December 15, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	)	

PACIFIC GAS AND ELECTRIC COMPANY'S REPLY TO PETITION FOR PARTIAL INTERLOCUTORY REVIEW

INTRODUCTION

In LBP-11-32, the Atomic Safety and Licensing Board in the Diablo Canyon Power Plant license renewal proceeding denied a motion filed by the San Luis Obispo Mothers for Peace ("SLOMFP") that sought to admit a new environmental contention (EC-5) based on the "findings and recommendations raised by the Nuclear Regulatory Commission's Fukushima Task Force Report" issued on July 12, 2011.[1] The Licensing Board ruled that EC-5 was not admissible because an applicant has no legal duty to supplement or update its Environmental Report ("ER") to incorporate information that arises from events that occur after the ER was filed.[2] The Licensing Board also found that, even if Part 51 imposes a duty on an applicant if

[1] "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" (Aug. 11, 2011) at 1 ("Motion"); *see also* "Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report" (Aug. 11, 2011) at 4 ("Contention"); "Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident" (Aug. 8, 2011) ("Makhijani Declaration").

[2] Under 10 C.F.R. § 2.323(f), the Licensing Board referred to the Commission this conclusion that an applicant has no legal duty, either under the National Environmental

new and significant information arises, the contention is inadmissible because the Task Force recommendations do not present a seriously different picture of the environmental impact of the project from what was previously envisioned and because SLOMFP failed to link the outcome of the Fukushima event to either Diablo Canyon or to the license renewal application. LBP-11-32, slip op. at 18-19.

SLOMFP seeks "partial" interlocutory review of LBP-11-32.[3] Specifically, SLOMFP seeks review of the ASLB's alternative ground for denying admission of the contention — characterizing that ground as a conclusion that the contention is premature. Petition, at 2, *citing* LBP-11-32, slip op. at 18-19. Pacific Gas and Electric Company ("PG&E") opposes the Petition. Putting aside that the Licensing Board did not specifically state that the contention is "premature,"[4] interlocutory review of this issue is not warranted under the Commission's standards for such review.

DISCUSSION

A. Standard for Interlocutory Review

Pursuant to 10 C.F.R. § 2.341(f)(2), the Commission may, at its discretion, grant a party's request for interlocutory review of a decision. The Commission grants interlocutory

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Policy Act ("NEPA") or NRC regulations, to supplement an ER to incorporate new and significant information that arises after the ER was submitted.

[3] *See* "San Luis Obispo Motions for Peace's Petition for Partial Interlocutory Review of LBP-11-32" (December 5, 2011) ("Petition").

[4] In this aspect of LBP-11-32, the Licensing Board found that proposed Contention EC-5 was not admissible "because it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv)." *Id*. at 18.

review only in "extraordinary circumstances."[5] A petition for interlocutory review will be granted only if the party seeking review demonstrates that the issue for which it seeks review:

> (i) threatens the party with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
>
> (ii) affects the basic structure of the proceeding in a pervasive or unusual manner.

The "mere potential for legal error" in a contention admissibility decision is not a ground for interlocutory review.[6] Such issues can be addressed through a normal petition for review after a full or partial initial decision. *See* 10 C.F.R. § 2.341(b).

B. The Petition for Review Does Not Raise Novel Legal or Policy Issues

SLOMFP in its Petition (at 2) cites as a basis for interlocutory review the standards under 10 C.F.R. § 2.341(f)(1) for Commission *acceptance* of a certified issue or referred ruling — that is, that the issue or ruling involve "significant and novel legal and policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding." This standard is not directly applicable to the present Petition, because the aspect of the Licensing Board decision on which SLOMFP seeks review was neither certified nor referred to the Commission by the Licensing Board. Regardless, the Petition for Review does not raise a novel issue that warrants further Commission consideration at this time.

1. The Commission already found that the NEPA supplement issue is premature

The Commission, in CLI-11-05, issued on September 9, 2011, already clearly addressed arguments that the NRC (and, as a consequence, applicants) are under a present

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5 *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133 (2009) (citation omitted).

