

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

E. Roy Hawkens, Chair
Nicholas G. Trikouros
Dr. Gary S. Arnold

In the Matter of

PACIFIC GAS AND ELECTRIC COMPANY

(Diablo Canyon Independent Spent Fuel
Storage Installation)

Docket No. 72-26-ISFSI-MLR

ASLBP No. 23-979-01-ISFSI-MLR-BD01

July 19, 2023

MEMORANDUM AND ORDER

(Granting the Hearing Request of San Luis Obispo Mothers for Peace)

Pending before this Licensing Board is a hearing request from San Luis Obispo Mothers for Peace challenging an application from Pacific Gas and Electric Company to renew its license to store spent nuclear fuel in the Diablo Canyon Independent Spent Fuel Storage Installation for an additional 40 years beyond the current license expiration date of March 22, 2024. Because we conclude that San Luis Obispo Mothers for Peace has demonstrated standing and submitted an admissible contention, we grant its hearing request.

I. BACKGROUND

In March 2022, Pacific Gas and Electric Company (PG&E) filed an application with the Nuclear Regulatory Commission (NRC) Staff to renew its license to store spent nuclear fuel for an additional 40 years in the Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI), which is located on the Diablo Canyon Power Plant (DCPP) site in San Luis Obispo

County, California.¹ The license, which was initially issued in March 2004 for a 20-year term, authorizes PG&E to “provide interim storage in a dry cask storage system for up to 2100 metric tons of uranium contained in intact and damaged fuel assemblies and associated radioactive materials resulting from the operation of the [DCPP].”²

When PG&E filed its ISFSI license renewal application (LRA) in March 2022, it intended to shut down and decommission the DCPP nuclear reactors, Units 1 and 2, at the end of their license terms (i.e., November 2, 2024, and August 26, 2025, respectively)³ pursuant to a 2018 planning decision by the California Public Utilities Commission (CPUC).⁴ However, on September 2, 2022 — six months after PG&E filed the ISFSI LRA — the Governor of California signed Senate Bill No. 846 (SB 846), which invalidated the 2018 CPUC planning decision and directed PG&E to seek renewal of the operating licenses for Units 1 and 2.⁵ Consistent with the statutory directive in SB 846, on October 31, 2022, PG&E’s Senior Vice President and Chief Nuclear Officer, Paula Gerfen, submitted a request to the NRC Staff (Gerfen Letter) asking, inter alia, for an exemption from the NRC’s “timely renewal” regulation.⁶ On March 2, 2023, the NRC

¹ See Letter from M.R. Zawalick, PG&E, to NRC Document Control Desk, License Renewal Application for the Diablo Canyon [ISFSI] (Mar. 9, 2022) (ADAMS Accession No. ML22068A189) [hereinafter LRA].

² Notice of Issuance of Materials License SNM-2511; Diablo Canyon [ISFSI], 69 Fed. Reg. 15,910 (Mar. 26, 2004); see also LRA, app. G, at G-2.

³ See [PG&E, DCPP] Unit 1, Docket No. 50-275, Facility Operating License No. DPR-80 at 12 (ADAMS Accession No. ML053140349); [PG&E, DCPP] Unit 2, Docket No. 50-323, Facility Operating License No. DPR-82 at 10 (ADAMS Accession No. ML053140353).

⁴ See Decision Approving Retirement of Diablo Canyon Nuclear Power Plant, Decision 18-01-022, Pub. Utils. Comm’n of the State of Cal. (Jan. 11, 2018).

⁵ See S.B. 846, Diablo Canyon Powerplant: Extension of Operations (Cal. 2022) (approved by Governor Sept. 2, 2022).

⁶ See Letter from Paula Gerfen, Senior Vice President and Chief Nuclear Officer, PG&E, to NRC Document Control Desk (Oct. 31, 2022) (ADAMS Accession No. ML22304A691). Pursuant to NRC’s “timely renewal” regulation, if the licensee of a nuclear power plant files a sufficient application for renewal of an operating license at least five years before the existing

Staff granted the exemption request, which will allow PG&E's license renewal application for the DCPP reactors to be considered "timely" if it is filed no later than December 31, 2023 and if the NRC Staff finds it acceptable for docketing.⁷

Meanwhile, in January 2023, the NRC Staff published a Federal Register notice describing PG&E's ISFSI LRA and informing the public of the opportunity to petition to intervene and request a hearing. See [PG&E]; Diablo Canyon [ISFSI], 88 Fed. Reg. 1431 (Jan. 10, 2023).

On March 13, 2023, San Luis Obispo Mothers for Peace (SLOMFP) filed a hearing request in which it (1) alleged it had standing to intervene; and (2) proffered a safety contention (Contention A) and an environmental contention (Contention B).⁸ In both contentions, SLOMFP claims that the LRA is deficient because it fails to consider PG&E's intention to seek renewal of the operating licenses for the DCPP nuclear reactors, Units 1 and 2.

license expires, the existing license will not be deemed to have expired until the NRC Staff makes a final determination on the renewal application. See 10 C.F.R. § 2.109(b).

⁷ As explained in the Federal Register notice granting PG&E's request, pursuant to this exemption, if PG&E submits an LRA for DCPP, Units 1 and 2, by "December 31, 2023, and if the NRC staff finds it acceptable for docketing, the existing operating licenses will be in timely renewal under NRC regulations [and the reactors may therefore continue operations] until the NRC has made a final determination on whether to approve the license renewal application." [PG&E; DCPP], Units 1 and 2; Exemption; Issuance, 88 Fed. Reg. 14,395, 14,395 (Mar. 8, 2023).

