

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/18/02

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

RESPONSE OF NRC STAFF TO MOTION FILED BY THE COUNTY OF
SAN LUIS OBISPO FOR REFERRAL OF THE 2.715(c) ISSUES TO THE COMMISSION

INTRODUCTION

On December 11, 2002, the County of San Luis Obispo ("SLOC") filed a motion under 10 C.F.R. § 2.730(a), "for Referral to the Commission of that Part of LBP-02-023 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", as well as a brief in support of the Motion (hereinafter collectively referred to as "SLOC motion").¹ For the following reasons, the NRC staff ("Staff") respectfully requests that SLOC's motion be denied.

BACKGROUND

In April, 2002, the Staff provided a notice of acceptance for docketing and notice of opportunity for a hearing regarding an application by Pacific Gas & Electric Company ("PG&E") for permission to construct and operate an independent spent fuel storage installation ("ISFSI") at its Diablo Canyon Power Plant ("DCPP") site in San Luis Obispo, California. See 67 Fed. Reg. 19,600

¹ 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-02-023 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

(April 22, 2002). A number of timely requests for hearings and petitions to intervene were received in response to this notice, the majority of which were filed with the San Luis Obispo Mothers for Peace ("SLOMFP") acting as lead intervenor. In addition to the SLOMFP intervention challenge, five purported state and local organizations filed requests to participate as interested governmental entities under 10 C.F.R. § 2.715(c).²

During the initial prehearing conference held in San Luis Obispo, California, on September 10 and 11, 2002, there was discussion regarding whether issues submitted by section 2.715(c) participants must meet the same contentions admissibility requirements set forth in 10 C.F.R. § 2.714(b)(2) or something less rigorous. The Atomic Safety and Licensing Board ("Board") accepted the Staff's offer to brief the issue, and following the Staff's brief, afforded all participants an opportunity to respond to the Staff's comments. In its filing, the Staff argued that the section 2.714(b)(2) standard for contentions also applies to any new issues submitted by interested governmental entities.³ The Board, in its Order ruling on standing and admissibility of contentions agreed with the Staff, holding that "we find that subjecting new issues submitted by section 2.715(c) interested governmental entities to the requirements set forth in section 2.714(b) is most consistent with agency case law and purposes of sections 2.714 and 2.715(c)." See Board 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-02-023, 56 NRC ____, slip op. at 50-55 (December 2, 2002) (hereinafter "Board Order").

² See San Luis Obispo County's Request to Participate as of Right under 2.715(c) (June 20, 2002); Request of Port San Luis Harbor District to Participate as of Right under 2.715(c) (July 19, 2002); California Energy Commission's Request to Participate as of Right under 10 C.F.R. 2.715(c) (August 16, 2002); Diablo Canyon Independent Safety Committee Request to Participate as of Right under 10 C.F.R. 2.715(c) (August 20, 2002); and need to reference Avila Beach Community Services District - I believe date of 1st pleading was August 14, 2002 as supplemented on 10/07/02 and 09/17/02.

³ See NRC Staff's Position Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Entities (September 25, 2002).

Subsequently, SLOC filed the pending motion requesting that the Board refer to the Commission that part of its ruling which applied the section 2.714(b) contention requirements to new issues raised by section 2.715(c) interested governmental participants. Staff now responds to SLOC's motion, and because of both procedural and substantive defects, the Staff respectfully requests that SLOC's motion be denied.

DISCUSSION

While SLOC requests "interlocutory review" of the Board's ruling regarding the appropriate contention admissibility standard for section 2.715(c) participants, the Staff is uncertain of the precise procedural avenue which SLOC is attempting to pursue. On one hand, SLOC acknowledges the standards for the Commission's discretionary review located in section 2.786(b), but on the other hand, the filing is in the form of a motion rather than a petition for review and is addressed to the Licensing Board rather than the Commission.⁴ As a result, the Staff has determined SLOC's motion is most appropriately classified as a motion for reconsideration of the Board's presumed decision not to refer its ruling or certify the question to the Commission. However, because the possibility exists that this filing was intended, instead, to be presented to the Commission as a request for interlocutory review, and because SLOC primarily relies upon NRC's regulations defining the Commission's standards for discretionary review for its substantive arguments, the Staff will address why those standards have also not been met in this instance.

