

March 5, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PACIFIC GAS AND ELECTRIC COMPANY)	Docket No. 72-26-ISFSI
)	
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation))	ASLBP No. 08-860-01-ISFSI-BD01

NRC STAFF'S RESPONSE TO SAN LUIS OBISPO MOTHERS
FOR PEACE'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTION 6

INTRODUCTION

Pursuant to the Commission's Order setting forth the initial schedule for this proceeding,¹ the Staff opposes the admission of the late-filed contention proffered by San Luis Obispo Mothers for Peace ("SLOMFP").² As discussed below, SLOMFP's new contention is no more than another attempt to initiate litigation of the Staff's consideration of terrorist threat scenarios, an issue which the Commission already rejected in ruling on SLOMFP's previous contentions. Therefore, it does not raise an issue which is appropriate for a hearing and, furthermore, does not satisfy the criteria applied to late-filed contentions.

¹ *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 66 NRC ____, slip op. at 31 (January 15, 2008) ("CLI-08-01").

² "San Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6 Regarding Diablo Canyon Environmental Assessment Supplement," February 27, 2008 ("Second Petition").

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BACKGROUND

SLOMFP initially submitted late-filed contentions addressing the Staff's supplemental EA³ addressing the environmental impacts of terrorism at the Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI) in June, 2007.⁴ Among the contentions submitted was Contention 3, alleging that the supplemental EA failed to consider credible threat scenarios that could cause significant environmental damage by contaminating the environment.⁵ *Id.* at 12. As for the basis for this contention, SLOMFP argued that it could be inferred from the very small dose consequence estimated in the supplemental EA that only scenarios that caused minimal damage to a storage module were examined. *Id.* Citing a supporting affidavit from SLOMFP's expert, Dr. Thompson, SLOMFP described a threat scenario and projected potential consequences which SLOMFP alleged would exceed the dose estimated in the supplemental EA and require the preparation of an environmental impact statement (EIS). *Id.* at 12–13. According to SLOMFP's filing, it was seeking to have the Commission require the Staff to prepare a full EIS which publicly summarized the nature of all threat scenarios considered and their impacts. *Id.*

In rejecting Contention 3, the Commission recognized that it was impracticable to adjudicate alternate terrorist scenarios given the limitless range of conceivable terrorist scenarios and the necessity of protecting classified and safeguards information. CLI-08-01 at

³ "Supplement to the Environmental Assessment and Final Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation," August 2007 ("Supplemental EA").

⁴ "San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement," June 28, 2007 ("First Petition").

⁵ SLOMFP's Contention 3 stated: "In violation of NEPA and Council on Environmental Quality ("CEQ") regulation 40 C.F.R. § 1502.22(b)(3), the EA fails to consider credible threat scenarios that could cause significant environmental damage by contaminating the environment."

24. Relying on the Supreme Court's holding that public policy forbids disclosure of legally protected security information in adjudications⁶ and the NRC's statutory obligation to protect national security information,⁷ the Commission concluded that "[i]n practical terms this leaves the matter of threat assessment under NEPA in the hands of the NRC, without judicial oversight or agency hearings. But that is exactly the result *Weinberger* calls for." CLI-08-01 at 24 – 25.

DISCUSSION

1. SLOMFP Improperly Seeks to Litigate the NRC's Threat Assessments

SLOMFP now seeks admission of the following late-filed contention relating to the Staff's Supplemental EA, designated Contention 6:

Inappropriate reliance on the "Ease" indicator to exclude reasonably foreseeable and significant environmental impacts from the NRC's environmental analysis for the Diablo Canyon ISFSI. 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").

As the basis for this contention, SLOMFP makes the argument that "it may be inferred" from the redacted version of a reference document⁸ cited in support of the supplemental EA that the Staff improperly excluded consideration of credible terrorist threat scenarios for the Diablo Canyon ISFSI. Second Petition at 3–5. SLOMFP points to the description of a quantitative indicator used to assess probability of threat scenarios in the Sandia report and speculates that because the document was cited as a reference in the supplemental EA, the

⁶ *Weinberger v. Catholic Action of Hawaii/Peace Education*, 454 U.S. 139,146 (1981).

⁷ CLI-08-01 at 24, n. 96, *citing*, AEA § 141, 42 U.S.C. § 2161 (2000) and AEA § 147, 42 U.S.C. § 2167 (2000).