⁸ See [SLOMFP] Hearing Request and Petition to Intervene in License Renewal Proceeding for Diablo Canyon [Independent] Spent Fuel Storage Installation (Mar. 13, 2023) [hereinafter SLOMFP Petition]. SLOMFP filed its petition on the NRC's E-Filing system on March 14, a day after the filing deadline; however, no one was prejudiced by the late E-Filing because SLOMFP provided all participants with its petition on March 13 via e-mail. See Licensing Board Memorandum and Order (Initial Prehearing Order) at 1 n.2, 2 (Mar. 29, 2023) (unpublished). SLOMFP was unable to E-File its petition on March 13 because it waited until that day to inform the Office of the Secretary (SECY) of its intent to file a petition. SECY therefore lacked the necessary information to create a timely electronic docket for SLOMFP's filing. See E-mail from SECY to Diane Curran (Mar. 14, 2023). To ensure timely E-Filings, petitioners should inform SECY of their intent to intervene "at least 10 days prior to the filing deadline," as advised in the Federal Register hearing opportunity notice for this proceeding. 88 Fed. Reg. at 1432.

On April 7, 2023, PG&E and the NRC Staff filed answers.⁹ PG&E does not dispute that SLOMFP has standing, see PG&E Answer at 1 n.3, but it argues that SLOMFP's hearing request should be denied for failure to proffer an admissible contention. See id. at 1–2. The NRC Staff, on the other hand, argues that SLOMFP's hearing request should be granted because SLOMFP demonstrated standing and proffered one contention (Contention A) that is admissible in part. See NRC Staff Answer at 1.¹⁰

On April 13, 2023, SLOMFP filed a reply in which it reiterated that it demonstrated standing and proffered two admissible contentions.¹¹ Notably, however, SLOMFP narrowed the scope of Contention A, abandoning its argument relating to the General Design Criteria and seeking admission only of the two components relating to PG&E's financial qualifications to operate and decommission the ISFSI. See SLOMFP Reply at 3–4.

On June 13, 2023, this Licensing Board held oral argument on standing and contention admissibility. See Official Transcript of Proceedings, [NRC], [PG&E], Diablo Canyon [ISFSI], Docket No. 72-26-ISFSI-MLR (June 13, 2023) (Revised Transcript, filed July 6, 2023) [hereinafter Tr.]. During the oral argument, SLOMFP further narrowed the scope of Contention A, abandoning its claim relating to PG&E's financial qualifications to decommission the ISFSI. See Tr. at 66–67 (Curran). SLOMFP now seeks admission only of that portion of Contention A

⁹ See [PG&E's] Answer Opposing [SLOMFP's] Hearing Request and Petition to Intervene (Apr. 7, 2023) [hereinafter PG&E Answer]; NRC Staff Answer to [SLOMFP] Hearing Request and Petition to Intervene (Apr. 7, 2023) [hereinafter NRC Staff Answer].

¹⁰ As proffered in SLOMFP's petition, Contention A consisted of three components, alleging that the ISFSI is deficient because it fails to provide accurate and complete information regarding (1) PG&E's financial qualifications to operate the ISFSI pursuant to 10 C.F.R. § 72.22(e); (2) PG&E's financial qualifications to decommission the ISFSI pursuant to 10 C.F.R. § 72.30(a) and (b); and (3) the General Design Criteria in 10 C.F.R. Part 72, Subpart F. See SLOMFP Petition at 5. According to the NRC Staff, only the first component is admissible. See NRC Staff Answer at 11–13.

¹¹ See [SLOMFP's] Reply to PG&E's and NRC Staff's Responses to SLOMFP's Hearing Request and Petition to Intervene in License Renewal Proceeding for Diablo Canyon [ISFSI] (Apr. 13, 2023) [hereinafter SLOMFP Reply].

that challenges PG&E's financial qualifications to operate the ISFSI pursuant to 10 C.F.R. § 72.22(e). See id.

II. ANALYSIS

To intervene in a licensing proceeding, a petitioner must (1) demonstrate standing pursuant to 10 C.F.R. § 2.309(d); and (2) submit a timely contention that satisfies the admissibility criteria in 10 C.F.R. § 2.309(f). See 10 C.F.R. § 2.309(a). We conclude that SLOMFP satisfies both requirements.

A. Standing

1. Standards for Establishing Standing

NRC regulations on standing require that a petitioner's hearing request include the following:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1)(i)–(iv).

Additionally, an organization, like SLOMFP, that seeks to establish representational standing on behalf of its membership must show that (1) "at least one member has standing and has authorized the organization to represent [them] and to request a hearing on [their] behalf," (2) "the interests that the representative organization seeks to protect [are] germane to its own purpose," and (3) "neither the asserted claim nor requested relief must require an individual member to participate in the organization's legal action." Southern Nuclear Operating Co., Inc. (Vogtle Electric Generating Plant, Unit 3), CLI-20-6, 91 NRC 225, 238 (2020).

In a materials licensing case like this, an organization asserting representational standing can show a member has standing by, inter alia, demonstrating that the member satisfies the “proximity-plus test.” See U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii), CLI-10-20, 72 NRC 185, 189 (2010).¹² Pursuant to this approach, a presumption of standing based on an individual’s geographic proximity to the relevant facility may be applied when the organization shows “(1) that the proposed licensing action involves a ‘significant source’ of radiation, which has (2) an ‘obvious potential for offsite consequences’ that will adversely affect the member. Id. (quoting Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)).

