RAS 5145

December 18, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION OF SAN LUIS OBISPO COUNTY FOR PARTIAL REFERRAL TO THE COMMISSION 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 parties and governmental participants and on the admissibility of contentions in this proceeding.[1] In this decision, among other things, the Licensing Board addressed an issue raised by San Luis Obispo County ("County") regarding the threshold admissibility standard to be applied to proposed contentions submitted by governmental entities participating pursuant to 10 C.F.R. § 2.715(c). The Licensing Board, based on the regulations, agency precedent, and all of the policies inherent in the regulations and precedent, found that contentions proposed by interested governmental entities are subject to the

[1] *See Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC __ (slip op. Dec. 2, 2002).

specificity and basis requirements for admissibility of contentions set forth in 10 C.F.R. § 2.714(b).[2] The Licensing Board went on to reject all three issues proffered by the County.[3]

On December 11, 2002, the County filed a motion for partial referral of LBP-02-23, on the sole issue of whether the Licensing Board correctly determined that Section 2.715(c) participants are subject to the rules governing admissibility of contentions set forth in Section 2.714(b).[4] Pursuant to the Licensing Board's December 12, 2002, scheduling order, Pacific Gas and Electric Company ("PG&E") herein responds to the County Motion. Because the County has not met the Commission's stringent standards for interlocutory review, and because the County has not demonstrated a basis to reconsider or reverse the Licensing Board decision, the County Motion should be rejected.

II. DISCUSSION

A. The County Has Not Met the Commission's Standard for Interlocutory Review

1. Applicable Standards

The Licensing Board's decision in LBP-02-23 is not presently subject to appeal by the County under 10 C.F.R. § 2.714a because the County has been admitted under 10 C.F.R.

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2 *Id.*, slip op. at 50-55.

3 *Id.* at 57-60. The Licensing Board also rejected the unique issue proposed by another interested governmental agency, the Port San Luis Harbor District ("PSLHD").

4 *See* "Motion by the County of San Luis Obispo Under 10 C.F.R. § 2.730(a) for Referral to the Commission of That Part of LBP-02-23 That Amended 10 C.F.R. § 2.715(c) to Improperly Apply to Issues Proffered by Interested Governmental Entities the Criteria in 10 C.F.R. § 2.714(b) for the Admissibility of Contentions Proffered by Private Litigants," dated December 11, 2002; "Brief in Support of Motion by the County of an Luis Obispo Under 10 C.F.R. § 2.730(a) for Referral to the Commission of That Part of LBP-02-23 That Amended 10 C.F.R. § 2.715(c) to Improperly Apply to Issues Proffered by Interested Governmental Entities the Criteria in 10 C.F.R. § 2.714(b) for the Admissibility of Contentions Proffered by Private Litigants," dated December 11, 2002 ("County Brief") (collectively, "County Motion").

§ 2.715(c) as an interested governmental entity and, as such, may participate with respect to the one contention, TC-2, admitted in this proceeding. LBP-02-23, slip op. at 59; *see Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-838, 23 NRC 585, 589-91 (1986). Further, 10 C.F.R. § 2.730(f) provides, in pertinent part:

> *Interlocutory appeals to the Commission.* No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer. When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission . . . .

It is well established that interlocutory review is generally disfavored and, as provided in Section 2.730(f) above, is not available to parties as of right. The criteria in 10 C.F.R. § 2.786(g) reflect the limited circumstances in which interlocutory review may be appropriate. Section 2.786(g) provides, in pertinent part:

> *Certified questions and referred rulings.* . . . [A] ruling referred under § 2.730(f) must meet one of the alternative standards in this subsection to merit Commission review. A . . . referred ruling will be reviewed if it either —
>
> (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
>
> (2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001)(citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000); *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear

Generating Station), CLI-94-2, 39 NRC 91, 93 (1994).[5] Neither standard is ordinarily satisfied where a licensing board "simply admits or rejects particular issues for consideration in a case." *Seabrook*, ALAB-838, 23 NRC at 592; *see Project Mgmt. Corp.* (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC 613, 615 (1976).

