September 26, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF RESPONSE TO MOTION FOR RECONSIDERATION OF CLI-06-23

INTRODUCTION

On September 18, 2006 the San Luis Obispo Mothers for Peace, Santa Lucia Chapter of the Sierra Club, and Peg Pinard (collectively, "the Petitioners") filed a motion for reconsideration[1] of two portions of CLI-06-23[2] which denied the Petitioners' previous requests that the Commission: (1) declare invalid Pacific Gas and Electric Co.'s ("PG&E") permit for an independent spent fuel storage installation (ISFSI) at PG&E's Diablo Canyon nuclear power plants; and (2) enjoin PG&E from loading spent fuel into the ISFSI until the NRC staff ("Staff") has completed an environmental impact statement (EIS) addressing the potential environmental impacts of a terrorist attack at the ISFSI. The Staff hereby responds and, for the reasons discussed below, respectfully requests that the Petitioners' Motion for Reconsideration be denied.

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[1] "Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard for Partial Reconsideration of CLI-06-23," September 18, 2006 ("Motion for Reconsideration").

[2] *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant Independent Spent Fuel Storage Installation), CLI-06-23, 64 NRC __, *slip op.* (September 6, 2006).

BACKGROUND

This proceeding stems from an application by PG&E for a materials license authorizing storage of spent nuclear fuel in a dry cask storage system at an ISFSI to be constructed at the Diablo Canyon site[3]. The Petitioners filed a request for a hearing[4]. Among the proposed contentions was one alleging that the Staff's environmental review of the proposed ISFSI pursuant to the National Environmental Policy Act of 1969 ("NEPA") should consider the environmental impacts of terrorism. The Atomic Safety and Licensing Board ("Board") rejected the contention, and, on review the Commission affirmed. *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant), CLI-03-01, 57 NRC 1, 6-8 (2003).

On review, the U.S. Court of Appeals for the Ninth Circuit reversed the Commission's determination that NEPA does not require an analysis of the environmental impact of terrorism and remanded the issue for further proceedings before the Commission. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1035 (9th Cir. 2006). Following the Ninth Circuit's decision, the Petitioners filed a motion with the Commission for declaratory and injunctive relief[5], requesting that the Commission declare that the license issued to PG&E is invalid and that PG&E proceeds with construction at its own risk; and enjoin PG&E from loading fuel into the facility until the Staff has completed an EIS analyzing the potential environmental impacts of a terrorist attack on the ISFSI. The Commission denied the Motion for Injunctive Relief as "unnecessary and premature." CLI-06-23, 64 NRC _, *slip op.* at 2. In its decision, the

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[3] "Letter from Lawrence F. Womack, PG&E, to the U.S. Nuclear Regulatory Commission," Dec. 21, 2001.

[4] "Petition of San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council for Leave to Intervene and Request for a Hearing," May 22, 2002; "Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace, et al.," May 22, 2002; "Supplemental Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace, et al.," July 18, 2002.

[5] "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. ("Motion for Injunctive Relief").

Commission noted that the Ninth Circuit's mandate had not yet issued, the Ninth Circuit had not imposed or directed the Commission to impose any interim remedy, the Ninth Circuit had not specified the procedures the Commission must follow on remand, and PG&E had stated that it will not be ready to load fuel into the ISFSI until at least November, 2007. *Id.* Based on these circumstances, the Commission saw "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," and, accordingly, denied the Motion for Injunctive Relief[6]. *Id.* at 3.

Following the issuance of the Ninth Circuit's mandate, the Petitioners filed Motion for Reconsideration at issue, requesting that the Commission invalidate PG&E's license and enjoin PG&E from loading spent fuel into the ISFSI. As discussed below, despite the issuance of the Ninth Circuit's mandate, reconsideration is not warranted because there has been no showing of compelling circumstances as required by 10 C.F.R. § 2.323(e)[7].

