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April 2, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket Nos. 50-275-OLA-2
Pacific Gas and Electric Company	)	50-323-OLA
	)	(Construction Period
(Diablo Canyon Nuclear Power	)	Recovery)
Plant, Units 1 and 2)	)	
	)	

PACIFIC GAS & ELECTRIC COMPANY'S
RESPONSE TO SAN LUIS OBISPO
MOTHERS FOR PEACE FIRST LATE-FILED CONTENTION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(a)(1), the San Luis Obispo Mothers for Peace ("MFP") proffered a late-filed contention, dated March 12, 1993.[1] Their Petition challenges the Environmental Assessment and Finding of No Significant Impact ("EA") issued by the Nuclear Regulatory Commission ("NRC") on February 3, 1993, in connection with the license amendment at issue.[2] Repeating an allegation previously rejected by the Licensing Board in this proceeding, MFP again alleges that the NRC should be required to prepare an Environmental Impact Statement ("EIS") in conjunction with the proposed license amendment.

1/ "San Luis Obispo Mothers for Peace Late-filed Contention," March 12, 1993 ("Petition").

2/ "Pacific Gas and Electric Co., Diablo Canyon Nuclear Power Plant, Units 1 and 2; Issuance of Environmental Assessment and Finding of No Significant Impact," 58 Fed. Reg. 7899 (February 10, 1993).

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Pacific Gas and Electric Company ("PG&E") herein responds to MFP's late-filed contention. As explained below, MFP fails to justify its contention when analyzed against the factors specified in 10 C.F.R. § 2.714(a)(1)(i)-(v), as well as 10 C.F.R. § 2.714(b)(2)(iii). The Petition essentially regurgitates old issues in a new package; it is not based on any new information revealed for the first time in the EA. In fact, substantially all of the information in the contention was available in PG&E's license amendment application filed nine months ago.

Furthermore, even if the contention were timely, it fails to satisfy the legal standards for admissibility of contentions codified at § 2.714(b) and (d). MFP fails to provide any reason in law or fact why an EIS is needed in this case. In essence, the contention is not an "environmental" contention at all, but rather a thinly disguised "back door" attempt to circumvent the Licensing Board's previous rejection of technical contentions on aging (Contention IV), spent fuel storage (Contention VII), and "need for power" (Contention XI). Therefore, MFP's Petition should be rejected by the Licensing Board.

II. BACKGROUND

A. PROPOSED AMENDMENT AND RELEVANT ENVIRONMENTAL ANALYSES

On July 9, 1992, PG&E submitted "License Amendment Request 92-04, 40-Year Operating License Application" ("LAR"). The proposed amendment, often referred to as a "CP recapture" amendment, would

change the expiration dates of the full-power licenses for Diablo Canyon Power Plant, Units 1 and 2 ("DCPP") to allow for 40 years of operation, dated from issuance of the respective operating licenses. The proposed amendment merely conforms the license terms to the period of operation assumed in the original environmental review. It introduces no new technical or environmental issues. Nor is the proposed amendment equivalent to an application for either a new or renewed operating license.

Section 5.0 of PG&E's LAR set forth the results of PG&E's review and assessment of environmental information contained in the NRC's "Final Environmental Statement Related to the Nuclear Generating Station, Diablo Canyon Units 1 and 2" ("FES"), the NRC's 1976 Addendum to the FES,[3/] as well as PG&E's prior Environmental Report and eight Supplemental Environmental Reports, the Final Safety Analysis Report ("FSAR") Update, and other studies and data accumulated over the course of plant operation. LAR at 18. The purpose of this review and assessment was "to ensure thorough and complete evaluation of potential environmental issues related to the proposed 40-year operating license terms." Id. The LAR presented a detailed evaluation of the environmental effects of plant operation during the proposed 40-year license terms to ensure they remain within the bounds of the FES, Addendum, and applicable regulatory criteria and permits. Topics addressed included offsite

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3/ "Addendum to the Final Environmental Statement for the Operation of the Diablo Canyon Nuclear Plant Units 1 and 2," May 1976.

ecological effects, offsite radiation exposures from normal operation and postulated accidents, and the projected population and distribution in the vicinity of the plant for the proposed 40-year operating license terms.

The NRC Staff issued an EA and Finding of No Significant Impact related to the proposed amendment on February 3, 1993. The EA and Finding of No Significant Impact were published in the Federal Register on February 10, 1993. 58 Fed. Reg. 7,899. The EA reveals no new issues or significant information, but rather reflects a review and evaluation of information and conclusions in the July 1992 LAR. The NRC Staff concluded in the EA that:

> [T]he effects of changing the expiration date for the Unit 1 Operating License from April 23, 2008, to September 22, 2021, and the expiration date for the Unit 2 Operating License from December 9, 2010, to April 26, 2025, are bounded by the assessment in the original FES. In addition, . . . the Commission concludes that there are no significant environmental impacts associated with the proposed amendment.

Id. at 7,902, col. 1. Consistent with this finding and in accordance with 10 C.F.R. § 51.31, an EIS need not be prepared by the NRC for the proposed license amendment.

B. CHRONOLOGY OF DEVELOPMENTS IN THIS PROCEEDING

MFP's original proposed contentions (I through XI) in this proceeding were set forth in a Supplemental Petition, dated

October 26, 1992.[4] Several of the contentions proffered by MFP in its Supplemental Petition stated concerns now offered again in the late-filed Petition. For example, the original Contention XI alleged that "extension of the licenses for the Diablo Canyon Nuclear Power Plant would significantly increase the health and safety risk to the public. As the plant ages, the risks to public health and safety substantially increase. . . . This additional risk makes a new EIS a requirement." Supplemental Petition at 45-46. In addition, MFP alleged in Contention XI that "when an EIS is done, it will show that the cost of operating [DCPP] during the period of the proposed license extension will outweigh the benefits." Id. at 46. These stale assertions related to alleged aging risks and DCPP costs are again central to the new Petition.

With respect to equipment aging, MFP also previously proffered Contention IV, which alleged that "age-related degradation of components and systems at the Diablo Canyon Nuclear Power Plant will increase the risk of accident during the extended period of operation." Supplemental Petition at 28. The basis proffered in support of this prior proposed contention was predicated, to a significant degree, on two reports published by the General Accounting Office ("GAO") purportedly addressing license renewal

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[4] "San Luis Obispo Mothers for Peace Supplement to Petition to Intervene," October 26, 1992 ("Supplemental Petition").

issues.[5/] These same reports are now referenced in the new late-filed Petition. In fact, MFP has in its Petition simply lifted verbatim much of the general information previously cited in support of Contention IV.

On January 21, 1993, the Licensing Board issued its Prehearing Conference Order in this proceeding.[6/] Contention IV was rejected by the Licensing Board as lacking adequate basis. Prehearing Conference Order at 34. In particular, the Licensing Board noted that the general information cited by MFP in support of its allegation that "age-related degradation of systems, structures and components unacceptably increases the risk of accidents during the extended period of operation," "do not relate specifically to Diablo Canyon." Id. at 32-33.

