14763

March 7, 1994

'94 MAR -9 A10:44

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 Plant, Units 1 and 2)	)	Recovery)
	)	

PACIFIC GAS AND ELECTRIC COMPANY'S
REPLY IN OPPOSITION TO SAN LUIS OBISPO
MOTHERS FOR PEACE MOTION TO REOPEN THE RECORD

I. INTRODUCTION

On February 25, 1994, the San Luis Obispo Mothers For Peace ("MFP") filed, pursuant to 10 C.F.R. § 2.734, a motion to reopen the record in this proceeding.[1] The Motion is based solely upon an NRC inspection report[2] identifying unresolved items related to the past operability of the Auxiliary Saltwater ("ASW") system at the Diablo Canyon Nuclear Power Plant ("DCPP") due to biofouling. As described in the attached Affidavit of Michael J. Angus (Attachment 1), Pacific Gas and Electric Company ("PG&E") has already responded to that inspection report. PG&E's response

---

[1] "San Luis Obispo Mothers for Peace's Motion to Reopen the Record Regarding Pacific Gas and Electric Company's Application for a License Amendment to Extend the Term of the Operating License for the Diablo Canyon Nuclear Power Plant," dated February 25, 1994 ("Motion").

[2] NRC Inspection Report Nos. 50-275/93-36 and 50-323/93-36, dated January 12, 1994 ("IR 93-36").

D503

demonstrates the current operability of the ASW system, establishes the low actual and potential safety significance of certain past conditions, and describes the present operating, testing, and maintenance practices that provide assurance of future ASW system operability.[3/] Contrary to MFP's claims, the inspection report provides no basis to reopen the record of this proceeding related to construction period ("CP") recovery.

MFP's Motion continues a familiar pattern in this proceeding. MFP seeks to introduce a document prepared by another party in this proceeding -- the NRC Staff. With no independent technical support, MFP characterizes the document as raising issues of "enormous safety significance." MFP in its Motion, however, conspicuously ignores PG&E's response to the inspection report which demonstrates just the opposite. MFP, as it has in the past, focuses on routine inspection and enforcement details rather than upon the real issue raised in Contention I in this proceeding: the comprehensiveness and effectiveness of the overall DCPP maintenance program. Nothing in IR 93-36 suggests a global maintenance program problem, or even a current problem with respect to ASW system biofouling. To the contrary, IR 93-36 finds that PG&E's current maintenance activities to control biofouling (i.e., continuous chlorination) appear to be very effective. In addition, and as

---

3/ PG&E Letter No. DCL-94-037, "Auxiliary Saltwater System Operability," dated February 15, 1994 ("PG&E Response"). A copy is included as Attachment 2 hereto. A copy was served directly upon MFP at the time it was issued.

perspective, on January 25, 1994, DCPP was once again cited by the NRC as one of the best plants in the country in terms of safety performance.[4/] Under the heavy burden imposed by 10 C.F.R. § 2.734, MFP's Motion must be denied.

II. APPLICABLE LEGAL STANDARD

The Commission's standards for reopening the record of an evidentiary proceeding are established in 10 C.F.R. § 2.734. A motion such as MFP's must satisfy all of the following criteria:

(1) The motion must be timely (§ 2.734(a)(1));

(2) The motion must address a significant safety or environmental issue (§ 2.734(a)(2));

(3) The motion must demonstrate that "a materially different result would be . . . likely had the newly proffered evidence been considered initially" (§ 2.734(a)(3)); and

(4) The motion must be accompanied by affidavits, "given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised," supporting the movant's claims with respect to the prior three criteria (§ 2.734(b)).

The Commission's reopening standard draws upon and amplifies longstanding Commission jurisprudence which stresses the "heavy burden" on a motion to reopen the record. See, e.g., Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340,

---

4/ NRC Letter, J.M. Taylor to R.A. Clarke, dated January 25, 1994. A copy is included as Attachment 3 hereto.

1344 (1983). The Commission, in promulgating Section 2.734 in 1986, specifically emphasized the importance of closing the record tc achieve finality in the hearing process -- notwithstanding that the normal NRC inspection and enforcement process would continue. See 51 Fed. Reg. 19535, 19539 at col. 1 (1986), citing ICC v. Jersey City, 322 U.S. 503, 514-15 (1944). Given that the NRC Staff will: (1) continue to routinely inspect nuclear facilities, (2) resolve inspection "open items" as it finds them, and (3) assure necessary compliance prior to issuing licenses and amendments, there can be little doubt that the Commission requires more than mere reliance on an "open" inspection item. The "heavy burden" on the proponent of a motion to reopen includes a showing of a tangible contribution, independent of the NRC Staff, of some technically competent evidence that would be likely to lead to a materially different outcome in the proceeding. See 10 C.F.R. § 2.734(b).

In reviewing a motion to reopen, the Licensing Board also need not take the proffered "evidence" at face value. Consistent with longstanding practice, PG&E is entitled to file affidavits in response to the Motion. The Licensing Board must take a "hard look" at the responsive affidavits to determine whether, in light of those responses, the Motion raises a legitimate basis to reopen the record. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989) ("[N]o reopening of the evidentiary hearing will be required if the

affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect on the outcome of the proceeding").[5/]

As discussed below, MFP has failed on all four of the Section 2.734 criteria. MFP's Motion was filed in excess of forty days after the inspection report that is its sole basis. The Motion therefore is not timely. In addition, when all relevant information is considered, specifically including PG&E's response to the inspection report, it can be seen that there are not "significant" issues related to the current performance of the ASW system at DCPP. Moreover, the specific issues raised by the inspector related to past performance of this system could not possibly lead to a different result in this proceeding. PG&E has in this proceeding already shown conclusively that it has effectively implemented a comprehensive maintenance program at DCPP, and that this program is a sufficient basis on which to issue a CP recovery license amendment. Finally, MFP's reliance on only open or unresolved issues in an NRC inspection report and on a

---

[5/] See also Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1299 at n.15 (1984) ("Unlike with respect to a new, timely filed contention, on a motion to reopen the record, we can give some consideration to the substance of the information to be added to the record"); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

"declaration of counsel" is, under Section 2.734(b), woefully insufficient to justify further litigation.

