

April 17, 2008 (4:36pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

April 17, 2008

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 MOTION FOR RECONSIDERATION OF CLI-08-05

I. INTRODUCTION

On April 7, 2008, San Luis Obispo Mothers for Peace ("SLOMFP") filed a Motion for Reconsideration¹ of CLI-08-05.² Pacific Gas and Electric Company ("PG&E") herein responds to and opposes that Motion. SLOMFP specifically seeks reconsideration of (a) the Commission's denial in CLI-08-05 of SLOMFP's prior motion for reconsideration of CLI-08-01,³ in which the Commission declined to grant SLOMFP access to non-public documents under a protective order; and (b) the schedule set forth in CLI-08-05 for further proceedings on Contention 1(b) in this matter. With respect to the former, there is simply no basis for reconsideration of an issue that the Commission has already decided twice in this

¹ "San Luis Obispo Mothers for Peace's Motion for Reconsideration of CLI-08-05," dated April 10, 2008 ("Motion").

² Order, CLI-08-05, dated March 27, 2008.

³ Memorandum and Order, CLI-08-01, dated January 15, 2008.

proceeding. With respect to the latter, the Commission has set a manageable and appropriate schedule for resolution of the limited remaining procedural matters involved under Contention 1(b). SLOMFP's reconsideration Motion therefore should be denied.

II. DISCUSSION

A. Access to Non-Public Documents

The Commission initially addressed the question of access to security information in CLI-08-01, issued on January 15, 2008. In that decision, the Commission admitted Contention 1(b) — a very specific contention of omission focusing on the alleged failure of the NRC Staff to properly identify the documentary support underpinning the NRC Staff's Environmental Assessment ("EA") Supplement addressing the consequences of plausible terrorist attack scenarios. The Commission outlined procedures — based on the Freedom of Information Act ("FOIA") — for the Staff to address and remedy the omission. The Commission required the NRC Staff — utilizing a *Vaughn* index — to identify its list of references, which it has done. Then, separately addressing the issue of public access to those documents, the Commission directed the presiding officer to follow the FOIA process, to allow the public disclosure of information that can be properly released while assuring protection of security information that is entitled to be protected under FOIA for national security or other reasons. In this context, the Commission also considered and applied the Supreme Court decision in *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 145 (1981), regarding the scope and conduct of this proceeding.⁴

⁴ As the Commission noted previously, *Weinberger* "makes it clear that protecting national security information overrides ordinary NEPA disclosure requirements." CLI-08-01, slip op. at 9; *id.*, at 18 ("We will permit SLOMFP to dispute the NRC Staff's exemption claims based on the index and the record. Under the *Weinberger* decision, we need not and will not provide SLOMFP access to exempt documents").

On February 20, 2008, SLOMFP first sought reconsideration of CLI-08-01 in connection with the issue of access to security information. PG&E opposed that motion.⁵ The Commission, in CLI-08-05, issued on March 27, 2008, denied the motion for reconsideration. In addition to questioning the timeliness of SLOMFP's request for reconsideration (coming over a month after the decision), the Commission found that SLOMFP had not made the compelling showing required by NRC precedent to support reconsideration. The Commission maintained the course it previously set for resolution of Contention 1(b), and set milestones for further actions and for resolution of the contention.

SLOMFP now boldly seeks reconsideration of a denial of a request for reconsideration. Such a motion should require little deliberation. As the Commission already pointed out in CLI-08-05, under NRC case law a petition for reconsideration "must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated."⁶ This standard is a strict one, as the Commission does "not lightly revisit [its] own already-issued and well-considered decisions."⁷ The Commission will "do so only if the party seeking reconsideration brings *decisive* new information to [the Commission's] attention or demonstrates a fundamental Commission misunderstanding of a key point."⁸ The Commission has now carefully considered SLOMFP's

⁵ See "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," dated February 26, 2008.

⁶ CLI-08-05, slip op. at 3 (citations omitted). Compare 10 C.F.R. §§ 2.345(b) and 2.323(e) (which, although not applicable to this proceeding, codify longstanding NRC practice).

⁷ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004) (citation omitted).

⁸ *Id.* (emphasis added).

issue at least twice, and there is no basis, much less a decisive basis, for the Commission to revisit the matter once again.

SLOMFP's argument remains exactly as it was when PG&E last addressed it in our filing of February 26, 2008. SLOMFP is attempting to fundamentally change and expand the nature of Contention 1(b). SLOMFP seeks to "evaluate the adequacy of the Final EA Supplement based on the redacted information in those [Staff reference] documents." Motion, at 7. This is simply a generalized restatement of its desire to review and potentially litigate the full scope of the EA Supplement, including the scope of scenarios considered by the NRC Staff. However, as a contention of omission, none of this is within the scope of Contention 1(b). To the extent any omission existed with respect to the NRC Staff's list of references, the Staff has addressed that by providing its list of references. The Staff has represented that its list is complete; that is, that these are the documents it relied upon and that form the basis for its conclusion. Contention 1(b) does not present an open discovery opportunity. It is up to SLOMFP to affirmatively plead contentions asserting a substantive deficiency. Discovery follows contentions, not the reverse.

Moreover, litigation of attack scenarios is an activity the Commission has previously decided that it will not allow. CLI-08-01, slip op. at 24 ("We 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.") In total, the Commission has carefully evaluated its options and explained its rationale. There is no basis for reconsideration.

