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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

SERVED JUN 17 1993

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Frederick J. Shon

In the Matter of	Docket Nos. 50-275-OLA-2 50-323-OLA-2
PACIFIC GAS AND ELECTRIC COMPANY	ASLBP No. 92-669-03-OLA-2
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	(Construction Period Recovery)
Facility Operating Licenses No. DPR-80 and DPR-82	June 17, 1993

PREHEARING CONFERENCE ORDER
(Late-filed Contentions and Discovery)

Pending before us are three late-filed contentions submitted by the San Luis Obispo Mothers for Peace (MFP), an Intervenor in this proceeding.[1] Pacific Gas and Electric

[1]San Luis Obispo Mothers for Peace Late-filed Contention, dated March 12, 1993; San Luis Obispo Mothers for Peace Second Late-filed Contention, dated March 16, 1983; San Luis Obispo Mothers for Peace Third Late-filed Contention, dated April 12, 1983. The deadline for filing timely contentions was set by this Board as October 26, 1992. MFP filed 11 proposed contentions by that deadline, of which we ultimately found two to be acceptable. LBP-93-1, 37 NRC 5 (January 21, 1993). The three new contentions before us were filed subsequent to that deadline and hence are "late-filed."

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Co. (Applicant or PG&E) and the NRC Staff each oppose admission of all of these contentions.[2] On May 11-12, 1993, we held a prehearing conference at the Commission's office at Walnut Creek, California, to discuss these contentions, as well as outstanding discovery questions.[3]

For reasons set forth below, and confirming our ruling at the aforementioned prehearing conference (Tr. 485), we are denying all three of these contentions but permitting specified portions of two of them to be litigated in the context of already-admitted Contention I. (There no longer appears to be a genuine dispute over two significant portions of the other contention, by virtue of action taken by PG&E.)

A. Standards. In ruling on late-filed contentions, we are required to determine whether the contention meets the generally applicable contention requirements, set forth in 10 C.F.R. § 2.714(b) and (d). (These requirements were

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[2]PG&E's Response to San Luis Obispo Mothers for Peace First Late-filed Contention, dated April 2, 1993; PG&E's Response to MFP Second Late-filed Contention, dated April 6, 1993; NRC Staff's Response to MFP First Late-filed Contention, dated April 14, 1993; NRC Staff's Response to MFP Second Late-filed Contention, dated April 14, 1993; PG&E's Response to MFP Third Late-filed Contention, dated April 27, 1993; NRC Staff's Response to MFP Third Late-filed Contention, dated May 4, 1993.

[3]Tr. 407-568. The conference was announced through our Notice of Prehearing Conference, dated April 23, 1993 (58 Fed. Reg. 26177, April 30, 1993).

described in detail in earlier opinions in this proceeding.[4]) In addition, however, we also must consider whether the proponent of such a contention has satisfied the late-filed criteria, involving a balance of the following factors:[5]

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

These five factors are not equally weighted--nor do all of them have to be evaluated favorably to the proponent of a late-filed contention in order for the contention to be accepted. Good cause for late filing has been described as the most significant.[6] Absent good cause, a petitioner must make a stronger showing on the other factors in order to have a contention accepted.[7] But the good-cause factor

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[4]LBP-92-27, 36 NRC 196, 200-01 (September 24, 1992); LBP-93-1, 37 NRC 5, 13-14 (January 21, 1993).

[5]10 C.F.R. § 2.714(a)(1).

[6]Nuclear Fuel Services Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

[7]Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982).

is not to be given controlling weight; all of them must be considered.[8] Indeed, in applying these factors, a Licensing Board has "broad discretion in the circumstances of individual cases."[9]

In the circumstances of this case, we determined that we would first consider the validity and admissibility under 10 C.F.R. § 2.714 of the three contentions before us. Only if a contention warranted acceptance under those standards would we then consider the timeliness aspects--an inquiry that we in fact were never required to reach.

This approach was contrary to that advocated by the Applicant and Staff. Relying on cases such as Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156 (March 9, 1993); Texas Utilities Electric Co.(Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 70 (1992); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461 (1985) and Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1983), they would have had us first determine whether the contentions withstood the timeliness criteria and, only if so, have us consider their admissibility.

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[8]Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

[9]West Valley, supra, 1 NRC at 275.

Under either approach, a late-filed contention would not be admitted if it failed to meet either the late-filed criteria or the admissibility criteria of § 2.714. In the current context, however, the Intervenors, who lack extensive funding, are not "sleeping on their rights" but, instead, are attempting to raise technically sophisticated issues with the assistance of outside technical consultants. The Board therefore considers it to be in the public interest and within its discretion to consider the seriousness of the asserted safety or environmental problem before considering the late-filed criteria, in order to avoid the possibility of overlooking a safety or environmentally significant matter for purely procedural reasons.

Cases cited in support of the opposite approach such as CLI-93-4, CLI-92-12 and ALAB-707 involved attempts to intervene years (rather than days, weeks or even months) late--indeed, following the close of the entire record in a proceeding. At that stage, a more stringent application of timeliness factors might arguably be mandated and we are inclined to read those decisions in that light. As for ALAB-816, that decision, although not involving excessive lateness, involved a failure of the petitioner even to address the late-filed factors. Here, there was no such complete failure.

