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RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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  
ANSWER TO SAN LUIS OBISPO MOTHERS FOR PEACE  
MOTION FOR LEAVE TO CONDUCT SUPPLEMENTAL DISCOVERY

I. INTRODUCTION

In a filing of April 10, 2008,<sup>1</sup> San Luis Obispo Mothers for Peace ("SLOMFP") seeks leave to conduct supplemental discovery against the NRC Staff. Separately, SLOMFP filed its proposed supplemental discovery requests, including four interrogatories and three document production requests — some containing several sub-requests.<sup>2</sup> For the reasons discussed below, Pacific Gas and Electric Company ("PG&E") herein opposes SLOMFP's Discovery Motion. While the motion may relate to a discovery matter between SLOMFP and the NRC Staff, PG&E concludes that the discovery being sought is not necessary for resolution of Contention 1(b) as admitted in this proceeding. SLOMFP is simply fishing for information, in an apparent attempt to expand the scope of the litigation. Accordingly, the Discovery Motion should be denied.

<sup>1</sup> "San Luis Obispo Mothers for Peace's Motion for Leave to Conduct Supplemental Discovery," dated April 10, 2008 ("Discovery Motion").

<sup>2</sup> "San Luis Obispo Mothers for Peace's Supplemental Discovery Requests regarding Documents produced by the NRC Staff in Connection with Vaughn Index," dated April 10, 2008 ("Supplemental Discovery Request").

## II. DISCUSSION

Contention 1(b) is 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. In CLI-08-01,<sup>3</sup> the Commission established the procedures to be followed for adjudicating and resolving Contention 1(b). The Commission directed the presiding officer to follow procedures based on the Freedom of Information Act ("FOIA") by which the Staff would 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, to separately address the issue of public access to the documents, the Commission's procedures allow the disclosure of information that can be properly released while assuring protection of security information that is entitled to be protected under a FOIA exemption. The presiding officer's role is to resolve disputes regarding the Staff's bases for exemptions from public disclosure under FOIA.<sup>4</sup>

The NRC Staff filed its *Vaughn* index on February 13, 2008.<sup>5</sup> Redacted versions of the documents were made available to SLOMFP and the public. In accordance with the Commission's directions, the NRC Staff identified the applicable FOIA exemption, and the justification for the exemption, for each redaction or withheld document. SLOMFP filed its

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<sup>3</sup> Memorandum and Order, CLI-08-01, dated January 15, 2008.

<sup>4</sup> See, e.g., CLI-08-01, slip op. at 18 ("We will permit SLOMFP to dispute the NRC Staff's exemption claims based on the index and public record. Under the *Weinberger* decision, we need not and will not provide SLOMFP access to exempt documents [citation omitted].")

<sup>5</sup> "NRC Staff's Response to Commission Order to Provide Reference List and *Vaughn* Index," dated February 13, 2008. The Staff filed an addendum to its response two days later, on February 15, 2008.

response with the Commission on February 20, 2008.<sup>6</sup> The SLOMFP Response, in Sections II.A and II.B, first asserts that the *Vaughn* index is “incomplete” — a curious charge in that the NRC Staff authored the EA Supplement and would be presumptively entitled to determine its list of references. Second, in Section III, the SLOMFP Response addresses the issue contemplated by the Commission in CLI-08-01 — that is, specific challenges to the Staff’s redactions and/or justifications for non-disclosure. Finally, in Section IV, the SLOMFP Response requested that the Commission reconsider its decision in CLI-08-01 holding that SLOMFP would not be given access to documents or portions thereof properly withheld under a FOIA exemption.

In CLI-08-05, issued on March 27, 2008,<sup>7</sup> the Commission denied SLOMFP’s latter request. With respect to SLOMFP’s challenges to the completeness of the reference list and to the Staff’s bases for FOIA exemptions, the Commission delegated those matters to the presiding officer to resolve on an expedited basis. The Commission did not direct or compel any particular approach to resolving Contention 1(b). Rather, the Commission noted that the “presiding officer has full authority to use all adjudicatory tools, including consulting with parties, setting schedules, requesting further briefs, calling for summary disposition motions, holding oral argument, and reviewing documents *in camera*.” CLI-08-05, slip op. at 4. The Commission also noted that: “In his discretion and only if absolutely necessary to ensure a complete record and a fair decision, the presiding officer may allow limited discovery. But we

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<sup>6</sup> “San Luis Obispo Mothers for Peace’s Response to NRC Staff’s Vaughn Index, Request for Leave to Conduct Discovery against NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures to Protect Submission of Sensitive Information,” dated February 20, 2008 (“SLOMFP Response”).