III. SUMMARY OF RELEVANT FACTS

MFP's Motion characterizes NRC IR 93-36 as "new evidence" of deficiencies and safety problems. The inspection report indeed identified certain "unresolved items" and "followup items." However, open items and followup issues are not evidence of a significant problem. The inspection report is not the final word on the subject. The NRC Staff specifically "encouraged" PG&E to perform a detailed evaluation addressing operability of the system, and to inform the Staff of steps that will be taken to resolve the concerns raised in the report. IR 93-36, cover letter at 2. PG&E provided this response on February 15, 1994. The conclusions in PG&E's evaluations are summarized in Attachment 1, the Affidavit of Michael J. Angus, and Attachment 2, the PG&E Response.

A. Background

In July 1989, the NRC issued Generic Letter ("GL") 89-13, "Service Water System Problems Affecting Safety-Related Equipment," addressing biofouling of service water systems. PG&E responded to GL 89-13 by letter dated January 26, 1990, with specific commitments to address the recommendations of the GL. By letter dated November 25, 1991, PG&E informed the NRC that the actions had been performed. Among other things, PG&E implemented an ASW system monitoring program (involving flow testing, trending, inspection,

and maintenance) to ensure that the system would retain its design basis capability. PG&E also performed, as a supplement to the monitoring program, a one-time heat exchanger performance test on the Component Cooling Water ("CCW") heat exchangers (which transfer heat from the CCW system to the ASW system in the event of a design basis accident). In addition, in 1992, PG&E implemented a continuous chlorination program that is very effective in addressing biofouling that could affect service water system performance. As recognized in IR 93-36, the continuous chlorination has significantly reduced the frequency of heat exchanger outages for cleaning.

IR 93-36 documents the results of a December 1993 NRC inspection at DCPP which focused on PG&E's implementation of the GL 89-13 recommendations and PG&E's related commitments. IR 93-36 notes eight discrete "unresolved items" and inspector "followup items." In its Motion, MFP simply restates several of the NRC inspector's "unresolved" or "followup" items, as well as other inspector "observations." Nearly all these items relate to the operability of the CCW heat exchangers rather than the other components in the ASW system. In several respects, MFP draws incorrect conclusions from the inspector's issues and observations, without providing technical justification for those conclusions. In addition, throughout its Motion, MFP fails to address or even acknowledge the detailed response to IR 93-36 that PG&E submitted to the NRC and provided to MFP.

B. Effectiveness of PG&E's Current Maintenance Program for the ASW System

By dwelling on (and, in some cases, mischaracterizing) each detail of IR 93-36, MFP fails to acknowledge the three most important facts underlying the issues raised by the inspection report and addressed in PG&E's Response:

- First, PG&E's comprehensive operability evaluation included in the response to IR 93-36 (see Enclosure 1 of PG&E Response) demonstrates that the ASW system is and has been operable at all times since implementation of the GL 89-13 recommendations;
- Second, PG&E's evaluations (see Enclosures 1 and 3 of PG&E Response) demonstrate that the current maintenance program for the ASW system, including the continuous chlorination referenced in IR 93-36, is comprehensive and effective, and assures the continued operability of the ASW system; and
- Three, PG&E's response to IR 93-36 (see cover letter and Enclosure 3 of PG&E Response) demonstrates that any unresolved or open items identified by the NRC with regard to PG&E's past implementation of its GL 89-13 program have been addressed and/or corrected by PG&E.

These three facts alone belie MFP's claim of current significance of this matter for this proceeding.

Moreover, to address the inspection report, PG&E also has conducted a thorough evaluation of ASW system performance prior to establishment of the continuous chlorination program (see Enclosure 2 of PG&E Response). This evaluation identifies two bounding periods since operation began at DCPP (in 1990 and at certain times from 1986 to 1988). For these periods, PG&E's safety

evaluation shows that the public health and safety would not have been adversely affected by potential ASW system deficiencies. This further underscores the lack of "significance" of these issues for this proceeding.[6/]

In contrast to these fundamental "big picture" facts, MFP's individual assertions in its Motion are either unsupported or irrelevant to this proceeding. Nonetheless, PG&E discusses those assertions in the order presented in the Motion.

C. MFP's Assertions Regarding Ongoing Program for Surveillance and Control of Biofouling

MFP asserts that the NRC's inspection of the DCPP ASW system "revealed numerous deficiencies" regarding PG&E's surveillance and control of biofouling in the ASW system. Motion at 8. However, IR 93-36 specifically states that "[t]he licensee implemented a continuous chlorination program which appeared to be very effective and eventually resulted in a significant reduction in the frequency of heat exchanger outages for cleaning." IR 93-36 at 3. As just discussed, PG&E's evaluations specifically establish the current operability of the system based on the ASW system

---

6/ As even MFP recognizes, the potential for biofouling problems in service water systems prior to implementation of the programs recommended in GL 89-13 is not unique to DCPP, but was a generic issue in the industry for a number of years and was precisely the reason the NRC issued the GL on the subject in the first place. However, as IR 93-36 and PG&E's Response both indicate, PG&E's enhanced chlorination program has been effective in reducing the risk of the type of biofouling events which potentially occurred in the past.

design, operational limits, chlorination, and maintenance. See Enclosure 1 of PG&E Response. The inspector's focus was primarily upon past operability of the system and upon PG&E's "engineering understanding" of the effects of macrofouling, microfouling and CCW heat exchanger differential pressure. IR 93-36 at 2. These issues are not directly indicative of the current maintenance of the ASW system and therefore have no bearing on Contention I in this proceeding.