⁴ See SLOC's Motion at pg. 1 addressing the pleading to the "Atomic Safety and Licensing Board" and pg. 5 noting that "[t]he Commission's criteria for interlocutory review are immediate and serious irreparable impact on the adversely affected party or pervasive or unusual impact on the basic structure of the proceeding." (Although the first page of the Motion itself, rather than the Brief in Support of the Motion, referenced the "Atomic Safety and Licensing Appeal Board", Staff assumed that this was merely an error as the Atomic Safety and Licensing Appeal Board no longer exists and SLOC references its abolishment in its brief.)

As is more fully explained *infra*, the Staff respectfully submits that, regardless of the provision under which SLOC seeks review, SLOC's motion should be denied as the appropriate time for review of the Board's ruling in this regard is only following a final decision by the Board.

A. Assuming SLOC's motion is a Motion for Reconsideration,
SLOC Fails to Show the Error in the Presiding Officer's
Original Decision not to Refer this Ruling to the Commission

Under the Commission's Rules of Practice, interlocutory appeals are generally not permitted as a matter of right. 10 C.F.R. § 2.730(f).⁵ The regulations and longstanding agency practice provide, instead, that the presiding officer of the Board assigned to the case may, in its discretion, refer rulings to the Commission in only the most compelling circumstances, but the Board is not required to do so. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-486 (1975); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). The Board appropriately refers an issue to the Commission only when, "in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense."⁶ 10 C.F.R. § 2.730(f).

SLOC's motion fails to clearly articulate any argument that would lend support to its effort to convince the Board to reconsider its decision not to refer this ruling. SLOC has essentially provided no argument as to why, in this instance, a prompt decision of this issue is necessary to

⁵ 10 C.F.R. § 2.730(f) provides: *(f) 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, and notify the parties either by announcement on the record or by written notice if the hearing is not in session.

⁶ While the regulations use the language of presiding officer, the Staff instead refers to the Board because a Board has been established to rule on the appropriate matters in this proceeding.

prevent detriment to the public interest or unusual delay or expense. Because the Board's ruling admits SLOC to the hearing as an interested governmental entity, thus allowing SLOC to maintain an active role on any issue surrounding the other parties admitted contentions, the public has in no way been harmed by the Board's Order. Moreover, the Board Order actually ensures against any unusual delay or expense as this ruling clarifies the roles of the parties and provides the standards for admitting and contesting the issues to be litigated at the hearing, saving all parties precious resources.

Therefore, the Staff contends that SLOC has provided no argument of Board error, and that none is present, regarding the Board's decision to appropriately exercise its discretionary authority and not refer to the Commission its ruling regarding the contention admissibility standards for section 2.715(c) interested governmental entities. Furthermore, there is little question that the Board properly understood its ability to refer rulings to the Commission as the Board, in the same Order, referred to the Commission its ruling on SLOMFP's Contentions EC1, EC2, and #C3.⁷ Thus, to the extent SLOC's motion is viewed as a motion for reconsideration, the Staff submits such motion should be denied.

B. Assuming SLOC's Motion is a Petition for Review of the Board's Decision Under 10 C.F.R. § 2.786(b)&(g), SLOC's Motion is Both Procedurally Deficient and Substantively Without Merit

Because SLOC's motion is addressed to the Licensing Board as a motion requesting the Board to refer to the Commission its ruling on the appropriate contention admissibility standard for new issues raised by section 2.715(c) interested governmental entities, the Staff continues to assert that the motion is most appropriately classified as a motion for reconsideration. However, the factors upon which SLOC's argument is substantively based instead rely upon NRC regulations governing Commission Petitions for Review. Thus, the Staff feels compelled to explain why this

⁷ See Board Order, slip op. at 43.

filing is procedurally defective if it was intended to be a Petition for Review, and substantively, why the arguments lack merit in any event.

