Group A

FOIA/PA NO: 2015-00280

RECORDS BEING RELEASED IN THEIR ENTIRETY

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December 11, 2003
BY FEDERAL EXPRESS

Clerk, United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Subject: *Petition for Review*

Dear Madam/Sir,

Enclosed for filing please find a Petition for Review of three orders by the U.S. Nuclear Regulatory Commission ("NRC"). I am also enclosing a check to cover the filing fee of $250.

As attested in the attached Certificate of Service, this Petition for Review has been served on counsel for the following parties and interested government agencies who participated in the administrative proceeding below:

Pacific Gas & Electric Company
Staff of the U.S. Nuclear Regulatory Commission
San Luis Obispo County
California Energy Commission
California Public Utilities Commission
Diablo Canyon Independent Safety Committee

In addition, pursuant to F.R.A.P. 15(c) and 28 U.S.C. § 2344, I am enclosing two extra copies of the petition, for service by the Clerk's office on the NRC and the Attorney General.

Please be advised that although Circuit Rule 15-2 states that a Docketing Statement is required, when I called the Clerk's office for advice on how to fill out the form (which seems to be designed for appeals from District Court decisions), I was told that Docketing Statements are not required for petitions for review. Therefore, I have not including a Docketing Statement. Please let me know if my understanding is incorrect.

Sincerely,

Diane Curran

cc: Service list

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, SANTA LUCIA CHAPTER OF THE SIERRA CLUB, and PEG PINARD, Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	No. 03-74628

PETITION FOR REVIEW

Pursuant to F.R.A.P. 15 and 28 U.S.C. § 2342-2344, Petitioners, San Luis Obispo Mothers for Peace, the Santa Lucia Chapter of the Sierra Club, and Peg Pinard, hereby petition the Court for review of three orders by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"). The orders were issued in a licensing proceeding concerning Pacific Gas & Electric Company's proposal to build and operate an Independent Spent Fuel Storage Installation ("ISFSI") on the site of the Diablo Canyon Nuclear Power Plant.

The orders of which Petitioners seek review are:

- *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (December 2, 2002) (*see* Attachment 1);

- *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230 (November 21, 2002) (*see* Attachment 2); and
- *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1 (January 23, 2003) (*see* Attachment 3).

These decisions were rendered final in *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 57 NRC ___ (October 15, 2003) (*see* Attachment 4).

Petitioners contend that, by refusing to hold a hearing on whether the environmental impacts of terrorist attacks and other acts of malice or insanity against the proposed ISFSI should be addressed in an Environmental Impact Statement, and by refusing to take measures to improve the security of the entire Diablo Canyon site before approving a license for the proposed ISFSI, the NRC violated the Atomic Energy Act, the National Environmental Policy Act, and the Administrative Procedure Act; and abused its discretion. Therefore, Petitioners seek review and reversal of LBP-02-23, CLI-02-23, and CLI-03-1.

Respectfully submitted,

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Attorney for Petitioners

December 11, 2003

Attachment 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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**
(ASLBP No. 02-801-01-ISFSI)

PACIFIC GAS AND ELECTRIC COMPANY
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)

December 2, 2002

In this proceeding concerning the application of Pacific Gas & Electric Company (PG&E) under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI) at the Diablo Canyon Power Plant, the Licensing Board rules on (1) the standing of, and admissibility of contentions proffered by, individuals and organizations seeking to intervene in accordance with 10 C.F.R. § 2.714; and (2) the participation of, and admissibility of issues proffered by, professed state and local interested governmental entities seeking to take part in the proceeding in accordance with 10 C.F.R. § 2.715(c).

RULES OF PRACTICE: STANDING

A person who wishes to intervene in a Commission proceeding must file a petition that

> set[s] forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should

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be permitted to intervene, with particular reference to the factors in [§ 2.714(d)(1)], and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

10 C.F.R. § 2.714(a)(1)-(2). In determining whether a petitioner has sufficient interest to intervene in a proceeding, the Commission has traditionally applied judicial concepts of standing. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983) (citing *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976)). Contemporaneous judicial standards for standing require a petitioner to demonstrate that (1) it has suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury can be fairly traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999). An organization that wishes to intervene in a proceeding may do so either in its own right by demonstrating harm to its organizational interests, or in a representational capacity by demonstrating harm to its members. *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998). To intervene in a representational capacity, an organization must show not only that at least one of its members would fulfill the standing requirements, but also that he or she has authorized the organization to represent his or her interests. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 168, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

ATOMIC ENERGY ACT: STANDING (INJURY IN FACT; PRESUMPTION BASED ON GEOGRAPHIC PROXIMITY)

RULES OF PRACTICE: STANDING (INJURY IN FACT; PRESUMPTION BASED ON GEOGRAPHIC PROXIMITY)

In certain types of proceedings, a petitioner may be presumed to have fulfilled the first of the required three standing showings based on geographical proximity to the facility, without having specifically to plead that element, if the petitioner resides within, or frequently comes into contact with, the facility's zone of possible harm. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff'd*, CLI-01-17, 54 NRC 3 (2001). Whether such a presumption applies depends upon whether there is an " 'obvious potential for offsite consequences.' " *See id.* at 148 (quoting *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)).

Moreover, the zone of possible harm varies, depending on the type of proceeding. For instance, although petitioners living within a 50-mile radius of a nuclear facility have been presumed to have standing in reactor construction permit and operating license cases, the requisite proximity may be considerably closer in other proceedings, such as those involving reactor spent fuel pool expansion and reracking. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 28 (2000).

ATOMIC ENERGY ACT: STANDING (INJURY IN FACT)

RULES OF PRACTICE: STANDING (INJURY IN FACT)

There is authority indicated that to establish injury in fact it is not necessary to proffer radiation impacts that amount to a regulatory violation. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 417 (2001) (citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996)). On the other hand, simply showing the potential for any radiological impact, no matter how trivial, is not sufficient to meet the requirement of showing a "distinct and palpable harm" under standing element one.

RULES OF PRACTICE: STANDING (REPRESENTATIONAL; AUTHORIZATION)

The agency's previous decisions have not required an organization to establish that it has independent litigating authority to represent itself or its members in adjudicatory proceedings, instead requiring only that an organization that wishes to intervene in a representational capacity show that at least one of its members would fulfill the standing requirements and that the organization has been authorized by the member to represent his or her interests. *See, e.g., Private Fuel Storage*, LBP-98-7, 47 NRC at 168. Moreover, even if an organization is required to demonstrate its authority to litigate on behalf of itself or its members, given that section 369.5(a) of the California Code of Civil Procedure provides that "[a] partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known," Cal. Civ. Proc. Code § 369.5(a) (2002), by virtue of its status as a California unincorporated association the organization in question in this proceeding has independent litigating authority.

ATOMIC ENERGY ACT: STANDING (INJURY IN FACT; TRANSPORTATION ROUTE-RELATED CLAIMS)

RULES OF PRACTICE: STANDING (INJURY IN FACT; TRANSPORTATION ROUTE-RELATED CLAIMS)

As has been noted previously relative to transportation route-related standing claims, mere geographical proximity to potential transportation routes is insufficient to confer standing; instead, the section 2.714 petitioners must demonstrate a causal connection between the licensing action and the injury alleged. *Compare Savannah River*, LBP-01-35, 54 NRC at 419-20 (transportation route-related standing established based on environmental report discussion of transportation impacts) *with Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 42-43 (1990) (petitioner who resided 1 mile from likely transportation route denied standing) *and Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 NRC 518, 519-20 (1977) (assertion of injury because spent fuel would travel on railway tracks very near property insufficient to establish standing).

RULES OF PRACTICE: PARTICIPATION BY AN INTERESTED STATE OR LOCAL GOVERNMENT (INDICIA OF STATUS)

Consideration of purported indicia of "governmental entity" status should be done under the Commission's *Yankee Rowe* determination, which declares:

> Not all organizations with governmental ties are entitled to participate in our proceedings as governmental "agencies." The federal, state and local governments are replete with numerous boards, commissions, advisory committees, and other organizations — all of which have governmental or quasi-governmental responsibilities. We do not, however, understand section 2.715(c) to authorize automatic participation in our adjudications by each and every subpart of state and local government. [The regional planning board in question] is, by its own admission, an advisory body and lacks executive or legislative responsibilities. We conclude that advisory bodies, by their very nature, are so far removed from having the representative authority to speak and act for the public that they do not qualify as governmental entities for purposes of section 2.715(c).

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202-03 (1998) (citation omitted). The essence of the *Yankee Rowe* criterion is whether a purported governmental body has legislative or executive responsibilities, i.e., the authority to impose (by rule, order, or otherwise) or implement/enforce (by order, monetary penalty, or otherwise) requirements.

RULES OF PRACTICE: ATTAINING PARTY STATUS (ESTABLISH STANDING AND ADMISSIBLE CONTENTION); PARTICIPATION BY AN INTERESTED STATE OR LOCAL GOVERNMENT (PROFFERING ISSUES)

To intervene in a proceeding, in addition to establishing standing, an individual or organization seeking party status must also set forth at least one admissible contention. *See* 10 C.F.R. § 2.714(b)(1). Section 2.715(c) participants have the opportunity to interpose issues as well.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

To be admissible, a contention submitted by a section 2.714 petitioner must state with specificity the issue of law or fact to be raised or controverted. *See* 10 C.F.R. § 2.714(b). Furthermore, each contention must be accompanied by: (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion the petitioner will rely upon to prove the contention, including references to specific sources and documents that will be relied upon to establish those facts and opinions; and (3) sufficient information to show that a genuine dispute on a material issue of law or fact exists with the applicant, which consists of either (a) references to specific portions of the application (including the applicant's environmental and safety reports) that are disputed and the reasons supporting the dispute, or (b) identification of each instance where the application purportedly fails to contain information on a relevant matter as required by law and the reasons supporting the allegation. *See id.* § 2.714(b)(2)(i)-(iii). If the contention fails to satisfy any one of these requirements, the contention must be denied. *See id.* § 2.714(d)(2)(ii).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

In addition to the threshold requirements set forth in section 2.714(b)(2), there are a number of other criteria that govern the admissibility of contentions. For example, a licensing board must reject a contention that, even if proven, would not entitle the petitioner to any relief and would, thus, make no difference in the outcome of the proceeding. *See id.* A contention will also be deemed inadmissible if it challenges an existing Commission rule or attempts to litigate an issue that is, or clearly is about to become, the subject of a Commission rulemaking. *See id.* § 2.758; *see also Private Fuel Storage*, LBP-98-7, 47 NRC at 179 (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974)). Furthermore, contentions that concern matters outside the scope of the proceeding, as defined by the notice of hearing or opportunity for hearing, must also be denied. *See, e.g., Public Service Co. of*

Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; CHALLENGE TO REACTOR FACILITY DESIGN EARTHQUAKE IN CONNECTION WITH CO-LOCATED ISFSI)

As was stated in another context, "issues of law or fact raised in a contention must be material to the grant or denial of the license application in question, i.e., they must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief." *Private Fuel Storage*, LBP-98-7, 47 NRC at 179. As was also indicated in that instance, "[a]gency case law further suggests this requirement of materiality mandates certain showings in specific contexts." *Id.* at 180. As the applicable 10 C.F.R. Part 72 regulations make clear, *see* 10 C.F.R. §§ 72.40(c), 72.102(f), for a co-located ISFSI, an applicant does not write on a clean slate relative to any seismic requirements. Absent an exemption or new information sufficient to alter the original site evaluation finding, the design earthquake (DE) for the nuclear facility is what the ISFSI applicant must use. As a consequence, a contention challenging the seismic qualifications of such a co-located ISFSI facility must necessarily provide not only a basis to indicate that there are specific concerns about the elements used to calculate the nuclear power plant seismic design criteria, but also a showing that, given those concerns, the reactor facility DE itself is now inaccurate to some meaningful degree.

RULES OF PRACTICE: PARTICIPATION BY AN INTERESTED STATE OR LOCAL GOVERNMENT (ADMISSIBILITY OF ISSUES)

Regarding the standard to be applied to the admission of issues proffered by a section 2.715(c) interested governmental entity, because the ultimate burden of proof rests with the applicant in a licensing action, it is not clear as a procedural matter against what standard a presiding officer would judge the applicant's response to such an "informal" issue that did not meet the requirements of section 2.714(b). Any party choosing to respond to the issue, including the applicant and the Staff, would be obligated to respond with the same degree of evidence as if it were a contention admitted under section 2.714(b), so that ultimately, permitting section 2.715(c) participants to interject "informal" issues for litigation would not only undermine the issue-sharpening and party-resource-saving purposes of section 2.714(b), but would remove any incentive for governmental entities to participate in the proceedings as full intervenor parties. As was noted recently, "[t]he Commission 'has long recognized the benefits of participation in our proceedings by representatives of interested states, counties,

municipalities, etc.'" *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 345 (2002) (quoting *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 344 (1999)). Thus, while presiding officers welcome the input of such section 2.715(c) participants on any section 2.714 contentions that are admitted for litigation in a proceeding, for any new issues an interested governmental entity wishes to raise on its own, it must satisfy the standards for contentions set forth in section 2.714(b).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; CHALLENGE TO REACTOR FACILITY EMERGENCY PLAN IN CONNECTION WITH CO-LOCATED ISFSI)

Because 10 C.F.R. § 72.32(c) relieves an applicant from having to draft a new emergency plan (EP) or amend an approved EP in seeking authorization to construct and operate an ISFSI co-located at an existing reactor facility, any issues or contentions that seek such relief and do not relate specifically to the proposed ISFSI are essentially a challenge to that regulation and so are inadmissible pursuant to 10 C.F.R. § 2.758.

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)

Pending before the Licensing Board are various requests and petitions filed in connection with the December 21, 2001 application of Pacific Gas and Electric Company (PG&E) under 10 C.F.R. Part 72 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. Responding to an April 2002 notice of opportunity for a hearing, *see* 67 Fed. Reg. 19,600 (Apr. 22, 2002), various Petitioners, including the San Luis Obispo Mothers for Peace (SLOMFP, which by consent is acting as a Lead Petitioner, the Avila Valley Advisory Council (AVAC), Peg Pinard, and nine other organizations (hereinafter referred to collectively as SLOMFP), have filed timely requests for hearing and petitions to intervene in accordance with 10 C.F.R. § 2.714 that, as supplemented, seek to interpose various joint contentions challenging the application. In addition, San Luis Obispo County, California (SLOC), the Port San Luis Harbor District (PSLHD), the California Energy Commission (CEC), the Diablo Canyon Independent Safety Committee (DCISC), and the Avila Beach

Community Services District (ABCSD) have filed requests to participate in any hearing as interested governmental entities in accordance with 10 C.F.R. § 2.715(c) and, in the case of SLOC and PSLHD, proffered particular issues they wish to have litigated in this proceeding. For its part, PG&E opposes (1) the intervention of various of the section 2.714 Petitioners as lacking standing and of all the Petitioners for failing to submit a litigable contention; (2) the section 2.715(c) participation of DCISC; and (3) the admissibility of the SLOC and PSLHD issues. On the other hand, the NRC Staff favors (1) granting SLOMFP and the other section 2.714 Petitioners party status because they have standing and have filed admissible contentions relating to PG&E's financial qualifications to operate its proposed ISFSI facility; and (2) affording section 2.715(c) interested governmental entity status to all those seeking that designation, albeit without admitting the SLOC and PSLHD issues.

For the reasons stated below, although finding that some of the section 2.714 Petitioners lack standing, we conclude that the remainder not only fulfill that jurisprudential requirement, but also have set forth one admissible contention — relating to PG&E's current financial qualifications in light of its pending bankruptcy — so as to warrant admission as parties, with SLOMFP as the Lead Intervenor. Further, we find that, with the exception of DCISC, section 2.715(c) interested government entity status should be afforded to those requesting that designation, but that the SLOC- and PSLHD-proffered issues are dismissed for failing to meet the section 2.714 standards governing contention admissibility.

I. BACKGROUND

A. PG&E ISFSI Application and the Resulting Hearing Requests/Intervention Petitions

The object of the various pending section 2.714 hearing petitions and section 2.715(c) participation requests is the December 2001 application of PG&E for a 20-year 10 C.F.R. Part 72 license that would enable it to build and utilize an ISFSI at which it can store all of the spent fuel and associated nonfuel hardware resulting from the operation of Units 1 and 2 at its DCPP facility over the term of the current operating licenses, which expire in 2021 and 2025, respectively. *See* [PG&E], [DCPP ISFSI] License Application ¶ 3.0, at 7-8 (Dec. 21, 2001) (ADAMS Accession No. ML020180153) [hereinafter Application]. Included with the application were a safety analysis report (SAR) and an environmental report (ER). The total spent fuel storage design capacity of the proposed dry cask storage facility is 4400 spent fuel assemblies, or up to 140 casks (i.e., 138 casks with two spare locations). *See id.* at 8.

As was noted above, the Staff's April 2002 notice indicating this application was being docketed and offering an opportunity for a hearing regarding its contents

evoked a number of timely requests for hearings and petitions to intervene in accordance with 10 C.F.R. § 2.714(a).[1] In its answer to the various filings submitted by the Petitioners, the Staff asserted that SLOMFP and all nine other organizations that initially filed a joint petition, but not Ms. Pinard and AVAC, had satisfactorily demonstrated their standing to intervene. *See* NRC Staff's Response to Requests for Hearing and Petitions To Intervene Filed by [Kitman, SLOMFP, Pinard, and AVAC] (May 30, 2002) at 6-9 [hereinafter Staff Response to SLOMFP Petition]. While taking the same position with respect to Ms. Pinard and AVAC, PG&E, did not agree with the Staff's assertion that SLOMFP and the other nine Petitioners had met the Commission's requirements for standing to intervene. Although PG&E in its initial answers did not challenge the standing of SLOMFP, the Santa Lucia Chapter of the Sierra Club (SLCSC), and San Luis Obispo Cancer Action Now (SLOCAN), it argued that the Cambria Legal Defense Fund (CLDF), the Central Coast Peace and Environmental Council (CCPEC), the Environmental Center of San Luis Obispo (ECSLO), Nuclear Age Peace Foundation (NAPF), the San Luis Obispo Chapter of Grandmothers for Peace International (SLOCGPI), Santa Margarita Area Residents Together (SMART), and the Ventura County Chapter of the Surfrider Foundation (VCCSF) have not demonstrated standing. *See* Answer of [PG&E] to [SLOMFP] Petition for Leave To Intervene and Request for Hearing (June 3, 2002) at 8-17 [hereinafter PG&E Response to SLOMFP and Kitman Petition]; Answer of [PG&E] to [Pinard and AVAC] Petition for Leave To Intervene and Request for Hearing (June 3, 2002) at 3-8 [hereinafter PG&E Response to Pinard/AVAC Petition].

The Licensing Board issued an initial prehearing order that, among other things, directed that steps be taken to make available to the section 2.714 Petitioners any confidential information relative to the PG&E application and established a July 19, 2002 deadline for each of the Petitioners to submit supplements to their hearing requests/intervention petitions specifying their contentions and labeling them by subject matter areas (e.g., technical, environmental). *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (June 6, 2002) at 2-3 (unpublished). In response, PG&E filed a motion for a protective order requesting that the disclosure of certain confidential proprietary information to SLOMFP counsel and experts be governed by an appropriate protective order

[1] *See* Letter from Lorraine Kitman to Nuclear Regulatory Commission (May 8, 2002); Request for Hearing and Petition of San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council for Leave To Intervene and Request for Hearing (May 22, 2002) [hereinafter Pinard/AVAC Petition]; Request for Hearing and Petition for Leave To Intervene of San Luis Obispo Mothers for Peace, *et al.* (May 22, 2002) [hereinafter SLOMFP Petition].

Relative to the Kitman petition referenced above, by means of an amended hearing request the Board subsequently was informed that, rather than participating as an independent party, Petitioner Lorraine Kitman would take part in this proceeding in her capacity as a SLOMFP member. *See* Petitioners' Amended Hearing Request and Petition To Intervene (July 8, 2002) at 1 [hereinafter Pinard/AVAC Amended Petition]; *see also* LBP-02-15, 56 NRC 42, 45-46 n.2 (2002). As a consequence, we dismiss her petition.

and nondisclosure agreement. *See* [PG&E] Motion for Protective Order (June 17, 2002) at 1-2. There being no objection from SLOMFP, in a June 19, 2002 issuance, the Board granted PG&E's protective order motion.[2] *See* Licensing Board Memorandum and Order (Protective Order Governing Disclosure of Proprietary Information) (June 19, 2002) at 1 (unpublished). Additionally, in a series of June and July 2002 issuances, the Board established the time and place for an initial prehearing as the first full week in September in the San Luis Obispo, California area. *See* Licensing Board Memorandum and Order (Schedule for Initial Prehearing Conference) (June 26, 2002) at 1-2 (unpublished); Licensing Board Memorandum and Order (Initial Prehearing Conference Status and Participation as Interested Governmental Entity) (July 26, 2002) at 1 (unpublished).

Thereafter, Peg Pinard and AVAC declared in an early July 2002 amended joint petition that Ms. Pinard was seeking to intervene as a private citizen, rather than in her capacity as a member of the San Luis Obispo Board of Supervisors, and that AVAC wished to intervene in the proceeding as a private organization rather than a governmental entity. *See* Petitioners' Amended Hearing Request and Petition To Intervene (July 8, 2002) at 2 [hereinafter Pinard/AVAC Amended Petition]. For its part, acting as a Lead Petitioner on behalf of Ms. Pinard, AVAC, and the nine other organizations named above, SLOMFP supplemented its petition by challenging the PG&E license application with five technical and three environmental contentions. *See* Supplemental Request for Hearing and Petition To Intervene by [SLOMFP, AVAC], Peg Pinard, [CLDF, CCPEC, ECSLO, NAPF, SLOCGPI, SLOCAN, SMART, SLCSC, and VCCSF] (July 18, 2002) at 1-40 [hereinafter SLOMFP Contentions].

