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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION OFFICE OF SECRETARY  
ATOMIC SAFETY AND LICENSING BOARD DOCKETING & SERVICE  
BRANCH

Before Administrative Judges:

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

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In the Matter of  
  
PACIFIC GAS AND ELECTRIC  
COMPANY  
  
(Diablo Canyon Nuclear Power  
Plant, Units 1 and 2)  
  
Facility Operating Licenses  
No. DPR-80 and DPR-82

Docket Nos. 50-275-OLA-2  
50-323-OLA-2

ASLBP No. 92-669-03-OLA-2

(Construction Period  
Recovery)

March 23, 1994

MEMORANDUM AND ORDER  
(Ruling Upon Motion to Reopen Record)

On February 25, 1994, the San Luis Obispo Mothers for Peace (MFP), an intervenor in this construction permit recapture proceeding, filed a motion to reopen the evidentiary record, which had been closed following hearings in August, 1993. On March 7, 1994, Pacific Gas and Electric Co. (PG&E or Applicant) filed a timely response opposing any reopening of the record. On March 14, 1994, the NRC Staff filed a timely response likewise opposing reopening of the record. For reasons set forth herein, we are denying the

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motion at this time, without prejudice to its being reasserted at a later date under certain circumstances.

A. Background. The motion is based solely on NRC Inspection Report 50-275/93-36 and 50-323/93-36 ("IR 93-36"), covering an inspection conducted on December 13-17, 1993 and apparently issued on January 12, 1994. An officer of MFP was mailed a copy of this report.<sup>1</sup> The inspection was performed by Mr. Paul P. Narbut, Regional Team Leader, NRC Region V, who also appeared as a Staff witness in this proceeding. It involved, inter alia, some apparent deficiencies in the maintenance/surveillance program that is the subject of one of the contentions in this proceeding. Some of the statements in IR 93-36 (and the accompanying transmittal letter to PG&E) seem on their face to undercut (based on new information) the testimony earlier provided by Mr. Narbut.

B. Applicable Standards. For the record to be reopened, stringent criteria must be satisfied. The Commission's regulations (10 C.F.R. § 2.734) provide, in pertinent part, that a motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

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<sup>1</sup>We are not certain when the report, dated January 14, 1994, was in fact mailed to MFP. It was not entered into the NUDOCS system until February 2, 1994, when it clearly became a publicly available document. Thus, absent any direct information, we are unsure of when MFP actually received its copy.

(a)(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.

(2) The motion must address a significant safety . . . issue.

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.743(c). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. . . .

C. PG&E Response. In its response, PG&E claims that none of the four criteria are satisfied. It claims--correctly--that we may take account of its response to IR 93-36 in reaching our conclusion about the significance of the matters for which the record is sought to be reopened. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 73 (1989); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1299 n. 15 (1984). It asserts that the so-called "open items" upon which MFP in large part relies cannot serve as a basis for reopening. Further, it asserts that its March 15, 1994 response to the Staff (which it provided) explained and resolved all the "open items" raised by IR 93-36.

D. Staff Response. For its part, the Staff likewise asserts that MFP has fulfilled none of the bases for reopening the record. The Staff relies primarily upon the affidavit of Mr. Narbut, the NRC inspector responsible for IR 93-36. Mr. Narbut explained that none of the items in the report would conflict with or undermine his prior testimony in the proceeding and that many of MFP's references were to "unresolved items" that had not as yet been evaluated as to their severity.

E. Licensing Board Evaluation. We need not explore each of the reopening criteria to conclude that MFP's motion cannot be granted at this time;<sup>2</sup> for we have determined that the standard for changing the course of the proceeding could not be currently satisfied, particularly given the status in IR 93-36 of many items as no more than unresolved items. In its motion, MFP places explicit reliance on the expertise of the Staff inspector, Mr. Narbut, who by affidavit has stated that the inferences drawn by MFP from some of his statements are inaccurate or unwarranted. For that reason, we are denying MFP's motion based on the record currently before us.

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<sup>2</sup>Given the ambiguities of when MFP actually was served with IR 93-36, we are not basing this ruling on timeliness or lack thereof. In that connection, we raise a serious question whether a matter as apparently significant as this one should not have initially been the subject of a Board Notification. A follow-up inspection (IR 94-08) was the subject of Board Notification 94-06, dated March 17, 1994.

We note, however, that various unresolved items must some day become resolved. Indeed, by virtue of Inspection Report 94-08, dated March 16, 1994, transmitted to us by Board Notification 94-06, dated March 17, 1994, it appears that some former unresolved items have been escalated to the status of apparent violations. To the extent that resolution may have implications with respect to the implementation of the maintenance/surveillance program (especially to the extent that it might potentially warrant license conditions), our denial of MFP's motion is without prejudice to MFP's later filing of a motion to reopen based on matters that have been demonstrated as significant and possessing substantive implications with respect to implementation of the maintenance/surveillance program.<sup>3</sup> In that connection, for purposes of reopening the record for new information, the scope of the program should be viewed

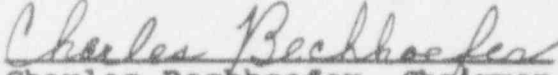
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<sup>3</sup>We note from IR 94-08 that certain of PG&E's activities identified in IR 93-36 are to be subject to an Enforcement Conference on March 23, 1994. The Board thus has properly been informed by Board Notification concerning this conference.

broadly--e.g., in the context of the definition appearing in  
INPO-90-008 (Rev. 1, March 1990), MFP Exhibit 4.

IT IS SO ORDERED.

For the Atomic Safety and  
Licensing Board

  
Charles Bechhoefer, Chairman  
ADMINISTRATIVE JUDGE

Bethesda, Maryland  
March 23, 1994

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 MEMO & ORDER (LBP-94-9) 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.

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

Administrative Judge  
Charles Bechhoefer, Chairman  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
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Administrative Judge  
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LB MEMO & ORDER (LBP-94-9)

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Dated at Rockville, Md. this  
23 day of March 1994

  
Office of the Secretary of the Commission



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of  
  
PACIFIC GAS AND ELECTRIC COMPANY  
  
(Diablo Canyon Nuclear Power Plant,  
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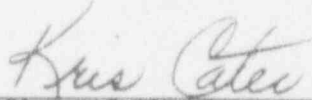
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Dated at Rockville, Md. this  
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Office of the Secretary of the Commission