RAS 5142

LBP-02-25

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/26/02

ATOMIC SAFETY AND LICENSING BOARD

SERVED 12/26/02

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of	Docket No. 72-26-ISFSI
PACIFIC GAS AND ELECTRIC CO.	ASLBP No. 02-801-01-ISFSI
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)	December 26, 2002

MEMORANDUM AND ORDER
(Denying Motions for Commission Referral and Reconsideration of Portions of LBP-02-23; Granting Requests to Invoke 10 C.F.R. Part 2, Subpart K Procedures and Establishing Schedule)

Pending are several different items relating to the Licensing Board's December 2, 2002 memorandum and order, LBP-02-23, 56 NRC __ (Dec. 2, 2002), admitting (1) the San Luis Obispo Mothers for Peace (SLOMFP) and several other 10 C.F.R. § 2.714 petitioners as parties to this proceeding because they had established standing and proffered an admissible contention; and (2) San Luis Obispo County, California (SLOC), the Port San Luis Harbor District (PSLHD), the California Energy Commission (CEC), and the Avila Beach Community Services District (ABCSD) as 10 C.F.R. § 2.715(c) interested governmental entities, albeit without accepting certain issues proffered by SLOC and PSLHD. In a December 11, 2002 filing, SLOC requests that the Board, pursuant to 10 C.F.R. § 2.730(a), refer to the Commission that portion of its December 2 ruling that held SLOC's issues subject to the admission standards applicable to petitioner contentions under 10 C.F.R. § 2.714. Additionally, on December 12, acting as the lead section 2.714 intervenor, SLOMFP filed on behalf of petitioner

Environmental Center of San Luis Obispo (ECSLO) a request for reconsideration of that portion of the Board's December 2 ruling that found ECSLO lacked standing. Finally, on that same day both applicant Pacific Gas and Electric Company (PG&E) and the NRC staff requested that this proceeding be conducted in accordance with the hybrid hearing procedures of 10 C.F.R. Part 2, Subpart K.

For the reasons set forth below, we deny the SLOC referral request and the SLOMFP/ECSLO reconsideration request. Further, we grant the PG&E and staff requests to utilize Subpart K procedures and, in accord with those procedural dictates, establish a schedule for the next phase of this proceeding.

I. SLOC REFERRAL REQUEST

In its December 11 filing, SLOC asserts that referral of that portion of LBP-02-23 that applied the 10 C.F.R. § 2.714 contention admissibility standards to issues raised by section 2.715(c) participants to the Commission is warranted because the Board's decision "will have a pervasive effect on the participation by governmental entities in all future NRC proceedings." Brief in Support of Motion by [SLOC] 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 (Dec. 11, 2002) at 2 [hereinafter SLOC Brief]. SLOC further argues that Commission review of the Board's decision is merited at this point in the proceeding based on the Commission's criteria for interlocutory and discretionary review. See id. at 5.

Although section 2.715(c) participants CEC and PSLHD support the motion for referral, see Response of the [CEC] to Motion Filed by [SLOC] on December 11, 2002 (Dec. 18, 2002)

at 2; Position of [PSLHD] Regarding [SLOC] Motion Requesting Referral of the Licensing Board's Ruling in Section II.C.3.a of LBP-02-23, 56 NRC __ (Dec. 2, 2002) Regarding the Criteria for Considering Issues Raised by Governmental Entities under 10 C.F.R. § 2.715(c) (Dec. 18, 2002) at 1, both PG&E and the staff oppose it. PG&E argues that the Board should reject the SLOC motion because SLOC has neither satisfied the Commission's requirements for interlocutory review nor submitted a basis to reconsider or reverse the Board's December 2 ruling. See Answer of [PG&E] to Motion of [SLOC] for Partial Referral to the Commission of LBP-02-23 (Dec. 18, 2002) at 2. For its part, the staff asserts that the SLOC motion, while styled as a motion for referral, is more appropriately classified as either "a motion for reconsideration of the Board's presumed decision not to refer its ruling or certify the question to the Commission" or as a petition to the Commission for interlocutory review. Response of NRC Staff to Motion Filed by [SLOC] for Referral of the 2.715(c) Issues to the Commission (Dec. 18, 2002) at 3. In either event, the staff contends, the Board should deny SLOC's motion because SLOC has failed to show any error on the Board's part in not exercising its discretionary authority to refer its ruling to the Commission and, alternatively, the SLOC motion is procedurally deficient and lacks substantive merit to the degree that it seeks to rely upon NRC regulations governing petitions seeking discretionary Commission review. See id. at 4-10.