In response to these supplemental filings, PG&E declared that although it would not challenge Ms. Pinard's standing as an individual, it still believed AVAC had not established its standing to intervene. *See* Answer of [PG&E] to Amended [Pinard and AVAC] Petition for Leave To Intervene and Request for Hearing (July 18, 2002) at 1 [hereinafter PG&E Response to Pinard/AVAC Amended Petition]. In addition, PG&E urged the Board to reject all eight proposed contentions submitted by SLOMFP and thus deny the section 2.714 Petitioner hearing request. *See* Response of [PG&E] to [SLOMFP] Supplemental Request for Hearing and Petition To Intervene (Aug. 19, 2002) at 1-2 [hereinafter PG&E Response to SLOMFP Contentions]. Although agreeing with PG&E relative

[2] At about the same time, SLOMFP filed with the Board a motion to stay the ISFSI licensing proceeding pending the resolution of ongoing proceedings in connection with PG&E's bankruptcy reorganization in federal bankruptcy court, a California Attorney General's suit against PG&E's parent company in state court, and the DCPP license transfer application before the agency. *See* Petitioners' Motion for Stay of Licensing Proceeding (June 25, 2002) at 1-2. The Board also received two additional requests to stay the ISFSI licensing proceeding from Lorraine Kitman and Klaus Schumann and Mary Jane Adams. *See* E-mail from Lorraine Kitman to Richard Meserve, Chairman, Nuclear Regulatory Commission (June 11, 2002); E-mail from Klaus Schumann to Richard Meserve, Chairman, Nuclear Regulatory Commission (June 12, 2002). Both PG&E and the Staff opposed the motions to stay the proceeding. The Board subsequently denied the three stay requests. *See* LBP-02-15, 56 NRC at 44-45.

to Ms. Pinard's standing, the Staff differed regarding standing for AVAC and the admissibility of certain contentions submitted by SLOMFP, declaring that two of the eight contentions should be admitted into the proceeding. *See* NRC Staff's Response to Amended Petition To Intervene Filed by [Pinard and AVAC] (Aug. 12, 2002) at 2-5 [hereinafter Staff Response to Pinard/AVAC Amended Petition]; NRC Staff's Response to [SLOMFP Contentions] (Aug. 19, 2002) at 1 [hereinafter Staff Response to SLOMFP Contentions].

B. Requests for 10 C.F.R. § 2.715(c) Interested Governmental Entity Status

In addition to the SLOMFP intervention challenge, four purported state and local government organizations — SLOC, PSLHD, CEC, and DCISC — filed requests prior to the scheduled initial prehearing conference to participate in the proceeding as interested governmental entities under 10 C.F.R. § 2.715(c). *See* [SLOC] Request To Participate as of Right Under 2.715(c) (June 20, 2002) at 1-2; Request of [PSLHD] To Participate as of Right Under 2.715(c) (July 19, 2002) at 1-3; [CEC] Request To Participate as of Right Pursuant to 10 C.F.R. § 2.715(c) (Aug. 16, 2002) at 1-4; [DCISC] Request To Participate as of Right Under 10 C.F.R. 2.715(c) (Aug. 20, 2002) at 1-5 [hereinafter DCISC Request]. Each of the four expressed its intent to participate in the proceeding, although without necessarily taking a position on all of the issues before the Board.

With regard to these potential section 2.715(c) participants, the Staff did not object to the participation of either SLOC, PSLHD, CEC, or DCISC as interested governmental entities. *See* NRC Staff's Response to [SLOC] Request To Participate as of Right Under 2.715(c) (July 10, 2002) at 1-2; NRC Staff's Response to [PSLHD] Request To Participate as of Right Under 2.715(c) (Aug. 5, 2002) at 1-3; NRC Staff's Response to [CEC and DCISC] Request To Participate as of Right Under 2.715(c) (Aug. 26, 2002) at 1-3 [hereinafter Staff Response to DCISC Request]. Similarly, PG&E did not object to the participation of SLOC, PSLHD, or CEC. *See* Letter from David A. Repka, Counsel for PG&E, to Licensing Board (July 2, 2002); Response of [PG&E] to Request of [PSLHD] To Participate as of Right Under 10 C.F.R. 2.715(c) (July 29, 2002) at 1-2; Response of [PG&E] to Request of [CEC] To Participate as of Right Under 10 C.F.R. 2.715(c) (Aug. 26, 2002) at 1-2. PG&E did, however, oppose DCISC's participation as an interested governmental entity. *See* Response of [PG&E] to Request of [DCISC] To Participate as of Right Under 10 C.F.R. 2.715(c) (Aug. 30, 2002) at 1-7 [hereinafter PG&E Response to DCISC Request]. The Board granted the requests of SLOC and PSLHD, *see* Licensing Board Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation) (Aug. 7, 2002) at 1 (unpublished), but scheduled argument on the question of DCISC participation, *see* Licensing Board

Memorandum and Order (Initial Prehearing Conference Argument Schedule) (Sept. 3, 2002) at 1 (unpublished).

Further, in accord with a Licensing Board order establishing a deadline for the timely submission of issues by potential interested governmental entities, *see* Licensing Board Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation) (Aug. 7, 2002) at 1-2 (Aug. 7, 2002) (unpublished) [hereinafter Board Order on Interested Governmental Entity Issue Identification], PSLHD has sought to raise an issue of its own regarding DCPP's emergency response plan (ERP), *see* Response of [PSLHD] to [Licensing Board] Order of August 7, 2002 (Aug. 19, 2002) at 2-4 [hereinafter PSLHD Issues]. SLOC also submitted one environmental and two technical issues it seeks to litigate in the proceeding. *See* Subject Matter Upon Which [SLOC] Desires To Participate Pursuant to 10 C.F.R. § 2.715(c) (Aug. 21, 2002) at 3-11 [hereinafter SLOC Issues]. PG&E and the Staff, however, have objected to the admission of all four issues proffered independently by SLOC and PSLHD. *See* Response of [PG&E] to Issues Proffered by [SLOC] and [PSLHD] (Sept. 4, 2002) at 3-17 [hereinafter PG&E Response to SLOC and PSLHD Issues]; Response of NRC Staff to [PSLHD Issues] (Sept. 4, 2002) at 2-4 [hereinafter Staff Response to PSLHD Issues]; Response of NRC Staff to [SLOC Issues] (Sept. 5, 2002) at 2-8 [hereinafter Staff Response to SLOC Issues].

C. Initial Prehearing Conference and Post-Conference Filings

Beginning on September 10, 2002, the Board conducted a 2-day initial prehearing conference, during which it heard oral presentations regarding the standing of each of the Petitioners, the participation of DCISC as an interested governmental entity, and the admissibility of the eight contentions and four issues raised by Petitioners and the interested governmental entities. *See* Tr. at 1-419. Also, during the initial prehearing conference a representative from the Avila Beach Community Services District appeared and advised the Board that by letter dated August 16, 2002, addressed to the "Nuclear Regulatory Commission," ABCSD had requested section 2.715(c) participant status, but had received no response to its inquiry. *See* Tr. at 68-70. The Board Chairman advised ABCSD that its request had not been received by the Board, but that ABCSD could submit such a request directly to the Board and the participants then would have an opportunity to comment on its request. *See id.* at 70-72. Following the initial prehearing conference, ABCSD resubmitted its request for section 2.715(c) participant status and stated that it did not have any new issues it wished to raise on its own. *See* Letter from John L. Wallace, ABCSD General Manager, to Licensing Board Chairman Judge Bollwerk (Sept. 17, 2002); Letter from John L. Wallace, ABCSD General Manager, to Licensing Board

Chairman Judge Bollwerk (Oct. 7, 2002). Further, neither PG&E nor the Staff objected to ABCSD's participation as a section 2.715(c) interested governmental entity, *see* NRC Staff's Response to [ABCSD] Request To Participate Under 2.715(c) (Oct. 10, 2002) at 1-3; Response of [PG&E] to Request of [ABCSD] To Participate as an "Interested Party" Pursuant to 10 C.F.R. § 2.715(c) (Oct. 15, 2002) at 2, which also is supported by SLOC, *see* Response of [SLOC] to Request of [ABCSD] to Participate as an "Interested Government" Pursuant to 10 C.F.R. 2.715(c) (Oct. 18, 2002) at 1-3.

Also during the initial prehearing conference, there was substantial discussion concerning whether issues submitted by section 2.715(c) participants must meet the same contention admissibility requirements set forth in 10 C.F.R. § 2.714(b)(2) or something less rigorous. *See generally* Tr. at 119-69. The Board accepted the Staff's offer to brief the issue more thoroughly and afforded all of the participants an opportunity to respond to the Staff's comments. *See id.* at 169-72; *see also* Licensing Board Memorandum and Order (Schedules for Submissions Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Entities; Forwarding Additional Participant Submissions for Record Inclusion) (Sept. 17, 2002) at 1 (unpublished). In its filing, the Staff has argued that the section 2.714(b)(2) standard for contentions also applies to issues submitted by interested governmental entities. *See* NRC Staff's Position Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Entities (Sept. 25, 2002) at 2-9 [hereinafter Staff Position on Section 2.715(c) Participant Issues]. PG&E and, seemingly, ABCSD agree with the Staff's position. *See* Position of [PG&E] Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Entities (Oct. 9, 2002) at 4-14 [hereinafter PG&E Position on Section 2.715(c) Participant Issues]; Letter from John L. Wallace, ABCSD General Manager, to Licensing Board Chairman Bollwerk (Oct. 7, 2002) at 2. SLOC, CEC, and PSLHD, on the other hand, have opposed this Staff interpretation of the regulations as applied to interested governmental entities. *See* Position of [SLOC] Regarding the Criteria for Considering Issues Raised by Governmental Entities under 10 C.F.R. § 2.715(c) (Oct. 9, 2002) at 5-12 [hereinafter SLOC Position on Section 2.715(c) Participant Issues]; [CEC] Response to [Staff's] Position Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Participants (Oct. 9, 2002) at 1-8 [hereinafter CEC Position on Section 2.715(c) Participant Issues]; Position of [PSLHD] Regarding the Criteria for Considering Issues Raised by Governmental Entities Under 10 C.F.R. § 2.715(c) (Oct. 9, 2002) at 2-3 [hereinafter PSLHD Position on Section 2.715(c) Participant Issues].

Against this background, we now address the standing of each of the Petitioners; the participation of entities seeking section 2.715(c) participant status; and the admissibility of the proffered contentions/issues, including the question of the appropriate admission standard applicable to issues introduced by section 2.715(c) participants.

II. ANALYSIS

A. Standing of Section 2.714 Organizational and Individual Petitioners

DISCUSSION: Pinard/AVAC Petition at 3-7; SLOMFP Petition at 2-5; Staff Response to SLOMFP Petition at 6-9; PG&E Response to SLOMFP Petition at 8-17; PG&E Response to Pinard/AVAC Petition at 3-8; Pinard/AVAC Amended Petition at 2; PG&E Response to Pinard/AVAC Amended Petition at 3-6; Staff Response to Pinard/AVAC Amended Petition at 2-5; Tr. at 20-32, 38-43, 45-56, 62-68.

RULING: A person who wishes to intervene in a Commission proceeding must file a petition that

> set[s] forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in [§ 2.714(d)(1)], and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

10 C.F.R. § 2.714(a)(1)-(2). In determining whether a petitioner has sufficient interest to intervene in a proceeding, the Commission has traditionally applied judicial concepts of standing. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983) (citing *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976)). Contemporaneous judicial standards for standing require a petitioner to demonstrate that (1) it has suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury can be fairly traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999). An organization that wishes to intervene in a proceeding may do so either in its own right by demonstrating harm to its organizational interests, or in a representational capacity by demonstrating harm to its members. *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998). To intervene in a representational capacity, an organization must show not only that at least one of its members would fulfill the standing requirements, but also that he or she has authorized the organization to represent his or her interests. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 168, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998).

In certain types of proceedings, a petitioner may be presumed to have fulfilled the first of the required three standing showings based on geographical proximity

to the facility, without having specifically to plead that element, if the petitioner resides within, or frequently comes into contact with, the facility's zone of possible harm. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff'd,* CLI-01-17, 54 NRC 3 (2001). Whether such a presumption applies depends upon whether there is an " 'obvious potential for offsite consequences.' " *See id.* at 148 (quoting *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)). Moreover, the zone of possible harm varies, depending on the type of proceeding. For instance, although Petitioners living within a 50-mile radius of a nuclear facility have been presumed to have standing in reactor construction permit and operating license cases, the requisite proximity may be considerably closer in other proceedings, such as those involving reactor spent fuel pool expansion and reracking. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 28 (2000). Although in the *Private Fuel Storage* ISFSI licensing proceeding, standing was granted to a petitioner based on geographical proximity, the Licensing Board in that case did not specify the limits of the required proximity to the facility. *See Private Fuel Storage,* LBP-98-7, 47 NRC at 169 (granting standing to petitioners residing less than 4 miles from proposed ISFSI).

1. Geographic Proximity to DCPP

In the instant case, although there appears to be no dispute relative to the various section 2.714 Petitioners' compliance with standing elements two and three, various of the organizational Petitioners represented by SLOMFP base their conformity with standing element one solely on the geographic proximity of members' residences to DCPP and/or to potential transportation routes that may be used to transport spent fuel away from the DCPP site. Referencing Table H-7 of the Department of Energy's draft environmental impact statement (Draft EIS) for the proposed Yucca Mountain high-level waste (HLW) geologic repository, they argue that health impacts from radiation doses resulting from cask-handling accidents can occur up to 50 miles. *See* SLOMFP Petition at 2-3 (citing Office of Civilian Radioactive Waste Management, U.S. Dep't of Energy, [Draft EIS] for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, DOE/EIS-250D, Vol. 2, App. H, at H-29 (July 1999)). Although these section 2.714 Petitioners do not necessarily seek to establish a presumption of 50 miles, *see* Tr. at 26, they nonetheless assert that even small environmental impacts such as those reflected in that table can be sufficient to confer standing. For its part, as was noted in Section I.A above and discussed in more detail below, PG&E contests the standing of certain of these Petitioners. The Staff, however, does not oppose the grant of standing to any of the twelve section 2.714 Petitioners.

All the parties seemingly are in agreement that, in the context of our standing determination, prior agency rulings regarding spent fuel pool expansion proceedings provide at least some guidance to the Board here, in particular the *Shearon Harris* case in which the Licensing Board found that the closest boundary of a section 2.714 governmental petitioner 17 miles from the facility at issue provided it with standing. *See Shearon Harris,* LBP-99-25, 50 NRC at 29-31; *see also Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118-19 (1987); *id.,* LBP-87-17, 25 NRC 838, 842, *aff'd in part and rev'd in part on other grounds,* ALAB-869, 26 NRC 13 (1987) (residence within 10 miles of facility found sufficient for standing); *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454-55 (1988), *aff'd,* ALAB-893, 27 NRC 627 (1988) (standing of individual living within 10 miles of facility conceded by parties); *Millstone,* LBP-00-02, 51 NRC at 28 (granting standing to individual with part-time residence located 10 miles from facility). Nonetheless, in referencing the DOE draft EIS table, SLOMFP would more than double the largest expanse of the area that to date has been found to encompass individuals who would be considered potentially subject to an spent nuclear fuel (SNF) storage-related impact that would be sufficient to fulfill the "injury in fact" component of the standing equation. We are unable to accept this expansion, however.

Assuming that the cask handling accidents that are the benchmark for that table equate fairly to the cask handling aspects of operations at the DCPP facility, the impacts set forth by the table nonetheless are not sufficient to show standing. To be sure, there is authority indicated that to establish injury in fact it is not necessary to proffer radiation impacts that amount to a regulatory violation. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 417 (2001) (citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996)). On the other hand, simply showing the potential for any radiological impact, no matter how trivial, is not sufficient to meet the requirement of showing a "distinct and palpable harm" under standing element one. As it is relevant here, bearing in mind that the radiological consequences set forth in the table are those for the entire 2000 census population of 28,000 estimated to live within a 50-mile radius of the facility, and utilizing the cask handling event from the table that has the maximum dose consequences (i.e., a 7.1-meter drop of pressurized water reactor fuel assemblies), for any individual member of that population, the average dose consequences are in the neighborhood of 3×10^{-3} (0.003) millirem. This is a number that, in addition to being an average for the population of the entire area so as likely to be considerably less at the 50-mile area's outer boundary, is four or five orders of magnitude below average natural background radiation levels. To whatever extent a "minor" radiological exposure arising from an applicant's

proposed activities is sufficient to afford standing, this clearly falls below the level that can be considered substantial enough for standing purposes.

Accordingly, based on the showing now before us,[3] in considering each of the Petitioners' claims of standing based on geographical proximity to DCPP, we utilize the 17-mile mark established in the *Shearon Harris* proceeding as our guide.

a. San Luis Obispo Mothers for Peace

SLOMFP bases its standing on the affidavits of four of its members, Susan Biesek, Elaine Holder, Nancy Walker, and Jill ZamEk. All four members have authorized SLOMFP to represent their interests in this proceeding. *See* SLOMFP Petition, Exh. 1-4. In their affidavits, Ms. Biesek and Ms. Walker both state that they reside within 10 miles of DCPP, and Ms. Holder and Ms. ZamEk both state that they reside within 20 miles of the facility. *Id.* PG&E does not contest the standing of SLOMFP to intervene, based on its representation of members Ms. Biesek and Ms. Walker. The Staff, as noted above, does not object to the standing of any of the twelve section 2.714 Petitioners.

Regarding SLOMFP we find that, as is the case with the rest of the section 2.714 Petitioners, standing elements two and three have been fulfilled and that, with respect to element one, SLOMFP has established its standing to intervene in this proceeding based on its representation of members Ms. Biesek and Ms. Walker, who both reside well within 17 miles of DCPP.

b. Santa Lucia Chapter of the Sierra Club

SLCSC asserts standing through its member, Peter Wagner. Mr. Wagner states that he lives within 15 miles of DCPP and authorizes SLCSC to represent his interests in this proceeding. *See* SLOMFP Petition, Exh. 6. PG&E does not oppose this Petitioner's standing.

Based on its representation of Mr. Wagner, who resides within 17 miles of DCPP, we find that SLCSC has sufficiently demonstrated its standing to intervene in this proceeding.

c. San Luis Obispo Cancer Action Now

SLOCAN seeks standing through representation of its member, Virginia Monteen. In her declaration, Ms. Monteen states that she resides and works in the

[3] As we noted above, the participant claiming standing has the burden of demonstrating it meets the requisite three-factor test, and so our determination here is based on the showing made by the Petitioners, who failed to carry their burden relative to establishing that there should be a 50-mile benchmark for ISFSI standing claims.

town of San Luis Obispo, which is located 10 miles from DCPP. *See* SLOMFP Petition, Exh. 7. She also states that she travels the roads of San Luis Obispo on a daily basis, including U.S. Highway 101 that could serve as a potential transportation route for SNF away from DCPP. *See id.* She has authorized SLOCAN to intervene on her behalf in this proceeding. *See id.* PG&E does not challenge this Petitioner's standing to intervene, based on the geographical proximity of Ms. Monteen's residence and place of work to DCPP.

We conclude that SLOCAN has established its standing through Ms. Monteen, who lives and works within 17 miles of the facility.

d. Peg Pinard

Ms. Pinard seeks to intervene in this proceeding as an individual citizen on her own behalf. She states that her home lies within 10 to 15 miles of DCPP. *See* Amended Petition, Decl. of Peg Pinard. PG&E does not contest Ms. Pinard's standing.

We find that Ms. Pinard has standing to intervene in this proceeding based on the location of her residence within 17 miles of DCPP.

e. Avila Valley Advisory Council

AVAC asserts standing as the representative of its member, Seamus Slattery. Mr. Slattery resides within 10 miles of DCPP and has authorized AVAC to represent him in this proceeding. *See* Amended Petition, Decl. of Seamus Slattery. Although there was some initial confusion as to whether AVAC sought to participate in the proceeding as an interested governmental entity under 10 C.F.R. § 2.715(c), in its amended petition, AVAC clarified that it was seeking to intervene as a private organization under section 2.714. *See id.* at 2. AVAC is an unincorporated association, whose purposes include the advocation for the interests of Avila Valley residents through intervention in legal proceedings. *See* Amended Petition, AVAC Bylaws art. III, § 5; Tr. at 31. PG&E contests AVAC's standing on the basis that apart from its bylaws, AVAC has not demonstrated that it has the independent authority to represent itself or others in legal proceedings as a private organization. PG&E maintains that AVAC has failed to show that it has any authority to act beyond its capacity as a quasi-governmental advisory body.

We do not find PG&E's argument on this point persuasive. We are not aware of any legal authority that requires an organization to establish that it has independent litigating authority to represent itself or its members in adjudicatory proceedings, and PG&E has not proffered any such support for its assertion. This agency's previous decisions have only required organizations who wish to intervene in a

representational capacity to show that at least one of its members would fulfill the standing requirements and that the organization has been authorized by the member to represent his or her interests. *See, e.g., Private Fuel Storage,* LBP-98-7, 47 NRC at 168. Here, Mr. Slattery resides within 10 miles of DCPP, which is sufficient to confer standing on him individually if he wanted to participate in that capacity, and he has authorized AVAC to represent his interests in this proceeding. Moreover, even if PG&E is correct in arguing that AVAC is required to demonstrate its authority to litigate on behalf of itself or its members, section 369.5(a) of the California Code of Civil Procedure provides that "[a] partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known." Cal. Civ. Proc. Code § 369.5(a) (2002). Thus, by virtue of its status as an unincorporated association, California Code section 369.5(a) provides AVAC with independent litigating authority.