Although the petitioner bears the “burden of setting forth a clear and coherent argument for standing,” Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999), when a licensing board assesses the existence of standing, “we construe the petition in favor of the petitioner.” Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

2. SLOMFP Has Established Standing

SLOMFP maintains that it satisfies representational standing requirements based on the geographic proximity of its members to the DCPD site. See SLOMFP Petition at 3–4 & n.6. The NRC Staff agrees that SLOMFP has representational standing pursuant to the proximity-plus test, see NRC Staff Answer at 6, and PG&E does not dispute SLOMFP’s standing. See PG&E Answer at 1 n.3.

Although the NRC Staff and PG&E do not dispute SLOMFP’s assertion of representational standing, this Board has an obligation to “determine[] that the requester/petitioner has standing” before it may grant a hearing request. 10 C.F.R. § 2.309(a);

¹² If the organization cannot satisfy the proximity-plus test, “then [it] must establish standing according to traditional standing principles.” Schofield Barracks, CLI-10-20, 72 NRC at 189.

see Northern States Power Company (Prairie Island Nuclear Generating Plant ISFSI), LBP-12-24, 76 NRC 503, 507 n.13 (2012) (citing cases for the principle that a licensing board has an independent obligation to determine whether standing requirements are met even though no litigant disputes standing). We conclude that SLOMFP satisfies the three prerequisites for representational standing.

First, SLOMFP demonstrates that it has members who have standing and have authorized SLOMFP to represent them and request a hearing on their behalf. See Vogtle, CLI-20-6, 91 NRC at 238. In this regard, SLOMFP provides affidavits from four members who declare that they (1) live within six to eighteen miles of the DCPD site; (2) are concerned about the safety and environmental impacts of the continued operation of the Diablo Canyon ISFSI; and (3) authorize SLOMFP to represent their interests in this proceeding. See SLOMFP Petition, attachs. 1–4.¹³

SLOMFP claims that these members have standing based on the proximity of their homes to the DCPD site and, in support of that claim, references the proximity-plus standing analysis in Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (2002). We agree that the analysis in that case provides persuasive support. That case involved a challenge to PG&E’s 2001 application to construct and operate the Diablo Canyon ISFSI that is at issue here. The licensing board, guided by agency rulings on standing in the analogous context of cases involving the expansion of spent fuel pool storage, see id. at 428, coupled with the “obvious potential for offsite consequences” posed by the large volume of spent nuclear fuel that would be stored at the Diablo Canyon ISFSI, id. at 427 (internal quotation marks omitted), ruled that persons living

¹³ According to the affidavits, Kaoru Hisasue lives within six miles of the DCPD site, see SLOMFP Petition, attach. 1; Linda Seeley lives within eight miles, see id., attach. 2; Lucy Jane Swanson lives within twelve miles, see id., attach. 3; and Jill ZamEk lives within eighteen miles. See id., attach. 4.

within seventeen miles of the DCPD site had standing. See id. at 429. Because the facts in that case are identical in material respects to the facts in this case, we follow that board’s cogent ruling and conclude that SLOMFP members who live within seventeen miles of the DCPD site — i.e., Kaoru Hisasue, Linda Seeley, and Jane Swanson, see supra note 13 — have standing. As the NRC Staff correctly states, SLOMFP satisfies the “proximity-plus standard [because this proceeding involves] the renewal of the [DCPD] ISFSI license to store up to 2100 metric tons of spent nuclear fuel, [which is a significant] source of radioactivity [with an] obvious potential for offsite consequences” to SLOMFP members. NRC Staff Answer at 6–7.¹⁴

In compliance with the second requirement for representational standing, see Vogtle, CLI-20-6, 91 NRC at 238, SLOMFP shows that the interests it seeks to protect on behalf of its members are germane to its own purpose. Its members aver that they are concerned that the continued operation of the Diablo Canyon ISFSI will jeopardize their health and safety, the quality of their environment, and the value of their property. See SLOMFP Petition, attachs. 1–4. SLOMFP states that it is an “organization concerned with the dangers posed by Diablo Canyon and other nuclear reactors, nuclear weapons, and radioactive waste.” Id. at 4. It also “works to promote peace, environmental and social justice, and renewable energy.” Id. Insofar as SLOMFP seeks to protect its members’ health, safety, and environmental concerns, it seeks to protect interests germane to its own purpose.

¹⁴ The Commission’s standing analyses in two recent ISFSI proceedings are consistent with the conclusion that SLOMFP satisfies proximity-plus standing. See Interim Storage Partners LLC (WCS Consolidated Interim Storage Facility), CLI-20-15, 92 NRC 491, 494–96 (2020) (affirming licensing board’s finding of proximity-plus standing in ISFSI proceeding based on individual who lived six miles from the site); Holtec International (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 177–78 (2020) (affirming licensing board’s finding of proximity-plus standing in ISFSI proceeding based on individual’s operation of a ranch three miles from the site).

Lastly, consistent with the third requirement for representational standing, see Vogtle, CLI-20-6, 91 NRC at 238, neither SLOMFP's asserted claim nor its requested relief requires an individual member to participate in this proceeding.

We therefore conclude that SLOMFP has representational standing.

