

August 27, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PACIFIC GAS & ELECTRIC COMPANY)	Docket Nos. 50-275-LR
)	50-323-LR
(Diablo Canyon Nuclear Power Plant,)	
Units 1 and 2))	

JOINT WRITTEN STATEMENT RESPONDING TO BOARD'S NOTICE AND ORDER

INTRODUCTION

On August 9, 2012, the Atomic Safety and Licensing Board ("Board") issued a notice and order notifying the parties that the NRC amended its Part 2 regulations related to adjudicatory proceedings.¹ The order instructed the parties to file a written statement on whether those amendments to the Part 2 regulations require any changes to the initial scheduling order ("ISO") or any other orders governing this proceeding.² The order specified that the parties could file the statement individually or jointly.³ The NRC staff ("Staff"), the Pacific Gas & Electric Company ("PG&E") and the San Luis Obispo Mothers for Peace ("SLOMP") (collectively, the "parties"), agree to the following.

¹ Notice and Order (Scheduling Prehearing Conference Call and Notifying Parties of Amendments to Regulations), at 1 (Aug. 9, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12222A213) ("Order").

² *Id.* at 2.

³ *Id.*

The parties have reviewed the ISO, Memorandum and Order (Concerning Protective Order and Non-Disclosure Agreement), and the Board's other orders that establish rules for this proceeding. In light of that review, the following amendments should be made to the ISO.⁴

DISCUSSION

I. Additional Contentions

First, as the Board's August 9, 2012 order correctly notes, the amendments to Part 2 "change the rules regarding the admission of new contentions."⁵ Prior to the amendments, NRC regulations contained two provisions potentially applicable to contentions filed after the initial filing period: 10 C.F.R. § 2.309(c)(1), governing nontimely filings, and 10 C.F.R. § 2.309(f)(2), governing new or amended contentions. The amendments to Part 2 eliminate the provisions on nontimely filings, currently in 10 C.F.R. § 2.309(c)(1), and move the provisions on new or amended contentions currently in § 2.309(f)(2) to § 2.309(c)(1).⁶

Additionally, the amendments to Part 2 clarify that 10 C.F.R. § 2.323, the provision normally governing motions in NRC practice, does not apply to motions for new or amended contentions under the new § 2.309(c).⁷ Moreover, the amendments to Part 2 also provide that the time periods for answers and replies concerning initial contentions in new 10 C.F.R.

⁴ Initial Scheduling Order (Sep. 15, 2010) (ADAMS Accession No. ML102580745) ("ISO"); Memorandum and Order (Concerning Protective Order and Non-Disclosure Agreement) (Feb. 25, 2011) (ADAMS Accession No. ML110560680); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257 (2010)..

⁵ Order at 1.

⁶ Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46562, 46566-67, 46571-72, 46582-83, 46,591(Aug. 3, 2012).

⁷ *Id.* at 46,567, 46,574, 46,583, 46,593

§2.309(i) also apply to answers and replies on new contentions.⁸ This will alleviate the difficulties, noted in the ISO, that “have arisen in several proceedings concerning the interplay of the sequence and timing for motions under 10 C.F.R. §§ 2.309(f)(2) and 2.323 (motion, answer), and the sequence and timing for contentions under 10 C.F.R. § 2.309(h) (contention, answer, reply).”⁹

As a result, the new rules eliminate the need for much of section F of the ISO, which governs additional contentions. That section currently reads:

1. Consolidated Briefing. If a party seeks to file a motion or request for leave to file a new or amended contention (timely or untimely), then it shall file such motion and the substantive proposed contention simultaneously. The pleading shall include a motion for leave to file a timely new or amended contention under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file an untimely new or amended contention under 10 C.F.R. § 2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). Within twenty-five (25) days after service of the motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention. Within seven (7) days of service of the answer, the movant may file a reply.
2. Timeliness. A motion and proposed new contention referred to in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both provisions, and the motion should cover the three criteria of 10 C.F.R. § 2.309(f)(2) and the eight criteria of 10 C.F.R. § 2.309(c) (as well as the six criteria of 10 C.F.R. § 2.309(f)(1)).
3. Selection of Hearing Procedures. A motion and proposed new contention specified in paragraph II.F.1 above may address the selection of the appropriate hearing procedure for the proposed new contention. See 10 C.F.R. §§ 2.309(g) and 2.310(d).¹⁰

⁸ *Id.* at 46,592.

⁹ ISO at 12 n.19.

¹⁰ *Id.* at 12-13 (footnote omitted).

In light of the amendments to Part 2, it is no longer necessary to discuss consolidated briefing for new or amended contentions and provide which deadlines apply to responses to those contentions. Therefore, the parties propose that section (F)(1) of the ISO be eliminated. Moreover, because all motions for new or amended contentions will need to meet the timeliness criteria currently in § 2.309(f)(1) under the new rules, the ISO's discussion of nontimely contentions under current § 2.309(c) in section (F)(2) of the ISO is superfluous. The Amendments to Part 2 do not appear to affect section (F)(3) of the ISO.