As for Contention XI, it too was dismissed by the Licensing Board. In rejecting the contention, the Licensing Board took note of the fact that EISs have not been prepared for any of the more than 50 CP recapture amendments issued to date by the NRC. Prehearing Conference Order at 52, citing, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31

5/ "License Renewal Questions for Nuclear Plants Need to be Resolved," GAO/RCED-89-90 (April 1989); "Research Efforts Under Way To Support Nuclear Power Plant License Renewal," GAO/RCED-91-207.

6/ "Prehearing Conference Order (Ruling Upon Intervention Petition and Authorizing Hearing)," LBP-93-1, January 21, 1993 ("Prehearing Conference Order").

NRC 85, 97-98 (1990). Furthermore, the Licensing Board ruled that issuance of a CP recapture amendment is not among the actions requiring an EIS. Prehearing Conference Order at 52, citing, 10 C.F.R. § 51.20. The Licensing Board noted that MFP may, after issuance of the Staff's EA, submit a late-filed contention calling for an EIS. Prehearing Conference Order at 52-53. The Licensing Board emphasized, however, that "[s]uch a contention, to be accepted, would have to be based on substantial and significant information indicating why an EIS is called for." Id. at 53. The Licensing Board also rejected outright the "need for power" aspects of Contention XI as precluded by NRC regulations. Id. A late contention would, of course, also need to meet the requirements for late contentions specified in 10 C.F.R. § 2.714(a)(1) and 10 C.F.R. § 2.714(b)(2)(iii).[7]

More than 30 days after publication of the EA, and eight months after the LAR was filed, MFP filed its Petition asserting again that an EIS is required in connection with issuance of the proposed amendment because the amendment "will, in fact,

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[7] See Prehearing Conference Transcript ("Tr.") at 205. The Prehearing Conference Order, at 52, refers to the original contention as "premature." That contention, however, was not really premature in its assertion of the need for an EIS. The Commission requires environmental contentions to be filed at the same time as all other contentions based upon the environmental information in the application. 10 C.F.R. § 2.714(b)(2)(iii). MFP in the original contention simply failed to provide any basis in law or fact for the bald assertion that an EIS is required in the present case. As discussed below, the new, late contention fails for the same reason. It also has the additional defect that it is based on no new information presented in the Staff's EA. See id.

significantly increase the risk of adverse impacts to the human environment, in ways that were not considered in the FES twenty years ago." Petition at 2. The proposed amendment, according to MFP, poses "a significant, previously unconsidered risk to the human environment" due to (1) aging; (2) changes in population; (3) cumulative exposure to low level radiation; (4) high level radioactive waste storage; (5) low level radioactive waste storage; and (6) "cost benefits" (really "need for power"). As will be shown in Section III below, all of these alleged bases for an EIS predated the EA and could have (and in most cases were) proffered in MFP's original Supplemental Petition. There is no good cause for a late-filed contention. The EA offers nothing new on these subjects and does not come to conclusions different from the conclusions provided in the PG&E LAR. Moreover, none of these issues provides a sufficient, litigable basis for an argument that an EIS is required on the routine license amendment at issue. There is no reason offered to support departure from longstanding Commission precedent on CP recapture amendments.

III. ARGUMENT

A. MFP'S LATE-FILED CONTENTION SHOULD BE REJECTED BECAUSE IT RAISES NO NEW ISSUES BASED ON THE EA AND CANNOT BE ADMITTED UNDER 10 C.F.R. § 2.714(a)

Contentions filed later than 15 days prior to the special or first prehearing conference are treated as late-filed. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-82-91, 16 NRC 1364, 1366-67 (1982); 10 C.F.R. § 2.714(b). Late

petitioners have a "substantial burden" in justifying their tardiness. Nuclear Fuels Servs., Inc., and New York State Atomic and Space Dev'l Auth. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Late-filed contentions may be admitted only if they satisfy the legal standards for admissibility (i.e., basis and specificity) and, as well, upon a favorable balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1):

> (i) Good cause, if any, for failure to file on time.
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> (ii) The availability of other means whereby the petitioner's interest will be protected.
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> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
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> (iv) The extent to which the petitioner's interest will be represented by existing parties.
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> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Id., citing, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 509 (1982).[8/]

This same requirement applies to late contentions based on an NRC Staff EA. Commission regulations require that contentions based on the National Environmental Policy Act ("NEPA") be filed by would-be intervenors based on environmental information in the

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[8/] The good cause factor applies equally to the admission of late-filed intervention petitions and late-filed contentions. South Texas Project, LBP-82-91, 16 NRC at 1367.

application. 10 C.F.R. § 2.714(b)(2)(iii). Good cause for a new contention would exist only if the EA conclusions "differ significantly from the data or conclusions in the applicant's document." Id. (emphasis added). In promulgating this rule in 1989, the Commission expressly

> emphasize[d] that these amendments to § 2.714(b)(2)(iii) are not intended to alter the standards of § .174(a) . . . as interpreted by Commission caselaw, e.g., Duke Power Co., (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983), respecting late-filed contentions nor are they intended to exempt environmental matters as a class from the application of those standards.

54 Fed. Reg. 33,168, 33,172 at col. 1-2 (1989). In Catawba, CLI-83-19, 17 NRC at 1043-44, the Commission had specifically endorsed a three-part test for determining the good cause factor in § 2.714(a)(1)(i) for late filed environmental contentions based on newly issued Staff documents. The test requires a determination of whether the untimely contention:

1. is wholly dependent upon the content of the new document;

2. could not therefore have been advanced with any degree of specificity (if at all) in advance of the public availability of that document; and

3. is tendered with the requisite degree of promptness once the Staff document comes into existence and is accessible for public examination.

Id. at 1043-44. MFP fails to even address this test and, as shown below, its late-filed contention certainly fails to meet it.

The five factors of 10 C.F.R. § 2.714(a)(1) are not equally weighted. Good cause (§ 2.714(a)(1)(i)) is accorded more weight than the remaining four factors in the balancing process. E.g., West Valley Reprocessing Plant, CLI-75-4, 1 NRC at 275 ("the burden of [justification] on the basis of the other factors in the rule is considerably greater where the late comer has no good excuse."); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984) ("good cause is more heavily weighted."). Thus, if the good cause factor weighs against admission of the tardy contention, then MFP must make a "compelling showing" on the other four factors in order to be successful. Cincinnati Gas & Elec. Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 662-63 (1983); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982). As will also be shown below, MFP has failed to show good cause and has failed to make any persuasive, much less compelling, showing on the other four factors.

