RAS 4935

October 9, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

POSITION OF THE COUNTY OF SAN LUIS OBISPO REGARDING THE CRITERIA FOR CONSIDERING ISSUES RAISED BY GOVERNMENTAL ENTITIES UNDER 10 C.F.R. § 2.715(c)

I. INTRODUCTORY STATEMENT

This filing responds to the Atomic Safety and Licensing Board's ("Board") invitation to address the issue of the appropriate standard for the presentation of information and admission of issues proffered by interested governmental entities under 10 C.F.R. § 2.715(c) in hearings conducted by the Nuclear Regulatory Commission ("NRC or "Commission").[1] The County of San Luis Obispo ("SLOC") demonstrates below that the NRC's standard for evaluating admissibility of issues under Section 2.715(c) is a finding that the issue is relevant to the proceeding and is framed with sufficient detail and preciseness to permit adjudication. In addition, SLOC demonstrates that adoption of the NRC's criteria in 10 C.F.R. §2.714(b)(2) for private parties would impede realization of the Commission's regulatory purposes for 10 C.F.R. § 2.715(c) and would be contrary to long-established NRC law.

The Commission has on many occasions stated that participation in its hearings by states, counties, municipalities and other governmental entities provides important insights to

[1] Memorandum and Order (Schedules for Submissions Regarding Issues Proffered by 10 C.F.R. Section 2.715(c) Interested Governmental Entities; Forwarding Additional Participant Submissions for Record Inclusion) (September 17, 2002).

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the Commission.[2] This serves overriding purpose of ensuring that the NRC has a complete record on which to make a decision. A determination that the criteria for private party participation in a hearing controls governmental participation in this proceeding would seriously impede the NRC's implementation of this overriding purpose. To fully implement the Commission's policy consistent with the recognized public responsibilities of the interested governmental entities, the appropriate criteria for the admission of issues under Section 2.715(c) have been articulated by the NRC's Atomic Safety and Licensing Board.[3]

In *Gulf States,* the Board explicitly addressed the issue of the appropriate threshold for the admission of new issues by an interested government under 10 C.F.R. § 2.715(c) and held that the new issues proposed by an interested government need only be relevant and framed with sufficient detail and preciseness.[4] Also, contrary to the suggestion by the NRC staff, not only does 10 C.F.R. § 2.715(c) fail to differentiate between issues already in a proceeding and new issues proposed to be raised by an interested government, but the Board in *Gulf States* made no such distinction.[5] Finally, the suggestion that the Commission's amendments to 10 C.F.R. § 2.714 also somehow raised the threshold for admitting issues under 10 C.F.R. § 2.715(c) is contrary to well established administrative law principles. The Commission's long-standing interpretation of 10 C.F.R. § 2.715(c) can be changed only by rule or order, as was done to implement the changes in 10 C.F.R. § 2.714.[6]

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[2] Final Rule, Miscellaneous Amendments to Rules of Practice, 43 Fed. Reg.17798 (1978). *Power Authority of the State of New York, et al.*, (James FitzPatrick Nuclear Power Plant; Indian Pont Unit 3), CLI-00-22, 52 NRC 266 (2000).

[3] *Gulf States Utilities Company* River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977) ("*Gulf States*").

[4] *Id.* at 768-69.

[5] *Id.* at 770.

[6] See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 43-44, 57 (1983) (an agency changing its long-standing interpretation of a rule is obligated to

Accordingly, for all of these reasons of law and policy, this Board must permit interested governments proceeding under Section 2.715(c) to address any issues at hearing that are relevant and are framed with sufficient detail and preciseness to permit adjudication.

II. BACKGROUND

Special provisions enabling interested governments to participate in NRC proceedings under requirements less onerous than those applicable to private litigants have long been part of the NRC's regulatory scheme. Congress, as early as 1959, made special provision for state participation in NRC proceedings by adopting Section 274 (Title I) of the Atomic Energy Act of 1954, as amended ("AEA"). 42 U.S.C. § 2021. The Commission has characterized the statutory provision as directing it 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* (Clinch River Breeder Reactor Plant), ALAB-354, 4.NRC 383, 393 (1976) ("*Project Management*").

In 1962, the NRC adopted 10 C.F.R. § 2.715(c) to implement this statutory requirement. 27 Fed. Reg. 377, 384. Consistent with its above-quoted understanding of the statutory mandate, the Commission permitted interested States to fully participate in licensing hearings and enabled them to fully advise the Commission on the resolution of issues by not requiring the States to set forth affirmative contentions of its own. NRC experience with the value of state participation led it to extend these special criteria to other governmental entities. Final Rule, Miscellaneous Amendments to Rules of Practice, 43 Fed. Reg.17798 (1978). Thus, Commission statements about the value of state participation apply equally to participation by other interested governmental entities.