MFP asserts three specific examples of PG&E action or inaction that it alleges indicate failure by PG&E to implement the recommendations in GL 89-13 regarding biofouling. However, as discussed below, none of the three cited examples implicates the current performance of the system or the effectiveness of the DCPP GL 89-13 biofouling control program.

1. Increased Biofouling During Upgrade To Continuous Chlorination System

MFP asserts first that "PG&E did not follow its criteria for maintenance of the ASW structure." Motion a 8. This is not a conclusion reached by the NRC inspector. As the only support for this assertion, MFP cites the NRC inspector's observation that during the period of implementation of the ASW continuous chlorination system at DCPP in 1992, PG&E "temporarily allowed the heat exchangers to exceed their operational differential pressure limit of 140 inches, be declared inoperable and left in service until a limit of 200 inches was reached." IR 93-36 at 3. However,

the temporary condition cited by MFP is one which the NRC did not pursue as an open item in IR 93-36. Furthermore, there is no question that since full implementation in 1992, the continuous chlorination system at DCPP has operated effectively.[7/]

2. ASW System Surveillance Program

As a second basis for its assertion that PG&E did not take proper action to prevent biofouling in the ASW system, MFP asserts that PG&E failed to establish a permanent testing program. In support of this assertion, MFP states simply that PG&E utilized "temporary" test instrumentation to monitor ASW system flow. Motion at 8. However, MFP never explains how the use of temporary instrumentation undercuts the existence or validity of the monitoring program. Certainly the inspection report does not draw this conclusion.

Later in its Motion, MFP also cites the inspector's "observation" that DCPP operators do not have ASW flow instrumentation available in the control room. Motion at 17. However, as the NRC inspector explicitly recognized in IR 93-36,

---

[7/] In addition, an administrative control (Equipment Control Guideline (ECG) 17.2, "ASW Continuous Chlorination System") has been implemented to assure availability of chlorination equipment. This ECG specifies the length of time that the chlorination system may be out-of-service without compensatory actions to control biofouling. The ECG also includes a periodic surveillance requirement to verify that adequate chlorination is being introduced into the ASW system. Enclosure 1 of PG&E Response, at 6.

"there is no regulatory requirement for flow instrumentation." IR 93-36 at 12.[8/]

3. ASW System Flow Test Acceptance Values (NRC Review of ASW System Design Basis)

As a third basis for its assertion that PG&E did not take proper action in response to GL 89-13 to prevent biofouling, MFP notes that, in testing ASW system flow, PG&E used acceptance criteria that were not reviewed and approved by the NRC. Motion at 8. In fact, the inspector listed as a "followup item" the acceptability of what he considered to be "revised design bases." IR 93-36 at 4.

However, as explained in PG&E's response to IR 93-36, the acceptance criteria were derived from an analysis performed by Westinghouse and are consistent with the NRC-approved design basis for the DCPP ASW system. PG&E has not changed the design basis and no NRC review was necessary. The ASW system design basis has remained unchanged since 1983, when the design basis was made more limiting. Enclosure 3 of PG&E Response, at 1-2.

[8/] In its response to IR 93-36, PG&E committed to install enhanced ASW flow instrumentation with local readout. This is a voluntary upgrade by PG&E. Enclosure 3 of PG&E Response, at 6. In the meantime, PG&E can continue to satisfy its regulatory obligations by monitoring ASW flow under the established program, using existing instrumentation.

D. Adequacy of Heat Exchanger Testing and Maintenance

1. Reporting of Heat Exchanger Testing Results

MFP next focuses on the inspector's "unresolved item" concerning PG&E's letter DCL-91-286, dated November 25, 1991. Motion at 10-11. The inspector's concern was that PG&E did not provide complete and accurate information to the NRC regarding the ability of heat exchanger CCW 1-2 to meet the design basis heat load. IR 93-36 at 5-6. PG&E has addressed this concern. See Enclosure 3 of PG&E Response, at 3-5.

As discussed in PG&E's response, the statement regarding the results of the heat exchanger performance testing was considered accurate and complete in light of an engineering judgment regarding the test methodology and uncertainties. At the time, PG&E used an industry computer program to perform the heat exchanger analysis. The model predicted that the heat exchanger in question (one of four) was performing at 1.3 percent less than the design (nameplate) heat transfer capability. The 1.3 percent margin was, as a matter of engineering judgment, considered to be within the range of the heat balance and measurement accuracy. Since the model and test results demonstrated that the other three heat exchangers exceeded their design heat transfer capability and all four were designed similarly, PG&E concluded that all four heat exchangers would meet their design basis requirements. This conclusion was consistent with the guidance in GL 89-13, which

recognized the inherent limitations of baseline testing programs. Id., Enclosure 3 at 4.[9/]

PG&E has also shown, by a reanalysis of the CCW 1-2 heat exchanger test data with a validated computer code, that the CCW 1-2 heat exchanger actually operated at 101 percent of design nameplate rating at the time of the test with a 95 percent confidence level. Id., Enclosure 1 at 8, Enclosure 3 at 4. Therefore, the initially calculated discrepancy between the test result and heat exchanger nameplate rating had no impact on system operability. This "unresolved" issue raises no questions concerning the effectiveness of the DCPP maintenance program, does not involve a maintenance issue, and is of no relevance to MFP's contention as admitted in this proceeding.

