

August 2, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PACIFIC GAS & ELECTRIC COMPANY)	Docket Nos. 50-275-LR
)	50-323-LR
(Diablo Canyon Nuclear Power Plant,)	
Units 1 and 2))	

NRC STAFF'S RESPONSE TO SAN LUIS OBISPO MOTHERS FOR PEACE MOTION
FOR LEAVE TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE
AND ULTIMATE DISPOSAL OF SPENT REACTOR FUEL AT
DIABLO CANYON NUCLEAR POWER PLANT

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission ("Staff") files its answer to the San Luis Obispo Mothers for Peace ("SLOMFP") Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Diablo Canyon Nuclear Power Plant (July 9, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12191A374) ("Motion"). The Motion raises a new contention based on the D.C. Circuit Court of Appeals' June 8, 2012 opinion in *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). As explained below, the new contention would be admissible if the Atomic Safety and Licensing Board ("Board") rules on it after the D.C. Circuit issues the mandate for that decision. But, if the Board rules before the issuance of the mandate, then the Commission's existing regulations bar admission of the contention, and the Board should dismiss it without prejudice to timely refiling upon issuance of the court's mandate.

BACKGROUND

A. Procedural History

As relevant to the instant motion, this proceeding concerns the November 23, 2009, application of Pacific Gas and Electric Company (“PG&E”) to renew its operating licenses for Diablo Canyon Nuclear Power Plant, Units 1 and 2.¹ SLOMFP has shown standing and been admitted as a party to this proceeding. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 345-46 (2010). Currently, SLOMFP has one admitted contention pending in this proceeding. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC ___, ___ (Oct. 12, 2011) (slip op. at 23). The admitted contention challenges the adequacy of PG&E’s severe accident mitigation alternatives analysis. *Id.* On July 9, 2012, SLOMFP filed the instant Motion before the Board.

B. The NRC’s Waste Confidence Decision

In the National Environmental Policy Act of 1969 (“NEPA”), Congress announced a national policy “to create and maintain conditions under which man and nature can exist in productive harmony.” 42 U.S.C. § 4331(a). NEPA requires the NRC to prepare an environmental impact statement (“EIS”) to support a major Federal action, such as issuing a license for a power reactor. 42 U.S.C. § 4332. The NRC regulations in 10 C.F.R. Part 51 govern this process. Among other things, these regulations require applicants to submit an environmental report (“ER”) as part of a license renewal application to aid the NRC in conducting its environmental analysis. 10 C.F.R. § 51.41.

Before acting on a power reactor license application, NEPA requires the NRC to address the environmental impacts of operation, including on-site storage and disposal of the reactor’s spent fuel after the licensed period of operation ends. *Minnesota v. NRC*, 602 F.2d 412, 414-

¹ Letter from James R. Becker, Senior Vice President, dated November 23, 2009, transmitting application for license renewal for Diablo Canyon Nuclear Power Plant, Units 1 and 2 (ADAMS Accession No. ML093350335).

15, 419 (D.C. Cir. 1979). In the past, “the Commission sensibly has chosen to address high-level waste disposal generically.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999). The agency has most recently addressed issues pertaining to spent fuel storage and disposal in its “Waste Confidence Decision Update,” 75 Fed. Reg. 81,037 (Dec. 23, 2010) (“Waste Confidence Decision”) and a temporary storage rulemaking, “Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation,” Final Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010) (“Temporary Storage Rule”).

The Waste Confidence Decision Update and the Temporary Storage Rule support generic findings in 10 C.F.R. § 51.23(a), regarding the impacts of spent fuel storage after the licensed period of operation. See Motion at 1; 10 C.F.R. § 51.23(a). The Commission rendered several findings in § 51.23(a). Two of those findings are (1) that spent fuel “can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation” and (2) that “there is reasonable assurance that sufficient mined geologic repository capacity will be available . . . when necessary.” 10 C.F.R. § 51.23(a). 10 C.F.R. § 51.23(b) relies on § 51.23(a) to exclude “discussion of any environmental impact of spent fuel storage [during] the period following the term of the reactor operating license” from any EIS, Environmental Assessment, or ER. 10 C.F.R. § 51.23(b).

