

August 3, 2012

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 PROPOSED NEW CONTENTION  
ON SPENT FUEL STORAGE AND DISPOSAL

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), Pacific Gas and Electric Company (“PG&E”) hereby responds to the “San Luis Obispo Mothers for Peace [(“SLOMFP”)] Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Diablo Canyon Nuclear Power Plant,” dated July 9, 2012 (“Motion”). The proposed contention is based on the recent Court of Appeals decision in *New York v. NRC* and seeks a discussion of the environmental impacts of spent fuel storage after cessation of operations.<sup>1</sup>

As recognized by SLOMFP, the “mandate” for the Court of Appeals decision has not yet issued. The proposed contention is therefore premature. But, in any event, the issues raised in the proposed contention are generic in nature and have historically and consistently been addressed through generic analysis and rulemaking. Longstanding Commission precedent

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<sup>1</sup> Docket No. 11-1045 (D.C. Cir. June 8, 2012). The Court of Appeals decision would vacate the NRC’s Waste Confidence Decision (“WCD”) and Temporary Storage Rule (“TSR”) and remand the matter to the NRC for further consideration. The WCD includes a finding that spent fuel can be safely stored onsite until a permanent repository is available. The TSR prohibits further consideration in individual licensing cases of the issue of interim spent fuel storage after permanent cessation of plant operation.

establishes that issues that are, or that are about to become, the subject of a rulemaking are not appropriate for litigation in individual licensing proceedings. Moreover, the proposed contention fails to demonstrate any material site-specific issue. The proposed contention therefore should not be accepted for a hearing involving Diablo Canyon. In the event that the Licensing Board does find the proposed contention to be admissible, the Licensing Board should refer that determination to the Commission and hold the contention in abeyance pending action by the Commission.

## DISCUSSION

### A. The Proposed Contention Is Premature

As recognized by SLOMFP (Motion at 2), the “mandate” for the Court of Appeals decision in *New York v. NRC* has not yet issued. Under the Federal Rules of Appellate Procedure, the mandate is the certified copy of the judgment and is, in effect, the order that makes the decision effective.<sup>2</sup> By rule, the mandate will not issue until seven calendar days after the time for a petition for rehearing expires or an order denying a petition for rehearing is issued, whichever is later.<sup>3</sup> A timely rehearing petition by the NRC or other party in the case would automatically stay the issuance of the mandate.<sup>4</sup> Until the mandate issues, the remand to the NRC is not effective and there is no need for the NRC to take any action in connection with pending license applications. The proposed contention is therefore premature.

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<sup>2</sup> Fed. R. App. P. 41(a).

<sup>3</sup> Fed. R. App. P. 41(b). The present deadline for filing a petition for rehearing of the Court’s decision is August 22, 2012.

<sup>4</sup> Fed. R. App. P. 41(d)(1). A circuit court can also, upon a motion of a party, stay its mandate pending a petition for certiorari in the Supreme Court. Fed. R. App. P. 41(d)(2).

B. The Proposed Contention Should Not Be Admitted

1. *The Proposed Contention Raises Generic Issues*

The Commission has previously determined that issues related to spent fuel storage lend themselves to generic resolution.<sup>5</sup> The issue of spent fuel storage and disposal, the Commission has said, “is a national problem of essentially the same degree of complexity and uncertainty for every [license] renewal application and it would not be useful to have a repetitive reconsideration of the matter.”<sup>6</sup> The Commission therefore has chosen to proceed through the general rulemaking process on issues related to interim (post-license) storage of spent fuel — that is, through the WCD/TSR — instead of litigating the same issues case-by-case, in individual adjudicatory proceedings.<sup>7</sup> If the WCD and TSR are vacated and remanded, the issues raised by the Court of Appeals, and indirectly in the proposed contention, presumptively will be addressed by the NRC through a revised rulemaking<sup>8</sup> or through the update to the NRC’s Generic

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<sup>5</sup> *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 343 (1999).

<sup>6</sup> 61 Fed. Reg. 66537, 66538 (Dec. 11, 1996).