DISCUSSION

Pursuant to 10 C.F.R. § 2.323(d), a motion for reconsideration may be filed upon leave of the Commission only "upon a showing of compelling circumstances, such as the existence of a clear and material error in the decision, which could not have reasonably been anticipated, that renders the petition invalid." The Commission has held that "reconsideration motions 'are an opportunity to request correction of [an] error by refining an argument, or by pointing out a factual misapprehension or a controlling decision or law that was overlooked.'" *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-2,

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[6] The Commission also declined the Petitioners' request for a declaration that PG&E proceeds at its own financial risk, finding no controversy among the parties regarding the risk for the project. *Id.* The Petitioners do not seek reconsideration of this point. Motion for Reconsideration at n. 1.

[7] The Petitioners seek reconsideration pursuant to both 10 C.F.R. § 2.323(e) and 10 C.F.R. § 2.345(d). However § 2.345(d) is applicable only to petitions for reconsideration of a final decision, and, therefore, is not applicable to the instant motion. In any event, the provisions are nearly identical.

55 NRC 5, 7 (2002); *quoting Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264, *aff'g Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998). In their Motion for Reconsideration, the Petitioners argue that the Commission must reconsider its ruling in CLI-06-23, in light of the recently issued mandate from the Ninth Circuit. However, while the Commission's decision was issued before the mandate issued, the Petitioners have not shown that the Commission overlooked the pending mandate or any other issue of fact or law pertinent to the relief then sought, and, therefore, reconsideration of CLI-06-23 would be improper at this time.

The Commission's determination on the Petitioners' original Motion for Injunctive Relief was based on a consideration of "the 'equities' that traditionally govern stays or injunctive relief." CLI-06-23, 64 NRC_, *slip op.* at 3; (*citing Entergy Nuclear Vermont Yankee, L.L.C.* and *Entergy Nuclear Operation, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC237-38 & nn. 4-7 (2006)). The "equities" to be considered in connection to a request for injunctive relief are: (1) the likelihood of success on the merits; (2) the likelihood of irreparable injury to the petitioner; (3) the likelihood of harm to other parties; and (4) where the public interest lies. *Vermont Yankee*, CLI-06-8, 63 NRC at 237; *see also* 10 C.F.R. § 2.342(e) (standards for considering whether to stay presiding officers' decisions). Of these factors, the most important is the possibility of "imminent, irreparable harm that is both 'certain and great.'" *Id.*, (*citing USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1295 (2d Cir. 1995)).

The Commission's earlier determination on the equities in this proceeding considered several factors, of which issuance of the mandate was but one of the factors considered. The Commission, while noting that the Ninth Circuit's mandate had not yet issued, and that the court had neither proposed a particular interim remedy nor specified the procedures the Commission must follow on remand, placed the greatest emphasis on PG&E's statements that it will not

store spent fuel at the ISFSI until November 2007 at the earliest, stating that "the current state of affairs – ongoing construction but no loading of spent fuel – causes no imminent or irreparable harm justifying immediate Commission action." CLI-06-23, *slip op.* at 2-3. The absence of immediate harm, "the *sine qua non* of the kind of equitable relief" sought by the Petitioners, formed the basis for the Commission's decision. *Id.* at 3

The Petitioners argue that "the issuance of the mandate of the Ninth Circuit has eliminated any reason that may have existed postponing the granting of Petitioners' motion for declaratory and injunctive relief." Motion for Reconsideration at 4. In actuality, this is not the case. As shown above, while the absence of the mandate was one factor in the Commission's determination, the primary factor was the absence of imminent, irreparable harm. The Petitioners have not made, nor even attempted to make, the required showing that the Commission either overlooked an important factual matter or misapprehended the facts presented, and therefore they have not shown that reconsideration is warranted. *See Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 5 (1997). Nor have the Petitioners made a compelling argument that the Commission overlooked a controlling law or legal principle, as discussed below. *See* CLI-02-2, 55 NRC at 7.