Consequently, we find that AVAC has established its standing to intervene in this proceeding.

f. Environmental Center of San Luis Obispo

The ECSLO asserts standing through its member, Pamela Heatherington. Ms. Heatherington resides within 30 miles of the facility and has authorized ECSLO to intervene on her behalf in this proceeding. *See* SLOMFP Petition, Exh. 5. Her affidavit states that she is concerned for her and her family's health and safety and the value of her property. *Id.* PG&E challenges this Petitioner's standing based on the distance of Ms. Heatherington's home from DCPP.

Ms. Heatherington's home lies well beyond the 17-mile mark that we have established as our benchmark here. Because her affidavit does not present any additional information aside from her stated concerns, we have no basis to extend that zone of cognizable injury beyond 17 miles. Therefore, we find that the ECSLO has not demonstrated its standing to intervene in this proceeding.

g. Central Coast Peace and Environmental Council

CCPEC bases its standing on the geographical proximity of its member, Bruce Miller. Mr. Miller resides in San Luis Obispo, within one-quarter mile of U.S. Highway 101, which is the main evacuation route for DCPP through the city, and the Union Pacific railroad tracks. *See* SLOMFP Petition, Exh. 14. He also travels the highway on a daily basis and regularly travels near the railroad tracks. *See id.* According to his affidavit, Mr. Miller has authorized the CCPEC to represent him in this proceeding and is concerned that his health and safety may be injured

by his proximity to spent fuel casks that may be shipped from DCPP through San Luis Obispo en route to Yucca Mountain. *Id.*

Although Mr. Miller presents his claimed injuries in terms of his concern about transportation, it is facially apparent from the description in his affidavit that he resides well within 17 miles of DCPP. Therefore, we find that CCPEC has established standing to intervene in this proceeding.

h. Cambria Legal Defense Fund

The CLDF seeks to establish its standing through the geographical proximity of its founder and director, Suzy Ficker, to DCPP. Ms. Ficker resides 27 miles from the facility. *See* SLOMFP Petition, Exh. 9. She also states that the organization is concerned that construction of the ISFSI would jeopardize the health and safety of its members and their families, as well as the value of their properties. *See id.* PG&E opposes CLDF's standing on the basis of Ms. Ficker's distance from DCPP.

Ms. Ficker resides more than 17 miles from the facility. As was the case with Ms. Heatherington above, Ms. Ficker's affidavit fails to show why the zone of possible harm should be extended in this proceeding. We conclude, therefore, that the CLDF has not established its standing to intervene in this proceeding.

i. Santa Margarita Area Residents Together

SMART asserts standing through the representation of its member, Jude Ann Rock, whose home is represented to lie within 20 miles of DCPP. *See* SLOMFP Petition, Exh. 8. Ms. Rock states that the organization is concerned for the health and safety of its members and their families and the value of their properties. *See id.* PG&E contests the standing of SMART based on the distance of Ms. Rock's home from the plant.

Based on her affidavit, it appears Ms. Rock's residence is located more than 17 miles from DCPP. Although her home lies only 3 miles beyond the distance previously acknowledged as conferring standing, this Petitioner has made no showing as to why the zone of possible harm should be extended. Statements consisting only of generic, unsubstantiated concerns for health, safety, and property devaluation are insufficient to expand the zone of possible harm beyond 17 miles. Without more, we cannot grant SMART standing to intervene in this proceeding.

2. Geographical Proximity to Transportation Routes

Three other Petitioner organizations — San Luis Obispo County Chapter of the Grandmothers for Peace International, Nuclear Age Peace Foundation, and

Ventura County Chapter of the Surfrider Foundation — base their argument regarding standing element one solely on the geographical proximity of their members' homes to transportation routes that could potentially be used to transport spent fuel away from DCPP to the proposed Yucca Mountain HLW repository facility or the proposed Private Fuel Storage ISFSI in Skull Valley, Utah. Specifically, SLOCGPI asserts standing in this regard through its member Molly Johnson. Although Ms. Johnson lives and works more than 25 miles from DCPP, she does reside within 3 miles of Highway 46, which she asserts is a major road over which spent fuel from DCPP may be transported to the proposed Yucca Mountain facility or the proposed Private Fuel Storage facility in Utah. *See* SLOMFP Petition, Exh. 11. For its part, NAPF contends it has standing through its member David Kreiger, a resident of Santa Barbara, California, which is some 100 miles to the south of the DCPP. According to Mr. Kreiger, he regularly travels on and lives within 5 miles of U.S. Highway 101, a main area highway, and regularly walks or drives near area railroad tracks, either of which could be a spent fuel transportation route. *See id.*, Exh. 12. Finally, VCCSF claims to have standing through its member, Paul Jenkin. In addition to residing within three-quarter mile of both U.S. Highway 101 and the railroad tracks in Ventura, California, which is more than 100 miles from the DCPP, Mr. Jenkin purportedly regularly travels on Highway 101 and walks or drives near the area railroad tracks. *See id.*, Exh. 13.

In response, PG&E argues that any transportation issues are purely conjectural and speculative at this time and, moreover, are beyond the scope of this ISFSI licensing proceeding. Thus, PG&E contests the standing of any petitioner asserting standing based upon proximity to potential transportation routes. The Staff, as noted above, does not oppose the standing of any of the Petitioner organizations.

Citing the Licensing Board's decision in *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61 (1996), as support, the Petitioners argue that even if the Board were to deny admission of a transportation-related contention because it is beyond the scope of the proceeding, the Board could nonetheless grant Petitioners standing to raise the contention. *See* Tr. at 66. While the Petitioners accurately describe the *Yankee Rowe* Board's order as stating that the findings of standing and admissibility of contentions are discrete determinations, *Yankee Rowe* is not altogether helpful to their case. The petitioners in *Yankee Rowe* were able to establish standing to intervene based on their members who not only used potential transportation routes, but also lived within 10 miles of the facility and recreated along waterways that received effluent discharges from the plant. *Yankee Rowe*, LBP-96-2, 43 NRC at 69. In that case, the Licensing Board held that once the petitioners had established their standing to intervene, they consequently had standing to pursue any contention they wished to raise. *See id.* at 69-70.

Here, the section 2.714 Petitioners' transportation route-related standing claims fall short. As has been noted previously relative to transportation route-related standing claims, mere geographical proximity to potential transportation routes is insufficient to confer standing; instead, the section 2.714 Petitioners must demonstrate a causal connection between the licensing action and the injury alleged. *Compare Savannah River,* LBP-01-35, 54 NRC at 419-20 (transportation route-related standing established based on environmental report discussion of transportation impacts) *with Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 42-43 (1990) (petitioner who resided 1 mile from likely transportation route denied standing) *and Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 NRC 518, 519-20 (1977) (assertion of injury because spent fuel would travel on railway tracks very near property insufficient to establish standing). Although the Petitioners cite *Savannah River* as support for their standing, that case can be distinguished from the one here. In *Savannah River,* the petitioners did not base their standing solely on geographical proximity to likely transportation routes. Rather, they were able to demonstrate a nexus between the licensing proceeding and the risk of injury. *See Savannah River,* LBP-01-35, 54 NRC at 419. Any person traveling alongside a truck shipment of mixed oxide (MOX) fuel would receive a small, but unwanted, dose of ionizing radiation, even in the absence of a vehicular accident. *See id.* at 420. Here, the substance of what these Petitioners have claimed in the declarations of the individuals whose interests they would represent is more akin to what the petitioners in the above-cited *Pathfinder* and *Exxon* cases asserted.[4] In both cases, the Licensing Boards denied standing, in part because the injuries alleged were too speculative in nature and in part for lack of a causal relationship between the injury claimed and the proceeding. *See Pathfinder,* LBP-90-3, 31 NRC at 43; *Exxon,* LBP-77-59, 6 NRC at 520.

B. Participation by Section 2.715(c) Interested Governmental Entities

DISCUSSION: DCISC Request at 1-4; PG&E Response to DCISC Request at 3-7; Staff Response to DCISC Request at 2-3; Tr. at 32-37, 43-47, 56-61.

RULING: As we noted earlier in Section I.B, in addition to the individual and organizational Petitioners seeking to intervene in this proceeding pursuant to section 2.714, five proclaimed state or local governmental bodies — San Luis Obispo County, California, the Port San Luis Harbor District, the California

[4] In *Exxon,* LBP-77-59, 6 NRC at 519, a petitioner who sought to intervene claimed that if the license for the proposed reprocessing facility were approved, it was likely that spent fuel would be shipped by way of the railroad located very near her home and rental property. In addition, if an accident were to occur in that vicinity, it could result in bodily harm, loss of life, or loss of income to her. *See id.* In *Pathfinder,* LBP-90-3, 31 NRC at 42, a petitioner who lived 1 mile from a likely transportation route claimed that an accident involving a truck shipment of radioactive waste could result in, among other things, an increased risk of contracting cancer or other debilitative disease.

Energy Commission, the Diablo Canyon Independent Safety Committee, and the Avila Beach Community Services District — have sought leave to participate as interested governmental entities under the dictates of 10 C.F.R. § 2.715(c). Previously, the Board had granted that status to SLOC and PSLHD. With this issuance, we do the same for CEC and ABCSD, whose requests for section 2.715(c) status are unopposed. With respect to DCISC, however, as also was noted above, PG&E has objected to its denomination as a section 2.715(c) participant. Relying principally on the Commission's decision in *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202-03 (1998), PG&E asserts that DCISC is the type of "advisory body" that the Commission there made clear does not merit such a designation.

In its initial filing, DCISC described its origin and responsibilities as follows:

> The Safety Committee was initially created by the California Public Utilities Commission ("CPUC") under the terms of the Diablo Canyon Settlement Agreement (CPUC Decision D.88-12-083) as an independent three-member committee specifically to monitor the safety of PG&E's operation of Diablo Canyon.
>
> "An Independent Safety Committee shall be established consisting of three members, one each appointed by the Governor of the State of California, the Attorney General and the Chairperson of the [CEC], respectively, serving staggered three-year terms. The Committee shall review Diablo Canyon operations for the purpose of assessing the safety of operations and suggesting any recommendations for safe operations. Neither the Committee nor its members shall have any responsibility or authority for plant operations, and they shall have no direct authority to direct PG&E personnel. The Committee shall conform in all respects to applicable federal laws, regulations and Nuclear Regulatory Commission ("NRC") policies."
>
> As stated by the CPUC in its decision, the Safety Committee was intended by the parties to the Settlement Agreement to provide an "added level of assurance to the public that Diablo Canyon will continue to operate safely."

DCISC Request at 2-3 (footnotes omitted). Further, during the initial prehearing conference, in support of its assertion that it should be granted section 2.715(c) status, DCISC made the point that:

> I can assure you that the [DCISC], pursuant to California law, is a state agency, an agency of the state and is a governmental agency. It's appointed by state officials.
>
> It's open — it's subject to the open meeting laws for state agencies, that was just referenced, the Brown Act or the Bagley-Keene Act. The members file conflict-of-interest statements, like all public officials, state and federal, do.
>
> And, again, it's the position of the — of DCISC is clearly distinguishable from that of a general, regional planning agency and, in fact, was created specifically to oversee the safety of operations at this plant, which is integral to what you have before you in these proceedings.

Tr. at 58. And in this regard, the DCISC-cited Bagley-Keene Open Meeting Act, Cal. Gov. Code § 11121(c), which imposes open meeting requirements on any

"state body," defines that term as "[a]ny advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons."

In considering these purported indicia of "governmental entity" status, we do so under the Commission's *Yankee Rowe* determination, which declares:

> Not all organizations with governmental ties are entitled to participate in our proceedings as governmental "agencies." The federal, state and local governments are replete with numerous boards, commissions, advisory committees, and other organizations — all of which have governmental or quasi-governmental responsibilities. We do not, however, understand section 2.715(c) to authorize automatic participation in our adjudications by each and every subpart of state and local government. [The regional planning board in question] is, by its own admission, an advisory body and lacks executive or legislative responsibilities. We conclude that advisory bodies, by their very nature, are so far removed from having the representative authority to speak and act for the public that they do not qualify as governmental entities for purposes of section 2.715(c).

Yankee Rowe, CLI-98-21, 48 NRC at 202-03 (citation omitted). The essence of the *Yankee Rowe* criterion is whether a purported governmental body has legislative or executive responsibilities, i.e., the authority to impose (by rule, order, or otherwise) or implement/enforce (by order, monetary penalty, or otherwise) requirements. In this instance, as the DCISC describes its functions, responsibility, and authority, it does not appear to embrace either of these necessary elements. Nor do we think that the California state open meeting statute and its definition of a "state body" compel a different result. To be sure, the NRC affords deference to bona fide executive, statutory, or judicial declarations regarding the status of a particular entity as being part of a state or local governmental system, *see Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 148-49 (1987), but in this instance, the definition itself, while imposing certain "sunshine" requirements on DCISC, also recognizes that the body upon which these requirements are being levied is an "advisory committee," exactly the type of entity the Commission has made clear is not encompassed within section 2.715(c). Accordingly, we deny the DCISC request for section 2.715(c) status.

This is not to say the DCISC is hereafter precluded from any meaningful participation in this proceeding. As has been noted in a similar situation, *see id.* at 149-51, DCISC may continue to have input into this proceeding through participation as an *amicus curiae*. In this regard, we will direct that it remain on the agency service list for this proceeding and that all participants continue to provide its representative with electronic and hard copies of their filings in this proceeding. To the extent DCISC finds there are any matters about which it

wishes to provide its written, or in appropriate circumstances, oral comments, it can do so by requesting leave of the Board to file or provide those comments. In any instance in which it wishes to file written comments regarding a particular filing, it must submit those comments, along with a motion for leave to file, within the time frame provided for a response to that pleading or, if there is no time established for a response, within 7 days of the filing. Thereafter, in the absence of a Board directive establishing a different schedule, any other participant to the proceeding shall have 7 days to file a response to the DCISC motion for leave to file and to the substance of the proposed DCISC *amicus curiae* submission.

C. Contentions/Issues

To intervene in a proceeding, in addition to establishing standing, an individual or organization seeking party status must also set forth at least one admissible contention. *See* 10 C.F.R. § 2.714(b)(1). Section 2.715(c) participants have the opportunity to interpose issues as well. Having found that a number of Petitioners have standing and that several of the governmental entities come within the ambit of section 2.715(c), we next consider the admissibility of each contention/issue proffered by the Petitioners and the section 2.715(c) interested governmental entities.

1. Section 2.714 Contention Admissibility Standards

To be admissible, a contention submitted by a section 2.714 petitioner must state with specificity the issue of law or fact to be raised or controverted. *See* 10 C.F.R. § 2.714(b). Furthermore, each contention must be accompanied by: (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion the petitioner will rely upon to prove the contention, including references to specific sources and documents that will be relied upon to establish those facts and opinions; and (3) sufficient information to show that a genuine dispute on a material issue of law or fact exists with the applicant, which consists of either (a) references to specific portions of the application (including the applicant's environmental and safety reports) that are disputed and the reasons supporting the dispute, or (b) identification of each instance where the application purportedly fails to contain information on a relevant matter as required by law and the reasons supporting the allegation. *See id.* § 2.714(b)(2)(i)-(iii). If the contention fails to satisfy any one of these requirements, the contention must be denied. *See id.* § 2.714(d)(2)(ii).

In addition to the threshold requirements set forth in section 2.714(b)(2), there are a number of other criteria that govern the admissibility of contentions. For example, a licensing board must reject a contention that, even if proven, would not entitle the petitioner to any relief and would, thus, make no difference in the

outcome of the proceeding. *See id.* A contention will also be deemed inadmissible if it challenges an existing Commission rule or attempts to litigate an issue that is, or clearly is about to become, the subject of a Commission rulemaking. *See id.* § 2.758; *see also Private Fuel Storage*, LBP-98-7, 47 NRC at 179 (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974)). Furthermore, contentions that concern matters outside the scope of the proceeding, as defined by the notice of hearing or opportunity for hearing, must also be denied. *See, e.g., Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

With these general principles in mind, we consider each of the contentions and issues submitted by the Petitioners.

2. *Admissibility of SLOMFP Contentions*

As was noted in Section I.A above, the Board requested that contentions be labeled by general subject matter area, a framework we utilize in discussing the admissibility of each of the proffered SLOMFP issue statements. Further, in reiterating and discussing these contentions,[5] we refer to Lead Intervenor SLOMFP as their sponsor, although they were proffered jointly by all the section 2.714 Petitioners.

a. SLOMFP Technical Contentions

SLOMFP Technical Contention (TC)-1: Inadequate Seismic Analysis

> CONTENTION: In Section 2.6 of the SAR, PG&E claims to satisfy Appendix A of 10 C.F.R. Part 100 and 10 C.F.R. § 72.102, which provide criteria for seismic design of nuclear facilities and ISFSIs. However, the seismic analysis presented by PG&E does not consider a number of significant seismic features in the area of the Diablo Canyon plant. As a result, the design basis earthquake for the proposed ISFSI cannot be considered reasonable or conservative for purposes of protecting public health and safety against the effects of earthquakes.

DISCUSSION: SLOMFP Contentions at 2-11; PG&E Response to SLOMFP Contentions at 5-19; Staff Response to SLOMFP Contentions at 7-9; Tr. at 347-418.

RULING: In proffering this contention, which it supports with the affidavit of Dr. Mark R. Legg, SLOMFP asserts there are a number of "serious shortcomings" in the SAR and the ER for the Diablo Canyon ISFSI that bring into question

[5] The language of the SLOMFP contentions is replicated from the July 2002 SLOMFP supplemental petition, albeit without the internal footnotes.

the design basis earthquake utilized for the ISFSI. SLOMFP Contentions at 2. According to SLOMFP, these include PG&E's failure to consider the threat posed by large reverse or thrust fault earthquakes in the vicinity of the site as well as its reliance on the incorrect assumptions that the Hosgri fault zone is purely strike-slip and is vertical rather than east dipping, which could cause PG&E to place the fault in a nonconservative position. Although various of the interested governmental entities support admission of this issue statement, both PG&E and the Staff challenge its admissibility on the basis that SLOMFP has failed to assert how, even if true, the alleged deficiencies create a health and safety issue for the facility.

PG&E indicates that the matters upon which SLOMFP seeks to rely were, in fact, considered in accordance with 10 C.F.R. Part 100, Appendix A, as part of (1) the operating licensing review for the DCPP, during which the safe shutdown earthquake (SSE) was postulated based on an earthquake with a magnitude of 7.5 on the Richter Scale; and/or (2) the subsequent 1984-1991 Diablo Canyon Long Term Seismic Program that sought to confirm the seismic design bases for the facility, which resulted in a determination that the maximum or controlling earthquake associated with the Hosgri fault would have a magnitude of 7.2. Further in this regard, both PG&E and the Staff direct the Board's attention to 10 C.F.R. §§ 72.40(c), 72.102(f), which provide, respectively:

> (c) For facilities that have been covered under previous licensing actions including the issuance of a construction permit under Part 50 of this chapter, a reevaluation of the site is not required except where new information is discovered which could alter the original site evaluation findings.
>
> * * * *
>
> (f) The design earthquake (DE) for use in the design of structures must be determined as follows:
>
> (1) For sites that have been evaluated under the criteria of Appendix A of 10 CFR Part 100, the DE must be equivalent to the [SSE] for a nuclear power plant.

Both PG&E and the Staff argue that these regulations bar the admission of contention SLOMFP TC-1 given SLOMFP has not provided sufficient information to alter the original site evaluation to the degree it has not provided a basis to establish that the SSE or maximum/controlling earthquake number should be something other than what was previously established. In response, although acknowledging "it's true that we don't have a number at this point," Tr. at 413, SLOMFP nonetheless maintains it has provided enough information to meet its burden as to the admission of this contention.

As the members of this Board have indicated in another context, "issues of law or fact raised in a contention must be material to the grant or denial of the license application in question, i.e., they must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief."

