RAS 4768

August 19, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
Pacific Gas and Electric Co.	)	Docket No. 72-26-ISFSI
	)	
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)	)	

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO SUPPLEMENTAL REQUEST FOR HEARING AND PETITION TO INTERVENE OF SAN LUIS OBISPO MOTHERS FOR PEACE ET AL.

Template= SECY-037

SECY-02

TABLE OF CONTENTS

August 19, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
Pacific Gas and Electric Co.	)	Docket No. 72-26-ISFSI
	)	
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)	)	

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO SUPPLEMENTAL REQUEST FOR HEARING AND PETITION TO INTERVENE OF SAN LUIS OBISPO MOTHERS FOR PEACE ET AL.

I. INTRODUCTION

On July 18, 2002, the San Luis Obispo Mothers for Peace et al. ("SLOMFP" or "Petitioners")[1] submitted proposed contentions in a supplemental filing amending its request for hearing and petition for leave to intervene in this matter.[2] In accordance with 10 C.F.R. § 2.714(c) and the schedule established by the Atomic Safety and Licensing Board ("Licensing

---

1 The Supplemental Request was submitted by the San Luis Obispo Mothers for Peace, Avila Valley Advisory Council ("AVAC"), 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 Cancer Action Now, Santa Margarita Area Residents Together, Santa Lucia Chapter of the Sierra Club, and the Ventura County Chapter of the Surfrider Foundation.

2 *See* Supplemental Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace, Avila Valley Advisory Council, 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 Cancer Action Now, Santa Margarita Area Residents Together, Santa Lucia Chapter of the Sierra Club, and Ventura County Chapter of the Surfrider Foundation, dated July 18, 2002 ("SLOMFP Contentions").

Board") in this proceeding,[3] Pacific Gas and Electric Company ("PG&E") herein responds to SLOMFP's proposed contentions on the issue of admissibility. As discussed further below, Petitioners have failed to identify an admissible contention. Accordingly, the request for hearing should be denied.

II. BACKGROUND

On December 21, 2001, PG&E submitted an Application for a site-specific license under 10 C.F.R. Part 72 to possess spent fuel, and other radioactive materials associated with spent fuel, generated at the Diablo Canyon Power Plant ("DCPP") in an independent spent fuel storage installation ("ISFSI"). The Application included a Safety Analysis Report ("SAR") and Environmental Report ("ER"). If granted, the Part 72 license will authorize PG&E to store spent fuel and associated materials in a dry cask storage system co-located with the power plant at the DCPP site in San Luis Obispo County. A notice of opportunity for hearing was published in the *Federal Register* on April 22, 2002.[4]

In response to this notice, SLOMFP, on behalf of itself and several other groups, submitted a petition on May 22, 2002.[5] Ms. Pinard and AVAC also submitted a petition on May

---

3 *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), Memorandum and Order (Initial Prehearing Order), slip op. June 6, 2002 ("Initial Prehearing Order").

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

5 *See* Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace, 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 Cancer Action Now, Santa Margarita Area Residents Together, Santa Lucia Chapter of the Sierra Club, and Ventura County Chapter of the Surfrider Foundation, dated May 22, 2002.

22, 2002.[6] The NRC Staff submitted a response to these requests for hearing and petitions to intervene, on the issue of standing only, on May 30, 2002.[7] PG&E responded to the SLOMFP petition and the Pinard/AVAC petitions, also on the issue of standing, in two separate filings dated June 3, 2002.[8] On July 8, 2002, petitioners Pinard and AVAC amended their hearing request and petition for leave to intervene, with respect to standing.[9] PG&E responded to this amended petition on July 18, 2002.[10]

On May 31, 2002, a Licensing Board was established for this proceeding.[11] Shortly thereafter, on June 6, 2002, the Licensing Board issued the Initial Prehearing Order setting forth dates and other requirements for petitioners to amend their petitions with regard to standing and proposed contentions, and for PG&E and the NRC Staff to respond thereto. On July 19, Petitioners (now including, as noted above, petitioners Pinard and AVAC) filed an amended petition setting forth their proposed contentions.

---

6 *See* Petition of San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council for Leave to Intervene and Request for Hearing, dated May 22, 2002.

7 *See* NRC Staff's Response to Requests for Hearing and Petitions to Intervene Filed by Lorraine Kitman, San Luis Obispo Mothers for Peace, and San Luis [Obispo] County Supervisor Peg Pinard and Avila Valley Advisory Council, dated May 30, 2002.

8 *See* Answer of Pacific Gas and Electric Company to the Petitions for Leave to Intervene and Requests for Hearing of Lorraine Kitman and the San Luis Obispo Mothers for Peace et al., dated June 3, 2002; Answer of Pacific Gas and Electric Company to the Petition for Leave to Intervene and Request for Hearing of San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council, dated June 3, 2002.

9 *See* Petitioners' Amended Hearing Request and Petition to Intervene, dated July 8, 2002. Additionally, this filing informed the Licensing Board that petitioner Kitman intended to participate in the proceeding as a member of SLOMFP.

10 *See* Answer of Pacific Gas and Electric Company to Amended Petition to Intervene of Peg Pinard and Avila Valley Advisory Council, dated July 18, 2002.

11 *See* Pacific Gas and Electric Company; Establishment of Atomic Safety and Licensing Board, 67 Fed. Reg. 39,073 (June 6, 2002).

III. STANDARDS FOR ADMISSIBILITY OF CONTENTIONS

To be admissible in NRC licensing proceedings, proposed contentions must satisfy 10 C.F.R. § 2.714(b)(2), which provides that each contention "must consist of a specific statement of the issue of law or fact to be raised or controverted." Additionally, each contention must be accompanied by:

> (i) A brief explanation of the bases of the contention.
>
> (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
>
> (iii) Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application that the petitioner disputes and the supporting reasons for each dispute.

10 C.F.R. § 2.714(b)(2). *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 333 (1999); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996).

The rules on the admission of contentions establish an evidentiary threshold more demanding than a mere pleading requirement. The rules require precision in the contention pleading process and require that a proposed contention have plausible and relevant factual support. The rule provides that if the contention and supporting material fail to demonstrate a genuine issue as required by Section 2.714(b)(2), the presiding officer (or, in this case, the Licensing Board) must refuse to admit the contention. 10 C.F.R. § 2.714(d)(2)(i). *See also Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991)(*citing* Final Rule, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989)).

A contention must also be rejected when, even if proven, it "would be of no consequence in the proceeding because it would not entitle petitioner to relief." 10 C.F.R. § 2.714(d)(2)(ii). *Yankee*, CLI-96-7, 43 NRC at 249 (*citing Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 142 (1993)). Similarly, under longstanding Commission precedent, proposed contentions must fall within the scope of the issues set forth in the notice of hearing. *See Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 91 (1990) (*citing Pub. Serv. Co. of Ind., Inc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170 (1976).

As discussed below, SLOMFP has not satisfied the Commission's requirements for admissible contentions. The Petitioners raise issues beyond the scope of this proceeding and issues that do not have a supporting basis sufficient to show a genuine issue. Lacking an admissible contention, the hearing requests should be denied.

IV. SLOMFP PROPOSED CONTENTIONS

Pursuant to the Initial Prehearing Order, the proposed contentions are divided into technical and environmental contentions, designated "TC" and "EC," respectively. Each proposed contention is discussed in detail below.

A. TC-1 — Inadequate Seismic Analysis

In proposed Contention TC-1 SLOMFP contends that "the seismic analysis presented by PG&E does not consider a number of significant seismic features in the area of [DCPP]. 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." (SLOMFP Contentions at 2.) In particular, SLOMFP provides three bases — all relying on the declaration and input of Dr. Mark R. Legg — for this contention. All three

bases relate to the limiting seismic source characterization for a design basis earthquake to be used at the DCPP site:

- Basis a: *Reverse or thrust fault* — SLOMFP contends that "[t]he foremost problem with PG&E's seismic analysis is its failure to consider the threat posed by large reverse or thrust fault earthquakes in the vicinity of Diablo Canyon. While PG&E correctly considers the Hosgri fault zone to constitute the constraining seismic source for the facility, PG&E incorrectly and non conservatively assumes that it is a purely strike-slip fault (SAR p. 2.6-33)." (SLOMFP Contentions at 2.)

- Basis b: *Dipping* — SLOMFP contends that "[t]he nonconservatism is increased by the fact that PG&E also assumes that the fault is a vertical fault (SAR p. 2.6-30), rather than east-dipping." (SLOMFP Contentions at 2-3.)

- Basis c: *Fault Location* — SLOMFP contends that PG&E also "places the [limiting] fault in a non conservative location." (SLOMFP Contentions at 3.)

As discussed below, this proposed contention — all three bases — is inadmissible because it raises only matters that were thoroughly and comprehensively addressed at the time of licensing DCPP and that are, under NRC rules, beyond the scope of review (and the scope of the hearing) for a co-located ISFSI. Specifically, the source characterization of the controlling fault at DCPP, including the magnitude, distance, and focal mechanism (*i.e.,* type of faulting, such as strike-slip, reverse/oblique, or reverse/thrust) of the design basis earthquake are not new issues. They were all matters comprehensively addressed and reviewed by the NRC and it's consultants during the operating license review and the confirmatory Diablo Canyon Long Term Seismic Program required by DCPP operating license condition. This characterization was used to determine design ground motions at the DCPP site. Under 10 C.F.R. §§ 72.102(f) and 72.40(c), the seismic source characterization and DCPP ground motions cannot and should not be reopened in this Part 72 proceeding.

Moreover, the established seismic source characterization has been utilized to calculate the site ground motions and structural response spectra used for evaluating the DCPP ISFSI. As is discussed further below with respect to each of the bases for the proposed contention, no expertise or basis is demonstrated in the proposed contention to show that, assuming the prior source characterization, there is a genuine dispute with the design ground motions and response spectra for the ISFSI that are discussed in the SAR. Therefore, in this regard, the proposed contention lacks basis.

1. NRC Regulations Preclude Reopening Seismic Source Characterization Issues.

The NRC issued full power operating licenses ("OLs") to PG&E for DCPP, Units 1 and 2, in November 1984 and August 1985, respectively. The OLs were based on a fulsome technical review at the time of geological and seismological data. Seismic issues were also fully addressed in the NRC hearing process on the OL application, and SLOMFP was an intervenor in those proceedings. *See, e.g., Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903 (1981) (pointing out that the Licensing Board's conclusions on the limiting earthquake on the Hosgri fault were not challenged, but comprehensively addressing contentions on the seismic reanalysis of Diablo Canyon based on the Hosgri characterization, including contentions related to ground motions at the plant site and the response spectra used in the Hosgri design re-analysis); *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-763, 19 NRC 571 (1984) (addressing seismic design reverification issues); *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-811, 21 NRC 1622 (1985) (addressing seismic design reverification issues pertaining to Unit 2).

Specifically, at the time of licensing DCPP for operation, the geological and seismic characteristics of the region and the site were reviewed by PG&E and the NRC based on

the data compiled and studies completed at the time, the recommendations of the United States Geological Survey ("USGS"), and review by the Advisory Committee on Reactor Safeguards ("ACRS"), and in accordance with 10 C.F.R. Part 100, Appendix A. The NRC required a Safe Shutdown Earthquake ("SSE") for DCPP represented as a horizontal peak ground acceleration ("PGA") of 0.75g based on a postulated magnitude 7.5 earthquake on the Hosgri fault located at 5 km from the DCPP site.[12] This is referred to as the Hosgri ground motion for DCPP. PG&E reanalyzed the applicable existing plant structures, and made modifications as necessary, to confirm the plant's ability to accommodate the Hosgri ground motion. The Hosgri earthquake ground motion supplemented the previous DCPP seismic design bases developed during the construction permit review at a time when NRC regulations in Part 100 Appendix A governing seismic design were still under development. The original design bases were known as the Design Earthquake ("DE") and Double Design Earthquake ("DDE").

In addition, in the DCPP OLs the NRC included a license condition requiring PG&E to develop and implement a program to reevaluate and confirm the seismic design bases used for DCPP. In accordance with that license condition, PG&E developed and implemented what is known as the Long Term Seismic Program ("LTSP"). The LTSP Final Report was submitted to the NRC in July 1988, including detailed evaluations of existing and new geologic and seismologic data related to characterization of seismic sources of significance to the Diablo Canyon site.[13] This enabled PG&E to conclude that a maximum earthquake magnitude of 7.2 on

---

12 NUREG-0675, NRC Supplemental Safety Evaluation Report 4 ("SSER 4"), Diablo Canyon Nuclear Power Plant (May 1976).

13 PG&E Letter No. DCL-88-192, Docket Nos. 50-275, 50-323, "Long Term Seismic Program Completion" (July 31, 1988).

the Hosgri fault zone provides a very conservative basis for evaluating the adequacy of the power plant structures, systems, and components.

The NRC conducted a thorough review of the LTSP, over several years, evaluating significant new information and studies related to characterizing the seismic sources at DCPP. The NRC again consulted with the USGS, its other consultants, and the ACRS.[14] In June 1991, the NRC Staff issued its full report on the results of the LTSP, and concluded that the DCPP license condition had been met.[15] Based on the LTSP review of data and seismic source characterizations, the NRC concluded that:

- PG&E's LTSP conclusion was acceptable that the maximum or controlling earthquake associated with the Hosgri fault has a magnitude of 7.2 and could be located (for calculating ground motions at the site) on the strand of the Hosgri fault zone that is nearest to the site (*i.e.*, 4.5 km from the site).

- The ground motion at the site should be evaluated for an earthquake on the Hosgri fault that is 2/3 strike-slip and 1/3 reverse slip. Specifically, response spectra were developed using weighted probabilities of the three potential styles of faulting (65 percent strike-slip, 30 percent oblique, 5 percent thrust).

