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September 4, 2002
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PACIFIC GAS & ELECTRIC CO.)	Docket No. 72-26-ISFSI
)	
(Diablo Canyon Independent Spent Fuel Storage Installation))	ASLBP No. 02-801-01-ISFSI
)	

RESPONSE OF NRC STAFF TO "RESPONSE OF PORT SAN LUIS HARBOR DISTRICT
TO ATOMIC SAFETY AND LICENSING BOARD ORDER OF AUGUST 7, 2002"

INTRODUCTION

By Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation) ("Order"), dated August 7, 2002, the Atomic Safety and Licensing Board ("Board") provided that any governmental entity seeking participation in this proceeding pursuant to 10 C.F.R. § 2.715(c) must identify by August 21, 2002, any issues that it seeks to raise other than those already proffered by petitioners San Luis Obispo Mothers for Peace, et al. ("SLOMFP"). The Board directed that responses to those issues be filed by September 4, 2002.

On August 19, 2002, the Port San Luis Harbor District ("PSLHD") filed a timely "Response ...to Atomic Safety and Licensing Board Order of August 7, 2002." Therein PSLHD set forth the issues that it wishes to pursue in this proceeding. The NRC staff ("Staff") files the following response in opposition to the admissibility of PSLHD's concerns. Since both pleadings are titled "responses," Staff will refer to PSLHD's pleading as "PSLHD's Issues" and to this pleading as the "Staff Response."

BACKGROUND

PSLHD filed on July 19, 2002, a request to participate in this proceeding as an interested governmental entity under 10 C.F.R. § 2.715(c). By responses dated, respectively, July 29, 2002, and August 5, 2002, Pacific Gas and Electric Company (“Applicant”) and the Staff did not object to PSLHD’s participation under that provision of the Commission’s regulations. Petitioners seeking participation as interested governmental entities are not required in their initial requests to identify the subject matters on which they desire to participate. However, “[t]he presiding officer may require such representative [of an interested governmental entity] to indicate with reasonable specificity, in advance of the hearing, the subject matters on which he desires to participate.” See, 10 C.F.R. § 2.715(c). The Board’s August 7, 2002, Order implemented section 2.715(c) by requiring such petitioners to identify their subject matters by August 21, 2002.

DISCUSSION

Governmental participants in this proceeding do not have to “take a position with respect to the issue” [referring to any issues raised by others in the proceeding]. See 10 C.F.R. § 2.715(c). The Board advised the section 2.715(c) petitioners in its August 7th Order that: “As is the case with contentions submitted pursuant to 10 C.F.R. § 2.714(b) by a petitioner seeking party status in a proceeding, such issues [referring to issues raised by petitioners under 10 C.F.R. § 2.715(c)] must ‘be framed with sufficient detail and preciseness’ to define matters that are sufficiently concrete for adjudication.” Citing *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977). Although the Board did not elaborate upon the criteria that would be applied to the subject matters or issues that a section 2.715(c) would have to satisfy for admissibility, the Staff submits that a proposed subject matter or issue must satisfy the same standards that are required for the admission of contentions under 10 C.F.R. § 2.714,¹ Contentions

¹ See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, (continued...)

constitute the method by which the parties to an NRC adjudicatory proceeding frame issues under Commission practice. *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981). Whether this proceeding is conducted under Subparts K or G of 10 C.F.R. Part 2, the contention standards set forth in 10 C.F.R. § 2.714 should be applied equally to matters to be litigated, regardless of whether the proponent is a party under section 2.714 or a participant under section 2.715(c). The same standard should be applied because the same burden is placed upon the Applicant, Staff, or any other party choosing to respond to the matter, irrespective of its proponent. PSLHD's Issues do not meet many of the requirements of 10 C.F.R. § 2.714. For purposes of the Staff Response, we have focused on one of these standards, that a subject matter must be "material" to the application under consideration,² because PSLHD's Issues so clearly, in the Staff's view, fail to meet that standard.

PSLHD's Issues focus exclusively on the San Luis Obispo County Nuclear Power Plant Emergency Response Plan ("ERP"). This focus is illustrated by the following excerpts from PSLHD's Issues:

"...the District has significant concerns regarding the adequacy of the... ERP and believes the ERP should be considered in PG&E's current application." pp.1-2.