2. *The County Has Not Demonstrated That Denial of Its Proposed Contentions Affects the Basic Structure of the Proceeding in a Pervasive or Unusual Manner.*

The County contends that the Licensing Board's decision to apply the Section 2.714(b) standards for the admission of contentions to governmental entities participating pursuant to 10 C.F.R. § 2.715(c) "will have a pervasive effect on the participation by governmental entities in all future NRC proceedings." County Brief at 2; *see id.* at 8, 10, 15. However, the County's argument does not correctly apply the regulatory standard for undertaking interlocutory review because it does not focus on *this proceeding*. As stated above, Commission regulations allow interlocutory review when the ruling "affects the basic structure *of the proceeding* in a pervasive or unusual manner." (Emphasis added.) An alleged failure by a licensing board to apply proper criteria for admissibility of contentions, and the perceived incorrect interpretation of Commission regulations, "have not been adequate in practice to demonstrate that the structure of a proceeding has been affected in a pervasive or unusual way." *Rancho Seco*, CLI-94-2, 39 NRC at 93-94; *Private Fuel Storage*, CLI-00-2, 51 NRC at 79-80

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[5] The County argues (County Brief at 5) that the criteria in 10 C.F.R. § 2.786(b)(4) should also be considered here. These less rigorous standards are not appropriate for consideration on the issue of whether the Commission should undertake (or, in this case, whether the Licensing Board should refer a decision for) interlocutory review. *See Oncology Servs. Corp.*, CLI-93-13, 37 NRC 419, 421 (1993)("The Commission may consider the criteria listed in section 2.786(b)(4) when reviewing interlocutory matters on the merits, *but when determining whether to undertake such review the standards in section 2.786(g) control our determination.*")(Emphasis added).

("the Board's refusal to admit [a contention] will not have a 'pervasive effect' on this proceeding as that term is used in our regulations").

The County questions the merits of the Licensing Board's decision to apply Section 2.714(b) standards to Section 2.715(c) participants (County Brief at 6-15), and argues in a conclusory fashion that "all" NRC proceedings will suffer from a "pervasive and unusual impact" stemming from the Licensing Board's determination. However, the precedent on interlocutory review on the question of the admission of contentions in a specific case applies regardless of the reason offered for seeking review of the issue (and regardless of whether the theory is generic or case-specific.) *Cf. Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987)("The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations.")(footnotes omitted). Quite simply, admissibility of proposed contentions is not an issue that meets the 10 C.F.R. § 2.786(g) criteria.

The Commission has granted interlocutory review based on the "pervasive and unusual" impact standard only in exceptional circumstances which impact the structure of the proceeding. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998) (granting interlocutory review to rule on a licensing board decision to create a second board in the proceeding, which would consider threshold admissibility questions already ripe for decision by the initial Board, because such a decision "affects the basic structure of the proceeding"); *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85-86 (1992)(accepting interlocutory review on a ruling consolidating a proceeding on the grounds that

the decision raised a substantial jurisdictional question affecting a license denial proceeding in a "pervasive and unusual manner" by converting it from a Subpart L into a Subpart G proceeding). Here, while the issue raised by the County may be generic, it is not structural, it is not at all determinative in this case as discussed below, and it can be addressed on appeal following the issuance of the Licensing Board's final decision.[6] Accordingly, because the County has not demonstrated that the Licensing Board's decision will affect the basic structure of the proceeding at all, let alone in a "pervasive and unusual manner," the Motion should be denied.[7]

3. *The County Has Not Demonstrated "Immediate and Serious Irreparable Impact."*

The County in its Motion does not argue the second standard for interlocutory review, *i.e.*, that it is threatened with "immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review" of the Licensing Board's final decision. *See* 10 C.F.R. § 2.786(g)(1). Nonetheless, if it had it would be no more successful. As stated above, as a general matter, the Atomic Safety and Licensing Appeal Board has held that the "irreparable impact" test is not satisfied where a licensing board "simply admits

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6 *Compare Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 464-65 (1982)(accepting a referral on the admission of contentions where the legal issue presented (the circumstances, if any, in which a licensing board may allow the conditional admission of a contention that falls short of 2.714(b) late-filing requirements) was structural, was determinative in the case, had generic implications, *and would "escape appellate scrutiny once the initial decision ha[d] issued.*")

7 PG&E recognizes that several licensing boards, including the Licensing Board in this case, have in recent months referred to the Commission the question of the admissibility of a number of contentions related to plant security and the need for an analysis of the environmental consequences of terrorist attacks, based on post-September 11, 2001 concerns. This is certainly an issue that is distinguishable from that posed in the present Motion — given that it is an issue that is generic and *currently* impacts a number of dockets, and that it is an issue currently intertwined with the NRC's ongoing top-to-bottom generic evaluation of security requirements. A generic review of this issue at this time is appropriate as a matter of regulatory coherence and efficiency. No similar urgency has been shown in the current County Motion.

