September 27, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PACIFIC GAS & ELECTRIC COMPANY	)	Docket Nos. 50-275-LR
	)	50-323-LR
(Diablo Canyon Nuclear Power Plant,	)	
Units 1 and 2)	)	

NRC STAFF'S SURREPLY TO THE REPLY OF SAN LUIS OBISPO MOTHERS FOR PEACE

INTRODUCTION

Pursuant to the invitation of the Atomic Safety and Licensing Board ("Board"), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby files this surreply opposing the "San Luis Obispo Mothers for Peace's ["SLOMPF"] Reply to Oppositions to Admission of New Contention" ("Reply") and SLOMPF's associated Reply Memorandum filed on September 13, 2011,[1] regarding Pacific Gas and Electric's ("PG&E or Applicant") license renewal application for Diablo Canyon Nuclear Power Plant, Units 1 and 2 ("DCNPP").[2]

BACKGROUND

In a pre-hearing conference call on September 20, 2011[3], the Board invited the Staff and

[1] San Luis Obispo Mothers for Peace's Reply to Oppositions to Admissions of New Contention (ADAMS Accession No. ML11256A342) (Sep. 13, 2011) ("Reply").

[2] *See* Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report ("NEPA Contention") (Aug. 11, 2011), Motion to Admit New Contention Regarding the Safety Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident ("Motion to Admit New Contention") (Aug. 11, 2011) (ADAMS Accession No. ML11236A322).

[3] Notice (Scheduling Pre Hearing Conference Call) (ADAMS Accession No. ML11243A081) (Aug. 31, 2011). The Board specified that the surreplies are to be ten pages or less and filed by September 27, 2011.

the Applicant to file surreplies to the Reply in order to address the implications of the Commission's recent decision in CLI-11-05 on September 9, 2011, denying SLOMPF's petition to suspend all pending reactor licensing decisions, suspend other proceedings related to the NRC's Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident, ("TFR")[4] and for a generic NEPA review based on the TFR.[5] The Intervenor addressed portions of the Suspension Order in its Reply on September 13, 2011.[6] Because the Staff's initial reply was due on September 6, 2011 and the Commission issued its decision in the Suspension Order three days later, the Staff did not address the Commission's findings in the initial reply.[7] The following discussion sets forth the effect of the Commission's decision in the Suspension Order on the admissibility of the Intervenor's proposed new contention based on the TFR.

DISCUSSION

The essence of SLOMPF's claim "is that the Task Force Report constitutes 'significant new information' under NEPA and the NEPA Documents need to be supplemented accordingly."[8] Because the TFR does not reference environmental issues, SLOMPF strains to link the TFR to NEPA requirements. SLOMPF alleges that the TFR calls into question "factual determinations that compliance with NRC safety regulations will ensure that the environmental impacts of reactor accidents will be 'SMALL.'"[9] However, SLOMPF misreads the implications of

[4] Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) (ADAMS Accession No. ML111861807).

[5] *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2) et al., CLI-11-05, 74 NRC __ (Sep. 9, 2011) (slip op.) ("Suspension Order").

[6] *See, e.g.*, Reply at ii; iii.

[7] NRC Staff's Answer To Motion To Admit New Contention Regarding The Safety And Environmental Implications Of The Nuclear Regulatory Commission Task Force Report On The Fukushima Dai-ichi Accident ("Staff Reply") (Sep. 6, 2011) (ADAMS Accession No. ML11249A216).

[8] Reply at 8.

[9] *Id*. at 6 (quoting Table B-1).

the TFR. In the Suspension Order, the Commission made clear that the information in the TFR in and of itself does not comprise the basis for such claims that would justify admission of SLOMPF's contention.

In its Suspension Order, the Commission essentially rebuffed claims that the TFR itself provides a sufficient basis for challenges to NRC regulations or individual proceedings, without showing more.[10] The Commission pointed out that the TFR affirmed that the "continued operation and continued licensing activities do not pose an imminent risk to public health and safety."[11] The Commission stated that "nothing we have learned to date [from the events at Fukushima] puts the continued safety of our currently operating regulated facilities, including reactors and spent fuel pools, into question."[12] Accordingly, the Commission found that under the current regulations, there is "no imminent risk to public health and safety or to the common defense and security."[13] These findings in the Suspension Order undermine SLOMPF's claims that the TFR provides any basis for alleging that continued compliance with the NRC's regulations will result in a different environmental result.