B. Contention Admissibility

1. Contention Admissibility Standards

To be admissible, a timely-filed contention must satisfy each of the following regulatory criteria:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the [petitioner's] position on the issue . . . , together with references to the specific sources and documents on which the [petitioner] intends to rely to support its position on the issue; [and]

(vi) [P]rovide sufficient information to show that a genuine dispute exists with the [applicant] on a material issue of law or fact. This information must include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief

10 C.F.R. § 2.309(f)(1)(i)–(vi).

The Commission's contention admissibility rule is "strict by design." AmerGen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006). A petitioner bears the burden of demonstrating a contention's admissibility, and a failure to satisfy

any of the six admissibility criteria constitutes grounds for rejecting a proposed contention. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). Although a petitioner need not “prove its contention at the pleading stage, we do require that it show a genuine dispute [on a material issue of law or fact] warranting a hearing.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004). A petitioner cannot rely on speculation to show the existence of a genuine dispute. See Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 221 (2015). Likewise, “generalized assertions, without specific ties to NRC regulatory requirements . . . do not provide adequate support demonstrating the existence of a genuine dispute of fact or law.” U.S. Department of Energy (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009).

2. Contention A is Admissible

SLOMFP’s Contention A alleges that the “information provided in [PG&E’s LRA] is incorrect and insufficient to satisfy NRC safety regulations.” SLOMFP Petition at 5. More precisely, SLOMFP argues that PG&E’s analysis of its financial qualifications to operate the ISFSI fails to satisfy 10 C.F.R. § 72.22(e)¹⁵ because the analysis is based on the invalid assumption that PG&E will not seek renewal of the DCPD reactors. In fact, asserts SLOMFP, PG&E intends to seek renewal of those reactors and has obtained a regulatory exemption from the NRC Staff for that purpose. See id.; infra note 16.

PG&E argues that Contention A is not admissible because the alleged deficiency is “beyond the scope of this proceeding, unsupported, and fail[s] to raise a genuine dispute with

¹⁵ Section 72.22(e) requires PG&E to provide information in its LRA “sufficient to demonstrate . . . financial qualifications . . . to carry out, in accordance with the regulations in this chapter, the activities for which the license is sought.” 10 C.F.R. § 72.22(e). As relevant here, the LRA must show that the applicant possesses the necessary funds or has reasonable assurance of obtaining the necessary funds to cover the “[e]stimated operating costs over the planned life of the ISFSI.” Id. § 72.22(e)(2).

the LRA, as required by 10 C.F.R. § 2.309(f)(1)(iii), (v), and (vi).” PG&E Answer at 15. The NRC Staff argues that Contention A is admissible.¹⁶ As discussed below, we agree with SLOMFP and the NRC Staff that Contention A satisfies the six criteria in 10 C.F.R. § 2.309(f)(1) and therefore is admissible.

First, in compliance with section 2.309(f)(1)(i), SLOMFP provides the following specific statement of the issue of law or fact to be raised: “PG&E’s [LRA] is incorrect and insufficient to satisfy NRC . . . regulations for ISFSIs because it fails to provide accurate and complete information regarding its satisfaction of NRC safety regulation[] 10 C.F.R. § 72.22(e)” SLOMFP Petition at 5.

Second, as required by section 2.309(f)(1)(ii), SLOMFP provides a brief explanation of the basis for Contention A. SLOMFP points out that PG&E has a regulatory obligation to provide the Commission with information that is “both correct and sufficient to demonstrate satisfaction of NRC’s safety regulations.” SLOMFP Petition at 7; see also id. n.11 (citing 10 C.F.R. § 72.11(a)).¹⁷ SLOMFP explains that, notwithstanding this regulatory requirement, PG&E neglected to revise the LRA to reflect its intent to seek renewal of the DCPD reactors.¹⁸ Instead, when discussing PG&E’s financial qualifications to operate the ISFSI, the LRA relies on the incorrect assumption that Unit 1 will be permanently shut down when its current license expires in November 2024. See id. at 5.

¹⁶ As explained supra Part I, the NRC Staff’s answer argued that Contention A was only admissible in part. See NRC Staff Answer at 11; see also Tr. at 54 (Gendelman). SLOMFP thereafter abandoned the portions of Contention A that the NRC Staff viewed as inadmissible. See SLOMFP Reply at 3; Tr. at 66–67 (Curran). Consequently, the NRC Staff now views SLOMFP’s version of Contention A as admissible in full. See Tr. at 55 (Gendelman).

¹⁷ Section 72.11(a) states that the “[i]nformation provided to the Commission by a licensee . . . must be complete and accurate in all material respects.” 10 C.F.R. § 72.11(a).

¹⁸ Counsel for PG&E acknowledged at oral argument that PG&E intends to seek renewal of the operating licenses for the DCPD reactors. See Tr. at 35 (Lighty).

Third, SLOMFP demonstrates that the issue raised is within the scope of the proceeding, as required by section 2.309(f)(1)(iii). This proceeding involves the issue of whether the analysis in the LRA “meets the standards and requirements of the Atomic Energy Act of 1954 . . . and the NRC’s regulations.” 88 Fed. Reg. at 1432. Contention A asserts that the financial qualifications analysis in the LRA relies on an incorrect and incomplete assumption regarding the retirement of the DCPD reactors, which, in turn, raises a question as to the impact of that allegedly flawed analysis on PG&E’s compliance with 10 C.F.R. § 72.22(e). See SLOMFP Petition at 5–6; see also Tr. at 57–58 (Gendelman). Thusly framed, Contention A falls within the scope of this proceeding.¹⁹

