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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE
TO SAN LUIS OBISPO MOTHERS FOR PEACE'S
MOTION TO REOPEN

INTRODUCTION

On February 15, 1994, San Luis Obispo Mothers for Peace (SLOMFP) filed a "Motion to Reopen the Record Regarding Pacific Gas and Electric Company's Application for a License Amendment to Extend the Terms of the Operating License for the Diablo Canyon Nuclear Power Plant." By its motion, SLOMFP seeks to reopen the record in order to introduce Inspection Report 93-36 (IR), issued January 12, 1994. SLOMFP states that IR 93-36 contains significant new evidence suggesting that Pacific Gas and Electric Company's (PG&E) maintenance of the plant's vital Auxiliary Saltwater (ASW) system may be seriously inadequate; that "maintenance was so deficient that the ASW system may have been nonfunctional during the summer months;" and that PG&E may have made false representations to the NRC regarding the maintenance and operability of the ASW system.

For the reasons discussed, the NRC Staff opposes SLOMFP's motion.

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BACKGROUND

On July 9, 1992, PG&E submitted a license amendment request by which it sought to extend the life of its operating licenses by "recapturing" the period spent in constructing Diablo Canyon Nuclear Power Plant Units 1 and 2. In response to a notice of opportunity for hearing on the proposed amendments (57 Fed. Reg. 32,575 (July 22, 1992)), San Luis Obispo Mothers for Peace (SLOMFP) timely filed a request for a hearing/petition for leave to intervene. The Licensing Board was established to rule on the request/petition and to preside over the proceeding in the event that a hearing was ordered. 57 Fed. Reg. 43,035 (Sept. 17, 1992).

A prehearing conference was held in San Luis Obispo, California, on December 10, 1992, and the Board granted SLOMFP's petition for leave to intervene and request for a hearing. 37 NRC 5 (1993); *see also* LBP-92-27, 36 NRC 196 (1992). Two contentions were admitted, SLOMFP's Contention I concerning the adequacy of PG&E's maintenance and surveillance program and Contention V concerning Thermo-lag. 37 NRC 5, 14-21, 26-28.

Hearings were held for seven days, August 17-24, 1993, in San Luis Obispo, California. SLOMFP did not prefile direct testimony, but introduced some two hundred documents at the hearing, which SLOMFP used as the basis of its proposed findings. PG&E and the NRC Staff introduced the testimony of expert witnesses looking at the surveillance and maintenance programs as a whole.

The record was closed and proposed findings have been filed by all parties; the Board has not yet issued a decision in this matter.

On January 12, 1994, the NRC issued Inspection Report No. 50-275/93-36 and 50-323/93-36, which documented a routine, announced, regional inspection during the period of December 13 through December 17, 1993, of PG&E's activities performed in response to Generic Letter (GL) 89-13, "Service Water System Problems Affecting Safety-Related Equipment," issued on July 18, 1989. The generic letter described recurring industry problems with the service water systems at nuclear power plants. Service water systems transfer heat from structures, systems and components are important to safety to an ultimate heat sink following a design basis event. The generic letter recommended certain actions to be taken by licensees and required that each licensee advise the NRC of the programs to be implemented in response to the generic letter recommendations. PG&E Letter No. DCL-90-027, dated January 26, 1990, provided PG&E's response to the generic letter and committed to perform certain actions. PG&E Letter No. DCL-91-286, dated November 25, 1991, provided a supplemental response to the generic letter and reported the completion of the initial program actions.¹

The general conclusion of the IR included a conclusion that the surveillance performed by PG&E's QA organization to determine if the licensee's program and commitments for GL 89-13 were being properly implemented was performed in technical depth and made significant findings which paralleled the inspection findings. Two engineering weaknesses were identified regarding that organization's technical response to the issues raised in GL 89-13 and the timeliness of that organization's response to QA

¹For the Licensing Board's information, the Staff is attaching an affidavit of William T. LeFave, dated March 14, 1994, which addresses the general background of the matters discussed in IR 93-36.

surveillance of May 1993. There was also a conclusion that the licensee's response to GL 89-13 apparently contained incomplete information. The IR identified as a significant safety matter the fact that operability of the CCW heat exchangers was not clearly established by the licensee's 1991 heat exchanger performance testing. IR at 1-2.

