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October 9, 2002

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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

October 17, 2002 (1:11PM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
Pacific Gas and Electric Co.	)	Docket No. 72-26-ISFSI
	)	
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)	)	ASLBP No. 02-801-01-ISFSI

POSITION OF PACIFIC GAS AND ELECTRIC COMPANY REGARDING ISSUES  
PROFFERED BY 10 C.F.R. § 2.715(c) INTERESTED GOVERNMENTAL ENTITIES

During the prehearing conference held on September 10-11, 2002, the Nuclear Regulatory Commission ("NRC") Staff offered to brief the Atomic Safety and Licensing Board ("Board") on the question of the governing standard for the admission of issues proffered by governmental entities seeking to participate in an NRC proceeding under 10 C.F.R. § 2.715(c). (September 10, 2002 Transcript at 146-48.) At that time, the Board established a schedule for briefing by the Staff and other participants. (Tr. at 169-71.) Pursuant to the September 17, 2002, Memorandum and Order issued by the Board memorializing this schedule,<sup>1</sup> Pacific Gas and Electric Company ("PG&E") herein submits its position with respect to the issue.

As discussed further below, governmental participants should be held to the standards for submission of contentions set forth in 10 C.F.R. § 2.714(b). To permit otherwise would contravene established precedent and impermissibly frustrate the purposes underlying the Commission's requirements for contentions in an NRC proceeding.

<sup>1</sup> See *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, Memorandum and Order (Schedules for Submissions Regarding Issues

Template = SECY-021

SECY-02

## II. BACKGROUND

Five entities<sup>2</sup> have requested to participate in this proceeding as interested governmental participants pursuant to 10 C.F.R. § 2.715(c): San Luis Obispo County (“County”),<sup>3</sup> the Port San Luis Harbor District (“Harbor District”),<sup>4</sup> the California Energy Commission (“CEC”),<sup>5</sup> the Diablo Canyon Independent Safety Committee (“DCISC”),<sup>6</sup> and the Avila Beach Community Services District (“ABCSD”).<sup>7</sup> To date, the Board has granted the

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Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Entities; Forwarding Additional Participant Submissions for Record Inclusion), slip op. Sept. 17, 2002.

<sup>2</sup> In their original petition to intervene, the Avila Valley Advisory Council (“AVAC”) and County Supervisor Peg Pinard did not specify a basis for their standing. *See* Petition of San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council for Leave to Intervene and Request for Hearing, dated May 22, 2002. It appeared that AVAC and Ms. Pinard based their standing on their participation in San Luis Obispo County government and on some unspecified quasi-governmental status of the AVAC. Both PG&E and the NRC Staff opposed the petition. *See* NRC Staff’s Response to Requests for Hearing and Petitions to Intervene Filed by Lorraine Kitman, San Luis Obispo Mothers for Peace, and San Luis [Obispo] County Supervisor Peg Pinard and Avila Valley Advisory Council, dated May 30, 2002; Answer of Pacific Gas and Electric Company to the Petition for Leave to Intervene and Request for Hearing of San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council, dated June 3, 2002. On July 8, 2002, petitioners Pinard and AVAC amended their petition to clarify that they were petitioning as private, and not governmental, participants. *See* Petitioners’ Amended Hearing Request and Petition to Intervene, dated July 8, 2002.

<sup>3</sup> *See* Request of San Luis Obispo County to Participate as of Right Under 2.715(c), dated June 20, 2002.

<sup>4</sup> *See* Request of Port San Luis Harbor District to Participate as of Right Under 10 C.F.R. 2.715(c), dated July 19, 2002.

<sup>5</sup> *See* Request of the California Energy Commission to Participate as of Right Pursuant to 10 C.F.R. § 2.715(c), dated August 16, 2002.

<sup>6</sup> *See* Request of the Diablo Canyon Independent Safety Committee to Participate as of Right Under 10 C.F.R. 2.715(c), dated August 20, 2002.

