LBP-12-13

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Nicholas G. Trikouros
Dr. Paul B. Abramson

In the Matter of	Docket Nos. 50-275-LR and 50-323-LR
PACIFIC GAS & ELECTRIC COMPANY	ASLBP No. 10-900-01-LR-BD01
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	June 27, 2012

MEMORANDUM AND ORDER
(Denying Motion to Admit New Contentions Challenging the Environmental Report)

On April 27, 2012, the San Luis Obispo Mothers for Peace (SLOMFP) moved to admit two new contentions challenging the adequacy of Pacific Gas & Electric Co.'s (PG&E's) environmental report (ER) for the proposed renewal of the operating licenses for the Diablo Canyon Nuclear Power Plant (DCNPP).[1] On May 22, 2012, PG&E and the NRC Staff filed answers opposing the admission of these two new contentions.[2] On May 29, 2012, SLOMFP

[1] San Luis Obispo Mothers for Peace Motion to Admit Contentions Regarding Failure of Environmental Report to Address Post-Fukushima Investigations and Modifications (April 27, 2012) [Motion].

[2] Applicant's Response to Proposed Contentions (May 22, 2012) [PG&E Answer]; NRC Staff's Answer to Motion to Admit Contentions Regarding Failure of Environmental Report to Address Post-Fukushima Investigations and Modifications (May 22, 2012) [Staff Answer].

filed its reply.[3] For the reason set out below, and in accordance with our prior decision herein, LBP-11-32, 74 NRC __, __ (slip op. at 16) (Nov. 18, 2011), the motion is denied.

SLOMFP's first proposed new contention, which we denominate as EC-6,[4] asserts that the ER fails to satisfy 10 C.F.R. § 51.53(c)(2) because it does not assess the environmental consequences of PG&E's plans to modify the DCNPP to comply with EA-12-049,[5] an order issued by the NRC on March 12, 2012. Motion at 2. EA-12-049 requires PG&E to make certain modifications to the DCNPP as a result of the accidents that occurred in March 2011 at the Fukushima Dai-ichi nuclear power plants in Japan.

SLOMFP's second proposed new contention, which we denominate as EC-7,[6] asserts that the ER fails to comply with 10 C.F.R. § 51.45(d) because it does not list or describe the status of PG&E's compliance with (a) EA-12-049, and (b) an NRC request for additional information (RAI) issued on March 12, 2012. Id. at 6-7.[7]

In LBP-11-32 this Board declined to admit EC-5, holding that "neither NEPA nor Part 51 requires an applicant to supplement, update or modify an originally compliant ER to incorporate 'new and significant information' arising from events occurring after the ER was filed." LBP-11-32, 74 NRC at __ (slip op. at 16).

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[3] San Luis Obispo Mothers For Peace's Reply to Oppositions by PG&E and NRC Staff to Motion to Admit Contentions Regarding Failure of Environmental Report to Address Post-Fukushima Investigations and Modifications (May 29, 2012) [Reply].

[4] "EC" means environmental contention. EC-6 is the sixth environmental contention proffered by SLOMFP.

[5] EA-12-049 was published at 77 Fed. Reg. 16,091 (Mar. 19, 2012).

[6] EC-7 is the seventh environmental contention proffered by SLOMFP.

[7] Both EC-6 and EC-7 raise issues that are percolating in at least one other case – Union Electric Co. (Callaway Plant Unit 1), Docket No. 50-483-LR. See Missouri Coalition for the Environment's Hearing Request and Petition to Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant at 2, 7 (May 7, 2012).

