

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S POSITION REGARDING ISSUES PROFFERED
BY 10 C.F.R. § 2.715(c) INTERESTED GOVERNMENTAL ENTITIESINTRODUCTION

On September 17, 2002, the Atomic Safety and Licensing Board ("Broad") issued a Memorandum and Order (Schedules for Submissions Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Entities; Forwarding Additional Participant Submissions for Record Inclusion), requesting the Staff submit its position on the issue of 10 C.F.R. § 2.715(c) participation. The Staff's position follows.

BACKGROUND

In this proceeding, four entities have filed requests to participate under 10 C.F.R. § 2.715(c), which addresses participation by "...representatives of an interested State, county, municipality, Federally-recognized Indian Tribe, and/or Agencies thereof...." Two of those entities, the California Energy Commission ("CEC") and the Diablo Canyon Independent Safety Committee ("DCISC") are not seeking to litigate issues different from those proffered by the petitioners for intervention. The other two such entities, the County of San Luis Obispo ("SLOC") and the Port San Luis Harbor District ("PSLHD"), however, are seeking to litigate subject matters or issues different from those proffered by the intervention petitioners.

Pacific Gas and Electric Company ("Applicant") and the NRC staff ("Staff") have filed responses opposing the admissibility of the subject matters or issues raised by the County and the PSLHD.¹ Nevertheless, at the initial Prehearing Conference held on September 10-11, 2002, there was substantial discussion regarding whether the contention admissibility standards of 10 C.F.R. § 2.714, "Intervention," apply to participants in NRC proceedings under the provisions of paragraph 2.715(c). Tr. 119-130, 131-133, 146-148, 150-159 (September 10, 2002). The County and PSLHD argued that, as governmental entities, the Commission's regulations do not require them to meet contention admissibility standards in order to have their independent subject matters or issues litigated. Tr. 119, 129-130. The Applicant and the Staff argued the opposite position. Tr. 131-133, 146-148. It became apparent to the Staff that the issue warranted additional briefing. Accordingly, the Staff offered to file this Memorandum of Law on the subject. Tr. 148.

DISCUSSION

Following a thorough review of NRC case law and regulatory history, the Staff submits that a 10 C.F.R. § 2.715(c) participant (hereinafter "interested participant") must meet the 10 C.F.R. § 2.714(b)(2) contention requirements with respect to any *new* issues it seeks to introduce into a proceeding. If, however, the interested participant instead simply chooses to participate in the proceeding without taking a position on the desired outcome of the proceeding, or if the interested participant informs the Board of the issues, among those proffered by other parties, with which it desires to participate with reasonable specificity, the interested participant is not obligated to meet the additional burdens imposed by 10 C.F.R. § 2.714. The Staff asserts that its position not only serves the design and purpose of the regulation, but is also consistent with prior NRC case law.

¹ 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); Response of Pacific Gas and Electric Company to Issues Proffered by the County of San Luis Obispo and the Port San Luis Harbor District (September 4, 2002); and Response of NRC Staff to Subject Matter Upon Which the County of San Luis Obispo Desires to Participate (September 5, 2002).

I. The Staff's Position is Consistent with the Statutory and Regulatory Purpose

The Staff's position serves both the design and purpose of 10 C.F.R. § 2.715(c) and its statutory source, Section 274 of the Atomic Energy Act ("AEA" or "Act"), 42 U.S.C. 2021(l). The design of both provisions is to "accord the States the privilege of fully participating in licensing proceedings and advising the Commission on the resolution of issues considered therein without being obliged in advance to set forth any affirmative contentions of its own (as is required of private intervenors)." *Project Management Corporation, Tennessee Valley Authority, Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 393 (1976). Thus, the purpose of both the regulation and the Act is served best by allowing the interested participants to determine the most appropriate avenue to participate in the proceedings.