or rejects particular issues for consideration in a case." *Seabrook*, ALAB-838, 23 NRC at 592. Additionally, as discussed below, there is no irreparable impact in the present case because, even had less stringent standards for admission of its proposed issues been applied (as desired by the County), the County's proposed contentions still would not be admissible. The County's contentions were excluded for reasons wholly apart from the threshold evidentiary standards of 10 C.F.R. § 2.714(b).

a. County Issue TC-1

County Issue TC-1 argued that the PG&E independent spent fuel storage installation ("ISFSI") Application "fails to adequately identify the identity and organizational structure of the Applicant."[8] Specifically, the County contended that the information provided by PG&E in the Application to satisfy 10 C.F.R. § 72.22(d) is insufficient in light of PG&E's pending Chapter 11 bankruptcy proceeding and Plan of Reorganization. The County contended that PG&E should not be permitted to apply for a license that "may be transferred to an unknown corporate entity." *Id.* at 4. The County also argued that an evaluation of PG&E's corporate structure should only be done following confirmation of a reorganization plan by the Bankruptcy Court. *Id.*

The Licensing Board rejected this issue for the same reasons that it rejected a similar contention proffered by the San Luis Obispo Mothers for Peace *et al.* ("SLOMFP"). LBP-02-23, slip op. at 55. Specifically, the Licensing Board found that "petitioner concerns regarding entities that may or may not be created in the future to take over operations at DCPP, depending on whether PG&E's reorganization plan is approved by the bankruptcy court, are

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8 *See* "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, ("County Response") at 3.

irrelevant to/and or outside of the scope of this proceeding at this point." *Id.* at 35.[9] The Licensing Board did not reject the contention on the basis of any failure of the County to fulfill the basis or specificity requirements of Section 2.714(b). Rather, the contention falls outside the scope of the proceeding, regardless of the technical pleading requirements applied. The County does not argue, and there is no basis on which to argue, that interested government agencies are entitled under 10 C.F.R. § 2.715(c) to raise irrelevant contentions. Thus, the County cannot demonstrate irreparable harm with respect to the Licensing Board's decision with respect to the application of the Section 2.714(b) requirements.

b. County Issue TC-2

County Issue TC-2 contended that PG&E has not provided sufficient information to allow the NRC to "make an informed decision about the licensee's financial qualifications" and to satisfy the requirements of 10 C.F.R. § 72.22(e). County Response at 5. As "bases" for this issue, the County contended that (1) PG&E only "speculates" that it or its successor will be in a position to borrow sufficient funds to cover the costs of constructing the ISFSI, and that in the County's view the "creditworthiness and borrowing capabilities of PG&E or its successor cannot be ascertained or assured" (County Response at 6); and (2) PG&E seeks to avoid

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[9] In footnote 8, the Licensing Board stated:

> In this regard, assuming that the bankruptcy court confirms PG&E's reorganization plan, and that the Commission approves the license transfer of DCPP from PG&E to Gen, PG&E would then be required to amend its ISFSI license application to reflect the change in applicant. If this chain of events is in fact realized, then issues regarding Gen's financial qualifications would be ripe for litigation, and SLOMFP seemingly would be free to submit any concerns about Gen or other newly-accountable entities as a late-filed contention.

Any other participant, including the County, would also be free to propose late-filed contentions at the appropriate time.

financial qualifications requirements "by representing that it is an electric utility." *Id.* The County argued that PG&E should not be "relieved" of financial qualifications requirements on this basis, because the ISFSI licensee will not be an electric utility if PG&E's reorganization plan is implemented. *Id.*

The Licensing Board rejected this issue, as follows:

> Although this issue is similar to contention SLOMFP TC-2 in its concerns about PG&E assertions about credit worthiness and utility status as a financial qualifications basis in light of the pending bankruptcy proceeding, we agree with the [NRC] staff that, in contrast to the admitted portions of issue SLOMFP TC-2, *its post-bankruptcy reorganization focus renders it inadmissible at this juncture.*

