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Title: Diablo Canyon Power Plant ISFSI
Conference Call

OFFICE OF SECRETARY
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ADJUDICATIONS STAFF

Docket Number: 72-26-ISFSI

Location: Teleconference

Date: Wednesday, January 23, 2008

Work Order No.: NRC-1979

Pages 1-21

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL

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

-----X

Teleconference
Wednesday,
January 23, 2008
10:00 a.m.

BEFORE:

E. ROY HAWKENS, Administrative Judge

1 APPEARANCES:

2
3 On Behalf of the NRC:4
5 LISA B. CLARK, ESQ.

6 Of: Office of the General Counsel

7 Mail Stop - O-15 D21

8 US Nuclear Regulatory Commission

9 Washington, DC 20555-0001

10
11 On Behalf of Pacific Gas and Electric Co.:12
13 DAVID REPKA, ESQ.

14 TYSON R. SMITH, ESQ.

15 Of: Winston & Strawn LLP

16 1700 K Street, NW

17 Washington, DC 20006

18
19 JENNIFER POST, ESQ.

20 Of: Pacific Gas and Electric Company

21 77 Beale Street, B30A

22 San Francisco, CA 94105

23
24
25
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1 On Behalf of San Luis Obispo Mothers for Peace:

2
3 DIANE CURRAN, ESQ.

4 Of: Harmon, Curran, Spielberg & Eisenberg,

5 L.L.P.

6 1726 M Street, NW

7 Suite 600

8 Washington, DC 20036

9
10 ALSO PRESENT:

11
12 ERICA LAPLANTE, Law Clerk

13

14

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P-R-O-C-E-E-D-I-N-G-S

10:06 a.m.

1
2
3 JUDGE HAWKENS: We're ready to go on
4 record. We're conducting a conference call in Docket
5 Number 72-26-ISFSI to discuss matters relating to
6 discovery scheduling and management. My name is Roy
7 Hawkens. I'm the presiding officer and I'm joined by
8 my law clerk, Ms. Erica LaPlante. And would the
9 counsel who will be speaking today please introduce
10 themselves?

11 MR. REPKA: Yes, this is David Repka, with
12 Winston and Strawn for Pacific Gas & Electric Company.

13 MS. CURRAN: This is Diane Curran
14 representing San Luis Obispo Mothers for Peace.

15 MS. CLARK: And this is Lisa Clark
16 representing the staff.

17 JUDGE HAWKENS: Thank you. Ms. Clark,
18 when you speak can you, perhaps get a little closer to
19 the phone. I'm having a little difficulty hearing
20 you.

21 MS. CLARK: Okay.

22 JUDGE HAWKENS: Thank you. And as a
23 reminder, as the Court Reporter requested, please
24 identify yourself prior to speaking to aid her in her
25 efforts. The Commission in its memorandum and order

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1 of January 15th, set a schedule for further
2 consideration of Contention 1B for discovery and for
3 a Subpart K oral argument type hearing on Contention
4 2. My role as presiding officer is limited to the
5 functions that relate to keeping discovery on track
6 and on schedule. And to that end, I'd like to make
7 sure that the parties understand the governing
8 schedule and that we take this opportunity to identify
9 and hopefully take steps toward resolving any
10 procedural or foreseeable discovery related issues.

11 First, regarding the global discovery
12 schedule, as I read the Commission's memorandum and
13 order, discovery began on January 15th and is to
14 conclude no later than 45 days from that date, which
15 by my calculation, would be Friday, February 29th.
16 Ms. Curran, do you agree with that?

17 MS. CURRAN: Yes.

18 JUDGE HAWKENS: All right, and Ms. Clark,
19 you likewise agree?

20 MS. CLARK: Yes, I do.

21 JUDGE HAWKENS: All right. Second, the
22 Commission in its memorandum and order stated that the
23 NRC staff would file its reference document list
24 together with a Vaughn index or the equivalent and
25 make documents or any portion of documents that are

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1 not covered by FOIA exemptions available. And as I
2 read the memorandum and order, that would be due no
3 later than Tuesday, January 29th. Ms. Clark, are you
4 on board with that date?

5 MS. CLARK: That's the way I understand
6 the Commission order. One of the matters I'd like to
7 discuss is that I don't believe that the staff will be
8 able to meet that deadline and we expect to be filing
9 with the Commission, a request for an extension.