---

[14] The LTSP and NRC review specifically took place from April of 1984 to September of 1991, a total of seven years and five months. During this time over sixty noticed public meetings were held, including the NRC, NRC consultants, the USGS, University of Nevada professors and graduate students, a Ground Motion Panel consisting of four distinguished professors, a Soil Structure Interaction Panel consisting of four distinguished professors, a Fragility Panel consisting of distinguished engineers from the Brookhaven and Sandia National Laboratories, and engineers from EQE, Inc. and a PRA Advisory Panel consisting of distinguished engineers from Brookhaven Laboratory. In addition, independent studies for the NRC were conducted by Dr. David B. Slemmons, University of Nevada, on geology, seismology, and tectonics; Dr. Kenneth Cambell of EQE on empirical ground motions; Dr. Anestis S. Veletsos on soil/structure interaction; Dr. Michael Bohn, Sandia National Lab, on seismic risk; Dr. James Johnson, EQE, Inc., and Dr. M. K. Ravinda, EQE, Inc., on fragility; and the Brookhaven National Laboratory on probabilistic risk assessment. All of these activities were reviewed at a series of public ACRS meetings.

[15] NUREG-0675, NRC Supplemental Safety Evaluation Report 34 ("SSER 34"), Diablo Canyon Nuclear Power Plant, at 1-7 (June 1991).

- The NRC's estimate of horizontal and vertical ground-motion response spectra at the site were equal to or less than PG&E estimates except at certain response frequencies (the "exceedences");

- PG&E's analysis of the horizontal and vertical exceedences was acceptable and confirmed that the plant seismic margins are adequate to accommodate the exceedences.[16]

The NRC Staff further emphasized that the "seismic qualification basis for Diablo Canyon will continue to be the original design basis plus the Hosgri evaluation basis, along with the associated analytical methods, initial conditions, etc."[17] In September 1991 the ACRS held a final meeting and concurred with the NRC Staff safety evaluation in SSER 34. Therefore, after completion of the LTSP, the DCPP design basis effectively encompassed the original DE and DDE, plus the Hosgri seismic design from the operating license process. Furthermore, the NRC's SSER 34 on the LTSP concluded:

> The LTSP has served as a useful check on the adequacy of the seismic margins and has generally confirmed that the margins are acceptable. For future plant design modifications, the staff concludes that LTSP spectra, increased to envelope the exceedences in the vertical and horizontal spectra discussed in Section 2.5.2.3 of this SSER, should be used to verify that the plant high confidence of low probability of failure (HCLPF) values remain acceptable (Section 3.3 of this SSER). PG&E has agreed (Shiffer, 1991) to review future plant modifications in the light of the findings of the LTSP, and is currently developing an implementation procedure for that purpose.[18]

---

16 NRC SSER 34, at 1-5 through 1-7. An excellent illustration of the scope of effort associated with the LTSP and the NRC review of the LTSP leading to these conclusions is provided by the "Chronology of LTSP Review" in Appendix A of SSER 34. The Chronology spans 13 years and takes up 12 pages in the appendix. An exhaustive list of references is also included in Appendix C to SSER 34.

17 *Id.* at 1-7.

18 *Id.*

Therefore, the NRC captured in the DCPP seismic design going forward the LTSP confirmatory response spectra, including the exceedences based on a composite source characterization including both strike-slip and reverse components.

PG&E explained in the Part 72 Application SAR that DCPP design basis ground motions were used for the design of the ISFSI in accordance with 10 C.F.R. 72.102(f). That regulation provides that "[f]or sites that have been evaluated under the criteria of Appendix A of 10 C.F.R. Part 100, the [ISFSI Design Earthquake ("DE")] must be equivalent to the safe shutdown earthquake (SSE) for a nuclear power plant." This regulation obviates re-review of the seismic design basis (including the source characterization of the design earthquake and the corresponding ground motions and response spectra at the site) for a co-located ISFSI. For the DCPP ISFSI, PG&E utilized the original design earthquakes (the DE and DDE), plus the Hosgri re-evaluation. Further, consistent with its commitment at the time of the LTSP, PG&E incorporated the LTSP response spectra. The ISFSI seismic design therefore is based upon a composite of the bounding ground motions and response spectra of the four prior earthquake ground motions (DE, DDE, Hosgri, LTSP) across the range of previously calculated frequencies. *See generally* SAR Section 2.6.2. The contention is barred by 10 C.F.R. § 72.102(f) which defines the design earthquake for the co-located ISFSI as equivalent to the design earthquake (and ground motions) for the power plant.[19]

---

[19] This approach is also reflected in the NRC's recently proposed rule, "Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installations and Monitored Retrievable Storage Installations," 67 Fed. Reg. 47,745 (July 22, 2002). The proposed rule would give an applicant for a Part 72 specific license for dry cask storage, located in the western United States or in areas of known seismic activity, and co-located with a nuclear power plant, an option of using the existing design criteria for the nuclear power plant for determining the design earthquake. *See, e.g.*, 67 Fed. Reg. at 47,747, col. 1-2; 47,748, col. 3; 47,750, col. 3; 47,754, col. 2. The proposed rule specifically reflects that "the criteria used to evaluate existing NPPs

Proposed Contention TC-1 does no more (or less) than challenge the seismic source characterization for the DCPP site. However, NRC regulations for ISFSIs, 10 C.F.R. § 72.40(c), also provide that:

> 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.

No new information is cited in the proposed contention. Rather, in challenging the fault mechanism (strike-slip versus reverse/thrust) and location, the proposed contention specifically seeks to re-open old issues thoroughly addressed in connection with the power plant.[20] (Further, no contention is made, and no basis is provided, to challenge the conclusion in the SAR, Section 2.6.2.3, that the power block and ISFSI site soil conditions are comparable and therefore that the DCPP ground motions are applicable.) All three aspects of this proposed contention cannot, as a matter of law, be admitted.

[nuclear power plants] 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." *Id.* at 47,748.

20 The policy inherent in this regulation is similar to that in the judicial concepts of *res judiciata* and collateral estoppel. Those doctrines may be applied in administrative proceedings to bar relitigation of previously resolved factual issues. *See Ga. Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-93-6, 38 NRC 25, 38 n.27 (1993); *Ala. Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-182, 7 AEC 210, 214-15, *remanded on other grounds,* CLI-74-12, 7 AEC 203 (1974); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986). Collateral estoppel in particular precludes relitigation of issues of law or fact which have been finally adjudicated. *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-378, 5 NRC 557, 561 (1977). The purpose of the doctrine "is to prevent continuing controversy over matters finally determined and to save the parties and boards the burden of relitigating old issues." *Safety Light Corp.* (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 442 (1995).

2. *The Bases Offered Do Not Demonstrate a Genuine Issue.*

The three specific bases offered by SLOMFP are further discussed below to demonstrate that these issues have been previously addressed and that there is no basis provided to establish, under 10 C.F.R. § 2.714(b)(2)(iii), a genuine dispute with respect to the ground motions and response spectra utilized in the design of the ISFSI.

a. Basis a: Reverse or Thrust Faults

With respect to the ISFSI design basis earthquake source characterization, SLOMFP argues that PG&E "assumes" that the Hosgri fault is a "purely" strike-slip fault. In alleged contrast, SLOMFP contends that the seismic analysis should consider "the oblique fault character, with thrust or reverse slip in combination with the right-slip." (SLOMFP Contentions at 3.) SLOMFP cites several references for the proposition that "the south-central California coastal zone is an area dominated by oblique-shortening." Thus, the proposed contention asserts, PG&E should re-evaluate the "seismic hazard" at DCPP to include "the real potential for large oblique-reverse earthquake ruptures in close proximity to the subject site." (SLOMFP Contentions at 5.)

As discussed above, the fundamental seismic source characterization for the DCPP site was fully addressed during licensing of DCPP and during the LTSP. As observed by the Appeal Board in ALAB-644, 13 NRC at 913, the Licensing Board concluded that a 7.5 magnitude earthquake is the largest likely on the Hosgri fault and that the Intervenors found this "acceptably conservative." Another component of a seismic source characterization is the

mechanism of the limiting fault.[21] During licensing and the LTSP, data was evaluated and arguments were made regarding whether the Hosgri fault zone is strike-slip, reverse/oblique, or reverse ("thrust") fault. PG&E's conclusion in the LTSP, based on substantial study, was that the Hosgri fault zone is characterized by "high-angle, strike-slip displacement." Nonetheless, based on its review, the NRC Staff in SSER 34 on the LTSP adopted the conservative composite source characterization described above. For developing DCPP response spectra the NRC Staff characterized the Hosgri fault as 2/3 strike-slip and 1/3 thrust slip (reverse-slip with a low dip angle). Therefore, because PG&E in the ISFSI design utilizes the final LTSP spectra (where those spectra are more conservative than the DE, DDE, or Hosgri spectra), it is simply incorrect for SLOMFP to maintain that PG&E is assuming a 100 percent strike-slip fault. Even if the entire issue of the fault mechanism were re-opened (contrary to the regulations discussed above), the proposed contention is based on a faulty premise.

Furthermore, a careful reading of the proposed contention demonstrates that it actually focuses only on PG&E's assumption of a strike-slip fault at SAR page 2.6-33. (SLOMFP Contentions, at 2, 3.) While SLOMFP shows no understanding or focus in its discussion, that SAR section (Section 2.6.2.5) is in fact focused on only one issue: the ISFSI long-period earthquake spectra ("ILP"). This relates to the response spectra at greater than 2.0 seconds, which is relevant only to issues of slope stability and postulated cask transporter sliding. Because the near-fault effect of directivity is stronger for strike-slip earthquakes than for thrust-slip earthquakes as discussed in SAR Section 2.6.2.5, PG&E for conservative reasons maximized

---

[21] Factors included in the characterization, for purposes of calculating the ground motions at the site and developing structural response spectra, include the magnitude and location of the fault, the site characteristic (*e.g.*, "rock" or "soil"), and the fault mechanism. More recent analysis techniques also incorporate the geometry of the fault ("hanging wall" versus "foot wall"), directivity, and fling.

the directivity effects for the ILP by adopting a strike-slip fault for the long-period response. In this long-period response range (the period greater than 2.0 seconds) characterizing the fault as reverse-slip as suggested by SLOMFP would actually result in *lower* ground motions than used by PG&E for the ILP. Nothing in the basis statement for the proposed contention therefore provides a meaningful basis to challenge the ISFSI long-period response spectra or the discussion in the SAR.

In sum, the proposed contention merely references papers and data—including LTSP data and data presented in the SAR—to re-argue the fundamental source mechanism of the Hosgri fault zone. That issue is beyond the scope of this proceeding. Moreover, any challenge to the long-period spectra discussed in SAR Section 2.6.2.5 is lacking in both specificity and basis.

b. Basis b: East Dipping Fault

SLOMFP next contends that "an important effect of considering an oblique-reverse character for major earthquakes along the Hosgri fault zone is to realize that the fault is not vertical, but instead has an east to northeast dip." (SLOMFP Contentions at 5.) SLOMFP cites to references demonstrating "numerous east-dipping reverse or thrust faults in the region, including faults within the mapped HOSGRI fault zone." (*Id.*) Thus, SLOMFP states that, "with an east to northeast dip, the closest distance of the fault surface to the DCPP and ISFSI [sic] is significantly closer" to the site than the figure used in PG&E's design ground motion evaluations, and "the epicenter of such an earthquake could lie directly beneath" DCPP. (SLOMFP Contentions at 6.)

In this basis, SLOMFP is again fundamentally challenging the seismic source characterization (*i.e.*, the characteristics of the controlling fault) for the design earthquake for DCPP and the ISFSI. The "dip" of the Hosgri fault was previously specifically evaluated as part

of the LTSP. Based on PG&E's LTSP analyses, the NRC concluded that the dip of the Hosgri fault is between 60 and 90 degrees over most of its length through the seismogenic zone.[22] Reopening that issue for the ISFSI is now precluded by regulation.

Apart from the legal bar, PG&E also finds no technical basis in this aspect of the proposed contention to justify re-opening the source characterization issue in this proceeding. The set of data referenced in the basis for this proposed contention that is actually related to the Hosgri fault zone is not new data. The data of J.K. Crouch and others cited by SLOMFP was presented as a basis to reopen the DCPP OL proceeding and to stay issuance of the license in 1984 and 1985. The motion to reopen was dismissed. *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-782, 20 NRC 838 (1984). The request for a stay was denied. *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-85-14, 22 NRC 177, 178-80 (1985). In any event, however, these matters were specifically evaluated during the LTSP.

An additional set of data now cited by SLOMFP in this proposed contention, including more recent studies referenced related to the ground motions of "larger reverse or thrust" faults, is not addressed to the Hosgri fault zone source for DCPP and therefore has no clear relevance. The source for the DCPP design ground motions has been previously characterized. SLOMFP's assertion that ground motions for reverse or thrust faults may be larger than for faults with another focal mechanism, while perhaps true, is an assertion without applicability. SLOMFP's assertion of "selective ignorance" on the part of PG&E is gratuitous and unfounded.[23]

---

22 *See, e.g.*, SSER 34, at 2-19.

23 Applicable to bases a and b, SLOMFP also references the data presented in the SAR Figures 2.6-40 through 2.6-42. These Figures present seismicity data from October 1987

Moreover, in this basis SLOMFP again fails to provide any evidence on which to conclude that the DCPP design ground motions and response spectra are in any way inadequate. No expertise is presented with respect to the calculation of ground motions given a seismic source, or in the development and analysis of the response spectra (including the ILP). Accordingly, apart from re-raising old issues previously related to the source characterization, there is no genuine dispute demonstrated with respect to the ISFSI response spectra. There is no basis to justify admission of a contention.

c. Basis c: Fault Location

Lastly, SLOMFP argues that PG&E's seismic analysis is not conservative because PG&E uses a vertical fault plane, and places the plane on the "more distant side" of the fault zone. (SLOMFP Contentions at 6-7.) Based on its assertions regarding the location of the 1927 Lompoc earthquake, SLOMFP contends that PG&E should re-evaluate the ground motions including the concept of "focusing" and "fling." Such a re-evaluation would, according to SLOMFP, "require re-evaluation of all the subsequent secondary hazard issues, including earthquake-induced slope failure, liquefaction or lurching (surficial ground failures due to extreme shaking), tsunami, and possible secondary faulting in the hanging wall of the active fault surface beneath the coastline." (SLOMFP Contentions at 8.)

