

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 03/10/08

ATOMIC SAFETY AND LICENSING BOARD

SERVED 03/10/08

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

March 10, 2008

**ORDER DENYING SAN LUIS OBISPO MOTHERS FOR PEACE
MOTION TO COMPEL DISCOVERY RESPONSES BY NRC STAFF**

On March 3, 2008, San Luis Obispo Mothers for Peace (SLOMFP) filed a motion to compel discovery responses by the Staff.¹ Because the discovery schedule mandated by the Commission expired on February 29, 2008, I am constrained to deny the motion as untimely.

1. This case involves a license application by Pacific Gas and Electric Company (PG&E) for an independent spent fuel storage installation (ISFSI) at the site of the Diablo Canyon nuclear power reactor in California. In San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1028, 1035 (9th Cir. 2006), cert. denied, 127 S. Ct. 1124 (2007), the Ninth Circuit held that the NRC's "categorical refusal to consider the environmental effects of a terrorist attack" in this licensing proceeding violated the National Environmental Policy Act (NEPA), and it remanded to the Commission for further proceedings on the "NEPA-terrorism" question.

On remand, the Commission directed the NRC Staff to prepare a revised environmental assessment addressing the "likelihood of a terrorist attack at the Diablo Canyon ISFSI site and the potential consequences of such an attack" (Pacific Gas and Electric Co. (Diablo Canyon

¹ San Luis Obispo Mothers for Peace's Motion to Compel Discovery Responses by NRC Staff (Mar. 3, 2008) [hereinafter Motion to Compel].

Power Plant ISFSI) CLI-07-11, 65 NRC 148 (2007)).² In August 2007, the NRC Staff issued a final supplemental environmental assessment (FSEA), to which SLOMFP proffered several contentions.

On January 15, 2008, the Commission issued a decision (CLI-08-01) in which it: (1) admitted two of SLOMFP's contentions challenging the FSEA (slip op. at 29); (2) set a hearing schedule that, *inter alia*, required discovery to be completed by February 29, 2008 (*id.* at 30); and (3) directed that a Presiding Officer be designated to "keep discovery on schedule, if necessary by setting schedules, and by resolving promptly any discovery disputes" (*id.* at 31).

On January 23, 2008, I convened a telephonic conference call with PG&E, SLOMFP, and the NRC Staff. During the course of that conference call, each party affirmatively stated his or her understanding that, consistent with the Commission's mandated schedule, discovery would conclude by February 29 (Tr. at 5) and an extension beyond that date must be obtained from the Commission (Tr. at 14).

The following day, based on input provided by the parties during the conference call, I issued a Scheduling and Management Order for Discovery [hereinafter Management Order] that required the filing of interrogatories by February 6 and the filing of responses to interrogatories by February 20 (Management Order at 4). The Management Order emphasized that "absent an extension by the Commission, discovery is to be completed on February 29" (*ibid.*).

Shortly thereafter, the NRC Staff filed an unopposed motion requesting a two-day extension of time – from February 20 to February 22 – for responding to SLOMFP's interrogatories. By order dated February 15, I granted the Staff's request, and I likewise granted a two-day extension for SLOMFP to respond to the NRC Staff's interrogatories (Order Granting NRC Staff's Unopposed Request for Extension at 1 (Feb. 15, 2008) [hereinafter Order Granting

² The Commission elected to handle the merits of the remand itself rather than delegate that responsibility to a Licensing Board.

Unopposed Staff Request]). The parties again were reminded that, “absent an extension by the Commission, discovery is to be completed on February 29” (*id.* at 2).

By close of business on February 22, all the parties had filed their discovery requests and responses. Between then and the expiration of the discovery deadline on February 29, the parties submitted no discovery-related filings.

2. On March 3, 2008, SLOMFP filed a motion to compel discovery responses from the NRC Staff (*supra* note 1). SLOMFP’s motion requests that the Staff be directed to answer various interrogatories, admission requests, and document production requests that the NRC Staff allegedly improperly failed, or refused, to answer in its Response and Objections to San Luis Obispo Mothers for Peace’s First Set of Discovery Requests filed on February 22, 2008.