2. Initial Conditions in Heat Exchanger Testing; Adequacy of Computer Program Used to Review Test Data

MFP next notes that the NRC inspector observed that PG&E did not record certain initial conditions during the one-time performance test of CCW system heat exchangers. Motion at 11. However, the inspector carried no open item based on this observation (see IR 93-36 at 4-5), and MFP fails to provide any

---

[9/] Nonetheless, in response to the NRC's concern, PG&E has committed to several actions to ensure thorough review of future test results and to ensure sufficient explanatory information in NRC submittals. Id., Enclosure 3 at 4.

explanation as to the relevance of the observation to the contention in this proceeding.

MFP also notes that the NRC inspector observed that the computer program used by PG&E to analyze the heat exchanger test data was not validated for accuracy and that the NRC considered this to be an "unresolved item." Motion at 11; IR 93-36 at 11. Here again, however, MFP provides no explanation as to the relevance of these observations to its maintenance contention admitted in this proceeding. The inspection findings are simply restated.

As stated in PG&E's response to IR 93-36, PG&E's use of the computer program in question to evaluate the heat exchanger test results was consistent with the guidance in GL 89-13. Enclosure 3 of PG&E Response, at 12-13. Supplement 1 to GL 89-13 indicates the NRC's position that off-the-shelf software that is reviewed for technical adequacy is acceptable for use in this situation. PG&E benchmarked the computer program against the heat exchanger manufacturer's design criteria to verify that the program provides accurate results. Id. In addition, in response to the open item, PG&E performed two independent calculations to verify the validity of the program, and PG&E hired an outside firm to reanalyze the heat exchanger test data using a different computer program that has been widely used and accepted for GL 89-13 evaluations. The preliminary results of the reanalysis confirm the

validity of the computer program originally utilized by PG&E and, in fact, suggest that it may be overly conservative. Id.

3. Heat Exchanger Differential Pressure Setpoints and Operability

In IR 93-36, the NRC cited an "apparent failure" by PG&E to establish appropriate setpoints for the maximum allowable differential pressure at which the operability of the CCW heat exchangers would be ensured. The NRC characterized this issue as an "unresolved item" pending completion by PG&E of an operability assessment. The NRC inspector was concerned because PG&E's documentation indicated that the heat exchanger setpoints were based on "engineering judgement" and that no technical basis for this judgement was apparent. IR 93-36 at 6.

MFP mischaracterizes this issue as asserting that the NRC found "inadequate setpoint[s] and resultant inoperability of the heat exchangers." Motion at 13-14. This issue was in fact only carried as an open item based on the inspector's "technical judgement" (IR 93-36 at 7) that "the heat exchangers may have been inoperable during conditions of warmer ocean temperatures" (IR 93-36 at 7 (emphasis added)). PG&E in fact has performed an engineering evaluation of the adequacy of the differential pressure setpoint and has concluded that the current setpoint and other operational controls effectively ensure the operability of the CCW heat exchangers. See Enclosure 1 of PG&E Response, at 9-12.

MFP dismisses an unspecified PG&E operability assessment as "suspect, given the many deficiencies found by the NRC in PG&E's program for monitoring and assessing the operability of the heat exchangers." Motion at 12. MFP cannot, however, cite an NRC Staff open item as support to dismiss either the operability assessments or the evaluations documented in the PG&E Response to IR 93-36. The purpose of the PG&E evaluations was precisely to respond to those items. And MFP of course provides no expert testimony to rebut PG&E's conclusions.

4. Trending for Calcification in Heat Exchanger Tubes

MFP next merely repeats the NRC inspector's observation that calcification buildup in CCW heat exchanger tubes at DCPP was not being trended, and the inspector's conclusion that this could result in undetected tube plugging. Motion at 14. The NRC identified as a "followup item" a review of the effects of such calcification. PG&E has responded, mooting any significance MFP could attach to the issue. See Enclosure 3 of PG&E Response, at 14.

As detailed in PG&E's response, there is little potential for undetected tube plugging in the CCW heat exchangers. Tube plugging normally would be detected by differential pressure monitoring and, if calcification were observed, appropriate maintenance performed. PG&E explained that if tube cleaning did not effectively educe the differential pressure, further

mechanical cleaning methods could be employed to eliminate calcification. Id. In its response to the NRC, PG&E nevertheless agreed that trending of differential pressure increases on each heat exchanger would be helpful in anticipating calcification and other buildup that could affect differential pressure. PG&E stated that it is revising plant procedures to require formal trending of this parameter. Id.

E. Timeliness of Corrective Actions

MFP next cites the inspector's concerns regarding the timing of PG&E's corrective actions. Motion at 14-16. IR 93-36 indeed raised an unresolved item associated with the promptness of corrective actions related to the ASW system. See IR 93-36 at 10-11. Specifically, the inspector observed that: (1) "[t]he failed heat exchanger capacity test in 1991 should have triggered investigative actions but did not"; and (2) "a QA surveillance in May 1993 . . . raised the specific issue of the adequacy of the differential pressure setpoint, but did not elicit a studied response from the engineering organization." Id. at 7 (emphasis added). MFP, however, fails to relate these findings to the subject of this proceeding -- the adequacy of the DCPP maintenance program.