<sup>7</sup> Order, CLI-08-05, dated March 27, 2008. On April 7, 2008, SLOMFP has separately filed with the Commission yet another request for reconsideration with respect to this issue. The reconsideration motion also addresses the schedule for this proceeding on Contention 1(b). PG&E has replied to these requests in a filing to the Commission on April 17, 2008.

remind him (and the parties) that discovery is ‘sparingly granted’ in FOIA litigation [citations omitted] — which ordinarily is resolved on summary disposition without discovery and without evidentiary trials or hearings.” *Id.* at 4-5.

The presiding officer set the schedule for further actions on Contention 1(b) in a scheduling order dated April 4, 2008.<sup>8</sup> The presiding officer gave SLOMFP the opportunity to further brief the issues that it had raised in the SLOMFP Response of February 20, 2008. SLOMFP declined to exercise that option, presumably resting on the issues raised and arguments made in February (in Sections II and III of that filing, since the issue in Section IV has been rejected by the Commission). SLOMFP instead exercised the other option offered by the presiding officer — a motion for additional discovery. SLOMFP recognizes the admonitions of both the Commission and the presiding officer that discovery in this context is “sparingly granted,” yet continues to argue that discovery is “fundamentally necessary” to its understanding of certain issues. Specifically, these are: (a) the nature of the Staff’s reliance on what SLOMFP calls a “key reference document,” SECY-04-0222; (b) the reasons that the Staff did not include any reference to a study done by the NRC in conjunction with the Department of Homeland Security; and (c) the justifiability of certain specific redactions from the documents released, in light of SLOMFP’s position that the redacted material may be “secret law” that may not be withheld from public disclosure. Discovery Motion, at 2. SLOMFP, however, never demonstrates why discovery is necessary on any of these issues in connection with the resolution of Contention 1(b) — particularly given the task delegated to the presiding officer for resolution.

As noted previously, Contention 1(b) is a contention of omission focused on identifying source documents. The Staff has now identified its source documents. In addition,

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<sup>8</sup> “Scheduling and Case Management Order for Adjudication of Contention 1(b),” dated April 4, 2008.

the Staff has released those documents to the extent it considers 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. Rather, the specific issue for resolution is the adequacy of the Staff's bases for redactions, with respect to the specific issues raised in Section III of the February 20, 2008 SLOMFP Response. Once those issues are resolved, either by release of further information or by sustaining the redaction, the contention of omission — concerning the Staff's list of references — has been resolved, making the contention moot.<sup>9</sup> Under the Commission's rules of practice, and the procedures established by the Commission for Contention 1(b), intervenors do not have an opportunity to conduct discovery to search for new or amended contentions. The presiding officer now has sufficient information, or adequate procedural means for it to obtain additional information if needed (*e.g.*, *in camera* review of documents), to rule on the issues raised in Section III of the SLOMFP Response, including the issue of allegedly "secret law."<sup>10</sup>

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<sup>9</sup> 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.).

<sup>10</sup> SLOMFP has not developed its argument on "secret law" except to cite *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653 (9th Cir. 1980). However, the court in *Hardy* held that where disclosure of information withheld under Exemption 2, such as the redacted information in SECY-04-0222, would risk circumvention of agency regulation, the materials are exempt from disclosure. *Id.*, at 656. SLOMFP has put forth nothing to specifically contradict the NRC Staff's determination that the information, if disclosed, would aid adversaries in circumventing security features. Moreover, SLOMFP has not explained how the Staff's approach in this case is "secret." We know the approach the Staff is taking here — it is the subject of Contention 2.

The two issues in Section II of the SLOMFP Response, asserting the “incompleteness” in the list of references (*i.e.*, the issues related to SECY-04-0222 and to the alleged study with DHS), are not matters properly within the scope of Contention 1(b) as admitted. But even if they were, the additional step of discovery against the NRC Staff is not necessary. The NRC Staff can address those matters to the extent it feels necessary in a summary disposition motion. Otherwise, the Staff has identified its references, and made them available to the extent required/permitted under FOIA, and Contention 1(b) is moot. While the information that SLOMFP seeks in its Supplemental Discovery Request may be of interest to SLOMFP, SLOMFP never explains how such discovery is essential to resolve the contention as defined in CLI-08-01. There the Commission directed the NRC Staff to provide a complete list of references in a *Vaughn* index. The Commission did not direct litigation of “completeness” of the list (which is presumptively a matter of Staff prerogative). *See* CLI-08-01, slip op. at 18 (The Commission’s specific direction was: “We will permit SLOMFP to dispute the NRC Staff’s exemption claims based on the index and the public record.”).

