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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 RESPONSE TO SAN LUIS OBISPO
MOTHERS FOR PEACE PROPOSED LATE-FILED CONTENTION 6

I. INTRODUCTION

On February 27, 2006, the San Luis Obispo Mothers For Peace ("SLOMFP") submitted proposed late-filed Contention 6 regarding the Final Environmental Assessment Supplement ("EA Supplement") at issue in this remand proceeding.¹ The proposed contention is expressly derived from SLOMFP's review of a consultant's report released in redacted form by the Nuclear Regulatory Commission ("NRC") Staff on February 13, 2008, in connection with the NRC Staff's Contention 1 *Vaughn* index. In accordance with the schedule established by the Commission in its Memorandum and Order of January 15, 2008 (CLI-08-01), Pacific Gas and Electric Company ("PG&E") herein responds to the proposed late-filed contention. PG&E opposes admission of the contention on grounds that: (1) it fails to raise a genuine dispute of fact or law within the scope of this limited proceeding; and (2) there is insufficient justification for admission of the late-filed contention.

¹ "San Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6 Regarding Diablo Canyon Environmental Assessment Supplement," dated February 27, 2008 ("SLOMFP Contention 6").

II. BACKGROUND

SLOMFP initially filed proposed contentions addressing the NRC Staff's EA Supplement on June 28, 2007. PG&E responded to those proposed contentions on the issue of admissibility on July 9, 2007.² The Commission ruled on admissibility in CLI-08-01.

In PG&E's July 2007 response to the previous contentions, PG&E addressed: (1) the standards for admissibility of contentions generally, and (2) the additional standards for admissibility of late-filed contentions. In general, under the Part 2 procedures applicable to this proceeding, general admissibility is addressed under 10 C.F.R. §§ 2.714(b) and (d). The additional criteria for assessing late-filed contentions are set forth in 10 C.F.R. § 2.714(a)(1). These regulations, and the case law applying the regulations, are well-known and the Commission itself addressed the relevant standards in CLI-08-01. PG&E will not repeat the previous discussions here.

III. DISCUSSION

A. Proposed Contention 6 Does Not Present a Genuine Dispute on a Material Issue of Law or Fact

Proposed Contention 6 specifically challenges the NRC Staff's alleged reliance on an "Ease" factor referenced in one of the documents identified in the NRC Staff's *Vaughn* index: "NRC Spent Fuel Source Term Guidance Document, with Appendices A-E" ("Guidance Document"), prepared by consultants from the Sandia National Laboratories ("Sandia"), dated November 5, 2004.³ SLOMFP, in its proposed contention, specifically references the Guidance

² "Pacific Gas and Electric Company's Response to Proposed Contentions," dated July 9, 2007. PG&E supplemented that response in a filing dated October 11, 2007, addressing the issue of the impact of the Staff's issuance of the final EA Supplement on August 31, 2007.

³ The Sandia "Guidance Document" is *Vaughn* index Document 3.

Document at page 133. There, in the context of explaining evaluation methods for evaluating “high profile” terrorist scenarios, the report explains:

For sabotage, it is not possible to calculate or even estimate a “probability” or “likelihood” of successful completion for each scenario (or even the likelihood of an attempt). Rather, a simple measure (called Ease) was developed to estimate how easy or difficult it is to complete an attack scenario. [Redacted] Ease includes three parameters: (1) time required to complete the attack, (2) complexity (number of steps required), and (3) technology (low vs. high).

The Guidance Document continues, through the following page, to explain the “Ease” formula and “preliminary” parameter values.

SLOMFP admittedly does not know whether or how the NRC Staff utilized the Guidance Document in its EA Supplement. SLOMFP merely infers that the Staff has relied on it because: (a) the Staff labeled it as a “guidance document;” and (b) the Staff listed it as a reference for the EA Supplement. SLOMFP Contention 6, at 3.⁴ SLOMFP does know that it disagrees with the Sandia consultants’ “Ease” formula. SLOMFP’s argument in proposed Contention 6 appears to be twofold. First, SLOMFP argues that “use of the ‘Ease’ indicator as a proxy for the probability of a threat scenario is inappropriate.” *Id.* at 4. On its face this broad statement could be construed as an argument that *any* consideration or quantification of parameters such as those outlined in the document (“as a proxy for the probability of a threat”) is inappropriate. Second, SLOMFP more clearly argues that *Sandia’s specific factor (i.e., including Sandia’s parameter values)* is inappropriate because it understates the “potential for attack on nuclear facilities in the U.S.” *Id.* On the latter point, Proposed Contention 6 is based on a declaration from SLOMFP’s consultant, Gordon R. Thompson. That declaration in turn

⁴ With respect to the first point, it is unclear what significance an NRC Staff label would convey. Nonetheless, from the document itself it is clear that Sandia — not the NRC Staff — used the term “guidance document” in the title of their own document.

merely references his report (dated June 28, 2007; corrected June 29, 2007) submitted in support of SLOMFP's previous set of proposed contentions. SLOMFP argues that the NRC Staff has improperly excluded "sophisticated, time consuming, and technologically advanced attacks" that Dr. Thompson alluded to in his report, that he believes are "reasonably foreseeable" (SLOMFP Contention 6, at 5) — largely because of his view that U.S. nuclear facilities are "especially attractive targets" (*id.* at 4). None of these assertions, however, establish a genuine dispute admissible in this proceeding.