We consider SLOC's motion as it was presented to the Board -- as a request for referral to the Commission -- rather than as a motion for reconsideration.[1] The agency's regulations governing motions for interlocutory appeals to the Commission are set forth in 10 C.F.R.

[1] In addition to requesting referral, SLOC makes several substantive arguments, namely, that the Board erred by (1) overruling longstanding Commission policy of encouraging interested governmental entity participation in NRC proceedings; (2) usurping the Commission's rulemaking authority by substantially amending section 2.715(c); and (3) ignoring controlling Atomic Safety and Licensing Appeal Board precedent. See Motion at 6-15. Because we view SLOC's motion as one requesting referral rather than reconsideration, we need not address these SLOC allegations of substantive error.

§ 2.730(f), which affords a presiding officer considerable discretion in choosing whether or not to refer a Licensing Board ruling to the Commission. The regulation provides, in pertinent part:

> 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 . . . .

10 C.F.R. § 2.730(f). In addition, section 2.786(g) describes the standards under which Commission review of a presiding officer referral is warranted as "immediate and serious irreparable impact" that cannot be alleviated through petition for review of a final presiding officer determination or a "pervasive or unusual" effect on the basic structure of the proceeding.

In the context of both sections 2.730(f) and 2.786(g), the Board finds no basis for referring the section 2.715(c) participant issue admission standard portion of our ruling (i.e., section II.C.3.a) to the Commission. In terms of the public interest and delay/expense concerns in section 2.730(f), as was noted in our December 2 ruling, the contention admission standard we found applicable is rooted in the Commission-recognized public interest in ensuring that participants present well-substantiated issue statements for litigation so as to ensure that the resources and time expended by the parties and the agency in resolving those issues are well-founded. See LBP-02-23, 56 NRC at __ (slip op. at 54). Additionally, denial of SLOC's referral request will not affect this ISFSI licensing proceeding in a pervasive and unusual manner given that our ruling was essentially an issue statement admissibility determination, which in due course is subject to Commission review.[2] See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986) (dismissing

[2] SLOC has not sought to establish, as we think it could not, that it is threatened with immediate and serious irreparable impact, the first item under the more recently adopted section 2.786(g) standard for Commission review of presiding officer section 2.730(f) ruling referrals and section 2.718(i) question certifications.

an interlocutory appeal by interested governmental entity whose sole proffered issue was rejected by Licensing Board because "[n]either test [under section 2.786(g)] ordinarily is satisfied where a licensing board simply admits or rejects particular issues for consideration in a case"). Moreover, although SLOC will not be able to litigate its own issues, it nonetheless is in a better position than a similarly situated section 2.714 petitioner. A section 2.714 petitioner without an admissible contention would not be permitted to participate in the proceeding, but as a section 2.715(c) interested governmental entity, SLOC can still actively participate through discovery,[3] introducing evidence, interrogating witnesses, and advising the Board on its position relative to the admitted SLOMFP contention. See id. ALAB-731, 17 NRC 1073, 1074-75 (1983) (even if erroneous, Licensing Board's grant of summary disposition on intervenor's sole contention did not affect proceeding in pervasive and unusual manner because intervenor was still participant in proceeding in connection with another intervenor's contention).

