

RAS 4810

August 30, 2002

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
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September 4, 2002 (3 29PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of: )  
)  
Pacific Gas and Electric Co. )  
)  
(Diablo Canyon Power Plant Independent )  
Spent Fuel Storage Installation) )

Docket No. 72-26-ISFSI

ASLBP No. 02-801-01-ISFSI

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO REQUEST  
OF THE DIABLO CANYON INDEPENDENT SAFETY COMMITTEE  
TO PARTICIPATE AS OF RIGHT UNDER 10 C.F.R. § 2.715(c)

I. INTRODUCTION

On August 20, 2002, the Diablo Canyon Independent Safety Committee ("DCISC") filed a request to participate as an "interested state agency" pursuant to 10 C.F.R. § 2.715(c) in any hearing granted in this proceeding ("DCISC Request").<sup>1</sup> Applicant Pacific Gas and Electric Company ("PG&E") herein responds to the DCISC Request. As discussed further below, PG&E opposes the participation of DCISC under 10 C.F.R. § 2.715(c), because the DCISC is not a government agency within the purview of the rule.

<sup>1</sup> Notwithstanding the service requirements set forth by the Licensing Board in its June 6, 2002, Initial Prehearing Order, applicant PG&E and its counsel were served via deposit in the U.S. mail, first class, on August 20, 2002. See *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation), slip op. at 2 (Aug. 7, 2002)(extending the procedural requirements set forth in the June 6 Order to all Section 2.715(c) participants). As a result, PG&E did not receive the DCISC Request until August 26, 2002. Accordingly, PG&E is responding within the response times set forth at 10 C.F.R. §§ 2.710 and 2.730.

## II. BACKGROUND

10 C.F.R. § 2.715(c) provides, in pertinent part (emphasis added):

The presiding officer will afford *representatives of an interested State, county, municipality, Federally-recognized Indian Tribe, and/or agencies thereof*, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue.

In promulgating this rule in its current incarnation,<sup>2</sup> the Commission expanded participation to include interested States, cities and counties, and agencies thereof, but did not discuss the limits of the provision, or provide a definition for the term “agency.” See Final Rule, Miscellaneous Amendments, 43 Fed. Reg. 17,798, 17,800 (Apr. 26, 1978). However, in *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343 (1998), a Licensing Board considered the limitations of the provision. In denying interested governmental entity status to an advisory regional planning board, the Licensing Board stated:

[I]t would be unprecedented to suggest that any and all governmental or quasi-governmental entities could invoke [Section 2.715(c)] for participation in a proceeding . . . [T]he Commission did not intend to allow participation by agencies that neither had standing on their own nor had legal authorization from a recognized government with a sufficient interest in the proceeding . . . The ability to participate in an NRC proceeding is offered only to “units of the government which . . . have an interest in the licensing proceeding.” [Citation omitted.] The words “interest” and “interested” as they are used in 10 C.F.R. § 2.714 and 2.715 appear to be synonymous with the term “standing.” See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). *Given jurisprudential standing requirements, it is appropriate to require a representational government, or an agency thereof, to have a foundational element of directly representing the citizens of the area affected.* Such representation is not validated by

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<sup>2</sup> Prior to 1978, Section 2.715(c) only allowed participation by the representative of a state. See, e.g., 10 C.F.R. § 2.715(c)(1973) (“The presiding officer will afford a representative of an interested State which is not a party a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issues”).

delegation to an advisory body . . . . To find otherwise would be to dismiss the “interest” requirement out of 10 C.F.R. § 2.715.

*Yankee Rowe*, LBP-98-12, 47 NRC at 355, 356. The Commission subsequently upheld the Licensing Board’s finding, stating that the regional planning board was not an “agency” within the meaning of Section 2.715:

Not all organizations with governmental ties are entitled to participate in our proceedings as governmental “agencies.” The federal, state and local governments are all replete with numerous boards, commissions, *advisory committees*, and other organizations — all of which have governmental or quasi-governmental responsibilities. We do not, however, understand section 2.715(c) to authorize automatic participation in our adjudications by each and every subpart of state and local government. [The regional planning board] is, by its own admission, an advisory body and lacks executive or legislative responsibilities. [Citation omitted.] We conclude that advisory bodies, by their very nature, are so far removed from having the representative authority to speak and act for the public that they do not qualify as governmental entities for purposes of section 2.715(c).