Private Fuel Storage, LBP-98-7, 47 NRC at 179. As we also indicated in that instance, "[a]gency case law further suggests this requirement of materiality mandates certain showings in specific contexts." *Id.* at 180. While in other circumstances, the showing made by SLOMFP regarding its contention TC-1 might be sufficient to establish the requisite materiality, and so an admissible contention, it falls short here. As the Part 72 regulations quoted above make clear, for a co-located ISFSI, the applicant does not write on a clean slate relative to any seismic requirements. Absent an exemption or new information sufficient to alter the original site evaluation finding, the DE for the nuclear facility is what the ISFSI applicant must use.[6] As a consequence, a contention challenging the seismic qualifications of such a co-located ISFSI facility must necessarily provide

[6] Contrasting the existing language of section 72.102(f)(1), which states that an ISFSI DE must be equivalent to the SSE "for a nuclear power plant," and the language of a pending proposed rule that would add a new section 72.103(b) that declares that for a site west of the Rocky Mountains "[i]f an ISFSI or [monitored retrievable storage installation (MRS)] is located on a [nuclear power plant (NPP)] site, the existing geological and seismological design criteria for the NPP may be used," 67 Fed. Reg. 47,745, 47,754 (July 22, 2002), SLOMFP argues that the specificity of the new section 72.103(b) language creates the inference that the existing rule was not intended to provide for incorporation of the co-located NPP's SSE. *See* Tr. at 351-52. We do not agree. In connection with this new provision, as the statement of considerations accompanying the proposed rule explains at several different junctures:

> In comparison with a NPP, an operating dry cask ISFSI or MRS facility, storing [SNF], is a passive facility in which the primary activities are waste receipt, handling, and storage. An ISFSI or MRS facility does not have the variety and complexity of active systems necessary to support safe operations at a NPP. Further, the robust cask design required for non-seismic considerations (e.g., drop event, shielding), assure low probabilities of failure from seismic events. In the unlikely occurrence of a radiological release as a result of a seismic event, the radiological consequences to workers and the public are significantly lower than those that could arise at a NPP. This is because the conditions required for release and dispersal of significant quantities of radioactive material, such as high temperatures or pressures, are not present in an ISFSI or MRS. This is primarily due to the low heat-generation rate of spent fuel that has undergone more than one year of decay before storage in an ISFSI or MRS, and to the low inventory of volatile radioactive materials readily available for release to the environment. The long-lived nuclides present in spent fuel are tightly bound in the fuel materials and are not readily dispersible. Short-lived volatile nuclides, such as [Iodine]-131, are no longer present in aged spent fuel. Furthermore, even if the short-lived nuclides were present during a fuel assembly rupture, the canister surrounding the fuel assemblies is designed to confine these nuclides. Hence, the Commission believes that the seismically induced risk from the operation of an ISFSI or MRS is less than at an operating NPP. *Therefore, the Commission proposes to revise the DE requirements for ISFSI and MRS facilities from the current part 72 requirements, which are equivalent to the SSE for a NPP.*
>
> * * * *
>
> The Commission does not intend to require new ISFSI or MRS applicants that are co-located with a NPP to address uncertainties because *the criteria used to evaluate existing NPPs are considered to be adequate for ISFSIs, in that the criteria have been determined to be safe for NPP licensing, and the seismically induced risk of an ISFSI or MRS is significantly lower than that of a NPP* . . . .
>
> * * * *
>
> If an ISFSI or MRS is located at a NPP site, the existing geological and seismological design criteria for the NPP may be used instead of [probabilistic seismic hazards analysis (PSHA)] techniques or suitable sensitivity analysis because the risk due to a seismic event at an ISFSI or MRS is less than that of a NPP. If the existing design criteria for the NPP is used and the site has multiple NPPs, then the criteria for the most recent NPP must be used to ensure that the seismic design criteria used is based on the latest seismic hazard information at the site.

67 Fed. Reg. at 47,746, 47,748, 47,751 (emphasis supplied). Thus, the language of the proposed rule is intended to reflect an additional option for a co-located ISFSI applicant, i.e., it can use appropriate analyses, such as a PSHA or suitable sensitivity analyses, for determining the DE in lieu of using the SSE for the co-located NPP, which is the only avenue afforded under the existing rule.

not only a basis to indicate that there are specific concerns about the elements used to calculate the nuclear power plant seismic design criteria, but also a showing that, given those concerns, the reactor facility DE itself is now inaccurate to some meaningful degree.[7] In this instance, despite having provided information concerning the first consideration, by failing to make any showing regarding the latter point, SLOMFP has failed to put forth an admissible contention.

SLOMFP TC-2: PG&E's Financial Qualifications Not Demonstrated

CONTENTION: PG&E has failed to demonstrate that it meets the financial qualifications requirements of 10 C.F.R. § 72.22(e).

DISCUSSION: SLOMFP Contentions at 11-19; PG&E Response to SLOMFP Contentions at 19-32; Staff Response to SLOMFP Contentions at 9; Tr. at 251-90; 294-319, 327-39, 342-43.

RULING: Supported by the declaration of Dr. Michael F. Sheehan, SLOMFP claims that PG&E has failed to demonstrate that it is financially qualified to cover the costs of construction, operation, and decommissioning of the proposed ISFSI. SLOMFP argues that because PG&E is currently involved in a contested bankruptcy, it is questionable whether PG&E will emerge from the bankruptcy proceedings as a viable entity, and if so, with what resources. SLOMFP further asserts that PG&E reliance on PG&E's ability to recover its costs from the California Public Utilities Commission (CPUC) as a regulated electric utility is not only insufficient to establish reasonable assurance of financial qualification, but also disingenuous. This is so, according to SLOMFP, because under PG&E's proposed reorganization plan PG&E would no longer own or operate DCPP or the ISFSI, but would transfer those functions to a new generating company, Electric Generation LLC (Gen), rendering PG&E's ability to recover operating costs from the rate base irrelevant. SLOMFP also declares that PG&E has not demonstrated its ability to cover the costs of construction and operation of the ISFSI through borrowing sufficient funds or through incoming revenue. Finally, SLOMFP claims that PG&E's financial qualifications are further compromised by the California Attorney General's pending billion-dollar lawsuit against PG&E's parent company, PG&E Corporation, and the consequences the lawsuit could have for PG&E.

The Staff, PSLHD, and CEC support the admission of all or part of contention SLOMFP TC-2. In this regard, although the Staff did not find all of SLOMFP's proffered bases to be appropriate for litigation in this proceeding, the Staff

[7] Although SLOMFP counsel declared SLOMFP's concerns would change the DCPP DE/SSE figure, *see* Tr. at 401, that certainly is not self-evident nor are we willing to assume that is the case absent some specific, adequately supported technical showing by SLOMFP.

submits that the contention is admissible relative to the SLOMFP concerns about PG&E's access to credit and its ability to recover costs through rates. PG&E, on the other hand, opposes the admission of this contention arguing that the mere fact of bankruptcy does not alone establish a basis for this contention. PG&E asserts that it remains a viable going concern and that the NRC is satisfied that PG&E has adequate operating and decommissioning funds safely to operate and decommission DCPP. According to PG&E, any expenses it incurs, including the costs of the proposed ISFSI, are recoverable from the rate base, regardless of its past debts. Thus, PG&E contends its access to credit is irrelevant. Similarly irrelevant to this proceeding, PG&E asserts, are the financial qualifications of Gen, assuming that PG&E's reorganization plan is approved by the bankruptcy court and the Commission then approves the DCPP license transfer to Gen, as well as the pending California Attorney General lawsuit against PG&E's parent company.

An ISFSI applicant is required by 10 C.F.R. § 72.22(e) to demonstrate in its application its financial qualifications to carry out the activities for which the license is sought. In pertinent part, section 72.22(e) provides:

> (e) . . . The [submitted financial qualifications] information must show that the applicant either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary funds or that by a combination of the two, the applicant will have the necessary funds available to cover the following:
>
> (1) Estimated construction costs;
>
> (2) Estimated operating costs over the planned life of the ISFSI; and
>
> (3) Estimated decommissioning costs . . . .

We agree with PG&E that the mere fact of PG&E's filing for bankruptcy does not by itself indicate that it is no longer financially qualified to continue day-to-day operations at the DCPP facility. In fact, when the petition for bankruptcy was first filed in April 2001, NRC Chairman Meserve assured California Governor Davis that the Commission was closely monitoring the operations at DCPP and was satisfied that PG&E's financial situation had no impact on its ability to operate the facility safely and in accordance with agency regulations. *See* PG&E Response to SLOMFP Contentions, Attach. 1 (Letter from Richard A. Meserve, NRC Chairman, to Governor Gray Davis (Apr. 6, 2001)). Yet, notwithstanding PG&E's financial qualifications to conduct day-to-day DCPP operations, in its bases two and three SLOMFP has raised relevant and material concerns regarding the impact of PG&E's bankruptcy on its continuing ability to undertake the new activity of constructing, operating, and decommissioning an ISFSI by reason of its access to continued funding as a regulated entity or through credit markets. *See* SLOMFP Contentions at 14-17; *id.*, Exh. 3, at 127 (PG&E Corp. 2001 Annual Report). We, therefore, admit contention SLOMFP TC-2 to this proceeding as supported by these bases establishing a genuine material dispute adequate to

warrant further inquiry, but with the caveat that neither the unresolved California Attorney General's lawsuit against PG&E Corporation for alleged fraud nor the financial qualifications of any entities that may in the future construct or operate the ISFSI are litigable matters under this contention as irrelevant to and/or outside the scope of this proceeding.

SLOMFP TC-3: PG&E May Not Apply for a License for a Third Party

> CONTENTION: In its License Application, PG&E first asserts that it, as the applicant, is financially qualified. It then goes on to assert, however, that it has applied to transfer its Part 50 operating license to a yet-to-be-created limited liability company, Electric Generation LLC ("Gen"), which will then transfer it further to yet another yet-to-be-created entity, Diablo Canyon LLC. License Application at 5. "Gen" is one of the proposed offsprings of a restructuring proposal being considered in the bankruptcy proceeding. *See* Application for Consent to License Transfers and Conforming License Amendments for Diablo Canyon Power Plant, Units 1 and 2, at 4 (November 30, 2001) (hereinafter "License Transfer Application"). The License Transfer Application and Enclosure 8 are attached as Exhibit 5. PG&E also asserts that revenue and income projections for Gen, "as well as the substantial assets of the company," demonstrate Gen's financial qualifications to construct and operate the Diablo Canyon ISFSI. *Id.*
>
> As discussed in Contention TC-4 below, it is not all clear whether Gen or some other entity will be the owner and licensee of the proposed ISFSI under PG&E's reorganization plan, even if that reorganization plan is approved, which it may well not be.
>
> The crux of the problem is that PG&E may not apply for a license for a third party that does not constitute the "applicant." There is no corporate entity, other than PG&E, that has applied for a license to build and operate the proposed ISFSI. In the absence of an alternative applicant, PG&E's attempt to demonstrate the financial qualifications of a third-party shell corporation that is a non-applicant must fail.

DISCUSSION: SLOMFP Contentions at 19-20; PG&E Response to SLOMFP Contentions at 32-34; Staff Response to SLOMFP Contentions at 10-12; Tr. at 260-63, 275-78, 290, 299, 312-13, 327-39, 342-43.

RULING: In this contention, which also is supported by the declaration of Dr. Michael F. Sheehan, SLOMFP argues that PG&E is attempting to apply for the ISFSI license on behalf of an entity that would be created to operate DCPP if and when the bankruptcy court approves PG&E's reorganization plan. SLOMFP asserts that because section 72.22 requires the Applicant to demonstrate its financial qualifications, PG&E must demonstrate that it — and not a non-existent "third-party shell corporation" — is financially qualified to construct and operate the ISFSI. SLOMFP Contentions at 20.

Although the PG&E and the Staff both contest the admissibility of this contention, SLOC, CEC, and PSLHD support its admissibility. PG&E and the Staff maintain that the Applicant for the license application before the Commission is PG&E in its existing corporate form, not Gen or any other entity that may or may not be created in the future. Thus, they argue, the application that has been

submitted by PG&E is factually accurate, and any inquiries into the financial qualifications of Gen are beyond the scope of this proceeding and would be more appropriately raised in the license transfer proceeding before the Commission concurrently.

As we explained in our discussion above regarding contention SLOMFP TC-2, we find that SLOMFP's concerns relative to the bankruptcy reorganization proceedings and its effects on PG&E's financial capacity to construct, operate, and decommission the proposed ISFSI are relevant to this proceeding and warrant further inquiry. However, as PG&E itself has recognized, Petitioner concerns regarding entities that may or may not be created in the future to take over operations at DCPP, depending on whether PG&E's reorganization plan is approved by the bankruptcy court, are irrelevant to and/or outside of the scope of this proceeding at this point.[8] Therefore, as it seeks to challenge the efficacy of the PG&E application on the basis of the information that application provides on these matters, contention SLOMFP TC-3 is not admitted either.

SLOMFP TC-4: Failure To Establish Financial Relationships Between Parties Involved in Construction and Operation of ISFSI

CONTENTION: Newly formed entities that seek ISFSI licenses must conform to the requirements of 10 C.F.R. § 72.22, and also follow the Commission's guidance in 10 C.F.R. Part 50, including 10 C.F.R. § 50.33(f) and Appendix C. *See Private Fuel Storage Facility* (Independent Spent Fuel Storage Facility), LBP-98-7, 47 NRC 142, 187 (1998), citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302 (1997). Assuming that PG&E lawfully can seek to demonstrate the financial qualifications of a third party that does not constitute the license applicant for an ISFSI (*see* Contention TC-3 above), PG&E has failed to satisfy these requirements, because it has not provided an adequate description of the financial relationships between the corporate entities that will own, operate, and lease the proposed ISFSI.

DISCUSSION: SLOMFP Contentions at 20-23; PG&E Response to SLOMFP Contentions at 34-40; Staff Response to SLOMFP Contentions at 12; Tr. at 260-63, 275-78, 290-91, 299, 312-13, 327-39, 342-43.

RULING: With its contention TC-4, which is supported by the declaration of Dr. Michael F. Sheehan, SLOMFP argues that PG&E has failed to demonstrate that Gen, the proposed DCPP license transferee, is financially qualified to construct and operate the proposed ISFSI. SLOMFP further contends that the financial relationships between Gen and several other corporate entities that may

[8] In this regard, assuming that the bankruptcy court confirms PG&E's reorganization plan, and that the Commission approves the license transfer of DCPP from PG&E to Gen, PG&E would then be required to amend its ISFSI license application to reflect the change in applicant. If this chain of events is in fact realized, then issues regarding Gen's financial qualifications would be ripe for litigation, and SLOMFP seemingly would be free to submit any concerns about GEN or other newly accountable entities as a late-filed contention.

have an interest in DCPP and the proposed ISFSI are not clearly defined, leaving it uncertain which entity would be liable or financially accountable in the event of an accident or other problem. PG&E and the Staff oppose the admission of this contention, generally echoing their replies to contention SLOMFP TC-3, while SLOC, CEC, and PSLHD support the issue statement's admission.

For the reasons we rejected contention SLOMFP TC-3 above, we similarly deny the admission of contention SLOMFP TC-4. SLOMFP's concerns center on Gen's financial qualifications and relationships between Gen and other entities that may be created as part of PG&E's bankruptcy reorganization plan, if confirmed. Indeed, SLOMFP's disputes appear to be based on information largely found in PG&E's license transfer application, which is currently being considered by the Commission in a separate proceeding. As such, in terms of providing a basis for denying the PG&E application, at this time those concerns are irrelevant to and/or beyond the scope of this ISFSI licensing proceeding, in which PG&E is the sole applicant.[9] Contention SLOMFP TC-4 thus is rejected as inadmissible.

SLOMFP TC-5: Failure To Provide Sufficient Description of Construction and Operation Costs

CONTENTION: PG&E has failed to provide a sufficient description or breakdown of costs for construction, and operation, and therefore it does not satisfy 10 C.F.R. § 72.22.

DISCUSSION: SLOMFP Contentions at 23; PG&E Response to SLOMFP Contentions at 40-43; Staff Response to SLOMFP Contentions at 12; Tr. at 292, 298-300, 320-21.

RULING: In proffering contention SLOMFP TC-5, which is supported by the declaration of Dr. Michael F. Sheehan as well, SLOMFP asserts it is impossible to evaluate the reasonableness of PG&E's cost estimates for building and operating the ISFSI because PG&E has failed to provide any detailed description of the associated costs, in violation of 10 C.F.R. Part 50, Appendix C, § II, and 10 C.F.R. § 72.22. PG&E opposes the admission of this contention, arguing that Part 50, Appendix C does not apply in this proceeding and that it has complied with the requirements set forth in section 72.22. The Staff, on the other hand, asserts that because SLOMFP has identified a specific regulatory requirement and a perceived deficiency in PG&E's ISFSI license application, the Board should admit contention SLOMFP TC-5. SLOC, CEC, and PSLHD also support admitting the contention.

Appendix C of Part 50 describes the financial data, including estimated costs of construction, that must be provided by applicants who wish to construct

[9] As we noted above, *see supra* note 8, any concerns relating to the financial qualifications of Gen, or of any other entities other than PG&E, are not yet ripe for litigation in the instant proceeding.

nuclear production, utilization, or testing facilities. In the context of this ISFSI licensing proceeding, however, Appendix C is not directly applicable. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 30 (2000) (finding that outside the reactor context, the requisite showing of financial qualifications under Part 72 is considerably more flexible than under Part 50 and that Part 72 applicants are not required to meet the detailed requirements of Part 50). Instead, section 72.22 is more pertinent for our purposes.

As we noted in connection with our discussion of contention SLOMFP TC-2 above, with regard to the necessary financial disclosures, section 72.22(e) requires an applicant to demonstrate that it either possesses or has reasonable assurance of obtaining sufficient funds to cover the ISFSI's estimated construction, operating, and decommissioning costs. *See* 10 C.F.R. § 72.22(e). In addition, an applicant must "state the place at which the activity is to be performed, the general plan for carrying out the activity, and the period of time for which the license is requested." *Id.* Beside the fact that section 72.22(e) does not require PG&E to itemize or break down the estimated costs of construction or operation, the only specific problem identified by SLOMFP with the information provided — the purported PG&E failure to provide income information for years 4 and 5 of possible ISFSI operation in the November 30, 2001 license transfer application enclosure eight materials that are referenced on page five of the December 21, 2001 Part 72 license application, *see* SLOMFP Contentions at 23 — is really not a PG&E failure at all. As the license transfer application materials included as exhibit five to the July 2002 SLOMFP supplemental petition indicate, enclosure eight contained proprietary material that was not included in the publically available version of the application. *See* SLOMFP Contentions, Exh. 5, at 4 (Nov. 30, 2001 Letter from Gregory M. Rueger, PG&E Senior Vice President–Generation and Chief Nuclear Officer, to NRC Commission and Staff). Although we provided SLOMFP an opportunity to seek any Part 72 license application associated–proprietary materials it wanted, as far as we are aware it made no request relative to this particular document. *See* Memorandum and Order (Protective Order Governing Disclosure of Proprietary Information) (June 19, 2002), Attach. A, at 1-2 (unpublished). As a consequence, this purported missing information does not, in our estimation, provide a legitimate basis for the contention. SLOMFP thus having failed to establish purported material deficiencies in the application, we deny the admission of contention SLOMFP TC-5.

b. SLOMFP Environmental Contentions

SLOMFP Environmental Contention (EC)-1: Failure To Address Environmental Impacts of Destructive Acts of Malice or Insanity

CONTENTION: The Environmental Report's discussion of environmental impacts is inadequate because it does not include the consequences of destructive acts of malice or insanity against the proposed ISFSI.

DISCUSSION: SLOMFP Contentions at 24-28; PG&E Response to SLOMFP Contentions at 43-50; Staff Response to SLOMFP Contentions at 13-14; Tr. at 76-114.

RULING: Supported by the declaration of Dr. Gordon R. Thompson, SLOMFP argues that the ER is inadequate because it does not contain any discussion of the environmental impacts of destructive acts of malice or insanity. While conceding that this omission is consistent with the Commission's practice of not considering the environmental impacts of such acts, SLOMFP argues that in light of the events surrounding September 11, 2001, there is a "demonstrable need" for the Commission to revisit its policy. SLOMFP Contentions at 25. Specifically, SLOMFP points to interviews with terrorists who candidly admit that nuclear power stations are top targets for attacks in the United States. SLOMFP also cites the agency's 1994 vehicle bomb rulemaking, 59 Fed. Reg. 38,889 (1994), as evidence that the Commission has begun to acknowledge the foreseeability of destructive acts of malice or insanity.

While PSLHD and SLOC support admitting contention SLOMFP EC-1, both PG&E and the Staff oppose its admission. PG&E and the Staff assert contention SLOMFP EC-1 is inadmissible as a matter of law because it challenges existing NRC regulations governing ISFSI physical security. In addition, they declare that, in light of the agency's current reevaluation of its security requirements and programs, contention SLOMFP EC-1 concerns matters that are, or are about to become, the subject of general rulemaking by the Commission.

Current NRC regulations do not require licensees to plan for or to design their facilities to protect against all acts of destruction or sabotage. Pursuant to 10 C.F.R. §§ 72.24(o), 72.180, an applicant, such as PG&E, is required to describe physical security protection plans for its ISFSI, which must meet the requirements set forth in 10 C.F.R. § 73.51. Section 73.51 requires a licensee to implement plans that will provide "high assurance that activities involving [SNF] and high-level radioactive waste do not constitute an unreasonable risk to public health and safety." 10 C.F.R. § 73.51(b)(1). When section 73.51 was adopted in 1998, the Commission specifically rejected a proposal that would have required ISFSIs to be protected against malevolent attacks by either land-based or airborne vehicles. *See* 63 Fed. Reg. 26,955, 26,956 (May 15, 1998). In doing so, the Commission acknowledged that spent fuel storage installations carried with them a lower potential for offsite consequences as compared to other types of facilities, and thus would not be held to the same stringent safety requirements as production facilities, for example. *See id.* Moreover, pursuant to 10 C.F.R. § 50.13, even applicants who wish to construct and operate a power reactor facility are

not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 379 (2001).

Contention SLOMFP EC-1 thus appears to directly challenge the Commission's rules regarding destructive acts of malice or insanity by enemies of the United States. As we have noted above, contentions that question existing NRC regulations are inadmissible as a matter of law. SLOMFP does argue that because its contention EC-1 is an environmental contention based on the National Environmental Policy Act (NEPA), rather than a safety contention based on the Atomic Energy Act and implementing NRC regulations, 10 C.F.R. § 2.758 does not apply and this Board may admit the contention. In our view, however, whether contention SLOMFP EC-1 is characterized as a safety contention or as an environmental issue statement is of no moment, because "the rationale for 10 CFR § 50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities." *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 487 (2001), *referral accepted,* CLI-02-3, 55 NRC 155 (2002). Therefore, we find that contention SLOMFP EC-1 is inadmissible.