Accordingly, nothing presented by SLOC has convinced the Board that a section 2.730(f) referral of that portion of LBP-02-23 regarding the standard for admission of issues proffered by section 2.715(c) participants is warranted at this time, whether as a matter of discretion or otherwise.[4]

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[3] Although SLOC declares that section 2.715(c) participants are not permitted discovery relative to admitted contentions, see SLOC Brief at 8, agency case law indicates otherwise, see, e.g., Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983). Accordingly, as is outlined in section III of this issuance, we afford SLOC and the other section 2.715(c) participants the opportunity for discovery relative to admitted contention SLOMFP TC-2, PG&E's Financial Qualifications Not Demonstrated.

[4] As was noted above, SLOC avers that the criteria in 10 C.F.R. § 2.786(b)(4) under which the Commission decides to accept petitions for discretionary review support Commission referral of our December 2 ruling as well. See SLOC Brief at 5. As the Commission has noted, however, it "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." Oncology Services Corp. (Suspension Order), CLI-93-13, 37 NRC 419, 421 (1993). Similarly, the section 2.786(b)(4) criteria are not relevant to our determination whether to refer.

II. SLOMFP/ECSLO RECONSIDERATION REQUEST

In a December 12 filing, acting on behalf of petitioner ECSLO, lead intervenor SLOMFP requested that the Board reconsider its ruling that ECSLO lacked standing. See Motion for Partial Reconsideration of LBP-02-23 by [SLOMFP] and [ECSLO] (Dec. 12, 2002) [hereinafter SLOMFP/ECSLO Motion] at 1-2. In LBP-02-23, the Board recognized that petitioners who resided within seventeen miles of the Diablo Canyon Power Plant (DCPP) could establish standing to intervene in the proceeding based on the geographic proximity of their homes to the facility. See 56 NRC at __ (slip op. at 13-15). We concluded that ECSLO failed to establish representational standing because its standing was based solely on the geographic proximity of its member, Pamela Heatherington, whose supporting declaration only stated that she resides within thirty miles of DCPP. See id. at 18-19. Although SLOMFP does not directly contest the Board's seventeen-mile geographic proximity finding, it requests reconsideration based on new information it has received from Ms. Heatherington. According to SLOMFP, Ms. Heatherington recently informed SLOMFP that her office, where she spends approximately nine hours per day, is located within ten miles of DCPP, but that she had not volunteered this information to SLOMFP earlier because she believed the location of her workplace could not be used to establish standing. See SLOMFP/ECSLO Motion at 1-2; id. Decl. of Pamela Heatherington.

PG&E objects to the SLOMFP/ECSLO request, arguing that a motion to reconsider based on new information relevant to a matter that could easily have been anticipated is improper. See Answer of [PG&E] to Motion of [SLOMFP] and [ECSLO] for Partial Reconsideration of LBP-02-23 (Dec. 19, 2002) at 2. On the other hand, PSLHD supports the

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Additionally, for the reasons noted above, this matter is not the type of novel issue regarding a proposed contention that will not abide the end of the proceeding. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998).

request as does the staff, which did not object to the standing of ECSLO or any of the other section 2.714 petitioners initially. See Position of [PSLHD] Regarding Reconsideration of the Board's Ruling Denying Party Status to [ECSLO] for Lack of Standing (Dec. 19, 2002) at 1; Response of NRC Staff to Motion Regarding Board's Ruling on Standing of [ECSLO] (Dec. 19, 2002) at 1-2.

Properly supported motions to reconsider request the correction of an erroneous presiding officer decision resulting from a misapprehension or disregard of a critical fact or controlling legal principle or decision. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000). Such a motion is not an opportunity to present new arguments or evidence, unless the proponent can show that the new material addresses a presiding officer ruling that could not reasonably have been anticipated. See Louisiana Energy Services. L.P., (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984). Nowhere in its December 12 motion does SLOMFP question the substantive merits of the Board's order denying standing to ECSLO. Moreover, the "new" evidence that SLOMFP and ECSLO wish to bring to the Board's attention is information that petitioner ECSLO apparently knew, or should have known, at the time that it submitted the documentation in support of its standing claims, but did not disclose. Indeed, the agency has clearly recognized that the proximity of a petitioner's workplace to a facility can be sufficient to establish standing in other types of licensing proceedings. See, e.g., Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC 381, 385 n.1 (1998), aff'd, CLI-99-11, 49 NRC 328 (1999); Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 287, aff'd, CLI-95-12, 42 NRC 111 (1995); General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23,

44 NRC 143, 158-59 (1996). Based on existing NRC case law, therefore, ECSLO could have readily anticipated that the proximity of a member's workplace to DCPP would be very relevant to a determination of standing. In this context, the fact the petitioner mistakenly did not believe the information was relevant at the time does not provide grounds for a motion to reconsider.

