

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 SUBJECT MATTER UPON WHICH  
THE COUNTY OF SAN LUIS OBISPO DESIRES TO PARTICIPATE

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 County of San Luis Obispo (“SLOC”) thereafter submitted the subject matters upon which it desires to participate in a response dated August 21, 2002.<sup>1</sup> The NRC staff (“Staff”) files the following response in opposition to the admissibility of SLOC’s subject matters.

BACKGROUND

On June 20, 2002, SLOC filed 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 2, 2002,

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<sup>1</sup> See Subject Matter Upon Which the County of San Luis Obispo Desires to Participate Pursuant to 10 C.F.R. § 2.715(c); dated August 21, 2002 (“SLOC Response”)

and July 10, 2002, Pacific Gas and Electric Company (“Applicant”) and the Staff did not object to SLOC’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.<sup>2</sup> 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.

On August 21, 2002, SLOC filed a response to the Board’s Order of August 7, 2002. However, according to the Certificate of Service which accompanied its response, SLOC failed to serve its response upon the NRC Staff by electronic or first class mail. Thus, the Staff did not receive the response, nor know of its existence, until August 30, 2002, when Staff received electronic distribution of the document from the Office of the Secretary of the Commission. Because of this oversight, the Staff was unable to meet the original Board deadline of September 4, 2002, in which to file its response, but has endeavored, despite the delay, in filing a response as promptly as possible. The Staff requests that the Board thus excuse the single day delay in the Staff’s filing and that the Board briefly address the importance of appropriate service at the upcoming prehearing conference.

#### 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 7<sup>th</sup> 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

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<sup>2</sup> *But see* 10 C.F.R. § 2.715(c). That paragraph of the Commission’s regulations refers to a “representative” of an interested governmental entity and states in its last sentence that: “The presiding officer may require such representative to indicate with reasonable specificity, in advance of the hearing, the subject matters on which he desires to participate.”

'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) petitioner 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,<sup>3</sup> Contentions 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. As explained more fully below, SLOC's Issues, which are almost identical to the contentions previously raised by SLOMFP, do not meet many of the requirements of 10 C.F.R. § 2.714, and thus, the Staff contends SLOC's issues are inadmissible.

A. SLOC TC1: Corporate Identity and Structure of the Applicant

In its first proposed issue, SLOC contends that PG&E fails to "adequately identify the identity and organizational structure of the Applicant" in violation of 10 C.F.R. § 72.22(d). (SLOC Response at 3.) SLOC takes issue with the fact that, "[d]espite the uncertainty regarding the corporate identity and structure of the licensee, PG&E attempts to satisfy the requirements of

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<sup>3</sup>See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-12, 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).

10 C.F.R. § 72.22(d) by describing its current business structure,” when, in light of the ongoing bankruptcy proceeding, the corporate identity and structure is likely to change. (SLOC Response at 4.) Moreover, SLOC contends that “[a]n evaluation of the licensee’s corporate structure should only be done after a reorganization plan has been confirmed.” (SLOC Response at 4.)

Staff contends that this proposed issue is inadmissible for the same reasons offered by the Staff in its Response to SLOMFP’s contention TC3, and thus, will not be repeated in detail here.<sup>4</sup> (Staff’s Response at 10 -12.) SLOC’s issue TC1, just as SLOMFP’s contention TC3, essentially raises issues regarding the restructuring proposal currently before the Bankruptcy Court and the Commission. The current Part 72 application before the Staff identifies PG&E as the Applicant and the Staff is reviewing the application accordingly. The ongoing license transfer proceeding does not change the current applicant of the Part 72 license. PG&E, as the current applicant, will have to meet the Commission’s financial qualification requirements. Any new applicant, likewise, will be required to meet the Commission’s financial qualification requirements.