LBP-02-23, slip op. at 55 (emphasis added). Here again, the issue was not rejected because of the County's failure to meet the pleading requirements, but rather because it fell outside the scope of this proceeding. Therefore, there was no irreparable harm in the Licensing Board's decision to apply the Section 2.714(b) standards, as the Licensing Board's decision did not turn on the application of those standards. Moreover, to the extent that the County has concerns over *PG&E's* continued ability to construct, operate, and decommission an ISFSI by virtue of its access to continued funding as a rate-regulated entity or through credit markets, the County is free to participate in the resolution of those issues as they were admitted by the Licensing Board in connection with SLOMFP Contention TC-2. *See* LBP-02-23 at 33. Thus, there can be no irreparable harm.

c. County Issue EC-1

County Issue EC-1 argued that the PG&E Environmental Report ("ER") does not contain an adequate analysis of alternatives, in that the ER fails to adequately consider (A) alternative sites and associated security measures, and (B) alternative security plans. LBP-02-23, slip op. at 56. This issue was divided by the County into two sub-issues.

As described by the Licensing Board, Sub-issue EC-1.A argued:

> PG&E failed to consider important factors, such as vulnerability to offshore attacks post-September 11, when selecting the site for its ISFSI. [The County] also asserts that the ER's failure to evaluate security-related features for alternative sites and failure to consider reasonable alternatives violates 10 C.F.R. § 72.94 and [the National Environmental Policy Act], respectively.

Id. The Licensing Board rejected this sub-issue as a matter of law because it "appear[ed] to challenge the Commission's rules regarding acts of destruction and sabotage." *Id.* at 57.[10] The County does not argue, nor could it, that the NRC's regulations or the policies inherent in 10 C.F.R. § 2.715(c) allow interested government agencies to challenge NRC rules in individual licensing cases. Thus, there was no irreparable harm as a result of the decision regarding applying Section 2.714(b) criteria.

As described by the Licensing Board, sub-issue EC-1.B was as follows:

> PG&E's cost-benefit analysis may have failed to take into account the costs [the County] would bear in training its security personnel and implementing the [plant Emergency Response Plan ("ERP")]. Moreover, [the County] argues, because failure of the ISFSI's physical security plan could have substantial environmental consequences for the county's citizens, PG&E should be required to evaluate whether alternative security measures would reduce the ISFSI's exposure to offshore attack. Finally, [the County] asserts that review of the ERP is necessary so that [the County] can better understand and prepare for its increased responsibilities under the ERP.

Id. at 56. The Licensing Board rejected this sub-issue, as follows:

> For ISFSIs that will be located on the site of a previously-licensed reactor, [10 C.F.R. §] 72.32(c) relieves a licensee of having to create a new ERP or amend an existing ERP. [The County's] concern about the adequacy of the existing DCPP ERP is, therefore, a challenge to an agency regulation that renders issue [County] EC-1.B inadmissible. Furthermore, the subject of emergency planning is outside the scope of this proceeding, unless it

[10] The Licensing Board referred this sub-issue to the Commission for further action and consideration, as appropriate, in light of the Commission's ongoing comprehensive review of the agency's safeguards and physical security programs. *Id.* at 57, 41.

> can be demonstrated that there are specific concerns with the ERP that are directly related to the proposed ISFSI. [The County] has raised none that provide an adequate basis for its issues. [Footnote omitted.] We, therefore, deny the admission of sub-issue [County] EC-1.B as well.

Id. at 57. Again, quite simply, the Licensing Board did not reject EC-1.B for failure to comply with the threshold evidentiary requirements of 10 C.F.R. § 2.714(b). Rather, the proposed contention raised issues beyond the scope of the proceeding.[11]

In sum, the County cannot demonstrate "immediate and serious irreparable impact" from the application of the Section 2.714(b) standards because none of its issues were rejected on the basis of those standards. Indeed, the County Brief does not now focus at all on the criteria for referral of a decision to the Commission, but rather recycles the County's legal and policy arguments already rejected by the Licensing Board. As discussed further below, these arguments do not demonstrate a basis on which to reconsider or reverse the Licensing Board determination in LBP-02-23 that contentions proposed by 10 C.F.R. § 2.715(c) petitioners are subject to the standards of 10 C.F.R. § 2.714(b).

B. The County Has Not Shown a Basis to Reconsider or Reverse the Licensing Board Decision

The County's Brief is, in reality, more an argument for reconsideration than it is for referral. Rather than addressing the criteria for referral of the decision to the Commission, the County re-argues the merits of its rejected legal theory. The County's argument remains as misguided as ever, and does not provide a basis for referral or reconsideration.