On February 15, 1994, PG&E responded to the inspection report in PG&E Letter No. DCL-94-037. On February 25, 1994, SLOMFP filed a motion to reopen the record to introduce in evidence the NRC inspection report. SLOMFP's motion takes no notice of PG&E's response.

DISCUSSION

A. NRC Standards Governing Motions To Reopen a Closed Record

A motion to reopen a closed record to consider additional evidence must be timely, address a significant safety issue, and must demonstrate that a materially different result would be likely had the newly proffered evidence been considered initially. 10 C.F.R. § 2.734(a).² The motion must be accompanied by one or more affidavits which set forth the factual and technical bases for the movant's claim that the criteria set forth in § 2.734(a) have been met. 10 C.F.R. § 2.734(b). These affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. *Id.*

The proponent of a motion to reopen the record bears a heavy burden. Reopening is required only when new evidence is shown to be timely, safety significant

²The record in this proceeding was closed on August 24, 1993, Tr. 2295, and findings have been filed by all parties.

and sufficiently material to have changed the result initially reached. *Kansas Gas & Electric Company* (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). A party moving to reopen must show that its new evidence is "strong enough, in the light of any opposing filing, to avoid summary disposition" and, therefore, the motion to reopen will not be granted "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 upon the outcome of the licensing proceeding." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). Further, the Commission expects its adjudicatory boards to enforce the section 2.734 requirements rigorously, that is, to reject out-of-hand reopening motions that do not meet those requirements within their four corners. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432 (1989), citing *Louisiana Power and Light Company* (Waterford Steam Electric Station, Unit 3), CLI-86-01, 23 NRC 1 (1986) and *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233 (1986).

In the Supplementary Information to the *Federal Register* Notice "Criteria for Reopening Records in Formal Licensing Proceedings," promulgating 10 C.F.R. § 2.734, the Commission stated that reopening will only be allowed where the proponent "presents material, probative evidence which either could not have been discovered before or could have been discovered but is so grave that, in the judgment of the presiding officer, it must be considered anyway." 51 Fed. Reg. 19,535; 19,538 (1986).

The criteria set forth in 10 C.F.R. § 2.734(b) require that the supporting material accompanying a motion to reopen "must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. § 2.714(b) for admissible contentions. Such supporting information must be more than mere allegations; it must be tantamount to evidence . . . and possess the attributes set forth in 10 C.F.R. § 2.743(c) defining admissible evidence for adjudicatory proceedings. Similarly, the new evidence supporting the motion must be 'relevant, material, and reliable.'" *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93 (1989), quoting *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984).

The continuing staff oversight of reactor regulation, whether in proposing new standards or in its continuing function of inspection and enforcement is neither novel nor unexpected and does not perforce warrant reopening a record. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 887 (1980); see also *Commonwealth Edison Company* (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 110 (1983). Similarly, the pendency of an OI investigation is not sufficient to support a motion to reopen, as it is not tantamount to evidence and is not the type of relevant, material and reliable new information required to reopen a record. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986).

B. SLOMFP's Motion Does Not Satisfy The NRC's Standards Governing Motions To Reopen.

1. SLOMFP has failed to show that its motion is timely.

SLOMFP argues that its motion is timely since it concerns an inspection report that was issued after the close of the record. Motion at 2, 18. This argument fails for two reasons: 1) it is the availability of the evidence the movant would introduce and not of the report in which that evidence appears that must be considered in determining the timeliness of the motion and SLOMFP has not shown that the newly proffered evidence is new; 2) it is not enough to say that the IR was issued after the hearing closed; the movant must also show due diligence in filing after it obtained the information. SLOMFP has failed to make such a showing and, in fact, filed its motion six weeks after the report was issued.