In any event, those decisions do not necessarily provide authority for the position taken by the Applicant and Staff here. For, even in the circumstances where there was extreme untimeliness, the Commission (in Comanche Peak) and the Appeal Board (in Fermi) took a close look at the safety significance of the issues sought to be raised. And, in summarily denying the Pilgrim petitioner's claim for failure even to mention the late-filed factors, the Appeal Board noted both that the petitioner had participated in other NRC proceedings and, more significantly, that nothing in its petition suggested that a "possibly serious safety problem" might escape proper scrutiny.[10]

With these standards in mind, we turn to the specific proposed contentions before us:

B. Contention XI. The first of the late-filed contentions reads as follows:

> XI. The San Luis Obispo Mothers for Peace challenges the Environmental Assessment [EA] and Finding of No Significant Impact (TAC NOS. M84006 and M84007) issued February 3, 1993. The NRC should be required to prepare an Environmental Impact Statement [EIS].

This contention was filed on March 12, 1993. Although the EA issued on February 3, 1993, MFP advises that it did

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[10] Pilgrim, supra, 22 NRC at 468.

not receive its copy until February 12, 1993, 28 days prior to its filing the contention.[11]

This contention had a timely-filed predecessor--i.e., the former Contention XI. That earlier contention also sought the issuance of an EIS. We rejected it solely because we considered it premature, inasmuch as the EA, in which the Staff determines whether an EIS need be prepared, had not yet been released.[12] Thus, not wishing either to presume any particular Staff determination prior to its actually being made or to require a party to do so, we determined that there was at least a possibility that the contention would become moot by virtue of Staff action (see Tr. 205). Therefore, we did not rule on the bases of the contention that was submitted but rejected it only on the ground of its prematurity.

In fact, the EA as issued determines that, in the Staff's view, an EIS is not warranted. The current contention (as well as the earlier version) challenges that conclusion.

The EA is also the subject of two questions posed by the Board by our Memorandum and Order (Addendum to FES), dated March 19, 1993. In particular, we noted that the EA

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[11]Staff issuance of the EA was announced in the Federal Register of February 10, 1993. 58 Fed. Reg. 7899-7903. The Notice set forth the entire contents of the EA.

[12]LBP-93-1, supra, 37 NRC at 35-36.

sanctioned the various environmental conclusions reached in the 1973 EIS but neglected to reference, in its overall conclusion, any of the changes noted in an Addendum issued by the Staff in May 1976.[13] We asked (1) whether the existence of the Addendum invalidated in whole or in part the conclusions reached in the EA and (2) whether the omission of reference to the Addendum from the EA's conclusion supports in some degree MFP's charges concerning the adequacy of the methodology used to prepare the EA--i.e., was preparation of the existing EA merely a pro forma exercise by the Staff?

All parties responded to the questions with similar positions.[14] Based on references to the Addendum in connection with particular environmental findings of the EA, none of the parties faulted the EA for failing specifically to reference the Addendum in the ultimate conclusion. On that basis, we will treat the EA as including the Addendum

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[13]See 41 Fed. Reg. 22895 (June 7, 1976), noting that on May 28, 1976 the Addendum had been issued.

[14]NRC Staff Response to Licensing Board's Questions, dated April 1, 1993; Pacific Gas & Electric Company's Response to Memorandum and Order (Addendum to FES), dated April 2, 1993; Intervenor San Luis Obispo Mothers for Peace Response to Memorandum and Order (Addendum to FES), dated April 8, 1993.

and will judge the contention's adequacy based on the challenges to the EA proffered by MFP.[15]

1. MFP position.

MFP assigns six reasons or bases for showing that the proposed license extensions "pose a significant, previously unconsidered risk to the human environment" and thereby for questioning the accuracy and adequacy of the conclusions reached in the EA. We will describe them seriatim.

(a) The first of the bases--aging--is the most extensive. MFP claims that the environmental impacts considered as a basis for the Staff's conclusion in the EA--i.e., a continuation of the types of impacts evaluated in 1973 or 1976 by the EIS or its Addendum--are not based on fact inasmuch as, in the EA, they fail to factor in newly discovered information on the methodology of aging, lack of technology to detect certain aging effects, as well as periods of time during which the components were being stored but not operated (and hence allegedly not considered as undergoing aging.)

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[15]On April 14, 1993, PG&E moved to strike certain material from MFP's response that it regarded as extraneous material. On April 26, 1993, MFP filed a reply explaining why the material was pertinent to its reply. As announced at the prehearing conference (Tr. 521-22), because we are not relying for any purpose on the allegedly extraneous statements, and because of our ruling denying admission of the contention to which the material related, there is no need for us to act on PG&E's motion, and we decline to do so.

In other words, various plant components (several are explicitly listed) will age more rapidly than originally projected, leading to a greater likelihood or risk of adverse impacts during the period of projected operation. The EA allegedly does not consider any aging effects in its calculation of projected environmental impacts. More particularly, the "1973 FES did not consider the full term of degradation and aging effects to which the DCNPP would be subjected over the 55-year lifetime that is now being proposed."[16] Further, the risk of unforeseen aging effects is said to be exacerbated by improper maintenance practices, as alleged in Contention I.