The Commission also found significant that "the Petition fails to identify specific problems with any captioned COL application [or] license renewal application," and that "[t]his lack of a specific link between the relief requested and the particulars of the individual applications makes it difficult to conclude that moving forward with any individual licensing

---

[10] The Commission denied the Intervenor's request to suspend licensing and standard certified design proceedings, denied the request to suspend proceedings related to the TFR, and denied the request for separate generic NEPA analysis. *See* Suspension Order at 41 (summing up holdings). The Commission granted only the request for a safety analysis, to the extent the Commission had already engaged in such analysis. *Id.*

[11] Suspension Order at 5 *citing* TFR at vii. The Commission further noted that "[t]he Task Force explained: 'The current [U.S.] regulatory approach, and more importantly, the resultant plant capabilities allow the Task Force to conclude that a sequence of events like the Fukushima accident is unlikely to occur in the United States and some appropriate mitigation measures have been implemented, reducing the likelihood of core damage and radiological release.'" *Id.* at 5 n.8.

[12] *Id*. at 22.

[13] *Id*. at 25.

decision or proceeding will have a negative impact on public health and safety."[14] Because SLOMPF fails to identify any specific dispute with the particulars of the Diablo Canyon license renewal application, the Commission's reasoning in the Suspension Order indicates that SLOMPF's contention based solely on the TFR is insufficient to establish a material dispute.[15]

Moreover, the Commission rejected Intervenor's demands for a generic NEPA analysis of the Fukushima events because the Commission found that the TFR does not contain new and significant information that would trigger the need for a generic review.[16] The Commission found the request to be "premature" and concluded that "any generic NEPA duty—if one were appropriate at all—does not accrue now."[17] Addressing individual applications, the Commission conditioned the need for supplementation of environmental documents on the discovery of new and significant information *beyond* the information contained in the TFR.[18] Accordingly, the TFR, in and of itself, does not contain new and significant information that would trigger either a generic or a specific analysis of environmental impacts.

---

[14] Suspension Order at 22.

[15] The Board in the Florida Power & Light (Turkey Point) COL proceeding provided support for this reading, finding three contentions based on the TFR inadmissible where the contentions did little other than identify TFR recommendations and failed to identify any new issue or genuine dispute with the application itself on a material issue of law or fact. Florida Power & Light Co. (Turkey Point Units 6 & 7) Unpublished Memorandum and Order (Denying CASE's Motion to Reconsider Rejection of Amended Contentions and to Admit Newly Proffered Contentions, and Denying FPL's Request to Impose Remedial Measures on CASE)(Sep. 21, 2011) at 4-9 (ADAMS Accession No. ML11264A096). The Board further cautioned the Intervenor against misrepresenting the findings of the TFR. *Id.* at 8 n. 10 (warning Intervenor that even though the TFR recommended enhancements, such recommendations did not render emergency planning impossible as Intervenor claimed). Although the Board recognized that the Commission allowed in the Suspension Order for Boards to consider new or amended contentions based on the Fukushima events, the Board found the contentions presented solely on the information in the TFR to be inadmissible. *Id.* at 12 n. 13 (citing Suspension Order at 35).

[16] Suspension Order at 30.

[17] *Id*. To the extent that SLOMPF's contention challenges the Generic Environmental Impact Statement ("GEIS") in license renewal proceedings, the ruling in the Suspension Order makes clear that the TFR does not provide new and significant information such that it justifies review by the Commission.

[18] *Id*. ("If, however, new and significant information comes to light that requires consideration as part of the ongoing preparation of application-specific NEPA documents, the agency will assess the significance of that information, as appropriate.").

At the same time, the Commission explicitly set forth the exacting standards for showing "new and significant" information such that a supplemental environmental review document needs to be prepared.[19] Specifically, "Section 51.72(a) requires preparation of as supplemental draft EIS when:

> (1) There are substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (2) There are *significant new circumstances or information* relevant to environmental concerns and *bearing on the proposed action or its impacts*."[20]

The Commission emphasized that in order "[t]o merit this additional review, information must be both 'new' and 'significant' and it must bear on the proposed action or its impacts."[21] Moreover, the Commission stressed that in order to be considered "significant", "the new information must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."[22] The Commission's Suspension Order concluded that the information in the TFR did not provide the type of new information required to meet this standard.[23] Therefore, without showing more, an intervenor in a specific proceeding may not rely on the TFR to demonstrate fulfillment of the requirements of Section 51.72(a).