The value that the Commission placed on input from interested governments is clear from the reasons given by the Commission in adopting the 1978 amendments to 10 C.F.R.

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supply a reasoned analysis for the change and support the change with substantial evidence on the record considered in its entirety.).

§ 2.715(c). The Commission noted that "this form of participation by members of the public and the States has been a welcome and valuable part of the Commission's licensing proceedings." 43 Fed. Reg. at 17800. In anticipation that similar value would be obtained by the participation of other interested governmental entities, the NRC amended 10 C.F.R. § 2.715(c) to explicitly include county and municipal governments under the same terms as it applied to the States. *Id.*

To implement this expanded participation by interested governments, the NRC relied on its statutory authority under Section 161 of the AEA to "obtain information, make investigations, or hold hearings as it deems necessary." *Id.* Thus, information gathering was a prime consideration in the Commission's adoption of relaxed criteria for interested government participation in NRC hearings. So vital is this principle that the Commission has excused a State's failure to fully comply with the requirements for participation in NRC proceedings in order to permit a State to participate and contribute to the to the development of a sound record. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535 (1977) (permitting Massachusetts to participate in appeal to Commission despite not having participated in the proceeding below); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983 (granting Texas an extension of deadline for participation in Phase II of a licensing proceeding, where it had not participated in Phase I, because of the Commission's desire to have the State participate in the proceeding).

In extending 10 C.F.R. § 2.715(c) to all interested governmental entities, the NRC also expanded the hearing-related activities in which interested governments could participate. In addition to participating in the hearing, the interested governments could file proposed findings of fact and conclusions of law under 10 C.F.R. § 2.754, file appeals under 10 C.F.R. § 2.762, and petitions for review by the Commission under 10 C.F.R. § 2.786. Regarding the admissibility of issues on which the interested governments desire to participate, the Commission did not refer to existing regulatory requirements in 10 CFR § 2.714 as it had with the other opportunities for participation enumerated above, but only directed the presiding officer to exercise discretion to require the interested governments to indicate, in advance of the hearing, the subject matters on which the interested governments desired to participate.

III. ANALYSIS

A. Section 2.715(c) Is Intended to Enable Interested Governments to Inform the Commission About All Relevant Issues of Importance to Them

The broad scope of participation by interested governments was clearly established by the Commission in its Supplementary Information accompanying adoption of 10 C.F.R. § 2.715(c). The Commission stated that Section 2.715(c) was amended to more clearly delineate the participation rights of interested governmental bodies. 43 Fed. Reg. at 17798. The Commission listed several independent activities in Section 2.715(c) that constitute participation. Under Section 2.715(c), an interested State may participate in a proceeding even though it is not a party. In this context, the Board must afford the representative of the interested State the opportunity to introduce evidence, interrogate witnesses and advise the Commission. In so doing, the interested State need not take a position on any of the issues raised by the other parties. *Project Management*, 4 NRC 383.

The ability of an interested government to introduce evidence was not qualified as limited to evidence that addresses issues raised by the other parties. To now distinguish between evidence related to the issues raised by the private litigants and the evidence of importance to governmental entities would not only create a difference not contemplated by the Commission but would also not serve the needs of the Commission for a full record on which to base a sound decision. There is simply no basis in law or policy for requiring evidence on issues of importance to governmental bodies but not to private litigants to meet the stringent criteria applicable to private litigants when the Commission has already determined that input from governmental entities is valuable enough to enable their participation through a separate section of the Commission's regulations.

Similarly, the opportunity to advise the Commission without taking a position on any issue should not be read to limit the opportunity to provide such advice on only the issues raised by the private litigants. To implement the Commission's intent to assure itself that it received the important views of interested governmental entities, the Commission clearly intended the phrase "without taking a position on any issue" as a direction to enable interested

governments to "advise the Commission" and is not as a limit for governments to merely advise on the issues raised by the private litigants.

B. Nothing in the Commission's Adoption or Implementation of 10 C.F.R. § 2.715(c) Suggests that 10 C.F.R. § 2.714(b)(2) Criteria Apply to Interested Governments

As discussed above, when the Commission extended the rights to participate in NRC hearings to all interested governments, the Commission also expanded the hearing-related activities in which those governments could participate. In so doing, the Commission made specific references to particular provisions in the NRC's Rules of Practice. Conspicuous by it absence is any Commission reference to 10 C.F.R. § 2.714. Also conspicuous by its absence is any Commission suggestion that new issues sought to be raised by interested governments are to be treated any differently from issues raised by other participants in a proceeding.