(b) The second basis--population changes--asserts that increases in population in the area of the plant have exceeded population changes predicted in the EIS (and assumed by the EA) and thus have upset some of the environmental conclusions of the FES based on population density or location (as in analyzing effects of offsite releases from postulated accidents). MFP also questions the EA's conclusion that population-center-distance standards of 10 CFR Part 100 will remain satisfied throughout the extended license term (although MFP does not provide any explicit information that would undercut the EA's conclusion).

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[16]MFP Late-filed Contention, dated March 12, 1993, at 8.

(c) The third basis challenges the EA for failing to consider cumulative and chronic impact of low-level radiation on population surrounding the plant, including unpredictable unplanned releases of radiation such as have occurred on several named occasions in the past. MFP cites high rates of lung and breast cancer in San Luis Obispo County and asserts that the correlation between low-level releases and cancer did not exist in 1973. MFP seeks an EIS to perform this analysis.

(d-f) The fourth and fifth bases take issue, respectively, with perceived deficiencies in which the EA deals with high and low-level waste. The sixth and final basis challenges the cost-benefit balance set forth in the EA, premised mostly on differences of opinion on the dollar cost of the power to be produced and the EA's conclusion that, if the licenses are not extended beyond 2008, PG&E would have to construct new baseload capacity.

To justify the late filing of this contention, MFP cites the release of the EA on February 3, 1993, its receipt of the document on February 12, and our earlier refusal to accept its EIS contention on grounds of prematurity. MFP adds that it proceeded as rapidly as it could in preparing its contention (given requirements to prepare discovery requests during that period) and that the 28-day period was a reasonable time for it to have filed its contention.

2. Applicant and Staff positions.

The Applicant and Staff each claim that MFP has not demonstrated good cause for late filing. They further assert that the contention fails to accord with NRC requirements for contentions.

With respect to lateness, the Applicant and Staff each claim that the facts forming the basis for the EA's conclusion are founded on those set forth in the Applicant's Environmental Report and in no case include facts arising subsequent to the December 10, 1992 prehearing conference. They each point to the Commission's rule that requires environmental contentions to be initially submitted on the basis of the Applicant's Environmental Report, subject to modification if the Staff review document differs significantly. 10 C.F.R. § 2.714(b)(2).

With regard to the substance of the contention, the Applicant claims that we have already rejected the aging aspects of the contention based on our prior resolution of Contention IV, which we found inadmissible. Both the Applicant and Staff claim that no grounds are asserted that would deem the instant licensing proposal to be a major federal action requiring preparation of an EIS.

3. Board analysis.

In the view of MFP (see Tr. 413), by far the most significant allegations in this contention are those concerning aging. In rejecting the initial Contention IV,

concerning aging, we pointed to the lack of a sufficient basis for admitting this contention standing alone. We also noted that, to the extent age-related degradation is subject to maintenance efficacy, the subject will be examined in conjunction with Contention I, which we were accepting.[17]

As we explained at the recent prehearing conference, all components are subject to aging. In order for a plant to be operable, it must utilize a maintenance and surveillance system that will accurately and timely detect such degradation, including degradation that occurs earlier than might otherwise have been expected, so that repair or replacement can be accommodated in a timely fashion. See Tr. 413. MFP in its new contention has listed a number of components that allegedly have prematurely aged.[18]

With respect to age-related degradation, we inquired through our Memorandum (Questions for Parties), dated April 16, 1993, what objection MFP (and other parties) would have to litigating the "aging" aspects of the first late-filed contention in conjunction with Contention I. We referred to our suggestion in LBP-93-1 that the earlier "aging" contention (Contention IV) could be litigated in that manner.

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[17]LBP-93-1, supra, 37 NRC at 25.

[18]MFP Late-filed Contention, dated March 12, 1993, at 4.

MFP offered no objection to our suggestion, although it expressed a desire also to consider the "aging" matters as a reason for requiring an EIS. MFP further commented that the "aging" contention was somewhat broader than what would fit into the Surveillance and Maintenance Program contention (Tr. 413).

The Applicant and Staff, however, both opposed the suggestion. The Applicant stressed the apparently broader scope of the aging allegations than what would reasonably fit into the Maintenance and Surveillance contention together with the asserted lateness of the claim. The Staff took essentially the same position, although it stressed what it regarded as the lateness of the filing.

Taking into account the entire record on this contention, it is apparent to us that MFP has offered no valid bases for its claim that an EIS rather than an EA should have been issued. It has not provided the "substantial and significant information" that we previously indicated would be requisite for an EIS contention.[19] It has defined no impacts that were not covered in the FES that will eventuate from the proposed license amendment. It acknowledged that its aging allegations would result not in producing impacts different in kind from those previously reviewed (in particular, results of accidents) but only in a

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[19]LBP-93-1, 37 NRC at 36.

potentially greater likelihood of occurrence of those impacts (Tr. 427).