In addressing the timeliness of the motion, SLOMFP should have addressed the question of what evidence is new. 10 C.F.R § 2.734. SLOMFP has failed to identify what information in IR 93-36 it considers to be new. SLOMFP mentions its diligence in acquiring and reviewing all relevant and obtainable documents from the NRC's Public Document Room. Motion at 18. SLOMFP's argument, however, fails to account for the fact that one of the documents on which it relies, IR 88-10, -11, was already in the record, that it was introduced on cross-examination by SLOMFP as its Exhibit 107 at Tr. 2241, and, further, that copies of all documents in the docket, both NRC and PG&E documents, are sent to SLOMFP when they are issued. Such factors undermine SLOMFP'S argument that its motion is timely.

SLOMFP also argues that its motion is timely in that it predates final enforcement action on the matters raised by IR 93-36. Motion at 18. SLOMFP cites no authority for this proposition and indeed there is none.

SLOMFP's motion is not timely and should not be granted.

2. SLOMFP has failed to show the significance of the issues to be raised.

As discussed above, a motion to reopen must satisfy the requirement of 10 C.F.R. § 2.734(a)(1), regarding the need to address a significant safety or environmental issue. SLOMFP addresses this criterion by simply asserting that, "There can be no question that Inspection Report 93-36 raises issues of enormous safety and environmental significance." Motion at 19-20. However, while there is no question of the significance of the ASW system, SLOMFP never identifies what new evidence the IR reveals that is of "enormous safety and environmental significance." SLOMFP states that the inspection report on which it urges reopening the record "contains significant new evidence, which suggests that PG&E's maintenance of the plant's vital Auxiliary Saltwater ("ASW") system may be seriously inadequate; that maintenance was so deficient that the ASW system may have been nonfunctional during the summer months; and that PG&E may have made false representations to the NRC regarding the maintenance and operability of its ASW system." Motion at 1. Despite these sweeping statements in its counsel's motion, SLOMFP fails to establish by an affidavit of a person having technical expertise or in some other manner what information in IR 93-36 is significant or what information is new.

3. SLOMFP has failed to show that its evidence would likely lead to a different result in this proceeding.

As discussed above, 10 C.F.R. § 2.734(a)(3) requires that a motion to reopen demonstrate that a different result would be or would have been likely if the newly proffered evidence had been considered initially. SLOMFP's motion fails to satisfy this standard. SLOMFP would offer IR 93-36 into evidence; however, SLOMFP fails to show how the questions that the NRC inspector raised with respect to PG&E's response to GL 89-13 constitute evidence or how that evidence relates to SLOMFP's Contention 1, a broad contention asserting that the Diablo Canyon CP recovery amendment application should be denied because PG&E had not shown that it had an adequate surveillance and maintenance program. SLOMFP argues in its motion, without any technical support, that the evidence in IR 93-36 is likely to affect the outcome of the case in that 1) SLOMFP believes that it contradicts the testimony and proposed findings of PG&E and the Staff, 2) it corroborates SLOMFP's proposed findings and 3) it raises questions about PG&E's competence and integrity. The affidavit of Paul P. Narbut filed herewith establishes that the evidence in the IR would not change the Staff's testimony. *See* Affidavit of Paul P. Narbut at ¶ 6.d. Indeed, the evidence is merely cumulative and fails to satisfy the requirement of 10 C.F.R. § 2.734(b) that it meet the standards of the NRC's regulation regarding admissibility of evidence, namely, 10 C.F.R. § 2.743(c). Section 2.743(c) requires, in pertinent part, that evidence be "not unduly repetitious." At the hearing, SLOMFP litigated more than 40 instances of what SLOMFP regarded as support for its contention that PG&E's surveillance and maintenance program at Diablo Canyon was

inadequate. Reopening the record would admit merely cumulative evidence that may be relevant to at most one or two of the instances that SLOMFP litigated. SLOMFP has failed to establish as a technical matter that its evidence is sufficiently probative to affect conclusions on the overall sufficiency of PG&E's surveillance and maintenance program. In any event, SLOMFP has failed to show how this isolated item would affect the conclusion reached in the hearing.

SLOMFP has not made the showing required by 10 C.F.R. § 2.734(a)(3) that had the newly proffered evidence been considered initially a materially different result would have been likely. SLOMFP has submitted no affidavits to support this conclusion. It is not at all clear what "evidence" SLOMFP seeks to introduce or what SLOMFP would seek to prove by the introduction of that evidence. What is clear is that the author of the IR does not endorse SLOMFP's conclusions drawn from his observations and does not agree that consideration of the evidence would likely result in a materially different result. *See* Affidavit of Paul P. Narbut.