<sup>7</sup> *See, e.g.*, “Waste Confidence Decision,” 49 Fed. Reg. 34658, 34659-60 (Aug. 31, 1984); “Waste Confidence Decision Review,” 55 Fed. Reg. 38474, 38505 (Sept. 18, 1990); “Waste Confidence Decision Review: Status,” 64 Fed. Reg. 68005, 68006-07 (Dec. 6, 1999). The Court in *New York v. NRC* also recognized that the issues involved may be appropriate for generic resolution, consistent with longstanding NRC precedent. *New York*, slip op. at 16. The Court specifically upheld the NRC’s authority to address NEPA issues by generic rulemaking. *Id.* at 20.

<sup>8</sup> *See, e.g.*, SRM-SECY-09-0090, “Final Update of the Commission’s Waste Confidence Decision,” dated September 15, 2010 (directing NRC Staff to begin a rulemaking effort to update the WCD to account for storage at onsite storage facilities, offsite storage facilities, or both, that would address impacts of storage beyond a 120 year time frame with the ultimate timeframe, which could be two or three hundred years or more); SECY-11-0029, “Plan for the Long-Term Update to the Waste Confidence Rule and Integration with the Extended Storage and Transportation Initiative,” dated February 28, 2010 (proposing a plan for a long-term waste confidence rule, including an environmental impact statement and updated WCD, for extended storage of spent nuclear fuel for more

Environmental Impact Statement (“GEIS”) for license renewal.<sup>9</sup> SLOMFP has presented no basis for supposing that the Commission will depart from its historic and consistent treatment of these issues through rulemaking. Under longstanding NRC policy, licensing boards “should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.”<sup>10</sup> Consequently, SLOMFP’s proposed contention seeking to raise interim fuel storage issues in this proceeding should not be admitted for hearing.

2. *The Proposed Contention Fails to Establish Any Genuine Site-Specific Dispute*

The sole basis for SLOMFP’s proposed contention is the decision in *New York v. NRC*. According to SLOMFP, that decision invalidates 10 C.F.R. § 51.23(a) and undermines the legal basis for 10 C.F.R. § 51.23(b).<sup>11</sup> The latter regulation relieves the NRC Staff and the applicant from addressing the environmental impacts of spent fuel storage for the period

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than 60 years after a reactor’s licensed life); Speech by Chairman Jazcko, “A Retrospective: A Decisive Regulator Built on a Firm Foundation,” No. S-12-010, dated July 5, 2012 (explaining that the Commission was already on its way to addressing the issues raised by the D.C. Circuit, noting that the Court decision “may just change the timeframe and the timing, and accelerate some of that work,” and concluding that “this is an issue that the Commission will have little difficulty addressing”).

<sup>9</sup> In CLI-11-11, the Commission rejected SLOMFP’s efforts to litigate issues involving spent fuel pools by explaining that the “GEIS is the operative document” in a license renewal proceeding and that SLOMFP’s general claims that new information regarding onsite fuel storage must be considered “go to the heart of the rulemaking to update the GEIS” and should be considered by the Commission in that process. *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-11-11, \_\_ NRC \_\_ (slip op. October 12, 2011, at 33). That rulemaking is ongoing.

<sup>10</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-19, \_\_ NRC \_\_ (slip op. July 8, 2010) at 2-3, citing *Oconee*, CLI-99-11, 49 NRC at 345 and *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974).

<sup>11</sup> Motion at 4.

following the license renewal term until permanent disposal by the federal government. However, the environmental impacts of onsite spent fuel storage are also addressed in 10 C.F.R. Part 51, based on the GEIS for license renewal.<sup>12</sup> According to 10 C.F.R. § 51.53(c)(3), license renewal applications need not include environmental analyses of Category 1 issues, as identified in the GEIS.<sup>13</sup> The GEIS specifically identifies onsite spent fuel storage as a Category 1 issue.<sup>14</sup> These regulations and environmental analyses provide separate and independent regulatory bases for concluding that a discussion of the issues raised by SLOMFP is not required to be included in the Diablo Canyon Environmental Report (“ER”).<sup>15</sup> SLOMFP has therefore failed to demonstrate a basis for alleging an omission in the ER. To the extent that the proposed contention seeks to assure that the NRC Staff will address the remanded issue prior to issuing a renewed license for Diablo Canyon, the proposed contention is no more than a truism. SLOMFP has provided no basis for supposing that the Commission will fail to comply with a Court of Appeals remand.