Moreover, the population projections for the area cited by MFP are not sufficiently different from those projected in the EIS to provide a basis for the claim that a new EIS is warranted. Further, as we previously held, the high-level waste matters and cost-benefit matters raised by MFP are not litigable in a proceeding of this sort.[20] Finally, there are insufficient bases provided for the low-level waste allegations.

Beyond that, the most significant of these matters for MFP--age-related degradation--to a great extent is litigable under Contention I, although as a safety rather than an environmental matter, and we are permitting such litigation. The lateness factors are not applicable--these matters always were litigable under Contention I. We therefore are rejecting the first late-filed contention but are expressly reiterating that its aging allegations may be litigated to the extent they bear on the maintenance and surveillance programs covered by Contention I. (We are modifying the discovery schedule to accommodate this further clarification of the scope of Contention I.)

C. Contention V. The second late-filed contention reads as follows:

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[20] Id., at 29-30, 36.

> V. The San Luis Obispo Mothers for Peace contends that the interim fire protection measures in place at DCNPP to compensate for the faulty fire barrier material, Thermo-Lag, are inadequate because the material itself creates a fire hazard. The proposed license extension request should therefore be denied until this situation is resolved.

This contention was filed on March 16, 1993. It supplements or expands upon a previous Contention V, also challenging certain uses of Thermo-Lag at the Diablo Canyon facility. The initially filed Contention V sought to challenge both the permanent and interim use of Thermo-Lag. We rejected the contention insofar as it sought to raise a generic issue, based on lack of an adequate basis supporting such an issue.[21] We accepted Contention V insofar as it sought to challenge the interim measures adopted to compensate for the reliance on Thermo-Lag. But we did not read the contention as a challenge to the adequacy of the interim measures. On the bases submitted by MFP, we ruled that the contention was limited to PG&E's implementation of the interim measures--i.e., the "adequacy of the Applicant's adherence to interim measures."[22]

As resubmitted, the contention clearly challenges the adequacy of the interim measures as well as the Applicant's implementation of those measures. Additional bases are provided in support of such an expansion.

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[21] Id., at 27.

[22] Memorandum and Order (Discovery and Hearing Schedules), dated February 9, 1993, at 2.

1. MFP Position.

One of the primary thrusts of the newly formulated contention is that Thermo-Lag is combustible--that "the material itself creates a fire hazard." As MFP points out, it made a similar claim in filing its initial Thermo-Lag contention. But we rejected the combustibility claim for lack of an adequate basis--in particular, a purported study that MFP conceded did not in fact exist, and newspaper accounts that appeared to misinterpret statements of certain NRC officials. (Certain information in NRC Bulletin 92-01, dated June 24, 1992, was also referenced, but only in terms of the necessity for compensatory measures.)[23]

MFP now makes further claims with respect to the adequacy of fire watches to serve as an interim corrective action. It also cites what it claims are newly discovered deficiencies with respect to the seismic aspects of Thermo-Lag, ampacity derating requirements, voids, and the validity of hose stream tests. Finally, it provides general data concerning the likelihood of fires in nuclear power plants.

In support of these theses, MFP particularly cites NRC Information Notice 92-82, dated December 15, 1992. (That

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[23]Bulletin 92-01 referenced tests of Thermo-Lag indicating that the material would not provide the degree of fire protection required, but did not suggest that the material itself was combustible. (Other bases included in the contention concerned faulty implementation of the compensatory measures and provided authority for the implementation claim that we actually admitted.)

document was issued subsequent to the date of the first prehearing conference in this proceeding, where we considered the various contentions that previously had been filed, including Contention V.) More important, MFP cites a Partial Director's Decision issued by the Director of NRC's Office of Nuclear Reactor Regulation (NRR) on February 1, 1993,[24] and statements made to Congress on March 3, 1993 by the NRC Inspector General and by the Chairman of the Commission. (MFP further references an October 21, 1992, NRR Memorandum indicating that further evaluations of Thermo-Lag by its manufacturer would be completed in 30-45 days.)

2. Applicant and Staff positions.

As in the previous contention, the Applicant and Staff each claim both that MFP lacks good cause for its late filing and that the contention, as filed, lacks adequate bases and hence does not comport with NRC contention standards. The Applicant adds that the adequacy of the interim measures has been resolved generically by the Commission and, in any event, is unrelated to the proposed license amendments at issue in this proceeding.[25]

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[24]Texas Utilities Electric Co.(Comanche Peak Steam Electric Station, Units 1 and 2), et al, DD-93-3, 37 NRC 113 (1993).

[25]Pacific Gas & Electric Company's Response to San Luis Obispo Mothers for Peace Second Late-Filed Contention, dated April 6, 1993, at 1-2, 28-29, 35-37.