4. SLOMFP has not supported its motion with the required affidavits.

As indicated above, contrary to the requirements of 10 C.F.R § 2.734(b), SLOMFP has not supported its motion by affidavits of experts in the disciplines appropriate to the issues raised. Thus, it is not a question of SLOMFP's experts disagreeing with the NRC Staff's experts. It is a question of SLOMFP's counsel, on whom SLOMFP mistakenly relies for technical expertise, disagreeing with the NRC Staff's expert opinion.

5. SLOMFP has not identified with particularity the issue it seeks to litigate.

Paragraph (b) of 10 C.F.R. § 2.734 requires a movant filing a motion to reopen to identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that the issue meets the criteria in paragraph (a) of 10 C.F.R. § 2.734. Thus, SLOMFP should have, with regard to each of its issues, supported its claim that the issue meets the criteria in Paragraph (a) by addressing the factual and/or technical basis for each of the issues with reference to those criteria. SLOMFP has failed to perform this analysis. Further, in having failed to perform the analysis, SLOMFP has unfairly burdened responding parties by requiring them to guess at what material they need to rebut.

Under the heading, "III. New Evidence of Maintenance Deficiencies and Safety Problems is identified in Inspection Report 93-36," SLOMFP characterizes IR 93-36 as providing "new evidence of maintenance deficiencies." Motion at 6-8. However, SLOMFP's characterization is not supported by affidavits of persons having technical expertise. Its statement that "the inspection revealed significant and extensive gaps, inaccuracies and weaknesses in PG&E's surveillance and testing of the system," Motion at 6, is not documented with a citation to the IR, and, indeed, the IR does not support it. See Affidavit of Paul P. Narbut, at ¶ 6.f.g. Rather, to the extent that "weaknesses" are identified in the IR, they are not related to PG&E's surveillance and testing but to engineering. See IR at 2; Affidavit of Paul P. Narbut at ¶ 6.g.

SLOMFP states that "because PG&E's surveillance program was inadequate, PG&E apparently did not recognize perform [*sic*] maintenance when it was necessary." Motion at 7. Again, this is SLOMFP's opinion unsupported by the IR.

SLOMFP also states that "PG&E did not discover through its own surveillance program that one of DCNPP's CCW heat exchangers had significant fouling, to the extent that it exceeded the margin of safety as specified by the manufacturer," and cites IR 93-36, Details at 7, for this statement. Motion at 7. SLOMFP further states that the fouling was found during the NRC's December 1993 inspection and that, accordingly, the NRC called the long-term operability of the ASW system into question. *Id.* SLOMFP cites the NRC's letter covering IR 93-36 as its source for this statement. *Id.* Contrary to SLOMFP's representation, there is nothing on page 7 under Details that supports SLOMFP's characterization that PG&E did not discover through its surveillance program that one of the heat exchangers was fouled. The statement in the IR, Details at 6, "The inspector examined CCW Heat Exchanger 2-1 which had been taken out of service at a differential pressure of about 125 inches per the shift foreman," supports the opposite conclusion. *See also* IR, Details at 2.

An explanation of each of the issues SLOMFP addresses at Motion 7-17 shows that SLOMFP has failed to raise any matter that would warrant reopening the record.

a. Alleged inadequacy of PG&E's program to control biofouling

SLOMFP's first issue seems to be "A. Ongoing program for surveillance and control of biofouling inadequate." Motion at 7-8. Although SLOMFP purports to find support for this conclusion in the IR, the citations to specific details in the IR support

neither this conclusion nor the three "deficiencies" that SLOMFP asserts follow from the findings of the inspector. See Affidavit of Paul P. Narbut at ¶ 6.