Specific Interrogatory No. 1 requests information about how the NRC Staff applied SECY-04-0222 to the EA Supplement. This request does not “dispute the NRC Staff’s exemption claims based on the index and public record” — the limited extent of the admitted contention. CLI-08-01, slip op. at 18. Specific Interrogatory Nos. 2 and 3 are similarly misguided. The interrogatories request information on a DHS analysis that is alleged to exist, but was not listed as a reference in the EA Supplement, and ask about the applicability of the Risk Analysis and Management for Critical Assets Protection (“RAMCAP”) to the EA Supplement. In both cases, SLOMFP is challenging the adequacy of the NRC Staff’s reference list, not the propriety of the NRC Staff’s redactions. Again, the latter is the only admitted issue

in Contention 1(b). The discovery sought by SLOMFP is simply not relevant to Contention 1(b). *See* 10 C.F.R. § 2.740(b) (“Parties may obtain discovery . . . which is relevant to the subject matter involved in the proceeding.”). Further, Document Production Request Nos. 1 and 2 are duplicative in that they seek access to information that the NRC Staff has already determined to be exempt from public disclosure. The adequacy of the Staff’s bases for its redactions is the specific issue for resolution in Contention 1(b), and permitting discovery on the issue would not in any way advance a determination on the redactions.

SLOMFP in its Discovery Motion also argues that discovery is somehow warranted because this contention is not “purely” a FOIA contention, but a contention under the National Environmental Policy Act and the Atomic Energy Act (“AEA”). Discovery Motion, at 2. However, this is an issue that is not properly before the presiding officer. The Commission has charted its course for this proceeding, implicitly concluding that its obligation to release documents is co-terminus with FOIA. Moreover, SLOMFP acknowledges that it has a pending motion for reconsideration before the Commission on this exact point. *Id.*<sup>11</sup> PG&E has responded to that motion.<sup>12</sup> As discussed in PG&E’s response, SLOMFP’s argument misses the point. The documents SLOMFP seeks and the discovery it wishes to conduct are beyond the scope of Contention 1(b) and therefore beyond the scope of the AEA hearing requirement — even if the AEA required greater access than the FOIA.

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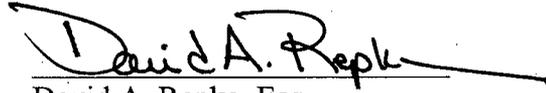
<sup>11</sup> See note 7 above.

<sup>12</sup> “Pacific Gas and Electric Company’s Opposition to San Luis Obispo Mothers for Peace Motion for Reconsideration of CLI—08-05,” dated April 17, 2008.

III. CONCLUSION

SLOMFP's Motion seeking leave to conduct supplemental discovery should be denied.

Respectfully submitted,



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

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

COUNSEL FOR PACIFIC GAS AND  
ELECTRIC COMPANY

Dated in Washington, District of Columbia  
this 18<sup>th</sup> day of April 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of: )  
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Pacific Gas and Electric Co. ) Docket No. 72-26-ISFSI  
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Spent Fuel Storage Installation) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "PACIFIC GAS AND ELECTRIC COMPANY'S ANSWER TO SAN LUIS OBISPO MOTHERS FOR PEACE MOTION FOR LEAVE TO CONDUCT SUPPLEMENTAL DISCOVERY" have been served as shown below by electronic mail, this 18<sup>th</sup> 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

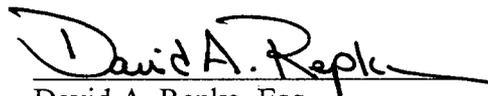
Diane Curran, Esq.  
Harmon, Curran, Spielberg & Eisenberg, LLP  
1726 M Street N.W., Suite 600  
Washington, DC 20036  
e-mail: dcurran@harmoncurran.com

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](mailto:beckers@thegrid.net)  
[jzk@charter.net](mailto: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](mailto: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](mailto:tmcnulty@co.slo.ca.us)



David A. Repka, Esq.  
Counsel for Pacific Gas  
and Electric Company