3. Board Analysis.

At the outset, we reject out of hand the Applicant's claim that the February 1, 1993 Partial Director's Decision could somehow operate to bar MFP's claim. That Decision is no more than a decision of an NRC Division Director on a 10 C.F.R. § 2.206 claim. It is not subject to appellate review at the behest of a party, either before the Commission or a Court of Appeals, even for abuse of discretion. See Heckler v. Cheney, 470 U.S. 821 (1985); Arnow v. NRC, 868 F.2d 223 (7th Cir., 1989); Safe Energy Coalition of Michigan v. NRC, 866 F.2d 1473 (D.C.Cir., 1989). It thus does not constitute an adjudicatory decision under § 189.b of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(b), and quite likely could not even bar the petitioner from seeking relief before NRC in an adjudicatory forum, were one available.[26]

Similarly, we reject PG&E's claim that the adequacy of interim measures is not related to the license amendments at issue in this proceeding. We dealt with this issue in LBP-93-1 and add only that it is far too late in the day to seek reconsideration of that decision.

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[26] Cf. 10 C.F.R. Part 52, where denial of a § 2.206 petition was explicitly made reviewable. With such reviewability, the licensing provisions in question were upheld. Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir., 1992).

Turning to the contention itself, we first note that its primary allegation is that Thermo-Lag itself creates a fire hazard--i.e., is combustible. We examined each basis cited by MFP to determine whether any supported this claim.

In that connection, our Memorandum (Questions for Parties), dated April 16, 1993, posed a question concerning a possible inconsistency between the Applicant's characterization of Thermo-Lag as "noncombustible" (under specified criteria) in its interim plan submission (concerning use of Thermo-Lag as a radiant energy shield inside the containment) and the Staff's evaluation of the material as being "combustible" (using other criteria) in Information Notice 92-82.[27] We asked that parties be prepared to address this inquiry at the prehearing conference.

Although not required to do so, the Applicant submitted a written response dated May 7, 1993. It differentiated the use of Thermo-Lag as a radiant energy shield inside the containment from its use as a fire barrier. PG&E further stated, however, that, as provided in its letter to the Staff dated April 30, 1993, it has elected to replace Thermo-Lag radiant energy heat shields at the Diablo Canyon facility with shields of another manufacturer. Because of

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[27]MFP specifically cited Information Notice 92-82 (December 15, 1982) for this aspect of its combustibility claim.

that action, time has overtaken this portion of the contention: the aspect of Thermo-Lag combustibility raised by MFP about which we had inquired. To that extent, we are treating that aspect of MFP's contention as no longer raising an issue concerning which there is a genuine dispute.

The other aspect of the contention that has been overtaken by time is the alleged ampacity derating errors resulting from reported miscalculations by the manufacturer of Thermo-Lag insulation. MFP claims that PG&E "has yet to take steps" to address this issue other than through compensatory measures. As a result, according to MFP, a fire could result. However, at the prehearing conference, in response to our explicit inquiry, PG&E reported that, as of April 16, 1993, it had performed at least a preliminary recalculation and had determined that its margins were adequate (Tr. 450-51).[28] Because the gist of this aspect of the contention was the asserted failure of PG&E to have performed any recalculation, there no longer appears to be a genuine dispute on MFP's ampacity claims.[29]

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[28]PG&E referenced its letter to the NRC Staff dated April 16, 1993. On June 9, 1993, confirming an offer made at the prehearing conference (Tr. 450-51), PG&E provided the Licensing Board with copies of its April 16, 1993 letter, indicating that it had earlier provided copies to other parties.

[29]We express no view of the contention's validity (apart from timeliness considerations) at the time it was

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Furthermore, those two allegations appear to form the only genuine bases potentially supporting MFP's claim that Thermo-Lag itself creates a fire hazard. In terms of regulatory standards, except where specifically required (as in the containment example noted above), there appears to be no general requirement or (for the Diablo Canyon facility) technical specification that Thermo-Lag (or any other fire-barrier material) be non-combustible--only that it provide a fire barrier for a specified time period. Specifically, MFP's fire-watch claim states that Thermo-Lag failed the "NRC cold side temperature limit in 22 minutes and burned through in 46 minutes" (citing NRC Information Notice 92-55, July 27, 1992). However, the cited Information Notice had nothing to do with Thermo-Lag creating a fire hazard but, rather, referenced tests that measured its ability to serve as a fire barrier to protect various components.

With regard to combustibility, apart from the claims for which a genuine dispute no longer exists (see earlier discussion), MFP's further references to Information Notice 92-82 (December 15, 1992) concern heat release of the material but have nothing to do with flammability. They

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[29](...continued)
filed, prior to the Applicant's performance of the recalculation in question. Nor do we express any view of the adequacy of the recalculation effort. No claim to the contrary is currently before us. Cf. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149 (1991).

accordingly do not stand for the proposition for which cited.

Similarly, MFP's "seismic" claims also do not support combustibility. They state that the material "may crack or crumble into powder material or fragments" and then hypothesize (without further basis) that the crumbled material "provides the potential scenario of loss of fire protection and fuel for the fire." No bases are cited for either of the claims--most particularly, the "fuel for the fire" claim. Without such support, the contention cannot be accepted.

With respect to "voids," MFP has offered no information demonstrating any voids in Thermo-Lag insulation used at Diablo Canyon. Although, as MFP claims, voids arguably may contribute to the material's flammability, there is no basis offered that would connect this claim to the Diablo Canyon facility.