The same principle applies to EC-6 and EC-7. When SLOMFP filed its original contentions herein, it did not assert that PG&E's November 23, 2009 ER was deficient for the reasons that it now articulates in EC-6 and EC-7 – and we have nothing before us to indicate that it was.[8] Now, however, SLOMFP asserts that the 2009 ER was rendered non-compliant by virtue of events that occurred in March 2012. Clearly, the issuance of EA-12-049 and the RAI constitute new information.[9] But in LBP-11-32 we held that the law does not require an applicant to update its originally compliant ER to reflect new information derived from subsequent events. LBP-11-32, 74 NRC at __ (slip op. at 16-17). Therefore, this challenge does not raise a genuine dispute and the "new information" is simply not material to the compliance status of the ER (as is required by 10 C.F.R. § 2.309(f)(1)(iv) and (vi)). Thus EC-6 and EC-7 are inadmissible.[10]

[8] When SLOMFP filed its original contentions in 2010, it did not claim that the ER failed to comply with the regulations specified in EC-6 and EC-7.

[9] We note that NRC typically issues dozens (and sometimes hundreds) of RAIs during the course of evaluating and processing a single application. If 10 C.F.R. § 51.45(d) required the Applicant to update its ER every time NRC issued an RAI, there would need to be dozens, if not hundreds, of such updates.

[10] EC-6 and EC-7 each identify a specific regulation that, allegedly, would be violated if the new information is not addressed in the ER (10 C.F.R. § 51.53(c)(2) and § 51.45(d), respectively). Likewise, proposed EC-5 was based, implicitly, on an alleged violation of 10 C.F.R. § 51.45(b) (i.e., the failure of the ER to address the impacts associated with the subsequently issued NRC Fukushima Near Term Task Force Report would cause the ER to violate the requirement that the ER must address all reasonably foreseeable environmental impacts of a proposed action). In all three situations, we assume arguendo that if the relevant events had occurred prior to the filing of the ER and the ER failed to address the subject, then the ER would violate the relevant regulation. In all three situations, however, we reject the proposition that post-ER events can render non-compliant an ER that was compliant at the time of its submission.

Both PG&E and the NRC Staff argue that EC-6 and EC-7 are inadmissible because there is no duty for an applicant to supplement or update an originally compliant ER in light of subsequent events.[11]

This is not to say that SLOMFP is without a remedy if it believes that the issuance of EA-12-049 (and/or any other "post-Fukushima investigations and modifications") has not been adequately considered in the environmental analysis of the DCNPP license renewal process. Many steps still remain in the NEPA process, including the need for NRC to issue a draft supplemental environmental impact statement (DSEIS) and a final SEIS (FSEIS). Were the NRC to complete its DSEIS without addressing EA-12-049 to SLOMFP's satisfaction, SLOMFP would be entitled to proffer contentions at that point asserting that, pursuant to NEPA or Part 51, EA-12-049 constitutes new and significant and material information that the NRC must adequately address in the DSEIS. As outlined in footnote 14, SLOMFP is entitled to file any such proposed new contentions within 30 days of the issuance of the DSEIS. [12]

Nor are we ruling that new or amended contentions challenging the adequacy of an ER may not be filed or admitted. To the contrary, new contentions concerning adequacy of ERs are

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[11] PG&E Answer at 8 ("Part 51 does not require an applicant to automatically revise its ER, which was submitted in accordance with 10 C.F.R. § 51.53(c), to discuss an order issued after the initial submission of the ER."); Staff Answer at 14 ("[T]here is no duty to update the ER.").

[12] As we stated in LBP-11-32

> SLOMFP is, however, not without potential remedy as to its concerns about the 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 a draft supplemental EIS (DSEIS). If the DSEIS fails to capture and address any information that the SLOMFP believes to be new and significant, the SLOMFP may file a NEPA contention at that time.

LBP-11-32, 74 NRC at __ (slip op. at 16-17) (internal citations omitted). This is not to guarantee admission of such a contention, but simply to identify the opportunity to raise it at that time.

numerous and commonplace. Such contentions are often filed when the applicant submits new information in response to an RAI and/or voluntarily amends its application or ER (e.g., changes the reactor design from an ESBWR to an AP1000). See 10 C.F.R. § 51.45(a) ("An applicant . . . may submit a supplement to an [ER] at any time."). Likewise, new contentions challenging an ER are often filed when new information reveals that the ER, as originally submitted, was deficient in some way at the time of its issuance (e.g., subsequent information reveals the existence of an endangered species that should have been discussed in the original ER).[13] Further, new or amended contentions may be admissible when a judicial decision invalidates a key regulation prescribing the contents of the ERs. But in such cases, any new contentions challenging the adequacy of the ER must be filed as early as possible and the petitioner may