In its response to IR 93-36, PG&E specifically acknowledged that the resolution of these issues was not given appropriate priority by the responsible technical departments.

Enclosure 3 of PG&E Response, at 9-11. At the same time, significant followup activities did occur subsequent to the 1993 QA review. The issue was entered into the plant's Action Request program which tracks such issues through resolution. Resolution of the QA findings was actively pursued and a schedule was established which called for resolution of the issues by the end of 1993. Id., Enclosure 3 at 9. PG&E's subsequent evaluations show that any untimeliness in the initial response to the QA surveillance in 1993 did not affect ASW system operability. However, to prevent recurrence of any similar concerns, PG&E in its Response to IR 93-36 committed to several specific corrective actions. Id., Enclosure 3 at 10-11. The facts do not support the broad sweep MFP proposes in its Motion.

F. Routine Inspection of ASW System Piping

MFP is also incorrect in its next assertion that PG&E "falsely told NRC it had established a routine inspection program" for the DCPP ASW system. Motion at 16. While IR 93-36 states that PG&E had not finalized its procedure for inspecting ASW system piping, that "apparent failure" is not tantamount to a finding that PG&E deviated from its commitment to establish a testing program or that PG&E "falsely" stated that the program had been established. See IR 93-36 at 8. In fact, PG&E did not violate its commitment to establish a routine procedure for inspecting ASW system piping or falsely report to NRC the status of that implementation effort. See Enclosure 3 of PG&E Response, at 7. While a permanent

procedure was not in place at the time of the NRC inspection in December 1993, a temporary procedure was used to perform the initial inspections during the fourth refueling outages and an Action Request was tracking the completion of the final procedure. Id. Accordingly, PG&E did not "falsely" inform the NRC of implementation status of the program.[10/]

IV. ARGUMENT

The above summary illustrates clearly that PG&E has thoroughly responded to IR 93-36, that PG&E has demonstrated that the ASW system is currently operable, that the current maintenance programs for the ASW system are comprehensive and effective, and that other concerns regarding timeliness of actions and accuracy of information have been addressed.

Turning directly to the criteria of 10 C.F.R. § 2.734, it is clear that MFP has failed to meet all four of the prerequisites to reopening this proceeding. The Motion is untimely and lacks an independent technical basis. Even more importantly, MFP raises no issue "significant" to assessing the programmatic effectiveness of PG&E's maintenance program or which could lead to a different result in this proceeding.

10/ The Action Request called for the final procedure to be issued by June 1, 1994, to ensure that it was finalized prior to the next scheduled inspection at each unit. This inspection procedure for surveillance of ASW system piping, STP M-235 "ASW Piping Inspection," was issued on January 12, 1994 (in advance of the target issuance date). Id.

A. MFP's Motion is Untimely

Under 10 C.F.R. § 2.734(a)(1), MFP's Motion is patently untimely. It was filed on February 25, 1994, and is based on no more than NRC IR 93-36, which is dated January 12, 1994. MFP claims (Motion at 18) that it proceeded "diligently" to review the inspection report and prepare the Motion. However, the proof of diligence is in the time taken, and MFP took forty two days. Forty two days, given the nature of the Motion, the fact that it merely repeats the essence of the inspection report, and that it does not even include an independent technical affidavit, does not reflect "diligence"; it reflects untimeliness.[11/]

MFP claims that time was necessary to collect relevant documents from the NRC's Public Document Room. However, the inspection report was served by the NRC directly upon MFP. See IR 93-36, cover letter at 2. It is not clear what other documents MFP collected, but surely this task would not take counsel in Washington, D.C. in excess of forty days. (The Motion includes as attachments only Generic Letter 89-13, a 1988 NRC Inspection

---

11/ In the Seabrook licensing proceeding, the Commission denied a Motion to Reopen "because Intervenors did not act promptly after the relevant information became available." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990). The Motion to Reopen was filed on February 27, 1990, was based in part of an NRC inspection report dated January 9, 1990, and an NRC Bulletin dated January 29, 1990. The Commission rejected the motion as untimely based on the time elapsed between issuance of the January 9 NRC report and the February 27 motion and, in doing so, indicated that even four weeks' delay between January 29 and February 27 would have been inexcusable.

Report, and two PG&E letters. At least the latter two documents would have been served, in their time, directly on MFP.) MFP also asserts that "the motion is timely because it predates final enforcement action on the matters raised." Motion at 18. However, this assertion (which presumes that there will be an enforcement action) is beside the point. It was incumbent upon MFP to act timely from the time its purported basis for a motion to reopen was identified. This MFP has failed to do.

3. MFP's Motion Fails to Provide Evidence of a "Significant" Issue in the Context of this Proceeding

Under 10 C.F.R. § 2.734(a)(2), a motion to reopen must address a "significant" safety or environmental issue. MFP of course claims that IR 93-36 raises a significant issue, and that the inspection report would change the outcome of this proceeding. MFP -- which conveniently ignores PG&E's response to the inspection report -- is mistaken. While PG&E certainly takes the issues raised by the inspection report seriously, PG&E does not believe that the issues are "significant" in the overall context of the present CP recovery proceeding or to an assessment of the overall maintenance program at DCPP. A summary of PG&E's response to the issues raised in IR 93-36 is outlined in Section III above. There is no need to repeat that discussion here. Suffice it to say, those issues do not justify reopening the record.