<sup>7</sup> *See* Transmittal of Avila Beach CSD Declaration and Request for “Interested Party” Status; Docket No. 72-26-ISFSI ASLBP No. 02-801-01-ISFSI, dated September 17, 2002.

requests of the County and the Harbor District.<sup>8</sup> In response to the Board's August 7 Order, the County and the Harbor District each filed a statement of issues they wished to raise in addition to the contentions proffered by other Section 2.714 petitioners in the proceeding.<sup>9</sup> Both the NRC Staff and PG&E opposed admission of the County's and the Harbor District's issues, in part on the basis that neither the County nor the Harbor District proffered an admissible contention, applying the standards of 10 C.F.R. § 2.714(b).<sup>10</sup> (PG&E also objected to many of the potential issues on the basis that they were outside the scope of the proceeding.)

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<sup>8</sup> See *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-15, 56 NRC \_\_\_, slip op. at 3 n.3 (July 15, 2002); *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation), slip op. Aug. 7, 2002 ("August 7 Order"). Neither PG&E nor the NRC Staff has objected to the participation of the CEC. See Response of NRC Staff to Requests of the California Energy Commission and the Diablo Canyon Independent Safety Committee to Participate as of Right Under 10 C.F.R. § 2.715(c), dated August 26, 2002 ("Staff Response to CEC and DCISC"); Response of Pacific Gas and Electric Company to Request of California Energy Commission to Participate as of Right Pursuant to 10 C.F.R. § 2.715(c), dated August 26, 2002. With respect to DCISC, the NRC Staff does not object to its participation (see Staff Response to CEC and DCISC), but PG&E opposes its participation under § 2.715(c). See Response of Pacific Gas and Electric Company to Request of the Diablo Canyon Independent Safety Committee to Participate as of Right Under 10 C.F.R. § 2.715(c), dated August 30, 2002. Responses are to be filed with respect to the ABCSD on October 15, 2002. See *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), Memorandum and Order (Schedule Relative to Participation by Additional 10 C.F.R. § 2.715(c) Interested Governmental Entity), slip op. Sept. 27, 2002.

<sup>9</sup> See Response of Port San Luis Harbor District to Atomic Safety and Licensing Board Order of August 7, 2002, dated August 19, 2002; 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.

<sup>10</sup> See Response of the NRC Staff to "Response of Port San Luis Harbor District to Atomic Safety and Licensing Board Order of August 7, 2002," dated September 4, 2002; Response of the NRC Staff to Subject Matter Upon Which the County of San Luis Obispo Desires to Participate, dated September 5, 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, dated September 4, 2002.

As discussed above, subsequent to the briefing of these issues, on September 10, 2002, during the prehearing conference, there was discussion of the appropriate standards for admission of issues identified by governmental participants. The NRC Staff proposed to brief the Board on the issue, and, accordingly, filed its statement of position on September 25, 2002.<sup>11</sup> PG&E is also taking the opportunity to present its position, as discussed further below.

### III. DISCUSSION

Section 274.1 of the Atomic Energy Act of 1954, as amended ("AEA"), 42 U.S.C. § 2021(l), sets forth the mandate for limited governmental participation in NRC adjudicatory proceedings (emphasis added):

*With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection c., the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.*

This statutory provision is implemented through 10 C.F.R. § 2.715(c), which states:

The presiding officer will afford representatives of an interested State, county, municipality, Federally-recognized Indian Tribe, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue. 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.

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<sup>11</sup> See NRC Staff's Position Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Entities, dated September 25, 2002 ("Staff Position").

As discussed in the NRC Staff Position (at 3), the purpose of the statute and the regulation 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 Mgmt. Corp., Tenn. Valley Auth., Energy Research & Dev. Admin.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 393 (1976). These provisions also allow participation in the proceeding on an issue, to the degree described therein, without the governmental entity taking a position on the merits of the issue.