MFP next references the failure of Thermo-Lag to pass certain "hose stream" tests. As the Applicant points out,[30] the tests are used as an indicator of the potential for electrical faulting after suppression of a fire. They do not relate to the flammability of the material or the validity of fire watches used as the heart of the interim corrective measures. The test failures of Thermo-Lag,

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[30]PG&E's Response to MFP Second Late-filed Contention, dated April 6, 1993, at 34.

therefore, cannot validly found the contention before us.[31]

Finally, MFP's references to investigations and to the frequency and significance of fires at nuclear plants generally appear to have no specific relationship to the Diablo Canyon facility. Indeed, the Commission has specifically held that the "bare pendency of an investigation" does not reflect that there is a substantive problem, that there has been any violation or, indeed, that there even exists an outstanding significant safety issue. Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986).[32] These claims, therefore, thus cannot serve as valid bases for this contention.

In conclusion, we have determined that two aspects of this contention are no longer in dispute because of action taken by PG&E and that there are no bases adequate to create

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[31]MFP's complaint concerning the planned substitution of other tests for hose-stream tests relates to proposed standards by which Thermo-Lag is to be judged in the future and clearly bears no relationship to the use at Diablo Canyon of Thermo-Lag insulation.

[32]This ruling related to a motion to reopen a closed record, where a higher standard of relevance or significance must be satisfied. Nonetheless, we believe the ruling reflects the likely reasoning of the Commission in a situation such as is present here. This is particularly so where, as here, the investigations in question do not appear to be directed at the Diablo Canyon facility but rather (as the Staff observes) at various practices followed by the manufacturer of Thermo-Lag.

a genuine issue with respect to the other allegations. We thus are denying this contention without regard to its timeliness. In that connection, however, although aspects of the Thermo-Lag contention might not have survived a timeliness analysis, we note that the contention involves an issue that has been developing over several years. At the time that problems with Thermo-Lag first were revealed (or, in this case, at the time timely contentions could have been filed), there was considerable doubt as to whether an appropriate contention could have been formulated. At that time, sufficient tests had not been performed to indicate whether there was a significant safety problem. The Applicant (although not the Staff) took the position that "Proposed Contention V addresses a current issue * * * that is not safety significant."[33] The tests relied on by MFP in support of its original contention were inconclusive at best. Indeed, MFP tried to submit an appropriate contention but, except for one limited issue, did not succeed.

As MFP now points out, tests by the manufacturer were not scheduled to be completed prior to 30 to 45 days from October 20, 1992.[34] And the results of the NIST test, although apparently provided to the NRC Staff on August 31,

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[33]PG&E's Response to Petitioner's Supplement to Petition to Intervene, dated November 18, 1992, at 37.

[34]MFP Second Late-filed Contention, dated March 16, 1993, Attachment 4.

1992, were not necessarily available to the public on that date. The test was released as part of Information Notice 92-82, dated December 15, 1992.

Given these considerations, we cannot conclude that all aspects of MFP's contention would or should have been rejected on timeliness grounds.

D. Contention XII. The third late-filed contention 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 cables (Okonite cables 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.

This contention was formally filed on April 12, 1993, but on April 1 and 2, 1993, MFP's technical advisors (MHB Technical Associates) forwarded underlying data to the Staff. (The Board was served with these documents, either by MFP or the NRC Staff.) On April 14, 1993, the Staff responded to the technical advisors, and on April 16, 1993, it prepared a Board Notification (#93-08) advising the Board and parties of its response, and transmitting the response

together with the incoming communication from MHB Associates (the above-mentioned April 1-2, 1993, communications).[35]

1. MFP Position. In submitting this contention, MFP first notes that there may be some overlap with Contention I (Maintenance and Surveillance). As written, the contention formally challenges both the Maintenance and Surveillance programs for cables and the environmental qualification program.

As bases, MFP cites four examples of failed cables (one 12 kV cable and three 4 kV cables). The most recent occurred on February 5, 1993, and was the subject of the April 1-2, 1993 communications with the Staff; it resulted in an electrical fire. The earlier cable failures allegedly occurred in October, 1989, May, 1992 and October, 1992. MFP cites these failures as the type of cable failure identified (generically) by the Staff in NRC Information Notice 92-81, "Potential Deficiency of Electrical Cables with Bonded Hypalon Jackets," dated December 12, 1992 (dealing with the failure of certain cables to meet Environmental Qualification standards). MFP also cites several internal Staff communications and an NRC memorandum to NUMARC relating to cables with bonded Hypalon jackets.

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[35]On April 28, 1993, PG&E furnished the Board and parties with a report to the Staff concerning cable failures. On May 3, 1993, the Staff furnished the Board and parties with a further Board Notification (#93-09) transmitting copies of an Inspection Report dealing, inter alia, with the cable failures.

MFP goes on to assert that the cable failures resulted from exposure to water and that the maintenance and surveillance system fails to detect whether the cables are being used in an environment for which they are qualified.