First, if the contention is a challenge to *any* or *all* use of a quantification or qualitative screening factor for assessing credible scenarios, the contention is easily dismissed. As SLOMFP itself recognizes, the National Environmental Policy Act ("NEPA") requires consideration only of scenarios that are "reasonably foreseeable" and does not require analysis of scenarios that are "remote and highly speculative." *See, e.g., San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 751 F.2d 1287, 1300 (D.C. Cir. 1984)(in an Environmental Impact Statement "agencies need not discuss in detail events whose probabilities they believe to be inconsequentially small"), *citing* (among other cases) *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974), *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir. 1980). Moreover, the agency is not obligated to address every conceivable or "worst case" scenario. *Robertson v. Methow Valley Citizens Counsel*, 490 U.S. 332, 354 (1989). Therefore, even assuming that the NRC Staff did in some sense rely on the Sandia Guidance Document, and/or the "Ease" factor for its EA Supplement, there is nothing unreasonable or improper in so doing. Indeed, "Ease" as defined by Sandia appears to be a corollary to target "attractiveness," which is a factor SLOMFP itself is arguing in its contention. The agency is clearly free to consider "ease" or "attractiveness" or any other threat assessment information

available to it in order to evaluate the otherwise unquantifiable risk of terrorist acts. Otherwise, the limitation of the NEPA review to “reasonably foreseeable” scenarios would be meaningless.

Second, proposed Contention 6 can more plainly be read as a challenge to the specific values assigned by Sandia in its “Ease” formula. SLOMFP, and Dr. Thompson, would apparently argue that the attractiveness of nuclear facilities to terrorists is so great that the would-be attackers would marshal whatever resources might be necessary to overcome the very large obstacles. They challenge the specific Sandia “Ease” assessment because — they believe — attacks on nuclear facilities are “technically credible and reasonably foreseeable.” SLOMFP Contention 6, at 5. In this way, SLOMFP seeks to litigate in this hearing the Sandia “Ease” assessment and the scope of “credible” attack scenarios. However, this is plainly not an admissible contention.

The Commission has already decided — in rejecting similar proposed Contention 3 — 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 23-24. In proposed Contention 3, relying on the very same declaration that it now relies upon for proposed Contention 6, SLOMFP sought to litigate the scope of threat scenarios considered in the Staff’s EA Supplement, positing the existence of scenarios that it believes would lead to consequences greater than those reported by the Staff. But the Commission in CLI-08-01 already held that “[a]djudicating alternate terrorist scenarios is impracticable” and that the Staff’s approach to scenarios in the EA Supplement, “grounded in the NRC Staff’s access to classified threat

assessment information, is reasonable on its face.” *Id.* (footnotes omitted). SLOMFP’s new challenge amounts to the very same issue and should be rejected for the very same reasons.⁵

In addition, proposed Contention 6 and the supporting declaration provide absolutely no basis to link the perceived terrorist risk for U.S. nuclear facilities generally to the Diablo Canyon ISFSI. Even if, hypothetically, a “nuclear facility,” or even some specific nuclear facility, might have the target “attractiveness” characteristics that Dr. Thompson claims, there is no showing whatsoever how those characteristics would apply to an ISFSI (as opposed to a power plant or other nuclear facility) or how they would apply at this particular site (with relatively unique site characteristics, including remoteness from large populations). The contention and its bases are purely speculative and generic, and provide no basis for site-specific or license-specific litigation.

Finally, as Proposed Contention 3 did previously, this proposed contention exceeds the scope of a permissible challenge to an EA under NEPA. The Commission has held that the NRC hearing process does not serve to “fly speck” the agency’s NEPA documents or to simply “add details or nuances” to the NEPA documents. *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005), *citing Hydro Resources Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 71 (2001). Moreover, as noted previously, the Court of Appeals has previously held that, under NEPA’s “rule of reason,” the NRC need not consider “events whose probabilities they believe to be inconsequentially

⁵ In this regard, this proceeding is *not* a hearing on the Sandia Guidance Document. A challenge to the specific formula and parameter values in that document is clearly beyond the scope of this proceeding. The hearing is about the EA Supplement — and therefore any hearing issue must be tied to the EA Supplement. SLOMFP’s only proposed nexus is the range of alleged, “credible” scenarios evaluated by the Staff. And this, as discussed above, is precisely the issue rejected previously by the Commission in connection with proposed Contention 3.