Based upon the individual needs of the interested participant, it may choose to advise the Board with respect to issues raised by other parties and of which the interested participant has a keen interest - a role clearly envisioned by the regulation and statute. On the other hand, while not required to do so, an interested participant may choose to sponsor new issues not raised by other parties by setting forth its own affirmative contentions, in which case its § 2.715(c) status basically provides it a waiver of the Commission's standing requirements.² Additionally, an interested participant may choose to play dual roles in the proceeding - as a party with respect to any new

² This position is consistent with changes in the proposed rulemaking for Part 2. See "Changes to the Adjudicatory Process," 66 Fed. Reg. 19610 (April 16, 2001). The proposed rulemaking for Part 2 envisions changes to section 2.714 (proposed section 2.309) which would explicitly provide State and local governments and affected Indian Tribes with automatic standing. The proposed rule continues by restating that the interested participant would not be required to take a position with respect to any admitted contention, however, "the representative will be required to identify those contentions on which it will participate in advance of any hearing held. A representative who wishes to litigate a contention not otherwise admitted in the proceeding must satisfy the requirements of paragraph (f) of this section with respect to that contention." 66 Fed. Reg. at 19623 & 19635. Despite these changes, the discussion surrounding the proposed rule indicates that there have been no significant changes with respect to the current section 2.715, thus, again inferring that the contention requirements for new issues are already established in NRC case law.

issues it proffers for litigation in the proceeding *and* as an interested participant with respect to the existing issues with which it desires to participate. This flexibility is what allows the interested participant to join the proceeding at almost any stage, despite the tardiness, with the understanding, however, that the interested participant must “take the proceeding as it finds it.” *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 8 (1980).

II. The Staff’s Position is Consistent with the Regulatory History

The history of the section 2.715 regulation, in addition to its purpose, also provides evidence regarding the appropriate interpretation of the regulation. While 10 C.F.R. §2.715 has not changed often from its original inception wherein it followed the AEA § 274(l) statutory framework closely, section 2.715(c) was revised in 1978.³ The 1978 revisions to section 2.715(c) regarding participation by interested States broadened the provision to include counties, cities and agencies of these entities. The 1978 revisions also specifically afforded interested participants the right to file proposed findings and exceptions pursuant to §§ 2.754 and 2.762 and petitions for review by the Commission pursuant to § 2.786. Moreover, and most importantly for our purposes, the 1978 revisions also added the provision, which remains in the current § 2.715(c), providing that the presiding officer may require such participants to indicate, in advance of the hearing, the subject matters on which the participant desires to participate. Although the rulemaking failed to discuss this additional provision in much detail, the rulemaking indicated that these amendments “conform to present practice.” 43 Fed. Reg. 17798, 17800 (April 26, 1978).

In other words, this 1978 revision codified the case law that developed prior to this rulemaking regarding the rights of interested participants to file various procedural documents in a proceeding despite their participation as interested participants rather than as intervenors or

³ See *Miscellaneous Amendments*, 43 Fed. Reg. 17798 (April 26, 1978).

parties. While the case law evolved to consider the difficult question of the appropriate role of interested participants in post-intervention procedural steps, as will be discussed *infra*, the decisions often presupposed that interested participants could participate in issues already proffered for litigation in the proceeding, or could choose to proffer their own issue(s), but only if their newly advanced issue met the specificity requirements of admissible contentions.⁴ Thus, as the case law reveals, the regulatory changes to section 2.715(c) were not intended to alter the role and requirements of interested participants who choose to offer new issues for litigation in a proceeding.

