

June 25, 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
PACIFIC GAS AND ELECTRIC	)	Docket No. 50-275-LR
COMPANY	)	Docket No. 50-323-LR
	)	
(Diablo Canyon Power Plant, Units 1 and 2)	)	

APPLICANT’S RESPONSE TO PETITION TO SUSPEND

INTRODUCTION

On June 18, 2012, several individuals and organizations (“Petitioners”), including the San Luis Obispo Mothers for Peace (“SLOMFP”) in this proceeding, collectively filed with the Commission a “Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings” (“Petition”). The Petitioners request that the Commission (1) suspend its final licensing decisions in pending licensing proceedings pending completion of the remanded proceedings on the waste confidence decision update (“WCD”) and temporary storage rule (“TSR”); and (2) establish a process for ensuring that the remanded proceeding complies with the public participation requirements of Section 189a of the Atomic Energy Act (“AEA”).<sup>1</sup> Pacific Gas and Electric Company (“PG&E”) herein responds to the Petition.<sup>2</sup>

The Petitioners state that the Petition is not a motion for a stay of the effectiveness of a decision pursuant to 10 C.F.R. § 2.342 or any other kind of request for equitable relief.

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<sup>1</sup> Pet at 3.

<sup>2</sup> By Order dated June 19, 2012, the Commission established a deadline for responding to the Petition of 12:00 pm Eastern Daylight Time on Monday, June 25, 2012.

Likewise, the Petition does not request that the Commission suspend any licensing proceedings — they do not seek any change in the schedules for the NRC Staff’s review of reactor license applications or adjudications in pending reactor licensing cases. Instead, the Petition purports to seek only the suspension of final licensing decisions pending the NRC’s completion of the National Environmental Policy Act (“NEPA”) reviews as discussed by the U.S. Court of Appeals for the D.C. Circuit in *New York v. NRC*.<sup>3</sup> The Petitioners also seek assurances from the Commission that they will have adequate opportunity to participate in any proceeding on the remanded issues.

As discussed below, the Petition is unnecessary. If the WCD and TSR are vacated, then the NRC would necessarily comply with NEPA requirements and AEA procedures prior to making any final licensing decisions in this proceeding. The Commission has flexibility under both the AEA and NEPA to address the issues on remand generically, with appropriate public participation under the agency’s rulemaking procedures. The schedule in the license renewal proceeding currently allows ample time in which the remanded issues can be addressed prior to a final decision. There is no reason to prospectively suspend the final licensing decision. To the extent that the Petition requests a 60-day period for raising proceeding-specific challenges to any generic conclusions made by the NRC on remand, it should be denied. The Commission’s existing processes provide ample opportunity for parties to raise those issues in individual proceedings, and provide appropriate criteria for considering the admissibility of those issues.

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<sup>3</sup> Docket No. 11-1045 (D.C. Cir. June 8, 2012).

## DISCUSSION

### A. The Petition to Suspend Final Licensing Decisions Is Unnecessary

#### 1. *The Petition Is Premature*

As an initial matter, and as recognized by the Petitioners, the “mandate” for the Court’s decision in *New York v. NRC* has not yet issued. Under the Federal Rules of Appellate Procedure, the mandate is the certified copy of the judgment and is, in effect, the order that makes the decision effective. By rule, the Court’s mandate will not issue until seven calendar days after the time for a petition for rehearing expires or an order denying a petition for rehearing is issued, whichever is later.<sup>4</sup> A timely rehearing petition by the NRC or other parties in the case would automatically stay the issuance of the mandate.<sup>5</sup> The time in which a party may seek rehearing is 45 days after entry of judgment. Moreover, a circuit court can, upon a motion of a party, stay its mandate pending a petition for certiorari in the Supreme Court.<sup>6</sup> Until the mandate issues, the remand to the NRC is not effective and there would be no need for the NRC to take any action with respect to the WCD or TSR in connection with pending licensing decisions.

#### 2. *The NRC Will Comply With NEPA and the AEA*

In the event that the mandate issues without modification of the judgment in the case, the WCD/TSR matter would then be remanded to the NRC for further consideration. In that case, the Petition seeks “non-discretionary compliance with the requirements of NEPA, the AEA, and the court’s decision in *State of New York*.”<sup>7</sup> This aspect of the Petition is unnecessary.

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<sup>4</sup> Fed. R. App. P. 41(b).

<sup>5</sup> Fed. R. App. P. 41(d)(1).

<sup>6</sup> Fed. R. App. P. 41(d)(2).

<sup>7</sup> Pet. at 4.