However, in light of the Commission's ongoing "top to bottom" review of the agency's safeguards and physical security programs, including those related to ISFSIs, which was commenced following the events of September 11,[10] we will refer our ruling on contention SLOMFP EC-1 to the Commission for its consideration.

SLOMFP EC-2: Failure To Fully Describe Purposes of Proposed Action or To Evaluate All Reasonably Associated Environmental Impacts and Alternatives

CONTENTION: NRC regulations at 10 C.F.R. § 51.45(b) require a license applicant to describe, among other things, a statement of the purposes of the proposed action. PG&E's Environmental Report fails to meet this requirement because it does not completely disclose the purposes of the proposed ISFSI. In describing the need for the facility, the ER states that additional spent fuel storage capacity is needed at Diablo Canyon to accommodate the additional spent fuel that will be generated through the operating life of each unit. ER at 1.2-1. Yet, the capacity of the proposed ISFSI would be two or three times greater than what is needed to fulfill that purpose.

[10] *See* CLI-02-23, 56 NRC 230, 236 (2002) (in denying request by SLOMFP and other Petitioners to suspend this proceeding, discussing ongoing comprehensive security review).

It appears that PG&E may have an additional, unstated purpose, i.e., to provide spent fuel storage capacity during a license renewal term. PG&E implies, in setting forth its financial qualifications in Section 1.5 of the License Application, that the proposed ISFSI could be used to accommodate spent fuel offloaded from the spent fuel pools after the present license terms of Diablo Canyon Units 1 and 2 have expired. However, if PG&E proceeds with its publicly stated plan to obtain license renewals for these units, the capacity of the proposed ISFSI would accommodate spent fuel generated during a substantial part of the license renewal term. Thus, the excess capacity of the proposed ISFSI — beyond that needed to accommodate the additional spent fuel that will be generated during the remaining license terms of the two Diablo Canyon units — could serve two different purposes. Neither purpose is discussed explicitly in the ER, and the License Application discusses only one of the purposes — namely, offloading the pools. Moreover, the discussion in the License Application is so oblique that PG&E's true purpose cannot be divined. Accordingly, the ER must be revised to fully disclose the purposes of the proposed facility.

A revision of the statement of purpose for the proposed ISFSI would require significant changes to the ER. As the courts have recognized, the statement of purpose and need in an EIS determines the range of alternatives that must be considered. *City of Carmel-by-the-Sea v. U.S. Department of Transportation,* 123 F.3d 1142, 1155 (9th Cir. 1995); *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 195 (D.C. Cir. 1991); *City of New York v. United States Department of Transportation,* 715 F.2d 732, 743 (2nd Cir. 1983). As the Court observed in *[Citizens] Against Burlington,* "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." 938 F.2d at 196.

If, as it appears, the purposes of the proposed ISFSI could include providing for spent fuel storage during an extended or renewed license term, then it is appropriate to consider whether previous environmental analyses support renewed authorization to continue storing spent fuel at the Diablo Canyon site in the manner currently provided. In particular, the ER must "contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv). The intervenors recognize that consideration of environmental impacts of spent fuel storage in a license renewal term is generally precluded in license renewal cases, because these environmental impacts were previously addressed in NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (1996). *See, in particular,* Section 6.4.6.3. However, the NRC's NEPA regulations create an exception to this prohibition, by requiring consideration of "new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(iv).

In this case, the ER should address new information showing that (a) previous NRC environmental analyses of the risks of high-density pool storage of spent fuel considerably underestimate the risk of a spent fuel pool fire; and (b) in light of the terrorist attacks of September 11, 2001, and other events, the adequacy of design for both pool storage and dry storage has been demonstrated to be inadequate to protect against the potentially catastrophic effects of destructive acts of malice or insanity. The ER should consider a range of alternatives for extended spent fuel storage that will avoid or mitigate these risks.

DISCUSSION: SLOMFP Contentions at 28-38; PG&E Response to SLOMFP Contentions at 50-58; Staff Response to SLOMFP Contentions at 15-16; Tr. at 174-219.

RULING: SLOMFP proffers a number of bases in connection with its contention EC-2, which is supported by the declaration of Dr. Gordon R. Thompson. SLOMFP submits that the ER understates the ISFSI's capacity relative to the storage needed during the current DCPP operating license terms and, as a result, the statement of purpose must be revised to incorporate a discussion of storage during an extended term following license renewal. SLOMFP also contends that there is new information that shows not only that the risks of spent fuel pool fires are higher than previously estimated, but also that pools and casks alike are vulnerable to destructive acts of malice or insanity. In addition, according to SLOMFP, the NRC has acknowledged the potential for sabotage-induced pool fires. SLOMFP further argues that previous environmental analyses are inadequate and that the ER needs fully to address impacts and alternatives. Both PG&E and the Staff oppose the admission of this contention, while SLOC and PSLHD support its admission.

SLOMFP calculates, based on the remaining fuel cycles at DCPP, that the capacity of the ISFSI should be two to three times smaller than what has been proposed by PG&E and infers that PG&E most likely is contemplating license renewal. PG&E, however, has very plainly stated that the proposed ISFSI "is designed to store all of the spent fuel and associated nonfuel hardware resulting from the operation of the Diablo Canyon Power Plant Units 1 and 2 through 2021 and 2025 respectively," Application ¶ 3.0, at 8, and supplied calculations that confirm that statement, *see* PG&E Response to SLOMFP Contentions at 53-54. The Staff too has concluded that the proposed storage capacity is mathematically consistent with what would be needed to store all of the spent fuel generated over the lifetimes of DCPP Units 1 and 2, including capacity needed to support decommissioning at that juncture. Notwithstanding SLOMFP's assertion that PG&E could use the decommissioning-related capacity for storage during a renewal term, *see* Tr. at 177, we fail to see how an application that accurately describes what the proposed capacity will be and provides a logical basis for that capacity is deficient so as to create a material dispute for contention admission purposes.[11] *Cf. Shearon Harris,* LBP-99-25, 50 NRC at 34 (particularized showing needed to demonstrate applicant will act contrary to terms of regulatory requirement). Consequently, we find that revision of the ER's statement of purpose is unnecessary, as is further consideration of other alternatives.

Further, in response to the information proffered by SLOMFP regarding the risks of spent fuel pool fires, PG&E and the Staff counter that this new information

[11] This is particularly so in this instance, given that the 20-year term of the proposed DCPP ISFSI license would need to be extended prior to the beginning of any DCPP operating license renewal period, thus seemingly affording an opportunity for hearing consideration of the impacts upon the ISFSI renewal of any reactor-renewal-driven expansion.

is beyond the scope of this proceeding. As we observed in Section II.C.1 above, contentions that concern matters outside the scope of the proceeding, as defined by the notice of hearing or opportunity for hearing, must be denied. The notice of opportunity for hearing for this proceeding indicated that at issue is PG&E's application for a Part 72 license to possess SNF and other radioactive materials associated with an SNF dry cask storage system at an ISFSI. *See* 67 Fed. Reg. at 19,600. Environmental impacts regarding spent fuel pool fires thus are, on their face, beyond the scope of this licensing proceeding, at least absent a demonstration of how an issue associated with wet storage is applicable here, which SLOMFP has not provided.

In several of the contention's bases, SLOMFP also rehashes arguments concerning acts of destruction or sabotage that were advanced in support of contention SLOMFP EC-1. Because we have previously addressed these arguments in our discussion of that contention above, we will not repeat our reasons for rejecting them here. At the same time, we also will refer our ruling on this contention to the Commission to the extent destruction and sabotage matters are proffered in support of admission of this contention.

Finally, SLOMFP argues that the previous analyses conducted in NUREG-0575, Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel (Aug. 1979) and NUREG-1437, Generic Environmental Impact Statement for License Renewal, Vol. 1 (May 1996), are inadequate because they do not consider the potential for spent fuel pool accidents. SLOMFP further challenges other technical studies reviewed by the NRC on the basis they do not consider the more severe consequences of a partial pool drainage in addition to total and instantaneous pool drainage. PG&E and the Staff once again assert that this basis be rejected on the grounds that impacts associated with spent fuel pool accidents are beyond the scope of this proceeding and that it is an impermissible challenge to NRC regulations.

As we noted in our earlier discussion of this contention, SLOMFP has not demonstrated how environmental impacts of spent fuel pool accidents are relevant to this ISFSI licensing proceeding. Without such a showing, we find that these additional concerns relative to spent fuel pool accidents are beyond the scope of this proceeding. Because SLOMFP has failed to provide any basis for contention SLOMFP EC-2 that satisfies the requirements of section 2.714(b) for this contention, we must deny its admission.

SLOMFP EC-3: Failure To Evaluate Environmental Impacts of Transportation

CONTENTION: In violation of NEPA, PG&E's ER completely fails to evaluate the reasonably foreseeable environmental impacts of transporting spent fuel away from the Diablo Canyon ISFSI at the end of the license term of the ISFSI, either to a repository or another

interim storage site. In failing to address these reasonably foreseeable impacts, PG&E violates [NEPA], and NRC implementing regulations at 10 C.F.R. § 51.45(b)(1) (requiring ER to address the impacts of the proposed action on the environment) and 10 C.F.R. § 72.108 (requiring the applicant to address the impacts of spent fuel transportation within the "region" of the proposed ISFSI).

DISCUSSION: SLOMFP Contentions at 39-40; PG&E Response to SLOMFP Contentions at 58-67; Staff Response to SLOMFP Contentions at 16-18; Tr. at 219-37.

RULING: Again relying on the support of Dr. Gordon Thompson, with this contention SLOMFP challenges the adequacy of the PG&E ER's discussion of transportation-related impacts, specifically those that would arise from the transport of any spent fuel to a final geologic repository, such as the proposed Yucca Mountain, Nevada facility, or an interim storage facility, such as the proposed Skull Valley, Utah Private Fuel Storage ISFSI. According to SLOMFP, such SNF transportation is reasonably foreseeable at the end of the proposed DCPP ISFSI's 20-year license. As such, SLOMFP claims its impacts must be considered in the ER, including a discussion of impacts arising from normal conditions, reasonably foreseeable severe and beyond-design-basis accidents, and sabotage/terrorist attacks and an analysis of transportation alternatives, including transportation deferral. Alternatively, according to SLOMFP, if there is some generic EIS that already addresses these matters, then the PG&E ER must identify that source and explain why and to what extent it applies. SLOC, PSLHD, and CEC support admission of this contention as well.

Admission of contention SLOMFP EC-3 is opposed by PG&E and the Staff on a number of grounds. According to the Staff, the hearing notice for this proceeding limits its subject matter to ISFSI facility construction and operation, so that subsequent transportation activities are outside its scope. Further, citing 10 C.F.R. § 72.108 and its regulatory history, both PG&E and the Staff maintain the NEPA responsibility arising under that provision to address regional transportation impacts is inapplicable to this proceeding. This is so, PG&E asserts, because section 72.108 was intended only to encompass impacts of transporting SNF into a region, and so in this instance the proposed action covers only onsite, rather than offsite, transportation impacts in that fuel is not moved offsite in connection with this co-located ISFSI. Similarly, the Staff declares that no section 72.108 evaluation is necessary consistent with 10 C.F.R. § 72.40(a), (c), which indicate that absent new information any Part 72, Subpart E siting evaluation requirement, including section 72.108, need not be revisited if covered by a prior licensing action, including a Part 50 construction permit. Further, according to PG&E, any offsite transportation impacts, including accidents, are considered in either the Department of Energy's EIS for the proposed Yucca Mountain HLW repository or the NRC EIS for the proposed Skull Valley, Utah ISFSI facility. Moreover, PG&E

asserts that any transportation impacts are reasonably foreseeable impacts arising from operation of the DCPP, not the ISFSI, as is reflected in operation-related generic analyses of such impacts in Table S-4, 10 C.F.R. § 51.52, and WASH-1238/NUREG-75/038, Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants (Dec. 1972 & Supp. 1, Apr. 1975). Finally, PG&E declares that neither sabotage/terror/warfare impacts nor transportation alternatives, such as deferral, need be addressed, the former for the reasons discussed above regarding contention SLOMFP EC-1, and the latter because the alternatives suggested by SLOMFP would not serve the purpose of the proposed action, which is SNF storage.

The applicability of section 72.108 requirement to assess regional transportation impacts under section 72.40(a)(2) is subject to the section 72.40(c) caveat that, in the absence of new information, such a Subpart E siting analysis that has been provided as part of a previous licensing action need not be reevaluated. Although the DCPP construction permit analysis of transportation impacts appears to predate Table S-4's applicability, PG&E had indicated such analysis nonetheless was done in the licensing documents, *see* Tr. at 230, and, with the exception of its already rejected assertion that sabotage/terror/warfare impacts need be included, nothing provided by SLOMFP has challenged that analysis. Accordingly, we find this contention inadmissible as failing to show a material factual or legal dispute, although we once again will refer our ruling in this regard to the Commission to the extent terrorism and sabotage matters are proffered in support of its admission.

3. *Interested Governmental Entity Issues*

a. *Admission Requirements for Issues Raised by Section 2.715(c) Participants*

DISCUSSION: Staff Position on Section 2.715(c) Participant Issues at 2-9; PG&E Position on Section 2.715(c) Participant Issues at 4-14; SLOC Position on Section 2.715(c) Participant Issues at 5-12; PSLHD Position on Section 2.715(c) Participant Issues at 2-3; CEC Position on Section 2.715(c) Participant Issues at 1-7; Tr. at 119-21, 125-29, 131-33, 146-48, 150-60, 165, 167-68.

RULING: Before ruling on the admissibility of the issues raised by PSLHD and SLOC, we first address the question of whether issues submitted by 10 C.F.R. § 2.715(c) participants must meet the same stringent requirements as contentions proffered by section 2.714 Intervenors. Both PG&E and the Staff argue that any new issues interested governmental entities wish to raise should be held to the same standard as contentions submitted by section 2.714 Intervenors. SLOC, on the other hand, asserts that the standard should be less rigorous. According to SLOC, given the unique role that interested governmental entities play in

protecting the public's health and safety, they should be permitted to bring their own issues of concern to the Board's attention, even if those issues would not qualify as contentions under section 2.714(b). For its part, PSLHD adopts the position and arguments of SLOC, while CEC argues that it is within the Board's discretion to permit a more flexible standard than the section 2.714(b) requirements when considering the admission of issues submitted by interested governmental entities.

For the reasons set forth below, 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 the purposes of sections 2.714 and 2.715(c).

On their face, sections 2.714(b) and 2.715(c) do not indicate with what level of specificity interested governmental entities must plead their issues. Section 2.714(b)(2) delineates only what "the petitioner" must provide with respect to each contention and nowhere mentions "interested governmental entities" or "section 2.715(c) participants." Section 2.715(c) states that a qualifying interested governmental entity will be given a reasonable opportunity to participate in the proceedings, including the ability to introduce evidence, interrogate witnesses, and advise the Commission without requiring it to take a position with respect to the issues being litigated. With respect to the issues that an interested governmental entity does take a position on, the provision indicates the presiding officer may require the entity, prior to the hearing, to indicate with "reasonable specificity" on which issues it wishes to participate. Section 2.715(c) does not, therefore, explicitly address how new issues raised independently by an interested governmental entity — as opposed to mere participation in discussions regarding contentions submitted by a section 2.714 petitioner — are to be pled. Because the text of the regulations leaves this question essentially unanswered, we turn to the agency's case law and regulatory history for guidance.

Prior to 1989, section 2.714(b) merely required petitioners to submit a list of contentions along with a statement of the basis for each contention with reasonable specificity. *See* 51 Fed. Reg. 24,365, 24,366 (July 3, 1986) (statement of considerations for proposed rule to raise contentions admission threshold). In practice, a petitioner could meet this low threshold by simply copying the contentions submitted by another petitioner in a completely unrelated proceeding involving a different facility. *See id.* At the same time, in connection with interested governmental entities, Appeal Board and Licensing Board decisions preceding the 1989 revisions to section 2.714(b) recognized that interested governmental entities could participate in a proceeding without offering contentions of their own. *See Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 246-47 (1981). They also determined, however, that once admitted as

a section 2.715(c) participant, "an 'interested state' must observe the procedural requirements applicable to other participants." *River Bend,* ALAB-444, 6 NRC at 768. Thus, with respect to late-filed contentions, the Licensing Board in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1139-40 (1983), held that a county, notwithstanding its status as a section 2.715(c) participant, could not interject new issues into the case more than 1 year after the hearing without satisfying section 2.714(a)(1)'s test for late-filed contentions. Even more directly on point is the Licensing Board's decision in the above-cited *Diablo Canyon* operating license proceeding, in which the Governor of California sought to participate in the proceeding as an interested governmental entity on certain subject matters. *Diablo Canyon,* LBP-81-5, 13 NRC at 246. The Licensing Board there stated that while the Governor was not required to proffer contentions of his own and was free to participate in the litigation of any admitted contentions, "if the Governor wishes to raise specific issues not otherwise accepted by the Board he must comply with the requirements of 10 CFR 2.714(b) for acceptable contentions, just as any other party must." *Id.* at 246-47 (citing *River Bend,* ALAB-444, 6 NRC 760 (1977)). Thus, prior to 1989, once admitted to the proceeding as an interested governmental entity, a section 2.715(c) participant that wished to file timely or untimely contentions of its own was required to meet the same procedural standards as those required of a section 2.714 intervenor.

The 1989 revisions to section 2.714(b) substantially raised the threshold for the admissibility of petitioner contentions. Section 2.715(c) was not amended, however, leaving it unclear what effect the 1989 revisions were intended to have on issues submitted by section 2.715(c) participants. Relying on the existing case law prior to 1989 that held section 2.715(c) participants to section 2.714's procedural requirements when they wished to interject new issues into the proceeding, the Staff argues that the revised section 2.714 contention admission requirements also apply to section 2.715(c) participants and that there is no evidence that indicates otherwise.

Although there seems to be little case law on this issue, at least one Licensing Board decision after the effective date of the 1989 rule change appears to support the Staff's position. In *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427 (1990), the Commonwealth of Massachusetts was admitted to the proceeding as a section 2.714 intervenor. After another intervenor withdrew, the Commonwealth attempted to adopt the withdrawn party's contention as its own and continue litigating it. The Licensing Board held that once a sponsoring intervenor drops out of the proceeding, its contention does not have a life of its own, and not even "the Commonwealth's avowed status as an 'interested state' avail[s] to it any special power to pick up issues dropped by other intervenors. *If it wishes to have issues heard in an NRC proceeding, it 'must observe the procedural requirements applicable to other*

participants.' " *Id.* at 430-31 (quoting *River Bend*, ALAB-444, 6 NRC at 768-69 (1977)) (emphasis added). This post-1989 rule change determination provides some support for holding interested governmental entities to the contention admissibility standards of section 2.714(b) for any new issues they wish to litigate.

Consideration of the policy rationales underlying sections 2.714(b) and 2.715(c) further support this conclusion. As proposed, the purpose of the 1989 amendments to section 2.714 was to "sharpen the issues in dispute throughout the prehearing and hearing phases and ensure that the resources of all parties are focused on real rather than imaginary issues." 51 Fed. Reg. at 24,366. Section 2.715(c) and its statutory source, section 274(*l*) of the Atomic Energy Act, 42 U.S.C. § 2021(*l*), were designed "to accord to States the privilege of fully participating in licensing proceedings and advising the Commission on the resolution of issues considered therein without being obliged in advance to set forth any affirmative contentions of its own (as is required of private intervenors)." *Project Management Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 393 (1976). As a consequence, requiring interested governmental entities to conform to the requirements of section 2.714(b) for any new issues they wish to litigate is in no way contrary to the intent of section 2.715(c), nor does it hold them "hostage" to the issues raised by private parties, as SLOC argues. SLOC Position on Section 2.715(c) Participant Issues at 12. Rather, it preserves the underlying purposes of both provisions by preventing parties from having to expend resources on litigating unsubstantiated issues, while at the same time affording interested governmental entities a full opportunity to be heard on the issues being litigated without imposing on them the burden of having to submit a formal contention just to be able to participate in the proceedings.

Moreover, because the ultimate burden of proof rests with the applicant in this type of action, it is not clear as a procedural matter against what standard we would judge the applicant's response to an "informal" issue that did not meet the requirements of section 2.714(b). In other words, if interested governmental entities were allowed to introduce issues under a standard less rigorous than section 2.714(b), is the applicant then to be permitted to respond to the issue with a less comprehensive showing? The Staff has indicated that any party choosing to respond to the issue, including the Applicant and the Staff, would be obligated to respond to any issue raised with the same degree of evidence as if it were a contention admitted under section 2.714(b). Ultimately, permitting section 2.715(c) participants to interject "informal" issues for litigation would not only undermine the purposes of section 2.714(b), but would remove any incentive for governmental entities to participate in the proceedings as full intervenor parties.

As was noted very recently in the previously referenced PG&E license transfer case, "[t]he Commission 'has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities,

etc.' " *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 345 (2002) (quoting *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 344 (1999)). We thus welcome the input of SLOC, PSLHD, CEC, and ABCSD (as well as DCISC, albeit under a different procedural regime) on any contentions that are admitted for litigation in this proceeding. For any new issues these interested governmental entities wish to raise on their own, however, they must satisfy the standards for contentions set forth in section 2.714(b).

Having thus established the standard for admissibility of issues proffered by section 2.715(c) participants, we turn to the issues independently submitted by PSLHD and SLOC.

b. PSLHD Issue

PSLHD Emergency Planning (EP-1): Emergency Response Plan Adequacy

CONTENTION: Although PSLHD is aware of 10 C.F.R. § 72.32(c), PSLHD has significant concerns regarding the adequacy of the San Luis Obispo County Nuclear Power Plant Emergency Response Plan (ERP) and believes the ERP should be considered in PG&E's current application.