The Commission has permitted limited exceptions to the general proscription against interlocutory appeals in 10 C.F.R. § 2.730(f) if a party can demonstrate that review is appropriate. See *Georgia Power Company, et al.* (Vogtle Electric Generating Plant, Units 1 & 2) CLI-94-5, 39 NRC 190, 193 (1993). Where, as here, SLOC seeks review of a Board Order which is interlocutory in nature, SLOC must show that at least one of the criteria in section 2.786(b)(i)-(v),⁸ identifying factors under which the Commission will review a Board decision, *and* at least one of the factors enunciated in section 2.786(g),⁹ identifying factors under which the Commission will

⁸ Section 2.786(b), in pertinent part, provides:

(b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

.....

(b)(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

.....

(i) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

.....

(v) Any other consideration which the Commission may deem to be in the public interest.

⁹ Section 2.786(g) provides:

(g) *Certified questions and referred rulings.*

A question certified to the Commission under § 2.718(i) or a ruling referred under § 2.730(f) must meet one of the alternative standards in this subsection to merit Commission review. A certified question or 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

(continued...)

accept interlocutory review of a matter, are present. See *Safety Light Corporation, et al.* (Bloomsburg Site Decontamination) CLI-92-09, 35 NRC 156 (1992).

The Staff respectfully contends that SLOC's motion would be procedurally defective if intended as a Petition for Review. Not only was the motion addressed to the Board, rather than the Commission, but the filing also fails to meet the specific regulatory requirements embodied in section 2.786(b).¹⁰ Additionally, the Staff asserts, as is more fully explained below, that because SLOC has mischaracterized the Board's ruling and its effect, SLOC's motion, if viewed as a Petition for Commission Review, lacks merit and, thus, should be denied.

SLOC contends that the Board's ruling in LBP-02-023 is in error and thus merits Commission review because the Board allegedly ignored the Commission's repeated statements regarding the value of participation by interested governmental entities; the Board usurped the Commission's rulemaking authority by substantially amending section 2.715(c); and finally, because the Board ignored controlling precedent established by the Appeal Board. SLOC's Motion at 6, 9, & 11. However, none of these allegations is correct. The Board's ruling regarding the interplay between the contention requirements of section 2.714 and the interested governmental entity provision in section 2.715(c) was nothing more than the Board performing its required role of interpreting agency regulations. The Board reached the interpretation that it did only after a

⁹(...continued)

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.

¹⁰ For example, section 2.786(b) requires such a Petition for Review only be filed for partial or initial Board decisions, or other actions of the presiding officer, but only where authorized by Part 2; that the Petition be limited to ten pages in length; and that the Petition concisely explain a variety of factors. Arguably, SLOC's motion does not appropriately comply with any of these requirements.

thorough review of agency case law as well as a review of the applicable regulatory histories.¹¹ The Board did not ignore the existing regulations, nor did it create any new regulations in its ruling, and thus, the Board could not have violated the Commission's policy of encouraging the participation of governmental entities, nor could the Board be said to have usurped the Commission's rulemaking authority. Moreover, the Board did not ignore existing precedent as SLOC alleges. To the contrary, the Board reviewed and followed the pertinent case law on this subject that followed a significant 1989 revision to the Part 2 regulations.¹²

Furthermore, the Staff contends that there is no basis for Commission review of the Board's ruling in this instance because neither of the standards delineated in section 2.786(g) are met by this Board ruling.¹³ The Board's decision to require SLOC, as an interested governmental participant, to meet the contention requirements in section 2.714 for any new issue it wishes to raise in this proceeding, in no way threatens SLOC with immediate and serious irreparable impact which could not be alleviated through a petition for review of the Board's Initial Decision. In fact, even SLOC fails to make an argument that this standard has somehow been met by the Board's ruling.