10 JUDGE HAWKENS: All right, what -- in your
11 motion to the Commission what -- how long an extension
12 are you going to be seeking?

13 MS. CLARK: I'm sorry, I didn't hear that.
14 Could you please repeat that question?

15 JUDGE YOUNG: Yes, I understand you'll be
16 filing a motion seeking an extension of time from the
17 January 29th deadline and I'm wondering how much
18 additional time will you be seeking?

19 MS. CLARK: At this point in time, I'm not
20 certain. I expect that we are having a meeting this
21 afternoon with the staff and at that time, I expect
22 that we will probably be able to determine exactly how
23 long we'll need and we'll probably be able to file
24 tomorrow.

25 JUDGE HAWKENS: All right. And I assume

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1 that you will be at least keeping Ms. Curran in the
2 information loop for that and seeing if she's onboard
3 so that it would -- may or may not be a consent
4 motion?

5 MS. CLARK: Yes, we've already been
6 discussing this.

7 JUDGE HAWKENS: All right.

8 MR. REPKA: And this is Mr. Repka, and we
9 would be in the loop as well.

10 JUDGE HAWKENS: Good. Thank you, Mr.
11 Repka. Then moving onto to the next deadline which
12 will be, I guess, a floating deadline. Ms. Curran,
13 any response to the staff's filing would be due within
14 seven days of that filing and I assume that unless you
15 think you'll have concerns meeting that, that any
16 extension by the staff, you would likewise get an
17 extension that would be consistent with that seven-day
18 period.

19 MS. CURRAN: Right.

20 JUDGE HAWKENS: Okay. And the next matter
21 I'd like to talk about is the role if any, that the
22 presiding officer will have with regard to the
23 response filed by Ms. Curran and I guess first, let's
24 have Ms. Curran address that.

25 MS. CURRAN: Well, Judge Hawkens, it's not

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1 clear from the Commission's order how the Commission
2 anticipates dealing with any objections that we might
3 have to the Vaughan index. I'm thinking that the
4 kinds of problems we might have would be if we think
5 that the list of documents isn't complete, if we think
6 that the justification is inadequate. I think that
7 since the Commission's order doesn't address it, we
8 really -- we'd like either the Commission or the Board
9 to address those issues in the first instance. I'm
10 not sure we have a preference for how that happens.

11 JUDGE HAWKENS: Understand. Have you
12 spoken to the staff or Mr. Repka at all about this?

13 MS. CURRAN: Yeah, we talked about it
14 yesterday and we agreed that we really don't have a
15 preference. I don't think any party had a preference
16 for which body deals with any concerns or objections.

17 MR. REPKA: This is Mr. Repka for PG&E.
18 I believe that my reading of it is that the Commission
19 has left it open and has done that purposely to give
20 themselves the discretion to decide down the road how
21 they want to handle that. So our position would be
22 that the Commission should decide that question.

23 JUDGE HAWKENS: Ms. Clark, what are your
24 views on that?

25 MS. CLARK: I agree with Mr. Repka. I

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1 believe that the Commission has left it within their
2 judgment as to how to deal with any objections.

3 JUDGE HAWKENS: So if I understand -- and
4 I have to say, I found -- there was some ambiguity in
5 the order as well. On the one hand, I don't want to
6 be exceeding my authority and it looks like my
7 authority goes toward, again, keeping the discovery
8 train on track and on schedule. To the extent Mr.
9 Curran may file a response objecting in some measure
10 to the Vaughan index, that would seem to go more
11 toward the merits of the contention itself.

12 I mean, I could envision the staff filing
13 the Vaughan index and any supplemental reference
14 document list and based on that, indicating that the
15 contention of omission has been rendered moot, and
16 then Ms. Curran in response may wish to file an
17 amended contention but all of that would plainly be
18 outside the authority conferred on me in the
19 Commission's order and memorandum.

20 And that's why I have some concerns about
21 getting involved in dealing with the responses that
22 Ms. Curran may file.

23 MR. REPKA: Judge Hawkens, this is Dave
24 Repka again. I agree with that assessment.

25 JUDGE HAWKENS: Ms. Clark?

1 MS. CLARK: Yes, this is Lisa Clark. I
2 agrée as well.

3 JUDGE HAWKENS: Mr. Curran, do you see my
4 concern about whether I have the authority to address
5 any responses you may or may not file?