1. MFP Is Without Good Cause For Filing an Untimely, Revised NEPA Contention

MFP claims to have satisfied the "good cause" factor for its EIS contention simply "because the EA was not issued until February 3, 1993, and [MFP] did not receive it until February 12. Because the EA was not available to [MFP] before February 12, it could not have prepared a contention challenging the EA before that." Petition at 14. This argument fails at the threshold to account for the more than 30 days that elapsed between publication

of the EA and the filing of the Petition.[9] Without lengthy analysis, therefore, MFP has failed to meet the good cause test for its late filing simply because it failed to meet the third part of the Catawba good cause test.

There is also no good cause for the more than eight months that passed between the filing of the LAR and the filing of the late contention. When one reviews the contention itself (again just an assertion of the need for an EIS), the purported bases for the contention, as well as the LAR and the EA, it is evident that all of the assertions made by MFP are old issues based on information that predated the EA, are issues that have been previously raised in this proceeding and rejected by the Licensing Board, and/or are issues that could have been previously asserted based upon information readily available in PG&E's LAR. The contention now proffered by MFP is not "wholly dependent" upon the content of the EA; it is not even marginally dependent on the EA. Therefore, it must be rejected by the Licensing Board. See 10 C.F.R. § 2.714(b)(2)(iii) (there would be good cause for a late contention only if the EA substantially diverged from the information and conclusions in the LAR).[10]

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[9] The EA itself is dated February 3, 1993. MFP is on the Service List for the EA. MFP surely did not need to wait until the February 10, 1993, Federal Register publication (much less February 12) to see the EA. Then, even after February 10, 30 days passed prior to the late filing.

[10] For purposes of analysis, the unavailability of the EA is not equivalent to the required "total unavailability of (continued...)

The United States Court of Appeals for the District of Columbia Circuit has explained that "[i]nformation raised in the environmental reports [NRC's NEPA documents] does not amount to a new material 'issue' simply because it adds marginal weight to the case of an opponent or a proponent of a license; the reports instead raise a new 'issue' only when the argument itself (as distinct from its chances of success) was not apparent [on a timely basis] . . . ." Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n, 920 F.2d 50, 55 (D.C. Cir. 1990)(emphasis in original). Where information is available to the public several months -- and certainly years -- before a contention is untimely submitted, then good cause for the tardiness is negated. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628 (1985), rev'd on other grounds, CLI-86-8, 23 NRC 241 (1986).[11] The following

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[10](...continued)
information" upon which a finding of good cause is dependent. Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983)(emphasis added). See also Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), CLI-93-03, slip op., March 3, 1993, wherein the Commission confirms that the unavailability of "information," as opposed to the institutional unavailability of a document (i.e., Staff "environmental documents"), is governing in the determination of "good cause." Slip op. at 32.

[11] As the Commission explained in Catawba,

> Because the adequacy of [a DES or FES] cannot be determined before they are prepared, contentions regarding their adequacy cannot be expected to be proffered at an earlier stage of the proceeding before the documents are available. But this does not mean that no environmental contentions can be formulated before the
> (continued...)

addresses sequentially each of the MFP's alleged bases in support of its contention that an EIS is necessary. In this light it is very clear that the EA does not create a new "issue;" the "argument itself" (that an EIS was necessary) has long been apparent, as has the information and alleged "risks" upon which that argument is based. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 30 (1987).

(a) Aging

To begin with, the fact that MFP proffered proposed Contention IV in its Supplemental Petition, and that "aging risks" were alleged as a basis for the original Contention XI, belies any suggestion that this late-filed, so-called environmental contention satisfies the test of good cause. See Section II.B supra. In fact, this pre-existing assertion suggests otherwise: that the new contention is offered in order to circumvent the Licensing Board's previous rejection of Contention IV. The EA approach to "aging" is no different from that of the LAR, and that concern could be, and indeed was raised, based on the LAR. Cf. 10 C.F.R. § 2.714(b)(2)(iii). Moreover, the elements of the late-filed contention pertaining to aging, (1) are not wholly dependent on the

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11/(...continued)

> Staff issues a DES or FES. While all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual aspects of particular issues can be raised before the DES is prepared. As a practical matter, much of the information in an Applicant's ER is used in the DES.

CLI-83-19, 17 NRC at 1049.

content of the EA; (2) could have been -- and in fact were -- proffered in advance of the EA's availability; and (3) therefore, were not timely tendered by MFP in this proceeding. Catawba, CLI-83-19, 17 NRC at 1043-44. In short, the aging aspect of the proffered late-filed contention is not based on a scintilla of previously unavailable information.

Review of underlying documents cited by MFP underscores the tardiness of the issue. MFP begins by quoting extensively from NUREG-1144, Rev. 1, "Nuclear Plant Aging Research (NPAR) Program Plan: Components, Systems, and Structures" (September 1987). Petition at 3, 4. Thus, by its own admission, the aging effects that form the purported basis for the late-filed contention were set forth in a document that has been available to the public since 1987. The referenced documents supporting NUREG-1144, as cited by MFP in footnote 1 of its late-filed contention, are even older -- dating back to 1985 and 1986. Petition at 3.

MFP next cites a string of six Licensee Event Reports ("LERs") and NRC Inspection Reports ("IRs"). Petition at 4. All of the LERs and IRs were available before the Prehearing Conference and several were in fact cited in the Supplemental Petition.[12/] In

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[12/] The Prehearing Conference was held on December 10, 1992. As referenced by MFP, the LERs and IRs were available before that time: LER 89-019-01 (September 19, 1991); LER 1-92-009-00 (July 27, 1992); LER 1-92-006-00 (August 6, 1992); NRC IR 92-22 (August 25, 1992); NRC IR (November 5, 1992); LER 1-92-023-00 (November 30, 1992). Petition at 4.

addition, MFP incorporates by reference "the entire basis of Contention I" previously set forth in its Supplemental Petition. Petition at 4, note 2. None of this information was in any way dependent upon issuance of the NRC Staff's EA. The LERs, IRs, and the "entire basis for Contention I" do not meet the good cause standard of § 2.714(a)(1)(i).

MFP also cites two GAO reports and two additional NUREGs in support of the aging aspects of the proffered contention. Petition at 5, 6. The first, GAO/RCED-89-90, was cited by MFP previously in Contention IV (Aging, Supplemental Petition) and is dated April 1989. The second GAO report, GAO/RCED-91-207, also cited by MFP in its Supplemental Petition (Contention IV), is dated September 1991. The first NUREG, NUREG-1377, is dated June 1991, and the second, NUREG/CR-4302, is dated April 1991. Clearly, given this long pre-existing basis for the contention, there is absolutely no good cause to allow an untimely repackaging of the aging aspects of the EIS contention.[13/]

[13/] Ironically, in this aspect of the contention MFP also cites the document that has been available for perhaps the greatest period of time -- the 1973 FES. Petition at 7. MFP avers that it "has studied the 1973 FES and can find no direct statement to the effect that it was evaluating the risks of a 40-year operating life, as opposed to a 40-year existence." Id. To the extent this could ever be an issue, MFP cannot now justify admission of a late-filed contention based simply on the "institutional unavailability" of the EA. By MFP's own admission, this aspect of the late-filed contention is based not on the EA, but the 1973 FES.