This proposed contention again challenges a component of the seismic source characterization for the design earthquake for DCPP — the location of the maximum or controlling fault. This issue also was fully addressed during both the OL review, the Hosgri re-

---

through January 1997. SLOMFP asserts that this data somehow supports the conclusion that the Hosgri fault activity is reverse fault with an eastern dip. On its face, the data does not support that conclusion. See in particular SAR Figure 2.6-41, seismic cross section B-B. The fault activity appears nearly vertical. In addition, focal mechanisms for earthquakes located within the Hosgri fault zone indicate strike-slip solutions with steeply dipping fault planes (*see* SAR Figure 2.6-42).

evaluation (in which a magnitude 7.5 earthquake was assumed at 5 km from the site), and the LTSP (in which the controlling earthquake was demonstrated to be a magnitude 7.2 earthquake on the Hosgri fault at 4.5 km from the site). The Hosgri and LTSP sources and response spectra were utilized in the ISFSI design and the location and magnitude of the source cannot be raised again in this proceeding.

This basis in particular focuses on the 1927 Lompoc earthquake. SLOMFP assigns a magnitude of 7.3 to this earthquake and argues that PG&E has "removed" it from consideration. This argument is, however, baseless. The magnitude and location of the 1927 Lompoc earthquake was a matter specifically and fully addressed during the LTSP. The NRC's SSER 34 states:

> The location and structural association of the 1927 Lompoc earthquake has been an issue because it is the largest historical event to have occurred in the region and it provides a lower bound for the maximum credible earthquake for the associated structure. The 1927 Lompoc earthquake occurred off shore and coverage by seismic stations was sparse. Prior to the LTSP review, the USGS estimated the magnitude of the 1927 Lompoc earthquake to be magnitude 7.3. PG&E reevaluated the magnitude using the California Institute of Technology database and found that the average surface-wave magnitude (Ms) was 7.0. The [NRC] staff agrees with the PG&E position that the Ms of the Lompoc earthquake was 7.0.
>
> The staff finds the PG&E evaluation of the epicenter of the 1927 Lompoc earthquake was thorough and agrees with PG&E that the 1927 earthquake did not occur on the Hosgri fault zone. Because of its offshore location and epicentral uncertainty, it is difficult to associate the 1927 epicenter with a specific geological structure. However, several northeast-dipping reverse faults have been observed on seismic lines in the vicinity of the epicenter; the trend and sense of slip on these faults agree with the fault plane solution.[24]

---

[24] NRC SSER 34, at 2-33 through 2-34.

Indeed, current seismological maps published by the State of California now formally locate the 1927 Lompoc earthquake off the Hosgri fault, with a magnitude and location that is consistent with PG&E's conclusions.[25]

Other arguments included in this basis related to "secondary hazard issues" are conclusory at best, and largely dependent on the argument that the design earthquake source should be re-characterized as one with a "reverse focal mechanism." No specific basis is provided with respect to the information in the PG&E ISFSI SAR on slope stability (*see* SAR Section 2.65) or liquefaction (*see, e.g.*, SAR Section 2.6.4.5). Similarly, no basis is provided to support a concern for a tsunami at the proposed DCPP ISFSI, which is at an elevation of 300 feet. Accordingly, in this basis SLOMFP has again failed to demonstrate the existence of a genuine dispute on a material issue.

B. TC-2 — PG&E's Financial Qualifications Not Demonstrated

SLOMFP's proposed Contention TC-2 is the first of several similar financial qualifications contentions. Contention TC-2 broadly argues that — because of the pending bankruptcy reorganization of PG&E — the Application does not meet the financial qualifications requirements set forth at 10 C.F.R. § 72.22. The amended petition divides this proposed contention into five subparts. While the five subparts are somewhat overlapping and redundant, they can be distilled to the five following bases:

- Basis a: Because PG&E is in a bankruptcy, its financial future and viability is "unknowable."
- Basis b: PG&E's reliance for financial qualifications on recovery through the rate process is "questionable" — because PG&E cannot recover "construction work in progress" expenses; because

[25] T. Toppozada, D. Branum, M. Peterson, C. Hallstrom, C. Cramer, M. Reichle, "Epicenters of and Areas Damaged by M≥5 California Earthquakes 1800-1999," Map Sheet 49, California Department of Conservation, Division of Mines and Geology (2000).

PG&E is in bankruptcy (*see* basis a); because of pending litigation against PG&E's parent company, PG&E Corporation (see basis e); and because it is allegedly not clear that PG&E will emerge from bankruptcy with debts repaid (*see* basis a).

- Basis c: The financial qualifications showing is inadequate because the licensee will not be a rate-regulated utility following the implementation of the plan of reorganization.

- Basis d: Based on excerpts from various public documents, it does not appear that PG&E can make capital investments and borrow sufficient funds to cover ISFSI construction and operating costs.

- Basis e: The lawsuit brought by the California Attorney General against PG&E Corporation "must be resolved."

Each of these five bases is discussed individually below. None establishes a genuine dispute of material law or fact with respect to PG&E's financial qualifications to construct and operate the ISFSI. Therefore, this proposed contention should be rejected in its entirety.

1. Basis a: The Mere Fact of Bankruptcy Does Not Establish a Specific Financial Qualifications Dispute.

SLOMFP first contends that, because PG&E is currently in bankruptcy, it is "unknowable" whether PG&E will emerge from bankruptcy a "viable entity," and, if it does, the extent of the resources that will remain available to it. (SLOMFP Contentions at 13.) SLOMFP makes no specific challenge here with respect to the data provided in connection with the Part 72 Application and the basis for PG&E's financial qualifications to construct and operate the proposed ISFSI. This basis asserts no more than the mere fact of the pending bankruptcy proceeding and the associated uncertainty involved in predicting the outcome of the bankruptcy confirmation process. However, the pending bankruptcy proceeding and the attendant uncertainty regarding the proposed reorganization alone do not establish that a genuine dispute exists on a material issue of law or fact.

PG&E indeed filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code on April 6, 2001. Pursuant to 10 C.F.R. § 50.54(cc), the licensee immediately notified the NRC that the petition for relief had been filed.[26] The same day, NRC Chairman Meserve notified California Governor Davis of the NRC's ongoing regulatory oversight functions. Chairman Meserve stated, in pertinent part:

> *Our ongoing regulatory oversight and our inspections to date confirm that the present financial situation has had no impact on PG&E's ability to operate its units safety* [sic] *and in accordance with our requirements.* Our inspectors are particularly sensitive to signs of curtailment of required activities that may impinge on safety. . . Representatives from PG&E have informed us that they have adequate operating funds to conduct safe operation of Diablo Canyon in accordance with our regulations. With respect to decommissioning funds . . . [t]he most recent reports . . . show that [PG&E's] decommissioning accounts for its nuclear facilities are sufficiently funded.

Letter, R.A. Meserve, NRC, to the Honorable Gray Davis, dated April 6, 2001 (appended hereto as Attachment 1)(emphasis added). PG&E and operations at DCPP have remained subject to NRC oversight continuously since the Chapter 11 petition was filed. With respect to NRC requirements, however, there is no presumption that, because of the bankruptcy filing, PG&E is not financially qualified to continue its day-to-day operations, such as operating the power plant and developing the ISFSI. While the NRC remains attuned to the potential for performance problems that might result from financial difficulties, any such issues would be addressed — when and if they were to arise — as an ongoing regulatory matter.

It is also important that PG&E has filed for Chapter 11 reorganization, not for Chapter 7 liquidation. The distinction reflects that PG&E remains a going concern — a solvent debtor-in-possession — continuing to conduct day-to-day operations under the protection of the

---

[26] *See* Letter, G.M. Rueger, PG&E, to E.W. Merschoff, NRC, "Notification of Filing of Voluntary Bankruptcy Petition of Pacific Gas and Electric Company — 10 CFR

bankruptcy process. PG&E and its parent corporation, PG&E Corporation, have filed with the Bankruptcy Court a comprehensive Plan of Reorganization ("Plan") for PG&E.[27] An alternative plan has been filed by the California Public Utilities Commission ("CPUC"). These plans are being considered by the Bankruptcy Court through the confirmation process. While the outcome may be "uncertain," any plan of reorganization ultimately confirmed by the Bankruptcy Court would need to be approved in accordance with Section 1129 of the Bankruptcy Code, 11 U.S.C. § 1129. (That section provides that the Bankruptcy Court shall confirm a plan if thirteen specified requirements are met.) Confirmation of a plan of reorganization is certainly anticipated prior to construction of the ISFSI.[28] The principal objective of a Chapter 11 case is the confirmation and consummation of a plan which would ultimately discharge the debtor from debt that arises prior to the date of confirmation of the plan and which would substitute the obligations specified under the confirmed plan.[29] Neither the current bankruptcy proceeding nor the potential reorganization provides a basis to broadly challenge PG&E's long-term, post-plan confirmation, ability to cover ISFSI construction and operating costs.

Pending the outcome of the bankruptcy case, as stated in the Application (at page 4), the funds necessary to cover the costs of designing, constructing, and operating the

---

50.54(cc)," dated April 6, 2001.

27 The Plan (and the associated Disclosure Statement) was originally filed with the Bankruptcy Court on September 20, 2001. Various amendments to the Plan have been subsequently filed.

28 Following the completion of voting and confirmation hearings on the proposed plans, it is currently anticipated that a Confirmation Order will be issued by the Bankruptcy Court by December 31, 2002.

29 This is the fundamental purpose of Chapter 11 reorganization. "Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate and reorganize its business rather than simply to liquidate a troubled business." 7 Collier on Bankruptcy, ¶ 1100.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev'd 2002).

ISFSI will derive from electric rates and from electric operating revenues. *See* Decision 02-04-016, Opinion Adopting Revenue Requirements for Utility Retained Generation, 2002 WL 988148 (Cal. P.U.C. Apr. 4, 2002), slip op. at 23-25.[30] In that decision, PG&E's retained generation was specifically returned to the regulated rate base. SLOMFP has not specified, in either this basis for the proposed contention or the declaration of its financial advisor, any information — other than the mere fact of "the bankruptcy" — to support the proposition that PG&E is not presently viable or that it will be unable to meet NRC requirements for safe construction and operation of the ISFSI. The pending bankruptcy proceeding and plan of reorganization do not alter PG&E's current access to the ratemaking process to cover prudently incurred expenses. Nor do they alter NRC's ongoing safety oversight. This proposed sub-issue should be rejected for lack of specificity and basis.

2. *Basis b: PG&E's Status as a Utility Establishes Reasonable Assurance of Financial Qualifications.*

In this basis, SLOMFP raises several questions related to PG&E's cost recovery through electric rates, as follows: (1) construction work in progress ("CWIP") generally is not recoverable in rates, until operation is under way; (2) PG&E's ability to recover operating costs from the rate base is "questionable," due to its bankruptcy (discussed above in connection with basis a) and pending litigation against PG&E's parent (discussed below in connection with basis e); and (3) PG&E is in bankruptcy "because it has incurred costs in excess of what it has been able to recover from the rate base," and, thus, it is unclear whether any rates recovered by PG&E will be sufficient to "make it whole again, sufficient to ensure that it operates safely and does not cut corners." (SLOMFP Contentions at 14-15.)

---

30 As also stated in the Application (at 4-5), for the period 2026 to 2040, as well as for the period thereafter until the fuel is removed from the site, costs will be derived from the Decommissioning Fund.

First, SLOMFP erroneously contends here that PG&E's current Chapter 11 status changes its ability to recover operating costs from the rate base. As discussed above, the CPUC has established interim cost-of-service revenue requirements for PG&E's utility-retained generation, and has specifically returned DCPP to the rate base. *See* Decision 02-04-016, 2002 WL 988148, slip op. at 23-25. There is nothing "questionable" about PG&E's access to the rate process for DCPP expenses. It is a fact. This argument does not raise a genuine issue.

Second, the argument regarding CWIP is unsupported and misplaced. No citation is given to a statute or regulation that would require deferring recovery of costs related to an ISFSI at an *operating* power plant. In fact, to date PG&E has been expensing the costs associated with development of the ISFSI. Going forward under rate regulation, PG&E has included costs associated with the ISFSI in its 2003 General Rate Case pending before the CPUC. While PG&E's ability to recover expenditures in the rate base is always subject to a prospective reasonableness review, this is not a unique situation and does not present a genuine issue of material fact or law in this proceeding. SLOMFP has shown no basis whatsoever for an argument that PG&E cannot cover ongoing expenses associated with the ISFSI through ongoing operating revenues and cash flows, through the normal, ongoing ratemaking process.[31]

SLOMFP claims "PG&E must retire enormous debts" and that it is not clear whether any rates recovered by PG&E will be "high enough to make it whole again, sufficient to ensure that it operates safely and does not cut any corners." (SLOMFP Contentions at 15.)

---

[31] In this regard, it is also important to note that — as discussed in the Application — the ISFSI, once authorized, will actually be built in phases. *See, e.g.*, ER §§ 3.1, 3.2. Sections of the ISFSI pad will be completed as needed. Similarly, casks will be ordered from the vendor as needed, not all at once. This normal and prudent staging serves to minimize the cash flow impacts of construction costs.

