UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 04/30/08
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COMMISSIONERS

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of	)	
PACIFIC GAS and ELECTRIC CO.	)	Docket No. 72-26-ISFSI
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)	)	

CLI-08-08

MEMORANDUM AND ORDER

I. INTRODUCTION

In January we issued an order admitting limited portions of Contentions 1(b) and 2 (proposed by San Luis Obispo Mothers for Peace (SLOMFP)) and setting a schedule for further proceedings in this adjudication on a license application for an independent spent fuel storage installation (ISFSI) at the site of the Diablo Canyon nuclear power reactor in California.[1] We directed the NRC Staff to file a complete listing of the source documents it relied on for its National Environmental Policy Act (NEPA) assessment, "together with a *Vaughn* index (or its equivalent)" detailing the Freedom of Information Act (FOIA) basis for any withheld documents or portions of documents.[2] The Staff responded to our direction regarding Contention 1(b) by

[1] CLI-08-01, 67 NRC ___ (Jan. 15, 2008).

[2] *Id*., slip op. at 30.

filing its Reference Document List and *Vaughn* index (with later addendum) and providing copies of releasable documents, redacted as it deemed necessary.[3]

The Staff's Reference Document List and *Vaughn* index filing prompted two fresh pleadings from SLOMFP. SLOMFP's first pleading objected to the adequacy of the Staff's filing, requested additional discovery based on information in the redacted documents the Staff provided, and asked for access to unredacted documents under a protective order.[4] SLOMFP's second pleading proposed a new contention — Contention 6 — based on information included in an unredacted portion of a classified document the Staff had released.[5] Both the Pacific Gas and Electric Company (PG&E)[6] and the NRC Staff[7] oppose admission of this new contention.

We addressed the first SLOMFP pleading in an order issued in March.[8] We denied SLOMFP's implicit request for reconsideration of our earlier ruling on access to unredacted information and reiterated our decision not to grant NEPA-based access to FOIA-exempt documents to SLOMFP "because by law disclosure of documents under NEPA is expressly

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[3] *NRC Staff's Response to Commission Order to Provide Reference List and Vaughn Index* (Feb. 13, 2008) and *Addendum to NRC Staff's Response to Commission Order to Provide Reference List and Vaughn Index* (Feb. 15, 2008).

[4] *San Luis Obispo Mothers for Peace's Response to NRC Staff's Vaughn Index, Request for Leave to Conduct Discovery Against the NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures to Protect Submission of Sensitive Information* (Feb. 20, 2008).

[5] *San Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6 Regarding Diablo Canyon Environmental Assessment Supplement* (Feb. 27, 2008) (Contention 6 Petition).

[6] *Pacific Gas and Electric Company's Response to San Luis Obispo Mothers for Peace Proposed Late-Filed Contention 6* (March 5, 2008) (PG&E Contention 6 Response).

[7] *NRC Staff's Response to San Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6* (March 5, 2008) (Staff Contention 6 Response).

[8] CLI-08-05, 67 NRC ___ (March 27, 2008).

governed by FOIA."[9] We delegated the resolution of Contention 1(b) — essentially a FOIA dispute — to the previously-delegated presiding officer.[10] We authorized the presiding officer "to use all appropriate adjudicatory tools," and directed him to issue a decision on an expedited basis — i.e., by May 30, 2008 — "[a]bsent unanticipated circumstances."[11] We also authorized limited discovery, but "only if absolutely necessary to ensure a complete record and a fair decision," and reminded the presiding officer and the parties of the sparing use of discovery in FOIA litigation, "which ordinarily is resolved on summary disposition without discovery and without evidentiary trials or hearings."[12]

Before us today are SLOMFP's motion to reconsider our March order on Contention 1(b) and its request to file Contention 6, a new contention based on recently released NRC Staff documents. We deny the motion to reconsider our Contention 1(b) ruling, except to note that the presiding officer can take additional time to decide the contention if necessary, and we find SLOMFP's Contention 6 inadmissible. We also address a number of case-management matters.

II. DISCUSSION AND ANALYSIS

A. Contention 1(b)

SLOMFP argues that we should reconsider our unwillingness to give access to safeguards and classified information and that we should also reconsider our expedited schedule for resolving Contention 1(b).[13] PG&E[14] opposes SLOMFP's motion for

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[9] *Id*., slip op. at 2.