Consequently, the parties propose the following revision to section (F) of the ISO (deletions are crossed out, additions are underlined).

~~1. Consolidated Briefing. If a party seeks to file a motion or request for leave to file a new or amended contention (timely or untimely), then it shall file such motion and the substantive proposed contention simultaneously. The pleading shall include a motion for leave to file a timely new or amended contention under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file an untimely new or amended contention under 10 C.F.R. § 2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). Within twenty five (25) days after service of the motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention. Within seven (7) days of service of the answer, the movant may file a reply.~~

~~21. Timeliness. A motion for leave to file a new or amended contention must address good cause in accordance with 10 C.F.R. § 2.309(c)(1). A motion and proposed new contention referred to in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is they are filed within thirty (30) days of the date when the new and material information on which it is they are based first becomes available. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both provisions, and the motion should cover the three criteria of 10 C.F.R. § 2.309(f)(2) and the eight criteria of 10 C.F.R. § 2.309(c) (as well as the six criteria of 10 C.F.R. § 2.309(f)(1)).~~

~~32. Selection of Hearing Procedures. A motion and proposed new contention specified in paragraph II.F.1 above may address the selection of the appropriate hearing procedure for the proposed new contention. See 10 C.F.R. §§ 2.309(g) and 2.310(d).~~

The above revisions would bring section (F) of the ISO into conformity with the amendments to Part 2.

II. Mandatory Disclosures and Production of Hearing File

The Board also noted that the Part 2 amendments “relax the rules regarding the Staff’s mandatory disclosure duties.”¹¹ Specifically, the amendments limit the scope of the Staff’s hearing file disclosure obligations under 10 C.F.R. § 2.336(b) to documents that “are relevant to the admitted contentions.”¹² The ISO does not specifically discuss the scope of the Staff’s disclosure obligations, so no revisions are necessary to conform the ISO to the amendments to § 2.336(b). Nonetheless, the Staff takes this opportunity to inform the parties and the Board that in light of this amendment, future hearing file updates will only reflect those documents that “are relevant to admitted contentions” or otherwise subject to disclosure under 10 C.F.R. § 2.1203.

III. Dispositive Motions

The Part 2 Amendments also clarify the standards for summary disposition in a subpart L proceeding under 10 C.F.R. § 2.1210.¹³ Because these changes are in the updated regulation, they do not require further changes to the ISO. Nonetheless, while reviewing the ISO’s provisions on summary disposition, the parties found that the ISO set an ultimate deadline for dispositive motions of June 1, 2011, for contentions based on Part 51 or the National Environmental Policy Act (*e.g.*, Contention EC-1). Because of changes in the Applicant’s and Staff’s schedules, the ultimate deadline was “temporarily lifted” by Board Order dated April 14,

¹¹ Order at 1.

¹² 77 Fed. Reg. 46,563-65, 46,574-75, 46, 583, 46,593.

¹³ *Id.* at 46,569, 46,579-80, 46,585, 46,598.

2011. Consistent with the basis for the original deadline in the ISO (note 25), the parties suggest that the Board consider amending this deadline to 70 days before scheduled publication date of the NRC Staff's FSEIS identified in the NRC Staff's status report.

IV. Other Changes

In addition, the Part 2 Amendments moved several existing regulations in Part 2 and changed the citations for other regulations. As a result, the parties recommend revising the following citations in the ISO that have been outdated by the amendments.

<u>Page/Line</u>	<u>Delete</u>	<u>Insert</u>
9 /13	10 C.F.R. § 2.323(a)	10 C.F.R. § 2.323(a)(2)
9 n. 17/ 1	10 C.F.R. § 2.323(a)	10 C.F.R. § 2.323(b)
9 n.17/ 2	10 C.F.R. § 2.323(b)	10 C.F.R. § 2.323(a)(2)
10/ 1	10 C.F.R. § 2.323(a)	10 C.F.R. § 2.323(a)(2)
14 n.21/ 4	10 C.F.R. § 2.309(h)(2)	10 C.F.R. § 2.323(i)(2)

Moreover, the amendments to Part 2 change many citations in section (F) of the ISO, but if the Board accepts the proposed modification to that section, those citations will be deleted or fixed.

CONCLUSION

For the reasons set forth above, the parties respectfully believe that the amendments to Part 2 warrant the aforementioned changes to the ISO.

/Signed (electronically) by/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S WRITTEN STATEMENT RESPONDING TO BOARD'S NOTICE AND ORDER," dated August 27, 2012, have been served upon the following by the Electronic Information Exchange, this 27th day of August, 2012:

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