Seemingly anticipating a ruling that the agency generally does not grant motions to reconsider based on new information, SLOMFP/ECSLO cites Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-21, 38 NRC 143, 145 (1993), in arguing that there may be an exception to the NRC's general practice if reconsideration would not cause an unwarranted delay in the proceedings. See SLOMFP/ECSLO Motion at 2. In Vogtle, the Licensing Board departed from the general practice outlined above and considered a motion to reconsider that raised new arguments. See LBP-93-21, 38 NRC at 145. The Vogtle Board noted that despite the "extraordinary nature" of the motion, it would nonetheless decide the motion on its merits because (1) no party objected to the motion; and (2) the Board was not under any time pressure as a result of having previously granted the staff a delay in the proceeding. Id. In this instance, however, although consideration of the SLOMFP/ECSLO request may not cause a significant delay in the instant proceeding, PG&E has objected to the motion, distinguishing Vogtle from the case at bar.

Thus, because SLOMFP and ECSLO had sufficient opportunity to present information concerning the proximity of Ms. Heatherington's workplace to DCPP prior to our December 2 ruling, and because a party to the proceeding has objected to the motion, we deny the SLOMFP/ECSLO request for reconsideration.

III. SCHEDULE FOR UTILIZING SUBPART K PROCEDURES

Under 10 C.F.R. § 2.1109(a)(1), a timely request by any party to a spent fuel storage expansion proceeding to invoke the Subpart K hybrid hearing procedures must be approved. Accordingly, we grant the December 12, 2002 PG&E and staff requests to proceed under Subpart K. Further, bearing in mind that we have admitted only a single issue in this proceeding, we establish the following timetable for utilizing the Subpart K procedures:

Discovery Begins	Monday, January 6, 2003
Discovery Ends	Friday, March 7, 2003
Initial Written Summaries Filed	Friday, April 11, 2003
Written Summary Responses Filed[5]	Monday, April 28, 2003
Oral Argument	Week of May 12, 2003

Also, in connection with the discovery process, the parties (SLOMFP, as lead section 2.714 intervenor, PG&E, and the staff) and section 2.715(c) participants are advised of the following limitations and guidelines:

1. Absent prior leave of the Board or written stipulation, relative to admitted contention SLOMFP TC-2, SLOMFP, PG&E, and the staff may serve on the other two parties not more than fifteen interrogatories per party, including all discrete subparts, and not more than two deposition notices per party. Each section 2.715(c) interested governmental entity may serve on each of these three parties not more than five interrogatories per party, including all discrete subparts, and not more than one deposition notice per party.[6] In turn, each of the parties may

[5] Based on previous experience in Subpart K proceedings, the Board believes providing for a responsive filing will ensure that the subsequent section 2.1113 oral session is, as Subpart K seems to contemplate, an argument rather than a quasi-evidentiary presentation.

[6] In this regard, the Board anticipates that any of the section 2.715(c) interested governmental entities will be able to participate in any of the party depositions noticed by

serve upon each of the four section 2.715(c) participants not more than five interrogatories per participant, including all discrete subparts, and not more than one deposition notice per section 2.715(c) participant.[7]

2. Absent some other agreement of the parties/section 2.715(c) participants, all discovery responses shall be provided within ten days of the filing of the discovery request. All discovery requests (including requests for admissions) and responses (other than document production responses, which need be provided only to the requesting party/section 2.715(c) participant) should be provided to the requesting party/section 2.715(c) participant, the Board, and the other parties/section 2.715(c) participants by e-mail, facsimile transmission, or other means that will ensure receipt on the day of filing, with conforming paper copies to follow.