6 MS. CURRAN: Yes, it's sort of a gray area
7 there because it is a form of discovery but it's also
8 the merits of the issue. So it seems to me that we
9 probably should -- when we file our -- if we file any
10 objections, we should file them with the Commission
11 and send them to you as well and await instructions.

12 JUDGE HAWKENS: I think that's a good plan
13 and that way having them go directly to the
14 Commission, if the Commission then wishes the
15 presiding officer to get involved, it can explicitly
16 instruct me to do so. So let's plan on going with
17 that procedure, but any responses to the Vaughan
18 filing, to the reference document list and to the
19 staff's provision of documents or portions of
20 documents, will go directly to the Commission.

21 The next item is were the parties able to
22 get together and come up with a proposed plan and
23 schedule for discovery and let's start with Ms. Curran
24 again.

25 MS. CURRAN: Well, yes, although I think

1 maybe I should defer to Lisa because there's kind of
2 a global problem with this schedule that effects
3 discovery. So we've worked out a plan but it involves
4 the staff extension request. And maybe Lisa, you
5 could get into that a little bit.

6 MS. CLARK: Yes, thank you. This is Lisa
7 Clark speaking. Judge Hawkens, the primary staff
8 expert that's addressing Contention 2 is scheduled to
9 have surgery some time at the end of February and her
10 recovering time could be as long as four weeks. So
11 the difficulty we have is that our expert will
12 probably be unavailable for the entire month of March.
13 One of the things we were considering is having at
14 least an initial round of interrogatories to be filed
15 February 4th which response is due on February 20th.

16 We recognize that there may be motions to
17 compel following that response time and it's uncertain
18 whether our expert would be available after that time
19 to respond. So we're not sure how to deal with that
20 issue. It may be best to go through the first round
21 and see how that works. Again, I'm anticipating that
22 this may impact the staff's ability to file written
23 summaries which I believe are due on March 30th.

24 So given our witness' unavailability, I
25 anticipate that we would probably be also requesting

1 an extension of time to file those probably into say
2 the second week of April.

3 JUDGE HAWKENS: I see. So are you going
4 to be submitting a motion to the Commission then --

5 MS. CLARK: Yes.

6 JUDGE HAWKENS: -- to that effect?

7 MS. CLARK: Yes, and I expect that we will
8 file probably tomorrow for both matters, the extension
9 of time for the documents and also for the written
10 summaries.

11 MS. CURRAN: Judge Hawkens, just to add
12 Mothers for Peace's perspective, this is Diane Curran,
13 we really are counting on that 45-day discovery period
14 to use by probably trying to do two rounds of
15 interrogatories and possibly asking for depositions,
16 depending on how those responses work out. We also
17 want at least one of the rounds of discovery request
18 to be able to -- for us to be able to do that after
19 the staff provides the -- any redacted or documents in
20 their entirety that they're going to provide with that
21 Vaughan index, so that our questions can be informed
22 by the reference documents.

23 So if the staff requests and extension of
24 time, we're going to be asking that the discovery
25 schedule be extended correspondingly, perhaps, say

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1 during the first two weeks of April.

2 JUDGE HAWKENS: I can understand that
3 request. Ms. Clark, what -- have you discussed those
4 details with Ms. Curran yet?

5 MS. CLARK: We've discussed it. We -- all
6 the parties agreed to the dates that I mentioned,
7 February 4th and February 20th. As for how --

8 MS. CURRAN: Actually, just to interrupt
9 Lisa, I said I'd get them out between the 4th and the
10 6th, as early as possible.

11 MS. CLARK: Oh, okay.

12 MS. CURRAN: And you were going to answer
13 by the 20th if they went out on the 6th.

14 MR. REPKA: And this is Dave Repka. I
15 would add that that scheduled was focused consistent
16 with the Commission's order on Contention 2.

17 JUDGE HAWKENS: Yes. I guess it's
18 difficult at this stage to set anything in stone given
19 the several motions seeking extensions of time that
20 are going to have a real impact on our discovery
21 schedule.

22 MR. REPKA: This is Dave Repka again. And
23 think this first round of dates that we agreed to this
24 morning was notwithstanding any flux that may occur
25 with respect to the schedule. I recognize that with

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1 respect to Contention 2, and the specific -- the
2 fairly specific issue that's raised there, this
3 process could at least begin and we could get this
4 much done.