In the Diablo Canyon license renewal application process, the Staff will issue a draft

---

[19] Suspension Order at 31.

[20] *Id*., *citing* 10 C.F.R. § 51.72(a) (emphasis added by the Commission).

[21] *Id*.

[22] *Id*., *citing Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999).

[23] Suspension Order at 30-31. The Commission stated that "*if*, however, new and significant information comes to light that requires consideration" in specific proceedings, then the agency would assess the significance of that information. Suspension Order at 30-31 (emphasis added). By conditioning any future assessment of application-specific NEPA documents on the *discovery* of new and significant information in the future, the Commission makes clear that the information in the TFR is insufficient to serve as the basis for a claim that new and significant information exists that should be considered in any existing application. Affirming this conclusion, the Commission found that "given the current state of information available to us," the standard for new and significant information is not met based on the TFR. Suspension Order at 31.

supplemental environmental impact statement before the renewal of the license at which time SLOMPF will have an opportunity to comment on that statement.[24] SLOMPF does not show, however, that the information in the TFR requires preparation of a supplemental environmental document now.[25] In its Reply, SLOMPF acknowledges that in order to show "new and significant" information, an intervenor must show that the "new information at issue is 'significant,' 'relevant to environmental concerns,' and has 'bearing on the proposed action.'[26] SLOMPF claims to have "met their burden in demonstrating that the TFR contains new and significant information that is relevant to environmental concerns and has bearing on the proposed agency regulatory action."[27] However, this conclusory statement is all that SLOMPF offers to make the required showing. In neither the Motion nor in the Reply does SLOMPF offer or point to any link or information that meets the standard for being "new", "significant", or "bearing on the proposed action" as required by Section 51.72(a). Notwithstanding SLOMPF's

[24] *See* Status Update Letter re: Projected Schedule for Completion of the Safety and Environmental Evaluations (ADAMS Accession No. ML11258A162) (Sep. 15, 2011) (providing status as to when the NRC will issue the draft supplemental environmental impact statement).

[25] For situations where new information may arise before the preparation of a draft environmental impact statement, the correct standard js 10 C.F.R. § 51.29(c), which is the same standard as 10 C.F.R. § 51.72(a). Section 51.29(c) states: "[a]t any time prior to the issuance of the draft environmental impact statement, the appropriate NRC staff director may revise the determinations made under paragraph (b) of this section, as appropriate, if substantial changes are made in the proposed action, or if significant new circumstances or information arise which bear on the proposed action or its impacts." 10 C.F.R. § 51.29(c).

[26] Reply at 10. Intervenor cites the incorrect standard for NRC proceedings, citing 40 C.F.R. § 1502.9(c) of the CEQ regulations. The correct standard is 10 C.F.R. § 51.72(a) or 10 C.F.R. § 51.29(c) of the NRC regulations implementing NEPA. The language is identical to 40 C.F.R. § 1502.9(c)(i)-(ii) but the standards are not necessarily the same because need for a supplemental impact statements is not derived from NEPA, but rather from case law and from the agencies' implementing regulations. *See Marsh v. Oregon*, 490 U.S. 360, 371 (1989) (noting that NEPA does not expressly address preparation of supplemental environmental impact statements). The NRC takes account of, but has not expressly adopted, the CEQ regulation. 10 C.F.R. § 51.10(a). Moreover, there are differences between the regulations. For example, the CEQ regulations provide that the CEQ may justify preparation of a supplemental impact statement, which the NRC reserves the right to do so itself in its own regulations. 40 C.F.R. § 1502.9(2); 10 C.F.R. § 51.72(b).

[27] Reply at 10-11.

strident complaints,[28] meeting the standard in Section 51.72(a) as set out by the Commission requires an intervenor to do more than identify the existence of a document such as the TFR.

Contrary to Intervenor's claim, an issue is not deemed "significant" for purposes of preparing a supplemental environmental statement merely "because it raises an extraordinary level of concern."[29] Rather, the information is significant if it presents "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."[30] "SLOMPF has not asserted that consideration of events in Japan would produce greater impacts than already covered under the NRC's GEIS rule on severe accidents or the Diablo Canyon SAMA. In fact, in its reply, SLOMPF implicitly acknowledges this shortcoming.[31]

Nor does SLOMPF show that the contention has "bearing upon the proposed project or its impacts."[32] SLOMPF has not demonstrated that the TFR or an event in another country at a

