

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 01/24/08

ATOMIC SAFETY AND LICENSING BOARD

SERVED 01/24/08

Before Administrative Judge:

E. Roy Hawkens, Presiding Officer

In the Matter of

PACIFIC GAS and ELECTRIC CO.

(Diablo Canyon Power Plant Independent
Spent Fuel Storage Installation)

Docket No. 72-26-ISFSI

ASLBP No. 08-860-01-ISFSI-BD01

January 24, 2008

SCHEDULING AND MANAGEMENT ORDER FOR DISCOVERY

In CLI-08-01, the Commission gave the Presiding Officer the specific and circumscribed responsibility to “keep discovery on schedule, if necessary by setting schedules, and by resolving promptly any discovery disputes, including privilege, materiality, and burdensomeness controversies” (CLI-08-01, slip op. at 31). On January 23, 2008, the Presiding Officer convened a telephonic conference call to discuss matters relating to case scheduling and management. This order summarizes significant aspects of that conference call, sets a tentative discovery schedule, and provides administrative directives that shall apply to the discovery phase of this proceeding.

I. SUMMARY OF CONFERENCE CALL

On January 23, 2008, the Presiding Officer conducted a conference call with the parties discussing matters relating to discovery scheduling and management. See Notice of Conference Call at 1-2 (Jan. 17, 2008) (unpublished). The following discussion summarizes significant aspects of that conference call.

A. With respect to Contention 1(b), the NRC Staff stated that it will be unable to comply with the Commission’s January 29 deadline for submission of the Vaughn index and,

accordingly, it will promptly file a motion with the Commission requesting an extension of time (Tr. at 6). The NRC Staff stated that it would coordinate preparation of the motion with the other parties in this proceeding, Pacific Gas and Electric Company (“PG&E”) and San Luis Obispo Mothers for Peace (“SLOMFP”) (id. at 7).

If the Commission denies the Staff’s requested extension of time with regard to Contention 1(b), the schedule set by the Commission in CLI-08-01 will govern, and the Staff will be required – no later than January 29 – to file a Reference Document List, together with a Vaughn index (or its equivalent) for any documents for which the Staff claims a Freedom of Information Act (“FOIA”) exemption, with the Commission and the Presiding Officer, and make available to the parties any documents or portions thereof not covered by a FOIA exemption (CLI-08-01, slip op. at 30). The other parties shall respond to the Staff’s Reference Document List and Vaughn index filing within 7 days of the Staff’s filing (ibid.).

With regard to what role, if any, the Presiding Officer should have in ruling on any of the responses to the NRC Staff’s filing, the parties observed that the Commission’s order was, quite understandably, not pellucid on that point, because any response may implicate a “form of discovery but it’s also the merits of the issue” (Tr. at 10; see also CLI-08-01, slip op. at 30 n.118 (“[i]t is premature . . . to consider discovery on the adequacy of the [Vaughn index, because a] relatively detailed index . . . should provide a sufficient basis for a decision as to the bases for withholding enumerated source documents”)).¹ The parties nevertheless indicated that the Commission’s order is fairly read to mean that the Commission will rule on any response in the

¹ It is well within the realm of possibility that the NRC Staff would accompany its filing with a motion to dismiss Contention 1(b) as moot. In response, SLOMFP might argue that the Vaughn index remains inadequate and that the motion to dismiss must therefore be denied. Resolving whether the Vaughn index remains inadequate would likely encroach on, and possibly subsume, the merits determination, which is – pursuant to CLI-08-01, slip op. at 31 – beyond the delegated authority of the Presiding Officer. See Tr. at 9, 16-17.

first instance or explicitly direct the Presiding Officer to do so (id. at 8, 10).² I agree. Accordingly, any responses will be filed directly with the Commission, which will either resolve any disputes in the first instance or provide further direction to the Presiding Officer (id. at 10).

B. With respect to Contention 2, the Commission directed that discovery is to be completed by February 29 (CLI-08-01, slip op. at 31). The parties stated that they agree on the following schedule for filing interrogatories and responses (Tr. at 13-14): (1) interrogatories shall be due no later than February 6; and (2) responses shall be due no later than February 20.

Significantly, the NRC Staff stated that one of its principal experts is scheduled to have surgery at the end of February, and her recovery time could be as long as four weeks (Tr. at 11). Because the NRC Staff recognized that SLOMFP might file motions to compel shortly after receiving the responses to interrogatories – i.e., during the time when the Staff expert is unavailable – the Staff stated that it would be filing a motion with the Commission seeking to extend the time to complete discovery beyond February 29 (id. at 12-13).