However, the argument confuses day-to-day cash flows and ongoing rate recovery with the bankruptcy reorganization to address past debts.

With respect to operating expenses, PG&E is presently the Part 72 applicant. Expenses incurred by PG&E are currently recoverable through rates, including the proposed ISFSI costs. This process is available without regard to "debts." With respect to "debts," the *object* of the bankruptcy reorganization under Chapter 11 is to reaffirm PG&E's financial viability. Any plan ultimately confirmed by the Bankruptcy Court should provide necessary cash and increased debt capacity to enable PG&E to repay creditors, restructure existing debt, and emerge from the Chapter 11 bankruptcy case with a strong and sustainable business.[32] Therefore, the muddled argument regarding recovering past debts in future rates is baseless and no support for a contention.

Finally, the speculative concern included in this basis about "cost cutting" is also not a valid basis for a contention. The ISFSI construction and operation would be subject to ongoing NRC oversight.[33] SLOMFP has provided no basis on which to assume that PG&E cannot or will not fulfill its responsibilities under the AEA. Accordingly, this basis is insufficient to meet the requirements of 10 C.F.R. § 2.714.

3. *Basis c: PG&E's Financial Qualifications as a Rate-Regulated Utility Are Appropriately Considered in This Proceeding.*

SLOMFP argues that PG&E's Application as a rate-regulated utility is "disingenuous" because, under the Plan of Reorganization connected with PG&E's bankruptcy

---

32 The PG&E Plan specifically provides for payment of allowed claims in full. The adequacy of the competing reorganization plans, however, is certainly beyond the scope of this proceeding.

33 Petitioners would be free to raise any future compliance matters under the process established in 10 C.F.R. § 2.206.

petition, DCPP will be transferred to a new generating company separate from PG&E Corporation. (SLOMFP Contentions at 15.)

This basis does not demonstrate a genuine dispute with respect to a material issue of law or fact and should be rejected. As discussed above and stated in the Application, PG&E is the applicant for the Part 72 license. PG&E is an electric utility subject to economic regulation by the CPUC, with revenues based upon traditional cost-of-service rates. It is anticipated that, as indicated in the Part 72 Application, as long as PG&E remains the applicant or licensee ISFSI costs will be covered by revenues derived from electric rates. Information on those costs as required to meet 10 C.F.R. § 72.22(e) is provided in the Application and its supplements, and there is nothing in the proposed contention to specifically challenge that information.

With respect to the charge that the Application is disingenuous, the contention is unfounded. As stated in the Application, and even more clearly in a supplement to the Application dated June 7, 2002,[34] *if* PG&E's proposed reorganization Plan is confirmed by the Bankruptcy Court, and *if* the Part 50 license transfer is approved by the NRC, and *if* the Plan is implemented, *then* PG&E will amend the Part 72 Application such that Electric Generation LLC ("Gen") would become the applicant/licensee. Accordingly, the basis for financial qualifications would change. Capital and operating costs related to DCPP and the ISFSI would be covered by revenues from merchant sales of electricity. The financial qualifications issues germane to the Plan and operation of DCPP are already being addressed by the NRC in its review of the DCPP Part 50 license transfer, subject to the associated NRC hearing process. (SLOMFP did not seek to participate in that process.) ISFSI expenses, which constitute only a small portion of DCPP

---

[34] PG&E Letter DIL-02-008 from L. Womack, PG&E, to the NRC Document Control Desk, "Supplemental General and Financial Information — 10 CFR 72.22," dated June 7, 2002.

expenses, are inherently addressed in the financial projections submitted in conjunction with the license transfer application. Those matters are beyond the present scope of review since they are subject to review in the Part 50 transfer context. At a minimum, those issues are premature on this docket.[35] And, at bottom, SLOMFP does not present *any* factual or legal basis to challenge Gen's financial qualifications to cover ISFSI expenses.[36] This issue is not admissible.

---

35 In its recent Memorandum and Order denying requests to stay this proceeding, the Licensing Board noted that, in considering contention admissibility, it will consider "the degree to which it can delve into financial qualifications matters in connection with the PG&E ISFSI application." LBP-02-15, 56 NRC __, slip op. at 10 n.7 (July 15, 2002). The financial viability of Gen is being addressed by the NRC Staff in reviewing the Part 50 license transfer application, and interested parties have had the opportunity to raise financial qualifications issues in the adjudicatory proceeding associated with that application and currently pending before the Commission. In order to approve the license transfer, the NRC must find that, among other things, the transferee (Gen) satisfies the NRC's financial qualifications requirements set forth at 10 C.F.R. § 50.33. If Gen does not satisfy those requirements, the Part 50 license transfer cannot be approved and Gen would not become the Part 72 licensee. Accordingly, under either scenario (PG&E as the applicant in this Part 72 proceeding, versus Gen as the applicant based on the Part 50 license transfer proceeding), the applicant will be determined to be financially qualified by the Commission. Thus, the Licensing Board in this proceeding need not consider financial qualifications issues currently pending in connection with the review of the Part 50 license transfer. However, as noted by the Licensing Board in LBP-02-15, at note 8, any relevant developments in the Part 50 proceeding (as well as the Bankruptcy Court and other forums) can be brought to the Licensing Board's attention.

36 As discussed in the Plan of Reorganization Disclosure Statement filed with the Bankruptcy Court, for the period 2003-2005, PG&E projects cash from operations for Gen at approximately $450 million per year, and capital spending of approximately $140 million per year. This would result in a cash surplus of over $300 million per year over this period. Spending on the proposed ISFSI is expected to range between approximately $2.5 and $22 million per year during this period, and ISFSI costs were already netted out of the projected cash from operations. Even if a challenge to Gen's financial qualifications under the proposed Plan of Reorganization were germane to this proceeding, SLOMFP has not argued — and could not argue — that funding for Gen would be insufficient, assuming that the Federal Energy Regulatory Commission ("FERC") and the Bankruptcy Court approve the power sales agreement on which PG&E's Plan of Reorganization is founded. *See Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 & 2), CLI-02-16, 55 NRC __, slip op. at 8-9 (June 25, 2002).

4. *Basis d: PG&E Has Sufficient Revenues to Cover Construction and Operation of the ISFSI on an Ongoing Basis.*

Citing excerpts from a Deloitte & Touche independent auditors' report included in PG&E Corporation's 2001 Annual Report, a recent PG&E 10-Q filing, and the 2001 Annual Report itself, SLOMFP claims that "PG&E has not demonstrated that it will be able to borrow sufficient funds to cover the costs of construction or that its income stream will be adequate to cover construction and operation" of the ISFSI. (SLOMFP Contentions at 15-16.)

As an initial matter, this basis does not include any references to the Application that SLOMFP disputes, or identify any areas in which SLOMFP believes the Application fails to contain the required information on financial qualifications to construct and operate the ISFSI. Rather, SLOMFP cites to three extraneous documents and draws the conclusion — based on the *current* bankruptcy — that PG&E will in the future be unable to "raise the funds" to build and operate the proposed ISFSI. However, these documents on their face do not demonstrate a genuine dispute of material fact or law as required by 10 C.F.R. § 2.714(b)(2)(iii).

First, SLOMFP cites to the Deloitte & Touche independent auditors' report included in the PG&E Corporation 2001 Annual Report. The auditors reviewed and discussed the events leading up to PG&E's filing for protection under Chapter 11 of the Bankruptcy Code. The auditors at the time made the cautious disclosure that there was "substantial doubt" that PG&E could continue as a going concern under the then-existing circumstances. However, as discussed above, PG&E is now operating as a solvent debtor-in-possession under the protection of Chapter 11 of the Bankruptcy Code. PG&E is moving towards a reorganization from which will emerge businesses that are viable going forward. DCPP has been returned to the rate base. In this context, the mere reference, without more, does not establish a genuine issue regarding downstream construction and operation of the ISFSI. Certainly there is no basis, beyond mere

citation of the document, for the assertion that PG&E (the rate-regulated electric utility) will not be qualified to continue operations at DCPP, including development of the ISFSI. *See Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part & remanded on other grounds*, CLI-90-4, 31 NRC 333 (1990), *clarified*, CLI-90-7, 32 NRC 129 (1990)("[B]oards must do more than uncritically accept a party's mere assertion that a particular document supplies the basis for its contention").

SLOMFP next cites to a recent 10-Q filing, "PG&E Corporation and Pacific Gas and Electric Company, Form 10-Q, for the Quarterly Period Ended March 31, 2002," for the proposition that it is unclear whether PG&E will be able to make capital investments in the future. (SLOMFP Contentions at 16.)[37] However, the relevance of this is unclear. The 10-Q report reflects only that, pending reorganization, capital investments in infrastructure are being made out of cash on hand and that capital expenditures of the utility are under the supervision of the Bankruptcy Court. The report qualifier regarding uncertainty in the ability to make capital investments is merely a recognition of the fact that the Bankruptcy Court, rather than PG&E, has the final word on such expenditures. The fact remains, however, that PG&E is currently budgeting and spending substantial capital investment at the utility under the court's supervision.[38] There is no indication in the contention basis that any capital investments needed

---

37 Interestingly, SLOMFP does not cite to the more recent 10-Q filing for the quarterly period ended June 30, 2002. This filing discloses that, "[a]s of June 30, 2002, the Utility had cash and short-term investments of $3.8 billion. The Utility believes that these funds will be adequate to maintain its continuing operations through 2002" (by which time a confirmed plan of reorganization is anticipated). The 10-Q financial data also shows substantial operating income for the utility for the three months ended June 30, 2002, and for the six months ended June 30, 2002.

38 With respect to current cash flows, on October 6, 2001, the Bankruptcy Court issued an order authorizing PG&E to (1) assume a Letter Agreement, between PG&E and Holtec International, for licensing support and engineering work related to the ISFSI; and (2) enter into a new contract ("Storage Agreement") with Holtec, under which Holtec will

for the ISFSI project have not been allowed or will not be allowed. (PG&E is currently covering costs related to the ISFSI from operating cash flows.) There is also no showing that this is even a relevant question, given that confirmation of a plan of reorganization (whether or not it involves a license transfer) will dissolve the Bankruptcy Court supervision.

Finally, SLOMFP quotes from PG&E's 2001 Annual Report and asserts that PG&E's financial qualifications are in question due to its limited access to credit markets while in bankruptcy. However, prior to implementation of the Plan, PG&E is proposing to cover ongoing expenses to develop, construct, and operate the ISFSI out of current revenues. Because financial qualifications for the ISFSI would not involve debt financing, any access PG&E presently may or may not have to the financial markets is irrelevant to the Part 72 application and, accordingly, irrelevant to this proceeding. SLOMFP's contention does not assert, with basis, that PG&E will require external financing to cover the costs of construction and/or operation of the ISFSI and does not demonstrate a legitimate issue regarding PG&E's access to rate recovery. After implementation of the Plan, PG&E would expect to have access to any credit needed, and SLOMFP has not asserted otherwise.

In total, this basis is no more than an impressionistic amalgam created from loosely related documents and half-formed thoughts. It does not demonstrate a genuine dispute.

5. *Basis e: A Pending Lawsuit Between the State of California and PG&E Corporation Does Not Create "Grave Uncertainties" for PG&E, and Is Irrelevant to this Proceeding.*

SLOMFP argues that a lawsuit brought by the California Attorney General and currently pending against PG&E Corporation, PG&E's parent company, involving "alleged

---

complete the design and licensing work, and fabricate and deliver to DCPP eight casks and canisters and related equipment, by March 2005. Thus, expenditures associated with a substantial component of the ISFSI are examples of expenditures specifically approved by the Bankruptcy Court.

defrauding of ratepayers on behalf of PG&E Corporation," must be resolved before it can be assumed that PG&E "will have straightforward access to the ratemaking system." (SLOMFP Contentions at 18-19.) This aspect of the proposed contention is simply speculative and irrelevant. The cited lawsuit does not provide any basis for an assertion that PG&E will not have access to the ratemaking process or that it will not be financially qualified. There is no genuine dispute with respect to any material issue of law or fact.

In January 2002, the California Attorney General, on behalf of the state of California, filed a civil complaint in California state court against PG&E Corporation (the parent company, as opposed to PG&E, the electric utility) and several individual defendants, who are officers, directors (or both) of PG&E Corporation and/or PG&E. The complaint contains a single cause of action for alleged violation of California Business & Professions Code § 17200 (the "Unfair Competition Law" or "UCL"). The Attorney General alleges, as a violation of the UCL, "improper use of the power of the bankruptcy court" by the defendants in connection with PG&E Corporation's participation in the PG&E Chapter 11 case as a co-proponent with PG&E of the Plan of Reorganization, and that PG&E Corporation, acting in concert with the individual defendants, wrongfully transferred assets, including revenues, *from PG&E* to PG&E Corporation. The Attorney General seeks restitution of those assets on behalf of the utility and the ratepayers.

SLOMFP draws unsupported, summary conclusions as to how this parallel and unrelated proceeding will be resolved. (*See* SLOMFP Contentions at 19 ("Unless and until the courts resolve issues relating to PG&E's alleged defrauding of ratepayers on behalf of PG&E Corporation, it is not reasonable to anticipate that PG&E will have straightforward access to the ratemaking system.")) However, SLOMFP offers no support for these claims and has no basis to

presume an outcome in the litigation. Rather than a basis for a contention, this is sheer speculation.

Moreover, the argument is irrelevant and illogical. The lawsuit does not in any way relate to PG&E's ability (as a utility) to recover its costs through the ratemaking system. Indeed, if the Attorney General is successful, the result could be a *return of monies to PG&E* from PG&E Corporation and its other subsidiaries.