Neither the statute nor the regulation establishes any separate or reduced standard for admission of issues *raised by* interested governmental participants. The statute and the regulations allow participation but, quite reasonably, Section 2.715(c) requires that such participants state the issues on which they will participate. The provision regarding stating the issues (which appears in the regulation but not the statute) appears to be administrative (or “housekeeping”) in nature, not a contention pleading standard. Section 2.715(c) participants must inform the presiding officer whether they opt to participate or not on otherwise admissible issues. It follows logically that these issues would be either contentions raised by themselves or others that meet the requirements of Section 2.714(b), issues raised *sua sponte* by the Licensing Board,<sup>12</sup> or issues otherwise being considered in an uncontested, mandatory hearing (e.g., a construction permit case).<sup>13</sup>

To the extent a Section 2.715(c) petitioner or party would raise its own, unique issue, the Section 2.714 thresholds must continue to apply. The agency’s longstanding practice

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<sup>12</sup> See 10 C.F.R. § 2.760a.

<sup>13</sup> See 10 C.F.R. § 2.104.

is to apply Section 2.714 requirements to issues raised by Section 2.715(c) participants. Moreover, to do otherwise would frustrate the public policy goals served by the Section 2.714 standards.

A. Historically, the Commission and Licensing Boards Have Applied the Section 2.714 Contention Standards to Section 2.715(c) Participants.

As indicated by the Staff's discussion,<sup>14</sup> the regulatory history of Section 2.715(c) does not directly address the standard for admissibility of new issues proffered by governmental participants. However, NRC boards and presiding officers have long applied the Section 2.714 contention standards to issues submitted by governmental participants.

As noted by the Staff,<sup>15</sup> in 1977 the Appeal Board considered this issue with respect to matters raised by the State of Louisiana in a construction permit proceeding. *Gulf States Utils. Co.* (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977). The Licensing Board in that proceeding had ordered the State, which had intervened pursuant to 10 C.F.R. § 2.715(c), to submit issues. In so doing, the Board stated that the issues "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." *Gulf States Utils. Co.* (River Bend Station, Units 1 & 2), ALAB-329, 3 NRC 607, 609 (1976). In response, the state filed a "Statement of Safety Issues," followed shortly thereafter by a supplement. The submittals largely consisted of lists of possibly relevant items without further discussion. The Licensing Board, notwithstanding its statement that particularized contentions were not required, held that the submittal did not provide "a fair opportunity to other parties to know precisely what the limited issues [are], exactly what proof, evidence or testimony is required to meet that issue and

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<sup>14</sup> See Staff Position at 4-5.

<sup>15</sup> See Staff Position at 6.

exactly what support the State intends to adduce for its allegations.” *River Bend*, ALAB-444, 6 NRC at 771.

The Appeal Board upheld the Licensing Board, stating, “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 contained in the [Staff Technical Safety Activities Report] or in regulatory guides.” *Id.* at 772. In making this determination, the Appeal Board stated:

Once let in . . . an “interested state” . . . may . . . raise particular issues of interest or concern to it. [Citing *Clinch River*, 4 NRC at 392-93.] The Board is entitled to insist, however, that any new issue raised be framed with sufficient detail and preciseness. *Cf.* 10 CFR 2.714(a). A hearing participant “must be specific as to the focus of the desired hearing.” *BPI v. Atomic Energy Comm’n*, 502 F.2d 424, 429 (D.C. Cir. 1974). 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.” [Citation omitted.]

