

February 4, 2003

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

February 11, 2003 (3:08PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

OPPOSITION OF PACIFIC GAS AND ELECTRIC COMPANY TO
REQUEST OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION
TO PARTICIPATE AS OF RIGHT UNDER 10 C.F.R. § 2.715(c)

I. INTRODUCTION

On January 28, 2003, the California Public Utilities Commission ("CPUC") filed a request to participate as an "interested state agency" pursuant to 10 C.F.R. § 2.715(c) in the hearing granted on the single admitted contention in this proceeding.¹ Pursuant to the Licensing Board's January 29, 2003 Order,² Applicant Pacific Gas and Electric Company ("PG&E") herein responds to the Request. As discussed further below, PG&E opposes the participation of the CPUC under 10 C.F.R. § 2.715(c) because the CPUC has not demonstrated either how its organizational interests fall within the NRC's "zone of interests" relating to radiological health and safety or the protection of the environment, or how it has the authority to represent the citizens of the State of California in the NRC radiological safety arena. In short, the CPUC has

¹ See "Request of the California Public Utilities Commission to Participate as of Right Under 2.715(c)," dated January 28, 2003 ("Request").

² *Pac. Gas & Elec. Co. (Diablo Canyon Independent Spent Fuel Storage Installation), Order (Schedule for Responding to Motions)*, slip op. Jan. 29, 2003.

not demonstrated the requisite "interest" to participate under Section 2.715(c). However, as the CPUC recognizes, the State of California is already represented in this proceeding through the California Energy Commission ("CEC"). To the extent the CPUC can offer witnesses on the issue of PG&E's financial qualifications, it may do so through the CEC.

I. BACKGROUND

10 C.F.R. § 2.715(c) provides, in pertinent part:

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.

In promulgating the rule in its current form,³ the Commission expanded participation to include interested States, cities and counties, and agencies thereof, but did not discuss the limits of the provision. *See* Final Rule, Miscellaneous Amendments, 43 Fed. Reg. 17,798, 17,800 (Apr. 26, 1978). However, in *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343, 355-56 (1998), a Licensing Board considered the restrictions imposed by the provision. In denying interested governmental entity status to an advisory regional planning board, the Licensing Board stated (emphasis added):

[I]t would be unprecedented to suggest that any and all governmental . . . entities could invoke [Section 2.715(c)] for participation in a proceeding . . . [T]he Commission did not intend to allow participation by agencies that neither had standing on their own nor had legal authorization from a recognized government with a sufficient interest in the proceeding . . . The ability to participate in an NRC proceeding is offered only to "units of the

³ Prior to 1978, Section 2.715(c) only allowed participation by the representative of a state. *See, e.g.*, 10 C.F.R. § 2.715(c) (1973) ("The presiding officer will afford a representative of an interested State which is not a party 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 issues").

government which . . . have an interest in the licensing proceeding." [Citation omitted.] *The words "interest" and "interested" as they are used in § 2.714 and 2.715 appear to be synonymous with the term "standing." See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). Given jurisprudential standing requirements, it is appropriate to require a representational government, or an agency thereof, to have a foundational element of directly representing the citizens of the area affected.*

The Commission subsequently upheld the Licensing Board's finding. *Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-12, 48 NRC 185 (1998).* In accordance with this precedent, a government agency that would not otherwise have standing to intervene in an NRC licensing proceeding should not be entitled to participate therein as an interested governmental entity under 10 C.F.R. § 2.715(c).

III. DISCUSSION

The CPUC states in its Request that it is "the agency of the State of California with the primary responsibility to oversee the financial condition of PG&E, a public utility directly subject to the CPUC's jurisdiction." (Request at 1-2.) In light of this authority, the CPUC contends that the single admitted contention in this proceeding, pertaining to PG&E's financial qualifications, "directly affects the interests of the CPUC" and "addresses a question that is of mutual concern both to the Commission and to the CPUC." (Request at 2.) The CPUC Request, however, does not in any way address the scope of the CPUC's authority to represent itself or the citizens of California in any capacity related to radiological health and safety or the protection of the environment.