*Yankee Rowe*, CLI-98-12, 48 NRC 185, 202-03 (1998)(emphasis added). From the *Yankee Rowe* decisions, it appears that the Commission will consider a state or local “agency” to fall within the definition of an “interested governmental entity” when it has (1) “a foundational element of directly representing the citizens of the area affected,” and (2) attributes of governance; that is, executive or legislative functions.

### III. DISCUSSION

DCISC states in its Request that it was initially created by the California Public Utilities Commission (“CPUC”) under the terms of the Diablo Canyon Settlement Agreement. (DCISC Request at 2.) *See Pac. Gas & Elec. Co.*, 88-12-083, 99 P.U.R. 4th 141 (Cal. Pub. Util. Comm’n Dec. 19, 1988) (“Settlement Order”). Specifically, Appendix C to the Settlement Order (which sets forth the terms of the Settlement Agreement) provides (at ¶ 16) that “an Independent Safety Committee shall be established and shall operate as described in Attachment A” to the

Settlement Agreement. As stated in the DCISC Response, the DCISC consists of three members, one each appointed by the Governor of California, the Attorney General, and the Chairperson of the California Energy Commission (“CEC”). The purpose of the DCISC is to “review Diablo Canyon operations for the purpose of assessing the safety of operations and suggesting any recommendations for safe operations.” (DCISC Response at 3, quoting Attachment A to Appendix C, at ¶ I.1.) The Settlement Agreement sets forth the scope of DCISC operations as follows:

- DCISC has the right to receive certain specified DCPD operating reports and records. Settlement Order, App. C, Att. A, ¶ II.A.
- DCISC has the right to conduct an annual site inspection of DCPD. If DCISC requires additional information regarding a particular issue, it may conduct an additional site visit to investigate that issue. Settlement Order, App. C, Att. A, ¶ II.B.
- DCISC shall prepare an annual report (as well as appropriate interim reports), including its recommendations. This report is submitted to PG&E, which is to respond in writing. PG&E’s response is made part of the report, which is ultimately submitted to the CPUC, the Governor of California, the Attorney General and the CEC. Under the Settlement Agreement, the CPUC, the Governor, the Attorney General, and/or the CEC may file a request with the NRC pursuant to 10 C.F.R. § 2.206 to institute a proceeding to require PG&E to adopt any safety recommendation made by the DCISC. Settlement Order, App. C, Att. A, ¶ II.C.

None of the above establishes that the DCISC is a government agency. While the DCISC clearly derives from the CPUC economic regulatory process, this does not make it an agency of the state. It was not created by the state or the CPUC. Rather, its existence and the scope of its authority were established in the Settlement Agreement executed by representatives of the state in conjunction with PG&E, a private party. In contrast to this genesis, the scope of authority of a government agency is generally established in a constitution, enabling statute, or regulations, or is otherwise set forth by an elected executive or legislative authority. Government authority also generally includes a rulemaking and/or adjudicative function. *See generally* Jacob A. Stein, Glenn A. Mitchell, & Basil J. Mezines, *Administrative Law*, § 1.01[1]

(2002)(“An ‘agency’ is any commission or department, or subdivision of a department . . . which has a substantial degree of independence in the department’s internal organization and in the conduct of its adjudicatory or rulemaking activities”). Here, the Settlement Agreement does not confer on the DCISC any adjudicatory or rulemaking authority. Indeed, its duties and functions are specifically enumerated, and, taken together, clearly limit the DCISC’s role to an *independent* oversight and advisory role.<sup>3</sup>