On March 5, 2008 the NRC Staff filed a motion to strike SLOMFP’s motion to compel discovery, arguing that “SLOMFP’s motion is out of time, in clear contradiction of the scheduling and case management orders issued in this proceeding.”³

On March 8, 2008, SLOMFP filed an opposition to the NRC Staff’s motion to strike, arguing that the Commission did not contemplate that “motions to compel [were included] within the scope of discovery-related activities that must be completed before February 29, 2008.”⁴

3. I agree with the NRC Staff that SLOMFP’s motion to compel is untimely and must be denied. The Commission unambiguously stated that discovery shall “conclude no later than

³ NRC Staff’s Motion to Strike San Luis Obispo Mothers for Peace’s Motion to Compel Discovery Responses by NRC Staff at 1 (Mar. 5, 2008).

PG&E also filed an opposition to SLOMFP’s motion (PG&E Company’s Opposition to San Luis Obispo Mothers for Peace Motion to Compel Discovery Responses by NRC Staff (March 5, 2008) [hereinafter PG&E Opposition]). Granting SLOMFP’s motion, observed PG&E, would be in derogation of the “clear and unambiguous deadlines imposed by both the Commission and the Presiding Officer” (PG&E Opposition at 2).

⁴ SLOMFP’s Opposition to NRC Staff’s Motion to Strike SLOMFP’s Motion to Compel Discovery Responses by NRC Staff at 1 (Mar. 8, 2008) [hereinafter SLOMFP Opposition].

[February 29, 2008]" (CLI-08-01, slip op. at 30). Under Commission regulations (10 C.F.R. § 2.740(f)),⁵ motions to compel fall within the rubric of discovery. Accordingly, SLOMFP's assertion that its motion to compel is not within the scope of discovery governed by the February 29 deadline is not tenable.

Moreover, SLOMFP cannot credibly contend that it thought it had ten days from the NRC Staff's submission of its discovery responses, or until March 3, to file a motion to compel (see 10 C.F.R. § 2.740(f)). Discovery time periods may be "shortened by the Commission" (id. § 2.711), and in the instant case, the Commission – exercising its prerogative to establish a scheduling order – explicitly directed that discovery would be completed by February 29.

Thus, at the outset of this proceeding, and repeatedly thereafter, I made it clear to the parties that any extension of the discovery deadline must come from the Commission, and absent such an extension, discovery must be completed on February 29. See Tr. at 5 (each party affirmatively acknowledges that discovery "is to conclude no later than . . . February 29"); Tr. at 14 (Presiding Officer advises parties that any extension of the discovery deadline must come from the Commission); Management Order at 4 ("[A]bsent an extension by the Commission, discovery is to be completed on February 29"); ibid. ("in the event the Commission denies the extension request, the parties should . . . [comply with] the February 29 deadline"); Order Granting Unopposed Staff Request at 2 ("the parties are reminded that, absent an extension by the Commission, discovery is to be completed on February 29").⁶

⁵ Our regulatory citations refer to the Commission's pre-2004 Part 2 procedural rules. See CLI-08-01, slip op. at 4 (Commission states that this proceeding will be governed by the pre-2004 rules). We note that our current procedural rules and the pre-2004 rules are, for purposes of this decision, substantively identical.

⁶ Because the Commission established the February 29 discovery deadline and directed that a Presiding Officer be designated for the limited purpose of keeping discovery on schedule (CLI-08-01, slip op. at 31), it is beyond my authority to grant SLOMFP's request to "retroactively extend the time for submitting the motion by one business day, until March 3" (SLOMFP Oppo-
(continued...))

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER DENYING SAN LUIS OBISPO MOTHERS FOR PEACE MOTION TO COMPEL DISCOVERY RESPONSES BY NRC STAFF have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 10th day of March 2008