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NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)	Docket Nos.	50-275-OLA-2
PACIFIC GAS & ELECTRIC CO.)		50-323 OLA-2
)		
(Diablo Canyon Nuclear Power Plant,)	(Construction Period Recovery)	
Units 1 & 2))		

NRC STAFF'S RESPONSE
TO SAN LUIS OBISPO MOTHERS FOR PEACE
THIRD LATE-FILED CONTENTION

INTRODUCTION

On April 12, 1993, San Luis Obispo Mothers for Peace ("SLOMFP") filed "Intervenor San Luis Obispo Mothers for Peace Third Late-Filed Contention" ("Petition"). The NRC Staff's response, opposing the admission of the contention, is set forth below.

BACKGROUND

The background against which SLOMFP's latest late-filed contention may be understood is set forth in the "NRC Staff's Response to San Luis Obispo Mothers for Peace First Late-Filed Contention" and "NRC Staff Response to San Luis Obispo Mothers for Peace Second Late-Filed Contention," both filed on April 14, 1993, which are incorporated by reference.

Further, after two of the contentions proposed by SLOMFP in its October 26, 1992, Supplement were accepted for litigation in this proceeding in the Licensing Board's

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prehearing conference order, LBP-93-1, 37 NRC 5 (January 21, 1993), SLOMFP filed a late contention on March 12, 1993, purportedly based on the NRC Staff's Environmental Assessment and a second late contention on March 16, 1993, seeking to expand the admitted contention that concerns the fire retardant material, Thermo-Lag.

On April 12, 1993, SLOMFP filed a third late-filed contention, "Intervenor San Luis Obispo Mothers for Peace Third Late-Filed Contention," in which it proposed for litigation in this proceeding a late contention alleging that "deficiencies exist at the DCNPP with the environmental qualification of safety-related and non-safety-related electrical cables (Okonite cables or other cables with bonded jackets)." Petition at 1. SLOMFP also alleged that "deficiencies exist in the adequacy of maintenance and surveillance practices at DCNPP to verify that the actual operating environment of these cables are [*sic*] bounded by the environmental parameters used to qualify the equipment." *Id.*

As noted above, the NRC Staff opposes the admission of SLOMFP's proposed Contention XII, both because it is late without satisfying the requirements of the five factors test set out in 10 C.F.R. § 2.714(a)(1) and because it fails to satisfy the requirements of 10 C.F.R. § 2.714(b)(2) regarding admissibility of contentions.

DISCUSSION

1. SLOMFP's Late-Filed Contention Fails to Meet the Standards Applicable to Late-Filed Contentions

Section 2.714(a)(1) specifically states that "*[n]ontimely filings will not be entertained absent a determination . . . that the petition and/or request should be granted*

based upon a balancing of [the five] factors" listed therein, including good cause, the extent to which the petitioner's participation may assist in developing a sound record, and the extent to which petitioner's participation will broaden the issues or delay the proceeding. 10 C.F.R. § 2.714(a)(1) [*emphasis supplied*]. The burden of showing that a balancing of the five factors favor intervention is on the petitioner. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-83-25, 18 NRC 327, 331 (1983).¹

The application of these standards to a late-filed petition is not discretionary. The Board is duty-bound to deny the petition unless it is persuaded that, on balance, the lateness factors point in the opposite direction. *Boston Edison Co. (Pilgrim Nuclear Power Station)*, ALAB-816, 22 NRC 461, 466 (1985). The Commission has held that even stipulated late-filed contentions may not be admitted unless the regulatory requirements are met. *Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2)*, CLI-86-8, 23 NRC 241, 251 (1986). Absent a showing by the petitioner that satisfies the requirements, the contention must be denied. As the Court of Appeals noted, in promulgating its new rule regarding the admission of contentions in NRC proceedings, the NRC did not change the rule with respect to late-filed contentions. The balancing test required under 2.714(a)(1) applies fully even in cases where contentions are filed late only because information on which they were based was not

¹ The Staff has previously stated the case law germane to the five factors in 10 C.F.R. § 2.714(a)(1) and will not repeat that discussion here, but incorporates by reference the Staff's previous responses to SLOMFP's 1st and 2nd Late-Filed Contentions.

available until after the filing deadline. *UCS v. NRC*, 920 F.2d 50, 52 (D.C. Cir. 1990), citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).² Recently in *Texas Utilities Electric Company, et al.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-04, 37 NRC ____ (1993), the Commission rejected intervenor's late-filed contention on a determination that it did not satisfy the five factors test and did not even reach the question of whether the contention satisfied the standards of 10 C.F.R. § 2.714(b)(2).