"...the District believes the current ERP is outdated...." p. 2.

"The current ERP is over two decades old and was completed prior to significant demographic and physical changes to the area surrounding Diablo Canyon. *Id.*

"Additionally, the District is concerned that many of the assumptions on which the ERP is based may no longer be valid in the post-September 11 world. *Id.*

¹(...continued)

31 NRC 427, 430-31, *aff'd in part on other grounds*, ALAB-934, 32 NRC 1(1990), quoting from River Bend (supra), ALAB-444, 6 NRC 760, 768-69 (1977).

²See 10 C.F.R. § 2.714(b)(2)(iii): "...the petitioner shall provide the following information with respect to each contention:...Sufficient information...to show that a genuine dispute exists with the applicant on a material issue of law or fact."

The adequacy of the ERP is immaterial to the NRC's consideration of the application for the Independent Spent Fuel Storage Installation ("ISFSI"). Specifically, 10 C.F.R. § 72.32 prescribes requirements for offsite emergency response only in terms of coordination and communication with offsite authorities and the public. See Final Rule: "Emergency Planning Requirements for Independent Spent Fuel Storage Facilities (ISFSI) and Monitored Retrievable Storage Facilities (MRS)," 60 Fed. Reg. 32,430, 32,431 (June 22, 1995). Additionally, when section 72.32 refers to "Offsite assistance," it simply states:

"The applicant's emergency plans shall include a brief description of the arrangements made for requesting and effectively using offsite assistance *on site* and provisions that exist for using other organizations capable of augmenting the planned *on-site* response." 10 C.F.R. § 72.32(a)(15), *emphasis added*.

Additionally, 10 C.F.R. § 72.32(c) provides that:

"For an ISFSI that is: (1) located on the site, or (2) located within the exclusion area as defined in 10 CFR part 100, of a nuclear power reactor licensed for operation by the Commission, the emergency plan required by 10 CFR 50.47 *shall be deemed to satisfy the requirements of this section.*" *Emphasis added*.

The requirements of 10 C.F.R. § 50.47, applicable to reactors, are much more extensive than the emergency planning requirements for ISFSI's. It is in this context that the Commission deemed that satisfaction of section 50.47 would be deemed to constitute satisfaction with section 72.32. Figures 1.1-1 and 1.1-2 on pages 7-8 of the Applicant's Emergency Plan (Attachment B to the License Application), show that the proposed ISFSI is entirely on the site of the Diablo Canyon Power Plant ("DCPP"). Thus, to satisfy the Commission's regulations, the Applicant could have simply relied on the existing Emergency Plan for DCPP. The Applicant, however, amended its existing DCPP Emergency Plan to specifically address the proposed ISFSI. The Emergency Plan puts what is described therein as the "San Luis Obispo County/Cities Nuclear Power Plant Emergency Response Plan" among the "Offsite Agency Support Documents." Staff understands this to be the ERP that is the subject of the PSLHD's Issues.

CONCLUSION

For the reasons developed in this NRC Response, the Staff submits that PSLHD has not raised an admissible subject matter or issue of its own. That does not mean that the PSLHD cannot participate as a party in this proceeding. The Board has already granted PSLHD's request to participate in this proceeding under 10 C.F.R. § 2.715(c). See, Order, dated August 7, 2002. Further, PSLHD has also stated in its Issues that it "...believes the contentions [proffered by SLOMFP] are well founded and that full hearings on the contentions should be granted." PSLHD's Issues, p. 4. As permitted by section 2.715(c), PSLHD may, therefore, participate and take a position with respect to such of SLOMFP's contentions as may be admitted and assuming there is a hearing granted.

Respectfully submitted,

/RA/

Stephen H. Lewis
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of September, 2002

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NUCLEAR REGULATORY COMMISSION

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Spent Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "RESPONSE OF NRC STAFF TO SUBJECT MATTER UPON WHICH THE COUNTY OF SAN LUIS OBISPO DESIRES TO PARTICIPATE have been served upon the following persons by United States mail, 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 5th day of September, 2002.

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Dated at Rockville, Maryland
this 4th day of September, 2002