⁸ "NRC Spent Fuel Source Term Guidance Document" Yoshimura, R.H. et al. Sandia National Laboratories, Albuquerque, N.M. 2004 ("Sandia report"). This document was provided to SLOMFP in redacted form as reference 3 in the *Vaughn* index submitted by the Staff on February 13, 2008.

Staff may have relied on the indicator to improperly exclude consideration of terrorist threat scenarios in its environmental analysis. *Id.* Specifically, SLOMFP asserts that the threat scenario described by Dr. Thompson in the affidavit filed in support of their first petition could have been improperly characterized as improbable under the criteria described in the Sandia report. *Id.* In this manner, SLOMFP again seeks to litigate the issue originally raised in Contention 3: Whether the Staff improperly failed to consider the terrorist scenario proposed by Dr. Thompson.

Originally, SLOMFP argued that one could infer that the scenario offered by Dr. Thompson had not been considered because of the small dose that the Staff had calculated. This time, SLOMFP argues that it can be inferred that the Staff did not consider the threat scenario offered by Dr. Thompson based on (1) SLOMFP's interpretation of a quantitative indicator of "ease" described in a report prepared by Sandia laboratories and (2) SLOMFP's assumption that this indicator, as interpreted by SLOMFP, was used by the NRC Staff to assess and reject the scenario SLOMFP has described. In either formulation, SLOMFP is seeking to adjudicate the threat scenarios considered by the Staff. This version of SLOMFP's contention should be rejected for the same reason it was rejected by the Commission originally – because it would not be possible to litigate the Staff's consideration of terrorist scenarios without substantial disclosure of classified and safeguards information.

2. The Commission's Late-Filing Criteria Weigh Against Admission of the Late-Filed Contention

The late-filing contention standards that must be balanced in order to determine admissibility, as set forth in 10 C.F.R. § 2.714(a)(1) are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.

- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Regarding the first and most important factor, SLOMFP argues that it has established good cause for filing this contention now because it did not know about the quantitative indicator used in the Sandia report until the redacted version was provided with the *Vaughn* index on February 13, 2008. However, as explained above, the real issue that SLOMFP seeks to litigate through the admission of this contention is the Staff's consideration of terrorist threat scenarios, and particularly the terrorist scenario postulated by Dr. Thompson. SLOMFP had sufficient information to raise this issue in its First Petition and did so in Contention 3, which the Commission declined to admit. SLOMFP's new contention is substantively identical to Contention 3 except that now SLOMFP speculates that the Staff used the qualitative indicator described in the Sandia report in assessing threat scenarios. This new formulation does not transform this into a new contention or one that could not have been formulated until the Sandia report was released.

Petitioners have an "ironclad obligation" to find "any information that could serve as a foundation for a contention," *Florida Power & Light* (Turkey Point Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001), and to raise their claims "at the earliest possible moment." *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 429 (2003). When "a new contention purportedly is based on information contained in a document recently made publically available, an important consideration in judging the contention's timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document's release." *Private Fuel Storage* (ISFSI), LBP-98-29, 48 NRC 286, 292 (1998), citing *Public Service Co of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n. 4 (1983). Because SLOMFP had sufficient information to raise this contention before disclosure of the Sandia report, good cause for this late filing has not been established.

Regarding the remaining late-filing criteria, admission of this contention would broaden the scope of the hearing beyond the parameters established by the Commission when ruling that threat scenarios would not be the subject of this adjudicatory proceeding. Although the remaining factors weigh in favor of admission to the extent that SLOMFP's interests will not be represented by other parties or through other means and SLOMFP is expected to provide supporting expert testimony, overall, consideration of the factors weighs against admission because, absent a showing of good cause, a compelling showing is necessary on the remaining factors to outweigh the lack of good cause. CLI-08-01 at 2, citing *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

CONCLUSION

For the reasons stated above, the Staff opposes admission of SLOMFP's late filed contention on the grounds that does not raise an issue which is appropriate for a hearing and, furthermore, does not satisfy the criteria applied to late-filed contentions.

Respectfully submitted

/RA/

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Counsel for NRC Staff

Dated at Rockville, MD
This 5th day of March, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO SAN LUIS OBISPO MOTHERS FOR PEACE'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTION 6" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 5th day of March, 2008.

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