

September 27, 2011

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 SUR-REPLY REGARDING ADMISSION OF
PROPOSED NEW CONTENTION

INTRODUCTION

In accordance with the invitation of the Atomic Safety and Licensing Board (“Board”) during the telephone status conference of September 20, 2011, Pacific Gas and Electric Company (“PG&E”) herein replies to the San Luis Obispo Mothers for Peace reply¹ to PG&E’s opposition² to admission of SLOMFP’s proposed contention addressing the environmental implications of the Fukushima event. In particular, as requested by the Board, this PG&E sur-reply addresses the implications for the admissibility of the proposed contention of the Commission decision, CLI-11-05, issued on September 9, 2011 (that is, subsequent to PG&E’s filing of September 6, 2011). As discussed herein, the Commission’s decision supports PG&E’s position. The Fukushima issues are being addressed by the Commission in generic processes outside site-specific adjudications, and any obligation for environmental reviews or

¹ “San Luis Obispo Mothers for Peace’s Reply to Oppositions to Admission of New Contention,” dated September 13, 2011 (“SLOMFP’s Reply”). SLOMFP’s Reply includes a generic “Reply Memorandum” which is addressed herein.

² “Applicant’s Response to Proposed Contention,” dated September 6, 2011 (“Applicant’s Response”).

supplements will arise, and will be addressed, only if new and significant environmental information is identified.

DISCUSSION

SLOMFP's Reply states that CLI-11-05 "contains language that bears on the timeliness and admissibility of the [Fukushima] contentions." Reply Memorandum, at 2. CLI-11-05 addressed the various petitions filed in various proceedings (including this one) to suspend the proceedings and NRC licensing decisionmaking. The Commission decision, by its terms, did not address admissibility of contentions in any proceeding. Nonetheless, PG&E agrees with SLOMFP that aspects of the decision bear directly on the admissibility of SLOMFP's proposed Fukushima contention.³ The Commission's decision does not support admissibility of the proposed contention.

SLOMFP identifies the discussion in CLI-11-05 of the NRC's obligations under the National Environmental Policy Act ("NEPA") and responds to prior arguments that its NEPA contention is "premature." Reply Memorandum, at 3-5, citing CLI-11-05, slip op. 30-31. The Commission specifically held, however, that requests for a NEPA supplement based on the Fukushima event are "premature." *Id.* at 30. That conclusion applies equally to the current proposed contention. The Commission recognized that "we do not know today the full implications of the Japan events for U.S. facilities." *Id.* The Commission further stated, directly to the point of the proposed contention, that "any generic NEPA duty — if one were appropriate at all — does not accrue now." *Id.* Echoing PG&E's position on the proposed contention (Applicant's Reply, at 13-14), the Commission observed that it will have a duty to supplement its

³ PG&E did not oppose SLOMFP's contention on grounds of timeliness. Accordingly the discussions in SLOMFP's Reply, and the Reply Memorandum, regarding the timeliness of the contention are superfluous and are not further addressed here.

NEPA evaluations only if and when “new and significant” environmental information is identified. *Id.* at 31. Based on the Task Force Report and the current state of information, there is no new and significant environmental information giving rise to a NEPA duty.

The Commission decision also addresses the Declaration of Dr. Arjun Makhijani that was submitted with the prior suspension requests. The Commission agreed with the respondents that the declaration was “mostly speculation, not facts or evidence, on potential implications [of the Fukushima event] for U.S. facilities.” CLI-11-05, slip op. 27; *see id.* (noting that Dr. Makhijani makes no showing that tsunami or station blackout risk at the subject plants is higher than previously assumed, or that spent fuel pool risk at U.S. plants is anything other than very low). The same assessment applies to the Declaration of Dr. Makhijani submitted with SLOMFP’s proposed contention. That declaration is also based on the NRC Task Force recommendations, and does not identify any new or significant environmental information that creates a current NEPA duty. *See Applicant’s Response*, at 11-14.

SLOMFP argues that its contention is one of omission — that the NRC’s NEPA documents “fail entirely to consider the findings, recommendations, and conclusion of the Task Force Report.” Reply Memorandum, at 9. However, this argument is also inconsistent with the Commission’s position on NEPA stated in CLI-11-05. There can be no NEPA “omission” if no new and significant environmental information has been identified. As the Commission concluded, a NEPA obligation “does not accrue now” — that is, the Commission determined that, based on current information and the Makhijani Declaration, that there is no new and significant information warranting an additional NEPA review. *See* CLI-11-05, slip op. 31 (concluding that there is not “new” and “significant” information that bears on the proposed action or its impacts such that additional NEPA review is warranted “given the current state of

information available”). Therefore, there is no omission to be addressed and no basis for a contention. SLOMFP would have an opportunity to challenge the lack or quality of a NEPA supplement if new and significant environmental information, applicable to Diablo Canyon, is ever identified.

The Commission decision also recognizes, consistent with PG&E’s position on the proposed contention, that “license renewal presents an additional circumstance” relevant to decisions on suspension of proceedings. CLI-11-05, slip op. 26. This same assessment applies to admissibility of the proposed contention in this case. Changes and enhancements to regulations and power plants based on the Fukushima accident will be addressed as part of the current licensing basis of the plant, irrespective of license renewal. *See Applicant’s Response*, at 10.⁴

Finally, SLOMFP points out that CLI-11-05 in effect addresses PG&E’s prior argument that admissibility of the proposed contention should be decided in the first instance by the Commission. SLOMFP’s Reply, at 3, citing CLI-11-05, slip op. 35. PG&E agrees. However, this aspect of CLI-11-05 does not affect PG&E’s request that the Board certify novel issues, or refer any decision accepting the proposed contention, to the Commission. *See Applicant’s Response*, at 8. In fact, the Commission itself stated that: “[S]hould a licensing board decision raise novel legal or policy questions, we encourage the boards to certify to us, in accordance with 10 C.F.R. §§ 2.319(l) and 2.323(f), those questions that would benefit from our consideration.” CLI-11-05, slip. op. 35.

⁴ SLOMFP also argues that its contention, to the extent it address the Severe Accident Mitigation Alternatives (“SAMA”) evaluation, is admissible because it is not an intervenor’s responsibility to explain how the analysis in the NEPA record would change. This argument is simply contrary to Commission regulations and precedent.

CONCLUSION

For the reasons discussed above and in Applicant's Response, SLOMFP's proposed new contention should not be admitted for hearing.

Respectfully submitted,

/s/ signed electronically by
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Executed in accord with 10 C.F.R. 2.304(d)
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Dated at Washington, District of Columbia
this 27th day of September 2011

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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S SUR-REPLY REGARDING ADMISSION OF PROPOSED NEW CONTENTION" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 27th day of September 2011, 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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