II. SCHEDULE

Based on the foregoing, and in accordance with CLI-08-01, the parties will be governed by the following:

A. Schedule For Contention 1(b) Absent An Extension By The Commission

1. January 29, 2008: Deadline for Staff to submit Vaughn index, reference document list, and any additional documents or portions of documents not covered by FOIA.
2. February 5, 2008: Deadline for responses to Staff's filing.
3. February 29, 2008: Discovery concludes.

² See Tr. at 8 (PG&E and the NRC Staff state that “our position would be that the Commission should decide that question”); id. at 10 (SLOMFP states that “if we file any objections, we should file them with the Commission and send them to [the Presiding Officer] and await instructions”).

B. Schedule for Contention 2 Absent An Extension By The Commission

1. February 6, 2008: Deadline for filing interrogatories.
2. February 20, 2008: Deadline for filing response to interrogatories.
3. February 29, 2008: Discovery concludes.

The parties should bear in mind that absent an extension by the Commission, discovery is to be completed on February 29. Under the current discovery schedule, it is unlikely that there would be time for a second round of interrogatories, and any motion to compel would have to be submitted and resolved with extreme expedition. Accordingly, in the event the Commission denies the extension request, the parties should be prepared to either adhere to the agreed-upon schedule, or reach agreement on an alternate schedule that will satisfy the parties' discovery needs consistent with the February 29 deadline.

C. Extensions By Commission

Within one day of any Commission action with respect to discovery matters, including any extension of time, the NRC Staff is to notify the Presiding Officer. The Presiding Officer will then, in coordination with the parties, issue any necessary revisions to the scheduling order.

D. Privilege Log

Pursuant to the parties' agreement (Tr. at 14-15), no party shall be required to prepare a privilege log.

III. ADMINISTRATIVE DIRECTIVES

A. Service on the Presiding Officer and on Other Participants

1. Presiding Officer Transmittal Information

For each pleading or submission filed before the Presiding Officer or the Commission in the discovery phase of this proceeding, subject to the requirement of subsection 4 below, in addition to submitting an original and two conforming copies to the Office of the Secretary as required by 10 C.F.R. § 2.304(f) and serving a copy on every other participant in this proceeding

in accordance with section 2.305(b), a participant should serve conforming copies on the Presiding Officer as follows:

a. Regular Mail: To complete service on the Presiding Officer via first-class mail, a participant should send conforming copies to the Presiding Officer and the Presiding Officer's law clerk at the following address:

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

For mail service, the NRC staff may use the NRC internal mail system (Mail Stop T-3F23) in lieu of first-class mail.

b. Overnight or Hand Delivery: To complete service on the Presiding Officer via overnight (e.g., express mail) or hand delivery, a participant should send conforming copies to the Presiding Officer and the Presiding Officer's law clerk at the following address:

Atomic Safety and Licensing Board Panel
Mail Stop T-3F23, Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738

It should be noted that use of the Presiding Officer's regular mail address (see subsection a, above) on an overnight/hand delivery (such as Federal Express) may delay receipt of the filing.

c. Facsimile Transmission: To complete service on the Presiding Officer by facsimile transmission, a participant should (i) send one copy by rapifax to the attention of the Presiding Officer at (301) 415-5599 (verification (301) 415-7399); and (ii) that same date, send conforming copies to the Presiding Officer's law clerk by regular mail at the address given in subsection a, above.

d. E-Mail: To complete service on the Presiding Officer by e-mail transmission, a participant should (i) send the filing (which should include the certificate of service) as a file attached to an e-mail message directed to the Presiding Officer and the Presiding Officer's law

clerk (erh@nrc.gov and eal1@nrc.gov); and (ii) send paper conforming copies that same date to the Presiding Officer and the Presiding Officer's law clerk by regular mail at the address given in subsection a, above.

If a participant has a pleading it wishes to send by e-mail that includes attachments it is unable to convert to electronic form, it should do one of the following:

- i. If the attachments the participant is unable to convert to electronic form are fifteen (15) pages or less, contemporaneous with the transmission of the pleading by e-mail the attachments should be sent by a separate facsimile transmission. The e-mail and facsimile transmissions should note that separate transmission modes are being used. The paper conforming copies of the pleading and attachments should be sent to the Presiding Officer and the Presiding Officer's law clerk by regular mail at the address given in subsection a, above.
- ii. If the attachments the participant is unable to convert to electronic form are more than fifteen (15) pages, the pleading should be sent by e-mail and the paper conforming copy of the pleading with the attachments should be sent to the Presiding Officer and the Presiding Officer's law clerk by express mail or other means that will ensure delivery on the next business day. The e-mail should note that there will be next-day service of the pleading with the attachments.