At bottom, this basis does not support admission of a financial qualifications contention related to PG&E. This appears to be an attempt to revive SLOMFP's earlier request for a stay of this proceeding, which was denied by the Licensing Board in a Memorandum and Order dated July 15, 2002.[39] To the extent any future decision in the state court proceeding bears on the instant proceeding or operation of the ISFSI, SLOMFP could raise that matter at the appropriate time through appropriate regulatory processes.

C. TC-3 — PG&E May Not Apply for a License for a Third Party

In proposed Contention TC-3, SLOMFP notes that PG&E has applied to transfer its 10 C.F.R. Part 50 operating license to Gen pursuant to the proposed Plan of Reorganization currently pending before the Bankruptcy Court. As a result, SLOMFP claims that "it is not at 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." (SLOMFP Contentions at 19.) SLOMFP claims that PG&E is, in effect, applying for a license on behalf of a third party, and, therefore, contravenes 10 C.F.R. § 72.22, which requires that financial qualifications be demonstrated by the applicant for the Part 72 license. (SLOMFP Contentions at 20.)

---

39 *See Diablo Canyon*, LBP-02-15, 56 NRC __ (slip op. July 15, 2002).

This proposed contention is a variation on proposed Contention TC-2, basis c. It also does not present a genuine dispute with respect to a material issue of law or fact and should be rejected. As discussed above and stated in the application, PG&E is the applicant for the Part 72 license.[40] PG&E is an electric utility subject to economic regulation by the CPUC. As long as PG&E remains the applicant or licensee, as indicated in the Part 72 application, any capital expenditures as well as operation and maintenance costs related to the ISFSI will be covered by revenues derived from electric rates. To the extent that financial qualifications of PG&E are an issue with respect to the ISFSI, that matter can be raised based on the Part 72 Application as filed. As stated above, information required to meet 10 C.F.R. § 72.22(e) is provided in the Application.

As discussed above, PG&E's Plan of Reorganization is indeed pending before the Bankruptcy Court. However, to be implemented, PG&E's Plan must be confirmed, and several other regulatory approvals are required. While PG&E is confident that its Plan will ultimately be confirmed, the Bankruptcy Court did authorize the CPUC to file an alternative competing plan. The CPUC's proposed plan of reorganization would not involve transfer of the NRC operating license for DCPP. PG&E would remain both the Part 50 licensee for the power plant and the Part 72 ISFSI applicant. Given the uncertainty inherent in this process, PG&E is proceeding with its ISFSI application based on the current power plant licensee (PG&E) becoming the Part 72 licensee.

---

40 *See* Application § 1.4 ("PG&E . . . makes this application on its own behalf. PG&E is not acting as an agent or representative of any other person.")

As stated in a supplement to the Part 72 ISFSI Application dated June 7, 2002,[41] if and when the Plan is confirmed, and if the license transfer is approved by the NRC, and if the Plan is implemented, then PG&E will amend the Part 72 application such that Gen would become the applicant. Accordingly, the basis for financial qualifications would change. Capital and operating costs related to DCPP and the ISFSI would be covered by revenues from merchant sales of electricity. The financial issues germane to the Plan are already being reviewed by the NRC in connection with the DCPP license transfer. Funding for the ISFSI, which constitutes only a small portion of the funding for DCPP, is addressed by the financial data submitted in conjunction with the Part 50 license transfer application.

In sum, the argument that PG&E is presently applying for a license for Gen is simply incorrect on its face. SLOMFP does not present a contention with any factual or legal basis, or one for which any relief could be granted in this proceeding. The proposed issue should be dismissed without further consideration.

D. TC-4 — Failure to Establish Financial Relationships Between Parties Involved in Construction and Operation of ISFSI

Building on proposed Contention TC-3, SLOMFP contends that PG&E has failed to demonstrate financial qualifications *for Gen* (as opposed to PG&E — the actual, current applicant) sufficient to satisfy 10 C.F.R. § 72.22. (SLOMFP Contentions at 20-21.) Specifically, SLOMFP asserts:

- Basis a: the income projections for Gen are "entirely hypothetical" (SLOMFP Contentions at 21);

---

41 PG&E Letter DIL-02-008 from L. Womack, PG&E, to the NRC Document Control Desk, "Supplemental General and Financial Information — 10 CFR 72.22," dated June 7, 2002.

- Basis b: the relationship between Gen and Diablo Canyon LLC, which will own DCPP under the Plan, is not clear (SLOMFP Contentions at 21-22);

- Basis c: it is unclear whether, or the extent to which, claims will be made against the company holding the ISFSI license, and whether such claims will interfere with the licensee's ability to raise funds for construction and operation (SLOMFP Contentions at 22); and

- Basis d: financial information in the Part 50 DCPP license transfer application is "sketchy" and "nominal" (*Id.*).

As a general matter, proposed Contention TC-4 is based on the premise that PG&E is required to demonstrate the financial qualifications of Gen in support of the Part 72 application. However, as discussed above with respect to proposed Contention TC-3, PG&E is the applicant in this proceeding. While Gen may ultimately become the Part 72 applicant or licensee, following reorganization of PG&E pursuant to PG&E's Plan of Reorganization, the financial qualifications of Gen are properly subject to review in the NRC license transfer proceeding currently ongoing before the Commission.

For completeness, each of the bases in this contention related to the financial qualifications of Gen is broken out individually and addressed in turn below. None of the elements of this proposed contention demonstrates that a genuine dispute of material fact or law exists with respect to the Part 72 application. Accordingly, the proposed contention should be dismissed.

1. Basis a: There Is No Specificity or Basis for a Challenge to the Income Projections for Gen.

As stated above, the financial qualifications for Gen are not relevant to this Part 72 proceeding, in which *PG&E is the applicant.* In any event, however, SLOMFP does not in any way substantively controvert the financial qualifications information set forth in the Part 50 license transfer application in accordance with 10 C.F.R. § 50.33. Indeed, SLOMFP

demonstrates no awareness of the information that has been submitted in the Part 50 license transfer docket, beyond conclusory allegations that the projections are "entirely hypothetical." SLOMFP submits the affidavit of Michael F. Sheehan in support of this contention, but Dr. Sheehan's affidavit sets forth only his qualifications, and does not provide any information in support of the proposed contention. The NRC's regulations require a petitioner to provide a "concise statement of alleged facts or expert opinion" supporting the contention and on which the petitioner will rely at the hearing. SLOMFP does not meet this requirement for this sub-issue.[42]

Furthermore, Gen's financial qualifications and income projections are fully supported in the Part 50 license transfer application. As explained in that application, Gen's output will be sold at wholesale to reorganized PG&E under a long-term bilateral power sales agreement between Gen and the reorganized PG&E. Pursuant to the bilateral contract, sales will be in accordance with a rate approved by FERC as just and reasonable. Gen's projected income and financial qualifications are based in part on this bilateral contract, and are not "hypothetical," as alleged by SLOMFP. Therefore, this allegation does not present sufficient information to show that a genuine dispute exists on a material issue of law or fact, and this basis cannot be admitted.

---

42 *See generally Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 300 (2000) (to be admitted for hearing, a challenge to a license transfer applicant's cost and revenue projections in a license transfer proceeding must be based on "sufficient facts, expert opinion, or documentary support"); *citing GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000); *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219-21 (1999).

2. *Basis b: Relationships Between Entities as Envisioned in PG&E's Proposed Plan of Reorganization are Clearly Enumerated.*

SLOMFP contends that PG&E does not demonstrate Gen's financial relationship with other corporate entities "that have an interest in the proposed ISFSI." (SLOMFP Contentions at 21.) While, as noted above, this issue relates to the pending Part 50 license transfer application, SLOMFP's issue is in any event baseless.

The Part 50 license transfer application summarizes at its outset the relationship of the relevant entities comprising proposed reorganized PG&E:

> Under the Plan, operating authority for DCPP will be transferred to a new limited liability company named Electric Generation LLC (Gen) and ownership of the two-unit generating asset will be assigned to a wholly-owned subsidiary of Gen named Diablo Canyon LLC (Nuclear). . . .
>
> In essence, under the Plan, the current business of PG&E will be disaggregated. PG&E will divide its operations and the assets of its business lines among four separate operating companies. . . .
>
> [T]he majority of the assets and liabilities associated with the current generation business, including DCPP, will be contributed to Gen or its subsidiaries. In addition, PG&E has created a separate corporation called . . . Newco to hold the membership interests of . . . Gen. PG&E is the sole shareholder of Newco. After the assets are transferred to the newly-formed entities, PG&E will declare and pay a dividend of the outstanding common stock of Newco to PG&E Corporation, and . . Gen will thereafter be an indirect wholly-owned subsidiary of PG&E Corporation. . . .
>
> Because Nuclear will hold the ownership interest in DCPP, Nuclear will need to become a licensed owner. Nuclear will lease DCPP to Gen under lease terms that assign to Gen the entitlement to the output and capacity of DCPP and that make Gen responsible for all costs of plant operation. . . . Gen will operate DCPP and will accordingly need to become the operating licensee.

PG&E Letter DCL-01-119 from G.M. Rueger, PG&E, to the NRC Document Control Desk, "Application for License Transfers and Conforming Administrative License Amendments," dated November 30, 2001, at 1-3; *see id.*, Enclosure 2 (graphical representation of the proposed corporate structure of PG&E Corporation and it principal subsidiaries following implementation

of the Plan). Thus, the relationships are clearly set forth to enable the NRC and other interested stakeholders to understand the proposed reorganization as it relates to DCPP. This sub-issue is plainly without basis and should be rejected.

3. *Basis c: Allowed Claims Are Known and Will Not Interfere With the Applicant's Financial Qualifications.*

SLOMFP questions PG&E's ability to finance the proposed ISFSI as a result of claims resulting from the pending bankruptcy. (SLOMFP Contentions at 22.) This proposed contention echoes proposed Contention TC-2, basis b. As discussed in connection with that issue, the administration of allowed claims will be resolved in the bankruptcy confirmation proceedings, and is beyond the scope of this proceeding. Moreover, as discussed below, allowed claims have been identified and — by virtue of the bankruptcy confirmation process — will not impact the financial qualifications of either PG&E or Gen.

Under Chapter 11, a debtor is authorized to reorganize its business for the benefit of itself, its creditors, and its equity interest holders. The goal of Chapter 11 reorganization is to confirm and consummate a plan of reorganization that will dictate the means for satisfying claims against and equity interests in a debtor. Among other things, confirmation of a plan by the bankruptcy court discharges a debtor from any debt that arose prior to the date of confirmation of the plan (with certain exceptions) and substitutes for those debts the obligations specified in the confirmed plan. The entities that emerge from bankruptcy reorganization will be financially viable going forward.

As of April 2002, approximately $44 billion of claims have been filed with the Bankruptcy Court in connection with the PG&E Chapter 11 case. However, PG&E provided, in its Plan of Reorganization Disclosure Statement, dated April 19, 2002, an estimate which represented its "most reasonable estimate" of the ultimate allowed claims. *See* Disclosure

Statement for the Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company Proposed by Pacific Gas and Electric Company and PG&E Corporation, dated April 19, 2002, at 8-23. These claims will be resolved over the course of the bankruptcy confirmation proceedings.

In sum, as discussed above with respect to proposed Contention TC-2, the proceedings in the Bankruptcy Court are beyond the scope of this NRC proceeding. This proposed contention provides no basis for an assertion that the bankruptcy process will not adequately resolve the pending claims, or that the financial projections for Gen provided in the Part 50 process will be impaired by those claims.

4. Basis d: The Validity of PG&E's Part 50 License Transfer Application Is Not Relevant to This Proceeding.

SLOMFP argues that the financial qualifications information provided in PG&E's Part 50 license transfer application is "sketchy," "nominal," and "unsupported." However, consideration of the Part 50 license transfer application and the supporting income projections is beyond the scope of this proceeding concerning a limited Part 72 approval.[43] *See* 67 Fed. Reg. at 19,601.

Moreover, neither SLOMFP nor its financial advisor offers any specific challenge to the financial projections for Gen, or offer any counter-projections, such as might establish a genuine dispute under 10 C.F.R. § 2.714(b)(2). Nor do they even attempt to demonstrate how the categories of information provided in the Part 50 transfer application (quite apart from the "missing" data that would populate those categories) are inadequate to meet NRC regulations

---

[43] The scope of contentions is limited to the scope of the proceeding delineated in the notice of opportunity for hearing. *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-91-19, 33 NRC 397, 411-12, *appeal denied on other grounds*, CLI-91-12, 34 NRC 149 (1991); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-01-10, 53 NRC 273, 280 (2001).

and guidance. And, in any case, the "missing" financial qualifications information cited by SLOMFP is redacted, not "missing." The data is included in the proprietary version of the Part 50 license transfer application. This proprietary financial information for Gen has been made available in the DCPP Part 50 license transfer proceedings *to petitioners in those proceedings* pursuant to appropriate confidentiality agreements. *Compare Consol. Edison Co. of N.Y.* (Indian Point, Units 1 & 2), CLI-01-8, 53 NRC 225, 230-31 (2001); *FitzPatrick*, CLI-00-22, 52 NRC at 291-92. Petitioners here had the opportunity to participate in the Part 50 license transfer proceeding currently pending before the Commission, but declined to do so.[44] Such an inquiry is beyond the scope of this proceeding.

E. TC-5 — PG&E Fails to Provide a Sufficient Description of ISFSI Construction and Operation Costs

Proposed Contention TC-5 argues that the Application provides only a summary of the total estimated costs of building and operating the ISFSI. SLOMFP contends that NRC regulations in Appendix C to 10 C.F.R. Part 50 require that construction costs "be itemized by categories of sufficient detail to permit an evaluation of reasonableness." (SLOMFP Contentions at 23.) Moreover, SLOMFP contends that financial data provided in the Part 50 license transfer application is similarly insufficient, and does not present information specific to the ISFSI. (*Id.*)

The information that must be provided to demonstrate financial qualifications is set forth at 10 C.F.R. § 72.22(e), as follows:

> [I]nformation sufficient to demonstrate to the Commission the financial qualifications of the applicant to carry out, in accordance with the regulations in this chapter, the activities for which the license is sought. . . . The information must show that the applicant either possesses

---

44 *See* Pacific Gas and Electric Company, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2; Notice of Consideration of Approval of Transfer of Facility Operating Licenses and Conforming Amendments and Opportunity for a Hearing, 67 Fed. Reg. 2455 (Jan. 17, 2002).