Fourth, in compliance with section 2.309(f)(1)(iv), SLOMFP demonstrates that the issue raised in Contention A is material to the findings the NRC must make in this proceeding. See SLOMFP Petition at 5–6, 8. A disputed issue “is material if its resolution would make a difference in the outcome of the licensing proceeding.” HI-STORE, CLI-20-4, 91 NRC at 190 (quotation marks omitted). A conclusion that the LRA contains a deficient financial qualifications analysis regarding PG&E’s ability to cover the “[e]stimated operating costs over the planned life

¹⁹ PG&E argues that SLOMFP’s financial qualifications claim is beyond the scope of this proceeding because the LRA’s discussion is properly confined to the status quo of the ISFSI, and “SLOMFP identifies zero support for its suggestion that PG&E was required, for purposes of satisfying 10 C.F.R. § 72.22(e),” to address a “separate, potential, future licensing application for renewal of the DCPD [reactor] licenses.” PG&E Answer at 11, 12. But, as the NRC Staff observes, “while operations at one facility would not ordinarily bear upon the licensing of another, here operations at the [DCPD] are connected to operations at the Diablo Canyon ISFSI by the [LRA].” NRC Staff Answer at 11. Specifically, in light of PG&E’s current intention to seek renewal of DCPD, Units 1 and 2, the factual assumption in the LRA regarding the retirement dates of the DCPD reactors is incorrect, which, in turn, raises questions about “the impact of these developments for the [LRA’s] satisfaction of NRC requirements.” Id. at 13. In other words, PG&E brought the renewal of the DCPD reactor licenses within the scope of this proceeding by including an allegedly inaccurate and incomplete factual assumption about the reactors’ retirement dates in its financial qualifications analysis.

of the ISFSI,” 10 C.F.R. § 72.22(e)(2), would make a difference in the outcome of this licensing proceeding. Contention A thus raises a material issue.²⁰

Fifth, SLOMFP provides a concise statement of the alleged facts and it references specific sources and documents to support its position, thus satisfying section 2.309(f)(1)(v). As a factual matter, SLOMFP alleges that PG&E failed to revise its LRA to reflect the fact that it intends to seek renewal of the DCPD reactors and, as a result, the LRA’s discussion of PG&E’s financial qualifications is based on the incorrect assumption that Unit 1 will cease operating in 2024. See SLOMFP Petition at 5, 6 (citing LRA at 1-4). In support of its assertion that, contrary to the LRA, PG&E intends to seek renewal of the DCPD reactors, SLOMFP cites SB 846 and the Gerfen Letter. See id. at 2, 7; see also supra note 18. Finally, SLOMFP cites NRC regulations to support its claim that the LRA’s financial qualifications analysis must be grounded on facts that are complete and accurate in material respects. See SLOMFP Petition at 5 (citing 10 C.F.R. § 72.22(e)); id. at 7 n.11 (citing 10 C.F.R. § 72.11(a)).

²⁰ “[A]s a practical matter,” states PG&E, “the scenario contemplated in the LRA — in which DCPD shuts down as of the units’ current expiration dates — presents a more conservative financial scenario than the one postulated by SLOMFP.” PG&E Answer at 12 (emphasis omitted). PG&E argues that SLOMFP “has not identified a material reason why anything beyond that conservative analysis . . . is required or even meaningful in this proceeding.” Tr. at 42–43 (Lighty). The salient question, however, is not whether PG&E’s allegedly inadequate analysis presents a more conservative financial scenario (which is a question that goes to the merits); rather, it is whether SLOMFP has alleged sufficient support for its assertion that, in light of PG&E’s plan to seek renewal of the DCPD reactors, the LRA’s financial qualifications analysis is grounded on assumptions that are inaccurate and incomplete in material respects. In our judgment, SLOMFP has made an adequate showing.

Relatedly, PG&E also argues that Contention A fails to satisfy the materiality requirement in section 2.309(f)(1)(iv) because “PG&E is financially qualified to continue operating the ISFSI regardless of whether the reactor licenses are renewed.” Tr. at 41 (Lighty). As the NRC Staff correctly counters, however, that argument goes to the merits; here, we are concerned only with whether SLOMFP has satisfied the contention admissibility requirements. See Tr. at 59 (Gendelman); see also NRC Staff Answer at 13 n.61 (“This is not to suggest that the Staff has substantive concerns with PG&E’s financial qualification to operate the ISFSI, but only that [SLOMFP] has met the pleading requirements of 10 C.F.R. § 2.309(f)(1).”).

Sixth and last, as required by section 2.309(f)(1)(vi), SLOMFP shows that a genuine dispute exists with PG&E on a material issue of law or fact. An ISFSI LRA must include complete and accurate information demonstrating the applicant's financial qualifications to operate the storage facility. See 10 C.F.R. §§ 72.11(a) and 72.22(e). Here, PG&E acknowledges that SB 846 "explicitly directed PG&E to pursue continued operation of DCP," PG&E Answer at 24, and PG&E concedes that it intends to seek renewal of the DCP reactors in compliance with that directive. See supra note 18. Yet, the LRA's financial qualifications analysis does not reflect PG&E's intention to seek renewal of the reactors; instead, it expressly refers to, and relies on, the 2024 retirement date of Unit 1 to demonstrate PG&E's financial qualifications to operate the ISFSI.