A. SLOMFP does not have Good Cause for Filing an Untimely Contention Regarding Cables with Bonded Jackets.

SLOMFP cites as its principal reason for filing this untimely third late-filed contention that it received documents from Robert Pollard of UCS on March 25, 1993. Petition at 4. SLOMFP continues to state that it did not uncover the importance of the documents from PG&E regarding Diablo Canyon's cables (which it received March 16, 1993) until it received the NRC documents from Mr. Pollard. *Id.* In this assertion, SLOMFP makes clear it does not have any understanding of what would be at issue if the contention were admitted. As pointed out in the Staff response regarding additional discovery, the cable problems identified at Diablo Canyon are wholly unrelated to the generic Okonite cable failure referenced in the Staff's IN-92-81.³

² Nor should SLOMFP be permitted to modify its contention in replying, for even if SLOMFP had filed a viable contention (i.e., one relating specifically to Diablo Canyon), application of the five factors would still be required, and would not weigh in favor of admission. See *Pilgrim*, ALAB-816, *supra*.

³ "NRC Staff Response to San Luis Obispo Mothers For Peace's Motion for Leave to File Additional Discovery Re: Okonite Cables with Bonded Jackets," April 21, 1993.

With regard to IN-92-81, as well as two of the other NRC documents referred to by SLOMFP as bases for the late-filed contention, they were all available in the public domain in December 1992. As the Commission has expressly stated,

the test for "good cause" is not simply when the Petitioners became aware of the material they seek to introduce into evidence. Instead, the test is when the information became available and when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain. [emphasis in original]

Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 2), CLI-92-12, 36 NRC 62, 70 (1992). Clearly, the information here is not "new" information at all, and was publicly available at least four months before SLOMFP filed this contention and more than three months before SLOMFP submitted its first and second late-filed contentions.

Further, the two documents that were not available in December, the Staff Action Plan regarding Okonite cables with bonded Hypalon jackets and the Morning Report regarding identification of a cable degradation at Diablo Canyon, do not lend any weight to the good cause argument presented by SLOMFP. The Information Report refers to the issue of Okonite cables with bonded Hypalon jackets, which is a generic staff concern unrelated to Diablo Canyon, and the other document was available in February, fully two months prior to the filing of the petition.

SLOMFP maintains that it failed to follow up on IN 92-81 because it did not identify this as being specific to Diablo Canyon until it learned on March 25, 1993, of

the occurrence of the electrical ground event of February 5, 1993.⁴ However, it is clear that the event referred to by SLOMFP has nothing whatever to do with IN-92-81, as evidenced by the letter from MHB, technical consultants to SLOMFP, to Ashok Thadani, dated April 1, 1993, which references the electrical fire of February 5, 1993, and specifically states that the fire involved *a non-safety related system* (and, thus, one not required to be environmentally qualified under NRC regulations), and did not involve cable with bonded jackets, let alone cable with bonded Hypalon jackets. Board Notification 93-08, April 16, 1993, Enclosure 2. SLOMFP's attempt to justify its tardiness on the issue of environmental qualification of Okonite cables with bonded jackets by referencing more recent cable failures at Diablo Canyon that are not safety related and not required to be environmentally qualified, and also are unrelated to the generic concern identified by the Staff in IN-92-81, does not provide good cause for the late filing of this environmental qualification contention.

B. The Remaining Factors do not Weigh in Favor of Admission of the Contention Regarding Environmental Qualification of Okonite Cables with Bonded Hypalon Jackets.

Where no good cause is tendered for the tardiness of the petition, the petitioner's demonstration on the other factors must be particularly strong. When the petition is untimely and no good cause is demonstrated for filing late, the petitioner must make a

⁴ "San Luis Obispo Mothers for Peace Motion for Leave to Reply to Pacific Gas and Electric Company's Opposition to Additional Discovery Re: Cables," April 26, 1993.

compelling case that the other four factors weigh in its favor. *Texas Utilities Electric Company* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988).⁵

With regard to factor three, SLOMFP utterly fails to provide the particulars required by this factor, which has been addressed by the Commission on numerous occasions. The regulations require a licensing board to consider the extent to which the petitioner's participation may be reasonably expected to assist in developing a sound record. 10 C.F.R. § 2.714(a)(1)(iii). It is necessary for the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise. *Braidwood*, CLI-86-8,