(b) Change in Population

As in its discussion of aging, MFP similarly has failed to satisfy the good cause criterion of § 2.714(a)(1) in its discussion of "change in population." Petition at 8-9. MFP avers that "the population size and distribution of San Luis Obispo County has changed," and proceeds to challenge the 1973 FES and the EA. However, all of the necessary information to raise this issue was previously available in the LAR. LAR at 30; see Section III.B.2 infra. The LAR obviously has been publicly available since the initiation of this proceeding. The data and conclusions in the EA do not "differ significantly from the data or conclusions in the applicant's document." 10 C.F.R. § 2.714(b)(2)(iii). In sum, the aspects of the contention pertaining to population changes (1) are not wholly dependent on the content of the EA; (2) could have been proffered in advance of the EA's availability; and, therefore, (3) were not tendered by MFP on a timely basis in this proceeding. Catawba, 17 NRC at 1043-44.

(c) Cumulative exposure to low level radiation

MFP, in this subpart of its late-filed contention, alleges that an EIS should be prepared "for the purpose of determining the cumulative and chronic impact of low level radiation on the population surrounding [DCPP]." Petition at 9. This aspect of the contention, however, is not dependent on the content of the EA, or on any other document or information that previously was unavailable to MFP. The information cited by MFP in

support of this aspect of its untimely contention consists of six "[a]ccidental releases of radiation . . . [that] are unpredictable and have occurred." Petition at 9-10. All but one of the alleged incidents occurred between May 8, 1985, and November 5, 1992. The last occurred on December 18, 1992. None of this information is dependent upon issuance of the EA. The only other documentation expressly cited and identified by MFP is a 1990 document published by the Committee for Nuclear Responsibility.[14/] Petition at 10.

Moreover, low level exposures from operation of DCPP were addressed at length in the LAR. LAR at 22-24. The LAR concludes that these exposures are not significant. The data and conclusions in the EA do not differ from that provided on the LAR. See Section III.B.3 infra. Therefore, there is no good cause for the tardiness of the environmental contention. 10 C.F.R. § 2.714(b)(2)(iii).

(d) High and low level radioactive waste storage

In proposed Contention VII, MFP previously alleged that "[w]hether this waste is labeled BRC, low level, or high level, it is a danger to the environment and to the public health and safety." Supplemental Petition at 35. The Licensing Board rejected Contention VII as being barred as a matter of law and for

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[14/] Petitioner also refers to the February 11, 1993, edition of "MIT Technology Review." Petition at 10. Because MFP fails to identify the purportedly relevant article in that publication, it is impossible to address its importance to this proceeding. Similarly, MFP alludes to unidentified newspaper articles in support of its allegation. Id. None of these documents seems to refer to DCPP specifically.

a lack of sufficient basis. Prehearing Conference Order at 42. Now, in its late-filed contention, MFP proffers the same allegations in the context of an EIS contention. The contention boils down to bald statements of disagreement with the EA results. Obviously, given that the issues were raised previously, there is no good cause to allow reraising them based solely on issuance of the EA. If MFP believed these concerns to be a basis for requiring an EIS (they are not, as is discussed below), they could certainly have done so in the original Contention XI.

(e) Need for Power

Appended to MFP's late-filed contention is a letter prepared by the Division of Ratepayer Advocates ("DRA") of the California Public Utilities Commission ("CPUC"), dated December 8, 1992. The DRA letter is cited by MFP in response to an alleged statement in the LAR that recapture of the construction period will "'reduce future electric rates.'" Petition at 12.[15/] The DRA letter on its face challenges information in the LAR. Thus, the basis for a challenge was available to MFP as soon as the LAR was issued. In fact, MFP raised such a concern in proposed Contention

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[15/] The MFP Petition attaches the DRA letter as a basis to litigate rates. However, the DRA letter itself is based on an erroneous reading of the LAR. The DRA challenges, and MFP repeats, what it believes to have been PG&E's assertion in the LAR that recapture will "reduce future electric rates." Petition at 12. The LAR made no such claim. Rates for DCPP power after 2015 have not been determined. However, the LAR stated only that, when compared to developing new base load capacity, the recapture amendment "would reduce future electric rate increases." LAR at 3.

XI, alleging that "the cost of operating [DCPP] during the period of proposed license extension will outweigh the benefits." Supplemental Petition at 46. In addition, MFP had a copy of the DRA letter prior to the Prehearing Conference and read most of it into the record (Tr. 197-200). Thus, the element of MFP's late-filed contention labeled "cost benefits" cannot be said to be wholly dependent upon the content of the EA. Catawba, 17 NRC at 1043-44. This element of the late-filed contention is untimely without good cause.

2. Lacking Good Cause, MFP Has Failed To Make The Requisite Compelling Showing on the Remaining Four Factors Set Forth In § 2.714(a)(1) To Warrant Admission of Its Late Contention

As explained above, in the absence of good cause, a petitioner must make a compelling showing on the other four factors in order to justify late intervention. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982). MFP has failed to do so.

Relative to factor two, MFP claims that "there are no other means by which [it] can protect its interest in having an EIS prepared for the proposed operating license extension." Petition at 14. While this may be true, as is discussed in Section III. B below, MFP has no basis for arguing that an EIS must be prepared in this proceeding. Lacking a basis for such an argument, MFP has no real "interest" relative to an EIS to be represented in this

proceeding. An adequate assessment of environmental issues has been made by the NRC Staff in the EA.

The fourth factor is similar to the second. PG&E concedes that there may be no other party to this proceeding which will represent MFP's interest in asserting the need for an EIS. However, again and as is discussed below, the NRC Staff has prepared an adequate EA which encompasses all of the matters raised by MFP. The NRC Staff has met the requirements of 10 C.F.R. § 51.31 and has acted consistent with agency precedent on other CP recaptures. Therefore, MFP's interest under NEPA has already been fulfilled.

Factors two and four are accorded less weight than factors one, three and five. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); South Carolina Elec. and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). Thus, even if the Licensing Board determines that factors two and four weigh in favor of admitting the late-filed contention at issue, those two factors are entitled to less weight than the other three criteria, which weigh against admission of the subject contention.

In response to factor three, MFP claims that its participation in the litigation of the contention "will lead to the development of a sound record." Petition at 14. In support of

this statement, MFP offers only the vague assurance that it "has obtained technical assistance in preparing its case on this issue and expects to be able to provide expert testimony on the significance of aging risks posed by the proposed operating license extension." Id. (emphasis added). The first deficiency in this cursory attempt to address factor three is that it is silent as to MFPs' ability to assist in the development of a sound record on those elements of the proffered contention other than "aging risks." The NRC Staff has, in the EA, considered all environmental impacts of operation of DCPP, as has PG&E in the LAR. MFP has defaulted in its obligation to show how it can enhance the record on these matters.