DISCUSSION

SLOMFP based the proposed contention on the D.C. Circuit Court of Appeals’ recent decision in *State of New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012). The D.C. Circuit’s decision vacated the NRC’s updated Waste Confidence Decision and its Temporary Storage Rule and remanded those rulemakings to the NRC. *Id.* at 483. The proposed contention states as follows:

The Environmental Report for renewal of the Diablo Canyon operating license does not satisfy NEPA because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation,

including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, as required by the U.S. Court of Appeals for the D.C. Circuit in *State of New York v. NRC*, No. 11-1045 (June 8, 2012). Therefore, unless and until the NRC conducts such an analysis, it may not renew the Diablo Canyon operating license.

Motion at 4. At root, the Motion asserts that because the generic findings in the Commission's rulemaking have been vacated, "the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing spent fuel storage impacts in individual licensing proceedings." Motion at 4.

Although the contention was filed after the initial deadline for submitting contentions in this proceeding, SLOMFP asserts that they meet the standards of § 2.309(f)(2) for late-filed contentions. Motion at 6-7. Considering the holding of the D.C. Circuit and that the Motion was filed within 30 days of the ruling, the Staff agrees that SLOMFP has sufficiently demonstrated the timeliness of the filing under that regulation.

The Board has previously discussed the Commission's standards for contention admissibility, which prohibit challenges to existing Commission regulations. *Diablo Canyon*, LBP-10-15, 72 NRC at 278. "SLOMFP recognizes that because the mandate has not yet issued in *State of New York*, this contention may be premature." Motion at 2. Indeed, the Commission has observed, "A court acts only through its mandate. When a mandate is stayed, a decision has no binding effect . . ." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 466 (1976) (*citing Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962)). Thus, when a board suspended a construction permit because an appellate decision invalidated a relevant NRC regulation, the Commission overturned the board, in part, because that mandate had not yet issued. *Id.* at 467. Moreover, licensing boards have typically found contentions premature, and therefore inadmissible, when those contentions relied on court decisions for which a mandate had not issued. *E.g., Cleveland Elec. Illuminating Co.* (Perry

Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).² As the licensing board in *Perry* stated, “Until that mandate is issued, the rules of the Commission remain in effect and this Board continues to be bound by them. As a result, the Court of Appeals’ decision does not as yet provide a ground for” an admissible contention.³ *Id.* at 205.

Under the Federal Rules of Appellate Procedure, a “court’s mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc or motion for stay of mandate, whichever is later.” Fed. R. App. P. 41(b). On July 6, 2012, at the Commission’s request, the D.C. Circuit extended the time to file a petition for rehearing of *State of New York* to August 22, 2012. *State of New York v. NRC*, No. 11-1045 (D.C. Cir. July 6, 2012) (order granting unopposed motion to extend time period to seek rehearing). As a result, under Rule 41(b), the mandate will not likely issue until at least August 29, 2012. Accordingly, because 10 C.F.R. § 51.23(b) remains in effect until the mandate issues, NRC regulations will continue to require the Board to exclude SLOMFP’s contention until the court issues the mandate. *Seabrook Station*, CLI-76-17, 4 NRC at 466. Consequently, the admissibility of the underlying contention depends on whether the mandate has issued when this Board rules on the Motion.⁴

If the D.C. Circuit’s mandate issues before the Board rules on the contention’s

² *But see Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1556-57 (1982) (noting that because “the mandate of that case has not been issued[,] we have deferred our rulings on these requests”).