small.” *San Luis Obispo Mothers for Peace*, 751 F.2d at 1300 (“the Commission was under no obligation to supplement the Diablo Canyon [Power Plant] EIS with a discussion of Class Nine accidents if the Commission reasonably believed that such accidents were highly unlikely to occur.”). In this context high deference can duly be accorded to the agency and its experts. *See Greenpeace Action v. Franklin*, 14 F.3d at 1332, citing *Marsh v. Oregon National Resources Council*, 490 U.S. 360 at 378 (1989) (“[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive”). A disagreement with the NRC Staff on threat assessment matters that are well within the agency’s unique knowledge-base and expertise, or on the methodology the Staff employed to assess the unquantifiable, cannot be sufficient to invalidate the Staff’s EA Supplement.⁶ Accordingly, there is no showing that further litigation of either “Ease” or the credibility of Dr. Thompson’s scenarios is necessary.

In sum, proposed Contention 6 does not raise a genuine dispute on an issue material to this proceeding. It disputes a specific point, the “Ease” factor, taken from a lengthy reference document of uncertain status in the Staff’s evaluation. The “Ease” factor, broadly stated, appears to reflect an intuitively obvious proposition — that the probability of a terrorist attack on a particular target cannot be quantified but could depend to some degree on the degree of difficulty of mounting an attack on that target. As the Commission has already decided, this hearing is not the forum to litigate the “credibility” of various attack scenarios based on un-

⁶ *See, e.g., Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1553 (10th Cir. 1993) (“Courts are not in a position to decide the propriety of competing methodologies . . . but . . . should determine simply whether the challenged method had a rational basis and took into consideration the relevant factors.”); *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985) (“NEPA does not require that we decide whether an [environmental assessment] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology.”).

provable speculation. The NRC Staff has access to the best available information. It has selected the scenarios that it reasonably believes to be credible and has excluded those that it reasonably believes to be highly unlikely or remote and speculative. The Commission has previously held the Staff's approach to scenario selection to be "reasonable on its face." SLOMFP's latest challenge should be rejected under 10 C.F.R. § 2.714(d) for failure to identify a genuine dispute on a material issue of fact or law.

B. Proposed Contention 6 Does Not Meet the Criteria for Admission of a Late-Filed Contention

A balancing of the late-filed contention factors does not weigh in favor of admitting proposed Contention 6. In particular, given the uncertainty inherent in assessing the likelihood of a terrorist attack and the lack of a means to reliably quantify the likelihood of an attack, SLOMFP and their expert are unlikely to assist in the development of a meaningful record in this proceeding. No private parties have access to the complete range of threat information available to the government. SLOMFP will therefore necessarily be limited in the extent to which it can advance development of a meaningful record. Indeed, despite the NRC Staff's release of redacted documents, SLOMFP now rely on the same report previously prepared by Dr. Thompson (dated June 28, 2007; corrected June 29, 2007) for this proceeding.⁷ The NRC Staff had the report from Dr. Thompson prior to issuance of the final EA Supplement and addressed that report in its responses to comments on the draft.

⁷ The absence of any "new" expert support also belies petitioners' claim that there is "good cause" for late-filing. SLOMFP Contention 6, at 6. SLOMFP are clearly recycling the same report that the Commission previously found inadequate to support an admissible contention in CLI-08-01. In this regard, the disclosure of an "Ease" factor in the Sandia study — with nothing more — does not convert a previously inadmissible contention into an admissible one.

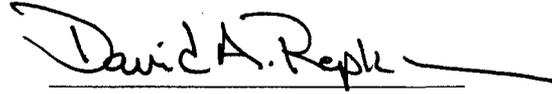
Further, SLOMFP and Dr. Thompson point to no particular expertise in threat assessment — another area where the Federal government will certainly have access to greater information than private parties. Moreover, conducting a hearing on the precise makeup of theoretical scenarios for attacking an ISFSI would not assist in assessing the unquantifiable risk of a terrorist attack. Litigation of the sort requested by the Petitioners would quickly devolve into speculation over imaginary attacks, which would not contribute useful information to the NRC's decision making process.

The proposed Contention 6 would also broaden the issues in the proceeding beyond the environmental impacts of the ISFSI into areas that are already addressed by other NRC regulations, such as NRC security requirements and ISFSI dry cask designs. In the same way, other means are available to protect the SLOMFP's interests, including, for example, participating in security-related rulemakings or commenting on dry cask storage Certificates of Compliance rulemakings. As a result, a balancing of the late-filed factors weigh against admitting proposed Contention 6.

IV. CONCLUSION

Proposed Contention 6 should not be admitted for hearing.

Respectfully submitted,



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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 RESPONSE TO SAN LUIS OBISPO MOTHERS FOR PEACE PROPOSED LATE-FILED CONTENTION 6" have been served as shown below by electronic mail, this 5th day of March 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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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.

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