

December 11, 2002

MEMORANDUM TO: Martin J. Virgilio, Director
Office of Nuclear Material Safety and Safeguards

FROM: Dennis C. Dambly /RA/
Assistant General Counsel
Materials Litigation and Enforcement

SUBJECT: BOARD RULING ON STANDING AND CONTENTIONS;
COMMISSION DENIAL OF PETITION FOR SUSPENSION OF
PROCEEDING BASED UPON TERRORISM

On December 2, 2002, the Atomic Safety and Licensing Board (Board) issued a Memorandum and Order (Ruling on Standing and Contentions of 10 C.F.R. § 2.714 Petitioners and Admission of 10 C.F.R. § 2.715(c) Interested Governmental Entities and Their Issues), LBP-02-23, 56 NRC ____ (Attachment 1). Previously, on November 21, 2002, the Commission issued a Memorandum and Order, CLI-02-23, 56 NRC ____, (Attachment 2) denying a petition by 11 petitioners and one additional group for a suspension of this proceeding pending a "comprehensive review of the adequacy of design and operation measures to protect against terrorist attack and other acts of malice or insanity." CLI-02-23, at 3. This memorandum provides a summary of the key points in these orders, and where the proceeding consequently stands.

The Board admitted only one contention. That contention asserts that the Applicant, Pacific Gas & Electric Company (PG&E), has failed to demonstrate that it has the financial qualifications to construct, operate, and decommission the proposed Independent Spent Fuel Storage Installation (ISFSI). The contention was admitted on the basis of assertions that PG&E would not have adequate access to credit or the ability to recover costs through rates in view of PG&E's ongoing petition for reorganization under Chapter 11 of the Bankruptcy Code. Thus, based upon the Board's order, the proceeding is currently very narrow.

The Board denied admission of contentions that:

- PG&E has not accurately characterized the seismicity in the area of the proposed ISFSI.
- PG&E is attempting to apply for a Part 72 license on behalf of an operating entity that would be created if PG&E's proposed Plan of Reorganization were accepted in the bankruptcy proceeding.
- PG&E has failed to provide a sufficient description or breakdown of the projected costs of construction and operation of the proposed ISFSI.

- PG&E's Environmental Report (ER) fails to evaluate the consequences of destructive acts of malice or insanity against the proposed ISFSI.¹
- PG&E's ER overstates the capacity needed in the ISFSI to accommodate spent fuel generated during the current operating license terms for the two Diablo Canyon Power Plant ("DCPP") Units. Also, the risks of spent fuel pool fires are higher than estimated in the ER, and spent fuel pools and dry cask storage facilities are vulnerable to destructive acts of malice or insanity.²
- The ER fails to address reasonably foreseeable environmental impacts of transportation of spent fuel from the proposed ISFSI at the end of the license term, either to a repository or another interim storage site.³

There will likely be substantial participation by interested governmental entities under 10 C.F.R. § 2.715(c). Four entities have been admitted as interested governmental entities: San Luis Obispo County, Port San Luis Harbor District, the California Energy Commission, and the Avila Beach Community Services District. The Board declined to admit the Diablo Canyon Independent Safety Committee (DCISC) as a section 2.715(c) participant on the basis that it is an advisory committee and does not have any legislative or executive responsibilities. The Board, however, noted that DCISC could participate in the proceeding as an *amicus curiae*, by permitting DCISC to provide written or, in appropriate circumstances, oral comments by requesting leave of the Board. The Board further ruled that a petitioner for section 2.715(c) status must, if it sought to raise separate issues of its own, meet the contentions pleading requirements of 10 C.F.R. § 2.714. The Port San Luis Harbor District and San Luis Obispo County sought to raise their own issues. None of those issues were, however, admitted by the Board. The only one of those issues that raised matters fundamentally different from those raised by the lead Intervenor, San Luis Obispo Mothers for Peace ("SLOMFP") was the Harbor District. That proposed issue raised questions regarding the San Luis Obispo Nuclear Power Plant Emergency Response Plan (ERP). Relying on 10 C.F.R. § 72.32(c), which provides that for a co-located ISFSI the emergency plan required for the nuclear power plant under 10 C.F.R. § 50.47 shall be deemed to satisfy the requirements of Part 72, the Board did not find sufficient basis why the questions raised by the Harbor District related specifically to the licensing of the ISFSI such that the issues should be admitted. Under section 2.715(c), the four interested governmental entities may still participate in the proceeding by introducing evidence, interrogating witnesses, and advising the Board on the admitted contentions of SLOMFP.

Regarding CLI-02-23, the Commission denied the motion for a stay of this proceeding on essentially the same bases as it invoked in previous denials of stay requests based upon

¹ In light of post 9/11 considerations, the Board referred its denial of the contention to the Commission. The Commission has not yet acted on that referral or the other two referred rulings identified immediately below.

² Since the contention was, in part, based upon assertions regarding vulnerability to sabotage, the Board also referred its denial of this contention to the Commission.

³ Once again, in view of the sabotage aspects of the proposed contention, the Board referred its ruling to the Commission.

terrorism considerations.⁴ The Commission summed up its position with a reference to *Private Fuel Storage*, CLI-01-026, 54 NRC at 384 as follows:

The Commission determined that moving forward with the proceeding “would neither present a threat to public health and safety nor interfere with our ongoing regulatory review, and halting [the proceeding] would interfere with our goal of adjudicatory efficiency.” CLI-02-023, at 8.

The final point of note is that this proceeding can be conducted under Subpart K to 10 C.F.R. Part 2, rather than Subpart G, upon the request of any party. 10 C.F.R. § 2.1109. There is only one contention to be litigated at this point (bearing in mind that there could be physical security issues following Commission direction in that area). Considering the currently narrow nature of the proceeding, OGC had discussions with SFPO and with the NRR components responsible for this financial qualifications review. Emphasis was placed upon the unique aspect of Subpart K that it limits time for discovery and requires all of the parties, at the close of that discovery, to file detailed written summaries of the facts, data, and arguments on which the party intends to rely at oral argument. Additionally, all supporting facts and data are required to be submitted in writing and under oath or affirmation. 10 C.F.R. § 2.1113. In effect, in a Subpart K proceeding Staff counsel and the technical reviewer need to develop relatively early in the proceeding written argument and a supporting affidavit to demonstrate that the contention does not raise a genuine and substantial dispute of fact. OGC recommended that the Staff inform the Board that it is invoking Subpart K for the conduct of this proceeding. Pursuant to section 2.1109 and the Board’s order, this filing is due today, December 12, 2002.⁵ Based upon discussions and agreement with this approach on the part of the staff and Bill Brach, Director, Spent Fuel Project Office, OGC will file the appropriate written notification.

The OGC contact for this matter is Stephen Lewis at 415-1684.

Attachments: As stated

cc w/att: W. Travers, EDO
S. Burns, OGC
L. Chandler, OGC
E. Brach, NMSS/SFPO
G. Tracy, NSIR/DNS
C. Grimes, NRR/DRIP
E. Merschoff, RIV
K. Smith, RIV

⁴ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376 (2001); Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399 (2001); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 390 (2001).

⁵ Based on discussions with the staff in SFPO and NRR, we understand that the staff will make necessary resources available on a timely basis to support the Subpart K process.