As an initial matter, the County argues that the Commission "erroneously overruled the Commission's longstanding policy of encouraging interested governmental entities

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[11] The security component of this contention was, as discussed above, already referred to the Commission — where it will undoubtedly receive full consideration.

to participate in NRC proceedings." County Brief at 6. The County argues that the Licensing Board decision "seriously undermines the Commission's dedication to enhancing public confidence through increasing public participation in NRC proceedings," and that the decision "deprives the Commission of the insights" of interested governmental entities. These allegations are gross hyperbole and simply untrue. By admitting several governmental participants in this case, including the County, the Licensing Board, in LBP-02-23 and in several other decisions,[12] has honored the Commission's policy of recognizing the benefits of governmental participation. *See, e.g.,* LBP-02-23, slip op. at 52. The interested governmental participants are free — and welcome — to fully participate under Section 2.715(c) on the contentions admitted in this proceeding. As discussed above, to the extent the County has substance to add with respect to the admitted contention TC-2, it will be free to do so.[13]

Second, the County contends that the Licensing Board "rewrote" Section 2.715(c) by "importing into it" the admissibility criteria of Section 2.714(b). County Brief at 9. Again, the County's argument is highly exaggerated and simply incorrect. The Licensing Board did not "re-write" anything in the regulations. Nothing in the regulation or the enabling statute

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12 *See Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-15, 56 NRC __ (slip op. July 15, 2002)(admitting the County as an interested governmental participant in the proceeding); *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 (admitting the PSLHD as an interested governmental entity); LBP-02-23, slip op. at 22 (admitting the California Energy Commission and the Avila Beach Community Services District.)

13 The County contends that the purposes of Section 2.714(b) are inapplicable to governmental participants because those participants "have unique knowledge of interest to the Commission and unique roles as guardians of public safety, health and welfare for the communities in which NRC-licensed facilities are located." County Brief at 8. Without disputing this point, it would seem that an interested governmental entity with "unique knowledge" would be uniquely positioned to easily fashion robust contentions admissible under the strictures of Section 2.714(b).

establishes any separate or reduced standard for admission of contentions proposed by interested governmental participants. In this context the Licensing Board applied the existing regulations based on NRC case law and Sections 2.714(b) and 2.715(c) as written. The applicable statute, regulations, and case law are discussed more fully in PG&E's brief on this question and in the Licensing Board's decision.

As another example of an overwrought argument, the County contends that the Licensing Board "failed to acknowledge that the Commission's proposed revisions to the hearing rules [footnote omitted] preserve the essence of 10 C.F.R. § 2.715(c)." The County erroneously cites proposed Sections 2.315(c) and 2.309(d)(2)(ii) for the proposition that an interested governmental entity would need, under the revised rules, only to satisfy the contention requirements of proposed Section 2.309(f) if it desires to "participate as a [full] party" (begging the question, we might add, of why it would ever do that if the County's theory were true). County Brief at 9-10. The County's interpretation, however, is incorrect on its face. Proposed Section 2.309(d)(2)(ii) specifically provides:

> The representative of the State or local government or affected Indian Tribe admitted under § 2.315(c) 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)*[14] *of this section with respect to that contention.*

Proposed Rule, Changes to Adjudicatory Process, 66 Fed. Reg. 19,610, 19,636 (Apr. 16, 2001) (emphasis added). As written, the section requires interested governmental entities participating in that capacity, *not* as parties to the proceeding, to conform to the requirements for admission of contentions. *See id.* at 19,637.

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14 Proposed Section 2.309(f) restates the current criteria for admissible contentions.

Finally, the County contends that the Licensing Board "ignored the controlling, relevant precedent" established by the Atomic Safety and Licensing Appeal Board in *Gulf States Utilities Co.* (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977) and other cases. These arguments were also fully addressed previously in the briefs and Licensing Board decision. The Licensing Board cited *River Bend* for the proposition that, once admitted to a proceeding, an interested governmental entity must observe the procedural requirements applicable to other participants. LBP-02-23, slip op. at 49; *see River Bend*, ALAB-444, 6 NRC at 768. The Licensing Board declined to rely further on the decision. The County merely repeats its argument here, and does not offer additional insights into the case that could provide a basis for a different interpretation on appeal.