Specifically, the LRA states that PG&E will satisfy the financial qualifications requirement in section 72.22 by using the decommissioning trust fund to operate the ISFSI following Unit 1's decommissioning in November 2024:

PG&E will remain financially qualified to carry out the operation . . . of the ISFSI during the period of the renewed material license as required by 10 C.F.R. 72.22(e). The source of funds to operate the [Diablo Canyon] ISFSI until the DCP Unit 1 permanent shutdown in November 2024 is the General Rate Case process The source of funds to operate . . . the [Diablo Canyon] ISFSI starting in November 2024 of the renewed license period will include the PG&E Decommissioning Trust Fund, which is regulated by the CPUC and [NRC].

LRA at 1-3 to 1-4 (emphasis added). However, assuming Unit 1 is still operating beyond November 2024 (as directed by SB 846 and as intended by PG&E), the decommissioning trust fund would not be available for ISFSI operations, and the above highlighted statement would be erroneous, thus raising a genuine question regarding PG&E's demonstration of its compliance with section 72.22(e). See SLOMFP Petition at 5–6; NRC Staff Answer at 12–13; Tr. at 58

(Gendelman). SLOMFP thus has shown that a genuine dispute exists on a material issue of law or fact, as required by section 2.309(f)(1)(vi).²¹

We therefore conclude that Contention A is admissible, as follows: PG&E's ISFSI LRA fails to provide accurate and complete information regarding its satisfaction of NRC safety regulation 10 C.F.R. § 72.22(e) because its financial qualifications analysis is based on the incorrect assumption that PG&E will not seek renewal of the DCPD reactors.²²

3. Contention B Is Not Admissible

SLOMFP also seeks to admit Contention B, which alleges that the "Purpose and Need for the Proposed Action" discussion in the Environmental Report (ER) is improperly "based on the assumption that the [DCPD] reactors will close when their operating licenses expire in 2024 and 2025." SLOMFP Petition at 9.²³ As a result, argues SLOMFP, the ER (1) improperly fails to address the spent fuel storage needs created by PG&E's intention to seek renewal of the DCPD reactors, see id.; (2) insufficiently considers alternatives for the proposed action, see id. at 11;

²¹ PG&E attempts to justify its financial qualifications analysis by asserting that, pursuant to Commission case law, "financial qualification discussions are not required to present 'absolutely certain predictions.'" PG&E Answer at 13 n.48 (quoting Exelon Generation Company, LLC (Braidwood Station, Units 1 and 2), CLI-22-1, 95 NRC 1, 7, (2022)). PG&E's assertion is true, but it is also quite beside the point. SLOMFP does not challenge PG&E's financial qualifications analysis for lacking predictive certainty; rather, it contends that the factual assumption underlying that analysis is not complete and correct in material respects, which calls into question whether PG&E satisfies regulatory requirements.

²² In PG&E's view, the LRA was "complete and accurate" when it was filed, it "reflects the current legal reality," and no regulation compels that it be updated until "the reactor licenses are, in fact, renewed." Tr. at 31 (Lighty). That legal argument remains open for PG&E to advance; however, it overlooks a principal thrust of Contention A, which is whether the LRA satisfies section 72.22(e) when its financial qualifications analysis is based on the incorrect assumption that PG&E will start using the decommissioning trust fund to operate the ISFSI in 2024. See Tr. at 65–66 (Curran); see also Tr. at 53 (Gendelman) (Counsel for NRC Staff states that "the developments associated with potential reactor renewal are relevant . . . [and form] the basis for an admissible contention . . . because they bear factually on the satisfaction of [section 72.22(e)].").

²³ What SLOMFP refers to as the Environmental Report is actually entitled the Environmental Report Supplement. See LRA, app. F. In this decision, we will use the terminology employed by SLOMFP.

- (3) inadequately analyzes the cumulative impacts of the proposed action, see id.; and
- (4) improperly fails to reconcile renewal of the ISFSI with California law and policies regarding the creation and storage of spent fuel. See id. at 10–11.

PG&E and the NRC Staff argue that Contention B fails to satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1). See PG&E Answer at 17–25; NRC Staff Answer at 15–18. We agree.

At the outset, we observe that the “purpose and need” statement in the ER does not explicitly refer to, much less rely on, the retirement dates for DCP, Units 1 and 2, as the basis for satisfying NRC regulatory requirements. Rather, it says in relevant part: “Due to the current timeframe projections for development of a federal geologic repository, the purpose and the need for the proposed action is to provide for continued temporary dry storage of spent nuclear fuel generated from operation of DCP at the [Diablo Canyon] ISFSI until facilities are available for interim or permanent disposal.” LRA, app. F, at F-2. As it is framed, the “purpose and need” statement is correct regardless of when the DCP reactors are shut down; namely, it will “provide for continued temporary dry storage of spent nuclear fuel generated from operation of DCP.” Id. SLOMFP’s claim that the statement improperly relies on an inaccurate assumption, see SLOMFP Petition at 9, is thus incorrect and fails to demonstrate the existence of a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Because SLOMFP does not identify a deficiency in the “purpose and need” statement, its assertion that this (non-existent) deficiency taints other analyses in the ER is seemingly baseless. We will nevertheless examine the four derivative claims embedded in Contention B.

