

October 9, 2002
DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

October 11, 2002 (11:13AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
PACIFIC GAS & ELECTRIC CO.)
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))
_____)

Docket No. 72-26-ISFSI

ASLBP No. 02-801-01-ISFSI

**CALIFORNIA ENERGY COMMISSION'S
RESPONSE TO NUCLEAR REGULATORY
COMMISSION STAFF'S POSITION REGARDING ISSUES PROFFERED
BY 10 C.F.R. § 2.715(c) INTERESTED GOVERNMENTAL PARTICIPANTS**

I. Introduction

On September 17, 2002, the Atomic Safety and Licensing Board (Board) issued a Memorandum and Order (Scheduling 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 Nuclear Regulatory Commission Staff (Staff) to submit its position on the question of the standard that governs the admission of issues proffered by government entities seeking to participate in an agency adjudicatory proceeding pursuant to 10 C.F.R. § 2.715 (c). On September 25, 2002, Staff submitted its position on this question to the Board. The California Energy Commission (CEC) response follows.

II. Discussion

After reviewing the submission by Staff, the relevant case law, and the regulatory language on the issue, the CEC takes the position that the Board has the discretion to allow for a more flexible standard than the criteria set forth under 10 C.F.R. § 2.714 when considering the admission of issues raised by 10 C.F.R.

§ 2.715(c) participants. The CEC agrees with Staff that § 2.715 (c) participants are not required to raise new issues in order to participate in the proceeding and that such participants may present evidence, cross examine witnesses, advise the Nuclear Regulatory Commission (Commission) without taking a position on the respective issue, propose findings and exceptions, and file petitions for review as to issues before the Board that have been raised by other Parties. However, the CEC differs from Staff's position in that it believes the case law supports a more flexible standard for the scope of issues proffered by 10 C.F.R. § 2.715 (c) participants. The rationale for this conclusion is stated below.

a. Statutory and Regulatory Purpose

Staff states that its position is consistent with the statutory and regulatory purposes of both Section 274 of the Atomic Energy Act (AEA or "Act"), 42 U.S.C. 2021(l), and with 10 C.F.R. § 2.715 (c). Staff cites to *Project Management Corporation, Tennessee Valley, Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 393 (1976), to support the proposition that the purpose of both provisions is to "accord the States the privilege of fully participating in the 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)." Staff contends that this language should be interpreted to give states a choice to file contentions and participate as a party pursuant to 10 C.F.R. § 2.714 (as to contentions raised by interested governmental entities), or to participate as advisors to the Commission under 10 C.F.R. § 2.715 (c) (which does not allow for additional issues to be raised by the participants other than through meeting the adversarial criteria set forth in 10 C.F.R. § 2.714). The CEC believes this is inconsistent with the long standing

Commission principle that governmental participants should be afforded an expanded opportunity to participate in the proceedings.

In order to allow for an expanded participation by interested governmental participants the Commission adopted 10 C.F.R. §2.715(c), which not only grants interested state participants an opportunity to participate in the hearing, but states:

Such participants may also file proposed findings and exceptions pursuant to §§2.754 and 2.762, and petitions for review by the Commission pursuant to §2.786. 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.

The Commission does not cite to existing regulatory requirements in 10 C.F.R. § 2.714, as it does for other existing provisions. Given the Commission's clear reference to existing regulatory provisions it seems logical that it would have also cited 10 C.F.R. § 2.714 if it had intended it to apply to 10 C.F.R. § 2.715(c) participants.

Additionally, 10 C.F.R. § 2.715 (c) states that an interested governmental participant must "indicate with reasonable specificity, in advance of the hearing, the subject matter on which [it] desires to participate." The Commission has emphasized that both the Act and 10 C.F.R. § 2.715(c) highlight the importance of participation by interested States, *Public Service Company of New Hampshire* (Seabrook Station, Units 1&2), CLI-77-25, 6 NRC 535 (1977). Adhering to that principle, the Board should grant governmental participants as much flexibility as the law allows to fully participate in the proceedings.

b. Regulatory History

Staff states that the regulatory history provides evidence that an appropriate interpretation of 10 C.F.R. § 2.715 (c) would require an interested governmental participant to meet the criteria in 10 C.F.R. § 2.714 if it wishes to

raise new issues in the proceeding. In 1978, revisions to the regulations allowed interested governmental participants to participate more fully in proceedings before the Commission, including allowing for appeal rights. Language was added stating that "the presiding officer *may* require governmental participants to indicate, in advance of the hearing, the subject matters on which the participant desires to participate." Staff concedes that that rulemaking failed to discuss in detail what this additional provision was intended to add to current practice, other than a statement that the amendments generally "conform to present practice." (43 Fed. Reg. 17798, 17800 (April 26, 1978).)