*Id.* at 768-69. Unlike the Licensing Board, the Appeal Board, in comparing the then-current contention standard to the attributes of admissible issues, clearly signaled its intent to apply a substantively comparable standard.<sup>16</sup>

Subsequent licensing and appeal boards have even more directly addressed the issue. In *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-81-5, 13 NRC 226, 246-47 (1981), the Licensing Board stated as follows with respect to the “subjects” on which the California governor intended to participate as a Section 2.715(c) participant:

As a representative of an interested state participating under 2.715(c) Governor Brown is not required to submit contentions of

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<sup>16</sup> See *Clinch River*, ALAB-354, 4 NRC at 393 n.14 (“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)”).

his own, but is free to fully participate in the litigation of any contentions which are otherwise accepted by the Board. *However, if the Governor wishes to raise specific issues not otherwise accepted by the Board he must comply with the requirements of 10 C.F.R. § 2.714(b) for acceptable contentions, just as any other party must.*

(Emphasis added.) More recently, a Licensing Board considered the request of a regional council of governments to participate under Section 2.715(c) in a proceeding on a license termination plan. In granting the request, the Board stated:

[The council] has not submitted formal contentions in this proceeding but has listed certain areas of interest. *Because these areas of interest do not qualify as contentions, we do not admit them as such* but only note that, to a large extent, they involve issues similar to those that we have admitted . . . earlier in this order. [Citation omitted.] [The council] will, of course, be permitted to participate in the adjudication of any of the issues that we are admitting as contentions.

*Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-99-14, 49 NRC 238, 258 (1999)(emphasis added).<sup>17</sup> Thus, for more than twenty-five years, presiding officers have applied contention standards to new issues raised by governmental participants.

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<sup>17</sup> See also *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 425-27 (1984). In this operating license proceeding, the state of Pennsylvania petitioned to participate under Section 2.715(c). The state subsequently filed a "statement of concerns" in which it stated it had a "particular interest" in several proposed contentions proffered by a Section 2.714 participant, although it did not modify, adopt, or take a position on them. The Board held that the state's interest in the contentions "did nothing to cure their deficiencies as proposed contentions" and did "nothing to alter their status as nonlitigable." The Board went on to hold that no petitioner had submitted a litigable contention, and that the acceptance of the state as a Section 2.715(c) participant, alone, did not trigger a hearing. See also *N. States Power Co.* (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980)(views of Chairman Ahearne and Commissioner Hendrie); *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 216 (1983). In the same vein, as pointed out by the Staff, where the only Section 2.714 intervenor in a proceeding withdraws, leaving an interested governmental participant, the proceeding will be terminated. See Staff Position at 7.

The Commission has proposed to codify this longstanding position. The currently pending proposed amendments to the NRC hearing procedures include a proposed Section 2.309(d)(2), which provides, in pertinent part:

(2) State and local governments and affected Indian Tribes.

(i) The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene will admit as a party to a proceeding a single representative designated by the State in which the facility is located as well as a single designated representative of the local governmental body (county, municipality or other subdivision) in which the facility is located and any affected Indian Tribe . . . without requiring a further demonstration of standing.

(ii) The representative of the State or local government or affected Indian Tribe admitted under § 2.315(c)<sup>18</sup> is not 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.*

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<sup>18</sup> Proposed Section 2.315(c) would amend Section 2.715(c) to state:

The presiding officer will afford representatives of an interested State, county, municipality, Federally-recognized Indian Tribe, and/or agencies thereof, a reasonable opportunity to participate in those proceedings and to introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, and advise the Commission without requiring the representative to take a position with respect to the issue. These representatives may also file proposed findings in those proceedings where findings are permitted and petitions for review by the Commission under § 2.340. The presiding officer may require the representatives to indicate with reasonable specificity, in advance of the hearing, the subject matters on which each representative desires to participate.

Proposed Rule, Changes to Adjudicatory Process, 66 Fed. Reg. 19,610, 19,636 (Apr. 16, 2001)(emphasis added). Section 2.309(f), in turn, sets forth the proposed requirements for admission of contentions in all NRC proceedings, and maintains the current requirements contained in Section 2.714. *See* 66 Fed. Reg. at 19,623 (“By continuing to impose these contention support requirements, the Commission seeks to ensure that the adjudicatory process is used to address real, concrete, specific issues that are appropriate for litigation”); *Id.* at 19,637.