Preliminarily, however, we take a moment to discuss the spent fuel storage capacity at DCP, because the derivative claims in Contention B are largely grounded on the premise that if the operating licenses for the DCP reactors are renewed, and if the reactors continue to operate for 20 more years, then PG&E may need to expand its existing ISFSI to accommodate all 60 years of spent fuel. PG&E explains, however, that the dry storage capacity in the ISFSI

coupled with the wet storage capacity in the spent fuel pools provides DCPD with enough capacity to store at least 60 years' worth of spent fuel, which is sufficient to allow for the operation of Units 1 and 2 through a full renewal period. See PG&E Answer at 2–3, 6.²⁴ Assuming, for the sake of argument, that additional dry storage were desired in the future (e.g., after permanent DCPD shutdown to support decommissioning), PG&E states that it could elect to develop that capacity in a separate spent fuel storage facility under its general license pursuant to 10 C.F.R. § 72.210. See id. at 6 & n.22. Moreover, the possibility exists that, at some point during the 40-year renewal period of the ISFSI, either a consolidated interim storage facility or a permanent repository may become available. See id. at 6. In short, declares PG&E, neither the need to construct additional storage, nor the need to do so at this existing ISFSI, is a foregone conclusion, and PG&E has made no decision on how it will proceed at this time. See id.

We now turn to the four derivative claims embedded in Contention B. First, SLOMFP alleges that the ER improperly fails to discuss the spent fuel storage needs created by PG&E's intention to seek renewal of the DCPD reactors. See SLOMFP Petition at 9–10. Such discussion is necessary, contends SLOMFP, because the DCPD reactors may not be able to operate for a full 20-year renewal period before running out of storage space for the spent fuel. See id. at 10. But SLOMFP's assertion that DCPD might run out of spent-fuel storage space is conjectural, see supra note 24, and does not satisfy the requirement in 10 C.F.R.

§ 2.309(f)(1)(v) that a contention must be supported by facts or expert opinion. Nor does SLOMFP cite any regulation that would require PG&E to discuss expanding its storage space at

²⁴ PG&E states that the DCPD ISFSI consists of seven storage pads that collectively provide sufficient storage for all spent fuel generated at DCPD for the initial 40-year operating periods of Units 1 and 2. See PG&E Answer at 2. The current operating licenses for Units 1 and 2 provide for a spent fuel pool at each unit that can store more than 20 years of spent fuel. See id. at 2–3 & n.7. DCPD thus can store at least 60 years' worth of spent fuel, see id. 3, 6, which includes the ability to offload the cores of Units 1 and 2 at the end of their renewal periods. See Tr. at 32 (Lighty).

the Diablo Canyon ISFSI under these circumstances. A generalized assertion without a specific tie to an NRC regulatory requirement does not provide adequate support to demonstrate a genuine dispute of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi); High-Level Waste Repository, CLI-09-14, 69 NRC at 588.

Second, SLOMFP asserts that the ER is deficient because it fails to consider “a reasonable array of alternatives [for the proposed action] as required by 10 C.F.R. §§ 51.30(a)(1)(ii) and 51.45(b)(3).”²⁵ SLOMFP Petition at 11. The ER’s description of alternatives consists of (1) the no-action alternative; (2) shipping fuel to a permanent federal repository; (3) shipping fuel to a reprocessing facility; (4) shipping fuel to a private spent fuel storage facility; and (5) shipping fuel to another nuclear power plant. See LRA, app. F, at F-7 to F-9. SLOMFP does not specify which of these alternatives it disagrees with or why. Nor does it provide adequate support for its claim that PG&E’s “array of alternatives” is unreasonable. The Commission has declared that for a contention to be admissible it must “refer to the specific portions of the application [it] disputes, [and provide] the supporting reasons for each dispute.” Vermont Yankee, CLI-15-20, 82 NRC at 221. In our judgment, SLOMFP has not provided sufficient information to show a genuine dispute with the LRA. See 10 C.F.R. § 2.309(f)(1)(v), (vi).²⁶

²⁵ SLOMFP’s petition does not cite section 51.30(a)(1)(ii); rather, it cites section 52.30(a)(1)(ii). See SLOMFP Petition at 11. Because section 52.30(a)(1)(ii) does not exist, we assume that SLOMFP intended to cite to section 51.30(a)(1)(ii).

²⁶ SLOMFP opines that the purpose and need statement is “excessively narrow” when compared with the purpose and need statement in the ER that accompanied the 2001 Diablo Canyon ISFSI license application. SLOMFP Petition at 12. As a result of this alleged shortcoming, SLOMFP argues that the ER improperly fails to discuss alternatives for increasing the capacity of the ISFSI or adding another ISFSI. See id. at 14, 16; see also SLOMFP Reply at 7 (asserting that the ER’s discussion of alternatives represents a “blinded approach to the continued generation of spent fuel.”). As discussed supra note 24 and accompanying text, however, PG&E states that DCPD can store at least 60 years’ worth of spent fuel, so the need for additional on-site storage during the renewal period of Units 1 and 2 is speculative. Moreover, a consolidated interim storage facility or a permanent repository may become available at some point during the ISFSI’s 40-year renewal period, in which case “no additional

Third, SLOMFP argues that the ER inadequately considers the cumulative impacts of the proposed action as required by 10 C.F.R. §§ 51.23(c) and 51.30(a)(1)(iii), see SLOMFP Petition at 11, because it fails to consider “the cumulative impacts of adding yet another spent fuel facility.” Id. at 16. However, whether PG&E will construct another spent fuel facility at DCPD is conjectural, see supra note 26, and a contention that is grounded on mere conjecture lacks supporting facts and fails to show a genuine dispute on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(v), (vi).²⁷