[10] *Id*. at 4-5.

[11] *Id*. at 4.

[12] *Id*. at 4-5.

[13] *San Luis Obispo Mothers for Peace's Motion for Reconsideration of CLI-08-05* (April 7, 2008) (April Reconsideration Motion).

reconsideration. The current adjudicatory proceeding arises out of *San Luis Obispo Mothers for Peace v. NRC*,[15] where the Ninth Circuit held that the NRC's "categorical refusal to consider the environmental effects of a terrorist attack" was unreasonable under NEPA,[16] and remanded this "NEPA-terrorism" issue to the Commission for "further proceedings consistent with this opinion."[17] As we noted in our initial scheduling order pursuant to this remand, the Ninth Circuit explicitly left to our discretion the precise manner of our procedural approach and our merits consideration of the NEPA-terrorism issue.[18] In so doing, the Ninth Circuit pointed out that the Supreme Court's decision in *Weinberger v. Catholic Action of Hawaii*,[19] supports "the proposition that security considerations may permit or require modification of some of the NEPA procedures" even though security issues do not "result in some kind of NEPA waiver."[20] The Ninth Circuit acknowledged that the NRC's information-security "arguments explain why a *Weinberger*-style limited proceeding might be appropriate."[21]

Consistent with the Ninth Circuit's suggestion, we have "use[d] *Weinberger* as our guidepost" throughout this remand proceeding.[22] As we stated before, "[o]ur inability to disclose

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[14] *Pacific Gas and Electric Company's Opposition to San Luis Obispo Mothers for Peace Motion for Reconsideration of CLI-08-05* (April 17, 2008).

[15] *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied sub nom. Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace,* No. 06-466 (Jan. 16, 2007).

[16] 449 F.3d at 1028.

[17] 449 F.3d at 1035.

[18] CLI-07-11, 65 NRC 148, 149 (2007).

[19] *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981).

[20] 449 F.3d at 1034.

[21] *Id*.

[22] CLI-08-1, slip op. at 9.

information based on the confidentiality of that information does not mean, however, that the NRC Staff (and the Commission, on review) has not performed the evaluation the Ninth Circuit directed, consistent with *Weinberger* — it simply means that certain information cannot be made public for security reasons."[23] Against this backdrop, we decline to reconsider our decision to restrict access to security-related information in this proceeding, even under protective order.[24]

In view of the scheduling concerns SLOMFP raises in its motion for reconsideration, we do, however, remind the presiding officer of his discretion to extend the schedule for resolution of Contention 1(b) if there are "unanticipated circumstances"[25] — which would include a need to obtain more information or to give parties reasonable time to file necessary pleadings or responses to the presiding officer's inquiries.

B. Contention 6

We turn now to consideration of the admissibility of SLOMFP's proposed Contention 6. As we reiterated in our January decision, under our pre-2004 rules, our late-filed contention standards were set out in 10 C.F.R. § 2.714(a)(1). The following five factors must be balanced before a petition to admit a late-filed contention can be granted:

(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.

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[23] *Id*.

[24] SLOMFP's latest motion to reconsider (April Reconsideration Motion at 6) complains that the Commission held SLOMFP to a ten-day deadline even though our former rules, applicable to this proceeding, contain no such deadline. This complaint is not without force, but it is not outcome-determinative, as we also found SLOMFP's motion to reconsider unpersuasive on the merits. *See* CLI-08-05, slip op. at 2-3.

[25] CLI-08-05, slip op. at 4.

