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RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of: )  
)  
Pacific Gas and Electric Co. )  
)  
(Diablo Canyon Power Plant Independent )  
Spent Fuel Storage Installation) )

Docket No. 72-26-ISFSI

ASLBP No. 02-801-01-ISFSI

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION OF  
SAN LUIS OBISPO MOTHERS FOR PEACE AND ENVIRONMENTAL CENTER OF  
SAN LUIS OBISPO FOR PARTIAL RECONSIDERATION OF LBP-02-23

I. INTRODUCTION

On December 2, 2002, the Atomic Safety and Licensing Board ("Licensing Board") issued LBP-02-23, ruling on the standing of certain petitioners and on the admissibility of proposed contentions in this proceeding.<sup>1</sup> Among other things, the Licensing Board held that intervenor Environmental Center of San Luis Obispo ("ECSLO") failed to demonstrate standing to intervene. Subsequently, on December 12, 2002, ECSLO filed a request for reconsideration of that portion of LBP-02-23 denying it intervenor status, based on a proffer of new information.<sup>2</sup> Pursuant to the Licensing Board's December 13, 2002, scheduling order, Pacific Gas and Electric Company ("PG&E") herein responds to the ECSLO Motion. Because ECSLO's new information is impermissibly out of time, its Motion should be denied.

<sup>1</sup> See *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-02-23, 56 NRC \_\_ (slip op. Dec. 2, 2002).

<sup>2</sup> See "Motion for Partial Reconsideration of LBP-02-23 by San Luis Obispo Mothers for Peace and Environmental Center of San Luis Obispo," dated December 12, 2002 ("Motion"). ECSLO is represented by counsel who also represents the San Luis Obispo Mothers for Peace ("SLOMFP"), the lead intervenor in this proceeding.

## II. DISCUSSION

### A. A Motion for Reconsideration is Improper

It is well established that a motion for reconsideration presents an opportunity to request correction of a Licensing Board error by refining an argument or by pointing out a factual misapprehension or a controlling decision or law that was overlooked. New arguments are improper. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000), citing *La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997). As ECSLO concedes (Motion at 2), a motion for reconsideration is an extraordinary filing, and should include new arguments or evidence only if a party demonstrates that its new material relates to a Licensing Board concern that “could not reasonably have been anticipated.” *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 NRC 509, 517-18 (1984); *see Ralph L. Tetrick* (Denial of Application for Reactor Operator License), LBP-97-6, 45 NRC 130 (1997).

ECSLO does not request modification of the Licensing Board decision based on a factual misunderstanding or legal error, but rather provides new information in connection with its intervention petition that could have been brought to the Licensing Board’s attention earlier in the proceeding. Certainly, the new information presented addresses a matter that could easily have been anticipated. Accordingly, a motion for reconsideration is not the proper vehicle for ECSLO’s request. Rather, the ECSLO Motion should be treated as an amendment to its intervention petition pursuant to 10 C.F.R. § 2.714(a)(3). As discussed below, because its

request could have been timely raised and is now grossly out of time, and does not otherwise fulfill the criteria for late filing, the Motion should be denied.<sup>3</sup>

B. The Request to Amend the Intervention Petition is Untimely and Does Not Meet the Late-Filing Criteria

ECSLO filed its original petition to intervene and request for hearing on May 22, 2002, at which time it based its standing on a member's geographical proximity to DCP. Specifically, the affidavit of Pamela Heatherington stated, at that time, that Ms. Heatherington resides within 30 miles of DCP. *Id.* at 2, Exh. 3. In its response to the SLOMFP Petition dated June 3, 2002, PG&E challenged ECSLO's standing, based on the distance of Ms. Heatherington's home from DCP.<sup>5</sup> A petitioner has the right to amend its petition for leave to intervene without prior approval of the presiding officer at any time up to fifteen days prior to the first prehearing conference (or, in practice, until such other time as set by the presiding

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<sup>3</sup> ECSLO cites to *Ga. Power Co. (Vogtle Electric Generating Plant, Units 1 & 2)*, LBP-93-21, 38 NRC 143 (1993), for the proposition that a licensing board may at least consider a motion for reconsideration raising new arguments that could have been raised earlier in the proceeding. In that case, the licensing board was willing to consider a motion to reconsider certain arguments germane to a discovery dispute, noting that no other party objected to the nature of the motion, and that the proceeding was not subject to time pressure because a delay in discovery had been granted to permit the NRC Staff to complete a pending investigation. Because PG&E does object to the Motion, because the Motion is more properly characterized as a late filing subject to the specific criteria of 10 C.F.R. § 2.714(a), and because this proceeding is not presently subject to external delay, the circumstances in *Vogtle* do not exist here and that case is inapposite.