The Petitioners argue that the Commission erred in applying the balancing factors for injunctive relief to their request for declaratory relief in relation to the validity of PG&E's license. Motion for Reconsideration at 6. The Petitioners appear to argue that the Commission erred by reaching a merits-based decision that the license is valid. *Id.* The Commission has not yet reached any merits-based decision in the context of the matter remanded to it by the Court of Appeals. Rather, the Commission considered only the Petitioners' specific requests seeking an

immediate declaratory judgment concerning the validity of the license.[8] Based on the absence of any immediate, irreparable harm and the knowledge that the course of the proceeding on remand has not yet been determined, the Commission found that such declaratory relief is both "unnecessary and premature." CLI-06-23, *slip op.* at 2-3. Thus, the Commission has made no error in relation to the legal standards applicable to the instant request for declaratory relief.

It also should be noted that, despite the issuance of the mandate, it is not yet clear what path the remand proceeding will take. The Ninth Circuit's decision "should not be construed as constraining the NRC's consideration of the merits on remand, or circumscribing the procedures that the NRC must employ in conducting its analysis." 449 F.3d at 1035. Because of the uncertainty regarding the next step in the remand proceeding, insofar as the Petitioners' requests invoke and necessitate the completion of a NEPA review by the Staff, the Petitioners' requests are premature because the Commission has not yet had the opportunity to determine, within the latitude included in the Ninth Circuit's decision, what acceptable option it may use to resolve the remanded issues. The procedural leeway afforded by Ninth Circuit grants the NRC discretion to establish and manage a timetable for its own proceedings. *Id.; see also Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). Here, no specific deadline for conclusion of the Staff's NEPA review has been set, and, in the absence of any specific deadline, the NRC has the discretion to establish a timetable for NEPA review as the NRC determines is appropriate. *See id*; *see also* 5 U.S.C. § 555(b) (directing administrative agencies to conduct and conclude matters "within reasonable time").

Due to the far-reaching, complex nature of the issues on remand and the potential impact any action on remand may have on agency activities and resources, the Commission

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[8] The Commission did note that although PG&E currently holds a license for the ISFSI, at this point, and until November 2007 at the earliest, only construction activities, which do not require a license, are being carried out at the site. CLI-06-23, *slip op.* at n. 9.

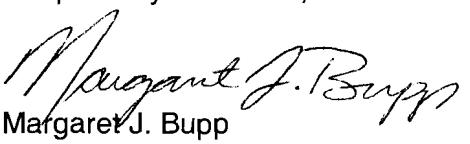
must carefully consider actions taken in response to the Ninth Circuit's mandate. Given the leeway afforded by the Ninth Circuit, the NRC is acting in a reasonable, timely, and appropriate fashion on the mandate. *Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir. 2001) (*quoting Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (*quoting Telecomm. Research and Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*citations omitted*))). As discussed above, because the proposed ISFSI will not be used to store spent fuel until November 2007 at the earliest, there is no present danger of imminent, irreparable harm from continued construction activities at the site while the Commission proceeds on remand. Thus, the Petitioners have shown no compelling legal reason to invalidate the license now while the Commission determines how best to proceed.

As the Commission noted, "as litigation moves forward or terminates, the 'equities' that traditionally govern stays or injunctive relief may change." CLI-06-23, *slip op.* at 3. At the present, the equities remain so that the issue is not ripe to be revisited. Therefore, the Motion for Reconsideration should be dismissed.

CONCLUSION

As discussed above, the Petitioners have not shown that compelling circumstances necessitating review of CLI-06-23 exist under the present circumstances. Nor have the Petitioners shown that the Staff has engaged in an unreasonable delay necessitating immediate action on the Ninth Circuit's mandate. Therefore, the Petitioners' Motion for Reconsideration should be denied.

Respectfully submitted,



Margaret J. Bupp
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 26th day of September, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO MOTION FOR RECONSIDERATION OF CLI-06-23" have been served upon the following persons by United States main, first class, or through the Nuclear Regulatory Commission's internal mail distribution as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 26th day of September, 2006.

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