> 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, and the necessary financial arrangements to provide reasonable assurance before licensing, that decommissioning will be carried out after the removal of spent fuel, high-level radioactive waste, and/or reactor-related [Greater than Class C] waste from storage.

Financial qualifications data sufficient to meet the requirements is set forth in the Application and the supplements. *See, e.g.,* Application, §§ 1.3, 1.5, 10.0; Attachment F, Chapter 4; PG&E Letter DIL-02-008 from L.F. Womack, PG&E, to NRC Document Control Desk, "Supplemental General and Financial Information — 10 CFR. 72.22," dated June 7, 2002.

SLOMFP contends that the data provided is insufficient to permit the NRC Staff (or any other interested party) to evaluate the reasonableness of the estimate. However, SLOMFP does not even make an attempt to dispute the financial qualifications data provided.[45] SLOMFP argues only that the application must follow NRC regulations at 10 C.F.R. Part 50, Appendix C, Section II, in order to permit an evaluation.[46] In contrast, the Commission has held that the financial assurance requirements for Part 50 reactor licensees do not apply to

---

45 *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), LBP-02-04, 55 NRC 49, 67-68 (2002), *rev'd on other grounds,* CLI-02-14, 55 NRC 278 (2002), *aff'd in part and rev'd in part on other grounds,* CLI-02-17, 56 NRC ___ (slip op. July 23, 2002) ("[P]etitioners must do more than merely make unsupported allegations").

46 10 C.F.R. Part 50, Appendix C sets forth guidelines, in connection with the financial assurance requirements set forth at 10 C.F.R. § 50.33, for financial qualifications information submitted in connection with an application for a construction permit for a nuclear power reactor. Section II pertains to financial requirements for applicants which are newly-formed entities.

applications under Part 72. In the *Private Fuel Storage* case, an intervenor argued that the Part 72 applicant was required to comply with Part 50, Appendix C, Section II. The Commission declined to adopt this position, stating:

> [W]hile both Part 72 and Part 50 call for "financial assurance" showings, the two parts differ considerably on what must be shown. Part 50 prescribes in detail precisely what a reactor license applicant must demonstrate. *See* 10 C.F.R. § 50.33(f); 10 C.F.R. Part 50, Appendix C. Part 72, by contrast, contains no equivalent detail; it simply sets out a broad "financial assurance" command. *See* 10 C.F.R. Part 72.22(e). Part 72, in other words, provides flexibility that Part 50 does not. Thus, as we held in *Claiborne*,[47] outside the reactor context it is sufficient for a license applicant to identify adequate mechanisms to demonstrate reasonable assurance, such as license conditions and other commitments. We will not require such applicants to meet the detailed Part 50 requirements.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 30 (2000).[48] Accordingly, SLOMFP's proposed contention lacks legal basis and should be rejected.

Rather than identifying a genuine issue with specificity and basis, SLOMFP appears to argue that the NRC's financial qualifications requirements for ISFSIs are inadequate, which constitutes an impermissible challenge to the regulations. *See* 10 C.F.R. § 2.758; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998) (*citing Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974);

---

47 In *La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302-03 (1997) ("*Claiborne*"), the Commission held, among other things, that that the financial qualifications standards established for reactor licensing do not necessarily apply outside the reactor context.

48 This Commission decision overrules the Licensing Board decision, in the same proceeding, cited by SLOMFP (at 20) (LBP-98-7, 47 NRC 142 (1998)) for the proposition that the financial qualifications regulations in 10 C.F.R. Part 50 apply to the Part 72 application in this proceeding.

Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 88-89 (1974); *cf. Seabrook*, CLI-99-6, 49 NRC at 217 n.8.

SLOMFP also contends that the publicly available financial qualifications data submitted in PG&E's Part 50 license transfer application (referenced in the Part 72 application at § 1.5) "has a one-page income statement going out five years with years 4 and 5 blank," with no information as to the ISFSI broken out separately. (SLOMFP Contentions at 23.) As discussed above with respect to Proposed Contention TC-3, PG&E is the applicant for the Part 72 license. Information related to PG&E required to meet 10 C.F.R. § 72.22(e) is provided in the Application. The Part 50 license transfer application is beyond the scope of this proceeding. Moreover, as stated above with respect to Proposed Contention TC-4, the "missing" proprietary financial qualifications information for Gen (such as years 4 and 5) has been available to petitioners in the Part 50 license transfer proceeding. While the ISFSI is not a line item in that information, it is expressly addressed and encompassed by that information.

In sum, this basis does not support a contention admissible in this proceeding. It should be rejected in accordance with 10 C.F.R. §§ 2.714(b)(2)(ii) and (iii).

F. EC-1 — Failure to Address Environmental Impacts of Destructive Acts of "Malice or Insanity"

In proposed Contention EC-1, SLOMFP argues that the discussion of environmental impacts in PG&E's ER is inadequate because it does not include the consequences of "destructive acts of malice or insanity against the proposed ISFSI" and because it should provide a full discussion of the potential consequences of a "range" of "credible" terrorist events. (SLOMFP Contentions at 24, 28.) SLOMFP also contends that the ER should evaluate a range of "reasonable alternatives to the proposed action," relating to protections against potential terrorist acts, including "dispersal of casks, protection of casks by berms or

bunkers, and use of more robust storage casks than the Holtec HI-STORM 100." (SLOMFP Contentions at 28.) The bases for this proposed contention are that: (1) based upon terrorist occurrences in recent years, and particularly that of September 11, 2001, the Commission should revisit its policy of "refusing to consider environmental impacts" of terrorist acts against nuclear facilities (SLOMFP Contentions at 24-26); and (2) the SAR indicates that the DCPP ISFSI is vulnerable to potential terrorist acts, based upon its design parameters (SLOMFP Contentions at 28).

1. As a Matter of Law, This Contention Cannot Be Admitted.

Proposed Contention EC-1 is an impermissible challenge to the Commission's regulations governing ISFSI safeguards and security, set forth at 10 C.F.R. §§ 72.180, 72.184 and 10 C.F.R. Part 73. As stated in the Application (at § 9.0), the physical security program for the DCPP ISFSI is provided in the DCPP Physical Security Plan, the Safeguards Contingency Plan, and the Security Training and Qualification Plan. PG&E maintains that these programs are consistent with current NRC regulatory requirements, and SLOMFP does not assert otherwise. Whether in the guise of an environmental contention or otherwise, a contention seeking security measures and evaluations of beyond-design-basis security threats goes beyond current regulations and cannot be admitted.

SLOMFP contends that the ISFSI design parameters demonstrate the "vulnerability" of the facility to "much more powerful instruments, such as anti-tank ordnance or an impacting aircraft." (SLOMFP Contentions at 28.) Although SLOMFP generally challenges the adequacy of the SAR, it has not presented a specific challenge or basis with respect to the adequacy of the facility design to meet *current* NRC regulations. Because of its failure to demonstrate where the SAR is deficient or in error, the proposed contention should be dismissed on that basis. *See, e.g., Private Fuel Storage,* LBP-98-7, 47 NRC at 179-80 (*citing Pub. Serv.*

Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1656 (1982)(statement of contention "must either allege with particularity that an applicant is not complying with a specified regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent")).

To the extent that SLOMFP requests additional security measures or analyses beyond the scope of current NRC requirements, the contention raises a challenge to NRC's security regulations that is prohibited by 10 C.F.R. § 2.758.[49] *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 394-95 (1987)(finding an impermissible challenge to NRC regulations where an intervenor sought to impose requirements in addition to those set forth in the regulations); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159 (2001) (same); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 484-85 (2001), *review accepted*, CLI-02-3, 55 NRC 155 (2002)(dismissing a contention in which the intervenor sought to litigate safety and environmental challenges related to terrorism, in part because the contention constituted an impermissible challenge to existing NRC requirements governing ISFSI physical security standards). For this reason, the proposed contention should be rejected.

In addition, the NRC is currently conducting a thorough re-evaluation of its security requirements and programs. *See* Letter from Chairman Meserve to Rep. Markey (D-Mass.) (Oct. 16, 2001)(describing ongoing NRC "top-to-bottom analysis [of] all aspects of the

---

[49] SLOMFP has made no attempt to request a waiver of application of the rules pursuant to 10 C.F.R. § 2.758(b), or make the showing that "special circumstances" exist such that application of the regulations would not serve the purpose for which they were adopted.

Agency's safeguards and physical security programs."[50] The NRC has a longstanding policy barring contentions which are (or are about to become) the subject of general rulemaking by the Commission. *Oconee*, CLI-99-11, 49 NRC at 345 (*citing Douglas Point*, ALAB-218, 8 AEC at 85). For this reason as well, proposed contention EC-1 should not receive further consideration in this proceeding.

SLOMFP's proposed contention also lacks the factual basis necessary for the admission of a contention. *See* 10 C.F.R. § 2.714(b)(2)(ii). Specifically, SLOMFP has shown no plausible connection between its generalized concerns regarding terrorist threats to nuclear power plants and spent fuel storage facilities and the DCPP ISFSI which is the subject of this proceeding. SLOMFP cites only to a newspaper article for the general proposition that nuclear power plants are "targets for attacks on civilians in the United States." (SLOMFP Contentions at 25.) In addition, SLOMFP states that "spent fuel storage facilities, which lack a containment, must be assumed to be as vulnerable as reactors" to damage from a terrorist attack. (*Id.*) SLOMFP then concludes that "PG&E's proposal of 140 unprotected casks installed on concrete pads provides an inviting terrorist target." (*Id.*) These assertions are without basis, unconnected

---

50 In connection with this ongoing review, since September 11, the Commission has issued Orders to various classes of licensees mandating the imposition of Interim Compensatory Measures to enhance security at nuclear facilities. *See, e.g.*, *All Operating Power Reactor Licensees*, Order Modifying Licenses (Effective Immediately), EA-02-026, slip op., Feb. 25, 2002; *All Decommissioning Power Reactor Licensees*, Order Modifying Licenses (Effective Immediately), EA-02-077, slip op. Mar. 25, 2002; *Honeywell Int'l, Inc.* (Metropolis Works Facility, Metropolis, Ill.), Order Modifying License (Effective Immediately), EA-02-025, slip op. Mar. 25, 2002; *Gen. Elec. Co.* (Morris Operation), Order Modifying License (Effective Immediately), EA-02-078, slip op. May 23, 2002; *United States Enrichment Corp.* (Portsmouth Gaseous Diffusion Plant, Portsmouth, Oh.), Order Modifying License (Effective Immediately), EA-02-108, slip op. June 17, 2002. The fact that the compensatory measures are considered "interim" reflects at least the potential for further requirements and rulemaking. An Order is expected to be issued shortly to define required Interim Compensatory Measures for ISFSIs. PG&E will comply with any such Order, as applicable.

to DCPP, and should not be considered further in this proceeding. *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993)(holding that a contention "simply alleg[ing] that some matter ought to be considered does not provide the basis for an admissible contention").

2. SLOMFP's Request That the Commission Revisit Its NEPA Policy With Respect to Terrorism is Unnecessary.

SLOMFP argues (at 25) that this proceeding presents another opportunity to revisit the Commission's NEPA policy regarding consideration of the environmental impacts of "destructive acts of malice or insanity against nuclear facilities." However, as SLOMFP points out (at 24), this issue has been previously raised in the context of four separate licensing proceedings (including the Private *Fuel Storage* ISFSI proceeding discussed above). In the *Private Fuel Storage* case (and others), the Commission's licensing boards have rejected similar contentions.[51] The Commission is currently considering, and has been fully briefed on, the issue of the NRC's responsibilities under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001.[52] There is no need to revisit that issue here.

As has been addressed in prior briefs and decisions on this issue, as a matter of law NEPA does not require the NRC to consider the environmental impacts of intentional malevolent acts. NEPA Section 102 expressly requires that, "to the fullest extent possible," the

---

51 *See, e.g., Tenn. Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2, Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC __, slip op. at 20-22 (July 2, 2002); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131 (2001).

52 *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-5, 55 NRC 161 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-4, 55 NRC 158 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-6, 55 NRC 164 (2002); *Private Fuel Storage,* CLI-02-3, 55 NRC 155.

policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with NEPA policies. 42 U.S.C. § 4221. However, when there is a clear and unavoidable conflict in existing law applicable to an agency's operations, the Supreme Court has recognized that "NEPA must give way." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788 (1976).

Specific security performance requirements for ISFSIs are set forth at 10 C.F.R. § 73.51. An ISFSI must meet the general performance objectives set forth at 10 C.F.R. § 73.51(b), which provides, in pertinent part:

> Each licensee subject to this section shall establish and maintain a physical protection system with the objective of providing high assurance that activities involving spent nuclear fuel and high-level radioactive waste do not constitute an unreasonable risk to public health and safety.

NRC regulations do not require a physical protection plan for a nuclear plant to protect against so-called enemies of the state. Specifically, 10 C.F.R. § 50.13 provides that reactor licensees are "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 the facility by an enemy of the United States." This regulation reflects the long-standing determination that the protection of the United States from foreign enemies is a government responsibility. NEPA should not be construed as a security statute requiring threat assessments overriding or replacing those prepared and conducted by government agencies and the military in the conduct of their separate statutory responsibilities. In this area, "NEPA must give way."

