UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 12199 **DOCKETED 09/06/06**

COMMISSIONERS

SERVED 09/06/06

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
PACIFIC GAS & ELECTRIC CO.	)	Docket No. 72-26-ISFSI
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)	)	

CLI-06-23

MEMORANDUM AND ORDER

This proceeding stems from an application by Pacific Gas and Electric Company ("PG&E") to operate an independent spent fuel storage installation ("ISFSI") at the site of its two Diablo Canyon nuclear power plants in California. Before us today is a "Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard for Declaratory and Injunctive Relief with Respect to Diablo Canyon ISFSI" (July 5, 2006) ("SLOMFP motion"). The motion is an offshoot of a recent judicial decision, *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), finding our "categorical refusal to consider the environmental effects of a terrorist attack" unreasonable under the National Environmental Policy Act ("NEPA").[1] The court remanded the NEPA-terrorism question to the Commission for "further proceedings consistent with this opinion."[2]

[1] 449 F.3d at 1028.

[2] *Id.* at 1035.

The SLOMFP motion seeks three forms of relief. First, it asks us to declare "invalid" PG&E's already-granted ISFSI license.[3] Second, it asks us to declare that PG&E proceeds with ISFSI construction "at the risk" that the NEPA-based judicial remand may result in denying the license or in changes in "the design and construction of the ISFSI."[4] And, third, the motion asks for a Commission order "enjoining" PG&E from loading spent fuel into the ISFSI pending completion of an Environmental Impact Statement discussing the environmental impacts of a terrorist attack.[5] We deny the motion as unnecessary and premature.

As the SLOMFP motion acknowledges, the court of appeals has not yet issued its "mandate" formally returning the ISFSI proceeding to the Commission.[6] So the court-ordered "remand" proceeding has not yet begun. Nor did the court impose any interim remedy, direct the Commission to impose one, or specify the procedures the Commission must follow on remand. On the contrary, the court gave the Commission maximum procedural leeway. The court stated that it was not "circumscribing the procedures that the NRC must employ," and that "[t]here remain . . . a wide variety of actions [the NRC] may take on remand."[7]

In the meantime, the Supreme Court has extended (by 30 days) the August 31 deadline for asking the Court to review the Ninth Circuit decision. Moreover, while PG&E has continued construction of the ISFSI, it has stated publicly that it will not be ready to use the ISFSI to store spent fuel "until at least November, 2007."[8]

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[3] *See* SLOMFP Motion, at 9.

[4] *Id.* at 9-10.

[5] *Id.* at 10.

[6] *Id.* at 2. *See* Federal Rules of Appellate Procedure, Rule 41(b).

[7] *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d at 1035.

[8] *See* Answer of Pacific Gas and Electric Company to Motion for Declaratory and Injunctive Relief, at 15 (July 17, 2006).

In these circumstances, notwithstanding SLOMFP's motion, we see no urgent reason to consider now the validity of PG&E's ISFSI license and PG&E's right to load spent fuel into its ISFSI. Neither issue has practical significance until late in 2007 at the earliest.[9] As for SLOMFP's request that we "declare" that PG&E is going forward with construction at its own risk, PG&E itself has already said as much: it fully acknowledges that continuing to construct the ISFSI comes "at its own financial risk."[10] Thus, in light of PG&E's acknowledgment, there is no controversy as to who bears the financial risk of going forward with construction of the ISFSI.

The long and short of this matter is that there remains well more than a year before PG&E will be in position to use its ISFSI license to load radioactive spent fuel. In the interval, further judicial review or further administrative review, or both, may take place. And, as litigation moves forward or terminates, the "equities" that traditionally govern stays or injunctive relief may change.[11] The Commission can decide later, if necessary, whether it is appropriate or necessary to prohibit or postpone loading spent fuel into the Diablo Canyon ISFSI. But the current state of affairs – ongoing construction but no loading of spent fuel – causes no imminent or irreparable harm justifying immediate Commission action. Such harm is the *sine qua non* of the kind of equitable relief SLOMFP seeks.[12]

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[9] As a legal matter, PG&E does not need an NRC license for construction activity; no one argues otherwise. *See generally Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-3, 57 NRC 239, 246-50 (2003).

[10] *See id.* at 18.

[11] *See generally Entergy Nuclear Vermont Yankee, L.L.C.* and *Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237-38 & nn. 4-7 (2006).

[12] *See id.* at 237.

For these reasons, the Commission *denies* SLOMFP's motion for declaratory and injunctive relief.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of September, 2006

Commissioner Gregory B. Jaczko respectfully dissents:

I dissent from this order because, as I have stated in the recent past, the NEPA terrorism issue is a significant matter that needs resolution. I believe the agency should conduct a review of the impacts of terrorist attacks on nuclear facilities as part of a NEPA analysis. More importantly, I believe continuing to refuse to consider the environmental effects of terrorist attacks will subject the agency to unnecessary judicial challenges. Thus, I am fully supportive of all efforts to give this matter the thorough and deliberate review warranted.

In addition, I believe that the current uncertainty surrounding the impact of this issue may lead to unnecessary confusion in the review of new reactor licenses. To eliminate this uncertainty, the agency should expeditiously develop a process to review terrorism issues as part of a NEPA analysis consistent with the recent Ninth Circuit decision. This particular case presents a timely opportunity for the Commission to resolve these matters, providing clarity and certainty for the potential increase in licensing reviews the Commission may conduct in the next few years.