In sum, NRC precedent demonstrates longstanding practice and policy to apply contention standards when determining the admissibility of issues submitted by governmental entities. This position is consistent with the plain language of the relevant statute, and the Commission has clearly demonstrated its intent to give finality to the issue by codifying the position as a regulatory requirement. Moreover, as discussed further below, this longstanding practice is consistent with the policy considerations underlying the current standards for admissibility of contentions. To apply some other, undefined standard to governmental participants would undermine the foundations of the current hearing process.

B. Inconsistent Contention Standards Would Thwart the Public Policy Goals Underlying Contention Standards.

In 1989, the Commission raised the threshold for the admission of contentions to require the proponent to supply information showing the existence of a genuine dispute with the applicant on a legal or factual issue. *See* Final Rule, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (Aug. 11, 1989); 10 C.F.R. § 2.714(b). The purpose of this rulemaking was to increase focus and efficiency in the NRC hearing process. *See generally* 54 Fed. Reg. at 33,168, 33,168-79. Nothing in the 1989 rulemaking suggested that there would be any departure at the time from precedent that contention standards would be applied to Section 2.715(c) participants.

Moreover, such a significant change in policy would have been completely antithetical to the goals of the 1989 rulemaking. Given the historical degree of participation in NRC hearings by state and local agencies, a reduced and undefined contention standard for such agencies would greatly expand the hearing process.

Contention pleading requirements are intended precisely to assure that:

- (1) The hearing process is not improperly invoked, for example, to attack statutory requirements or regulations;
- (2) Other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose;
- (3) The proposed issues are proper for adjudication in the particular proceeding — *i.e.*, generalized views of what applicable policies ought to be are not proper for adjudication;
- (4) The contentions apply to the facility at bar; and
- (5) There has been sufficient foundation assigned for the contentions to warrant further explanation.

*Gen. Pub. Utils. Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 285 (1986); *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20-21 (1974). *See Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-91-19, 33 NRC 397, 400 (1991) (agreeing that the cited purposes of the contention pleading requirements remain relevant following the 1989 amendments). Accordingly, the Commission has determined that it is “reasonable” that, before a person is admitted to a proceeding, “it read the portions of the application (including the applicant’s safety and environmental reports) that address the issues that are of concern to it and demonstrate that a dispute exists between it and the applicant on a material issue of fact or law.” 54 Fed. Reg. at 33,171. These purposes apply equally to both governmental and non-governmental participants.

To permit litigation of an issue that does not meet Section 2.714(b) would plainly thwart the purposes of the contention requirements. The filing of “vague, unparticularized” issues, or even those that are somewhat more specific, but still fall short of the admission requirements set forth in 10 C.F.R. § 2.714(b) constitutes “notice pleading,” which is strictly prohibited under the NRC’s regulatory scheme. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 338 (1999); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-01-10, 53 NRC 273, 279 (2001). Without a defined standard for the admission of issues that serves the purposes stated above, the NRC would open the door to insignificant, meritless, hypothetical and time-consuming “contentions” — to the detriment of efficient and timely decision-making. Although Section 2.715(c) is expressly intended to relieve affected governmental participants of certain procedural requirements, there is no support in the statute, precedent, or policy that the regulation was intended to create a separate, undefined standard for a category of participants at the expense of judicial economy.

C. Other Procedural Rules Are Consistently Applied to Governmental Participants

The privileges of governmental participant status are enumerated in Section 2.715(c) itself: an interested governmental participant may participate in the proceeding, introduce evidence, interrogate witnesses, advise the Commission without taking a position, file proposed findings and exceptions under Sections 2.754 and 2.762, and submit petitions for review pursuant to Section 2.786. In numerous other procedural contexts, however, it is clear that the Commission intends for governmental participants to satisfy the same regulatory requirements as other participants. *See Cincinnati Gas & Elec. Co.* (William H. Zimmer Nuclear

Station), LBP-80-6, 11 NRC 148, 151 (1980)(once admitted, governmental participant “is required to adhere to procedural rules and requirements which govern other parties”).