III. The Staff's Position is Consistent with NRC Case Law

While there are many decisions involving an interested participant, a few decisions in particular advance and clarify the Staff's position in this matter. In a decision much more complicated than need be explained for our present purposes, the Atomic Safety and Licensing Appeal Board ("Appeal Board") upheld the Board's decision below to exclude tardy petitions for interventions filed by various counties, and in doing so explained its interpretation of the requirements for section 2.715(c) participation. *Project Management Corporation Tennessee Valley Authority Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383 (1976). In rendering its decision in this matter, the Appeal Board noted that it would derogate from the purposes of Section 2.715(c) and its statutory source to hold that a State participating as a party under section 2.714 based upon the admissibility of a contention, could not then participate with respect to the remaining issues in the case in which it had an interest per the

⁴ As explained *infra*, under NRC case law, an interested participant has consistently been required to meet the contention requirements in section 2.714 if it offered a new issue for litigation. In 1989, when the Commission raised the threshold for the admissibility of contentions by amending section 2.714, it chose not to amend the requirements of 2.715 despite the consistency with which the two provisions have been linked in NRC case law when an interested participant desires to introduce its own issue into the proceeding. Thus, there is no evidence that the Commission anticipated an interested participant seeking to advance its own issue for litigation meeting requirements other than those delineated in section 2.714 for contentions.

provisions of section 2.715(c). *Id.* at 393. The Appeal Board limited its holding, however, stating that “Section [2.715(c)] does not appear to authorize the injection of *new* issues into a case. Thus, a state wishing to ‘advise’ the Commission on an issue not otherwise before the Licensing Board would be required to raise that issue itself by way of a contention meeting the pleading requirements....” *Id.* at 393, fn. 14.

A similar explanation of interested participant requirements was provided when the Appeal Board was faced with dilemmas involving issues raised by the State of Louisiana, an interested participant, in *Gulf States Utilities Company* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977). In determining whether the State properly raised its issues before the Board, the Appeal Board explained:

The State sought admittance to the proceeding as an “interested state.” It accordingly was not required to set forth contentions as a precondition to participation. Once let in, however, an “interested state” must observe the procedural requirements applicable to other participants. It may - as they may - raise particular issues of interest or concern to it. The Board is entitled to insist, however, that any new issue raised be framed with sufficient detail and preciseness. A hearing participant “must be specific as to the focus of the desired hearing.” And contentions (or their equivalent in the case of an “interested state”) serve the purpose of defining the concrete issues which are appropriate for adjudication in the proceeding.

Gulf States Utilities Company, 6 NRC 760, 768-769 (citations omitted). In noting its “general agreement” with the decision of the Board below to exclude insufficiently detailed safety issues the State sought to litigate, the Appeal Board reasoned that, “[i]t seems clear to us that, in order to introduce a new issue into a proceeding, a party - and likewise an interested state- must do more than present what amounts to a check list of items...” *Id.* at 772.

Staff’s position on interested participants is supported in less obvious Board rulings as well. When a county attempted to raise new issues in a proceeding just two months before the hearing, the Board determined that a 10 C.F.R. § 2.715(c) participant was required to satisfy the standards for admitting a nontimely contention set forth in section 2.714(a)(1). In so holding, the Board

explained that “even under Section 2.715(c), [the county] could not raise new issues in the case not already embraced within the scope of admitted contentions without satisfying the test for late-filed contentions.” *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1139 (June 22, 1983). If interested participants are required to meet the late-filed contention rule spelled out in section 2.714, the logical extension of such an argument is that an interested participant seeking to raise new issues in a proceeding in a timely manner must also meet the contention requirements of 2.714.

Additionally, in an instance where the only intervenor to the proceeding withdrew leaving behind an interested participant that offered no contentions in the proceeding, it was held that the withdrawal of the intervenor, despite the existence of an interested participant, removed both the need and the occasion for evidentiary hearings in a proceeding. *Rochester Gas & Electric Corporation* (Ginna Nuclear Power Plant, Unit 1), LBP-84-34, 20 NRC 769 (1984). Again, such a ruling only clarifies that the role of an interested participant as envisioned under section 2.715(c) is not as an intervenor, but rather as an adviser to the Commission on a specific issue or issues of the participants choosing. Consequently, if there is no intervenor, regardless of whether or not there is an interested participant, there is no longer the need or the requirement for a proceeding to be held.