A second and even more fundamental flaw in MFP's discussion of factor three is the fact that it is devoid of "specific information" from which the Licensing Board can draw an "informed inference that the intervenors can and will make a valuable contribution on a particular issue." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85 (1985). The type of "specific information" necessary in response to factor three is best described by the Commission in the following passage:

> Our case law establishes both the importance of this third factor in the evaluation of the late-filed contentions and the necessity of the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise. The Appeal Board has said: 'When a

> petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.'

Braidwood, CLI-86-8, 23 NRC at 246, quoting, Grand Gulf, ALAB-704, 16 NRC at 1730; Washington Pub. Power Supply Sys. (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983).

MFP has not described what, if any, "special expertise" they have with respect to aging issues. MFP only "expects to be able to provide expert testimony on the significant aging risks posed by the proposed operating license extension." Petition at 14. The expert testimony hinted at by MFP is not a certainty, is not described in any detail, and is not even portrayed as being relevant to the identification of significant environmental impacts. (The testimony to be offered -- perhaps -- would be limited to "significant aging risks.") Nor does MFP identify prospective witnesses, much less summarize their proposed testimony. Because MFP has failed to provide any specific information illustrating the extent to which its participation may reasonably be expected to assist in developing a sound record in this proceeding, factor three weighs heavily against admission of the proffered late-filed contention.

Finally, in response to factor five, MFP concedes that "[a]dmission of [its] contention at this time can be expected to

broaden and delay this proceeding." Petition at 14. MFP simply retorts that such delay is not its "fault," and that operation of DCPP would not be prevented or delayed as a result. Id. This justification does not override the admitted delay and begs the issue; i.e., "whether, by filing late, the [petitioner] has occasioned a potential for delay in the completion of the proceeding that would not have been present had the filing been timely." WPPSS, ALAB-747, 18 NRC at 1180 (emphasis in original). MFP acknowledges that admission of the proffered contention will broaden and delay the proceeding, thus adding yet another factor against admission of the issue in this proceeding.

B. MFP'S LATE-FILED CONTENTION FAILS FOR THE INDEPENDENT REASON THAT THERE IS NO ADMISSIBLE BASIS FOR THE ASSERTION THAT AN EIS IS NEEDED

Even if MFP had demonstrated that its late-filed contention should be considered upon a balancing of the factors of 10 C.F.R. § 2.714(a), the contention still should not be admitted for litigation. The contention fails to provide a basis, litigable in this proceeding, for an assertion that an EIS is needed for a CP recapture amendment. The Licensing Board previously noted that there would be a high threshold for such an assertion to be admitted in this proceeding. Prehearing Conference Order at 53 ("Such a contention, to be accepted, would have to be based on substantial and significant information indicating why an EIS is called for."). However, MFP has provided only an amalgam of baseless assertions which are barred from litigation in any NRC

licensing proceeding, have in prior incarnations already been rejected by the Licensing Board in this proceeding, or are simply insufficient in fact or law to warrant an EIS.

NEPA requires the preparation of an EIS only for major federal actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); see also 10 C.F.R. § 51.20.[16] NRC case law is also clear that where an amendment at issue does not change the "environmental status quo." The effects of continued plant operation need not be considered under NEPA. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 326 (1981); see also General Electric Co. (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530, 549-50 (1982) (dismissing a contention alleging the need for an EIS where there were no environmental changes). As a matter of law, therefore, MFP's contention fails. Since the proposed amendment

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[16] When a proposed federal action "may have some environmental impact, but it is not reasonable to anticipate that the impact will be 'significant,' no EIS is necessary." Sierra Club v. United States Army Corps. of Eng'rs, 771 F.2d 409, 411 n. 2 (8th Cir. 1985); see also Sabine River Auth. v. United States Dept. of Interior, 951 F.2d 669, 677 (5th Cir. 1992) ("An EIS is not required for non major action or a major action which does not have significant impact on the environment"). Thus, trivial environmental impacts will not require an agency to prepare an EIS. See, e.g., River Road Alliance, Inc. v. Corps of Engineers, 764 F.2d 445, 451 (7th Cir. 1985). Courts will uphold an agency's determination not to prepare an EIS if that decision was "'fully informed and well-considered.'" Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985) (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558, 98 S.Ct. 1197 (1978)).

involves no significant impacts and no changes to previously considered hypothetical impacts, an EIS is not necessary.

In assessing a contention asserting the need for an EIS, it is also essential to recognize that a CP recapture is not one of the actions requiring an EIS under 10 C.F.R. § 51.20. The NRC has already issued over 50 CP recapture amendments. In all cases these amendments were the subject of an EA, not an EIS. The only NRC Licensing Board to ever previously address this issue has held that a CP recapture amendment is not a licensing action that requires an EIS. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 97 (1990). The MFP Petition has failed to provide any basis why this precedent should not be followed for DCPP.[17] The late-filed contention, therefore, should be dismissed for lack of a basis and for a lack of genuine issue in dispute.

1. Equipment Aging and Degradation Concerns Do Not Involve Significant New Environmental Impacts

MFP's first argument in support of the need for an EIS is a technical one: equipment aging and degradation (presumably

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[17] When distilled, the only difference between this case and other CP recapture cases is the length of the recapture period. However, this is a difference in degree not kind. As becomes clear from the discussion below, the difference does not translate into any unique environmental impact that would necessitate an EIS in this case. Moreover, as a factual matter, other CP recaptures have been issued involving lengthy construction periods (e.g., McGuire, Units 1 and 2, for 8 and 10 years; Sequoyah, Units 1 and 2, for 10 and 11 years; Salem, Units 1 and 2, for 8 and 12 years).

associated with the recapture period) creates a "risk" not considered in the 1973 NRC FES. Petition at 7. This argument is bolstered by numerous citations to, among other documents, NUREG-1144, Rev. 1, "Nuclear Plant Aging Research [NPAR] Program Plan: Components, Systems and Structures (1987) and GAO/RCED-89-90, "License Renewal Questions for Nuclear Plants Need to be Resolved" (1989). As discussed above, this generic aging issue was previously advanced by MFP in this proceeding as Contention IV, and rejected by the Licensing Board. MFP's aging argument again distills to a simple observation: equipment ages and, accordingly, is subject to possible degradation. This observation does not provide a rationale for preparing an EIS rather than an EA.

