that the license for the Diablo Canyon Independent Spent Fuel Storage Installation ("ISFSI") is "invalid." Response at 8-9.

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1 "Response by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard to PG&E Motion for Prompt Commission Action," February 5, 2007 ("Response").

2 "Pacific Gas and Electric Company Motion for Prompt Commission Action," January 24, 2007 ("PG&E Motion").

3 *See also Detroit Edison Co.* (Enrico Fermi Atomic Plant, Unit 2), ALAB-467, 7 NRC 470, 471 (1978).

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Accordingly, PG&E herein responds to the cross-motion in accordance with 10 C.F.R. § 2.323(c).[4]

The Intervenors in their motion (*i.e.*, their "request") make an argument that they have made twice before in this proceeding and that the Commission has rejected twice before.[5] They argue that the site-specific Part 72 license for the Diablo Canyon ISFSI is "invalid" as a result of the decision of the Ninth Circuit Court of Appeals in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied* (January 16, 2007). Intervenors specifically seek a Commission order that PG&E "may not use the ISFSI to store spent reactor fuel unless and until the NRC completes the environmental analysis remanded by the U.S. Court of Appeals and re-issues a permit to PG&E for the ISFSI." Response at 9.

The fallacy of Intervenors' argument has already been demonstrated in detail by PG&E in its filings submitted the last two times the Intervenors made the argument.[6] To summarize, the Intervenors' argument is contrary to the fact that in the Court of Appeals they did not seek injunctive relief and the fact that no such relief was granted. The argument is contrary to the Supreme Court precedent in *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982)). There, in a similar

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4 In accordance with the Commission's rules and practice, PG&E does not here reply to the balance of the Response. Nonetheless, to the extent the Commission does not view any part of the Response as a new motion, PG&E hereby seeks leave to reply to that portion of the Response discussed herein.

5 *See Pacific Gas and Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-06-23, slip op. September 6, 2006; *Pacific Gas and Electric Company* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-06-27, slip op. November 9, 2006.

6 *See* "Answer of Pacific Gas and Electric Company to Motion for Declaratory and Injunctive Relief," July 17, 2006; Answer of Pacific Gas and Electric Company to Motion for Partial Reconsideration of CLI-06-23," September 28, 2006.

context, the Supreme Court held that injunctive relief is an "extraordinary" equitable remedy that "does not issue as of course." *Id.*[7] The argument is contrary to the precedent of *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3rd Cir. 1989). There, the Court of Appeals allowed the full power license for the Limerick plant to remain in place during remand proceedings on an environmental impact statement issue. *Id.* at 741, n. 27.[8] And, the argument is contrary to the NRC's own administrative precedent in connection with the Limerick license. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-89-15, 30 NRC 96, 100-101 (1989).

Finally, the Commission in this proceeding has also specifically recognized — in its two prior decisions on the point — that an injunction is not automatic; that the applicable test is an equitable test; and that "there is no presumption that irreparable damage occurs whenever there is a failure to adequately evaluate the environmental impact of a proposed project." CLI-06-27, slip op. at 3, n.9.

There is no basis provided by the Intervenors for the Commission to reconsider its prior two decisions. The Intervenors' "renewed" request is based on only two considerations. First, Intervenors cleverly argue that — by asking that the renewed proceeding move forward — PG&E "*implicitly* concedes that it has no legal authority to load spent fuel into the Diablo

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7 Numerous circuit courts have also concluded that NEPA remedies are governed by traditional principles of equity. *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); *Huntington v. Marsh*, 859 F.2d 1134, 1143 (2nd Cir. 1988); *Nat'l Audubon Soc'y v. Dep't of The Navy*, 422 F.3d 174, 200-201 (4th Cir. 2005); *Huron v. Richards*, 997 F. 2d 1168, 1175 (6th Cir. 1993); *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157-1158 (9th Cir. 1988); *Sierra Club v. Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988).

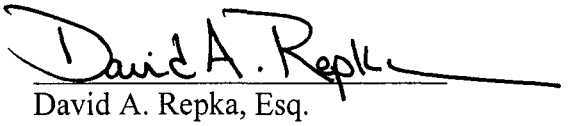
8 *See also Minnesota by Minnesota Pollution Control Agency v. NRC*, 602 F.2d 412, 418 (D.C. Cir. 1979) (remanding for further consideration "the specific problem isolated by petitioners" but declining to stay or vacate license amendments so as not to "effectively shut down the plants").

Canyon ISFSI until the NRC has completed the remanded proceeding." Response at 9 (emphasis added). But PG&E's actual position has been very *explicit*, and in fact PG&E has conceded no such thing. PG&E — in seeking prompt action — merely recognizes that the Commission in this proceeding has left open the question of whether, based on equitable considerations, "it is appropriate or necessary to prohibit or postpone loading spent fuel into the Diablo Canyon ISFSI." CLI-06-23, slip op. at 3.

Second, Intervenors seem to suggest that the situation is now different than the past two times that the Commission addressed their request for declaratory relief — because the Supreme Court has now declined to take review of the Ninth Circuit decision. Response at 9. However, this circumstance does not involve any real or material change. The mandate for the Ninth Circuit decision had issued previously; it did not depend on Supreme Court action or inaction. Moreover, the case law cited above related to the *effect* of the Ninth Circuit decision is unchanged by the denial of a petition for a writ of certiorari.

At bottom, as the Commission noted in CLI-06-27, and in accordance with 10 C.F.R. §§ 2.323(e), 2.345(b), the Commission will undertake reconsideration only when a party shows a "compelling circumstance," "such as the existence of a clear and material error in a decision" that "renders the decision invalid." CLI-06-27, slip op. at 2. That is certainly not the case here. Intervenors' third request for declaratory relief on the status of the ISFSI license should be denied.

Respectfully submitted,



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Dated in Washington, District of Columbia
this 13th day of February 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE TO INTERVENORS' "REQUEST FOR CLARIFICATION"" has been served as shown below by electronic mail, this 13th day of February 2007. 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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