DISCUSSION: PSLHD Issues at 14; Staff Response to PSLHD Issues at 2-4; PG&E Response to SLOC and PSLHD Issues at 3-7; Tr. at 129-30, 137-41, 144-46, 164-66.

RULING: PSLHD submits only one issue for consideration, which we refer to as Emergency Planning (EP)-1.[12] PSLHD argues that the existing ERP is more than 20 years old and does not reflect significant demographic and physical changes to the Diablo Canyon area that have occurred since its drafting. PSLHD outlines five areas of particular concern: (1) radio reception for local emergency alert system stations is poor or non-existent in Avila Valley; (2) evacuation time estimates would be more accurate if the latest technology were used; (3) risk factors such as terrorist attacks, human error, and seismic events may have been downplayed in the ERP; (4) population estimates and established emergency escape routes for Avila Valley contained in the ERP are outdated; and (5) the ERP does not accurately recognize population shifts in the emergency planning zones, particularly during summer weekend holidays.

While SLOC, CEC, and SLOMFP support admitting issue PSLHD EP-1, both PG&E and the Staff oppose its admission. In their pleadings, PG&E and the Staff both cite 10 C.F.R. § 72.32(c), which provides:

[12] Although the Board directed otherwise, *see* Board Order on Interested Governmental Entity Issue Identification at 2, because PSLHD did not provide a concise statement outlining its concern, this issue statement is the Board's paraphrase of PSLHD's summary discussion regarding its issue.

(c) For an ISFSI that is:
(1) located on the site, or
(2) located within the exclusion area as defined in 10 CFR part 100, of a nuclear power reactor licensed for operation by the Commission, the emergency plan required by 10 CFR 50.47 shall be deemed to satisfy the requirements of this section.

The Staff points out that because the emergency planning requirements set forth in section 50.47, which apply to reactors, are much more demanding than those pertaining to ISFSIs, the existing EP for the reactor is sufficient for ISFSIs that will be located on the site of a previously licensed reactor, such as the one being proposed by PG&E. In addition, PG&E argues that PSLHD's challenges to the ERP are beyond the scope of this proceeding because they only concern general ongoing operational matters, and not matters directly related to the proposed ISFSI.

Because section 72.32(c) relieves PG&E of having to draft a new EP or amend an existing EP, any issues or contentions that seek such relief are essentially a challenge to that regulation and so are inadmissible pursuant to 10 C.F.R. § 2.758. They seemingly are outside the scope of this proceeding as well. Although concerns regarding the EP approved for DCPP are beyond the scope of this proceeding and are not open to relitigation at this time, arguably an emergency planning concern that relates specifically to the proposed ISFSI might be admissible. PSLHD, however, has failed to demonstrate in its pleading how its concerns about changes to the demographics and physical characteristics of Avila Valley within the past 20 years would specifically impact emergency planning as it relates to the possession of spent fuel in the proposed ISFSI. For these reasons, we find that issue PSLHD EP-1 is inadmissible.

c. SLOC Issues

(i) SLOC TECHNICAL ISSUES

SLOC TC-1: The Corporate Identity and Structure of the Applicant Are Not Adequately Identified

DISCUSSION: SLOC Issues at 3-5; PG&E Response to SLOC Issues at 7-9; Staff Response to SLOC Issues at 3-5; Tr. at 271-74, 290, 298-314, 323-27, 339-42, 344-47.

RULING: With this issue, SLOC seeks to challenge the adequacy of the PG&E application to the extent that it identifies other corporate entities that would be created in the event the pending bankruptcy reorganization gains judicial approval. According to SLOC, the possibility exists that with such approval, one or more of these new entities would be responsible for the construction, operation, and decommissioning the ISFSI. As a consequence, SLOC maintains, until the

reorganization is approved, any financial qualifications evaluation relative to this application must be postponed. SLOMFP, PSLHD, and CEC support the admission of this issue. Both PG&E and the Staff, however, oppose accepting this issue, asserting it is essentially identical to contention SLOMFP TC-3 and should be rejected for the same reasons.

For the reasons we have provided above relative to contention SLOMFP TC-3, this issue is not admitted for further consideration at this time.[13]

SLOC TC-2: The Financial Qualifications of the Applicant Are Not Adequately Demonstrated

DISCUSSION: SLOC Issues at 5-6; PG&E Response to SLOC Issues at 9-12; Staff Response to SLOC Issues at 5; Tr. at 271-74, 292-93, 298-314, 323-27, 339-42, 344-47.

RULING: With this issue, SLOC challenges the adequacy of the financial qualifications information provided by PG&E in its Part 72 application to the extent it relies upon the creditworthiness/borrowing capabilities and the electric utility status of its bankruptcy reorganization successor. SLOMFP, CEC, and PSLHD support its admission. PG&E and the Staff oppose admission of this issue, the former essentially for the reasons it gave in response to contention SLOMFP TC-2, while the latter contends that it is inadmissible because of its post-bankruptcy reorganization focus.

Although this issue is similar to contention SLOMFP TC-2 in its concerns about PG&E assertions about creditworthiness and utility status as a financial qualifications basis in light of the pending bankruptcy proceeding, we agree with the Staff that, in contrast to the admitted portions of issue SLOMFP TC-2, its post-bankruptcy reorganization focus renders it inadmissible at this juncture.

(ii) SLOC ENVIRONMENTAL ISSUE

SLOC EC-1: The ER does not contain an adequate analysis of alternatives: the ER fails to adequately consider and analyze (A) alternative sites and associated security measures, and (B) alternative security plans.

DISCUSSION: SLOC Issues at 7-11; PG&E Response to SLOC and PSLHD Issues at 12-17; Staff Response to SLOC Issues at 6-8; Tr. at 121-24, 130-31, 133-46, 160-66.

RULING: Although bearing a general introduction regarding the need to discuss alternatives, the crux of this issue is provided in subissues (A) and (B).

[13] Moreover, to the extent the basis of this contention appears to mirror the concerns about the continuation of this proceeding expressed as grounds for the request to stay this proceeding previously ruled on by the Board, it likewise fails to provide grounds for further consideration in this proceeding. *See supra* note 2.

With regard to its subissue EC-1.A, SLOC argues that PG&E failed to consider important factors, such as vulnerability to offshore attacks post-September 11, when selecting the site for its ISFSI. SLOC also asserts that the ER's failure to evaluate security-related features for alternative sites and failure to consider reasonable alternatives violates 10 C.F.R. § 72.94 and NEPA, respectively. SLOC contends in subissue SLOC EC-1.B that PG&E's cost-benefit analysis may have failed to take into account the costs SLOC would bear in training its security personnel and implementing the ERP. Moreover, SLOC argues, because failure of the ISFSI's physical security plan could have substantial environmental consequences for the county's citizens, PG&E should be required to evaluate whether alternative security measures would reduce the ISFSI's exposure to offshore attack. Finally, SLOC asserts that review of the ERP is necessary so that SLOC can better understand and prepare for its increased responsibilities under the ERP.

While SLOMFP, CED, and PSLHD support the acceptance of SLOC EC-1 in its entirety, both PG&E and the Staff oppose the admission of any part of the issue into this proceeding. In their view, subissue SLOC EC-1.A largely incorporates the same post-September 11 security arguments advanced in contention SLOMFP EC-1. As we noted in our discussion of SLOMFP's contention EC-1 above, current NRC regulations do not require licensees to plan for or to design their facilities to protect against attacks by enemies of the United States. *See also* 10 C.F.R. §§ 50.13, 73.51(b)(1). Because subissue SLOC EC-1.A appears to challenge the Commission's rules regarding acts of destruction and sabotage, it must be denied as a matter of law, regardless of whether the issue is characterized as a safety issue or as an environmental one under NEPA. As was the case previously, however, we make this aspect of this issue a part of our referral to the Commission.

Likewise, for the reasons that we found issue PSLHD EP-1 to be inadmissible, we find subissue SLOC EC-1.B to be inadmissible. As we discussed relative to issue PSLHD EP-1 above, for ISFSIs that will be located on the site of a previously licensed reactor, section 72.32(c) relieves a licensee of having to create a new ERP or amend an existing ERP. SLOC's concern about the adequacy of the existing DCPP ERP is, therefore, a challenge to an agency regulation that renders issue SLOC EC-1.B inadmissible. Furthermore, the subject of emergency planning is outside the scope of this proceeding, unless it can be demonstrated that there are specific concerns with the ERP that are directly related to the proposed

ISFSI. SLOC has raised none that provide an adequate basis for its issues.[14] We, therefore, deny the admission of subissue SLOC EC-1.B as well.

III. ADMINISTRATIVE MATTERS

As we observed during the initial prehearing conference, *see* Tr. at 245, this ISFSI licensing proceeding is subject to the hybrid hearing process delineated in 10 C.F.R. Part 2, Subpart K, if any party wishes to invoke those procedures. *See also* 67 Fed. Reg. at 19,602. Pursuant to Subpart K, following a discovery period of up to 90 days, which can be extended upon a showing of exceptional circumstances, the parties simultaneously submit a detailed written summary of all facts, data, and arguments upon which each party intends to rely to support or refute the existence of a genuine and substantial dispute of fact regarding any admitted contentions. *See* 10 C.F.R. §§ 2.1111, 2.1113(a). Subsequently, the presiding officer conducts an oral argument, in which the parties address whether an adjudicatory proceeding is warranted because there are specific facts in genuine and substantial dispute that can be resolved with sufficient accuracy only by the introduction of evidence. *See id.* § 2.1115(b). Thereafter, the presiding officer issues a decision that designates the disputed issues of fact for an evidentiary hearing and resolves any other issues. *See id.* § 2.1115(a).

Within 10 days of an order granting a hearing request in a proceeding such as this one, a party may invoke Subpart K procedures by filing a written request for oral argument. *See id.* § 2.1109(a)(1). Accordingly, if PG&E, SLOMFP, or the Staff wishes to invoke the Subpart K procedures, it must file a request within 10 days of the date of this Order, or on or before *Thursday, December 12, 2002.* If such a request is received, the Licensing Board thereafter will issue an order regarding further scheduling.

IV. CONCLUSION

We find that Petitioners SLOMFP, SLCSC, SLOCAN, CCPEC, AVAC, and Ms. Peg Pinard have made showings sufficient to establish their standing to intervene as of right in this proceeding. Further, we find that one of these six Petitioners' eight contentions — SLOMFP TC-2 — is supported by bases adequate to warrant further inquiry so as to be admitted for litigation in this proceeding. Accordingly, pursuant to 10 C.F.R. § 2.714, we grant the hearing

[14] The only concern that SLOC has voiced that even comes close to being specific to the ISFSI is its statement that it does not understand what increased responsibilities it may bear once the ISFSI is operational. Although, as the Board suggested during the prehearing conference, this certainly should be the subject of additional consultation between PG&E and SLOC, *see* Tr. at 162-63, as presented it is not a matter that establishes the basis for an admissible issue.

requests/intervention petitions of these Petitioners and admit them as parties to this proceeding. We also grant SLOC, PSLHD, CEC, and ABCSD interested governmental entity participant status in accord with 10 C.F.R. § 2.715(c). However, because the issues raised by SLOC and PSLHD do not satisfy the section 2.714 contention admissibility standards, we do not admit any issues raised independently by these interested governmental entities for litigation in this proceeding.

For the foregoing reasons, it is, this second day of December 2002, ORDERED that:

1. Relative to the contention specified in paragraph three below, the hearing requests/intervention petitions of SLOMFP, SLCSC, SLOCAN, CCPEC, AVAC, and Peg Pinard are *granted* and they are *admitted* as parties to this proceeding, with SLOMFP acting as Lead Intervenor.

2. The hearing request/intervention petitions of ECSLO, CLDF, SMART, SLOCGPI, NAPF, and VCCSF are *denied* and the hearing request/intervention petition of Lorraine Kitman is *dismissed* as withdrawn.

3. Contention SLOMFP TC-2 is *admitted* for litigation in this proceeding as outlined in Section II.C.2.a above.

4. The following SLOMFP contentions are *rejected* as inadmissible for litigation in this proceeding: TC-1, TC-3, TC-4, TC-5, EC-1, EC-2, and EC-3.

5. The SLOC, PSLHD, CEC, and ABCSD requests for interested governmental entity participant status under 10 C.F.R. § 2.715(c) are *granted.*

6. The DCISC request for interested governmental entity participant status under 10 C.F.R. § 2.715(c) is *denied,* although DCISC may participate in this proceeding as an *amicus curiae* in accordance with the procedures set forth in Section II.B above.

7. The following issues submitted by interested governmental entities are *rejected* as inadmissible for litigation in this proceeding: issue PSLHD EP-1 and issues SLOC TC-1, SLOC TC-2, and SLOC EC-1.

8. In accordance with 10 C.F.R. § 2.730(f), the Licensing Board's rulings in Sections II.C.2.b and II.C.3.c(ii) above regarding the post-9/11 sabotage/terrorism aspects of contentions SLOMFP EC-1, SLOMFP EC-2, SLOMFP EC-3, and issue SLOC EC-1 are *referred* to the Commission for further consideration and action, as appropriate.

9. The parties are to file any request for oral argument under 10 C.F.R. § 2.1109(a)(1) in accordance with the schedule established in Section III above.

10. Pursuant to the provisions of 10 C.F.R. § 2.714a(a), as it rules upon an intervention petition, this Memorandum and Order may be appealed to the Commission within 10 days after it is served.

THE ATOMIC SAFETY AND LICENSING BOARD[15]

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 2, 2002

[15] Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel or the representative for (1) Applicant PG&E; (2) Petitioners SLOMFP, *et al.*; (3) SLOC, PSLHD, CEC, DCISC, and ABCSD; and (4) the Staff.

Attachment 2

Cite as 56 NRC 230 (2002) CLI-02-23

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. 72-26-ISFSI**

PACIFIC GAS & ELECTRIC COMPANY
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)

November 21, 2002

The Commission denies the request of several Petitioners to suspend this independent spent fuel storage installation licensing proceeding pending the Commission's comprehensive review of measures to protect against terrorist attack.

RULES OF PRACTICE: SEEKING RELIEF WITHOUT FORMAL PARTY STATUS

As the San Luis Obispo Chapter of the Surfrider Foundation has never made a hearing request or sought permission to participate in this adjudication on any other basis, it has no legitimate place in this proceeding. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 398 (2001), *reconsideration denied,* CLI-02-2, 55 NRC 5 (2002).

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RULES OF PRACTICE: SCOPE OF PROCEEDING; CHALLENGE TO COMMISSION REGULATIONS

The San Luis Obispo Mothers for Peace ("SLOMFP") is not free to use an adjudication as a means to enhance existing NRC orders or regulations. *See Bellotti v. NRC,* 725 F.2d 1380 (D.C. Cir. 1983) (hearing petitioners may not seek requirements more extensive than those imposed by NRC order); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 470 (2001) (hearing petitioners may not challenge NRC rules). *See also* 10 C.F.R. § 2.758. Thus, we decline SLOMFP's request to expand the current ISFSI proceeding to litigate the usefulness of the particular security measures that SLOMFP suggests.

RULES OF PRACTICE: SCOPE OF PROCEEDING; LITIGABILITY OF ISSUES

SLOMFP requested relief extending to the two Diablo Canyon power plants and to power plants and ISFSIs at other sites. The 10 C.F.R. Part 50 Diablo Canyon power plant licenses are not at issue in this 10 C.F.R. Part 72 proceeding. And SLOMFP's even broader requests involving other licensees are also not cognizable in this individual adjudicatory proceeding. *See Savannah River,* CLI-01-28, 54 NRC at 399 n.9.

RULES OF PRACTICE: MOTIONS

Because SLOMFP's request does not fit comfortably in any specific category, we will treat it as a general motion brought under the procedural requirements of 10 C.F.R. § 2.730. Such a motion should initially be addressed to the Presiding Officer when a proceeding is pending. *See* 10 C.F.R. § 2.730(a). The Commission does not encourage participants in adjudicatory proceedings to attempt to bypass the Board by filing motions or petitions directly with the Commission. *See Savannah River,* CLI-01-28, 54 NRC at 398 n.7.

RULES OF PRACTICE: SUSPENSION OF PROCEEDING

TERRORISM

By not suspending operating licenses in the 14 months that have elapsed since the terrorist attacks of September 11, 2001, the Commission has implicitly concluded that *continued operation* of power plants and ISFSIs does not pose an imminent risk to the public health and safety and is not inimical to the common defense and security.

RULES OF PRACTICE: SUSPENSION OF PROCEEDING

TERRORISM

Last year we enunciated the considerations we apply to *pending licensing proceedings* to decide whether to postpone them to await ongoing review of the agency's terrorism-related policies. "[W]e consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001); *accord Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 389-90 (2001); *Savannah River*, CLI-01-28, 54 NRC at 399.

RULES OF PRACTICE: SCOPE OF PROCEEDING

In an individual adjudicatory proceeding, a request to suspend other proceedings is not cognizable. *See Savannah River*, CLI-01-28, 54 NRC at 399.

RULES OF PRACTICE: SUSPENSION OF PROCEEDING

TERRORISM

SLOMFP has not advanced any arguments that alter our perception that immediate suspension of licensing proceedings is unwarranted. Indeed, we continue to believe that licensing proceedings can move forward in parallel with our comprehensive security review, undertaken in the aftermath of the September 11, 2001 terrorist attacks, and the interim compensatory measures (including additional protections at ISFSIs) we have ordered.

RULES OF PRACTICE: SUSPENSION OF PROCEEDING; BALANCING OF COMPETING PUBLIC INTERESTS

There is no reason to believe that any danger to public health and safety would result from *mere continuation of this adjudicatory proceeding*. The instant licensing proceeding is in its early stages and, even if the NRC approves the requested ISFSI license, construction is not scheduled to begin until early 2004 and loading of the first casks will not occur until 2006. On the other hand, suspending this proceeding would prove an obstacle to fair and efficient decisionmaking. As always, we balance the applicants' and licensees' interest in a prompt decision on their application against the petitioners' interest in an opportunity for a hearing.

See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 24 (1998).

RULES OF PRACTICE: SUSPENSION OF PROCEEDING

EFFICIENT LICENSING AND REGULATION

It is not sensible to postpone consideration and resolution of various safety and environmental issues having little or nothing to do with the Commission's ongoing review of security requirements. The Commission supervises its adjudicatory docket with a view toward "sound case management." *McGuire*, CLI-01-27, 54 NRC at 391, *quoting Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 40 (2001).

EFFICIENT LICENSING AND REGULATION

NUCLEAR WASTE POLICY ACT

Congress has recognized the need for and encouraged spent fuel storage at reactor sites and, to this end, has even mandated an *expedited* hearing process. *See* Nuclear Waste Policy Act, 42 U.S.C. §§ 10151 *et seq.*

RULES OF PRACTICE: SUSPENSION OF PROCEEDING; OPPORTUNITY FOR PARTIES TO ADDRESS ISSUES

Moving forward with this adjudication will not prevent appropriate implementation of any rule or policy changes arising from our ongoing evaluation of terrorism-related policies. SLOMFP may have an opportunity to file late contentions in this proceeding or reopen the record, if policy or rule changes take place and the timing is appropriate. *See* 10 C.F.R. §§ 2.714(a), 2.734. And *every license* the Commission issues is subject to the possibility of additional requirements. The Commission can modify license requirements by rule, regulation, or order; and changes can be applicable to both applicants and licensees. *See, e.g.*, 10 C.F.R. § 72.62, the backfitting rule for ISFSIs. ("The Commission will require backfitting of an ISFSI . . . if it finds that such action is necessary to assure adequate protection to occupational or public health and safety, or to bring the ISFSI . . . into compliance with a license or the rules or orders of the Commission . . . ." 10 C.F.R. § 72.62(b).) Thus, as in *Private Fuel Storage*, "holding up these proceedings is not necessary to ensure that the public will realize the full benefit of our ongoing regulatory review" at the Diablo Canyon facility. *Private Fuel Storage*, CLI-01-26, 54 NRC at 383.

RULES OF PRACTICE: SUSPENSION OF PROCEEDING

EFFICIENT LICENSING AND REGULATION

Both national policy and the principles of sound case management militate against suspending this ISFSI proceeding in its early stages.

MEMORANDUM AND ORDER

This proceeding stems from Pacific Gas & Electric Company's ("PG&E") application to construct an independent spent fuel storage installation ("ISFSI") at the site of its two Diablo Canyon nuclear power plants. Several intervention petitioners have directly requested the Commission to suspend the proceeding pending the Commission's comprehensive review of measures to protect against terrorist attack. We deny the petition.

I. BACKGROUND

On December 21, 2001, PG&E filed an application for a materials license authorizing storage of spent nuclear fuel in a dry storage cask system at its Diablo Canyon Power Plant ("DCPP") site. The NRC published notice of the application and opportunity for a hearing.[1] The Secretary of the Commission received three petitions to intervene from the following individuals and groups: Lorraine Kitman; San Luis Obispo County Supervisor Peg Pinard and the Avila Valley Advisory Council; and the San Luis Obispo Mothers for Peace, representing itself and eight other organizations.[2]

Twelve of the Petitioners filed a motion to stay the licensing proceeding on June 25, 2002.[3] The motion was based on PG&E's pending bankruptcy proceeding, California's claims of fraud against PG&E's parent corporation, and PG&E's application to transfer the Diablo Canyon power plant licenses in accordance with its bankruptcy plan of reorganization.[4] The Petitioners asserted, in essence, that there are too many uncertainties requiring resolution before it is sensible to proceed with the ISFSI application. The Board, noting that all

[1] *See* Pacific Gas and Electric Co.; Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for a Hearing for a Materials License for the Diablo Canyon Independent Spent Fuel Storage Installation, 67 Fed. Reg. 19,600 (Apr. 22, 2002).