5 JUDGE HAWKENS: I agree with that and let
6 me summarize that if I understand what everybody
7 agreed to in your discussion. That the first round of
8 interrogatories would be submitted no later than
9 February 6th. And that any responses would be due no
10 later than February 20th and these would be on
11 Contention Number 2. And beyond that, given the
12 uncertain availability of the staff's expert witness
13 due to the fact that she may be recovering from
14 surgery for the entire month of March, you need to go
15 to the Commission to seek an extension for the
16 discovery schedule. Is that a correct summary?

17 MS. CURRAN: Sounds correct to me, this is
18 Diane.

19 MS. CLARK: This is Lisa Clark. It sounds
20 correct to me.

21 MR. REPKA: And Dave Repka, yes, correct
22 to me. One additional point I would mention, that we
23 did agree to -- the parties agreed to waive any
24 requirement that -- for privilege log or requesting
25 the other parties prepare a privilege log?

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1 JUDGE HAWKENS: Ms. Curran and Ms. Clark,
2 you're on board with that?

3 MS. CURRAN: Yes.

4 MS. CLARK: Yes, this is Lisa Clark.

5 JUDGE HAWKENS: All right. Well, we will
6 -- I will issue a scheduling order that includes that.
7 It's fairly limited and it will obviously be subject
8 to change based on when we hear back from the
9 Commission and how it modifies the existing scheduling
10 order.

11 MS. CURRAN: Judge Hawken, this is Diane
12 Curran. There's just one thing that I'd like to add
13 about the Vaughan index. One of the issues that we
14 discussed, counsel for the parties discussed the other
15 day was the fact that in its order the Commission said
16 -- there's a question in the case as to whether the
17 staff has provided a complete list of its references.

18 And I was interested in doing some
19 discovery on why there were so many iterations of this
20 reference list, but the way we resolved things was
21 that the staff and correct me if I'm wrong, Lisa, but
22 the staff agreed in its Vaughan index, to provide an
23 explanation of how the reference list was arrived at.
24 And if we have any questions about that, we plan to
25 raise those questions in our response to the Vaughan

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1 index that's due on -- seven days after the Vaughan
2 index. If we think that we need to ask more questions
3 at that point, we will seek an opportunity to do it.

4 MS. CLARK: This is Lisa Clark. In
5 response, actually I believe that we had a
6 misunderstanding. The staff would object to any
7 interrogatories asking us about our internal processes
8 and we do not propose to provide an explanation as to
9 how we developed that list. One thing we may consider
10 before the Commission is if the Commission so desires,
11 we could explain to the Commission why we believe that
12 this list is, in fact, complete. But that would
13 simply be an explanation as to completeness and not as
14 to our internal process.

15 JUDGE HAWKENS: This seems to me to go
16 toward what we were talking about earlier in this
17 conference call, namely, where this response would go,
18 whether that response effectively would go to the
19 merits or would implicate discovery. To me, that type
20 of response tends to go to the merits because we're
21 talking about adequacy of the reference list,
22 reference document list. There's of course, a
23 presumption of regularity.

24 To the extent that the staff provides a
25 reference document list, it's expected to be complete

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1 and to the extent it is not complete, we would expect
2 it to explain in the Vaughan index or in any affidavit
3 that accompanies it, why it's not. But again, that
4 would go toward the contention of omission which, as
5 I think we agreed before, should be referred to the
6 Commission and not to -- should not be considered a
7 discovery dispute.

8 MS. CURRAN: This is Diane Curran. That
9 sounds fine to me and we can just -- if we think it's
10 appropriate to raise that issue in our response to the
11 Vaughan index, we will.

12 JUDGE HAWKENS: All right. Are there any
13 other matters regarding discovery that we can
14 currently address? Ms. Curran?

15 MS. CURRAN: Not at the moment.

16 JUDGE HAWKENS: Mr. Repka?

17 MR. REPKA: No, nothing here.

18 JUDGE HAWKENS: Ms. Clark?

19 MS. CLARK: Not for the staff.

20 JUDGE HAWKENS: All right, let me -- we
21 will -- I might have asked this earlier, Ms. Clark,
22 but when do you anticipate getting this motion up to
23 the Commission?

