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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

March 8, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

In the matter of  
Pacific Gas and Electric Company  
Diablo Canyon Nuclear Power Plant  
Unit Nos. 1 and 2  
Independent Spent Fuel Storage Installation

Docket # 72-26-ISFSI

**SAN LUIS OBISPO MOTHERS FOR PEACE'S  
REPLY TO NRC STAFF'S AND  
PACIFIC GAS & ELECTRIC COMPANY'S OPPOSITIONS TO  
REQUEST FOR ADMISSION OF LATE-FILED CONTENTION 6  
REGARDING DIABLO CANYON  
ENVIRONMENTAL ASSESSMENT SUPPLEMENT**

**I. INTRODUCTION**

Pursuant to the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") Memorandum and Order in *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, \_\_ NRC \_\_, slip op. at 31 (January 15, 2008) ("CLI-08-01"), San Luis Obispo Mothers for Peace ("SLOMFP") hereby replies to oppositions by the NRC Staff and Pacific Gas and Electric Company ("PG&E") to San Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6 Regarding Diablo Canyon Environmental Assessment Supplement (February 27, 2008) ("SLOMFP Request for Admission of Late-Filed Contention 6"). NRC Staff's Response to San Luis Obispo Mothers for Peace's Request for Admission of Late-filed Contention 6 (March 5, 2008) ("NRC Staff Response"); Pacific Gas and Electric Company's Response to San Luis Obispo Mothers for Peace Proposed Late-Filed Contention 6 (March 5, 2008) ("PG&E Response"). The

Staff's and PG&E's objections are without merit, and therefore Contention 6 should be admitted.

## **II. CONTENTION 6 IS ADMISSIBLE.**

Contention 6 asserts that:

In preparing the Final EA Supplement, the NRC Staff violated the National Environmental Policy Act ("NEPA") and federal implementing regulations by excluding reasonably foreseeable threat scenarios from consideration, based on the use of an inappropriate indicator known as "Ease" as a proxy for the probability of a threat scenario. The excluded threat scenarios could cause significant adverse impacts by contaminating the environment. Therefore, the NRC Staff should have prepared an environmental impact statement ("EIS").

SLOMFP Request for Admission of Late-Filed Contention 6 at "an Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6 Regarding Diablo Canyon Environmental Assessment Supplement at 2.

The Staff asserts that the Commission should reject Contention 6 because it raises an issue that the Commission has already rejected in dismissing SLOMFP's Contention 3, *i.e.*, whether the NRC Staff ignored credible threat scenarios in preparing the Environmental Assessment and Draft Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation (August 2007) ("Final EA Supplement"). NRC Staff Response at 1, 4.<sup>1</sup> Contention 6, however, does not attempt to litigate particular "alternate terrorist scenarios." CLI-08-01, slip op. at 24. Rather, like Contention 2, it challenges the NRC Staff's apparent reliance on a particular quantitative criterion to exclude consideration of an entire range of credible attack scenarios, therefore biasing the Staff's environmental study against consideration of significant impacts. *Compare* SLOMFP Request for

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<sup>1</sup> PG&E makes a similar argument at page 5.

Admission of Late-Filed Contention 6 at 2, 4 with San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement at 10 (June 28, 2007) ("SLOMFP Hearing Request"). Such misleading and unreasonable assumptions are impermissible under the National Environmental Policy Act ("NEPA") because they "can defeat the first function of an EIS by impairing the agency's consideration of the adverse environmental effects of a proposed project," by "skewing the public's evaluation of a project." *Hughes River Watershed Conservancy v. Agriculture Dept.*, 81 F.3d 437, 446 (4th Cir. 1996) (rejecting an EIS that contained misleading projections of a project's economic benefits), citing *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1011-12 (5th Cir. 1980). *See also Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983) (rejecting an EIS where an "artificially" and "unrealistically" low discount rate, used to calculate benefits of a water project, was "misleading" and resulted in "an unreasonable comparison of alternatives to the proposed project").

PG&E makes a number of arguments in opposition to the admission of Contention 6. First, PG&E contends that the contention should be dismissed if it is "a challenge to *any or all* use of a quantification or qualitative screening factor for assessing credible scenarios." PG&E Response at 4 (emphasis in original). That is not the case. As is made clear in the contention, SLOMFP objects to the use of the Ease indicator because it rests on the illogical assumption that the probability of an attack decreases as it becomes more sophisticated, time-consuming, and technologically demanding, and therefore has the effect of screening out credible scenarios. SLOMFP Request for Admission of Late-filed Contention 6 at 4-5.