As has been stated on numerous occasions, the proposed CP recapture amendment does not involve a license renewal. Rather, the amendment would allow operation of DCPP only for the normal 40-year term authorized by NRC regulations and the Atomic Energy Act and presumed in the DCPP FES (see discussion below). In previously rejecting proposed Contention IV, the Licensing Board recognized that the generic aging concern lacks a basis. The issue was properly held to be inadmissible. Prehearing Conference Order at 34. See also Vermont Yankee, LBP-90-6, 31 NRC at 105-107 (rejecting a generic, conclusory, "aging" contention). Although the MFP late-filed contention is supported by a bevy of citations to the effect that aging is an operational concern, and more

particularly an issue to be addressed for a license renewal, the Petition still does not show any specific reason why aging is a particular problem at DCPP for a 40-year operating life.[18/]

Furthermore, there is no link between this basis for the contention and the assertion of a need for an EIS. The NRC's environmental review, in the form of either an EA or an EIS, certainly does not consider technical issues involved in the licensing decision divorced from specific environmental impacts. The technical review is separate from the environmental review and will be documented in a safety evaluation report. With respect to the environmental review, the focus is on the environmental impacts of a licensing action; that is, the radiological impacts due to normal operation and due to the hypothetical design basis accidents. As stated by the Supreme Court, "a risk of an accident

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18/ The one DCPP-specific concern cited to support the aging argument is the length of the construction period involved. MFP asserts that DCPP equipment "was subject to aging effects for many years, including the particularly corrosive effects of exposure to salt air." Petition at 4. However, this is simply a rote recitation of a concern. There is no foundation provided for a conclusion that such a concern has not, in fact, been addressed by PG&E in its maintenance and surveillance activities. It is not proper in NRC licensing proceedings, particularly in light of the revised rules on admission of contentions, to admit a baseless concern as a contention in order that the concern can be amplified and developed during discovery. In issuing revisions to 10 C.F.R. § 2.714 in 1989, the Commission stressed the requirement that an intervenor have some factual basis for its position. "[T]his will preclude a contention from being admitted where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts." 54 Fed. Reg. 33,168, 33,171 (1989).

is not an effect on the physical environment. A risk is, by definition, unrealized in the physical world." Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 775 (1983) (emphasis in original). The impacts of design basis accidents for DCPP were evaluated in the FES and again in the Staff's EA on the proposed amendment. See FES at 7-1, et seq.; EA at 2-4. Aging and degradation do not change these environmental impacts. See Vermont Yankee, LBP-90-06, 31 NRC at 106-107 (rejecting "basis v"). While these concerns might be a postulated initiator for a design basis accident, the impacts of such an accident are bounded by the design basis analysis. MFP has failed to show how aging concerns would create environmental impacts not considered in the FES or the EA. In fact, there are no new hypothetical impacts created by a CP recapture amendment. EA at 11.[19]

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[19] MFP, in fact appears to recognize the defect in their logic. In the Petition at 2, MFP states that the amendment would "significantly increase the risk of adverse impact to the human environment," thereby subtly changing the focus from environmental "impacts" to "risk." See also Petition at 7 ("SLOMFP has studied the 1973 FES and can find no direct statement to the effect that it was evaluating the risks of a 40-year operating life"). However, even this approach fails. For purposes of the environmental analyses, the risk of a design basis accident is treated on an annual basis. One premise in the analysis to "rigorously establish a realistic annual risk" was "the 40-year plant lifetime." FES at 7-4. The NRC concluded that during this time the annual "environmental risks due to postulated radiological accidents are exceedingly small." Id. at 7-7. Thus, there is no "cumulative" risk and the "risk" in any year of the recapture period is the same as in any year of present operation. MFP has failed to specifically explain how annual "risk" would be increased.

MFP provides in the Petition at 7, an addendum to its aging issue, asserting that the impacts of aging were not considered in the 1973 FES. However, for the reasons just discussed, the specific issue of "aging" did not need to be addressed. The potential impacts of uncorrected aging, however, were addressed in that the impacts of all design basis accidents were addressed. For purposes of evaluating potential impacts, whether an accident were to happen in an original license period or in a recapture period is irrelevant; the hypothetical impacts have been addressed. Moreover, a review of the FES shows quite clearly that there was an assumption of a "40-year plant lifetime" and that DCPP would operate for a "30- to 40-year expected life," and possibly beyond. See, e.g., FES at 7-4; 9-2; 10-2; 10-4 at n.a. MFP has failed to provide a basis for its assertion that a new EIS is now required.

2. Changes in Population Have Been Adequately Considered in the NRC's EA

MFP next asserts, as a basis for an EIS, that "[s]ubstantial population growth in the Baywood-Los Osos community was not anticipated or analyzed in the 1973 FES . . . . An EIS is needed to determine whether or not this change in population affects previous conclusions on the potential environmental impacts of offsite releases." Petition at 8. However, this assertion is grounded on erroneous facts and, in any event, is not a basis for requiring a new EIS. As explained below, the assessment of population changes requested by MFP has already been made by the

NRC Staff, with the conclusion that there is no significant change in the effect of postulated offsite releases.

As recognized by MFP, the population distribution and the impact on the prior accident analysis is explicitly addressed in the EA, at page 3. The NRC Staff there provides population projections in Figure 1, based on the information supplied in the PG&E LAR. These figures specifically incorporate growth in the Baywood-Los Osos community. LAR at 30.[20/] The EA goes on to conclude that "[t]he changes projected in population distribution through 2025 will not significantly impact any accident analysis previously calculated." EA at 3. Thus, the analysis requested by MFP has been made. There is no reason to repackage this analysis as an EIS, and no basis provided to conclude that the analysis is in error.

20/ As noted in PG&E's LAR, at 30, the Baywood-Los Osos community is approximately 8 miles to the north of DCPP. The population projected in the LAR for 2020 in that community is 26,844. In compliance with 10 C.F.R. § 100.11(a)(3), PG&E assumed in its LAR analysis that the Population Center Distance ("PCD") would become 8 miles in 2020 based on the Baywood-Los Osos population reaching 25,000 at that time. Presently, the PCD is 10 miles based on the distance to San Luis Obispo (1990 population 41,958). The 2020 PCD will satisfy NRC requirements and results in no changes to previous conclusions regarding potential environmental effects of offsite releases from postulated accidents. Id.

3. There is no Basis Provided for Assertions that Exposures to Low Level Radiation from DCPP Create Significant Environmental Impacts

MFP next asserts that an EIS is necessary due to the alleged impacts of cumulative exposures to low level radiation from DCPP. These alleged environmental impacts occur because, according to MFP, the "human population is continually being exposed to unpredictable amounts of radiation." Petition at 10. MFP then relies upon two non-specific references for the proposition that "low doses of ionizing radiation received over time can be more harmful that [sic] single high doses." Id. As "evidence" that this impact is occurring, MFP refers to cancer rates for San Luis Obispo County published in the local newspaper and to a recent visit by a "representative" of the Environmental Protection Agency.