6 *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008);

obligation to prepare supplemental environmental analyses to address implications of the Fukushima event in order to satisfy NEPA. The Commission specifically held that requests for a NEPA supplement based on the Fukushima event are "premature." CLI-11-05, slip op. at 30. The Commission recognized that its "Task Force completed its review and provided its recommendations to us," but went on to state that the "the agency continues to evaluate the accident and its implications for U.S. facilities and the full picture of what happened at Fukushima is still far from clear." *Id*. Therefore, the Commission concluded, "any generic NEPA duty — if one were appropriate at all — does not now accrue." *Id.* Absent a NEPA duty at the present time, there is no omission in the Diablo Canyon ER and no basis for proposed EC-5.

SLOMFP would distinguish CLI-11-05 from EC-5, suggesting that the Commission's decision is limited to contentions that seek "generic" relief. Petition at 9. However, the Commission's decision is not so limited. The Commission's conclusions regarding the status of information related to the Fukushima event and the current applicability of NEPA are indeed generic. But the generic controls the specific. There is nothing in proposed EC-5 that was specific to Diablo Canyon that would suggest a different conclusion is warranted in this case.[7] As a result, this is a distinction without a difference.

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[7] One Licensing Board, in finding CLI-11-05 controlling on a similar contention, stated that "[i]t is difficult to fathom how the Commission could have stated more precisely and definitively that it remains much too early in the process of assessing the Fukushima event in the context of the operation of reactors in the United States to allow any informed conclusion regarding the possible safety or environmental implications of that event." *PPL Bell Bend LLC* (Bell Bend Nuclear Power Plant), LBP-11-27 (October 18, 2011), slip op. at 13. That Board also noted that it could "perceive no possible basis upon which, in opposition to the conclusion of prematurity reached by the Commission, we might conclude that the contention presented to us is ripe for adjudication." *Id*.

2. SLOMFP fails to show that a NEPA supplement is necessary

The cases cited by SLOMFP also do not suggest any novel issues that warrant Commission attention or that undermine the Commission's earlier conclusion that NEPA contentions involving Fukushima events are premature. SLOMFP argues that the mere "existence of the Task Force's criticisms of the existing safety regime" triggers a duty to supplement under NEPA, citing a number of cases for the proposition that an agency must disclose and respond to opposing scientific viewpoints. Petition at 7. However, those cases involved failures by an agency to address competing scientific information regarding environmental impacts.[8] In contrast, the Task Force Report itself does not discuss environmental impacts at all. And SLOMFP has not pointed to any new or different environmental impacts that were not considered or addressed in the ER.[9]

SLOMFP argues that the Licensing Board overlooked the environmental impact of a decision "*not* to adopt the Task Force recommendations: operation of the facility at a

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[8] For example, in *Center for Biological Diversity v. U.S. Forest Service*, the Court found inadequate an environmental impact statement ("EIS") prepared by the U.S. Forest Service because the EIS failed to discuss the U.S. Fish & Wildlife Service's conclusion that goshawks are not habitat generalists —resulting in the EIS downplaying the impacts on goshawks from the forest management plan under review. 349 F.3d 1157, 1167 (9th Cir. 2003). Similarly, in *Western Watersheds Project v. Kraayenbrink*, the Court found that the Bureau of Land Management, in finding no environmental impact, failed to acknowledge the conclusions of its own experts and those of the U.S. Fish & Wildlife Service that there would in fact be significant environmental impacts from the proposed action. 632 F.3d 472, 492 (9th Cir. 2011). SLOMFP has pointed to nothing in the Task Force recommendations that touches on environmental impacts or that contradicts the conclusions in the ER or the Generic Environmental Impact Statement ("GEIS") for license renewal.

[9] The Commission itself found that information previously presented by Dr. Makhijani 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).

significantly greater risk than was previously considered." Petition at 9. Although mere legal error in a contention admissibility decision would not be grounds for interlocutory review, SLOMFP nonetheless fails to show that the Licensing Board erred in finding that EC-5 did not meet the admissibility standard. SLOMFP did not challenge any of the specific environmental impacts discussed in the ER (or the license renewal GEIS), or present information suggesting new or different risks. The Licensing Board specifically noted that "SLOMFP offers nothing to link the outcome of the Fukushima events to either the [Diablo Canyon] plant or to its [license renewal application]." LBP-11-32, slip op. at 19.