For example, it is well established that, once a governmental participant enters a proceeding, it must “take the proceeding as it finds it.” *Zimmer*, LBP-80-6, 11 NRC at 151, citing *Nuclear Fuel Servs., Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975). See *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-600, 12 NRC 3, 8 (1980); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-13, 17 NRC 469, 471 (“An important part of ‘taking the proceeding as it finds it’ for [the participant] will be its compliance with procedures of long standing in this hearing requiring close coordination among private and governmental parties as a prerequisite for participation in prehearing, hearing and post-hearing matters. This includes discovery, *the filing of contentions*, presentation of testimony, cross-examination, and the filing of proposed findings.”)(emphasis added). The Board already has applied the same axiom to the participants in this proceeding. See LBP-02-15, 56 NRC \_\_\_, slip op. at 3 n.3. Because the contention standards are not expressly waived in Section 2.715(c), the procedural rules of Section 2.714 should be applied.

Other generally applicable procedural limitations are indeed imposed on governmental participants, and there is no clear justification for making an exception in the case of the contention pleading requirements here at issue. Examples include:

- *Late-Filed Contentions*: As recognized by the Staff (at 7), if a governmental participant seeks to raise new issues after the time to raise contentions has expired (and particularly when a hearing has already taken place), then it must satisfy the Section 2.714 criteria for late-filed contentions. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit

1), LBP-82-19, 15 NRC 601, 617 (1982), citing *River Bend*, ALAB-444, 6 NRC at 768-70.

- *Reopening the Record*: After closing of the adjudicatory record, an interested State which has petitioned to intervene under 10 C.F.R. § 2.715(c) is entitled to participate in an adjudicatory proceeding only if it can meet the stringent standards for reopening the record and filing late-filed contentions. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), CLI-86-20, 24 NRC 518, 519-20 (1986), citing *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 801-02 (1983). See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1136-1141 (1983).
- *Governmental Participation on Appeal*: An interested governmental participant has no right to enter appellate proceedings where it did not take part in the hearing below. *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447, 448-49 (1980).

These cases present examples where presiding officers have mandated compliance with procedural regulations to ensure the integrity, fairness, and timeliness of the hearing process. To fulfill that mandate, as well as the others discussed above, compliance by the governmental participants with Section 2.714(b) is necessary and required in this proceeding.

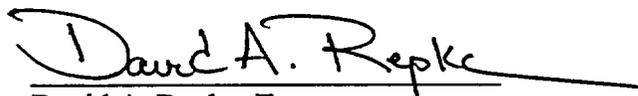
#### IV. CONCLUSION

For the reasons set forth above, to the extent that the governmental petitioners in this proceeding have proffered "new" issues, the petitioners should be required to conform to the contention pleading requirements set forth at 10 C.F.R. § 2.714(b).

Because this position is consistent with NRC precedent, and because the NRC generally requires adherence by governmental participants to procedural rules, PG&E opposes the suggestion set forth by the NRC Staff (at 9), that the governmental participants be given the opportunity to supplement their pleadings proffered in response to the August 7 Order.

Moreover, neither Section 2.714(b) nor Section 2.715(c) would allow a hearing on any issues beyond the scope of the present hearing notice and proceeding.

Respectfully submitted,



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Dated in Washington, District of Columbia  
this 9th day of October 2002

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of: )  
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Pacific Gas and 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 "POSITION OF PACIFIC GAS AND ELECTRIC COMPANY REGARDING ISSUES PROFFERED BY 10 C.F.R. § 2.715(c) INTERESTED GOVERNMENTAL ENTITIES" have been served as shown below by electronic mail, this 9th day of October 2002. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

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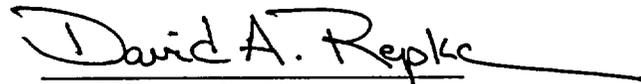
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