Moreover, nowhere in the Settlement Agreement do the parties establish that the DCISC has the authority to sue or be sued on behalf of the state of California, or to otherwise *represent* the interests of the State of California (or any subdivision thereof) in an adjudicatory proceeding or otherwise. Indeed, the DCISC does not purport to *represent* California citizens, or anyone other than itself, in this proceeding. In its Response (at 2), the DCISC specifically states that its request to participate is necessary to protect “*the Safety Committee’s interests*” in the event a hearing is granted. The DCISC has, therefore, not demonstrated that it has been accorded the authority to act in a representative capacity as a state agency.<sup>4</sup> For these reasons, the DCISC does not meet the criteria of a government agency and, therefore, cannot participate

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<sup>3</sup> Indeed, the private nature of the DCISC is illustrated by its funding. Rather than being funded through appropriations from the state of California, as a state agency would likely be, members of the DCISC are compensated in an amount established by the CPUC, but *paid by PG&E* (and included in its ordinary rate base operating expenses). See Settlement Order, App. C, Att. A, ¶ II.E.

<sup>4</sup> The CEC has requested to participate in this proceeding pursuant to Section 2.715(c), to represent the interests of the State of California. None of the other participants opposes the CEC’s participation in this regard. San Luis Obispo County and the Port San Luis Harbor District have been granted governmental participant status, representing interests at the municipal level. The DCISC has not made a showing that additional representation of these interests is either necessary or appropriate.

in this proceeding as an interested state agency pursuant to Section 2.715(c). *See Yankee Rowe, CLI-98-12, 48 NRC at 203.*<sup>5</sup>

The scope of the authority established in the Settlement Agreement (discussed above) is also limited by its own terms. As stated by DCISC (at 3), the DCISC is empowered to “*review Diablo Canyon operations for the purpose of assessing the safety of operations and suggesting any recommendations for safe operations.*” Settlement Order, App. C, Att. A., ¶ I.1 (emphasis added). This limited mandate does not extend to the review of construction and design issues, including the design and construction of the subject ISFSI, such as might be at issue in this proceeding. The limited mandate also does not extend to matters of financial qualifications or environmental assessment. Nor does the DCISC have the authority to review policy determinations within the discretion of PG&E management, such as the decision to construct an ISFSI, as opposed to the continued use of wet storage, or the use of any other storage or disposal option.<sup>6</sup>

The DCISC is also not correct that it must participate in the hearing process to represent its own interests. The DCISC can continue its oversight function regardless of whether

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<sup>5</sup> The DCISC states in its request (at 5) that it does not intend to raise issues other than those already proffered by other participants in the proceeding. If the Licensing Board grants this request to participate, the DCISC must, as it concedes (at 6-7), take the proceeding as it finds it. *See Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-15, 56 NRC \_\_\_, slip op. at 3 n.3 (July 15, 2002).*

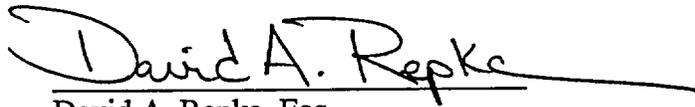
<sup>6</sup> *See also* Settlement Order, App. C., Att. A., ¶ I.1 (“Neither the committee nor its members shall have any responsibility or authority for plant operations, and they shall have no authority to direct PG&E personnel”).

it participates here.<sup>7</sup> At bottom, there is no demonstrable authority or need for the DCISC to participate in this proceeding.

### III. CONCLUSION

For the reasons set forth above, the DCISC should not be granted leave to participate in this proceeding pursuant to 10 C.F.R. § 2.715(c), because it is not a governmental entity. In the event the Licensing Board determines that the DCISC is entitled to participate under that provision, the scope of the DCISC's participation cannot exceed the issues already raised by others in this proceeding.

Respectfully submitted,



David A. Repka, Esq.  
Brooke D. Poole, Esq.  
WINSTON & STRAWN  
1400 L Street, N.W.  
Washington, DC 20005-3502

William V. Manheim, Esq.  
Richard F. Locke, Esq.  
PACIFIC GAS & ELECTRIC COMPANY  
77 Beale Street, B30A  
San Francisco, CA 94105