In *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973), the Appeal Board concluded that it would be illogical for the NRC to conclude that enemy attacks need not be addressed from a security perspective, but that environmental impacts of such attacks must be evaluated under NEPA. The agency's NEPA

responsibilities, like its AEA responsibilities, must be bounded by the scope of the agency's role and the licensee's responsibilities as reflected in Section 50.13. For a proposed ISFSI co-located with a Part 50 nuclear plant, Section 50.13 must be construed logically to limit the scope of the NRC's NEPA responsibilities, as well as the scope of its safety reviews, as they relate to the ISFSI.[53]

The scope of a NEPA review is also limited by a "rule of reason." *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1300 (D.C. Cir. 1984), *vacated in part on other grounds and hearing en banc granted sub nom. San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Comm'n* , 760 F.2d 1320, *aff'd en banc,* 789 F.2d 26, *cert. denied,* 479 U.S. 923 (1986). Under a "rule of reason," NEPA does not require the NRC to consider any and all environmental impacts that may conceivably be traced to an agency action. Rather, to be within the scope of a NEPA review, there must be a close causal relationship between potential environmental effects and the proposed federal action. *See generally Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983). Intentional terrorist acts, by their

---

[53] Indeed, ISFSI security requirements are less rigorous than those for power reactors:

> The Commission believes that the appropriate level of physical protection for spent fuel and high-level radioactive waste lies somewhere between industrial-grade security and the level that is required at operating power reactors. The Commission also notes that the nature of spent fuel and of its storage mechanisms offers unique advantages in protecting the material.

Final Rule, Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, 63 Fed. Reg. 26,955, 25,956 (May 15, 1998). It logically follows that Section 73.51 does not require a physical protection plan for an ISFSI to protect against threats posed by enemies of the state. One licensing board has held that Section 50.13 applies only to reactors. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 445 (2001). However, given the NRC's position that ISFSIs require less physical protection than reactor facilities, such a finding would not seem to extend to a co-located ISFSI.

very nature, cannot in any way be viewed as either "direct effects" or "indirect effects" of an NRC licensing action. Environmental impacts of acts of terrorists are not environmental impacts proximately caused by the issuance of an NRC license.

It has also been previously and specifically held that NEPA's "rule of reason" does not require the NRC to consider unpredictable, unquantifiable risks of sabotage or terrorist acts. *See Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Comm'n*, 869 F.2d 719, 729 (3d Cir. 1989). In *Limerick Ecology Action*, the court specifically held (without relying on Section 50.13) that the NRC was not required by NEPA to entertain an environmental contention on "sabotage risk." *Limerick Ecology Action,* 869 F.2d at 743. The Court rejected the petitioner's argument that the NRC's refusal to consider the risk of sabotage as a specific issue either in the Final Environmental Statement or as a contention in the administrative licensing proceeding violated NEPA.

For all of these reasons, the Licensing Board should reject this proposed contention.[54]

G. EC-2 — Failure to Fully Describe Purposes of Proposed Action or to Evaluate All Reasonably Associated Environmental Impacts and Alternatives

In proposed Contention EC-2 SLOMFP asserts that PG&E's ER must be revised as to its statement of the purpose of the ISFSI. SLOMFP argues that an "unstated purpose" of

---

[54] SLOMFP also contends that the ER should evaluate "a range of reasonable alternatives to the proposed action, including disposal of casks, protection of casks by berms or bunkers, and use of more robust storage casks than the Holtec HI-STORM 100 cask." (SLOMFP Contentions at 28.) The consideration of security-driven alternatives will also be subject to the Commission's determinations, both in the pending adjudications of the NEPA question and in its ongoing generic review of NRC's security program. PG&E will consider alternative security measures as required by the Commission following completion of the ongoing generic review. However, this basis is not itself admissible in this proceeding, as it constitutes an impermissible challenge to current NRC requirements for the reasons discussed above.

the ISFSI is to provide capacity for spent fuel storage during a license renewal term (SLOMFP Contentions at 29), and that the ER should be revised to reflect this purpose. Such a revision would, SLOMFP argues, then necessitate other changes to the ER, including the addition of an analysis of "any new and significant information regarding the environmental impacts of license renewal" pursuant to 10 C.F.R. § 51.53(c)(3)(iv). (SLOMFP Contentions at 30.) The new information SLOMFP would have PG&E address relates to (1) the risk of spent fuel pool fire; and (2) the risk associated with the design of spent fuel pools and dry storage in light of the September 11, 2001, and other terrorist attacks.

The various elements of this contention are discussed further below. However, at its core this proposed contention is based on a faulty premise. The ISFSI project, including its capacity and purpose, is accurately described in the ER. The impacts and alternatives discussions in the ER are based on the maximum storage capacity as currently contemplated, independent of any future license renewal application for DCPP.

1. The ER Statement of Purpose Need Not Be Revised To Address Spent Fuel Storage During a License Renewal Term.

SLOMFP first argues that information in the Application and the ER leads to the conclusion that the capacity of the proposed ISFSI will be "at least double, if not triple" the needed capacity for the license term of both DCPP units. (SLOMFP Contentions at 32.) SLOMFP infers that the most likely purpose for the ISFSI is to allow for spent fuel storage during a license renewal term. (SLOMFP Contentions at 33). SLOMFP would have PG&E amend the ER to reflect such a purpose, and, to avoid "improper segmentation," meet "all regulatory requirements applicable to license renewal with respect to the spent fuel storage issue," including the "new and significant information" requirement for license renewal in 10 C.F.R. § 51.53(c)(3)(iv).

NRC regulations require that an ER contain, among other things, a statement of the purpose of the proposed action. 10 C.F.R. § 51.45(b).[55] Accordingly, the need for the proposed ISFSI is set forth at § 1.2 of the ER. Specifically, under the Nuclear Waste Policy Act of 1982 ("NWPA"), Congress directed that the Department of Energy ("DOE") assume responsibility for the permanent disposal of spent nuclear fuel from U.S. commercial power plants. *See* NWPA §§ 111(a)(4), (b)(2); 42 U.S.C. §§ 10131(a)(4), (b)(2). Pending the availability of a permanent DOE repository, nuclear power plant operators have the responsibility to provide for interim onsite storage of spent fuel until it is accepted by DOE. *See generally* NWPA § 111, 42 U.S.C. § 10131. To provide storage for used fuel generated over the term of the current operating licenses, PG&E is proposing the subject ISFSI. *See* ER § 1.2 ("[T]he ISFSI with a storage pad capacity of 140 casks will be capable of storing the spent fuel generated by DCPP Units 1 and 2 over the term of the current operating licenses (2021 and 2025,

---

[55] With respect to the Part 72 ISFSI application, the NRC will prepare an Environmental Assessment ("EA"). The specific NRC licensing actions which require preparation of an EIS are set forth at 10 C.F.R. § 51.20(b). In addition to those specific circumstances, an EIS will be prepared for "[a]ny other action which the Commission determines is a major Commission action significantly affecting the quality of the human environment." 10 C.F.R. § 51.20(b)(14). The NRC has determined generically that storage of light water reactor spent fuel has an insignificant impact on the environment. *See* NUREG-0575, "Final Generic Environmental Impact Statement on Handling and Storage of Spent Light-Water Power Reactor Fuel," dated August 1979. Thus, an EA is the appropriate vehicle for environmental review for issuance of an ISFSI license under 10 C.F.R. Part 72.

An EA is required to identify the proposed action and include a "*brief*" discussion of the need for the action, the alternatives to it, and the environmental impacts of the proposal and the alternatives. *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-877, 26 NRC 287, 290 (1987); *see Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 858 (1987)(an agency's evaluation of alternatives in an EA is governed by NEPA Section 102(2)(E), 42 U.S.C. § 4332(2)(E)). Section 102(2)(E) requires that an agency "study, develop, and describe" appropriate alternatives in any proposal "which involves unresolved conflicts concerning alternative uses of available resources." This situation is not implicated here. Thus, PG&E's discussion of alternatives in the ER meets the requirements of NEPA for this proposed licensing action.

respectively)").[56] The maximum storage proposed for the ISFSI is not based on license renewal for the DCPP units. Indeed, PG&E has made no decision with respect to license renewal, has not filed a license renewal application, and, in the present Part 72 application is not seeking renewal of the Part 50 licenses.

More specifically, the discussions of alternatives and impacts of the proposed ISFSI included in the ER are based on the proposed maximum storage capacity. Proposed Technical Specification 4.3.2, "Storage Capacity," would specifically limit the number of assemblies (4,400) and casks (138 casks, 140 locations) that could be accommodated in the ISFSI. To increase these numbers, PG&E would be obligated to request a change in technical specifications, which would require a Part 72 license amendment. (Such a request would necessarily require a separate environmental review and provide for an opportunity for interested persons to petition to intervene and/or request a hearing.) Contrary to SLOMFP's claims, the proposed ISFSI is sized to accommodate all used fuel generated by the two units during the operating license terms, which end in 2021 and 2025. The size and capacity limits are based on the following: DCPP currently stores 1,748 fuel assemblies in the two spent fuel pools. Twenty-four refueling cycles remain in the current license terms for both units. Using an average load of 89 assemblies, 2,136 assemblies will be used during the rest of the reactors' license terms. This, combined with the fuel remaining in the reactors, results in a total of 4,270 assemblies used over

---

[56] Note again, PG&E actually contemplates phased construction of the ISFSI. Phases could be completed, as needed, up to the proposed maximum. *See, e.g.*, ER §§ 3.1, 3.2. This approach would allow PG&E to periodically assess other alternatives that may arise and obviate the need for full development of the ISFSI, such as licensing of a permanent geologic repository at Yucca Mountain, Nevada.

the lifetime of the plant.[57] Thus, the ISFSI is sized to accommodate a single 40-year licensing period for both units, and will support subsequent decommissioning of the units. SLOMFP's argument regarding license renewal is purely speculation.

SLOMFP states (at 32) that the capacity of the proposed ISFSI will allow DCPP to continue to operate "for another 34 to 66 reactor-years past the expiration of the license terms for Units 1 and 2." However, DCPP *cannot* operate past the expiration dates of its current operating licenses. Continued operation is only authorized if PG&E is issued renewed licenses pursuant to 10 C.F.R. Part 54, following a separate licensing process (including a separate environmental review) under that part.[58] PG&E has not applied for license renewal. The slide referenced by SLOMFP as Exhibit 9 is not inconsistent with PG&E's position on license renewal; the slide does not indicate that PG&E has made the policy decision to apply for renewal of its Part 50 licenses, or that such an application has been filed. The slide reflects only an internal attempt by management to motivate employees to maintain and protect the asset with a long-term view.

SLOMFP states that, to avoid "improper segmentation of the license renewal project with respect to spent fuel storage," PG&E should meet all regulatory requirements applicable to license renewal with respect to "the spent fuel issue." (SLOMFP Contentions at 33.) However, the segmentation argument is not developed and in any event baseless as a matter

---

57 Assuming all assemblies are undamaged, this would result in the use of 134 casks, at 32 assemblies per cask. However, certain canisters must be used to store damaged assemblies, such that additional casks may be necessary.

58 In any event, a Part 72 ISFSI license is also limited, by regulation, to a term of 20 years. *See* 10 C.F.R. § 72.42(a). This is consistent with the plant's current license term (the Unit 1 license expires in September 2021; the Unit 2 license expires in April 2025. If, as requested, the NRC issues the ISFSI license by December 2003, PG&E would be required to seek renewal of the ISFSI license by December 2021, two years prior to license expiration. 10 C.F.R. § 72.42(b).

of law. The proposed ISFSI and any future license renewal are not interdependent licensing actions; rather, the ISFSI license has present, independent utility. Unlike license renewal, the ISFSI is a project currently before the NRC. It can be reviewed and licensed without consideration of license renewal. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 296-97 (2002) (*citing Webb v. Gorsuch*, 699 F.2d 157 (4th Cir. 1983) ("when developing an EIS, an agency must consider the impact of other proposed projects 'only if the projects are so interdependent that it would be unwise or irrational to complete one without the other' [citations omitted]").

For all of these reasons, this basis should be rejected.

2. *PG&E Need Not Address in its ER "New Information" Purportedly Showing that Risks of Spent Fuel Pool Fires Are Higher Than Previously Thought.*

SLOMFP contends that PG&E should consider "new information" in the ISFSI ER, drawn from a recent NRC report[59] that loss of water from a high-density spent fuel pool can lead to the onset of exothermic oxidation reactions, causing an atmospheric release of a substantial fraction of the radioactive isotopes in the spent fuel. (SLOMFP Contentions at 33-34.)

First, as previously addressed, PG&E is not here applying for renewal of its Part 50 operating licenses. Therefore, the citation to 10 C.F.R. § 51.53(c)(3)(iv), related to "new and significant information," does not apply. That regulation applies to license renewal applications.[60]

---

59 NUREG-1738, "Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants" (October 2000).

60 Section 51.53(c)(3)(iv) provides, in pertinent part (emphasis added):

Second, the assertion that PG&E should address the risk of severe accidents in wet storage pool is completely unconnected to the dry cask license here at issue. Indeed, proposed contentions such as this one, arguing a need for a discussion in the ER of hypothetical severe accidents for wet storage, have been rejected in *wet storage* proceedings. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-02, 51 NRC 25, 43-44 (2000)(rejecting a proposed contention to consider "severe" (beyond design basis) accidents in a spent fuel pool rerack proceeding as lacking an adequate basis and as seeking to litigate a subject matter "that cannot be heard in a proceeding of this type"); *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 282-85 (1987) (upholding rejection of proposed contention, on the basis that the NRC did not intend to apply its Severe Accident Policy Statement to a license amendment proceeding involving spent fuel pool reracking); *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-880, 26 NRC 449, 461-62 (1987). It follows that similar contentions cannot be addressed in this Part 72 dry storage matter.