Indeed, the County misinterprets the *River Bend* case, at least in part. In its Brief (at 11), the County contends that the Appeal Board specifically stated that additional issues proffered by an interested State "need not be in the form of specific contentions." However, a careful reading of the case demonstrates that it was the Licensing Board below that made this statement. *See 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 Licensing Board subsequently 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 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, but a fair reading of the decision makes clear that the Appeal Board certainly did not decide that some lesser pleading criteria applied. It simply held that, by whatever criteria applied, the petitioner had failed.

Similarly, the Licensing Board considered other applicable cases, including *Shoreham*,[15] *Diablo Canyon*,[16] and *Seabrook*[17] as examples of cases in which licensing boards required interested governmental entities to conform to NRC procedural requirements once joining a case. It was within the Licensing Board's discretion to interpret and apply these cases to result in a conforming holding in this proceeding. The County merely rehashes its arguments already made on the issue without providing new insights that would merit reconsideration or reversal. For all of these reasons, the County Motion should be denied.

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15 *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132 (1983).

16 *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-81-25, 13 NRC 226 (1981).

17 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), LBP-90-12, 31 NRC 427 (1990).

III. CONCLUSION

For the reasons set forth above, the requested partial referral of LBP-02-23 is neither necessary nor appropriate, and the County Motion should be denied.

Respectfully submitted,

David A. Repka, Esq.
Brooke D. Poole, Esq.
WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005-3502

William V. Manheim, Esq.
Richard F. Locke, Esq.
PACIFIC GAS & ELECTRIC COMPANY
77 Beale Street, B30A
San Francisco, CA 94105

ATTORNEYS FOR PACIFIC GAS & ELECTRIC COMPANY

Dated in Washington, District of Columbia
this 18th day of December 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 COUNTY FOR PARTIAL REFERRAL TO THE COMMISSION OF LBP-02-23" have been served as shown below by electronic mail, this 18th 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.

Administrative Judge G. Paul Bollwerk, III
Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: gpb@nrc.gov

Administrative Judge Peter S. Lam
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: psl@nrc.gov

Administrative Judge Jerry R. Kline
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: jrk2@nrc.gov
kjerry@comcast.net

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
e-mail: dcurran@harmoncurran.com

Lorraine Kitman
P.O. Box 1026
Grover Beach, CA 93483
e-mail: lorraine@bejoseeds.com
l.kitman@bejoseeds.com

Karen D. Cyr, Esq.
Stephen H. Lewis, Esq.
Angela B. Coggins, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
e-mail: OGCMailCenter@nrc.gov
shl@nrc.gov
abc1@nrc.gov

Seamus M. Slattery, Chairman
Avila Valley Advisory Council
P.O. Box 58
Avila Beach, CA 93424
e-mail: Jslat1@aol.com

Peg Pinard
714 Buchanan Street
San Luis Obispo, CA 93401

Klaus Schumann
Mary Jane Adams
26 Hillcrest Drive
Paso Robles, CA 93446
e-mail: jayklaus@email.msn.com

Thomas D. Green, Esq.
Thomas D. Waylett, Esq.
Adamski, Moroski & Green LLP
444 Higuera Street, Suite 300
San Luis Obispo, CA 93401-3875
e-mail: green@adamskimoroski.com
waylett@adamskimoroski.com

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
e-mail: jlindholm@co.slo.ca.us

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

San Luis Obispo Mothers for Peace
P.O. Box 164
Pismo Beach, CA 93448
e-mail: beckers@thegrid.net
jzk@charter.net

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

Darcie L. Houck, Staff Counsel
California Energy Commission
Chief Counsel's Office
1516 Ninth Street, MS 14
Sacramento, CA 95814
e-mail: Dhouck@energy.state.ca.us

Robert R. Wellington, Esq.
Robert W. Rathie, Esq.
Wellington Law Offices
857 Cass Street, Suite D
Monterey, CA 93940
e-mail: info@dcisc.org

Christopher Helenius, President
Avila Beach Community
Services District
P.O. Box 309
Avila Beach, CA 93424
e-mail: AVILACSD@aol.com

Sheldon L. Trubatch, Esq.
4222 River Road
Washington, DC 20016
e-mail:
lawofficesofsheldontrubatch@starpower.net

David A. Repka

David A. Repka, Esq.
Counsel for Pacific Gas
& Electric Company