Moreover, SLOC’s TC1 in many ways simply restates arguments presented to this Board in previous requests for a stay of the proceeding.<sup>5</sup> In summarizing the stay requests the Board noted that “the essence of the concerns expressed in support of the three stay filings all involve PG&E’s bankruptcy and the impacts that flow from that action vis-a-vis various other federal and state judicial and/or administrative proceedings.”<sup>6</sup> Similarly, in arguing its proposed subject matters SLOC states that “an evaluation of the licensee’s corporate structure should only be done

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<sup>4</sup> See NRC Staff’s Response to Contentions Submitted by San Luis Obispo Mothers for Peace, et al., Peg Pinard and Avila Valley Advisory Council, August 19, 2002 (“Staff’s Response”).

<sup>5</sup> See E-mail from Lorraine Kitman to Richard Meserve, Chairman, Nuclear Regulatory Commission (June 11, 2002); E-mail from Klaus Schumann & Mary Jane Adams to Richard Meserve, Chairman, Nuclear Regulatory Commission (June 12, 2002); and Petitioners’ Motion for Stay of Licensing Proceeding (June 25, 2002).

<sup>6</sup> See Atomic Safety and Licensing Board Memorandum and Order (Denying Requests to Stay Proceeding), July 15, 2002 (“July 15, 2002 Order”).

after a reorganization plan has been confirmed,” and that only then will the application satisfy the requirements of 10 C.F.R. § 72.22(d)(3). (SLOC’s Response at 4 & 5) In the July 15, 2002 Order, the Board, after giving careful consideration to the same arguments raised now, denied the requests to stay the proceeding. Thus, SLOC’s request to delay the proceeding pending the outcome of the concurrent proceedings must also fail. PG&E is the current applicant for the part 72 license and thus, it is PG&E that must satisfy the Commission’s financial qualifications and decommissioning assurance regulations.

B. SLOC TC2: Adequacy of Applicant’s Financial Qualifications

SLOC’s issue TC2 asserts that “PG&E has failed to provide the NRC with adequate information in its application and in its supplemental filings, to make an informed decision about the licensee’s financial qualifications.” (SLOC Response at 5.) As bases in support of this proposition, SLOC argues that “whether PG&E or its successor will be in a position to borrow money will depend on the credit rating given to the entity that emerges from bankruptcy.” (SLOC Response at 6.) Additionally, SLOC questions PG&E’s reliance on its ability to cover costs as an electric utility, “because if PG&E’s reorganization is implemented the ISFSI licensee will not be an electric utility.” (*Id.*)

For reasons similar to those provided above, the Staff contends that the issue raised by SLOC in TC2 is inadmissible. Although SLOC’s TC2 is framed in a manner similar to that in SLOMFP’s TC2, the bases provided by SLOC in support of its issue focus only upon PG&E’s bankruptcy and license transfer proceeding rather than on any ISFSI-specific financial qualification question. Therefore, SLOC does not provide a basis properly within the scope of this proceeding. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411-12 (1991).

C. SLOC EC1: Adequacy of Alternatives Analysis

SLOC's environmental issues, labeled as EC1A and EC1B, claim that the applicant's environmental report ("ER") "does not include an adequate analysis of the economic, technical, and other costs and benefits of the proposed action and its alternatives," and additionally, that the "ER fails to adequately consider alternative sites and related alternative security plans." (SLOC's Response at 8.) For the following reasons, and because SLOC's issue EC1 is essentially a restatement of SLOMFP's environmental contentions, the Staff submits that neither part of this issue is admissible.

In issue EC1A, SLOC argues that the applicant failed to adequately address alternative sites in its ER, and particularly, that the applicant failed to consider security-related features for alternative sites in violation of 10 C.F.R. § 72.94. (SLOC Response at 9.) Contrary to the assertion, the applicant's ER indicates that "numerous potential sites along the coastal terrace near DCPD were initially considered for the location of the ISFSI." (Applicant's ER, pg. 8.1-3.) Despite PG&E's analysis, SLOC apparently takes issue with the fact that "design basis external man-induced events" referenced in 10 C.F.R. § 72.94 were not considered for each of the alternative sites selected.