⁵ SLOMFP's showing on the second and fourth factors is satisfactory if SLOMFP has any interest with regard to cable with bonded jackets at Diablo Canyon. With respect to the second factor, the availability of other means whereby the petitioner's interest will be protected, no other means exist whereby SLOMFP's interest in environmental qualification of electrical cables with bonded jackets can be protected. 10 C.F.R. § 2.714(a)(1)(ii). Likewise with respect to factor four, the extent to which the petitioner's interest will be represented by existing parties, no other party exists to represent SLOMFP's interest. 10 C.F.R. § 2.714(a)(1)(iv). In fact, absent SLOMFP's participation, there would be no proceeding regarding this licensee's requested amendment.

Licensee argues that a § 2.206 petition may be sufficient to protect a petitioner's interest for purposes of § 2.714(1)(1)(ii). "Pacific Gas & Electric Company's Response to San Luis Obispo Mothers For Peace Third Late-Filed Contention" at 8-9. However, while the staff believes that, even though the issue is generic and, thus, amenable to a petition for disposition under § 2.206, a strong case exists for the proposition that this issue is not safety significant; therefore, this is an appropriate forum to make the determination that further inquiry into the matter is not justified.

23 NRC at 246. The Commission has, also, spoken to precisely what is required under this factor to show that petitioner would contribute to the development of a sound record:

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.

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 611, (1988), quoting *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982). Vague assertions regarding petitioner's ability or resources are insufficient. *Id.*

As early as December 10, 1992, at the prehearing conference SLOMFP indicated that it had already contacted expert witnesses and had expert witnesses who would testify at any hearing that might be held. Becker, Tr. 94. Hence, SLOMFP was under an absolute duty to provide the identification of its witnesses and a summary of their proposed testimony regarding this contention "to demonstrate that it has special expertise" on this subject. *See Braidwood supra.* SLOMFP has not provided either in its filing. SLOMFP has had more than sufficient time to address this issue with the particulars required by the regulation, given its representation that it has experts.

Rather than provide identification of its witnesses and a summary of the proposed testimony as the Commission has required in order to meet the showing under factor three, SLOMFP simply repeats the same boilerplate it used to address that factor when it filed its other late contentions, filling in the blank following "SLOMFP has obtained technical assistance in preparing its case on this issue and expects to be able to provide expert testimony on" with "the significant risks posed by the degraded cable." However,

as is apparent from Inspection Reports 50-275/93-03 and 50-323/93-03 at pp. 4-5 and LER 1-93-005-00 at pp. 4-6, 11, the degraded cable was pulled and replaced. It is not possible for cable that is not in the plant to pose any risk for the construction permit recapture period. SLOMFP has purported to identify an issue that its witnesses will cover, but that issue is moot. Thus, SLOMFP has made no showing that its participation could aid in developing a sound record in that 1) the cable SLOMFP claims gives rise to the contention is not installed at Diablo Canyon, 2) no showing has been made that the use of cable with bonded jackets presents problems at Diablo Canyon, and 3) SLOMFP has not identified any expert witness who can give testimony that is germane to any issue that might pertain to Diablo Canyon's use of such cable.

As to 10 C.F.R. § 2.714(a)(1)(v), SLOMFP admits that admission of this contention would broaden and delay this proceeding. SLOMFP also inexplicably maintains that this would not be the fault of SLOMFP. It is difficult to determine to whom SLOMFP would ascribe such fault in light of the fact that there would be no proceeding absent SLOMFP's participation. The determination here is whether it would broaden and delay this proceeding, not whether it would prevent or delay the operation of the Diablo Canyon Nuclear Power Plant. It is abundantly clear that admission of this late-filed contention would indeed broaden and delay the proceeding and, thus, this factor must weigh heavily against SLOMFP.

SLOMFP utterly fails to meet the heavy burden placed upon it with regard to the late filing of a contention at this stage of the proceeding. The Board must deny the

petition for failure to meet the required five factor balancing test of 10 C.F.R.