The reasons that the Commission did not refer to 10 C.F.R. § 2.174 are clear. First, there was no need to refer to that provision because, as the NRC staff noted, the Commission indicated that the amendments "conform to present practice." 43 Fed. Reg. at 17800. Present practice in 1978 was: (1) a much less stringent set of criteria for the admission of contentions under 10 C.F.R. § 2.174 than have been applicable since the Commission's modification of that provision in 1989; and (2) a separate, set of criteria, even less stringent than those under 10 C.F.R. § 2.714, for the admission of issues by interested states, including new issues, as set forth in the *Gulf States* proceeding.

Thus, contrary to the NRC staff's claim in footnote 4 of its filing, interested governments have not consistently been required to meet the contention requirements in 10 C.F.R. § 2.714 for introducing new issues into a proceeding.[7] Rather, the evidence is clear that the Commission intended interested states to be permitted to introduce new issues under the criteria articulated in *Gulf States*. Accordingly, SLOC agrees with the NRC staff's observation

[7] The County agrees with the NRC staff to the extent that it states that "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." Thus, the Commission chose not raise the bar for admission of issues proffered under Section 2.715(c).

in footnote 2 of its filing that the because there have been no significant changes to 10 C.F.R. § 2.715(c) for many years, the criteria for the admission of new issues by interested governments are already established in NRC case law. Where SLOC and the NRC staff differ is what those criteria are. SLOC contends that they are the criteria established in *Gulf States*, which apply explicitly to new issues raised by interested governmental entities.

Second, the Commission did not distinguish between an interested government's participation on issues raised by other participants to a proceeding and new issues raised by only the interested government because such a distinction would have been contrary to the Commission's policy objective in extending 10 C.F.R. § 2.715(c) to interested governments. If an interested government were required to meet the criteria in 10 C.F.R. § 2.714 for new issues not raised by other parties to a proceeding, that would render nugatory the Commission's extension of 10 C.F.R. § 2.715 to obtain the views of interested governments in order to ensure a complete record for decision. Private parties cannot be expected to raise issues related to the public responsibilities implemented by the various governmental entities. To hold participation by interested governments hostage to the scope of the issues raised by private litigants would also severely limit the NRC's ability to develop the complete record it needs for a reasoned decision in a licensing proceeding. Accordingly, the Commission did not differentiate between an interested government's participation on existing issues and introduction of new issues and intended to apply the same standard to the admission of both of these kinds of issues.

C. The NRC Staff's Position Is Contrary to Applicable NRC Case Law

In claiming that its position is consistent with NRC case law, the NRC staff relies selectively on only a few of the many NRC decisions that address 10 C.F.R. § 2.715(c). In particular, the NRC staff ignores the substantial body of NRC decisions that, as already discussed above, have read the Section 2.715(c) provision broadly to enable the Commission to obtain the important views of interested governments. As a result, the NRC staff's interpretations of the few cases it cites are inconsistent with the totality of applicable NRC case law.

In support of its position, the NRC staff cites four cases: (1) *Rochester Gas & Electric*;[8] (2) *LILCO*;[9] (3) *Gulf States*; and (4) *Project Management*. A careful analysis of these decisions shows that they do not support the imposition of the 10 C.F.R. § 2.714(b) criteria on the issues proposed to be raised by interested governmental entities which wish to participate under 10 C.F.R. § 2.715(c). Rather, they show that the appropriate criteria for new issues raised by a governmental entity are that the issues are relevant and framed with sufficient detail and preciseness to permit adjudication.

Regarding *Rochester Gas & Electric*, the NRC staff is correct to the extent that it characterizes that decision as holding that where there is no hearing, there is no vehicle for interested governments to present their views to a Board. However, this holding sheds no light on the appropriate criteria under which an interested government can present its views under Section 2.715(c).

LILCO involved an unusual situation in which the interested government attempted to participate near the end of a long proceeding. Although the NRC's rules of practice do not apply time limits on when an interested government can participate in a proceeding, the extreme lateness of that government's expression of interest was an unusual circumstance relied on by the Board in that case to apply the lateness criteria in 10 C.F.R. § 2.714(a). One can question whether this decision was consistent with the Commission's decision in *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-25, 6 NRC 535 (1977), in which the State of Massachusetts was permitted to participate in Commission review of a Board decision despite not having participated in the proceeding. In determining to permit Massachusetts to participate in that proceeding, the Commission was motivated by its desire to obtain a complete record by enabling interested governments to participate in NRC proceedings ("...the participation of an interested sovereign state in our licensing process, as a full party or

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[8] *Rochester Gas & Electric Corporation* (Ginna Nuclear Power Plant, Unit 1), LBP-84-34, 20 NRC 769 (1984) ("*Rochester Gas & Electric*").