PG&E also argues that Contention 6 is speculative because SLOMFP does not support its statement that nuclear facilities are especially attractive for attack by sophisticated and well-funded sub-national groups, by showing how the “attractiveness” characteristic is applicable to independent spent fuel storage installations (“ISFSIs”) in general or to the Diablo Canyon ISFSI. PG&E Response at 6. According to PG&E, the “remoteness from large populations” of the Diablo Canyon ISFSI makes its attractiveness “speculative.” *Id.* This argument is absurd. Any nuclear facility in the United States that contains a substantial quantity of radioactive material is an attractive target, because a release of that material to the atmosphere could cause significant public and environmental harm at locations tens or hundreds of miles downwind. Moreover, a successful attack at even the remotest location would be symbolically significant, because it would reveal a national vulnerability.

Finally, PG&E argues that Contention 6 is not cognizable under NEPA because it asks the Commission to “fly speck” the Staff’s judgment or add “details or nuances.” PG&E Response at 6. But the Ease factor is an exponent, not just a multiplier. *See* the formula as described in SLOMFP Request for Admission of Late-Filed Contention 6 at 3-4. For instance, while the Ease factor for an instantaneous one-step attack, using low technology, would be 0.5 ( $1/2$  raised to the power 1), the Ease factor for an attack scenario lasting more than 60 minutes, with more than three steps, using high technology, would be 0.002 ( $1/2$  raised to the power 9). *Id.* Thus, on its face, the NRC Staff’s use of the Ease factor has a potentially significant mathematical effect on the estimated probability of an attack. Because the NRC Staff based its decision not to prepare an environmental impact statement (“EIS”) for the proposed ISFSI on the supposed

implausibility of a successful attack (*id.* at 7), the question raised by Contention 6 is not one of “details or nuances,” but goes to the heart of this NEPA case.

### **III. CONTENTION 6 SATISFIES A BALANCING OF THE NRC’S LATE-FILED CONTENTION CRITERIA.**

The Staff argues that Contention 6 does not satisfy the “good cause” factor of the NRC’s late-filed contention criteria because the “real issue” raised by Contention 6 is the consideration of specific threat scenarios, which SLOMFP already raised in Contention 3. NRC Staff Response at 5. As discussed above at pages 2-3, however, Contention 6 is not a substitute for Contention 3, but instead identifies a new criterion – not known to SLOMFP before the Staff released the guidance document containing the criterion on February 13 – which the Staff apparently has used to exclude the consideration of credible threat scenarios in determining whether impacts of an attack on the proposed Diablo Canyon spent fuel storage facility would be significant.

PG&E contends that SLOMFP and its expert are unlikely to assist in the development of a meaningful record because they have not been given access to the complete range of threat information available to the government. PG&E Response at 8. But that information is not necessarily required in order to evaluate whether the Ease factor is unreasonable. PG&E also argues that SLOMFP has not demonstrated any particular expertise in threat assessment. *Id.* at 9. PG&E ignores Dr. Thompson’s statement, in his declaration supporting SLOMFP’s Hearing Request, that since 1977, a significant part of his work has “consisted of technical analyses of safety, security and environmental issues related to nuclear facilities.” Declaration of Dr. Gordon R. Thompson in Support of San Luis Obispo Mothers for Peace’s (SLOMFP’s) Contentions Regarding the Diablo Canyon Environmental Assessment Supplement, par. 3 (June 27,

2007). PG&E also ignores the numerous examples of Dr. Thompson's work analyzing the vulnerability of nuclear facilities to intentional attack, which are described in paragraph 11 of his declaration and the attached curriculum vitae.

Finally, PG&E argues that "conducting a hearing on the precise makeup of theoretical scenarios for attacking an ISFSI would not assist in assessing the unquantifiable risk of a terrorist attack." *Id.* As discussed above, however, SLOMFP does not seek to litigate the precise makeup of any particular scenarios in Contention 6, but rather to establish that the Ease indicator is an inappropriate criterion for excluding attack scenarios, use of which has skewed the Staff's environmental analysis away from consideration of an entire range of credible attack scenarios with potentially significant environmental impacts.

#### IV. CONCLUSION

For the foregoing reasons, Contention 6 should be admitted.

Respectfully submitted,



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March 8, 2008

## CERTIFICATE OF SERVICE

I certify that on March 8, 2008, copies of San Luis Obispo Mothers for Peace's Reply to NRC Staff's and Pacific Gas and Electric Company's Oppositions to Request for Admission of Late-Filed Content ion 6 Regarding Diablo Canyon Environmental Assessment Supplement were served on the following persons by e-mail and first-class mail:

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