2. Applicant and Staff Positions. The Applicant and Staff treat this contention in essentially three parts. First, they claim that Environmental Qualification is irrelevant to the four cables in question, inasmuch as none of them are required to be environmentally qualified (pursuant to standards set forth in 10 C.F.R. § 50.49). As set forth in an affidavit of the co-author of IN 92-81:

> The cables that failed at Diablo Canyon are 12 kV and 4 kV 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 4 kV cables were not degraded and may have failed due to a manufacturing defect. The 12 kV cables are not used in any safety-related application at Diablo Canyon. They are not required to be environmentally qualified . . . .[36]

PG&E and the Staff further claim that an environmental qualification issue is untimely, without good cause, inasmuch as IN 92-81 had been issued as far back as December, 1992 (more than 4 months prior to the filing of the contention). Finally, they claim that the failed cable questions are also untimely.

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[36]Affidavit of Ann M. Dummer, NRR, dated April 21, 1993, at 2, ¶ 5.

3. Board Analysis. It is clear that, insofar as environmental qualification is concerned, this contention lacks any basis that would indicate that there is any such problem at Diablo Canyon. This portion of the contention must therefore be dismissed for lack of a viable basis.

As for the cable failures at Diablo Canyon, the prime question is whether the surveillance and maintenance system is adequate to detect any incipient failures. At least some of the documentation submitted as part of the contention indicates that submerged cables are not within the current scope of the maintenance and surveillance programs. These questions are already litigable under Contention I, so that a new, late-filed contention is not warranted. As we announced at the prehearing conference (Tr. 458), we are thus denying the contention but permitting the failed-cable questions at Diablo Canyon to be litigated under Contention I. (We reiterate that, in LBP-93-1, we specifically permitted additional bases for Contention I to be identified.[37])

E. Conclusion on Contentions.

We have examined all of the bases cited for the proposed contentions and find that, except for those portions of Contentions XI and XII already litigable under Contention I, none warrant the admission of new contentions.

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[37] 37 NRC at 20-21.

In so holding, we reiterate that we are operating under the raised threshold for contentions enacted by the Commission in 1989.[38]

F. Discovery.

1. Discovery Requests from MFP to PG&E. At the prehearing conference, we were faced with a number of discovery motions filed by MFP against PG&E--including motions for additional discovery, motions to compel discovery, motions for protective orders, and motions to impose sanctions for discovery deficiencies. Because many of the motions were related in part to whether or not the new contentions were admitted, we suggested, after our ruling on the contentions, that MFP and PG&E attempt to resolve their differences and agree upon a revised schedule for discovery (including further discovery on the enhanced portion of Contention I). With minor disagreements (which we resolved), they did so. We approved the following discovery schedule (see Tr. 491-498):

Cables:

May 19, 1993:	MFP to file additional interrogatories on cable matters (four copies to be faxed to PG&E by May 21, 1993).
May 26, 1993:	PG&E to respond to earlier filed MFP interrogatories 1-7 on cable questions.
	PG&E to respond to MFP additional interrogatories on cable matters within seven days of receipt.

[38]See id., at 13; Tr. 458.

Thermo-Lag:

May 16, 1993: PG&E to respond to Interrogatories 23-30 in MFP third set of interrogatories (re: Thermo-Lag).

May 26, 1993: MFP may inspect fire logs until the end of May 26.

Aging:

June 4, 1993: MFP Interrogatories on component-specific aging issues to be faxed to PG&E. Interrogatories to include follow-up interrogatories, including particular locations of check valves in connection with Interrogatory No. 6 of MFP third set. (Tr. 492, 498.)

Maintenance and Surveillance (follow-up discovery):

May 21, 1993: MFP to provide by fax list of NCRs referenced in 1990-92 NCRs that may date back to two years prior to 1990. PG&E to respond within seven days of receipt of request.

May 26, 1993: PG&E to provide specified NCRs and responses to specified Action Requests (ARs), plus 1990-92 OSRG annual and quarterly reports to the extent relevant to maintenance and surveillance.

May 26, 1993: PG&E to provide copies of specified plant procedures.

May 26, 1993: PG&E to provide further response to MFP Question 9, second set of interrogatories.

Information from INPO documents:

MFP filed a motion to compel relating to its Interrogatories 12 and 13 of its second set of interrogatories. Those interrogatories sought reports prepared by the Institute for Nuclear Power Operations

(INPO) concerning "fire protection and/or maintenance and surveillance programs or activities" (Interrogatory 12) and "fire protection and/or maintenance and surveillance programs or activities specifically at DCNPP" (Interrogatory 13). PG&E objected to these requests as overbroad and as seeking information that is "privileged and subject to non-disclosure," citing Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992), cert. den., 61 U.S. Law Week 3647 (March 22, 1993).

As justification for its Motion to Compel, MFP noted that "PG&E does not cite any regulation or case that requires the Board to protect these documents from disclosure."[39] MFP goes on to claim that the INPO documents are "relevant and useful because they provide the industry's own analysis of the effectiveness of safety programs."[40] At the prehearing conference, MFP withdrew its request for Interrogatory 12 information (general information) and information concerning the fire-protection program (a portion of Interrogatory 13). It limited its request to information explicitly relevant to maintenance and surveillance at Diablo Canyon (Interrogatory 13)

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[39]Motion to Compel, dated April 26, 1993, at 3, emphasis supplied.