The CEC believes that the amendments codified several Commission decisions issued before adoption of the amendments. For example, *Gulf States Utilities Company* (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 provides the following insight:

Accordingly, and to avoid proceeding by way of 'surprise' the State has been advised that it must apprise the Board and all parties [within a given period of time] of precisely what additional issues or particular concerns it believes are directly related, i.e. and relevant, to the radiological health and safety phase of this construction permit application and this particular proposed plant, beyond the contested issue already in the case. They need not be in the form of specific contentions, but they must be issues that are relevant, material and narrow enough permit evidentiary determination in an adjudicatory setting.

6 NRC at 770. Additional case law supporting a broad reading of 10 C.F.R. 2.715(c) includes *Public Service Company of New Hampshire* (Seabrook Station, Units 1& 2), CLI-77-25. These decisions allow for a more flexible standard than the one in 10 C.F.R. § 2.714.

c. NRC Case Law

Staff cites to several cases that clearly hold an interested state must identify issues with "reasonable specificity." Interested governmental

participants "must do more than present what amounts to a check list of items." *Gulf States Utilities Company* (River Bend Station, Units 1&2), ALAB-444, 6 NRC 760, 772 (1977). However, the case law does support allowance by 10 C.F.R. § 2.715 (c) interested governmental participants to raise new issues in a proceeding without specifically meeting the criteria set forth in 10 C.F.R. § 2.714. *Gulf States Utilities Company*, (River Bend Station 1 &2), ALAB-444, 6 NRC at 770, states that if a 10 C.F.R. § 2.715(c) participant raises additional issues in a proceeding, "They need not be in the form of specific contentions, but they must be issues that are relevant, material and narrow enough to permit evidentiary determination in an adjudicatory proceeding." Given the historical flexibility provided to 10 C.F.R. § 2.715(c) participants, the Board should not give a limiting interpretation to 10 C.F.R. § 2.715(c). The Board should interpret the regulation broadly to ensure that governmental participants may fully participate in the proceedings.

An interested governmental entity that is not required to take a position on an issue when it is serving in a more neutral advisory role should be allowed to raise critical issues to the Board without having to provide evidence of a legal or factual dispute with the applicant. An issue could be such that it would be important for the Board to hear testimony from several perspectives in order to make the most informed decision. As an "advisor" in the proceeding an interested state may wish to point out the potential for competing interests on a particular issue or flaws in a particular proposal, yet not necessarily take a position in opposition to the Project. In order to do this, a flexible standard for admitting new issues by 10 C.F.R. § 2.715 (c) participants is required.

In discussing the last sentence of 10 C.F.R. § 2.715 (c), the Appeals Board has stated, "There is no hint in this language or the statement of considerations (43 Fed. Reg. 17,798 (1978)), or by analysis of the River Bend

case or other cases, that this sentence is limited to issues already advanced by other parties." *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1&2) LBP-83-30, 17 NRC 1132, 1140. The Board's statement indicates that under 10 C.F.R. § 2.715 (c) participants could raise new issues under 10 C.F.R. §2.715(c).

As a practical matter, the Board should have the discretion to allow for a more flexible standard in admitting issues put forth from 10 C.F.R. § 2.715 (c) interested governmental participants. Even if a 10 C.F.R. § 2.715 (c) participant does not take a position on an issue, the participant's raising of the issue could well lead the Board to want additional information, which might be presented through testimony at a hearing, in order for the Board to hear the opposing view first hand from experts, or by community members affected by the matter. Governmental participants should have an opportunity to demonstrate with "reasonable specificity" the issues they propose and why the Board should allow for a hearing, without requiring the 10 C.F.R. §2.715 (c) participant to meet all of the criteria set forth under 10 C.F.R. § 2.714.

Staff cites a footnote in *Project Management Corporation Tennessee Valley Authority Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 393, fn. 14 (1976) as authority requiring interested governmental participants to meet 10 C.F.R. § 2.714 requirements when raising new issues in the proceeding. However, this footnote is not consistent with subsequent case law, *Gulf States Utilities*, (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC at 770. Additionally *Project Management Corporation Tennessee Valley Authority Research and Development Administration*, (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, was decided in 1976, two years before 10 C.F.R. § 2.715(c) was adopted. Therefore, it is reasonable given the other references to existing regulatory

authority within 10 C.F.R. § 2.715(c) that, if the Commission did want such criteria to apply, it would have referenced 10 C.F.R. § 2.714 within 10 C.F.R. § 2.715(c). The Commission chose not to apply the criteria set forth under 10 C.F.R. § 2.714 to 10 C.F.R. § 2.715(c) participants, consistent with the historical flexibility it has given to governmental participants.