On remand, the NRC would, of course, comply with the AEA and NEPA. And, any decision by the NRC on remand would be subject to review by the Court of Appeals. There is no need to grant a petition that merely seeks compliance with law. A “presumption of regularity attaches to the actions of Government agencies.”<sup>8</sup> The NRC Staff and the Commission will fully and properly carry out their duties without a need for the relief requested in the Petition.

B. If the Mandate Issues, the Commission Need Not Suspend Final Licensing Decisions

If the mandate issues, the Commission may decide to expeditiously conduct a rulemaking to supply the analyses identified by the Court of Appeals to support the WCD and TSR. The Court specifically upheld the NRC’s authority to address NEPA issues by generic rulemaking.<sup>9</sup> The usual notice and comment procedures, which provide opportunity for public participation, would apply during the rulemaking process. This approach would fully comply with NEPA and the AEA (including Section 189.a of the AEA).

To promote efficiency and uniformity the Commission has a longstanding practice that issues that are, or that are about to become, the subject of a rulemaking are not subject to challenge in individual licensing proceedings.<sup>10</sup> There is no reason to depart from this approach. Indeed, this approach is implicitly endorsed by Petitioners, who seek an opportunity to comment on any generic determinations that the NRC may make or challenge a generic rulemaking on site-specific grounds. Pet. at 11. The Petitioners would retain the ability to raise

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<sup>8</sup> *United States v. Postal Serv.*, 534 U.S. 1, 10 (2001); *see also Ark. Power & Light Co. (Arkansas Nuclear One Unit 2)*, ALAB-94, 6 AEC 25, 28 (1973) (“The well-recognized presumption of administrative regularity fully extends to the discharge by the staff of its responsibilities in connection with the issuance of operating licenses.”).

<sup>9</sup> *New York*, slip op. at 20.

<sup>10</sup> *Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2)*, ALAB-218, 8 AEC 79 (1974); 10 C.F.R. § 2.335(a).

a site-specific challenge based on unique considerations in accordance with the NRC's waiver rule, 10 C.F.R. § 2.335(b). Accordingly, the Commission should direct that any contentions seeking to raise waste confidence or temporary storage issues be held in abeyance until the Commission formally initiates a rulemaking. At that point, the contentions should be dismissed.

The NRC also does not need to prospectively suspend the final licensing decision for Diablo Canyon. Given the current schedule in this matter due to PG&E's ongoing seismic evaluations, there appears to be ample time for the NRC to complete necessary evaluations of the remanded issues through a generic rulemaking process prior to issuance of the renewed license.<sup>11</sup> And, as the Commission explained in CLI-11-05, a request to suspend a final licensing decision is premature where, as here, a license is not on the verge of being granted.<sup>12</sup>

C. The Procedural Relief Sought by Petitioners Is Unnecessary

The Petitioners also request that the Commission create special procedures to govern consideration of the issues on remand. The Petitioners specifically request (1) an opportunity to comment on any draft Environmental Assessment ("EA"); and (2) at least 60 days to seek consideration, in individual licensing cases, of site-specific safety or environmental concerns raised during the remanded proceeding. The Petitioners' requests should be denied.

This request is similar to a request made in response to the events at Fukushima, where Petitioners requested that the Commission "establish procedures and a timetable for raising new issues relevant to the Fukushima accident in pending licensing proceedings" to

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<sup>11</sup> If the NRC completes its review of the Diablo Canyon license renewal application before the rulemaking is complete, the Commission retains the option to address the issues involved on a case-by-case basis. The choice between proceeding by general rule or by individual, *ad hoc* litigation lies primarily in the informed discretion of the administrative agency. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 421 (1942).

<sup>12</sup> See *Union Elec. Co. d/b/a/ Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC \_\_\_, slip op. at 40 (Sept. 9, 2011).

include a sixty-day period for raising new issues following the publication of regulatory proposals or environmental decisions.<sup>13</sup> In CLI-11-05, the Commission rejected the request, explaining that its normal processes provide for filing new or amended contentions, submitting rulemaking comments, and making motions (including motions to reopen).<sup>14</sup> In the context of the present Petition, all of these procedural mechanisms are available to SLOMFP in this proceeding. Neither new procedures nor a separate timetable for raising new issues related to the remanded issues are warranted.

### CONCLUSION

For the foregoing reasons, the Commission should deny the request to suspend final licensing decisions.

Respectfully submitted,

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Dated at Washington, District of Columbia  
this 25th day of June 2012

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<sup>13</sup> *Callaway*, CLI-11-05, slip op. at 32.

<sup>14</sup> *Id.* at 33. In addition, NRC rules allow for petitions to deviate from generic rules in individual cases, based in special site-specific circumstances. 10 C.F.R. § 2.335(b).

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO PETITION TO SUSPEND” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 25th day of June 2012, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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