SLOC instead contends that the second standard embodied in section 2.786(g)(2) has been met by the Board's ruling, specifically that the Board's ruling affects the basic structure of the

¹¹ In LBP-02-23, the Board stated, "[b]ecause the text of the regulations leaves this questions essentially unanswered, we turn to the agency's case law and regulatory history for guidance." Board Order at 51.

¹² See Board Order at 52-53.

¹³ As explained *infra*, in order to succeed on a Petition for Commission interlocutory review, a petitioner must meet at least one of the standards identified in section 2.786(b), as well as at least one of the standards in section 2.786(g). Because the petitioner could not meet either of the standards delineated in section 2.786(g), it is unnecessary to address the five standards in section 2.786(b). However, if the Board were to determine that SLOC's motion is a Petition for Commission Review, the Staff reserves the right to more fully brief all of the standards in both sections 2.786(b) & (g).

proceeding in a pervasive or unusual manner. However, SLOC's argument is without merit. SLOC did not seek petitioner status in this proceeding, but instead, SLOC only requested to participate in this matter as an interested governmental entity, which the Board granted in its Order. The Board's ruling in question in no way affects SLOC's section 2.715(c) participational rights and thus, the ruling cannot be said to affect the structure of this proceeding in any manner, much less a pervasive and unusual one.¹⁴

Because this ruling did not affect SLOC's participational rights, SLOC's claim that the ruling affects the basic structure of the proceeding is strikingly similar to numerous such claims raised by petitioners dissatisfied with a Board's decision to deny admissibility of one of their contentions when other contentions remained. Just as here, those petitions have been appropriately denied as the petitioners' participation in the proceeding continued despite the dismissal of a contention, even if the dismissal was subsequently determined to be erroneous. *See Public Service Company of New Hampshire, et al.* (Seabrook Station, Units 1 & 2) ALAB-731, 17 NRC 1073, 1075 (1983); *citing Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1992 (1977); *see also Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation) CLI-00-02, 51NRC 77, 79-80 (2000). Instead the Commission has repeatedly explained that such a ruling is not subject to immediate appellate review, but instead that such rulings must "abide the end of the case." *Private Fuel Storage*, 51 NRC 77, 80, *citing Northern States Power Co.* (Tyrone Energy Park, Unit 1) ALAB-492, 8 NRC 251 (1978). Staff contends that the same applies to SLOC's request for review, and that this decision is not immediately appealable, but instead that SLOC should await an Initial decision from the presiding officer in this matter before requesting appellate review.

¹⁴ Moreover, as is evident from the Board's ruling, agency case law supports this Board ruling, thus denying the ruling any unusual quality.

CONCLUSION

Based on the foregoing, the Staff contends that SLOC's motion should be denied. SLOC has failed to show error in the Board's discretionary authority to determine if referral to the Commission is necessary under section 2.730(f). Additionally, SLOC has met neither the procedural nor substantive standards required for a Petition for Commission Review under section 2.786(g). Thus, the Staff asserts that there is nothing in the Board's ruling that merits the extraordinary step of requiring interlocutory appellate review, but instead, any alleged error in the Board's ruling is one that is more appropriately preserved for review following a presiding officer's Initial Decision.

Respectfully submitted,

/RA/
Angela B. Coggins
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Dated at Rockville, Maryland
this 18th 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 & ELECTRIC CO.)	Docket No. 72-26-ISFSI
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(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation))	ASLBP No. 02-801-01-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF NRC STAFF TO MOTION FILED BY THE COUNTY OF SAN LUIS OBISPO FOR REFERRAL OF THE 2.715(c) ISSUES TO THE COMMISSION" have been served upon the following persons by United States mail, first class, or through the Nuclear Regulatory Commission's internal mail distribution as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 18th day of December, 2002.

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Dated at Rockville, Maryland
this 18th day of December, 2002