As noted above, in addressing a motion to reopen, the Licensing Board must take a "hard look" at the evidence brought

forward by all parties. When comparing what MFP has filed with what PG&E has filed, it is apparent that MFP has not presented evidence. In denying an analogous motion to reopen based on an ongoing investigation by the NRC's Office of Investigations ("OI"), the Commission concluded that the mere pendency of a regulatory issue does not indicate a significant problem:

> OI conducts investigations of licensees and licensees' contractors to determine whether there has been a violation of NRC requirements involving wrongdoing. The bare pendency of an investigation does not indicate that there is a substantive problem, or even that there has been a violation. Nor does it indicate that an allegation raises a significant safety issue. The pendency of an OI investigation indicates only that there is an allegation that is being investigated. The material proffered by Joint Intervenors, i.e., that investigations are under way, certainly is not "tantamount to evidence," and is not the type of "relevant, material, and reliable" new information required to reopen a record.

Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5-6 (1986). Likewise, in this case, MFP's rhetoric aside, MFP has shown nothing more than that the NRC Staff has raised an issue. MFP provides no evidence that there is a current maintenance problem, much less a problem that is significant to this proceeding or that could affect its outcome.[12/]

[12/] The Commission has also ruled that a movant in seeking to meet the heavy burden required to justify reopening the record is not entitled to engage in discovery in order to support the motion. Rather, the issue is whether the available information brought forward by the movant meets the reopening (continued...)

MFP's recitation of the open items in the inspection report does not rebut PG&E's factual response.

Moreover, the NRC regulatory process inherently ensures that the issues of IR 93-36 will be resolved and, to the extent necessary, corrected. This process precludes those issues from ever maturing into a significant matter for CP recovery. One Licensing Board, in denying a motion to reopen based upon an NRC enforcement action, specifically observed that the enforcement action itself offsets the significance of the issue:

> The matter became significant in part because of the Staff's strong response which is relied upon by Intervenors as evidence of a significant safety problem. Because of that strong response, the matter in part loses its significance. The corrective actions produced by the Staff's enforcement conference, the additional explanatory information provided by the Applicant, and the Staff's monitoring commitment provide reasonable assurance that the matter has been or will be timely resolved.

Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109-10 (1983). Likewise, in the present

---

[12] (...continued)
standard. Id., CLI-86-1, 23 NRC at 6 (1986), quoting Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985). Here it does not.

case, where MFP offers nothing independent of the NRC Staff, the Staff can be relied upon to resolve its own issues.[13/]

C. MFP's "Evidence" Would Not Lead to a Different Result in this Proceeding

Under 10 C.F.R. § 2.734(a)(3), a motion to reopen must also provide evidence that on its face would be likely to lead to a materially different result in the proceeding. MFP's Motion does not accomplish this task. MFP's Motion fails to offer "evidence;" it raises issues that are neither relevant to nor probative of the issue in dispute in this proceeding and it involves matters that, even if they lead to enforcement, would not be outcome determinative.

Contention I is a programmatic maintenance contention. The standard for reviewing this contention is not error-free, issue-free, or even violation-free operation. The standard is one of "reasonable assurance" that the DCPP maintenance program is adequate for continued safe operation. As PG&E has discussed in prior filings in this proceeding, the Licensing Board must properly focus upon whether there has been a "pervasive" program

---

13/ Compare Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1354 at n.35 (1983) (leaving a potential enforcement matter to the Staff). The Staff has ample regulatory mechanisms, such as enforcement outside the context of this proceeding and the Systematic Assessment of Licensee Performance ("SALP") Program to assure that "unresolved" issues are "resolved." The Staff also has independent authority to control issuance of the CP recapture amendments, or to control operation of DCPP during the recapture period.

implementation problem, whether there has been demonstrated any "fundamental flaw" in an "essential element" of the program, and whether there are any significant uncorrected deficiencies. See Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 506-7 (1988).[14/] A motion to reopen must be evaluated in terms of this pertinent inquiry. To constitute a significant safety issue that would affect the outcome of this proceeding, the motion must present evidence establishing a pervasive breakdown, or an uncorrected fundamental flaw. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-45 (1983). MFP has not met this standard.

PG&E has already presented in this proceeding ample, unrebutted, evidence of the programmatic effectiveness of the maintenance and surveillance programs at DCPP. See, e.g., Proposed Findings M50-M94; Reply Findings R4-R17. In contrast to this evidence, IR 93-36 addresses the past design basis capability of one component -- the CCW heat exchangers -- for certain discrete periods of time. It does not, by its terms, suggest a maintenance program breakdown, a "pervasive" failure to implement the

---

[14/] See also "Pacific Gas and Electric Company's Proposed Findings of Fact and Conclusions of Law in the Form of an Initial Decision," dated October 8, 1993, at 3-10 ("Proposed Findings"); "Pacific Gas and Electric Company's Reply Findings of Fact and Conclusions of Law," dated December 30, 1993, at 3-5 ("Reply Findings").

maintenance program, or current uncorrected flaws in that program. Accordingly, even the issues raised in the inspection report have no bearing on the ultimate, programmatic focus of Contention I.[15/]

PG&E's response to the inspection report also makes clear that there is no issue regarding the present and future operability of the ASW system. PG&E fully implemented a continuous chlorination program in response to Generic Letter 89-13 in 1992. Since that time the system has not been adversely affected by biofouling. There is no relevance, much less significance, to the historical issues of ASW operability raised in IR 93-36. Compare Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1367 (1984) (denying a motion to reopen because the motion established neither uncorrected errors nor a pervasive breakdown of the quality assurance program).