[9] *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1139 (June 22, 1983) ("*LILCO*").

otherwise, is always desirable and is particularly appropriate in this review proceeding which present an issue about state utility ratesetting laws and practices.") 6 NRC at 537. In any event, the *LILCO* precedent is too slender a reed on which to support stretching this limited holding to conclude that the criteria in 10 C.F.R. § 2.714(b) should apply to participation under 10 C.F.R. § 2.715(c). Such a stretch would be an illogical extension of this holding because the underlying policy that motivated the Commission to adopt 10 C.F.R. § 2.715(c) would be thwarted.

Gulf States, contrary to the NRC staff's conclusion, when read in its entirety, clearly shows that the criteria in 10 C.F.R. § 2.714(b) are not intended to apply to interested governments participating under 10 C.F.R. § 2.715(c). In stating that a Board may require an interested state to frame new issues with "sufficient detail and preciseness," and upholding the Board's decision to refuse to admit new issues based on the presentation of a "check list" of items, the Board did not take the path now proposed by the NRC staff and impose the criteria in 10 C.F.R. § 2.714(b). Rather, in recognition of the unique situation and rights of interested states, the Board simply required any new issue to be framed with sufficient detail and preciseness, a much more relaxed standard. *Gulf States Utilities Company* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768-69 (1977).

This conclusion is clearly supported by two aspects of the decision not addressed by the NRC staff. First, the portion of the decision quoted by the staff not only omitted citations, as stated by the staff, but also an important flag. The sentence "The Board is entitled to insist, however, that any new issue be raised be framed with sufficient detail and preciseness," is followed by a *Cf.*[10] Had the Board intended to apply the criteria in 10 C.F.R. § 2.714 it would not have used this flag. Second, the Board directly addressed a State's offer of additional issues beyond the contested issues in a proceeding. The Board gave the following advice:

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[10] *Cf.* means that the "Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally "*cf.*" means "compare."" *The Bluebook, A Uniform System of Citation*, Fifteenth Ed. at p. 23.

> 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 precisely what *additional issues or particular concerns* it believes are directly related, i.e., 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 to permit evidentiary determination in an adjudicatory setting.* (Transcript citation omitted.)
> 6 NRC at 770 (emphasis added).

Thus, the Board's decision is explicitly contrary to the NRC staff's suggestion that new issues proposed to be raised by interested governmental entities should be subjected to 10 C.F.R. §2.714(b) criteria. Instead, it is established NRC law that there is only one standard for the admission of issues proposed by interested governmental entities and that standard is simply that an issue be relevant and described with sufficient detail and preciseness.

Finally, *Project Management* held that an interested government does not give up its right to participate under 10 C.F.R. § 2.715(c) simply because it has raised some issues under 10 C.F.R. § 2.714. The Board rejected as undue literalism contrary to the purposes of 10 C.F.R. § 2.715(c) any interpretation of that provision that would force an interested government to choose one of the two ways in which it could participate in an NRC proceeding. Thus, *Project Management* reinforces the conclusion, based on the underlying policy established by the Commission, that participation under 10 C.F.R. § 2.715(c) is different from participation under 10 C.F.R. § 2.714. Nevertheless, the Board did provide the following *dictum* in a footnote:

> The Section [10 C.F.R. § 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 of Section 2.714(a). In light of the expansive scope of the Commission's independent NEPA responsibilities, it is unlikely that many environmental questions would fall into that category.

4 NRC at 393, fn. 14. The last sentence of this footnote is critical to understanding this observation by the Board. This last sentence explains what the Board meant by an "issue not otherwise before the Licensing Board." By referring to the Commission's "independent NEPA

responsibilities," the Board did not limit the concept of an issue not otherwise before the Licensing Board to those issues that had been raised by the parties. Rather, the scope of the issues before the Board for the purposes of understanding this statement, is the scope of issues within the NRC's statutory authority, including, but not limited to, NEPA. Thus, issues related to the NRC's independent safety responsibilities and issues related to NRC compliance with its own regulations are also issues before the Licensing Board for the purposes of understanding this statement.

