

May 3, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
)
PACIFIC GAS AND ELECTRIC) Docket No. 50-275-LR
COMPANY) Docket No. 50-323-LR
)
(Diablo Canyon Power Plant, Units 1 and 2))

APPLICANT’S RESPONSE TO MOTION FOR
LEAVE TO REPLY TO OPPOSITIONS TO WAIVER PETITION

On April 23, 2010, San Luis Obispo Mothers for Peace (“SLOMFP”) filed a Motion for leave to reply to the oppositions filed by Pacific Gas and Electric Company (“PG&E”) and the Nuclear Regulatory Commission (“NRC”) Staff with respect to SLOMFP’s requests for waivers in accordance with 10 C.F.R. § 2.335(b).¹ By a response dated April 29, 2010, the NRC Staff has already opposed the SLOMFP Motion.² PG&E agrees with the NRC Staff and also opposes the Motion.

SLOMFP’s Motion relates to its requests for waivers to allow challenges to NRC regulations in connection with the issues raised in proposed Contentions EC-2 and EC-3. Both of those proposed contentions relate to the environmental impacts of spent fuel storage at Diablo

¹ “San Luis Obispo Mothers for Peace’s Motion for Leave to Reply to Oppositions Waiver Petition [*sic.*],” dated April 23, 2010 (“Motion”).

² NRC Staff’s Response to San Luis Obispo Mothers for Peace’s Motion for Leave to Reply to Oppositions to Waiver Petition,” dated April 29, 2010 (“Staff Response”).

Canyon Power Plant.³ As SLOMFP recognizes, under existing regulations spent fuel storage is a Category 1 issue for environmental reviews for license renewal, and therefore does not need to be addressed in an individual license renewal review or hearing. 10 C.F.R. Part 51, Appendix B, Table B-1. Absent a waiver, spent fuel storage cannot be addressed in this proceeding.

PG&E responded to the waiver requests and the proposed contentions in its Answer to the SLOMFP petition to intervene.⁴ SLOMFP's Motion now requests the opportunity to reply to the opposition to the waiver petition. SLOMFP has already included its reply to the oppositions to waiver within its reply to the PG&E and NRC Staff answers to the petition to intervene.⁵

A reply to the opposition to the waiver petition is not provided for in the rules or justified in the Motion. SLOMFP's sole basis for a reply on the waiver issue is that the "issues raised by the contentions and the waiver petition are inextricably tied." Motion at 1. According to SLOMFP, the arguments related to the hearing request (*i.e.*, contention admissibility) and to the waiver petition "cannot be easily separated, because they all relate to the question of whether the NRC has adequately addressed the environmental impacts of spent fuel storage. . . ." *Id.* at 1-2. This argument is completely inadequate.

The arguments related to a waiver petition are necessarily directed to the standards for a waiver defined by Commission regulations in 10 C.F.R. § 2.335(b) and

³ Contention EC-2 relates to spent fuel pool accidents, particularly related to earthquakes. Contention EC-3 relates to spent fuel pool risks posed by hypothetical terrorist attacks.

⁴ See "Applicant's Answer to Petition to Intervene and Response to Requests for Waivers," dated April 16, 2010 ("PG&E's Answer"), at 23-30, 33-38.

⁵ There is no issue under the regulations with respect to SLOMFP's right to reply to the PG&E and NRC Staff answers on the issue of admissibility of the proposed contentions.

Commission case law. The arguments related to admissibility of a proposed contention are necessarily directed to the criteria for evaluating a proposed contention defined by Commission regulations in 10 C.F.R. § 2.309 and Commission case law. PG&E had no difficulty in identifying the issues related to the waiver requests and separating those arguments from admissibility arguments. This is illustrated in the structure of PG&E's Answer. The arguments may all relate factually to spent fuel storage, but, nonetheless, the legal issues are separate and distinct.⁶ Accordingly, the basis for the SLOMFP's Motion is fundamentally flawed.

SLOMFP's reply to the oppositions to the petition to intervene and to the waiver request for proposed Contention EC-2 is largely focused on its argument that earthquake risks in California are not adequately reflected in the 1996 Generic Environmental Impact Statement ("GEIS") for license renewal, and therefore that the Category 1 designation in the rules for spent fuel storage should be set aside for Diablo Canyon. This is precisely the waiver argument that SLOMFP made previously. As PG&E demonstrated previously, the argument is simply wrong. PG&E's Answer, at 25-28.

Similarly, SLOMFP's reply to the oppositions to the petition to intervene and to the waiver request for proposed Contention EC-3 is largely focused on whether impacts of terrorist attacks on spent fuel pool storage have been adequately evaluated in the GEIS, and whether the NRC Staff in the GEIS adequately addressed "mitigation enhancements." These are arguments that are waiver arguments, not contention admissibility arguments. These are arguments SLOMFP has already made. Because SLOMFP is addressing a waiver issue, a reply is not provided for in the rules and is not justified in the Motion.

⁶ As the NRC Staff points out, the fact that there are similarities between a waiver petition and proposed contentions is hardly surprising — and does not establish compelling circumstances justifying a reply. Staff Response, at 4.

At bottom, the Motion seeking leave to reply should be denied. The regulations do not allow a reply with respect to a waiver petition and SLOMFP has not shown any reason why one should be accepted in this matter. It is simply continuing to argue points it has already made.

Respectfully submitted,

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Dated at Washington, District of Columbia
this 3rd day of May 2010

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO MOTION FOR LEAVE TO REPLY TO OPPOSITIONS TO WAIVER PETITION” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 3rd day of May 2010, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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