The issues raised in the inspection report are also predominantly engineering issues -- not maintenance issues. The concerns expressed in IR 93-36 regarding the timeliness of corrective actions specifically relate to the timing of engineering

---

15/ Stated another way, Contention I is not a CCW heat exchanger contention. There is no basis on which to focus in this proceeding on issues related solely to the past operability of one system. To the extent MFP's Motion could be interpreted as offering a new late-filed contention on the ASW system operability or biofouling, it must also fail utterly. Among its deficiencies under 10 C.F.R. § 2.714(a)(1), it fails to show how MFP -- without independent evidence or expertise -- could contribute to resolution of the issues raised in IR 93-36.

functions. Even though PG&E takes those issues seriously and has responded to them, those issues are immaterial to the outcome of the current proceeding. Those concerns specifically address, as described above, the timeliness of the technical departments in addressing an engineering issue. Furthermore, the record in this proceeding on PG&E's timeliness in identifying and resolving maintenance issues is very clear. The witnesses have given an overall perspective, concluding that PG&E's performance with respect to timeliness in the maintenance and surveillance area has been good. See, e.g., NRC Staff Direct Testimony at 12-13 (Narbut, Miller); see also Reply Findings R29, R32-R34.

MFP also attempts to extrapolate broad "concerns" regarding "PG&E's" credibility from the NRC inspector's questions regarding completeness and accuracy of information. As discussed above, however, PG&E's representations regarding heat exchanger CCW 1-2 were based on a reasonable engineering judgment. PG&E's 1990 commitment to establish ASW inspection procedures was in fact fulfilled by a temporary procedure. Thus, MFP's attempt (Motion at 26) to impugn the integrity and credibility of the entire company, and more specifically the PG&E witnesses in this proceeding, is unfounded and unsupportable, and should be summarily rejected. The credibility of the witnesses is certainly not an issue at all in the inspection report. Likewise, the credibility and reliability of PG&E's other evidence of the effectiveness of maintenance at DCPP -- including objective evidence of operating performance,

independent testimony of the NRC Staff, and the observations of an outside expert -- are not the least bit in doubt.

MFP would also find programmatic significance based on its oft repeated theory of this case, i.e., that there is a "pattern" of maintenance problems at DCPP. In its Motion, MFP recites one-by-one some of the same "patterns" it alleged in its proposed findings of fact. See Motion at 22-25. MFP invokes the alleged "pattern" of "unavailability of safety systems," of "untimely response" to maintenance issues, of "inadequate" testing, and of a "lack of communication." However, PG&E has already addressed these so-called "patterns" and shown that they are rebutted by the overwhelming evidence of record. See Reply Findings R18-R21, R28-R34, R53-R58, R62-R66, R69-R74. Now, even assuming that the issues related to the ASW system were safety significant, and that the root causes of any problems could somehow be related to maintenance, the inspection report would not lead to a different result in this proceeding. Another isolated, historical experience, that has been addressed, does not constitute a "pervasive" failure to implement a maintenance program.

MFP's theory in this case continues to be one of listing isolated incidents and counting beans in jars. At most, the issues of IR 93-36 could lead to one more bean. However, one more bean would not make MFP's case. One more bean would not lead to a

"materially different result."[16/] For all the reasons PG&E has already articulated in this proceeding, MFP has in fact failed to show a "pattern" or a "pervasive" breakdown of the maintenance program. The operational performance of the plant alone belies this theory. See Proposed Findings M50-M56. And, to the extent MFP relies on NRC Staff open or unresolved items, it must also accept the broader context which the Staff has provided for those findings. MFP previously introduced several violations, including those related to the containment fan cooler units and the control of measuring and test equipment. Notwithstanding these violations, the NRC Staff witnesses concluded that PG&E's maintenance program overall is superior. Tr. 2214-15 (Miller, Narbut); Tr. 2220 (Miller). The Staff has also placed prior violations in the overall context through its SALP program assessment and "Best Plants" determinations. See Proposed Findings M57-M67. Even after the January 12, 1994 issuance of IR 93-36, PG&E was named yet again to the NRC's "Best Plants" List (see Attachment 3 hereto).

The Licensing Board must also not lose sight of the fact that this is a construction period recovery proceeding. Similar license amendments have been issued by the NRC to numerous

---

16/ Compare South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 NRC 1183, 1185 (1982), in which the Licensing Board acknowledged that a motion to reopen "appear[ed] to establish safety violations." However, the Board went on to observe that "[i]f Intervenor cannot establish any safety significance to the improper practices, there is, of course, no purpose to reopening the record for further hearing."

licensees as largely an administrative matter. Operation of a plant without enforcement actions is not the standard for issuing such amendments. Compare Tr. 2275 (Peterson) (testifying that incident-free operation and a SALP 1 rating in maintenance are not necessary to support a CP recovery amendment). The NRC Staff has issued construction period recovery amendments to plants that have received enforcement actions during the time the amendment application was pending.[17] The vast majority of NRC enforcement actions -- including any that might conceivably be issued as a result of IR 93-36 -- do not compel plant shutdown. Rather, they are intended to elicit corrective actions to deter recurrence. It seems improbable that any such enforcement action could be a basis to deny a construction period recovery amendment.[18]

---

[17] For example, EA-91-045 was issued May 31, 1991, to Carolina Power & Light Company (Severity Level III violation with an $87,500 civil penalty) for maintenance-related violations at the Brunswick plant. The Brunswick CP recapture license amendment was issued on September 12, 1991. Similarly, EA-93-055 was issued May 15, 1993, to GPU Nuclear (Severity Level III violation with a $50,000 civil penalty) for operations-related violations at the Oyster Creek plant. The Oyster Creek recapture license amendment was issued on April 13, 1993. The inspection report and enforcement conference pre-dated issuance of the CP recapture amendment. Finally, EA-92-134 was issued September 24, 1992, to New York Power Authority (Severity Level III violation with a $100,000 civil penalty) for service water system problems at Indian Point Unit 3. The inspection was conducted in May to July 1992, and the CP recapture amendment was issued in July 1992.

