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ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)

Pacific Gas and Electric Co.)

(Diablo Canyon Power Plant Independent
Spent Fuel Storage Installation))

Docket No. 72-26-ISFSI

PACIFIC GAS AND ELECTRIC COMPANY'S OPPOSITION TO SAN LUIS OBISPO
MOTHERS FOR PEACE REQUESTS FOR LEAVE TO CONDUCT EXPANDED
DISCOVERY AND FOR ACCESS TO UNREDACTED DOCUMENTS

I. INTRODUCTION

In its filing of February 20, 2008,¹ San Luis Obispo Mothers for Peace ("SLOMFP") respond to the "Vaughn index" submitted by the NRC Staff on February 13, 2008. As contemplated by the Commission's Memorandum and Order of January 15, 2008 (CLI-08-01), SLOMFP respond to that document by pointing out certain aspects in which it believes the index is incomplete (see SLOMFP Response, Section II) or in which the Staff has, in SLOMFP's view, failed to justify the decision to withhold portions of certain documents (see SLOMFP Response, Section III). The Commission's schedule in this proceeding does not contemplate replies by other parties to these arguments (at least absent leave for a reply), and no reply is offered here.

¹ "San Luis Obispo Mothers for Peace's Response to NRC Staff's Vaughn Index, Request for Leave to Conduct Discovery Against the NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures to Protect Submission of Sensitive Information," dated February 20, 2008 ("SLOMFP Response").

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However, SLOMFP's Response does not stop with the previously contemplated comments on the NRC Staff's *Vaughn* index. SLOMFP goes on to make a new request that the Commission expand discovery against the Staff and "reconsider" its prior decision to not allow SLOMFP access to unredacted documents under protective order (*see* SLOMFP Response, Section IV). Pacific Gas and Electric Company ("PG&E") herein responds to this new motion ("request") and opposes the motion.

II. DISCUSSION

The Commission charted its course for this limited remand proceeding in its Memorandum and Order of January 15, 2008. The Commission carefully weighed its obligations in response to the Court of Appeals decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 016 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1124 (2007). The Commission also carefully considered and applied the Supreme Court decision in *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 145 (1981), referencing that decision as its "guidepost" with respect to the procedures to be followed in this case. The Commission specifically found that *Weinberger* "makes it clear that protecting national security information overrides ordinary [National Environmental Policy Act ("NEPA")] disclosure requirements" CLI-08-01, slip op. at 9.

Further, the Commission, in that Memorandum and Order, has already specifically concluded in this matter that:

- "[T]he NRC Staff has provided a sufficient description of its scenario identification process and the significance of associated consequences — again within the constraints of information security requirements and consistent with the *Weinberger* decision." *Id.* at 11.
- "SLOMFP's desire for greater detail or a technical discussion of differences between [Atomic Energy Act] and NEPA requirements does not show either that the supplemental assessment is insufficient for NEPA purposes or establishes [*sic.*] a concrete,

specific, and genuine issue of material fact or law to warrant the admission of the contention” [*i.e.*, contention 1(a), challenging the sufficiency of the Staff’s evaluation and explanation given in the environmental assessment supplement]. *Id.* at 13.

- “Under the *Weinberger* decision, we need not and will not provide SLOMFP access to exempt documents [*citing Weinberger*, 454 U.S. at 143].” *Id.* at 18.

The Commission admitted Contention 1(b) in this proceeding — a narrow contention of omission focusing on the alleged failure of the NRC Staff to properly identify the documentary support behind the Staff’s environmental assessment supplement. The Commission outlined the procedures — utilizing a *Vaughn* index — for the NRC Staff to address and remedy that omission. The NRC Staff has endeavored to provide precisely the information requested of it by the Commission. While the Commission permitted SLOMFP to dispute the details of specific exemption claims (and PG&E offers no position on such specific disputes), it appears that the Staff has thoroughly and expeditiously responded to the Commission’s direction. This is clearly not now an opportunity for the Commission to reverse course, reconsider matters already decided, and fundamentally change and expand the nature of Contention 1(b) as now requested by SLOMFP.

SLOMFP is dissatisfied because, fundamentally, it seeks consideration (and litigation of) hypothetical terrorist “attack scenarios that would have resulted in consequences other than early fatalities.” SLOMFP Response, at 7. SLOMFP seeks more “documentary material” that, it claims, “would have allowed SLOMFP to test the thesis of Contention 2 that the Staff arrived at its conclusion of ‘no significant impacts’ by arbitrarily screening out any attack scenarios that did not result in early fatalities.” *Id.* at 8. However, as noted above, the Commission has already decided that the Staff *has* provided sufficient information on scenario identification and the significance of associated consequences. SLOMFP’s assertions do not —

in reality — reflect Contention 1(b) (or Contention 2 for that matter) actually admitted by the Commission.² These SLOMFP assertions merely re-state *Contention 3* previously *rejected* by the Commission. The Commission in its Memorandum and Order stated quite clearly that “[w]e do not understand the Ninth Circuit’s remand decision — which expressly recognized NRC security concerns and suggested the possibility of a ‘limited proceeding’ — to require a contested adjudicatory inquiry into the credibility of various hypothetical terrorist attacks against the Diablo Canyon ISFSI.” CLI-08-01, slip op. at 24. Yet SLOMFP, in again seeking access to documents under a protective order, is nakedly attempting to do precisely that: to test the range and credibility of attack scenarios evaluated by the Staff. SLOMFP would turn this limited hearing into precisely that which the Commission previously rejected.

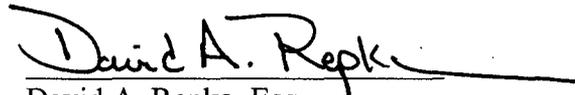
SLOMFP in its request further discusses the NRC’s prior use of protective orders and the NRC Staff’s prior discussions and disclosures to stakeholders regarding security matters. SLOMFP Response, at 8-11. These arguments, however, are beside the point. The disclosures SLOMFP seeks are beyond the scope of the admitted contentions and outside the procedures previously adopted. There is no need for the disclosures to address the issues in this case. Moreover, there still is no basis to expand the scope of the hearing to aimless litigation of hypothetical attack scenarios. SLOMFP’s requests for expanded discovery and reconsideration of protective orders should be rejected.

² Contention 2 was admitted only to the extent that it raises the question of whether — in the context of the Staff’s supplemental environmental assessment — consideration of land contamination and non-fatal health effects were considered or implicitly bounded. CLI-08-01, slip op. at 20-21. Contention 2, like Contention 1(b), does not create an opportunity to litigate threat scenarios and consequences.

III. CONCLUSION

SLOMFP's requests for (a) further discovery against the NRC Staff on its security assessments, (b) access to unredacted reference documents, and (c) procedures for protective orders, should all be denied.

Respectfully submitted,



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COUNSEL FOR PACIFIC GAS AND
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Dated in Washington, District of Columbia
this 26th day of February 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "PACIFIC GAS AND ELECTRIC COMPANY'S OPPOSITION TO SAN LUIS OBISPO MOTHERS FOR PEACE REQUESTS FOR LEAVE TO CONDUCT EXPANDED DISCOVERY AND FOR ACCESS TO UNREDACTED DOCUMENTS" have been served as shown below by electronic mail, this 26th day of February 2008. 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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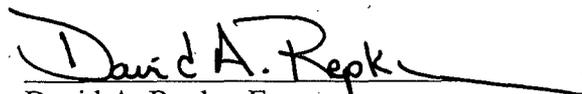
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A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right.

David A. Repka, Esq.
Counsel for Pacific Gas
and Electric Company