§ 2.714(a)(1).⁶

⁶ The Licensing Board, in its Notice of Prehearing Conference, April 23, 1993, references its Memorandum (Questions for Parties), April 16, 1993. In the Memorandum, the Licensing Board cites *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979) as authority for providing a forum for SLOMFP to reply to Applicant and Staff's argument. The Staff believes that if *Allens Creek* has any current viability it is narrowly limited. As relevant here, the Appeal Board itself distinguished *Allens Creek* in *Boston Edison Company* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461 (1985). In *Pilgrim*, petitioner had been eight days late in filing his intervention petition. He had not addressed the five lateness factors. The Licensing Board had denied the petition because it was late and because petitioner lacked standing. On petitioner's argument on appeal that the Licensing Board should have granted him an opportunity to reply to Licensee's and Staff's argument, the Appeal Board held that the Licensing Board was correct in denying the petition on untimeliness alone and did not even reach the standing question. The Appeal Board pointed out that the petitioner was mistaken in relying on the holding in *Allens Creek* that, "[b]efore any suggestion that a [timely] contention should not be entertained can be acted upon favorably [by the licensing board], the proponent of the contention must be given some chance to be heard in response," citing *Allens Creek*, ALAB-565, 10 NRC 521, 525 (1979). *Pilgrim*, *supra*, at 466, n.22. The Appeal Board continued:

That holding has no pertinence here. It rests on the consideration that intervenors (or petitioners for intervention) cannot be required to have anticipated *in the contentions themselves* the possible arguments their opponents might raise as grounds for dismissing them. *Ibid.* (emphasis in original). But, as seen above, late petitioners are not called upon to anticipate what their opponents might have to say about the untimeliness; rather, their obligation is to establish affirmatively at the threshold (i.e., in the late petition itself) that a balancing of the five lateness factors warrants overlooking the tardiness.

Id.

- II. Contention XII cannot be Admitted in this Proceeding because it does not Meet the Requirements of 10 C.F.R. § 2.714(b)(2) Regarding Standards for Admissibility

As argued above, the Licensing Board should reject SLOMFP's Contention XII because it is late without satisfying the five factors test. Therefore, the Licensing Board need not, and should not, reach the question of whether the contention satisfies the requirements of 10 C.F.R. § 2.714(b)(2). *Comanche Peak*, CLI-93-04, *supra*. The Staff, nevertheless, addresses that question.

SLOMFP's proposed contention XII reads as follows:

XII. The San Luis Obispo Mothers for Peace contends that deficiencies exist at the DCNPP with the environmental qualification of safety-related and non-safety-related electrical cable (Okonite cable or other cables with bonded jackets). Furthermore, deficiencies exist in the adequacy of maintenance and surveillance practices at DCNPP to verify that the actual operating environment of these cables are bounded by the environmental parameters used to qualify the equipment. Because these deficiencies make the plant more vulnerable to a severe accident, Pacific Gas and Electric Company's ("PG&E") license amendment request must be denied.

As basis for its contention involving Okonite cables and other cables with bonded jackets, SLOMFP references the recent cable failures at Diablo Canyon that are addressed in LER 1-93-005-00, forwarded to the Licensing Board and parties by a letter from PG&E counsel on April 28, 1993, and in Inspection Report 50-275/93-03 and 50-323/93-03, the subject of Board Notification No. 93-09, dated May 3, 1993. As noted, these failures are well documented. However, these reports do not concern cable with bonded

jackets and cannot form the basis for SLOMFP's environmental qualification contention. The cable at issue in the LER and the Inspection Report is not required to be environmentally qualified.

SLOMFP also relies on Information Notice 92-81: Potential Deficiency of Electrical Cables with Bonded Hypalon Jackets (December 11, 1992) and other Staff documents commenting on the Information Notice.⁷ However, these documents have nothing whatsoever to do with cable failures at Diablo Canyon. As Ann M. Dummer, co-author of Information Notice 92-81, stated in her affidavit, filed in support of the Staff's response to SLOMFP's motion to file additional discovery and submitted again here:

The cables that failed at Diablo Canyon are 12kV and 4kV power cables. These cables have EPR insulation, shielding, and a neoprene jacket They do not have a bonded jacket. The 12 kV cables that failed were severely degraded, apparently as a result of chemical attack. The 4kV cables were not degraded and may have failed due to a manufacturing defect. The 12kV cables are not used in any safety-related application at Diablo Canyon. They are not required to be environmentally qualified. The licensee has on-line fault detection capability for these cables.

Affidavit at 2, ¶ 5.