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

"The first factor — whether good cause exists to excuse the late-filing of the contention — is the most important factor."[26] "If 'good cause' is not shown, a petitioner 'must make a "compelling" showing' on the four remaining factors."[27] "In this analysis, factors three and five are to be given more weight than factors two and four."[28] If the late-filed contention criteria are satisfied, our next inquiry is whether the proposed contention is suitable for hearing. Here we find that, on balance, our late-filed contention criteria are not satisfied. We also find proposed Contention 6 unsuitable for hearing for the same reasons that, earlier in this proceeding, we rejected SLOMFP's virtually identical Contention 3.[29]

The heading for SLOMFP's Contention 6 reads:

> 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.[30]

SLOMFP argues that the Staff violated NEPA in preparing its final environmental assessment supplement by "excluding reasonably foreseeable threat scenarios from consideration, based on the use of an inappropriate indicator known as "Ease" as a proxy for

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[26] CLI-08-01, slip op. at 5. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986), citing *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 483 (2001), *review declined*, CLI-02-3, 55 NRC 155, 156 n.9 (2002).

[27] CLI-08-01, slip op. at 5, quoting *Braidwood Nuclear Power Station*, CLI-86-8, 23 NRC at 244.

[28] CLI-08-01, slip op. at 5, citing *Braidwood Nuclear Power Station*, CLI-86-8, 23 NRC at 245.

[29] *See* CLI-08-01, slip op. at 21-25.

[30] Contention 6 Petition at 2.

the probability of a threat scenario."[31] SLOMFP argues that because these excluded threat scenarios could have significant adverse effects on the environment, the Staff should have prepared an environmental impact statement.

SLOMFP relies on the "Ease" factor as the factual basis for Contention 6. SLOMFP states that it learned of the "Ease" factor in an unredacted portion of a classified document. This document, entitled *NRC Spent Fuel Source Term Guidance Document* (Sandia Study), issued by the Sandia National Laboratories (Sandia) in 2004, is listed as a reference in the final environmental assessment supplement, is included in the Staff's *Vaughn* index, and was produced (in redacted form) by the Staff together with its *Vaughn* index, pursuant to the schedule we set in CLI-08-01. "Ease" is a function of time, complexity, and technology, and "was developed to estimate how easy or difficult it is to complete an attack scenario."[32]

In addition to providing the factual basis for Contention 6, SLOMFP argues that disclosure of the "Ease" factor is new information supporting a new contention, so the "good cause" late-filing standard is satisfied. According to SLOMFP, a balancing of our late-filed contention criteria weighs in favor of admission of Contention 6. SLOMFP argues that it satisfies two other late-filing standards because it has no other means besides this proceeding to protect its interest in requiring the NRC to comply with NEPA, and that it may reasonably be expected, because of its experienced counsel and its qualified expert witness, to assist in the development of a sound record.[33] Regarding the final late-filing criterion, SLOMFP concedes that its participation will broaden and delay the proceeding, but argues that any delay is

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[31] *Id*.

[32] *Id*. at 3, citing Sandia Study at 133-34.

[33] *Id*. at 6.

attributable to the NRC and PG&E's unwillingness to consider NEPA-terrorism issues when this proceeding began over five years ago.[34]

PG&E counters SLOMFP's arguments by arguing that balancing our late-filed contention standards does not support admitting Contention 6. Pointing to the absence of any new expert witness support, PG&E argues that the good cause standard for late-filing is not met because disclosure of the "Ease" factor, by itself, is insufficient to make a previously inadmissible contention admissible.[35] The NRC Staff agrees with PG&E, arguing that Contention 6 is substantively identical to Contention 3, except for SLOMFP's speculation that the Staff used the "Ease" factor in assessing threat scenarios.[36] According to the Staff's argument, SLOMFP had sufficient information to raise its substantive contention before the existence of the "Ease" factor in the Sandia Study became known — and in fact raised essentially the same contention in Contention 3 — so the good cause standard is not satisfied.[37]

With respect to the remainder of the late-filing criteria, both PG&E and the NRC Staff argue that Contention 6 would broaden the proceeding beyond its intended scope. The Staff points out that the Commission already ruled that threat scenarios would not be part of this proceeding.[38] PG&E maintains that Contention 6 would lead the proceeding into areas "already addressed by other NRC regulations, such as NRC security requirements and ISFSI dry cask designs."[39] PG&E maintains that SLOMFP is unlikely to be able to contribute to the development of a meaningful record because of lack of access to threat information and lack of

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[34] *Id*.

[35] PG&E Contention 6 Response at 8 n.7.

[36] Staff Contention 6 Response at 5.

[37] *Id*.

[38] *Id*. at 6.