This asserted basis for an EIS does not meet the NRC's threshold for an admissible contention. There is no basis for the assertion that low level radiation releases from DCPP for the 13 to 15 year recapture period involve a significant environmental impact not previously considered. MFP has failed to provide a basis on which to conclude that the supposed impact (a higher cancer rate) has in fact occurred, that such an impact will continue in the future, or that the impact would be related to DCPP operation. Operational releases from DCPP must be maintained by PG&E in compliance with NRC requirements and with the DCPP Technical Specifications. Notwithstanding MFP's assertion of "unpredictable"

releases and citations to various historic releases, DCPP has been operated in compliance with those requirements.[21/]

The NRC has previously analyzed the expected low level releases during operation of the plant. These releases have been determined to involve no undue risk to public health and safety. The FES specifically addressed at length the annual radiological impacts of station operation. See FES at 5-49, et seq. Table 5.25 summarized estimated total body radiation doses per year to the population from all exposure pathways from two operating units. Also, the FES, at 5-66, then provided perspective on the estimated population dose numbers:

> The estimated population dose from exposure from all sources associated with the station is about 3.7 man-rems and is very small compared with the 30,000 man-rems that the population within a 50-mile radius of the station receives each year from natural radiation background and even with the 900 man-rems that the population within a 10-mile radius receives from natural background.

21/ MFP cites six events as "accidental releases of radiation." However, MFP starts with an erroneous spin on the facts. Only one of the six events cited actually resulted in any release of radiation to the environment. This one event, on May 8 and 9, 1985, involved an unplanned release of radioactive gases from the Unit 1 waste gas system (primarily Xe-133 and 135). The NRC confirmed in Inspection Report 50-275/85-17 (June 7, 1985) that the concentrations of released gases were insignificant fractions of the limits established in 10 C.F.R. Part 2, Appendix B. Of the other five events cited by MFP, one -- involving the December 18, 1992, waste shipment to Richland, Washington -- involved no release at all. The event involved direct radiation slightly higher from the 10 millirem limit, but with no effect on the environment. Releases from the other four events cited were all contained within the plant and obviously had no effect on the surrounding environment.

> Hence, no discernible radiological impact on individuals and the population is expected from normal operations of the Diablo Canyon Station.

The assumption in this aspect of the late-filed contention is that low level releases were only analyzed for 25 to 27 years of operation, and that CP-recapture will create new, cumulative impacts. However, as discussed above, the FES was prepared premised on 30 to 40 years of operation. Moreover, incremental cumulative exposures to radiation levels well below natural background are not a basis for a new EIS.

PG&E's LAR also addressed at length actual operational experience at DCPP regarding offsite radiation exposures. LAR at 22-24. The LAR notes that the plant must be and has been operated in compliance with 10 C.F.R. § 20.1(c) and 10 C.F.R. Part 50, Appendix I. Appendix I provides radiation exposure limits for liquids, gases, and iodines and particulates. Based on operating data, PG&E demonstrated in the LAR that DCPP doses have been a small percentage of Appendix I limits. Id. at 24. Projected exposures for the proposed 40-year operating terms are also well within the offsite exposures estimated in the FES. Id. The NRC Staff agreed with this assessment in the EA, noting that "the plant's contribution to the local population dose within a 50-mile radius is expected to remain insignificant in comparison to that from background radiation." EA at 5.

The proposed contention does not challenge the FES, LAR, or EA dose estimates. Likewise, it does not challenge the analytical comparisons of those doses to background radiation levels. In this context, there is absolutely no basis for the assertion that CP-recapture creates unique, significant, environmental impacts, or for the assertion that an alleged local cancer rate is due to operation of DCPP.[22] Furthermore, even the characterization of low level exposures as involving new cumulative exposures is erroneous. As discussed above, the premise at the time of the FES was for up to 40 years of operation, and possibly beyond. Obviously, there were no exposures from DCPP during the plant construction period, and the CP recapture only contemplates the original 40 years of operation. In total, therefore, this assertion fails to raise an admissible basis for a contention asserting that an EIS is needed.

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[22] "[T]he environmental review mandated by NEPA is subject to a 'rule of reason' and as such need not 'include all theoretically possible environmental effects arising out of an action' but rather 'may be limited to effects which are shown to have some likelihood of occurring.'" Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 48 (1978) (quoting Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973)). "It is undisputed that NEPA does not require consideration of remote and speculative risks." Limerick Ecology Action v. United States Nuclear Regulatory Commission, 869 F.2d 719, 739 (3rd Cir. 1989) (citing San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1300-01 (D.C. Cir. 1984), rehearing en banc granted on other grounds, 760 F.2d 1320 (D.C. Cir. 1985), aff'd on rehearing en banc, 789 F.2d 26 (D.C. Cir.), cert. denied, 479 U.S. 923, 107 S.Ct. 330 (1986); Carolina Envtl. Study Group v. United States, 510 F.2d 796, 799 (D.C. Cir. 1975).).

4. High Level Waste Storage Issues are Barred from this Licensing Proceeding

MFP next raises an issue that it has raised before, in the Supplemental Petition and at the Prehearing Conference: the issue of high level waste storage at DCPP. MFP, in the Petition, now acknowledges that "less high level waste will be generated [over 40 years] than originally anticipated." Petition at 10. However, MFP goes on to assert that storage of this waste in any event will be a problem. These generalized high level storage concerns, however, are not and cannot be an issue in this proceeding.

As noted by the Licensing Board in its Prehearing Conference Order, Commission regulations bar litigation of the issue of the environmental implications of short-term storage of spent fuel at a reactor site. As set forth in 10 C.F.R. § 51.23(a):

> The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either on site or offsite independent spent fuel storage installations.

See also Vermont Yankee, LBP-90-6, 31 NRC at 94-95. It therefore is very plain that MFP cannot in this proceeding assert high level waste storage issues as a basis for the need for an EIS. It has

been generically determined by the Commission that this issue does not involve any unique, significant environmental impacts.

MFP, in this aspect of its contention, attempts to spice the argument with quasi-technical issues (e.g., seismic issues) specifically related to DCPP. However, these safety assertions also are not proper in the present context. First, this proposed contention asserts the need for an EIS; it is not a safety contention. Second, the present amendment in no way implicates spent fuel storage. Therefore, safety issues related to such storage are not admissible in this proceeding. Third, in any event, there is no technical basis provided for the assertions. These arguments fail to meet the Commission's threshold for admissible issues. Finally, these safety issues were raised previously, and were dismissed by the Licensing Board. Prehearing Conference Order at 42. Attempts to re-raise the issues are not only untimely, they are barred by the law of this case.

5. Low Level Radioactive Waste Storage Concerns are not a Basis for an EIS

MFP next asserts the need for an EIS simply because the NRC Staff's EA "fails to acknowledge the difficulty and expense of disposing of this dangerous waste." Petition at 11. This is not a basis for requiring an EIS. Regardless of uncertainties surrounding future low level waste storage, or costs of that storage, MFP has not shown a potentially significant environmental impact that would necessitate an EIS. Simply citing an ongoing,

generic issue regarding waste storage is not a sufficient basis for alleging the need for an EIS.