The proposed contention also does not establish any issue for a site-specific hearing. In particular, SLOMFP has offered no basis in its proposed contention to identify site-specific environmental impacts to be considered in the Diablo Canyon ER. The GEIS, which is incorporated into the Diablo Canyon ER, concludes “that the expected increase in the volume of

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<sup>12</sup> NUREG-1437, “Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants”; “Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule,” 61 Fed. Reg. 28467 (June 5, 1996), *amended by* 61 Fed. Reg. 66537 (December 18, 1996).

<sup>13</sup> *See also* 10 C.F.R. §§ 51.71(d) and 51.95(c) (requiring environmental impact statements for license renewal to incorporate the generic analysis of Category 1 issues).

<sup>14</sup> 10 C.F.R. Part 51, Appendix B, Table B-1.

<sup>15</sup> SLOMFP has not sought a waiver of these regulations under 10 C.F.R. § 2.335(b).

spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects through dry or pool storage at all plants if a permanent repository or monitored retrievable storage is not available.<sup>16</sup> With respect to the potential for spent fuel pool fires, the GEIS specifically concludes that, even under the worst probable cause of a loss of spent-fuel pool coolant (a severe seismic-generated accident causing a catastrophic failure of the pool), the likelihood of a fuel-cladding fire is highly remote.<sup>17</sup> SLOMFP does not challenge these conclusions or provide any factual or expert support that would demonstrate a genuine dispute with the ER. Consequently, the proposed contention provides no basis to demonstrate a genuine dispute to be addressed in a hearing in connection with Diablo Canyon license renewal.

C. If the Board Admits a Contention, it Should Refer its Decision to the Commission and Hold the Contention in Abeyance

Given the Commission's historical treatment of interim spent fuel storage issues generically, a decision by the Licensing Board to admit the proposed contention, and to permit litigation of a generic issue in this proceeding, would certainly present novel legal and policy questions that would merit immediate Commission review under 10 C.F.R. § 2.323(f). SLOMFP itself recognizes that the question of whether the issues raised by the Court of Appeals should be addressed in a site specific analysis or generic analysis "must be decided by the NRC in the first instance." Motion, at 5. A decision to admit a fuel storage contention could have significant practical consequences for Diablo Canyon license renewal and the NRC's overall license renewal program, by expanding the scope of issues to be considered on a plant-specific basis.

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<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> GEIS at 6-75, *citing* 55 Fed. Reg. 38474 (September 18, 1990). Impacts or events that are "remote and speculative" need not be considered under NEPA. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002).

Consequently, a decision to admit the proposed contention would warrant referral by the Licensing Board to the Commission.

Any admitted contention also should be held in abeyance pending further direction from the Commission. This would include suspension of any disclosure obligations. Given the current schedule in this matter, based upon PG&E's ongoing seismic evaluations, there is also ample time for the Commission to consider a referred question and for the agency to complete necessary evaluations of the remanded issues through a generic rulemaking process prior to issuance of the renewed license.<sup>18</sup> PG&E's license renewal application will not be granted without the Commission's resolution of the issues identified by the Court of Appeals. Accordingly, there would be no prejudice to SLOMFP in holding a contention in abeyance.

#### CONCLUSION

For the foregoing reasons, the Licensing Board should deny the proposed contention. Alternatively, if the Licensing Board admits the proposed contention, it should refer its decision to the Commission and hold the contention in abeyance pending direction from the Commission.

Respectfully submitted,

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Executed in accord with 10 C.F.R. 2.304(d)  
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<sup>18</sup> Holding a contention in abeyance is appropriate where NRC Staff action may obviate the need for litigation. *CBS Corporation* (Waltz Mill Facility), CLI-07-15, 65 NRC 221, 235 (2007); *U.S. Dept. of Energy* (High Level Waste Repository), CLI-04-32, 60 NRC 469, 473 (2004).

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Dated at Washington, District of Columbia  
this 3rd day of August 2012

UNITED STATES OF AMERICA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO PROPOSED NEW CONTENTION ON SPENT FUEL STORAGE AND DISPOSAL” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 3rd day of August 2012, 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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