[39] *Id*. at 9.

expertise in threat assessment.[40] PG&E also argues that SLOMFP has other means of protecting its interests, such as "participating in security-related rulemakings or commenting on dry cask storage Certificates of Compliance rulemakings."[41] The Staff does not believe SLOMFP's ability to contribute to the record to be as limited, nor does it believe that SLOMFP's interests can be vindicated by other parties or through other means, but the Staff nonetheless agrees with PG&E that, on balance, our late-filed contention criteria are not satisfied and Contention 6 should not be admitted.[42]

We find that the good cause criterion is not satisfied, and that the other factors (to the extent any fall on SLOMFP's side of the ledger) do not outweigh this fundamental failure. Apart from reliance on the "Ease" factor, Contention 6 bears a strong resemblance to Contention 3 (which we did not admit[43]), both in the language of the contention and in the legal and expert witness support SLOMFP provides. As the legal basis for Contention 6, SLOMFP cites 10 C.F.R. § 51.20(a)(1) and 40 C.F.R. § 1502.22(b)(3).[44] The first of these cited regulations states simply the general proposition that if a major federal action significantly affects the quality of the human environment, an environmental impact statement must be prepared.[45] But the second regulation is the same Council on Environmental Quality (CEQ) regulation[46] that SLOMFP relied

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[40] *Id*. at 8-9.

[41] *Id*. at 9.

[42] Staff Contention 6 Response at 6.

[43] CLI-08-01, slip op. at 23- 25.

[44] *Id*. at 2.

[45] 10 C.F.R. § 51.20(a)(1).

[46] The cited section applies where there is incomplete or unavailable information, requires the agency to identify such information, and, "for the purposes of this section," defines "reasonably foreseeable" to include "impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific

Footnote continued…

on to support its Contention 3. And the expert witness support that SLOMFP provides[47] is nearly identical: SLOMFP relies on the same June 2007 report[48] it relied on for Contention 3, augmented only by a short declaration confirming the continued accuracy of the report and the accuracy of factual statements in Contention 6.[49] Comparison of Contention 6 and Contention 3 shows how similar the two contentions are:

Contention 6:	*Contention 3:*
The Staff's "[i]nappropriate reliance on the 'Ease' indicator" led it "to exclude reasonably foreseeable and significant environmental impacts" and "reasonably foreseeable **threat scenarios**" and "[t]he excluded threat scenarios **could cause significant adverse impacts by contaminating the environment.**"[50]	The "very small dose consequences estimated" by the Staff in the environmental assessment supplement shows that the Staff failed "to consider credible **threat scenarios** that **could cause significant environmental damage by contaminating the environment.**"[51]

We agree with the Staff[52] that whether SLOMFP bases its contention on inferences drawn from dose estimates (Contention 3) or from the existence of an "Ease" indicator (Contention 6), the fundamental contention is the same: in either case SLOMFP is challenging the range of threat scenarios examined by the Staff. Contention 3 satisfied our good cause

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evidence, is not based on pure conjecture, and is within the rule of reason." 40 C.F.R. § 1502.22(b)(4).

[47] Contention 6 Petition at 1-2.

[48] Thompson, Gordon R., *Assessing Risks of Potential Malicious Actions at Commercial Nuclear Facilities: The Case of a Proposed Spent Fuel Storage Installation at the Diablo Canyon Site* (June 27, 2007) (Thompson Report).

[49] Thompson, Gordon R., *Declaration of Dr. Gordon R. Thompson in Support of San Luis Obispo Mothers for Peace's Contention 6* (Feb. 27, 2008).

[50] Contention 6 Petition at 2 (emphasis added).

[51] *San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement* (June 28, 2007) at 12-13 (emphasis added).

[52] Staff Contention 6 Response at 4.

standard as a challenge to the Staff's then newly-available environmental assessment supplement and the range of scenarios considered by the Staff in that analysis, so it met our late-filing criteria. Contention 6 is essentially the same as Contention 3; as a challenge to scenarios considered in the no longer newly-available environmental assessment supplement, it cannot be timely now. SLOMFP has not shown good cause to admit today a contention that was not admitted when first proposed.