SLOMFP asserts that it has offered a “compelling” justification for reconsideration because this case is not solely governed by NEPA, and that SLOMFP’s right to information is not “governed exclusively by the FOIA.” Motion, at 7. SLOMFP additionally invokes the hearing requirement of Section 189a of the Atomic Energy Act. *Id.* at 7-8. However, this is not a new argument. A similar argument appeared in SLOMFP’s February 20, 2008 filing (at pages 8-9). Moreover, the argument misses the point. The documents SLOMFP seeks and the activities it wishes to conduct (*e.g.*, to “make a meaningful evaluation” of the Staff’s EA Supplement) are beyond the scope of Contention 1(b) and therefore the scope of the hearing requirement. As noted previously, Contention 1(b) is a contention of omission focused on identifying source documents. The Staff has now done that, releasing those documents to the extent permissible under FOIA (and subject to resolution of any specific challenges to its justification for FOIA exemptions). Nothing in Contention 1(b) requires discovery on the NRC’s EA Supplement, further evaluation of the references, or litigation of issues gleaned from the reference documents. SLOMFP’s request for reconsideration and expanded access under protective order should again be rejected.

B. Reconsideration of Schedule

As alluded to above, in CLI-08-05 the Commission delegated SLOMFP’s remaining claims regarding the adequacy of the *Vaughn* index and the Staff’s basis for withholding documents to the presiding officer. The Commission further stated that it “expected” the presiding officer to resolve Contention 1(b) on “an expedited basis,” with a decision “no later than May 30, 2008” (absent “unanticipated circumstances”). CLI-08-05, slip op. at 4. In its Motion, SLOMFP argues that this has forced a proceeding “so truncated that it leaves SLOMFP virtually no time to prepare a case.” Motion, at 8. SLOMFP requests an extension of the May 30 deadline.

PG&E respectfully disagrees with SLOMFP's characterization of the schedule and opposes reconsideration. The Commission initially set its expectations for the entire remand proceeding in CLI-07-11, issued on February 26, 2007.⁹ There the Commission anticipated completing the limited remand proceeding by the end of February 2008, a date which has obviously already passed. With respect to Contention 1(b), SLOMFP already filed, on February 20, 2008, its response to the Staff's *Vaughn* index, articulating its specific challenges to the list of references and to the Staff's bases for FOIA exemptions. As implicitly recognized by the Commission and the presiding officer, there is simply not a great deal of briefing remaining. For example, the presiding officer provided SLOMFP an opportunity to supplement its February 20, 2008 filing, and SLOMFP has already declined to exercise that option. The presiding officer can now decide the issue of challenges to specific FOIA exemptions. With respect to summary disposition motions and responses, the specific issue will be whether the contention of omission — concerning the Staff's list of references — has been resolved, making the contention moot.¹⁰ This is not an issue that will require substantial legal research or briefing. At bottom, it is simply not credible for SLOMFP to argue that the schedule is unfair, inadequate, or "draconian." The ultimate resolution date set by the Commission is reasonable, as are the interim milestones established by the presiding officer. The overall schedule will allow the Commission to efficiently resolve the limited issue remaining under Contention 1(b).

⁹ CLI-07-11, 65 NRC 148, dated February 26, 2007.

¹⁰ See generally *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-384 (2002) (When a contention alleges the omission of particular information or an issue, and the information is later supplied by the applicant or considered by the Staff in a draft environmental review document, the contention is moot. Intervenors have the burden to file new or amended contentions.).

III. CONCLUSION

SLOMFP's Motion for reconsideration of CLI-08-05 should be denied.

Respectfully submitted,



David A. Repka, Esq.
Tyson R. Smith, Esq.
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006-3817

Jennifer Post, Esq.
PACIFIC GAS AND ELECTRIC CO.
77 Beale Street, B30A
San Francisco, CA 94105

COUNSEL FOR PACIFIC GAS AND
ELECTRIC COMPANY

Dated in Washington, District of Columbia
this 17th day of April 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
)
Pacific Gas and Electric Co.) Docket No. 72-26-ISFSI
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of "PACIFIC GAS AND ELECTRIC COMPANY'S OPPOSITION TO SAN LUIS OBISPO MOTHERS FOR PEACE MOTION FOR RECONSIDERATION OF CLI-08-05" have been served as shown below by electronic mail, this 17th day of April 2008. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Judge E. Roy Hawkens
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Washington, DC 20555-0001
e-mail: erh@nrc.gov
Erica.LaPlante@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
e-mail: dcurran@harmoncurran.com

Lisa B. Clark, Esq.
Molly Barkman, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
e-mail: OGCMailCenter@nrc.gov
lbc@nrc.gov
Molly.Barkman@nrc.gov

San Luis Obispo Mothers for Peace
P.O. Box 164
Pismo Beach, CA 93448
e-mail: beckers@thegrid.net
jzk@charter.net

Barbara Byron, Staff Counsel
California Energy Commission
Chief Counsel's Office
1516 Ninth Street, MS 14
Sacramento, CA 95814
e-mail: Bbyron@energy.state.ca.us

Timothy McNulty, Esq.
Office of County Counsel
County Government Center Room 386
San Luis Obispo, CA 93408
e-mail: tmcnulty@co.slo.ca.us



Tyson R. Smith, Esq.
Counsel for Pacific Gas
and Electric Company