³ The Commission recognizes its responsibility to “act promptly and constructively in effectuating the decisions of the courts.” *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163, 166 (1976). Further, the Commission understands that “all that the mandate does is to effectuate the court of appeal’s judgment by formally returning the proceeding to the NRC[,] the eventual – legally required – issuance of the mandate is hardly an ‘unanticipated event.’” *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 (2006). Thus, the Commission, of course, could decide to act prior to issuance of the court’s mandate. *Vermont Yankee*, CLI-76-14, 4 NRC at 166. However, in the instant case, the Board cannot admit a contention that challenges an NRC regulation before a court of appeals issues its mandate striking down that regulation.

⁴ See 10 C.F.R. § 2.335(a) (noting that unless a party seeks a waiver of Commission regulations, “no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding”).

admissibility, upon the mandate's issuance, the contention as pled would satisfy each of the § 2.309(f)(1) criteria and would be admissible as a contention of omission. See Motion at 4-6. This determination, however, would remain subject to direction or action taken by the Commission in response to the D.C. Circuit's ruling, including any generic rulemaking action and/or issuance of any Commission instruction with respect to how contentions based on the court's ruling are to be addressed in individual NRC proceedings. For example, in the event that the Commission undertakes only a generic rulemaking approach to address these issues, the contention may need to be dismissed. See, e.g., *Oconee*, CLI-99-11, 49 NRC at 345 ("Licensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'").

If the D.C. Circuit's mandate has not issued by the time the Board rules on the contention, then 10 C.F.R. § 51.23 will remain in place. That regulation excludes from NRC NEPA documents a consideration of the environmental impacts of onsite spent fuel storage after the licensed term of operation. Because the contention demands such a consideration, Motion at 4, the contention at present would constitute an impermissible attack on existing Commission regulations. 10 C.F.R. § 2.335(a). Accordingly, pending the issuance of the court's mandate, the Board should reject the contention, without prejudice, subject to refiling when, and if, the mandate issues. If the Petitioners refile the contention after the court issues the mandate, it would be timely if filed within 30 days of the mandate's issuance and would be admissible provided the claims it raises do not become the subject of a generic rulemaking. 10 C.F.R. § 2.309(f)(2); *Oconee*, CLI-99-11, 49 NRC at 345.

CONCLUSION

For the foregoing reasons, the Staff agrees with SLOMFP that the contention would be admissible upon issuance of the D.C. Circuit's mandate in *State of New York*. However, if the Board rules before that time, the contention must be rejected as an impermissible challenge to NRC regulations. Finally, the admission of this contention is subject to any further action by the

Commission, including commencement of a generic rulemaking to address these matters, and/or the issuance of instructions as to how the contention should be addressed.

Respectfully submitted,

/signed (electronically) by/

Maxwell C. Smith
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-1246
Maxwell.Smith@nrc.gov

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PACIFIC GAS AND ELECTRIC COMPANY)	Docket Nos. 50-275-LR
)	50-323-LR
(Diablo Canyon Nuclear Power Plant,)	
Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Response to San Luis Obispo Mothers for Peace Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Diablo Canyon Nuclear Power Plant" dated August 2, 2012, have been served upon the following by the Electronic Information Exchange, this 2nd day of August, 2012:

Administrative Judge
Alex S. Karlin, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ask2@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop – O-16G4
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Administrative Judge
Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ngt@nrc.gov

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: pba@nrc.gov

David A. Repka, Esq.
Tyson Smith, Esq.
Carlos Sisco
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802
E-mail: drepka@winston.com
trsmith@winston.com
CSisco@winston.com

Jill ZamEk, Esq.
San Luis Obispo Mothers for Peace
1123 Flora Road
Arroyo Grande, CA 93420
E-mail: jzk@charter.net

Diane Curran, Esq.
Harmon, Curran, Spielberg, and Eisenberg
1726 M Street NW
Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

/Signed (electronically) by/

Maxwell C. Smith
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
Telephone: (301) 415-1246
E-mail: Maxwell.Smith@nrc.gov
Date of signature: August 2, 2012