3. To be timely, a discovery request must permit a timely response on or before the day the discovery period closes.[8] Likewise, depositions should be scheduled to conclude on or before the date discovery closes.

4. Any motion to compel shall be filed within seven days of the date the discovery response at issue is, or should have been, provided. Responses to a motion to compel or a motion for protective order shall be filed within seven days of the date the motion is filed. As part of any motion to compel/motion for protective order, counsel for the moving party/section 2.715(c) participant shall provide a certification that he or she previously has (a)

SLOMFP, PG&E, or the staff.

[7] For any section 2.715(c) participant deposition noticed by SLOMFP, PG&E, or the staff, the Board likewise anticipates that the other two parties will be able to participate in such a deposition.

[8] As was noted above, the filing deadlines specified for interrogatory, admission, and document production responses can be extended by agreement of the parties involved so long as the response does not run beyond the scheduled discovery cut-off date. The filing deadline for motions to compel can be extended only by leave of the Board.

provided the party/section 2.715(c) participant to whom the motion is directed with a clear and concise written statement of the asserted deficiencies or objections and the requested action relative to the discovery request; and (b) after providing this statement, consulted with counsel for that party/section 2.715(c) participant in an attempt to resolve all the disputed matters without Board action.

Finally, for planning purposes, the parties/section 2.715(c) participants should be aware that the Board intends to conduct the Subpart K oral argument in the San Luis Obispo, California area. In addition, the parties/section 2.715(c) participants are advised that the Board intends to conduct one or more sessions to receive 10 C.F.R. § 2.715(a) limited appearance statements in the vicinity of the Diablo Canyon facility during March or April, 2003. Additional details on these sessions will be provided at a later time.

IV. CONCLUSION

Finding insufficient justification to warrant Commission referral of our ruling in LBP-02-23 regarding the standard applicable to the admission of section 2.715(c) participant issues, we deny the SLOC request for such action pursuant to section 2.730(f). Finding also that the SLOMFP request, on behalf of ECSLO, for reexamination of our ruling in LBP-02-23 regarding ECSLO's standing to intervene fails to meet the applicable reconsideration standards,

we deny that motion as well. We do, however, grant the PG&E and staff requests to invoke the procedural scheme in Part 2, Subpart K, and establish a schedule for utilizing that process.

For the foregoing reasons, it is this twenty-sixth day of December 2002, ORDERED, that:

1. The December 11, 2002 SLOC request pursuant to 10 C.F.R. § 2.730(a) for referral to the Commission of the Licensing Board's ruling in section II.C.3.a of LBP-02-23, 56 NRC __ , __ (slip op. at 50-55) (Dec. 2, 2002) is denied.

2. The December 12, 2002 request of lead section 2.714 intervenor SLOMFP, on behalf of petitioner ECSLO, for reconsideration of that portion of LBP-02-23, 56 NRC at __ (slip op. at 18-19) regarding ECSLO's standing to intervene is denied.

3. The December 12, 2002 PG&E and staff requests to conduct this proceeding in accordance with the provisions of 10 C.F.R. Part 2, Subpart K are granted and a further schedule for the proceeding is set forth in section III of this memorandum and order.

THE ATOMIC SAFETY
AND LICENSING BOARD[9]

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 26, 2002

[9] Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PG&E; (2) intervenors SLOMFP, et al.; (3) SLOC, PSLHD, CEC, ABCSD, and the Diablo Canyon Independent Safety Committee; and (4) the staff.

Although Judge Kline was not available to sign this memorandum and order, he reviewed its contents and agrees with the determinations reached herein.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC CO.	)	Docket No. 72-26-ISFSI
DIABLO CANYON POWER PLANT	)	
	)	
(Independent Spent Fuel Storage	)	
Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING MOTIONS FOR COMMISSION REFERRAL AND RECONSIDERATION OF PORTIONS OF LBP-02-23; GRANTING REQUESTS TO INVOKE 10 C.F.R. PART 2, SUBPART K PROCEDURES AND ESTABLISHING SCHEDULE) (LBP-02-25) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of December 2002