[2] After these petitions were filed, various amendments and realignments, not relevant to our decision today, have occurred.

[3] By e-mail, two other individual requests, from persons who are not intervention petitioners, were addressed to the Commission's Chairman.

[4] PG&E filed for protection under Chapter 11 of the United States Bankruptcy Code prior to filing its ISFSI license application with the NRC.

of the Petitioners' concerns "involve PG&E's bankruptcy and the impacts that flow from that action vis-à-vis various other federal and state judicial and/or administrative proceedings," denied the motion.[5]

The Board heard oral argument on the issues of standing of the Petitioners and admissibility of their contentions on September 10-11, 2002, but has not yet decided these matters.

On September 9, 2002, a group of eleven intervention Petitioners and one additional group filed, directly with the Commission, a petition to suspend this proceeding pending comprehensive review of the adequacy of design and operation measures to protect against terrorist attack and other acts of malice or insanity.[6] The Commission denies the petition for the reasons we give below.

II. DISCUSSION

SLOMFP has requested that the Commission suspend the ISFSI licensing proceeding "pending the implementation of new and more rigorous measures to protect the public from the threat of a terrorist attack or other acts of malice or insanity against the Diablo Canyon nuclear complex."[7] In the alternative, it requests expansion of the scope of the ISFSI license proceeding to consider what interim measures should be imposed during the Commission's deliberation about longer-term measures. The gravamen of the petition, according to SLOMFP, "is that the Commission may not license the ISFSI unless and until it improves protection of the entire Diablo Canyon nuclear complex from terrorist attacks or other acts of malice or insanity."[8] SLOMFP declares an urgent need for protective measures because it sees the risk already posed as significant and unacceptable, and the planned ISFSI, SLOMFP maintains, would compound the attractiveness and vulnerability of the Diablo Canyon complex to attacks. The ISFSI, in SLOMFP's estimation, cannot be viewed in isolation from the existing operation of the two power plants. Moreover, SLOMFP contends that the NRC's "design

[5] *See* LBP-02-15, 56 NRC 42, 47 (2002).

[6] The eleven intervention Petitioners who joined in the motion are: Avila Valley Advisory Council, San Luis Obispo Mothers for Peace, Peg Pinard, Cambria Legal Defense Fund, Central Coast Peace and Environmental Council, Environmental Center of San Luis Obispo, Nuclear Age Peace Foundation, San Luis Obispo Chapter of Grandmothers for Peace International, San Luis Obispo Chapter of Cancer Action Now, Santa Lucia Chapter of the Sierra Club, and Ventura County Chapter of the Surfrider Foundation. We shall refer to these groups collectively as "SLOMFP." The San Luis Obispo Chapter of the Surfrider Foundation also joined in the September 9 filing. Since that organization has never made a hearing request or sought permission to participate in this adjudication on any other basis, it has no legitimate place in this proceeding. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 398 (2001), *reconsideration denied*, CLI-02-2, 55 NRC 5 (2002). We shall hereafter refer to SLOMFP's filing as "Petition."

[7] Petition at 1.

[8] *Id.* at 10.

basis threat" is inadequate and the compensatory measures the Commission has recently required do not correct this deficiency.[9]

The relief SLOMFP seeks from the Commission is fourfold: (1) complete a comprehensive review of the adequacy of NRC safety requirements to protect against the terrorist threat; (2) suspend the pending ISFSI license proceeding while the NRC conducts its review; (3) expand the scope of the pending proceeding to allow consideration of interim measures (if the Commission declines to suspend the proceeding); and (4) provide for public participation in considering new requirements. SLOMFP provides a list of interim measures it requests that we adopt.

Below, we consider and reject SLOMPF's request to suspend the Diablo Canyon ISFSI proceeding. As for SLOMFP's other requests, we consider them beyond the scope of this adjudication. We note, however, that some of what SLOMPF seeks already has taken place. For example, we have undertaken a comprehensive review of our security rules and policies. Consequently, we have adopted (recently) interim security measures for ISFSIs.[10] SLOMFP also seeks public participation on security-related issues, but the Atomic Energy Act already provides for appropriate public participation, for both licensing actions and rulemakings.[11] SLOMFP is free to make its positions known during this adjudication (as they relate to this proceeding) and in any rulemakings that emerge from our comprehensive security review. We are referring SLOMFP's current petition (and attachments) to the NRC Staff for appropriate consideration as the Staff continues its review of security measures.

A. Nature of the Petition

Before responding to the merits of the filing that is now before us, we shall attempt to characterize it. The Petitioners themselves reject characterization of their request as a petition for rulemaking or enforcement.[12] Although SLOMFP desires that we ultimately strengthen our physical protection regulations — a matter more appropriate for a generic rulemaking petition — SLOMFP's immediate objectives are site-specific, rather than generic, and thus inappropriate for a rulemaking petition.[13] We also take SLOMFP at its word that it is not requesting enforcement relief under 10 C.F.R. § 2.206.[14]

SLOMFP also requested relief extending to the two Diablo Canyon power plants and to power plants and ISFSIs at other sites. The 10 C.F.R. Part 50 Diablo Canyon power plant licenses are not at issue in this 10 C.F.R. Part 72 proceeding. And SLOMFP's even broader requests involving other licensees are also not cognizable in this individual adjudicatory proceeding.[15]

According to SLOMFP, it brings its petition "under the Atomic Energy Act's provisions which prohibit licensing actions that would pose unreasonable risk to public health and safety or be inimical to the common defense and security."[16] SLOMFP states that it has brought the petition directly to the Commission because only the Commission has the authority to determine what measures, beyond current regulatory requirements, must be imposed to meet the AEA's standard for protection of the public.[17]

Because SLOMFP's request does not fit comfortably in any specific category, we will treat it as a general motion brought under the procedural requirements of 10 C.F.R. § 2.730. Such a motion should initially be addressed to the Presiding Officer when a proceeding is pending,[18] and the Commission does not encourage participants in adjudicatory proceedings to attempt to bypass the Board by filing motions or petitions directly with the Commission.[19] Nevertheless, because we have ultimate supervisory control over our proceedings, we choose here to address the merits of SLOMFP's petition.

B. Merits of the Petition

By not suspending operating licenses in the 14 months that have elapsed since the terrorist attacks of September 11, 2001, the Commission has implicitly concluded that *continued operation* of power plants and ISFSIs does not pose an imminent risk to the public health and safety and is not inimical to the common

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[9] The "design basis threat" is the postulated threat that the physical protection system must have the capability to withstand. Design basis threats are "used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material." 10 C.F.R. § 73.1(a). Current design basis threats for radiological sabotage and for theft or diversion of formula quantities of strategic special nuclear material are described in 10 C.F.R. § 73.1(a)(1) and 10 C.F.R. § 73.1(a)(2), respectively.

[10] *See* Order Modifying Licenses (Effective Immediately), 67 Fed. Reg. 65,150 (Oct. 23, 2002) (affecting 10 C.F.R. Part 50 licenses) and Order Modifying Licenses (Effective Immediately), 67 Fed. Reg. 65,152 (Oct. 23, 2002) (affecting 10 C.F.R. Part 72 licensees). SLOMFP is not free to use an adjudication as a means to enhance existing NRC orders or regulations. *See Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983) (hearing petitioners may not seek requirements more extensive than those imposed by NRC order); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 470 (2001) (hearing petitioners may not challenge NRC rules). *See also* 10 C.F.R. § 2.758. Thus, we decline SLOMFP's request to expand the current ISFSI proceeding to litigate the usefulness of the particular security measures that SLOMFP suggests.

[11] *See* AEA § 189a, 42 U.S.C. § 2239(a).

[12] *See* Petition at 7.

[13] *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345-46 (1999) (remedy for petitioners dissatisfied with Commission's generic approach lies in rulemaking process, not specific adjudication).

[14] "Any person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper." 10 C.F.R. § 2.206(a). The Commission's vehicle to institute such a proceeding is 10 C.F.R. § 2.202.

[15] *See Savannah River*, CLI-01-28, 54 NRC at 399 n.9.

[16] Petition at 7. *See also* AEA, 42 U.S.C. §§ 2011 *et seq.*

[17] *See* Petition at 8.

[18] "All motions shall be addressed to the Commission or, when a proceeding is pending before a presiding officer, to the presiding officer." 10 C.F.R. § 2.730(a).

[19] *See Savannah River*, CLI-01-28, 54 NRC at 398 n.7.

defense and security. Last year we enunciated the considerations we apply to *pending licensing proceedings* to decide whether to postpone them to await ongoing review of the agency's terrorism-related policies.

> [W]e consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies.[20]

We have expressly denied direct requests for suspensions and/or dismissals of licensing actions in *Private Fuel Storage,*[21] *Savannah River,*[22] and *McGuire.*[23] *Private Fuel Storage* is a 10 C.F.R. Part 72 proceeding involving an application to build an ISFSI much larger than the proposed Diablo Canyon ISFSI. An intervenor, the State of Utah, requested that the "licensing proceeding be stopped until applicable laws and regulations can be brought into 'conformity with present realities.' "[24] Utah asked the Commission to stay proceedings until Congress and the Commission revise the law and regulations to account for the increased threat of domestic terrorism. We denied Utah's request. The Commission determined that moving forward with the proceeding "would neither present a threat to public safety nor interfere with our ongoing regulatory review, and halting it would interfere with our goal of adjudicatory efficiency."[25]

Here, SLOMFP has not advanced any arguments that alter our perception that immediate suspension of licensing proceedings is unwarranted. Indeed, we continue to believe that licensing proceedings can move forward in parallel with our security review and the interim compensatory measures[26] we have ordered:

> The Commission believes that its response to [the September 11, 2001 terrorist attacks] has been expeditious and that the current safeguards and physical security programs provide for a very high level of security at NRC-licensed facilities. However, in the aftermath of the terrorist attacks and the continuing uncertainty about future terrorist intentions, we have commenced a thorough review of our safeguards and physical security programs, from top to bottom, including those applicable to independent spent fuel storage installations. The review will include a comprehensive examination of the programs' basic underlying assumptions.[27]

There certainly is no reason to believe that any danger to public health and safety would result from *mere continuation of this adjudicatory proceeding.* The instant licensing proceeding is in its early stages and, even if the NRC approves the requested ISFSI license, construction is not scheduled to begin until early 2004 and loading of the first casks will not occur until 2006.[28]

On the other hand, suspending this proceeding would prove an obstacle to fair and efficient decisionmaking. As always, we balance the applicants' and licensees' interest in a prompt decision on their application against the petitioners' interest in an opportunity for a hearing.[29] In the instant case, the Petitioners have requested a hearing and have proffered eight contentions, including the contention that the Applicant has failed to address the environmental impacts of destructive acts of malice or insanity. The other seven contentions have little or no relationship to terrorism. For example, the Petitioners have advanced five technical contentions that are not linked to terrorism: (1) inadequate seismic analysis; (2) insufficient financial qualifications; (3) license applicant is not the real party in interest; (4) inadequate description of financial relationships between corporate entities; and (5) insufficient description of construction and operation costs. Further, they have presented two environmental contentions, failure to fully describe the purposes of the proposed action and failure to evaluate the environmental impacts of transportation at the end of the license term, that are, at most, peripherally related to terrorism. Nevertheless, SLOMFP asks the Commission to postpone action on all of the other issues while the Commission completes its thorough assessment of the post-September 11, 2001 implications of terrorism.

However, it is not sensible to postpone consideration and resolution of various safety and environmental issues having little or nothing to do with the Commission's ongoing review of security requirements. The Commission supervises its adjudicatory docket with a view toward "sound case management."[30] Efficient and expeditious decisionmaking is particularly important in this case, as PG&E has stated that, to preserve the capability for a full core offload, it needs to operate the proposed ISFSI at the beginning of 2006. Accordingly, PG&E has requested issuance of the license by the end of 2003

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[20] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001); *accord Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 389-90 (2001); *Savannah River,* CLI-01-28, 54 NRC at 399.

[21] *See Private Fuel Storage,* CLI-01-26, 54 NRC 376.

[22] *See Savannah River,* CLI-01-28, 54 NRC 393. Like SLOMFP here, the intervenor in the *Savannah River* mixed oxide fuel fabrication facility proceeding made a broad request. It maintained that current NRC regulations are inadequate and the Commission should "suspend proceedings in which applicable standards are inadequate to ensure protection of public health and safety until the regulatory review the Commission has mandated is complete." *Id.* at 399. The *Savannah River* intervenor also made the request, not cognizable in an individual adjudicatory proceeding, that we suspend *other* proceedings. *See id.*

[23] *See McGuire,* CLI-01-27, 54 NRC 385. In *McGuire,* the intervenor sought to dismiss a reactor license renewal proceeding because it considered major changes in security and safeguards requirements to be inevitable after the September 11, 2001, terrorist attacks. The intervenor claimed that meaningful review of the application would require consideration of future increased security costs. *See id.* at 390.

[24] *Private Fuel Storage,* CLI-01-26, 54 NRC at 380, *citing* intervenor's brief.

[25] *Id.* at 384.

[26] Those measures include additional protections at ISFSIs. *See* note 10 *supra.*

[27] *Private Fuel Storage,* CLI-01-26, 54 NRC at 379.

[28] *See* "Opposition of Pacific Gas and Electric Company to Requests for Stay of Proceeding" at 2 (July 2, 2002) ("Opposition").

[29] *See Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 24 (1998).

[30] *McGuire,* CLI-01-27, 54 NRC at 391, *quoting Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 40 (2001).

and filed its license application 2 years ahead of its target date.[31] Congress has recognized the need for and encouraged spent fuel storage at reactor sites and, to this end, has even mandated an *expedited* hearing process.[32]

Lastly, moving forward with this adjudication will not prevent appropriate implementation of any rule or policy changes arising from our ongoing evaluation of terrorism-related policies. SLOMFP may have an opportunity to file late contentions in this proceeding or reopen the record, if policy or rule changes take place and the timing is appropriate.[33] And *every license* the Commission issues is subject to the possibility of additional requirements. The Commission can modify license requirements by rule, regulation, or order; and changes can be applicable to both applicants and licensees.[34] Thus, as in *Private Fuel Storage*, "'holding up these proceedings is not necessary to ensure that the public will realize the full benefit of our ongoing regulatory review'' at the Diablo Canyon facility.[35]

In summary, the instant licensing proceeding neither conflicts with the Commission's ongoing review of terrorism-related matters nor forecloses the implementation of potential new rules. And both national policy and the principles of sound case management militate against suspending this ISFSI proceeding in its early stages.

III. CONCLUSION

The Commission *denies* SLOMFP's petition to suspend this proceeding or, in the alternative, to adopt interim safety measures.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of November 2002.

[31] *See* Opposition at 2.

[32] *See* Nuclear Waste Policy Act, 42 U.S.C. §§ 10151 *et seq.*

[33] *See* 10 C.F.R. §§ 2.714(a), 2.734.

[34] *See, e.g.*, 10 C.F.R. § 72.62, the backfitting rule for ISFSIs. "The Commission will require backfitting of an ISFSI . . . if it finds that such action is necessary to assure adequate protection to occupational or public health and safety, or to bring the ISFSI . . . into compliance with a license or the rules or orders of the Commission . . . ." 10 C.F.R. § 72.62(b).

[35] *Private Fuel Storage*, CLI-01-26, 54 NRC at 383.

Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

G. Paul Bollwerk III,* *Chief Administrative Judge*
Thomas S. Moore,* *Associate Chief Administrative Judge (Legal)*
Vacant,* *Associate Chief Administrative Judge (Technical)*

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Dr. David R. Schink
Ivan W. Smith
Ann M. Young*

*Permanent Panel Members

Attachment 3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. 72-26-ISI**

PACIFIC GAS AND ELECTRIC COMPANY
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)

January 23, 2003

In this proceeding to authorize construction of a dry cask independent spent fuel storage installation at the site of the Diablo Canyon Power Plant, the Commission accepts the Licensing Board referral of its decision to reject terrorism contentions and affirms the Board's rejection of the contentions.

TERRORISM

NEPA

We recently decided similar issues in four other cases in four different contexts *Private Fuel Storage* (a dry cask independent spent fuel storage installation) *Savannah River* (a mixed oxide fuel fabrication facility), *Millstone* (expansion of the spent fuel storage pool capacity at a commercial reactor site), and *McGuire/Catawba* (license renewal for four commercial reactors). *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Dominion*

Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002). In each of these settings, we considered whether NEPA requires the NRC, in rendering licensing decisions, to consider the impacts of terrorism. We held that NEPA does not require a terrorism review, and that an environmental impact statement is not the appropriate format in which to address the challenges of terrorism.

TERRORISM

NEPA

In the lead *Private Fuel Storage* case, involving a large away-from-reactor ISFSI, we detailed four principal reasons for our holding. First, the "possibility of a terrorist attack . . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA," which is confined to "manageable" inquiries. *See Private Fuel Storage*, CLI-02-25, 56 NRC at 349 & n.33, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983). Second, the risk of a terrorist attack at a nuclear facility cannot be adequately determined. *See* CLI-02-25, 56 NRC at 350-51, and references cited therein. As a practical matter, attempts to evaluate that risk even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking. Third, NEPA does not require a "worst-case" analysis, which "creates a distorted picture of a project's impacts and wastes agency resources." *See id.* at 352; *see generally id.* at 351-54, and references cited therein. Lastly, NEPA's public process is not an appropriate forum for considering sensitive security issues. In this regard we noted, "NEPA does not override [our] concern for making sure that sensitive security-related information ends up in as few hands as practicable." *Id.* at 355; *see id.* at 354-57 and references cited therein. For the same reasons, we affirm the Board's rejection of SLOMFP's contention EC-1, the terrorism-related portions of contentions EC-2 and EC-3, and the County's environmental issue.

NUCLEAR WASTE POLICY ACT

Our conclusion comports with the practical realities of spent fuel storage and the congressional policy to encourage utilities to provide for spent fuel storage at reactor sites pending construction of a permanent repository. *See Nuclear Waste Policy Act*, 42 U.S.C. §§ 10131 *et seq.*; *Millstone*, CLI-02-27, 56 NRC at 371.

MEMORANDUM AND ORDER

The Licensing Board, in a recent ruling on standing, admissibility of contentions, and admission of interested governmental entities in this independent spent fuel storage installation ("ISFSI") licensing proceeding, referred its decision on one environmental contention and portions of three other contentions to the Commission.[1] We accept the Board's referral and affirm its rejection of the contentions.

I. BACKGROUND

Pacific Gas & Electric Company ("PG&E") filed an application on December 21, 2001, for a materials license authorizing construction and operation of a dry storage cask ISFSI to be located at its Diablo Canyon Power Plant ("DCPP") site. In response to a notice of opportunity for hearing, the Secretary of the Commission received petitions to intervene from numerous petitioners.[2] The San Luis Obispo Mothers for Peace, acting as Lead Petitioner, submitted five technical and three environmental contentions. The County of San Luis Obispo ("County"), previously granted governmental participant status, submitted one environmental and two technical issues.[3] The Board heard oral argument on the issues of standing of the Petitioners and admissibility of their contentions on September 10-11, 2002. In addition to the Lead Petitioner, the Board found that the Santa Lucia Chapter of the Sierra Club, San Luis Obispo Cancer Action Now, Peg Pinard, the Avila Valley Advisory Council, and the Central Coast Peace and Environmental Council have standing.[4] We shall refer to the admitted Intervenors collectively as "SLOMFP." The Board granted governmental participant status to the California Energy Commission and the Avila Beach Community Services District, but denied the request of the Diablo Canyon Independent Safety Committee.

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[1] *See* LBP-02-23, 56 NRC 413 (2002).

[2] In addition, five entities sought leave to participate as interested governmental entities pursuant to 10 C.F.R. § 2.715(c): "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." Of the five requests, only that of the County of San Luis Obispo is relevant to today's decision.

[3] *See* unpublished Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation) (Aug. 7, 2002). The Board also granted governmental participant status to the Port San Luis Harbor District. *See id.*

[4] The Board also determined that the following groups had not demonstrated standing: the Environmental Center of San Luis Obispo, Cambria Legal Defense Fund, Santa Margarita Area Residents Together, San Luis Obispo Chapter of Grandmothers for Peace International, Nuclear Age Peace Foundation, and the Ventura County Chapter of the Surfrider Foundation.

The Board admitted one of SLOMFP's five technical contentions for litigation in this proceeding and rejected SLOMFP's three environmental contentions. In accordance with 10 C.F.R. § 2.730(f), the Board referred its rulings regarding the sabotage and terrorism aspects of SLOMFP's three environmental contentions and San Luis Obispo County's environmental issue to the Commission for further consideration and action as appropriate.[5] We accept the Board's referral and affirm the Board's denial of admission of the contentions, albeit for different reasons than those the Board expressed.

II. DISCUSSION

A. The Referred Terrorism Issues[6]

SLOMFP's three environmental contentions address, at varying levels of prominence, the threat of terrorism. Contention EC-1, the primary terrorism contention, states: "The Environmental Report's discussion of environmental impacts is inadequate because it does not include the consequences of destructive acts of malice or insanity against the proposed ISFSI."[7] SLOMFP believes that PG&E's environmental report should evaluate a range of alternatives to the proposed ISFSI, including dispersal of casks, protection of casks by berms or bunkers, and use of more robust storage casks.