However, as Staff noted in its Response to SLOMFP's contentions, section 72.94 falls within part 72's Subpart E, entitled "Siting Evaluation Factors" and, as a consequence, is not applicable for a co-located facility. (Staff's Response at 17.) Section 72.40(c) explains that a site reevaluation, which would include evaluation of all Subpart E criteria, including section 72.94, is not necessary for facilities that have been covered under previous licensing actions unless "new information is discovered which could alter the original site evaluation findings." 10 C.F.R. § 72.40(c). Because the Diablo Canyon Power Plant site has been previously evaluated in prior licensing actions and because SLOC has provided no new information which could alter the original site evaluation, the requirements of section 72.94 are inapplicable in this instance.

Moreover, to the extent that this sub-issue attempts to bring terrorism-related security issues into question under the National Environmental Policy Act (“NEPA”), the Staff submits that such arguments are an impermissible attack on the Commission’s safety and physical protection regulations and, thus, should be rejected. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Installation) LBP-01-037, 54 NRC 476, 484-487, CLI-02-3, 55 NRC 155 (2002). The Staff addressed this argument in detail its response to SLOMFP’s contention EC1 and will not restate the argument here. (Staff’s Response at 13-14.)

In issue EC1B, SLOC again raises concerns regarding the applicant’s analysis of alternative security plans and emergency planning responsibilities. (SLOC’s Response at 9-10.) First, SLOC contends that PG&E failed to consider economic, technical and other benefits and costs of the proposed action and of alternatives, specifically regarding the emergency response plan. (*Id.*) In support of this assertion, SLOC cites to section 8.1 of applicant’s ER.

While SLOC is correct that section 51.45(c) requires an applicant’s ER to address “economic, technical and other benefits and costs of the proposed action and of alternatives”, SLOC is incorrect in asserting that applicant has not done so. To the contrary, the applicant has appropriately addressed these factors in its discussion of alternatives to the proposed action, as is required, in section 8.2 of the ER. Because SLOC fails to claim any particular deficiency with the alternatives analysis in section 8.2, it has failed to demonstrate that a genuine dispute exists with the application on a material issue of law or fact. 10 C.F.R. 2.714(b)(2)(iii).

SLOC next raises its concern regarding the possibility of a terrorist attack on the ISFSI facility post September 11, 2001. (SLOC Response at 10.) However, as mentioned above regarding the first subpart of SLOC’s environmental issue, such a claim is an impermissible attack on the Commission’s safety and physical protection regulations and thus, should be rejected. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Installation) LBP-01-037, 54 NRC 476, 484-487, *referral accepted* CLI-02-3, 55 NRC 155 (2002). The Staff addressed this argument in

detail its response to SLOMFP's contention EC1 and will not restate the argument here. (Staff's Response at 13-14.)

Finally, SLOC claims that it should be able to review the applicant's emergency response plan as it is the "lead agency responsible for emergency preparedness in the vicinity of Diablo Canyon." (SLOC Response at 10.) Staff submits that SLOC currently has the ability to review the applicant's emergency response plan as it is publically available as part of the ISFSI application. Moreover, as explained in detail by the Staff in its response to the issues raised by the Port San Luis Harbor District, offsite emergency preparedness is not an appropriate issue for discussion in this forum.<sup>7</sup> See 10 C.F.R. 72.32(c).

#### CONCLUSION

For the foregoing reasons, the Staff submits that SLOC has not raised an admissible subject matter. Thus, while SLOC is free to participate and take a position with respect to such of SLOMFP's contentions as may be admitted and assuming the hearing is granted, SLOC has failed to raise any additional issues which warrant discussion in this proceeding.

Respectfully submitted,

***/RA/***

Angela B. Coggins  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 5<sup>th</sup> day of September, 2002

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<sup>7</sup> See Response of NRC Staff to "Response of Port San Luis Harbor District to Atomic Safety and Licensing Board Order of August 7, 2002", September 4, 2002.

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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  
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