In any event, the reading of this footnote proposed by the NRC staff is contradicted by the later decision in *Gulf States,* for the reasons discussed above. Accordingly, this *dictum* does not support the NRC staff's attempt to impose 10 C.F.R. § 2.714(b) on interested governments.

D. Adoption of the NRC Staff's Position Would Contradict The Administrative Procedure Act

The NRC is subject to the Administrative Procedure Act ("APA"). 5 U.S.C. § 552, *et seq.*; *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 76 (D.C.Cir. 1999); see 42 U.S.C. § 2231. It is hornbook APA law that an agency may not change a long-standing interpretation of its rules without conducting some kind of proceeding and explaining the reasons for the change. *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 42, 43-44. For almost 25 years, the NRC has not interpreted 10 C.F.R. § 2.715(c) as suggested by the NRC staff. Rather, the criteria in *Gulf States* have applied to the admission of all issues proffered by governments interested in the subject matter of an NRC proceeding. Accordingly, this Board would violate the APA if it were to adopt the NRC staff's position. Only the Commission can determine whether to modify its rules, including the long-standing interpretations of those rules. Accordingly, this Board must apply the criteria in *Gulf States* to determine the admissibility of new issues proffered by interested governments.

E. Imposition of the Private Litigant Criteria in 10 C.F.R. § 2.714(b)(2) to Interested Governmental Entities Would Deprive the Commission of Valuable Insights

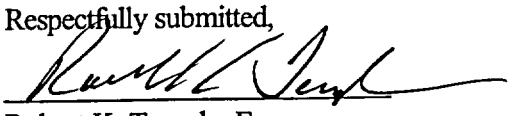
Contrary to the Commission's policy based on experience, the NRC staff has tended to treat states, counties, municipalities and other governmental entities no differently from private parties. In this case, the NRC staff has suggested that the criteria in 10 C.F.R. § 2.714(b)(2) for admitting contentions should apply equally to the presentation of new issues by interested governments. Commission precedent and policy clearly show that these high hurdles for the admission of contentions by private litigants are inapposite to the submittal of information by governmental bodies on issues of concern to them. Indeed, under the NRC staff's view, an interested government would be required to meet the criteria for participation as a party on issues of importance to that governmental entity, thus rendering nugatory the participation rights under 10 C.F.R. § 2.715(c).

The fundamental issue in determining how to interpret 10 C.F.R. § 2.715(c) is how that requirement can be reasonably read to best implement the Commission's long-standing view that participation by interested governments in NRC hearings provides valuable insights necessary for a complete record in a proceeding. If 10 C.F.R. § 2.715(c) were to be interpreted to require interested governments to meet the high standards in 10 C.F.R. § 2.714(b)(2) in order to present views on issues not raised by other parties to a proceeding, the interested governments would be severely inhibited in their abilities to inform the Commission on the issues of importance to those governments. Private parties cannot be expected to raise issues related to the public responsibilities implemented by the various governmental entities. To hold participation by interested governments hostage to the scope of the issues raised by private litigants would also severely limit the NRC's ability to develop the complete record it needs for a reasoned decision in a licensing proceeding. Accordingly, the Commission's purpose in adopting 10 C.F.R. § 2.715(c) can only be fully realized by applying the criteria articulated in *Gulf States* to all of the issues raised by an interested government, and not just those raised by private litigants.

IV. CONCLUSION

For all of the foregoing reasons, this Board must apply the criteria in *Gulf States* to the admission of all issues proffered by interested governmental entities. An interested government may fully participate on any issue, whether already raised by other participants in the hearing or newly offered by that governmental entity, as long as the issue is relevant to the proceeding and framed with sufficient detail and preciseness to permit determination in an adjudicatory proceeding. As SLOC has met these criteria with respect to the subject matter it has identified, the ASLB therefore should admit its issues for adjudication in this proceeding.

Respectfully submitted,



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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 Power Plant Independent Spent Fuel Storage Installation)	)	ASLBP No. 02-801-01-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Position of the County Of San Luis Obispo Regarding the Criteria for Considering Issues Raised By Governmental Entities Under 10 C.F.R. § 2.715(c)" have been served upon the following persons by United States mail, first class; and by electronic mail as indicated by an asterisk (*) on this 9th day of October 2002.

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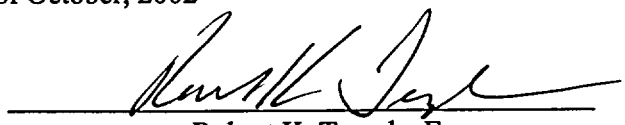
Dated at Chicago, Illinois, this 9th day of October, 2002



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