Even if Contention 6 satisfied our late-filing criteria, we would not admit it for hearing. As we found when we rejected SLOMFP's original "threat scenarios" contention (Contention 3), it is not practical or legally required for the NRC to adjudicate the essentially limitless range of conceivable (albeit highly unlikely) terrorist scenarios, where the core evidence (threat assessment and security measures) is protected security information. The Supreme Court's controlling decision in *Weinberger v. Catholic Action of Hawaii*, makes clear that NEPA does not contemplate adjudications resulting in the disclosure of matters under law considered secret or confidential.[53] Here, disclosure of such matters would be required to conduct meaningful hearings on alternate terrorist scenarios. As we pointed out in January, "[t]he NRC Staff's supplemental environmental assessment explains that the Staff considered '[p]lausible threat scenarios . . . includ[ing] a large aircraft impact similar in magnitude to the attacks of September 11, 2001, and ground assaults using expanded adversary characteristics consistent with the design basis threat for radiological sabotage for nuclear power plants.'"[54] This approach is based on the NRC Staff's access to classified threat assessment information,[55] and is

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[53] CLI-08-01, slip op. at 24, quoting *Weinberger*, 454 U.S. at 146-47.

[54] CLI-08-01, slip op. at 23, quoting Final EA Supplement at 7.

[55] CLI-08-01, slip op. at 23, citing Final EA Supplement at 4-7.

reasonable on its face. "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."[56]

III. SCHEDULING MATTER

The NRC Staff, PG&E, and SLOMFP submitted detailed written summaries of facts, data, and arguments and written supporting information, required under 10 C.F.R. § 2.1113, on April 14, 2008.[57] Thus, under our rules, the Subpart K oral argument (which will be heard by the Commission absent further determination to the contrary) may be held at any time after April 29, 2008. *See* 10 C.F.R. § 2.1113. With the expectation that oral argument will take no more than one day, we schedule it for July 1, 2008, at 9:30 a.m. at the Commission's headquarters in Rockville, Maryland. A more detailed scheduling order, covering matters like order of presentation, format, and time allocations, will be issued in the near future.

IV. CONCLUSION

Consistent with our discussion above, we deny the motion for reconsideration and remind the presiding officer that he has some scheduling flexibility in his resolution of Contention 1(b). We decline to admit Contention 6. Subpart K oral argument on Contention 2 will be heard on July 1, 2008, at 9:30 a.m. at the Commission's headquarters in Rockville, Maryland.

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[56] CLI-08-01, slip op. at 23-24, citing 449 F.3d at 1034-35.

[57] *NRC [Staff] Brief and Summary of Relevant Facts, Data and Arguments Upon Which the Staff Proposes to Rely at Oral Argument on San Luis Obispo Mothers for Peace's Contention 2* (April 14, 2008); *San Luis Obispo Mothers for Peace's Detailed Summary of Facts, Data, and Arguments on Which it Intends to Rely at Oral Argument to Demonstrate the Inadequacy of the U.S. Nuclear Regulatory Commission's Final Supplement to the Environmental Assessment for the Proposed Diablo Canyon Indep[e]ndent Spent Fuel Storage Installation to Consider the Environmental Impacts of an Attack on the Facility (Contention 2)* (April 14, 2008); *Summary of Facts, Data, and Arguments on Which Pacific Gas and Electric Company Will Rely at the Subpart K Oral Argument on Contention 2* (April 14, 2008).

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of April, 2008

Commissioner Gregory B. Jaczko Respectfully Dissenting in Part:

I respectfully dissent from the majority's decision. I continue to question the Commission's over-reliance on *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981), concerning the public release of State secrets, as a basis for categorically withholding classes of information from one of the parties to this hearing. We do have mechanisms we can employ to ensure that sensitive information provided to the participants in the proceeding is protected from disclosure.

I concur with the portions of the Memorandum and Order which make it clear to the presiding officer that he has discretion with regard to adjusting deadlines in his consideration of Contention 1(b) and that sets a date for the Subpart K oral argument.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC CO.	)	Docket No. 72-26-ISFSI
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	)	
(Diablo Canyon Power Plant,	)	
Independent Spent Fuel Storage	)	
Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-08-08) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 30th day of April 2008