ATTORNEYS FOR PACIFIC GAS &  
ELECTRIC COMPANY

Dated in Washington, District of Columbia  
this 30th day of August 2002

<sup>7</sup>

The DCISC is on routine distribution lists for regulatory documents related to DCPD and has been added to the service list in this proceeding.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of: )  
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Pacific Gas and Electric Co. ) Docket No. 72-26-ISFSI  
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Spent Fuel Storage Installation) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO REQUEST OF THE DIABLO CANYON INDEPENDENT SAFETY COMMITTEE TO PARTICIPATE AS OF RIGHT UNDER 10 C.F.R. § 2.715(c)" have been served as shown below by electronic mail, this 30th day of August 2002. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

Administrative Judge G. Paul Bollwerk, III  
Chairman  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop T-3F23  
Washington, DC 20555-0001  
e-mail: gpb@nrc.gov

Administrative Judge Peter S. Lam  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop T-3F23  
Washington, DC 20555-0001  
e-mail: psl@nrc.gov

Administrative Judge Jerry R. Kline  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop T-3F23  
Washington, DC 20555-0001  
e-mail: jrk2@nrc.gov  
kjerry@erols.com

Office of Commission Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16C1  
Washington, DC 20555-0001

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Attn: Rulemakings and Adjudications Staff  
(original + two copies)  
e-mail: HEARINGDOCKET@nrc.gov

Diane Curran, Esq.  
Harmon, Curran, Spielberg & Eisenberg, LLP  
1726 M Street N.W., Suite 600  
Washington, DC 20036  
e-mail: dcurran@harmoncurran.com

Lorraine Kitman  
P.O. Box 1026  
Grover Beach, CA 93483  
e-mail: lorraine@bejoseeds.com  
l.kitman@bejoseeds.com

Seamus M. Slattery, Chairman  
Avila Valley Advisory Council  
P.O. Box 58  
Avila Beach, CA 93424  
e-mail: Jslat1@aol.com

Klaus Schumann  
Mary Jane Adams  
26 Hillcrest Drive  
Paso Robles, CA 93446  
e-mail: jayklaus@email.msn.com

James B. Lindholm, Jr., Esq.  
County Counsel for San Luis Obispo County  
County Government Center  
1050 Monterey Avenue, Room 386  
San Luis Obispo, CA 93408  
e-mail: jlindholm@co.slo.ca.us

San Luis Obispo Mothers for Peace  
P.O. Box 164  
Pismo Beach, CA 93448  
e-mail: beckers@thegrid.net  
jzk@charter.net

Karen D. Cyr, Esq.  
Stephen H. Lewis, Esq.  
Angela B. Coggins, Esq.  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15D21  
Washington, DC 20555-0001  
e-mail: OGCMailCenter@nrc.gov  
shl@nrc.gov  
abc1@nrc.gov

Peg Pinard  
714 Buchanan Street  
San Luis Obispo, CA 93401

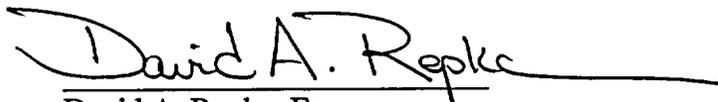
Thomas D. Green, Esq.  
Thomas D. Waylett, Esq.  
Adamski, Moroski & Green LLP  
444 Higuera Street, Suite 300  
San Luis Obispo, CA 93401-3875  
e-mail: green@adamskimoroski.com  
waylett@adamskimoroski.com

Robert K. Temple, Esq.  
2524 N. Maplewood Avenue  
Chicago, IL 60647  
e-mail: nuclaw@mindspring.com

Barbara Byron  
Nuclear Policy Advisor  
California Energy Commission  
1516 Ninth Street, MS 36  
Sacramento, CA 95814  
e-mail: Bbyron@energy.state.ca.us

Darcie L. Houck, Staff Counsel  
California Energy Commission  
Chief Counsel's Office  
1516 Ninth Street, MS 14  
Sacramento, CA 95814  
e-mail: Dhouck@energy.state.ca.us

Robert R. Wellington, Esq.  
Robert W. Rathie, Esq.  
Wellington Law Offices  
857 Cass Street, Suite D  
Monterey, CA 93940  
e-mail: info@dcisc.org

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right.

David A. Repka, Esq.  
Counsel for Pacific Gas  
& Electric Company