⁷ These documents, with the exception of the Thadani memorandum, were furnished by the Staff to the Licensing Board and parties with the NRC Staff Response to San Luis Obispo Mothers for Peace's Motion for Leave to File Additional Discovery Re: Okonite Cables with Bonded Jackets, dated April 21, 1993. All but one of the documents concern Information Notice 92-81. Subsequent to the Staff's filing on April 21, 1993, the Thadani memorandum was made public. (As noted above, SLOMFP was the recipient of a copy before it was authorized for release.) A copy of the memorandum is enclosed with this filing for the convenience of the Board and parties.

In her affidavit, Ms. Dummer details why the cables discussed in Information Notice 92-81 are not related to the cables that failed at Diablo Canyon:

The cable failures discussed in documents 1-4 (Information Notice 92-81 and other NRC documents) occurred during testing conducted by Sandia National Laboratories. These cables are small instrumentation and control cables that have one layer of EPR insulation with a hypalon jacket bonded to the insulation These cables failed during laboratory testing similar to that required for environmental qualification of cables. They had been artificially aged at a high temperature, exposed to radiation, and subjected to a simulated accident environment. The failures at Sandia were different from the Diablo Canyon failures because at Sandia the insulation split open from one end of the cable to the other, as if someone had cut the cable open with a knife. These failures appear to be mechanical in nature, resulting from the embrittlement of the hypalon jacket due to thermal aging. The NRC's concern with these Okonite cables is that these cables were never tested for qualification with the bonded jacket in place. The test failures may indicate that some installed cables may not be adequately qualified to perform their safety-related function during a design-basis event.

Affidavit at 3, ¶ 6.

Ms. Dummer's affidavit concludes:

San Luis Obispo Mothers for Peace, in its motion, attempts to tie the failures at Diablo Canyon to the failures described in the Information Notice. The cables are different sizes and of different construction, and are used in different applications. The failure mechanisms are also different. The Diablo Canyon cables are not environmentally qualified and do not have bonded jackets. Therefore, the Information Notice is not relevant to the recent cable failures at Diablo Canyon.

Affidavit at 3, ¶ 7.

Thus, contrary to the requirements of 10 C.F.R. § 2.714(b)(2) regarding contentions, proposed Contention XII does not consist of a specific statement of the issue of law or fact to be raised. Rather, proposed Contention XII seems to proceed from an idea that all cable, including all non-safety cable, is required to be environmentally

qualified. Cf. 10 C.F.R. § 50.49. SLOMFP seems to believe that environmental qualification concerns qualifying all electrical equipment for the environment it will see, whereas the regulation makes clear that only particular electrical equipment "important to safety" needs to be qualified for the post-accident environment defined in § 50.49(b).

The second sentence of proposed Contention XII seems to be based on the mistaken belief that the cable that failed at Diablo Canyon was EQ cable. The third sentence is so vague that one cannot hazard a guess as to what SLOMFP has in mind here.

Further, SLOMFP fails to satisfy 10 C.F.R. § 2.714(b)(2)(i), requiring a brief explanation of the basis of the contention, in that the basis as explained has no relationship to the statement of the contention. See discussion *supra*.

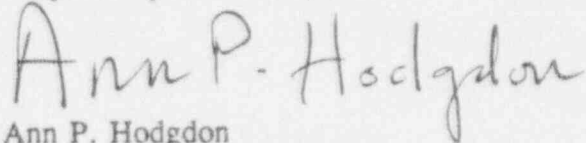
Nor does SLOMFP furnish a concise statement of the alleged facts or expert opinion that support the contention, as required by § 2.714(b)(2)(ii). As discussed above, the facts that SLOMFP sets out in the first two paragraphs of its basis relate to the cable failures at Diablo Canyon but do not relate to environmental qualification. The remainder of the basis documents the Staff's concern about Okonite cable with bonded Hypalon jackets. However, nothing is offered to connect this information to anything at Diablo Canyon.

Thus, SLOMFP fails to satisfy the requirements of 10 C.F.R. § 2.714(b)(2) regarding the admissibility of contentions.

CONCLUSION

SLOMFP's Third Late-Filed Contention does not meet the heavy burden required of it under 10 C.F.R. § 2.714(a)(1), nor does it meet the standards for admissibility of contentions under 10 C.F.R. § 2.714(b)(2). Therefore, the Licensing Board should not admit SLOMFP's third late-filed contention for litigation in this proceeding.

Respectfully submitted,

A handwritten signature in cursive script that reads "Ann P. Hodgdon".

Ann P. Hodgdon
Counsel for NRC Staff

A handwritten signature in cursive script that reads "Lisa B. Clark".

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of May 1993