[40]Id.

(Tr. 502). The information specifically relates to INPO's evaluation of the DCNPP maintenance and surveillance program and is clearly relevant to Contention I.

In evaluating this claim of privilege, we note first that the information does not appear to be "privileged" in the traditional sense but, rather, only subject to non-disclosure under the Freedom of Information Act (FOIA). According to the court decision relied upon, the information is of the type falling within FOIA exemption 4. Those standards are set forth in 10 C.F.R. § 2.790 of the Commission's Rules of Practice, and the exemption 4 criteria are spelled out in 10 C.F.R. § 2.790(a)(4).

The Board heard arguments concerning whether the information should be released in litigation circumstances and, if so, whether it should be subject to a protective order. MFP was not able to demonstrate any particular need for the document beyond that set forth in its motion, other than curiosity (Tr. 511). PG&E maintained that the information on which the INPO evaluations were formulated is all publicly available data, that MFP could reach its own conclusions from that data, and that PG&E would not use INPO reports as part of its affirmative case (Tr. 503-04).

As for reasons for the "privilege," PG&E referenced the "strong public policy interest in favor of self-critical, internal review and evaluation by licensees of potential problems." It adds that

> * * * the confidentiality of INPO evaluations is crucial to the accuracy, value, and self-critical nature of these evaluations.

PG&E also claims that the information sought is overly broad.[41]

In making our determination as to whether the information in question should or should not be released, we must take into account the factors spelled out in 10 C.F.R. § 2.790(b)(4)-(6). At the present time, the record is inadequate for us to make that determination. Accordingly, we invite parties to submit by affidavit information contemplated by those paragraphs. Such information would include that contemplated by 10 C.F.R. § 2.790(b)(4) (concerning the nature of the information) and § 2.790(b)(5) (concerning the necessity of the information for the effective performance of this Board's duties). In addition, we invite parties to discuss whether the provisions of 10 C.F.R. § 2.790(b)(6) require us to order release of the information subject to a protective order.

Such affidavits and briefs on the legal question should be submitted within 10 days of service of this Order. Pending our receipt and consideration of any such affidavits and brief, we are withholding any ruling on the requested discovery.

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[41]PG&E's Response to Second Set of Written Interrogatories and Requests for the Production of Documents filed by MFP, dated April 12, 1993, at 14-15.

2. Discovery from PG&E to MFP:

By June 21, 1993, MFP is to provide certain specified additional answers to PG&E interrogatories (including identification of proposed witnesses)(Tr. 527, 537-38).

3. Discovery from MFP to the Staff:

Discovery against the NRC Staff is subject to different standards than would be applicable between other parties. See 10 C.F.R. § 2.720(h). Under those standards, availability of information in the Public Document Room will bar discovery of that information. The Board declined to grant MFP's Motion to Compel, dated April 26, 1993, against the NRC Staff (Tr. 559). The questions related to the reliability of fire-watch personnel, inspections of PG&E's fire-watch program prior to July, 1991 (the Staff had provided information subsequent to that time), and the Staff's position on certain contentions or issues. The Board was advised that there was no general information or studies on the reliability of fire watches of which the Staff was aware, that inspections of PG&E's program were available in the public document room or through NUDOCS, and that the Staff had not yet taken a position on the contentions or issues, beyond that in its briefs opposing admission of the contentions.

G. Future Schedules:

July 2, 1993:	Filing of Motions for Summary Disposition pursuant to 10 C.F.R. § 2.749. Responses to follow times specified in 10 C.F.R. § 2.749.[42]
Mid-September	Simultaneous filing of direct testimony on remaining contentions. These dates could be advanced if parties were to waive the filing of summary disposition motions, as informally discussed at the prehearing conference (Tr. 567).
October, 1993	Target for hearing.

H. ORDER.

For the reasons stated, it is, this 17th day of June, 1993:

ORDERED

1. The admittance of the three proposed late-filed contentions, dated March 12, 1993, March 16, 1993 and April 12, 1993, respectively, is hereby denied.

2. Various discovery motions are decided as set forth in part F of this Memorandum and Order.

3. Affidavits and briefs with respect to INPO information may be filed not later than 10 days following service of this Order. Our ruling on discovery requests involving INPO information is hereby deferred.

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[42]The Board advised the parties that, if they were to forego the opportunity to file motions for summary disposition on all issues, the hearing dates could be advanced. PG&E declined to accept that offer at the time, although indicating that it may still do so (Tr. 561, 567).

4. The schedule outlined in part G of this Memorandum and Order is hereby confirmed, subject to more precise delineation at a later date.

The Atomic Safety and
Licensing Board

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Jerry R Kline

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon

Frederick J. Shon
ADMINISTRATIVE JUDGE

Bethesda, Maryland
June 17, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

PACIFIC GAS AND ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2)

Docket No.(s) 50-275/323-OLA-2

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB PREH. CONF. ORDER--LBP-93-9 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)50-275/323-OLA-2
LB PREH. CONF. ORDER--LBP-93-9

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Dated at Rockville, Md. this
17 day of June 1993

Kris Cater
Office of the Secretary of the Commission