[18] For an issue such as that raised by MFP in the Motion, relating entirely to an inspection and enforcement matter, the 10 C.F.R. § 2.206 forum remains available and viable. It is irrelevant that that forum does not involve an evidentiary hearing. It is the appropriate forum under the Commission's rules for addressing ongoing inspection and enforcement matters, and it provides procedures, adopted as a policy (continued...)

D. MFP's Motion Lacks the Necessary Technical Basis

As discussed above, a motion to reopen must also include affidavits from "competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised." 10 C.F.R. § 2.734(b). MFP's attempt to fulfill this requirement is grossly insufficient and must be disregarded. A "declaration" of counsel asserting no more than that counsel read an inspection report is not at all what the Commission requires to support reopening the record. Counsel in the present case has no technical expertise, has no independent knowledge of the facts and issues addressed in the inspection report, and is not an expert in any of the relevant disciplines. Compare 10 C.F.R. § 2.734(b). The characterizations of counsel of the various issues raised in IR 93-36 do not establish the "significance" of those issues.[19/]

The Commission's requirement for some contribution of meaningful, independent expertise is an essential part of the "heavy burden" inherent in the reopening standard. There are legitimate interests involved in bringing litigation to a close and in eliminating the expense of pointless litigation. Further

---

[18/](...continued)
judgment of the Commission, that are sufficient under the Atomic Energy Act.

[19/] The "declaration" also raises other problems. By filing the equivalent of an affidavit, counsel seems to be putting herself in the untenable position of being a witness in this proceeding. And, by relying solely on the NRC Staff inspector's expertise, counsel must also presumably accept the inspector's expertise in closing out those issues.

evidence and hearings can be justified only where the standards of Section 2.734 have been meet. The NRC Staff will continue to perform its ongoing regulatory responsibilities. This proceeding does not duplicate the inspection/enforcement process. Inspection and enforcement open items, unresolved issues, or even inspection findings do not -- absent some unique evidence contributed by MFP -- satisfy Section 2.734. If MFP desires further litigation, the time has come for it to bring something more than inspection reports that, by definition, will be resolved and closed out. The declaration of counsel is inadequate precisely because it fails to provide significant new information unknown to the Staff.[20/]

V. CONCLUSION

MFP has not met the heavy burdens established by 10 C.F.R. § 2.734. MFP has provided no technical basis on which to conclude that the open items in NRC Staff Inspection Report 93-36 involve an uncorrected flaw in the DCPP maintenance program or indicate a pervasive program implementation problem. PG&E's Response to IR 93-36 shows just the opposite. PG&E's Response, as well as the ample evidence already included in the record of this

---

20/ Compare Carolina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), LBP-78-2, 7 NRC 83, 87 (1978) (The Licensing Board, in denying a motion to reopen, specifically observed that, based on the intervenor's previous cross-examination of witnesses, rebuttal testimony, and proposed findings, the probable result of reopening the record would be "more evidence of the same nature and needlessly cumulative").

proceeding, demonstrate that IR 93-36 would not change the outcome of the proceeding. Accordingly, MFP's Motion should be denied.

Respectfully submitted,

David A. Repka

WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005-3502
(202) 371-5726

Christopher J. Warner
Richard F. Locke

PACIFIC GAS AND ELECTRIC COMPANY
77 Beale Street
San Francisco, CA 94106

Attorneys for Pacific Gas and Electric Company

Dated in Washington, DC
this 7th day of March, 1994

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 AND ELECTRIC COMPANY'S REPLY IN OPPOSITION TO SAN LUIS OBISPO MOTHERS FOR PEACE MOTION TO REOPEN THE RECORD" 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 overnight delivery, this 7th day of March, 1994.

Charles Bechhoefer, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Frederick J. Shon*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Docketing and Service Section
(original + two copies)

Ann P. Hodgdon, Esq.*
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Peter Arth, Jr.
Edward W. O'Neill
Peter G. Fairchild
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Nancy Culver, President
Board of Directors
San Luis Obispo Mothers for Peace
P.O. Box 164
Pismo Beach, CA 93448

Robert R. Wellington, Esq.
Diablo Canyon Independent Safety Committee
857 Cass Street, Suite D
Monterey, CA 93940

Robert Kinosian
California Public Utilities Commission
505 Van Ness, Rm. 4102
San Francisco, CA 94102

Mr. Gregory Minor
MHB Technical Associates
1723 Hamilton Ave., Suite K
San Jose, CA 95125

Truman Burns
California Public Utilities Commission
505 Van Ness, Rm. 4103
San Francisco, CA 94102

Christopher J. Warner, Esq.*
Richard F. Locke, Esq.
Pacific Gas & Electric Company
77 Beale Street
San Francisco, CA 94106

Jill ZamEk
1123 Flora Road
Arroyo Grande, CA 93420

Diane Curran*
c/o IEER
6935 Laurel Avenue, Suite 204
Takoma Park, MD 20912

David A. Repka

David A. Repka

Counsel for Pacific Gas and Electric Company

ATTACHMENT 1