2. Timely Service by Hand Delivery, Facsimile Transmission, or E-Mail

For service on the Presiding Officer to be timely, any pleading or other submission served by: (i) hand delivery must be received by 4:30 p.m. Eastern Time on the due date; and (ii) facsimile transmission or e-mail must be received by the Presiding Officer no later than 11:59 p.m. Eastern Time on the due date.

3. Service on Other Participants

Whichever of the methods outlined above is used for service on the Presiding Officer, the participant serving the pleading should employ the same or a comparable method to make

service on other participants and the Office of the Secretary (e-mail: hearingdocket@nrc.gov; facsimile number: (301) 415-1101 (facsimile verification number: (301) 415-1966)).

4. Receipt of All Filings

Absent some other directive from the Presiding Officer, all filings directed to the Presiding Officer shall be served on the Presiding Officer and the other participants so as to ensure receipt on the day of filing. Absent some other directive from the Presiding Officer, the participants may use any of the methods outlined above so long as the filing is timely received by the Presiding Officer and the other participants.

B. Limitations on Pleading Length and Reply Pleadings

1. Page Limitations

Any motion filed to be ruled on by the Presiding Officer after the date of this Scheduling and Management Order, and any related responsive pleadings to such a motion, shall not exceed ten (10) pages in length (including signature page) absent preapproval of the Presiding Officer. A request for Presiding Officer preapproval to exceed this page limitation shall be sought in writing no less than 3 business days prior to the time the motion or responsive pleading is filed or due to be filed. A request to exceed this page limitation must: (1) indicate whether the request is opposed or supported by the other participants to the proceeding; (2) provide a good faith estimate of the number of additional pages that will be filed; and (3) demonstrate good cause for being permitted to exceed the page limitation.

2. Reply Pleadings

In accordance with the agency's rules of practice, leave must be sought to file a reply to a response to a motion. See 10 C.F.R. § 2.323(c). A request for Presiding Officer preapproval to file a reply shall be sought in writing no less than 3 business days prior to the time the reply

will be filed.³ A request to file a reply must: (1) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (2) demonstrate good cause for permitting the reply to be filed.

C. Motions for Extension of Time

A motion for extension of time filed with the Presiding Officer shall ordinarily be submitted in writing at least 3 business days before the due date for the pleading or other submission for which an extension is sought. A motion for extension of time must: (1) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (2) demonstrate good cause for permitting the extension.

D. Opposing a Request to Exceed Page Limitations, to File a Reply, or to Extend the Time for Filing a Pleading

Any written opposition to a request to exceed the page limit, to file a reply, or to extend the time for filing a pleading shall be served on the Presiding Officer, the Office of the Secretary, and counsel for the other participants in the particular proceeding by facsimile transmission, e-mail, or other means that will ensure receipt on the next business day after the filing of the request.

³ Although the agency's rules of practice do not provide for reply pleadings, in this case, the Presiding Officer will presume that for a reply to be timely, it would have to be filed within 5 days of the date of service of the response it is intended to address.

E. Exhibits/Attachments to Filings

If a participant files a pleading or other submission with the Presiding Officer that has additional documents appended to it as exhibits or attachments, a separate alpha or numeric designation (e.g., Exhibit 1; Attachment A) should be given to each appended document, either on the first page of the appended document or on a cover/divider sheet in front of the appended document.

It is so ORDERED.

BY THE PRESIDING OFFICER⁴

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 24, 2008

⁴ Copies of this Scheduling and Management Order For Discovery were sent this date by Internet e-mail to counsel for: (1) Pacific Gas and Electric Co.; (2) San Luis Obispo Mothers for Peace; and (3) the NRC Staff.

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NUCLEAR REGULATORY COMMISSION

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PACIFIC GAS AND ELECTRIC CO.) Docket No. 72-26-ISFSI
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)
(Diablo Canyon Power Plant,)
Independent Spent Fuel Storage)
Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB SCHEDULING AND MANAGEMENT ORDER FOR DISCOVERY have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Washington, DC 20555-0001

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 24th day of January 2008