In Vermont Yankee, LBP-90-6, 31 NRC at 97-98, the Licensing Board rejected the contention asserting the need for an EIS. The Licensing Board observed that the intervenor had failed to show that the case was "substantively different from other [CP-recapture] cases where no EIS was required." Id. at 98. One of the proffered bases (b.3) for the rejected contention was precisely that now offered by MFP: the alleged uncertainty of availability of low-level waste storage. Id. at 94. The concern should also be rejected in the present case. Similarly, the Vermont Yankee Board rejected a separate low level waste contention, observing that the "obligations placed on Vermont by the [Low Level Waste Policy Amendments Act of 1985] are independent of the NRC's licensing responsibilities under the Atomic Energy Act." Id. at 93. The same could be said in the present case. The proposed amendment will not create any unique environmental impact related to low level waste storage. A generic concern regarding future operation and waste storage can be addressed by individual licensees, and by the NRC if necessary, without an EIS on the present amendment.

Finally, the Petition raises a concern regarding low level waste storage that, in truth, is unfounded. California has, in conformance with the Low Level Waste Policy Amendments Act, entered the Southwest Regional Compact for low level waste storage.

California has committed to provide a storage site and, toward this end, has designated a site at Ward Valley. Although the Ward Valley site remains under review, the Act does not require California to take low level waste until 1996. See 42 U.S.C. § 2021e(d)(2)(C). PG&E expects that the State will meet this goal.[23]

6. MFP's "Need for Power" Arguments and Rate Issues Are Barred from a License Amendment Proceeding

MFP next attacks the EA cost-benefit assessment. Petition at 12-13. The entire basis for this attack is the letter previously discussed from the DRA to the CPUC.[24] MFP argues, based on this letter, that "the energy produced by [DCPP] in the years of the proposed license extension will be costly." Petition at 12. MFP also asserts that the DRA letter "sheds light on the question of the need for new baseload capacity and the economics of extending the operating life of [DCPP] versus the use of alternative energy sources for producing an equivalent electrical power capacity." Id. at 13. However, in the context of NEPA issues or otherwise, need for power and ratemaking issues are not appropriate in an NRC license amendment proceeding.

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[23] PG&E also presently has adequate capacity onsite for low level waste storage through 1996.

[24] The DRA, as is clear on the face of the letter referenced by MFP, acts independently under the administrative umbrella of the CPUC. The statements in the letter, however, reflect the views of the DRA, not the CPUC.

First, in this portion of the Petition MFP challenges the need for power produced by DCPP during the recapture period. "Need for power" contentions, however, are not admissible as a matter of law in license amendment proceedings. See 10 C.F.R. §§ 51.53(a), 51.95(a), 51.106(c); Prehearing Conference Order at 53; see also Vermont Yankee, LBP-90-6, 31 NRC at 95.[25] Accordingly, MFP fails to provide an admissible basis for an assertion that an EIS is required.[26]

To the extent MFP seeks, in this portion of its Petition, to address rates for DCPP power during the recapture period, it also raises an irrelevant and inadmissible matter. The conclusions of the NRC Staff's EA are not dependent upon the costs of DCPP energy.

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[25] "Need for power" contentions have been rejected in other license amendment proceedings. For example, in Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 193 (1982), the Licensing Board ruled that contentions seeking to introduce "need for power" issues in a license amendment proceeding were inadmissible. Acknowledging that pertinent regulations do not speak directly to license amendment proceedings, the Licensing Board ruled that "need for power" prohibitions applicable to operating license proceedings also apply to operating license amendment proceedings. Id. at 194.

[26] Although the relevance and significance of the argument is not clear, MFP also claims, citing the Prehearing Conference Transcript at 188-89, that the Licensing Board requested that the NRC Staff consider the DRA letter in preparation of the EA. In fact the discussion cited by MFP related to proposed Contention X, which addressed the Staff's proposed no significant hazards consideration determination related to the proposed amendment. The NRC Staff has not issued its final no significant hazards consideration determination and can certainly consider proposed Contention X in that context. No reference is made on the cited transcript pages to the DRA letter. The DRA letter is addressed at Tr. 197-200.

Rather, the NRC Staff concluded in the EA that the environmental impacts of the proposed amendment "are bounded by the assessment in the original FES" and that "there are no significant environmental impacts associated with the proposed amendment." EA at 11. MFP's arguments regarding costs do not supply a significant environmental impact that would provide a basis for the assertion of a need for an EIS (which, after all, is the relief sought in this proposed contention).

Moreover, whether DCPP power will cause electric rates to go up or down during the recapture period is immaterial to the NEPA evaluation and inadmissible in this proceeding.[27] A long line of NRC cases, cited in and exemplified by Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-82-58, 16 NRC 512 (1982), holds that, unless an NRC licensing action involves environmental disadvantages in comparison to alternatives, differences in financial costs do not enter into the NRC's NEPA cost-benefit balance. Id. at 527. In the present case, the EA concludes that the licensee amendment at issue involves no significant impacts. Hence, costs of DCPP power during the recapture period relative to

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[27] In any case, DRA's conclusion that DCPP prices will not be "significantly below market levels" during most of the recapture period (DRA Letter at 4) is not inconsistent with the conclusions in the LAR.

costs during prior years or to other generating capacity need not be considered by the NRC.[28/]

V. CONCLUSION

For the foregoing reasons, MFP's First Late-Filed Contention should not be admitted in this proceeding. The proposed Contention is based on old information and old issues in no way dependent upon issuance of the EA. The proposed Contention is untimely and its admission cannot be justified under either 10 C.F.R. § 2.714(a)(1) or § 2.714(b)(2)(iii). Furthermore, MFP has failed to provide any admissible basis for the proposition that the proposed amendment involves significant environmental impacts that would necessitate

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28/ The current reasonableness of PG&E's rates for DCPP was recently reaffirmed by the CPUC. See Decision 93-03-075 (March 24, 1993).

an EIS. Therefore, the contention must be dismissed under 10 C.F.R. § 2.714(b)(2)(iii) for failure to raise a genuine issue of law or fact.

Respectfully submitted,

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Dated in Washington, DC
this 2nd day of April, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket Nos. 50-275-OLA
Pacific Gas and Electric Company	)	50-323-OLA
	)	(Construction Period
(Diablo Canyon Power	)	Recapture)
Plant, Units 1 and 2)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "PACIFIC GAS & ELECTRIC COMPANY'S RESPONSE TO FIRST LATE-FILED CONTENTION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk (*), by deposit for Federal Express delivery, or as indicated by the (†) symbol, by hand delivery, this 2nd day of April, 1993.

Charles Bechhoefer, Chairman(†)
Administrative Judge
Atomic Safety and Licensing Board
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Frederick J. Shon(†)
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