24 MS. CLARK: I'm hoping to get it up
25 tomorrow.

1 JUDGE HAWKENS: All right. May I suggest
2 that you may also wish to advise the Commission that
3 we decided in a conference my limited authority
4 regarding any response just so it is thinking about it
5 and if it wishes to at that it acts on your motion, it
6 can also provide any additional direction for me.

7 MS. CLARK: Very well. Just so I
8 understand, do you mean as to your authority over the
9 Vaughan index --

10 JUDGE HAWKENS: Correct.

11 MS. CLARK: -- and completeness? Okay.

12 JUDGE HAWKENS: Correct.

13 MS. CLARK: I will do that.

14 JUDGE HAWKENS: Ms. Curran and Mr. Repka,
15 you don't have any objection to that?

16 MR. REPKA: No.

17 MS. CURRAN: No, I think it might be
18 helpful.

19 JUDGE HAWKENS: Yeah. To the extent,
20 because we are on a short fuse now and will, I'm sure,
21 continue to be on one, although it will be less of a
22 short fuse, if you all foresee any disputes that
23 you're unable to resolve, please bring them to the
24 attention of my law clerk. You don't have to go into
25 the details but just send her an e-mail that you copy

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1 in all the other parties, just so we're aware that
2 something will be coming down the pike and we can
3 clear the decks for it. And please submit something
4 in writing just as quickly as you can or a turnaround
5 response. If necessary, I'll get a conference call
6 and we'll get an accelerated schedule for any type of
7 motions and necessary responses.

8 MS. CURRAN: This is Diane Curran. I
9 appreciate that. One of the things that I know the
10 Commission is not eager to let us do depositions, so -
11 - and I don't know that we're going to need them but
12 I'm anticipating that if we do, it will be within a
13 very short time frame and it may be very helpful to
14 resolve some of these issues through a conference call
15 rather than a letter -- and exchange of formal
16 motions.

17 JUDGE HAWKENS: I think that's right. I
18 think that would be right.

19 MR. REPKA: Judge Hawkens, this is Dave
20 Repka again. And I agree with that and I would just
21 say on the schedule issue, so the Board understands
22 where we're coming from, if I haven't said this
23 already, with respect to the staff's request, I've
24 indicated to Ms. Clark already, we wouldn't object to
25 a short delay in the schedule for a week or two.

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1 Longer delays, we would begin to have a problem with.
2 The company has a great interest in resolving this
3 case as expeditiously as possible. So I just wanted
4 to put that out there so that there's no
5 misunderstandings about where PG&E might be.

6 JUDGE HAWKENS: I understand. We all
7 share your interest in getting this resolved promptly
8 as quickly as possible. I know Ms. Clark does as well
9 as does Ms. Curran. I would encourage the parties to
10 work together to try to resolve disputes. As I
11 indicated in the notice, to the extent you're able to
12 avoid intervention by the presiding officer, it
13 promotes -- it's cost benefits and also time benefits.
14 So I just encourage you to work together and try to
15 resolve any timing issues, any procedural issues and
16 any discovery issues amongst yourselves.

17 Also I wanted to let you know, Ms.
18 LaPlante and I will be on travel for a week, the first
19 full week in February, Monday, February 4th to
20 Saturday, February 9th. We'll both be monitoring our
21 e-mail, however, and Ms. LaPlante, if she hasn't
22 already will provide you with her cell phone number.
23 So she'll be available and -- but I did want to let
24 you know that we would not be in the office.

25 MS. CURRAN: Thank you.

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1 JUDGE HAWKENS: Anything else, Ms. Clark,
2 Mr. Repka, or Ms. Curran?

3 MS. CURRAN: No, your Honor.

4 MS. CLARK: Nothing from me.

5 MR. REPKA: No, nothing.

6 JUDGE HAWKENS: All right, thank you very
7 much.

8 (Whereupon, at 10:33 a.m. the above-
9 entitled matter concluded.)

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CERTIFICATE

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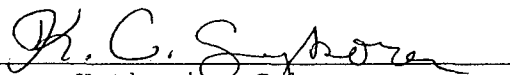
Name of Proceeding: Diablo Canyon Power Plant

Conference Call

Docket Number: 72-26-ISFSI

Location: Teleconference

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