IV. Application of Staff’s Position to the Interested Participants

Applying this analysis to the interested participants at hand, the Staff submits that, to the extent the filing of SLOC, in which it detailed subject matters upon which it desired to participate,⁵ simply informed the Board of its desire to participate in any issues that may be admitted pertaining to the financial qualifications of the Applicant's ability to construct and operate the proposed Independent Spent Fuel Storage Installation (“ISFSI”), or in any admitted issue pertaining to the

⁵ See “Subject Matter Upon Which the County of San Luis Obispo Desires to Participate Pursuant to 10 C.F.R. § 2.715(c),” filed August 27, 2002 (“SLOC filing”)

environmental siting considerations of the proposed ISFSI, the Staff does not object to SLOC's participation on such contentions as may be admitted.⁶ However, if SLOC is attempting to raise new and independent issues, separate from those raised by the San Luis Obispo Mothers for Peace, et al., regarding the financial qualifications of the applicant or the adequacy of the applicant's alternatives analysis, SLOC is required to meet the Commission's contention admissibility requirements in section 2.714. The Staff continues to assert, for the reasons provided in Staff's previous filing and thus not repeated here,⁷ that SLOC has failed to meet the Commission's requirements regarding the admissibility of contentions, and thus, SLOC's financial and environmental contentions should not be admitted in this proceeding.

The PSLHD, in its response to the Board's order requesting issues upon which PSLHD would desire to participate, requested that the Board litigate the issue of emergency planning in the Diablo ISFSI proceeding.⁸ Because emergency planning has not heretofore been raised as an issue for consideration in this proceeding, the PSLHD is seeking to raise a new issue. In order to do so, the PSLHD must meet the Commission's contention requirements as delineated in section 2.714. Because, as outlined in the Staff's previous response,⁹ PSLHD has failed to meet the Commission's contention admissibility requirements, the Staff continues to assert that the

⁶ SLOC identified several issues on which it desired to be heard: (1) whether the identity and corporate structure of the Applicant are adequately identified (labeled TC1); (2) whether the Applicant's financial qualifications are sufficiently demonstrated (labeled TC2); and (3) whether the environmental analysis supporting selection of the site adequately considered alternatives for the purposes of the National Environmental Policy Act of 1969, as amended (labeled EC1). SLOC filing at 2.

⁷ See "Response of NRC Staff to Subject Matter Upon Which the County of San Luis Obispo Desires to Participate," filed September 5, 2002.

⁸ See "Response of Port San Luis Harbor District to Atomic Safety and Licensing Board Order of August 7, 2002," filed August 19, 2002, at 1-2.

⁹ See "Response of NRC Staff to 'Response of Port San Luis Harbor District to Atomic Safety and Licensing Board Order of August 7, 2002,'" filed September 4, 2002.

emergency planning issue should not be admitted in this proceeding.

CONCLUSION

For the foregoing reasons, the Staff submits that interested participants under section 2.715(c) are not required to submit contentions in order to participate in a proceeding, and may instead seek to advise the Commission by participating in regard to specific issues raised by other parties in the proceeding of which it has an interest. However, if an interested participant desires to raise a new issue for inclusion in a proceeding, the participant must meet the Commission's contention admissibility requirements found in section 2.714. For these reasons, to the extent SLOC and PSLHD seek to raise new issues for inclusion in the Diablo ISFSI proceeding, the Staff submits that neither interested participant has satisfied the admissibility requirements and thus, their proposed contentions should not be admitted into the proceeding. The Staff, however, would not object if the Board were to afford the interested participants an opportunity to supplement their requests.

Respectfully submitted,

/RA/

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Dated at Rockville, Maryland
this 25th day of September, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S POSITION REGARDING ISSUES PROFFERED BY 10 C.F.R. § 2.715(c) INTERESTED GOVERNMENTAL ENTITIES" 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 25th day of September, 2002.

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