The case law shows that the Commission has long recognized the importance of governmental involvement in its proceedings and has "permitted states to participate even when contrary to procedural requirements, which might bar another party's participation." *Houston Lighting and Power Co.* LBP-83-26, 17 NRC 945,947 (1983). Therefore, the Board should use its discretion to allow for flexibility when issues are proffered by 10 C.F.R. § 2.715 (c) participants. This does not mean that the Board should allow any issue presented by such participants to be admitted, but that it should be open to allowing issues to be addressed at hearings that will allow for a more complete record, assist the Board in making a well-informed decision in a proceeding, and help governmental entities representing the people most affected by a project to have their concerns fully addressed by the Board within the framework of the proceeding.

III. CONCLUSION

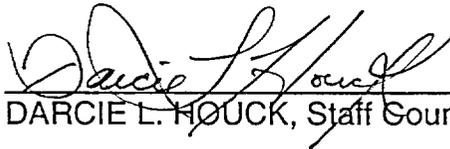
Although Staff points out that interested participants pursuant to 10 C.F.R. §2.715 (c) are not required to submit issues in order to participate in a proceeding, and may seek to advise the Commission by participating in regard to specific issues raised by other parties in the proceeding of which it has an interest, such participants may also raise additional issues to be addressed via the hearings. The CEC differs with the Staff conclusion that interested

governmental participants must meet all the criteria set forth under 10 C.F.R. § 2.714 in order for the Board to admit a proposed issue. The CEC takes the position that interested governmental participants may also seek to raise new issues in a proceeding pursuant to 10 C.F.R. § 2.715 (c). If an interested governmental participant puts forth with "reasonable specificity" a relevant issue, the Board has the discretion when presented with such an issue in a timely manner to admit the issue for purposes of a hearing. The NRC has long recognized the importance of interested governmental participants in its proceedings, and should balance the major interests of such entities (and the people that they represent) against the relatively small burdens of adding an additional issue to the hearing process.

Therefore, the CEC respectfully requests that the Board finds it has the discretion to allow for a flexible standard in admitting issues proffered by 10 C.F.R. §2.715 (c) governmental participants to the proceeding due to the great interest such participants have in the outcome of the proceeding.

WILLIAM M. CHAMBERLAIN, Chief Counsel
JONATHAN BLEES, Assistant Chief Counsel
DARCIE L. HOUCK, Staff Counsel

Dated: October 9, 2002


DARCIE L. HOUCK, Staff Counsel

Attorneys for California Energy Commission
Chief Counsel's Office
1516 Ninth Street, MS 14
Sacramento, CA 95814

CERTIFICATE OF SERVICE

I, Linda Torres, hereby certify that copies of the foregoing **California Energy Commission's Response to Nuclear Regulatory Commission 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, on the 9th day of October, 2002.

G. Paul Bollwerk, III
Administrative Law Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
Email: gpb@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, D.C. 20555

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

Lorraine Kitman
P.O. Box 1026
Grover Beach, CA 93843
Email: lorraine@bejoseeds.com
l.kitman@bejoseeds.com

County Supervisor Peg Pinard
County Government Center
1050 Monterey Avenue
San Luis Obispo, CA 93408
Email: ppinard@co.slo.ca.us

Diane Curran
Harmon, Curran, Spielberg, & Eisenberg,
LLP
1726 M Street N.W., Suite 600
Washington, D.C. 20036
Email: dcurran@harmoncurran.com

Peter S. Lam
Administrative Law Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555

Jerry R. Kline
Administrative Law Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T3F23
Washington, D.C. 20555
Email: jrk2@nrc.gov
Kjerry@erols.com

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
Email: HEARINGDOCKET@nrc.gov

Lawrence F. Womack
Vice President
Nuclear Services
Diablo Canyon Power Plant
P.O. Box 56
Avila Beach, CA 93424

Seamus M Slattery, Chairman
Avila Valley Advisory Council
P.O. Box 58
Avila Beach, CA 93424

David A Repka
Brooke D. Poole
Winston & Strawn
1400 L Street N.W.
Washington, D.C. 20005-3502

Thomas D. Green, Esq.
Thomas D. Waylett, Esq.
Counsel for Port San Luis Harbor District
Adamski, Moroski & Green LLP
444 Higuera Street, Suite 300
San Luis Obispo, CA 93401-3875
Email: green@adamskimoroski.com
Waylett@adamskimoroski.com

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

Klaus Schumann
Mary Jane Adams
26 Hillcrest Drive
Paso Robles, CA 93446

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
Email: jlindholm@co.slo.ca.us

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

John L Wallace
General Manager
District Engineer
Avila Beach Community Services District
P.O. Box 309
Avila Beach, CA 93424

Dated: October 9, 2002



Linda Torres

Signature