Moreover, as the NRC Staff points out, see NRC Staff Answer at 17, the ER provides a summary of different environmental impacts from the Diablo Canyon ISFSI, with reference to the Updated Final Safety Analysis Report’s cumulative impact discussion. See LRA, app. F, at F-31 to F-41. Of all the analyzed environmental impacts, the ER finds that the only potential impacts are occupational and public doses, both of which are within regulatory limits. See id. at F-40. Within those discussions, the ER specifically looks at the cumulative doses delivered to site personnel and the public. See id. at F-33, F-34. For example, under “Occupational Dose,” the ER “establishes the expected cumulative dose delivered to site personnel during the fuel handling and transfer activities,” including doses received during overpack loading, ISFSI walkdowns, and maintenance and repairs. Id. at F-33. For doses to the public, the ER looks at the doses received from the dry cask storage system surfaces, the spent fuel loading activity,

spent fuel storage capacity will be needed.” PG&E Answer at 22. Given these circumstances, SLOMFP has not provided factual support or expert opinion to sustain its assertion that PG&E’s purpose and need statement is “excessively narrow,” SLOMFP Petition at 12, much less its assertion that PG&E’s approach in discussing alternatives is “blinded” or otherwise unreasonable. SLOMFP Reply at 7. Nor has SLOMFP demonstrated that a genuine dispute exists on a material issue. This aspect of Contention B is therefore not admissible.

²⁷ SLOMFP correctly observes that the “rule of reason” governs the scope of environmental analyses in an ER. See SLOMFP Reply at 7–8 (quoting City of Carmel-by-the-Sea v. Dept. of Transportation, 123 F.3d 1142, 1150 (9th Cir. 1997)). But that rule does not salvage this aspect of Contention B because SLOMFP has not shown that PG&E acted unreasonably in declining to consider the cumulative impacts of an event that, at this juncture, is entirely speculative. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348–49 (2002); see also Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974).

and other uranium fuel cycle operations. See id. at F-34. Because the ER's discussion of environmental impacts evaluates the cumulative impacts for the resource areas that it found may have impacts from the ISFSI license renewal, we agree with the Staff's assertion that "SLOMFP's bare claim that such discussion is absent is not sufficient to raise a genuine dispute of law or fact under 10 C.F.R. § 51.30(a)(1)(iii), as required by 10 C.F.R. § 2.309(f)(1)(iv)." NRC Staff Answer at 17–18.

Lastly, SLOMFP argues that the ER improperly fails to reconcile the ISFSI license renewal with California law and policies regarding the creation and storage of spent fuel. See SLOMFP Petition at 10–11. But this proceeding concerns the LRA's compliance with NRC regulations in 10 C.F.R. Parts 51 and 72, not with state law and policies. SLOMFP identifies no federal regulation requiring PG&E to address California's law and policies. See Tr. at 23–24 (Curran). This aspect of Contention B is thus inadmissible for being outside the scope of the proceeding and failing to demonstrate a genuine dispute with the LRA on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(iii), (vi).

III. CONCLUSION

For the foregoing reasons, we grant SLOMFP's hearing request, and we admit Contention A as follows: PG&E's ISFSI LRA fails to provide accurate and complete information regarding its satisfaction of NRC safety regulation 10 C.F.R. § 72.22(e) because its financial qualifications analysis is based on the incorrect assumption that PG&E will not seek renewal of the DCCP reactors.

This proceeding shall be conducted pursuant to the Simplified Hearing Procedures for NRC Adjudications described in Subpart L of 10 C.F.R. Part 2.

This Memorandum and Order is subject to appeal in accordance with the provisions in 10 C.F.R. § 2.311(b) and (d)(1).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens, Chair
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 19, 2023

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY) Docket No. 72-26-ISFSI-MLR
)
(Diablo Canyon Independent Spent Fuel)
Storage Installation))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER(Granting The Hearing Request of San Luis Obispo Mothers for Peace) (LBP-23-07)** have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: ocaamail.resource@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001
E. Roy Hawkens, Chairman
Nicholas G. Trikouros, Administrative Judge
Dr. Gary S. Arnold, Administrative Judge
Noel M. Johnson, Law Clerk
Emily G. Newman, Law Clerk
Allison R. Wood, Law Clerk
E-mail: roy.hawkens@nrc.gov
nicholas.trikouros@nrc.gov
gary.arnold@nrc.gov
noel.johnson@nrc.gov
emily.newman@nrc.gov
allison.wood@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-14A44
Washington, DC 20555-0001
Adam S. Gendelman
Catherine E. Kanatas
Mauri T. Lemoncelli
E-mail: adam.gendelman@nrc.gov
catherine.kanatas@nrc.gov
mauri.lemoncelli@nrc.gov

Counsel for Pacific Gas and Electric
Company
Morgan, Lewis & Bockius, LLC
1111 Pennsylvania Ave NW
Washington, DC 20004
Ryan K. Lighty
Paul Bessette
Timothy Matthews
E-mail: ryan.lighty@morganlewis.com
paul.bessette@morganlewis.com
timothy.matthews@morganlewis.com

Pacific Gas and Electric Company (Diablo Canyon Independent Spent Fuel Storage Installation)
MEMORANDUM AND ORDER(Granting The Hearing Request of San Luis Obispo Mothers for Peace) (LBP-23-07)

Counsel for San Luis Obispo Mothers for Peace
Hamon, Curran, Spielberg, & Eisenberg, LLP
1725 DeSales Street, N.W.
Suite 500
Washington, DC 20036
Diane Curran
E-mail: dcurran@harmoncurran.com

Jill ZamEk
San Luis Obispo Mothers for Peace
1123 Flora Rd.
Arroyo Grande, CA 93420
E-mail: jzamek@gmail.com

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of July 2023