---

[28] SLOMPF asserts that the Staff and Applicant have a "fundamental misunderstanding of Intervenors' duties under NEPA" because the "applicants seek to require Intervenors to supply [environmental] analyses," which SLOMPF states the intervenors are not required to do. Reply at 9-11. This assertion is incorrect and mistaken. Although intervenors do not have to supply "analyses", they must identify *why* information is significant and relevant to the proceeding at hand, which SLOMPF fails to do. The cases the Intervenor cites do not match the facts. For example, Intervenor omits that the plaintiff in *Dubois v. U.S. Dept. of Agriculture* actually provided a concrete alternative to the agency that "provided sufficient notice to 'alert the agency' to the alternative being proposed and the environmental concern the alternative might address." *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1291 (1st Cir. 1996). Similarly, in *Friends of the Clearwater*, the plaintiffs in that case actually identified to the Forest Service changes in the status of species that had been previously identified differently in the completed EIS. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 555 (1st Cir. 1996).

[29] Motion at 11.

[30] Suspension Order at 31 *citing Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999).

[31] *See* Reply 9-10 (arguing incorrectly that Intervenor does not have to provide this information).

[32] 10 C.F.R. § 51.72(a); Suspension Order at 31. For example, the Eighth Circuit held that an agency does not have to supplement environmental documents where the new information does "not bear specifically on" the project in question. *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 544 (8th Cir. 2003). In that case, the plaintiff alleged that the Surface Transportation Board (STB) licensing the construction of a train line in the Midwest had to supplement its EIS to take into account safety information from a train derailment in Maryland and from the September 11, 2001 terrorist attacks. *Id.* at 543-44. The court affirmed the STB's finding that preparation of a supplement to the impact statement was not warranted under the "bearing on the proposed action or its impacts standard" where neither the remote derailment nor the general nature of the terrorist threat altered the studied impacts of the specific rail project. *Id.* at 544.

distinctively different licensing site environmentally bears on the proposed federal licensing action at Diablo Canyon. Merely inserting the name "Diablo Canyon" into a generic pleading is insufficient to show that the information presented has any bearing on this particular license renewal application. Consequently, SLOMPF fails to meet the standard in Section 51.72(a), as set forth by the Commission in the Suspension Order for showing that "new and significant" information exists and its contention is inadmissible.

CONCLUSION

Accordingly, for the reasons set forth above and in the Staff's previous answer to SLOMPF's new contention,[33] the Commission's ruling in its Suspension Order suggests that the TFR does not contain "new and significant" information that would necessitate supplemental NEPA review. The Commission's findings in the Suspension Order further emphasize the Commission's exacting standard for establishing the existence of "new and significant" information. The TFR contention does not meet the Commission's standards.

Respectfully Submitted,

/Signed (electronically) by/

_____

Lloyd B. Subin
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
(301) 415-1988
Lloyd.Subin@nrc.gov

[33] NRC Staff's Answer To Motion To Admit New Contention Regarding The Safety And Environmental Implications Of The Nuclear Regulatory Commission Task Force Report On The Fukushima Dai-ichi Accident (ADAMS Accession No. ML11249A216) (Sep. 6, 2011).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PACIFIC GAS & ELECTRIC COMPANY	)	Docket Nos. 50-275-LR
	)	50-323-LR
(Diablo Canyon Nuclear Power Plant,	)	
Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRC STAFF'S SURREPLY TO THE REPLY OF SAN LUIS OBISPO MOTHERS FOR PEACE, dated September 27, 2011 have been served upon the following by the Electronic Information Exchange, this 27th day of September, 2011:

Administrative Judge
Alex S. Karlin, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ask2@nrc.gov

Administrative Judge
Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ngt@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: pba@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G4
Washington, DC 20555-0001
E-mail: OCAAMAIL.resource@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Hearing.Docket@nrc.gov

David A. Repka, Esq.
Tyson Smith, Esq.
Carlos Sisco
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802
E-mail: drepka@winston.com
trsmith@winston.com
CSisco@winston.com

Jill ZamEk, Esq.
San Luis Obispo Mothers for Peace
1123 Flora Road
Arroyo Grande, CA 93420
E-mail: jzk@charter.net

Diane Curran, Esq.
Harmon, Curran, Spielberg, and Eisenberg
1726 M Street NW
Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

/Signed (electronically) by/

_____

Lloyd B. Subin
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Telephone: (301) 415-1988
E-mail: Lloyd.Subin@nrc.gov
Date of Signature: September 27, 2011