Notwithstanding the CPUC's statutory mandate pertaining to the economic interests of California electric consumers and its "concern" regarding the financial qualifications of a rate-regulated electric utility, "interest" in an NRC proceeding turns on an injury to the

petitioning organization, or those that the organization represents, within the NRC's zone of interests. See, e.g., *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.9 (1994) (to demonstrate organizational standing, an organization must allege (1) that the action will cause an "injury in fact" to either the organization's interests or the interests of its members, and (2) that injury is within the "zone of interests" protected by either the AEA, the Energy Reorganization Act, or NEPA). While financial qualifications may be a matter relevant to the NRC, and relevant to the public health and safety in connection with a nuclear plant, the CPUC itself does not face any radiological injury as a result of the proposed independent spent fuel storage installation. The CPUC also has provided no basis or authority by which *the CPUC* has standing to protect the interests of state citizens in the radiological safety arena.

The CPUC certainly has authority and responsibility to represent California citizens and ratepayers in conjunction with the CPUC's economic oversight duties. However, it is well established that potential injuries to economic and ratepayer interests are outside the "zone of interests" protected by the NRC's enabling statutes. *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 & 2), CLI-02-16, 56 NRC 317, 336-37 (2002) (holding, in denying standing to the CPUC, that [t]he "zone of interests" test for standing in an NRC proceeding does not encompass economic harm that is not directly related to environmental or radiological harm"), *appeal docketed*, No. 02-72735 (9th Cir. Aug. 23, 2002). E.g., *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 n.7 (1977); *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977). See *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, NM), CLI-98-11, 48 NRC 1, 9-11 (1998), *aff'd sub nom. Envirocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999). Were the CPUC to

intervene as of right, its petition would fail for the reasons described above. Indeed, for these very reasons the Commission recently determined the CPUC to have no standing to intervene in the Part 50 license transfer proceeding related to the Diablo Canyon Power Plant currently pending before the Commission and cited above. In accordance with *Yankee Rowe*, it is therefore inappropriate for the CPUC to participate as an interested governmental entity in this proceeding.

The citizens of California already have representation in this proceeding. The CEC, which, in its own words,⁴ has been the State of California's state liaison to the NRC since 1983 and coordinates California agencies' policy positions in federal proceedings affecting the State of California, is an admitted interested governmental participant. The CPUC indicates in its Request (at 2) that the CEC has requested that the CPUC provide appropriate witnesses to testify on the one remaining issue for hearing in this proceeding. The CPUC indicated that it has agreed to do so. (*Id.*) The CPUC is certainly free to work with the CEC and other interested governmental entities in this capacity, and need not be made a participant under Section 2.715(c) to do so.⁵

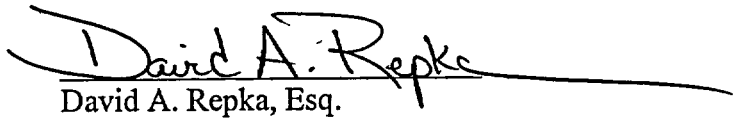
⁴ See "Request of the California Energy Commission to Participate as of Right Pursuant to 10 C.F.R. § 2.715(c)," dated August 16, 2002, at 1.

⁵ On January 28, 2003, the CEC, San Luis Obispo County ("County"), Avila Beach Community Services District ("ABCSD"), and CPUC filed a request to provide joint responses to discovery, and subsequently did so on January 31, 2003. PG&E does not object to the cooperation of the *admitted* governmental participants (that is, the CEC, County, and ABCSD) in the discovery process.

IV. CONCLUSION

For the reasons set forth above, the CPUC should not be granted leave to participate in this proceeding pursuant to 10 C.F.R. § 2.715(c), because it has not demonstrated an injury that falls within the "zone of interests" protected by either the Atomic Energy Act or the National Environmental Policy Act.

Respectfully submitted,

A handwritten signature in black ink, reading "David A. Repka", with a long horizontal line extending to the right.

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Dated in Washington, District of Columbia
this 4th day of February 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "OPPOSITION OF PACIFIC GAS AND ELECTRIC COMPANY TO REQUEST OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION TO PARTICIPATE AS OF RIGHT UNDER 10 C.F.R. § 2.715(c)" have been served as shown below by electronic mail, this 4th day of February 2003. 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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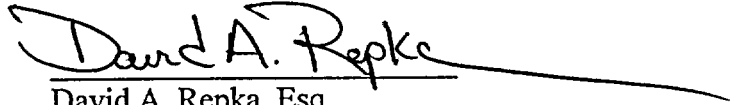
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