The Board found the contention inadmissible because it "directly challenge[s] the Commission's rules regarding destructive acts of malice or insanity by enemies of the United States. . . . [C]ontentions that question existing NRC regulations are inadmissible as a matter of law."[8] Thus, the Board relied in part on 10 C.F.R. § 2.758(a), which prohibits adjudicatory challenges to NRC rules,[9] and in part on 10 C.F.R. § 50.13, which provides that an applicant for a license to construct and operate a production or utilization facility "is not required to provide for design features or other measures for the specific purpose of protection against the effects of . . . attacks and destructive acts, including sabotage, directed against

[5] *See* LBP-02-23, 56 NRC at 462. *See also* 10 C.F.R. § 2.730(f): "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 . . . ."

[6] We recently denied the direct request of the San Luis Obispo Mothers for Peace and several other petitioners to suspend this proceeding pending completion of the Commission's comprehensive review of measures to protect against terrorist attack. *See* CLI-02-23, 56 NRC 230 (2002).

[7] "Supplemental Request for Hearing and Petition To Intervene by [SLOMFP]" at 24 (July 18, 2002).

[8] LBP-02-23, 56 NRC at 448.

[9] "[A]ny rule or regulation of the Commission, or any provision thereof . . . is not subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding involving initial or renewal licensing . . . ." 10 C.F.R. § 2.758(a).

the facility by an enemy of the United States, whether a foreign government or other person."[10]

Because EC-1 is an environmental contention based on the National Environmental Policy Act ("NEPA")[11] rather than a safety contention, SLOMFP argued that 10 C.F.R. § 2.758 is not applicable. The Board, however, reasoned that "the rationale for 10 C.F.R. § 50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities."[12] The Board thus found contention EC-1 inadmissible, but referred its ruling to the Commission.[13]

Contention EC-2 asserts that PG&E has failed to fully describe the purposes of the proposed ISFSI or to evaluate all reasonably associated environmental impacts and alternatives. SLOMFP's focus in this contention is its allegation that PG&E might have an unstated purpose for the proposed ISFSI; i.e., to provide spent fuel storage capacity during a license renewal term for the Diablo Canyon units. The Board found the contention inadmissible, but noted that, in several of the contention's bases, SLOMFP repeated arguments concerning acts of destruction or sabotage that were discussed in support of EC-1. Therefore, the Board referred its ruling on admissibility of contention EC-2 to the Commission "to the extent destruction and sabotage matters are proffered in support of admission."[14]

[10] 10 C.F.R. § 50.13. Although section 50.13 does not, on its face, apply to an ISFSI, an applicant for an ISFSI must describe physical security protection plans, which must meet the requirements set forth in 10 C.F.R. § 73.51. Adopting section 73.51 in 1998, the Commission specifically rejected a requirement that ISFSIs be protected against malevolent attacks by land-based or airborne vehicles. *See* Final Rule: "Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste," 63 Fed. Reg. 26,955, 26,956 (May 15, 1998).

[11] *See* 42 U.S.C. §§ 4321 *et seq.*

[12] LBP-02-23, 56 NRC at 448, quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973) and citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 487 (2001), *referral accepted,* CLI-02-3, 55 NRC 155 (2002).

[13] *See* LBP-02-23, 56 NRC at 448. In making the referral, the Board alluded to the Commission's ongoing comprehensive review of NRC's safeguards and physical security programs in the wake of the Sept. 11, 2001 terrorist attacks. Moreover, the Commission, at the time of the Board's referral, was considering terrorism contentions we had agreed to review in four other cases. *See Private Fuel Storage,* LBP-01-37, 54 NRC 476 (denying admission of terrorism contention and referring issue to the Commission), *referral accepted,* CLI-02-3, 55 NRC 155; *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station Units 1 and 2), LBP-02-4, 55 NRC 49 (2002) (certifying terrorism issue to the Commission), *certification accepted,* CLI-02-6, 55 NRC 164 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001), *reconsideration denied,* unpublished Memorandum and Order (Jan. 16, 2002), *petition for Commission review granted in part,* CLI-02-4, 55 NRC 158 (2002); and *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131 (2002) (denying admission of terrorism contention and referring contention to the Commission), *referral accepted,* CLI-02-5, 55 NRC 161 (2002).

[14] LBP-02-23, 56 NRC at 451.

In Contention EC-3, SLOMFP asserts that PG&E has failed to evaluate the environmental impacts of transporting fuel away from the proposed ISFSI at the end of its license term. SLOMFP claims that the ER must consider impacts of such transportation, including sabotage and terrorist attacks against transportation casks. The Board rejected contention EC-3 but, as with EC-2, referred its ruling to the Commission "to the extent terrorism and sabotage matters are proffered in support of its admission."[15]

Similar to SLOMFP's EC-1, the County's environmental issue asserted that the environmental report does not contain an adequate analysis of alternatives. Specifically, in its subissue regarding alternative sites and associated security measures, the County argues that PG&E did not consider vulnerability to offshore attacks when it selected the site for the proposed ISFSI. Because this subissue "appears to challenge the Commission's rules regarding acts of destruction and sabotage," the Board denied it as a matter of law, but made the terrorism aspects of the issue part of its referral to the Commission.[16]

B. The Commission's Ruling

We accept the Board's referral of the terrorism issues in SLOMFP's three environmental contentions and the County's environmental subissue and affirm the result the Board reached.

We recently decided similar issues in four other cases in four different contexts: *Private Fuel Storage* (a dry cask independent spent fuel storage installation), *Savannah River* (a mixed oxide fuel fabrication facility), *Millstone* (expansion of the spent fuel storage pool capacity at a commercial reactor site), and *McGuire/Catawba* (license renewal for four commercial reactors).[17] In each of these settings, we considered whether NEPA requires the NRC, in rendering licensing decisions, to consider the impacts of terrorism. We held that NEPA does not require a terrorism review, and that an environmental impact statement is not the appropriate format in which to address the challenges of terrorism.

In the lead *Private Fuel Storage* case, involving a large away-from-reactor ISFSI, we detailed four principal reasons for our holding. First, the "possibility of a terrorist attack . . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA," which

[15] *Id.* at 453.

[16] *See id.* at 460.

[17] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002).

is confined to "manageable" inquiries.[18] Second, the risk of a terrorist attack at a nuclear facility cannot be adequately determined.[19] As a practical matter, attempts to evaluate that risk even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking. Third, NEPA does not require a "worst-case" analysis, which "creates a distorted picture of a project's impacts and wastes agency resources."[20] Lastly, NEPA's public process is not an appropriate forum for considering sensitive security issues. In this regard we noted, "NEPA does not override [our] concern for making sure that sensitive security-related information ends up in as few hands as practicable."[21] For the same reasons, we affirm the Board's rejection of SLOMFP's contention EC-1, the terrorism-related portions of contentions EC-2 and EC-3, and the County's environmental issue.[22]

Our decision today rests entirely on our understanding of NEPA and of what means are best suited to dealing with terrorism. Nonetheless, our conclusion comports with the practical realities of spent fuel storage and the congressional policy to encourage utilities to provide for spent fuel storage at reactor sites pending construction of a permanent repository.[23] Storage of spent fuel at commercial reactor sites offers no unusual technological challenges. Indeed, it has been occurring at Diablo Canyon for many years and will continue whether or not we license the proposed ISFSI.[24]

[18] *See Private Fuel Storage*, CLI-02-25, 56 NRC at 349 & n.33, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983).

[19] *See Private Fuel Storage*, CLI-02-25, 56 NRC at 350-51, and references cited therein.

[20] *See id.* at 352; *see generally id.* at 351-54, and references cited therein.

[21] *Id.* at 355; *see id.* at 354-57, and references cited therein.

[22] We need not decide the applicability of the rationale for 10 C.F.R. § 50.13 to the Commission's NEPA responsibilities. We note that "[t]he provision grew out of a policy judgment by the Atomic Energy Commission that it was our nation's 'settled tradition' to 'look[] to the military' for defense against enemy attacks, and that it was 'impracticable' to expect a 'civilian industry' to provide the necessary defense." *Millstone*, CLI-02-27, 56 NRC at 369 n.7 (quoting *Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968)). As in *Private Fuel Storage, Savannah River, Millstone*, and *McGuire/Catawba*, our decision today "rest[s] on general principles regarding the scope of NEPA, [and] we do not reach the application of section 50.13 as applied to the terrorism contentions that are raised in [this] case." *Millstone* at 369, n.7.

[23] *See* Nuclear Waste Policy Act, 42 U.S.C. §§ 10131 *et seq.*; *Millstone*, CLI-02-27, 56 NRC at 371.

[24] *See Millstone*, CLI-02-27, 56 NRC at 371. *Cf. McGuire/Catawba*, CLI-02-26, 56 NRC at 465 ("Particularly in the case of a license renewal application, where reactor operation will continue for many years regardless of the Commission's ultimate decision, it is sensible not to devote resources to the likely impact of terrorism during the license renewal period, but instead to concentrate on how to prevent a terrorist attack in the near term at the already licensed facilities"); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 343 (2002) (terrorist attacks are neither caused by nor result from the proposed license transfers).

Although we decline to consider terrorism in the context of NEPA, the Commission is devoting substantial time and agency resources to combating the potential for terrorism involving nuclear facilities and materials. The NRC Staff is conducting a comprehensive review of our security and safeguards measures, including measures concerning interim spent fuel storage at power reactor sites. We have also instituted interim upgrades in security requirements for our licensees, and we are working with numerous other government agencies to meet and minimize the threat of terrorism.

III. CONCLUSION

We *accept* the Board's referral of the terrorism aspects of four environmental contentions and issues and *affirm* the Board's decision to reject consideration of the terrorism issues presented in this proceeding.

IT IS SO ORDERED.

For the Commission[25]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of January 2003.

[25] Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

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*Permanent Panel Members

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

CLI-03-12

MEMORANDUM AND ORDER

The County of San Luis Obispo ("SLOC") and six intervenors led by the San Luis Obispo Mothers for Peace (collectively, "SLOMFP") seek Commission review of two Licensing Board decisions (LBP-02-23 and LBP-03-11) that, cumulatively, rejected challenges to an application by Pacific Gas & Electric Company ("PG&E") to construct and operate an independent spent fuel storage installation ("ISFSI") in San Luis Obispo, California. We deny both petitions for review.

I. BACKGROUND

On December 21, 2001, PG&E filed an application for a materials license authorizing storage of spent nuclear fuel in a dry cask storage system at the California site of its two Diablo Canyon commercial nuclear reactors. Numerous petitioners sought to intervene, and five entities asked to participate in the adjudication as interested governmental entities.[1] In addition

[1] *See* 10 C.F.R. § 2.715(c).

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to the lead petitioner, the Board found that the Santa Lucia Chapter of the Sierra Club, San Luis Obispo Cancer Action Now, Peg Pinard, the Avila Valley Advisory Council, and the Central Coast Peace and Environmental Council had standing.[2] The Board granted governmental participant status to SLOC and three other entities.[3]

After sorting through the parties' submissions, the Board admitted a single contention, SLOMFP's Contention TC-2, which questioned PG&E's financial qualifications.[4] SLOMFP raised concerns about the impact of PG&E's bankruptcy on its continuing ability to construct, operate, and decommission an ISFSI "by reason of its access to continued funding as a regulated entity or through credit markets."[5] The Board narrowed the contention from that proposed by SLOMFP; specifically, the Board excluded two bases -- the unresolved California Attorney General's lawsuit against PG&E Corporation for alleged fraud and the financial qualifications of any entities other than PG&E that may construct or operate the ISFSI.[6]

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[2]*See Pacific Gas & Electric Co.* (Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (2002).

[3]The Board initially recognized SLOC and the Port San Luis Harbor District as governmental participants. *See* Licensing Board Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation) (Aug. 7, 2002) at 1 (unpublished). Subsequently, the Board granted governmental participant status to the California Energy Commission and the Avila Beach Community Services District. *See* LBP-02-23, 56 NRC at 435.

[4]*See* LBP-02-23, 56 NRC at 441-43. The Board rejected four other technical contentions and referred to the Commission its decision to reject portions of three environmental contentions. Earlier this year the Commission affirmed the Board's denial of admission of the environmental contentions. *See* CLI-03-01, 57 NRC 1 (2003).

[5]LBP-02-23, 56 NRC at 442.

[6]*See id.* at 443. There are two competing plans of reorganization in the bankruptcy proceeding. Approval of PG&E's plan would require that the ISFSI license be transferred to a new entity, Electric Generation LLC ("Gen"). Approval of the California Public Utility Commission's plan would require PG&E to continue to hold the ISFSI license. Under a pending bankruptcy settlement proposal, PG&E would remain the licensee when it emerges from bankruptcy. *See* Letter from David Repka, PG&E Counsel, to the Licensing Board at 2 (June 24, 2003). *See also Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1

The hearing in this case went forward under the special provisions in 10 C.F.R. Part 2, Subpart K.[7] After considering the Subpart K written submissions and oral arguments of the parties and governmental participants, the Board denied the request for a full-scale evidentiary hearing and terminated the proceeding.[8] SLOMFP and SLOC filed petitions for review of the Board's decisions in LBP-03-11 and LBP-02-23.[9] Both PG&E and the NRC Staff oppose the petitions for review.

II. DISCUSSION

Under 10 C.F.R. § 2.786(b)(4), the Commission may grant a petition for review if it raises a substantial question with respect to the following considerations:

> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
> (ii) 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;
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
> (v) Any other consideration which the Commission may deem to be in the public interest.[10]

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and 2), CLI-03-10, 58 NRC __ (Sept. 8, 2003). As part of its bankruptcy Plan of Reorganization, PG&E applied to the NRC on Nov. 30, 2001, to transfer its licenses for the Diablo Canyon power plants to Gen. The NRC Staff issued an order approving the license transfer application, with conditions that make completion of the transfer contingent on the outcome of the bankruptcy proceeding. *See* "Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2); Order Approving Transfer of Licenses and Conforming Amendments," 68 Fed. Reg. 33,208 (June 3, 2003), announcing Staff order dated May 27, 2003.

[7] *See* 10 C.F.R. §§ 2.1101 - 2.1117; *see also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-86 (2001).

[8] *See* LBP-03-11, 58 NRC __ (Aug. 5, 2003).

[9] A governmental participant has the right to petition for review. *See* 10 C.F.R. § 2.715(c); *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-317, 3 NRC 175, 177 (1976).

[10] 10 C.F.R. § 2.786(b)(4).

SLOMFP asserts that in LBP-02-23 the Board erred by denying admission of Contention TC-1 (inadequate seismic analysis); unlawfully excluded Contention EC-2 (nondisclosure of purpose of ISFSI); and erred by rejecting Contention EC-3 (inadequate consideration of transportation-related impacts). Further, SLOMFP contends that the Board erred in concluding that PG&E is financially qualified for the ISFSI license. For the seismic and financial qualification issues, SLOMFP urges review because of substantial questions of policy and discretion; and for the other issues, legal error. SLOC also challenges the Board's financial qualifications decision in LBP-03-11, but does so on the ground that the Board made several erroneous findings of fact and conclusions of law.[11]

We deny review of all issues the petitioners raise, for the Board's decisions do not implicate substantial questions of policy and discretion. Nor did the Board misapply the law or misread the facts. Only two issues warrant further Commission comment.

A. Contention TC-1 (Seismic)

An appeal may not be based on new arguments not raised before the Board.[12] SLOMFP, however, has attacked the Board's decision on seismic issues -- *i.e.*, its rejection of Contention TC-1 -- for reasons raised for the first time in its petition for review. Our rules state that for sites that have been evaluated under the criteria for nuclear power plants, the design

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[11]SLOC also requested the Commission to review the Board's decision to use the 10 C.F.R. § 2.714 contention standards to evaluate issues raised by interested governmental participants. SLOC made the request in the introductory remarks of its petition for review and again in a final footnote. In neither place did SLOC relate why it thought the Board's decision was erroneous or why Commission review should be exercised, as required by our regulations. *See* 10 C.F.R. § 2.786(b)(2)(iii)-(iv). This is not enough to trigger plenary Commission appellate review. *See Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786 (1979). *See also Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 132, N. 81 (1995); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001).

[12]*See Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 221 (1997).

earthquake must be equivalent to the safe shutdown earthquake for a nuclear power plant.[13] Accordingly, in Contention TC-1, SLOMFP addressed alleged inadequacies of the seismic source characterization for the design basis earthquake at the Diablo Canyon power plant site. The Board reasonably found that SLOMFP's concerns do not show the original seismic findings "inaccurate to some meaningful degree."[14]

Nevertheless, in its petition for review, SLOMFP contends that the Board's ruling that, absent new information sufficient to alter the original site evaluation, the design earthquake for a nuclear power plant constitutes the design earthquake for any co-located ISFSI has no support in the regulations. SLOMFP makes a weak semantic argument based on the choice of article ("a" versus "the") used in10 C.F.R. § 72.102(f). We need not consider SLOMFP's new semantic argument, first raised in the petition for review. In any event, SLOMFP's interpretation of the regulation is strained and illogical. The Board correctly interpreted the regulation as addressing the design earthquake for a power plant at the same site as the ISFSI.

B. Contention TC-2 (Financial Qualifications)

Because of apparent confusion, evidenced by the petitions for review, about what the Board's financial qualifications ruling in LBP-03-11 does and does not do, we will briefly address that issue.

The possible impact of PG&E's bankruptcy on its ISFSI application gave rise to serious concerns by both SLOMFP and the interested governmental participants in this adjudication. When the Board admitted SLOMFP's financial qualifications contention, it correctly stated that the mere fact of PG&E's filing for bankruptcy does not by itself indicate that it is no longer

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[13]10 C.F.R. § 72.102(f)(1).

[14]*See* LBP-02-23, 56 NRC at 441.

financially qualified to continue day-to-day operations at the Diablo Canyon facility.[15] The Board thus admitted the financial qualifications contention only regarding the impact of PG&E's bankruptcy "on its continuing ability to undertake the new activity of constructing, operating, and decommissioning an ISFSI by reason of its access to continued funding as a regulated entity or through credit markets."[16] The Board later ruled that, as a rate-regulated utility, PG&E was entitled to certain presumptions regarding its financial qualifications; specifically, that as a regulated entity, reasonable and prudent costs of safe operation will be recovered through the ratemaking process.[17]

SLOMFP faults the Board for, among other things, "mak[ing] a safety finding regarding a time period that the [Board] itself excluded from consideration in the proceeding: the period following PG&E's bankruptcy."[18] According to SLOMFP, the Board "addressed the narrow question of whether PG&E will be financially qualified as long as it remains in bankruptcy."[19] SLOMFP is troubled that there is no evidence in the record regarding the financial qualifications of any other entity that might be PG&E's successor. Similarly, SLOC believes that "PG&E took inconsistent positions, by demanding that the Board treat it as a utility regulated by the California Public Utilities Commission [with the ability to recover costs] from regulated rates without further demonstration of financial qualification" and "fil[ing] a reorganization plan in the

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[15] *See id.* at 442.

[16] *Id.*

[17] *See* LBP-03-11, 58 NRC at __, slip op. at 22; and *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 13, *rev'd on other grounds*, CLI-88-10, 28 NRC 573 (1988).

[18] "Intervenors' Petition for Review of LBP-02-23 and LBP-03-11" at 5 (Aug. 18, 2003).

[19] *Id.* at 6.

bankruptcy court that would result in the transfer of ISFSI responsibilities to a non-CPUC-regulated successor company."[20]

SLOMFP's and SLOC's arguments miss the mark. The Board sensibly admitted only the portion of SLOMFP's contention that deals with the *current applicant*; *i.e.*, PG&E. PG&E happens to be in bankruptcy, but it is still a rate-regulated utility and entitled to the corresponding presumption about financial qualification. After reviewing written submissions and hearing oral arguments, the Board concluded that no evidence effectively rebutted the presumption. The Commission declines to second-guess plausible Board findings of fact.[21]

The Board did not, however, make any *findings* about the post-bankruptcy period when it merely recited the two most probable outcomes of the bankruptcy proceeding; specifically, that PG&E would remain the licensee or that the ISFSI license would need to be transferred to another entity. If PG&E remains the licensee, of course, the presumption regarding financial qualifications of rate-regulated utilities would still apply. On the other hand, for another entity to become the license holder, PG&E would have to request the NRC to transfer the ISFSI license. As the Board noted, such a transfer request would be subject to a hearing, at which the question of the new entity's financial qualifications could be litigated.[22] And the proposed transferee must provide as much financial information as if the application were for an initial license.[23]

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[20]"Brief in Support of Petition for Review of Atomic Safety and Licensing Board Order Dismissing SLOMFP Contention TC-2 Challenge to PG&E's December 2001 Application to Construct and Operate an ISFSI at Its DCPP by the County of San Luis Obispo under 10 C.F.R. § 2.786(b)(1)" at 2-3 (Aug. 20, 2003). *See* note 6.

[21]*See, e.g., Shearon Harris,* CLI-01-11, 53 NRC at 382.

[22]LBP-03-11, 58 NRC at __, slip op. at 22.

[23]*See* 10 C.F.R. §§ 72.50(b)(1) and 72.22(e).

In summary, the Commission denies review of the Board's financial qualifications ruling, which addresses only the current applicant and the current situation -- PG&E as debtor-in-possession during bankruptcy reorganization. The Board's order does not make any findings about the qualifications of any possible successor entity, nor does it cut off hearing rights in the event an entity other than PG&E ultimately desires to become the ISFSI licensee.

III. CONCLUSION

The Commission *denies* SLOMFP's and SLOC's petitions for review of LBP-02-23 and LBP-03-11.

IT IS SO ORDERED.

For the Commission

Andrew L. Bates
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of October, 2003.

CERTIFICATE OF SERVICE

I certify that on December 11, copies of San Luis Obispo Mothers for Peace et al.'s Petition for Review were served on counsel to the following parties to the administrative proceeding before the NRC by first-class mail:

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