[13] We recognize, as the Commission has noted, that 10 C.F.R. § 2.309(f)(2) requires that a petitioner "shall file [NEPA-related] contentions based upon the applicant's environmental report." However, the filing of new or amended contentions is explicitly permitted under that regulation "if there are data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's documents." We see this as focusing upon the Staff's DSEIS and FSEIS and permitting the raising of challenges based upon information which arises after the filing of a compliant ER. Section 2.309(f)(2) goes on to permit the filing of amended or new contentions "only with leave of the [board]" and upon a showing that it is based on (i) information that was "not previously available" (i.e., new), (ii) the information that is "materially different;" and (iii) provided that the new contention is filed in a "timely manner." Although we agree that EC-6 and EC-7 meet two of these three criteria, i.e., that they are based on information that is indeed new and the contention was filed in a timely fashion, for the reasons stated elsewhere in this decision, these two contentions do not meet one of them (i.e., that the new information be material to the compliance, vel non, of the ER). We see no value to be added to the process of this proceeding by requiring, and believe it would be wasteful of the resources of all parties to require, the Applicant to address the subject matter of those contentions in some sort of amendment to its ER. SLOMFP may raise the substance of EC-6 and EC-7 when the Staff files its DSEIS or FSEIS, and we hereby hold that we will not find the raising of those matters at that time to be untimely based upon the fact that the information was available at the time SLOMFP raised the matters now. Moreover, not using our discretion to permit the filing of these new contentions at this point, has the practical result that the Staff has the opportunity to gather further information (including by requiring the applicant to respond to relevant RAIs) without the distraction of dealing with contentions at this point, which may well become moot by the time the DSEIS or FSEIS is issued.

not wait until NRC issues the DSEIS. See CLI-12-13, 75 NRC __, __ (slip op. at 7 n.31) (June 7, 2012).

Our ruling here, and in LBP-11-32, however, is limited to situations where it is uncontested that the ER, as originally filed, was compliant and where the key events and assertedly new information arose after its issuance, making it impossible for the applicant to have incorporated the alleged information into the original ER.[14] In LBP-11-32 we observed that the parties could not point to, nor could we find, any mandatory duty under Part 51 requiring an applicant to supplement its ER to address subsequent events or information.[15] Absent any such duty, if an ER is compliant as of its date of issuance, subsequent events and information (regardless of how "significant") are simply not material to the compliance status of the ER (which is the substantive challenge raised in EC-6 and EC-7). Likewise, absent any such duty, subsequent events and information do not create a "genuine dispute" as to the compliance status of the ER.

We note that we referred this issue to the Commission, asking it to decide whether 10 C.F.R. Part 51 mandates that an applicant must supplement an ER if "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise after the originally compliant ER was filed. LBP-11-32, 74 NRC at __ (slip op. at 20). The Commission acknowledged that the question raised "novel" legal issues. CLI-12-13, 74 NRC at __ (slip op. at 6). The Commission ordered the Staff to conduct a

[14] In this ruling, and LBP-11-32, we also hold that if the applicant voluntarily supplements the ER to address such subsequent information or if the NRC Staff issues an RAI causing the applicant to amend its ER to cover such information, then the Intervenor must file such contentions promptly (i.e., within 30 days of making the supplemental ER publicly available) and cannot await the issuance of the DSEIS.

[15] [SLOMFP's] Response to Board Question at 1 (Oct. 18, 2011); [PG&E's] Response to Licensing Board Question at Oral Argument at 1 (Oct. 18, 2011); NRC Staff's Response to Question at Oral Argument at 1 (Oct. 18, 2011).

"generic" review of NRC's regulations on this very point.[16] But the Commission declined to rule on the question. Id. (slip op. at 1).