In sum, there is no distinction, or unique circumstance, identified in the Petition that would distinguish the Licensing Board's decision to deny EC-5 in LBP-11-32 from the Commission decision in CLI-11-05 that a NEPA supplement is premature. Therefore, there is no novel legal or policy issue that would warrant interlocutory review.

C. The Licensing Board Decision Does Not Have a Pervasive or Unusual Effect on the Proceeding

SLOMFP also relies upon the standard for interlocutory review in 10 C.F.R. § 2.341(f)(2)(ii) — arguing that the decision will have a "pervasive and unusual effect on the proceeding." Petition at 10-11. However, no basis for this position is presented in the Petition. In fact, the Licensing Board decision would allow the proceeding to move forward in the typical fashion, in accordance with NRC's rules of practice. SLOMFP will retain its opportunities for a petition for review in accordance with 10 C.F.R. § 2.341(b), related to any initial decision of the Licensing Board. Even more importantly, the Licensing Board emphasized SLOMFP's continuing opportunities:

> SLOMFP is, however, not without potential remedy as to its concerns about NEPA-derived obligations respecting implications from the Fukushima events. Even though PG&E is not obligated to supplement the ER, the NRC Staff will, as it always does in license renewal proceedings,

> be issuing a draft supplemental EIS (DSEIS). If the DSEIS fails to capture and address any information that SLOMFP believes to be "new and significant", then SLOMFP may file a NEPA contention at that time. If it is filed within 30 days of the DSEIS, the contention will be deemed timely. . . . Alternatively, if PG&E voluntarily supplements its ER, either in response to an RAI or *sua sponte*, to address the impact of the Fukushima Accident or the Task Force Report, then a new contention, relating to those events, would need to be filed within 30 days of the filing of the supplemental ER in order to be timely.

LBP-11-32, slip op. at 16-17 (internal citations and footnotes omitted). The Licensing Board's decision therefore allows additional proposed contentions based on new and significant environmental information, should such information arise from the ongoing evaluations of the Fukushima event.[10]

D. Commission Review Is Unnecessary

As noted above, the Licensing Board denied EC-5 primarily based on its conclusion that PG&E has no duty to supplement its ER to incorporate new and significant information. The Licensing Board referred this issue to the Commission. However, fully consistent with CLI-11-05, even assuming that PG&E had a duty to supplement its ER, any such obligation would not yet have accrued because there is *no new and significant information* from Fukushima that bears on environmental impacts generally or on Diablo Canyon specifically.[11] Thus, even Commission review of the referred issue, at this stage of the proceeding, is

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[10] For similar reasons, the Petition for Review does not satisfy 10 C.F.R. § 2.341(f)(2)(i), which was *not* cited by SLOMFP. The Board decision does not threaten SLOMFP with any "serious irreparable impact" that could not be addressed in a petition for review of an initial decision or by a later contention based on mature environmental information from the Fukushima event with specific implications for Diablo Canyon license renewal.

[11] As noted above, the Licensing Board also specifically denied EC-5 because the Task Force recommendations do not present a seriously different picture of the environmental impact of the project from what was previously envisioned and because SLOMFP failed to link the outcome of the Fukushima events to either the Diablo Canyon units or to the license renewal application. LBP-11-32, slip op. at 18-19.

unnecessary. Review would constitute a "mere academic exercise" that would amount to little more than an advisory opinion.[12]

CONCLUSION

For the foregoing reasons, the Commission should deny SLOMFP's petition for partial interlocutory review.

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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 15th day of December 2011

[12] *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 94 (1983); *see also U.S. Department of Energy* (High-Level Waste Repository), CLI-08-21, 68 NRC 351, 353 (2008) (reaffirming the policy that the Commission disfavors issuing advisory opinions).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "PACIFIC GAS AND ELECTRIC COMPANY'S REPLY TO PETITION FOR PARTIAL INTERLOCUTORY REVIEW" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 15th day of December 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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