<sup>4</sup> See "Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace, Cambria Legal Defense Fund, Central Coast Peace and Environmental Council, Environmental Center of San Luis Obispo, Nuclear Age Peace Foundation, San Luis Obispo Chapter of Grandmothers for Peace International, San Luis Obispo Cancer Action Now, Santa Margarita Area Residents Together, Santa Lucia Chapter of the Sierra Club, and Ventura County Chapter of the Surfrider Foundation," dated May 22, 2002 ("SLOMFP Petition"), at 2.

<sup>5</sup> See "Answer of Pacific Gas and Electric Company to the Petitions for Leave to Intervene and Requests for Hearing of Lorraine Kitman and the San Luis Obispo Mothers for Peace et al.," dated June 3, 2002 ("PG&E Response") at 8-11, 13.

officer). See 10 C.F.R. § 2.714(a)(3). In its June 6, 2002, Initial Prehearing Order, the Licensing Board set potential dates for the prehearing conference and advised that amended petitions were due to be filed on or before July 19, 2002. Accordingly, any amendments following this date were to be considered by addressing the five factors to be considered for nontimely petitions.<sup>6</sup> See 10 C.F.R. § 2.714(a)(i)-(v); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 1), LBP-96-1, 43 NRC 19, 24 (1996); see also *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 & 2), LBP-82-43A, 15 NRC 1423, 1441 n.13 (1982) (filings by a party which are later than the date set for them by the Licensing Board “will be viewed with extreme disfavor”).<sup>7</sup> The ECSLO Motion attempts to amend the ECSLO petition not only after the date for such amendments, but after the prehearing conference itself and even after the Licensing Board’s decision. Clearly, an appropriate showing is required under 10 C.F.R. § 2.714(a).

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<sup>6</sup> *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), “Memorandum and Order (Initial Prehearing Order)”(unpublished), slip op. June 6, 2002, at 2.

<sup>7</sup> The late filing factors of § 2.714(a)(1) are as follows:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner’s interest will be protected.
- (iii) The extent to which the petitioner’s participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner’s interest will be represented by existing parties.
- (v) The extent to which the petitioner’s participation will broaden the issues or delay the proceeding.

The ECSLO Motion does not even address the late-filing factors set forth in Section 2.714(a)(1), much less pass muster under that regulation. First, ECSLO has not demonstrated good cause for its late filing. ECSLO has been represented by competent counsel and was on notice as early as June 3, 2002, based on PG&E's response, that it did not meet NRC requirements for standing in this proceeding.<sup>8</sup> Second, ECSLO's interests going forward in this proceeding will be protected by virtue of the fact that aligned intervenors have been admitted into the proceeding, under the leadership of lead intervenor SLOMFP. Indeed, SLOMFP's counsel also represents ECSLO. Therefore, the other admitted parties also will be specifically capable of representing ECSLO's interests in the proceeding. Finally, in none of its filings has ECSLO demonstrated any unique capabilities or that its participation may otherwise be expected to assist in developing a sound record. While its participation might not broaden the issues or delay the proceeding, on balance, ECSLO has not demonstrated that it has met the standards to admit its late-filed request to amend its intervention petition. Accordingly, the ECSLO Motion should be denied.

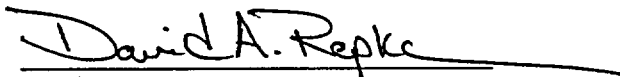
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<sup>8</sup> See *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 2), LBP-92-17, 36 NRC 23, 27 (1992) ("The NRC intervention rule tends to be forgiving in the sense that Petitioners have a chance to conform their petitions after seeing any objections to the initial petitions by the Licensee or the NRC Staff").

III. CONCLUSION

For the reasons set forth above, the Motion should be denied.

Respectfully submitted,



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Dated in Washington, District of Columbia  
this 19th day of December 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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CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION OF SAN LUIS OBISPO MOTHERS FOR PEACE AND ENVIRONMENTAL CENTER OF SAN LUIS OBISPO FOR PARTIAL RECONSIDERATION OF LBP-02-23" have been served as shown below by electronic mail, this 19th day of December 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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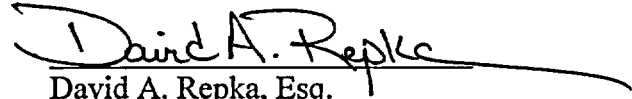
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