Instead, the Commission reminded us that "the 'trigger point' for timely submission of new or amended contentions is when new information becomes available" and reaffirmed that "our rules require the filing of contentions as early as possible after the information becomes available." Id. (slip op. at 7-8). We neither assert nor hold otherwise; contentions must be filed as early as possible and environmental contentions must, at the outset, be based on the ER. See 10 C.F.R. § 2.309(f)(2).[17]

The Commission added:

> Regardless of whether there is an affirmative duty to supplement an environmental report, applicants still face a continuing possibility of contentions in adjudicatory proceedings based upon omissions or deficiencies in their environmental report (as long as the contention meets all applicable contention admissibility criteria) because our rules require the filing of contentions as early as possible . . . . We expect intervenors to file contentions on the basis of the

[16] See CLI-12-13, 75 NRC at __ n.32 (slip op. at 8 n.32). Concurring, Chairman Jaczko stated that the Staff should "examine the laws, regulations, policies and guidance and practices associated with updating and correcting environmental reports." Id. (slip op. Jaczko, concurring in part and dissenting in part at 2).

[17] The Commission has repeatedly held that an intervenor has an "iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as a foundation for a specific contention," Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2) CLI-10-27, 72 NRC 481, 496 (2010) (quoting Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993)), and to file any such new contention "as early as possible." CLI-12-13, 75 NRC at __ (slip op. at 7 n.31). Failure to meet these stringent deadlines results in the denial of any such new contention, however meritorious. Certainly, if applicants were under a duty to supplement their ERs when new and significant information arises, then we would expect that the Commission would be equally zealous in requiring that applicants act with expedition. Presumably, an applicant would have a similar ironclad obligation to scour all potentially relevant new and significant information so as to update its ER whenever it arose. Likewise, we would expect to see regulations and/or decisions insisting that any such ER supplements be filed "as early as possible" or "in a timely manner." See e.g., 10 C.F.R. § 2.309(f)(2)(iii). We find no such NRC regulations or Commission decisions imposed on the applicants. The absence of such timeliness requirements reinforces our conclusion that nothing in Part 51 mandates that an applicant must supplement its originally compliant ER to reflect post-ER events and information.

> applicant's environmental report and not delay their contentions until after the Staff issues its environmental analysis.

CLI-12-13, 74 NRC at __, (slip op. at 7 n.31) (internal quotes omitted) (emphasis added).

As the Commission recognized, the core element of an admissible contention is that it must allege that there is some legal "omission or deficiency" in the ER. Id. Likewise, every admissible contention must meet "all applicable contention admissibility criteria." Id. A contention must show that the "issue raised in the contention is material." 10 C.F.R. § 2.309(f)(1)(iv). A contention must "provide sufficient information to show that a genuine dispute exists . . . on a material issue of law or fact." 10 C.F.R. § 2.309(f)(1)(vi).

And it is thoroughly recognized in our proceedings that the existence of new information, per se, is not a sufficient basis for an admissible contention. The new information must, in the present circumstance, be material to whether or not the substantive challenge (that the ER is not compliant with the law) has a legal foundation. Here, the "new information" is not material to compliance of the ER because the challenge is not raised to the original ER based upon the circumstances under which it was prepared, it is raised because of new requirements arising afterwards. Thus, because an applicant has no duty to supplement its ER, there is no deficiency that can form the basis of a contention.

We have previously held that PG&E is under no legal duty to amend, supplement, or modify its originally compliant ER to incorporate subsequent events, such as Fukushima or the NRC's Near Term Task Force Report – and that is the "law of the case" for this proceeding. The same holds true for events such as the EA-12-049 and the NRC RAI. For the foregoing reasons, the motion to admit contentions EC-6 and EC-7 is denied.

This order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.341(f). Any petitions for such review must be filed within fifteen (15) days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

_____
Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE
/RA/

_____
Nicholas G. Trikouros
ADMINISTRATIVE JUDGE
/RA/

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Paul B. Abramson
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 27, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Motion to Admit New Contentions Challenging the Environmental Report) (LBP-12-13) h**ave been served upon the following persons by the Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]
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Dated at Rockville, Maryland
this 27th day of June, 2012