b. Alleged inadequacy of heat exchanger testing and maintenance

SLOMFP's issue B, "Heat Exchanger Testing and Maintenance is Inadequate," tracks the IR, "Details b. Heat Exchangers Capacity Test." Motion at 9-14. However, SLOMFP's conclusion that heat exchanger testing and maintenance is inadequate does not follow from the inspector's observations. The inspector did not make the finding that SLOMFP attributes to him: "that PG&E had falsely stated that the heat exchanger passed the test." Motion at 10. Rather, the inspector's conclusion was that "the apparent failure to provide complete and accurate information to the NRC in regards to the CCW 1-2 heat exchanger's ability to meet the design basis heat load is considered an unresolved item pending further examination of the circumstances by the Commission." IR, Details at 5-6.

c. Alleged failure to take corrective action in response to ASW problems

SLOMFP's third issue, "C. PG&E failed to take any corrective action in response to ASW problems," Motion at 14-16, relies on a discussion in the IR under "b) Heat Exchanger Capacity Test, (3) Inadequate Preventative Maintenance Limits." Details at 6-7. The IR treats this matter as a sub-issue of the heat exchanger capacity test issue. In any event, the inspector's inquiry into the matter resulted in an unresolved item: "the apparent failure to establish adequate differential pressure limits to ensure CCW heat exchanger operability," IR, Details at 7, not to the conclusion SLOMFP would reach.

d. Allegation of PG&E's false reporting

SLOMFP's fourth issue, "D. PG&E Falsely Told NRC It Had Established A Routine Inspection Program For ASW System," Motion at 16-17, is loosely based on IR 96-36, "Details, C. Inspection and Maintenance of the ASW System Piping." Again, the inspector raised a question concerning the "apparent failure to develop a routine inspection program for the ASW system piping by the end of the 1991 fourth refueling outages of Units 1 and 2, as committed to in letter DCL-90-027 dated January 26, 1990 and the apparent failure to provide accurate implementation status of the piping inspection program in letter DCL-91-286, dated November 25, 1991." IR, Details at 8. SLOMFP mischaracterizes the IR in stating that the 1993 inspection revealed that PG&E had not established a routine inspection program. Motion at 16. SLOMFP cannot reach a conclusion different from the inspector's as SLOMFP does not provide affidavits of technically competent persons to support its conclusion. The IR treats the matter as an unresolved item. SLOMFP was not present, brings no technical expertise to the analysis, but nevertheless, with no basis whatsoever, disagrees with the import of the inspector's observations.

e. Allegation Concerning Lack of ASW Flow Indicators

As regards SLOMFP's sixth issue, "Lack of ASW Flow Instruments For Operator Information," Motion at 17, SLOMFP states that "it appears that one reason for PG&E's failure to give adequate maintenance attention to the ASW system is the lack of flow indicators." *Id.* As discussed above, the inspector did not conclude that PG&E's maintenance of the ASW system was inadequate. Further, the inspector's observation

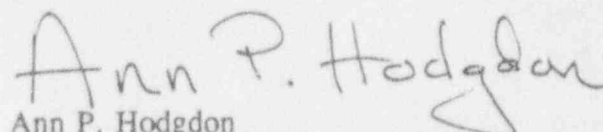
concerning flow indicators was limited to the fact that such instrumentation was not installed; it did not address the need for such instrumentation, which is not required. IR, Details at 12. SLOMFP's conclusion does not follow from the inspector's observation, nor has SLOMFP provided any technical support for the need for flow indicators. See Affidavit of Paul P. Narbut at ¶ 6.b.ii.

SLOMFP's motion does not identify with particularity the issues it seeks to litigate. The declaration of SLOMFP's attorney, which seems to be offered in lieu of an affidavit, states that the motion is based on the factual contents of the documents she has reviewed, "on the NRC's conclusions regarding the legal and safety significance of these facts, and on my own conclusions regarding the legal and safety significance of these facts." Motion at 27. These conclusions on the safety significance of facts are insufficient to satisfy the standards to reopen. See 10 C.F.R § 2.734. Section 2.734 requires affidavits of persons technically qualified to give expert opinion. SLOMFP's counsel's declaration is not a substitute for the affidavit of a person technically qualified to reach conclusions regarding the facts.

CONCLUSION

SLOMFP's motion satisfies none of the criteria required for motions to reopen under 10 C.F.R. § 2.734. The Licensing Board should deny the motion.

Respectfully submitted,


Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of March 1994