3. PG&E Need Not Evaluate in the ER Either the Potential for Sabotage-Induced Spent Fuel Pool Fires or the Vulnerability of Spent Fuel Pools and Casks to "Acts of Malice or Insanity".

SLOMFP argues that PG&E should evaluate the impact of acts of sabotage-induced *spent fuel pool* fires in its ISFSI ER. SLOMFP quotes extensive passages from SECY-01-0100, "Policy Issues Related to Safeguards, Insurance, and Emergency Preparedness

---

> (c) *Operating license renewal stage. . .* (3) *For those applicants seeking an initial renewal license* and holding either an operating license or construction permit as of June 30, 1995, the environmental report shall include the information required in [51.53(c)(2)] subject to the following conditions and considerations: . . . (iv) The environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.

Regulations at Decommissioning Nuclear Power Plants Storing Fuel in Spent Fuel Pools" (June 4, 2001), for the proposition that the NRC Staff has "conced[ed] the vulnerability of spent fuel pools to sabotage-included [sic] fires," and that they should be included in the NEPA decision-making process. (SLOMFP Contentions at 34-36.) SLOMFP also restates in Contention EC-2 its belief that the ER should address the consequences of a "range of credible events" involving acts of terrorism against the proposed ISFSI and the DCPP "fuel pools." (SLOMFP Contentions at 38.) Such an analysis would include a discussion of alternatives, including the use of casks "more robust" than the Holtec HI-STORM 100, dispersal of casks, and protection of casks using berms or bunkers. (*Id.*)

As discussed above with respect to proposed Contention EC-1, these security issues are not appropriate for litigation in this proceeding because (1) they constitute an impermissible challenge to NRC's security regulations that is prohibited by 10 C.F.R. § 2.758; (2) the NRC is currently conducting an evaluation of its physical security program, and therefore the contention is barred on the grounds that it is (or is about to be) the subject of general rulemaking by the Commission; and (3) NEPA does not require an evaluation of environmental impacts of acts of sabotage, terror, or warfare. Furthermore, as with the second basis for proposed Contention EC-2, discussed above, there is no plausible basis for requiring an assessment of spent fuel pool risks in this proceeding related to a dry cask ISFSI. Thus, this sub-issue should be rejected.

4. *SLOMFP's Challenge to Previous Environmental Analyses for On-Site Spent Fuel Storage Is Impermissible in this Proceeding.*

SLOMFP next argues that neither NUREG-0575, "Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel" (Aug. 1979) nor NUREG-1437, Vol. 1 "Generic Environmental Impact Statement for License

Renewal" (May 1996) discusses the potential for a pool fire. (SLOMFP Contentions at 36.) SLOMFP states that the discussion in the Waste Confidence Rule[61] of spent fuel storage risks is based on assumptions "which the NRC now concedes to be invalid" (per NUREG-1738, discussed above). (SLOMFP Contentions at 36-37.)

In support of its argument that the above-discussed spent fuel pool accident risks should be considered in the ER, SLOMFP challenges the generic analyses contained in NUREG-0575 (on spent fuel storage), NUREG-1437 (on license renewal), and the Waste Confidence Rule. Such challenges to generic findings (quite apart from being irrelevant to dry storage) are impermissible in this proceeding.

With respect to the Waste Confidence Rule, 10 C.F.R. § 51.23, it is well established that a contention is inadmissible if it constitutes an impermissible challenge to existing agency regulatory requirements. *See* 10 C.F.R. § 2.758; *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 364 (2001); *see Turkey Point*, LBP-01-06, 53 NRC at 165 (rejecting a contention as an impermissible challenge to the Waste Confidence Rule). The Challenges to the generic environmental impact statements are likewise impermissible. *See Private Fuel Storage*, LBP-98-7, 47 NRC at 192 (denying a contention as an impermissible challenge to the Commission's regulations *or* "*rulemaking-associated generic determinations*"). For these reasons, this aspect of the proposed contention must be rejected.

H. EC-3 — Failure to Evaluate Environmental Impacts of Transportation

SLOMFP Contention EC-3 argues that PG&E's ER violates 10 C.F.R. §§ 51.45(b)(1) and 72.108 because it does not evaluate the impacts of transporting spent fuel *away*

---

[61] Final Rule, Review and Final Revision of Waste Confidence Decision, 55 Fed. Reg. 38,474 (Sept. 18, 1990).

from DCPP at the end of the ISFSI license term, either to a high-level waste repository or to another interim storage facility. (SLOMFP Contentions at 39 (emphasis added).) SLOMFP contends that the ER should include:

- a description of the means by which spent fuel will be transported from the site to a repository or other facility;
- the environmental impacts of such transportation, including normal conditions, design basis accidents, and reasonably foreseeable severe [transportation] accidents;
- the environmental impacts of terrorist acts against the in-transit transportation casks; and
- a "reasonable array of alternatives for spent fuel transportation, including deferral of transportation." (SLOMFP Contentions at 40.)

This proposed contention raises several similar sub-issues. For completeness and as a matter of convenience, they are broken out individually and addressed in turn below. None establishes a basis for an admissible contention. Quite simply, NRC regulations do not require consideration of offsite transportation issues in the case of the DCPP ISFSI and therefore the proposed contention lacks any legal basis. The overarching issue is addressed first.

1. Offsite Transportation is Beyond the Scope of this Proceeding.

As a fundamental matter, this proposed contention must be rejected because there is no requirement that an ER for an ISFSI co-located with a nuclear power plant include a discussion of offsite transportation matters, such as transport away from the ISFSI at the end of the ISFSI license term. SLOMFP misinterprets the requirements of 10 C.F.R. § 72.108.

Section 72.108 provides, in pertinent part:

> The proposed ISFSI . . . must be evaluated with respect to the potential impact on the environment of the transportation of spent fuel, high-level radioactive waste, or reactor-related [Greater than Class C] waste within the region.

At the time Section 72.108 was promulgated, the NRC's statements of consideration reflected the Commission's intent regarding the transportation impacts within the scope of this requirement. The focus was on shipments *to the ISFSI*, and not on offsite transportation away from the ISFSI, such as to a high-level waste repository. Indeed, the NRC stated:

> Transportation Considerations. A number of commenters considered that the transportation *involved in spent fuel shipments to an ISFSI* could be an important consideration in an evaluation of site suitability. This might be particularly true of a large installation. The Commission agrees and a new § 72.70 has been added to the rule to specifically address this point.

Final Rule, Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693, 74,698 (Nov. 12, 1980)(emphasis added). In addition, with respect to the consideration of transportation in the applicant's ER, the NRC stated:

> The content of the environmental report required by § 72.20 was the subject of a number of comments. The environmental report required for an ISFSI is an evaluation of the environmental impact of the ISFSI *on the region in which it is located, including the transportation that is involved.*

Id., 45 Fed. Reg. at 74,694 (emphasis added).[62] Section 72.70 provided:

---

[62] The NRC received comments on the transportation issue, also raising concerns related to offsite transportation. For example, one commenter stated, with respect to the proposed rule:

> The 'Supplementary Information' states that the imposition of this site restriction (of .25g with a recurrence interval of 500 years) does raise the possibility that *a small amount of additional transportation of spent fuel might be necessary to reach an acceptable ISFSI site from a rew reactors in the U.S. Some state and local regulations may not permit the transportation of radioactive material across state borders. This should be recognized when siting an ISFSI which is to be used by several utilities.*

Another commenter stated:

> In choosing sites for ISFSI, *consideration should be given to transportation corridors involved in moving spent fuel from*

> The proposed ISFSI shall be evaluated with respect to the potential impact on the environment of spent fuel being transported *into* the area.

Id., 45 Fed. Reg. at 74,709 (emphasis added).[63] Thus, it is clear from the regulatory history that, for an ISFSI that is located at the site of the nuclear power plant that will be the sole source of the waste stored at the ISFSI, the relevant transportation "region" is onsite (*i.e.*, transportation from the reactor to the ISFSI).

Onsite transportation issues are addressed in PG&E's ER and SAR (*see, e.g.*, ER at §§ 4.2.3, 4.5, 5.2; SAR at §§ 3.2, 3.3.3, 4.3, 4.3.3, 4.4.1.2.4, 5.1.1.3, 5.4, 8.2.4). SLOMFP does not challenge those discussions. Where an ISFSI is co-located with the reactor, there will be no offsite transportation impacts attributable to the ISFSI. A discussion such as that proposed

---

> *present locations to the proposed sites.* The regulations should define criteria for locating ISFSI with minimum transportation.

A third stated:

> The regulations do not appear to directly address the problem of spent fuel transportation which would be associated with an ISFSI . . . Specific examples might include siting considerations which take into account transportation corridors and restraints, or further consideration of transportation accidents using site specific parameters.

To these comments, the NRC responded: "In response to these comments a new section 72.70, *Spent Fuel Transportation*, has been added to the rule." NUREG-0587, "Analyses of Comments on 10 CFR Part 72," dated November 1980, at II-118-19 (emphasis added).

63 Section 72.70 was recodified to its present location at Section 72.108 as part of a 1988 rulemaking adding language to Part 72 to provide for licensing the storage of spent fuel and high-level waste in monitored retrievable storage facilities. *See generally* Final Rule, Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, 53 Fed. Reg. 31,651 (Aug. 19, 1988). At that time, Section 72.108 was clarified to read: "The proposed ISFSI or MRS must be evaluated with respect to the potential impact on the environment of the transportation of spent fuel or high-level radioactive waste within the region." *Id.*, 53 Fed. Reg. at 31,671.

by SLOMFP is not required in connection with licensing of the ISFSI.[64] Accordingly, SLOMFP's proposed contention related to offsite transportation away from the ISFSI is beyond the scope of this proceeding and should be rejected.[65]

2. *Consideration of Environmental Impacts of Transportation from the ISFSI to an Interim or Permanent Repository is Appropriately Considered Elsewhere.*

Consistent with the discussion above, the environmental impacts of offsite transportation — to an interim or permanent repository — are appropriately considered in other licensing contexts and need not be considered here. For example, the NWPA assigns to DOE the responsibility to transport spent fuel from reactor sites to a high level waste repository. *See generally* NWPA § 137, 42 U.S.C. § 10157. Accordingly, the Department of Energy's EIS in support of a geologic repository at Yucca Mountain, Nevada, considers transportation impacts as follows:

> On a national basis DOE analyzed impacts of transporting spent nuclear fuel, . . . and high level radioactive waste . . . . These impacts include all activities necessary to transport these materials, from loading at the commercial and DOE facilities to delivery at the Yucca Mountain site.

U.S. Department of Energy, DOE/EIS-0250, Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste

---

64 The Commission's intent is also evident from the discussion of alternatives considered in the Final GEIS issued in support of the final rule, NUREG-0575. *See, e.g.*, GEIS, Executive Summary at § 5.0 ("Increasing at-reactor spent fuel storage does not in itself involve any additional transportation of spent fuel. The provisions for away-from-reactor spent fuel storage, assuming offsite locations, could involve an additional transportation step").

65 Such a determination is consistent with Environmental Assessments prepared for other ISFSIs co-located with the reactor, in which offsite transportation was not considered. *See* NRC, Environmental Assessment Related to the Construction and Operation of the North Anna Independent Spent Fuel Storage Installation, March 1997; NRC, Environmental Assessment Related to the Construction and Operation of the Trojan Independent Spent Fuel Storage Installation, November 1996.

at Yucca Mountain, Nye County, Nevada, Feb. 2002, at 6-1.[66] Any challenges to the transportation analysis undertaken therein by the Department of Energy are appropriate for consideration in a licensing proceeding for the Yucca Mountain Repository. *See also Private Fuel Storage,* LBP-98-7, 47 NRC at 199-200, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998)(denying portion of a contention asserting that the applicant's ER failed to give adequate consideration to the transportation-related environmental impacts of its proposed Skull Valley ISFSI which alleged, among other things, that PFS and the NRC Staff must evaluate all environmental impacts associated with "transfers and transportation required for the ultimate disposal of the spent fuel").

Alternatively, in the event that spent fuel and high-level waste from DCPP would be transported to the proposed PFS ISFSI in Skull Valley for interim storage, the impacts of offsite transportation to that facility, including impacts from accidents, are considered in the NRC EIS in connection with that facility. The PFS EIS specifically discusses the impacts associated with transportation of spent nuclear fuel from nuclear power plants to the proposed ISFSI in Skull Valley. *See* NRC NUREG-1714, Vol. 1, Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Bank of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, December 2001, at 5-1. Moreover, the NRC Staff performed an

---

66 Indeed, the NWPA specifically directs DOE to consider transportation to the repository. *See* NWPA § 112(a)(2), 42 U.S.C. § 10132(a)(2)(in issuing general guidelines for the recommendation of sites for repositories, DOE is directed to consider "the cost and impact of transporting to the repository site the solidified high-level radioactive waste and spent fuel to be disposed of in the repository. . . ").

additional assessment of the shipment of spent nuclear fuel from the proposed PFS facility to a permanent repository, as if the repository were located at Yucca Mountain, Nevada. *Id.* at 5-46.

Thus, the DCPP ISFSI ER need not consider the impacts of transportation from the DCPP site, including design-basis and severe accidents, to either an interim repository at Skull Valley, Utah, or a permanent geologic repository at Yucca Mountain, Nevada. These impacts are evaluated in other environmental reports supporting other licensing actions.

3. Transportation-Related Impacts Are Not "Reasonably Foreseeable" Impacts Related To This Proposed Project.

In one variation of this proposed contention, SLOMFP asserts that PG&E must address the environmental impacts associated with transportation of spent nuclear fuel offsite because such impacts are "reasonably foreseeable." Offsite transportation impacts, however, are reasonably foreseeable impacts of *plant operation*, not of the proposed ISFSI. The spent fuel is generated by the power plant, not by the proposed ISFSI. [67] Accordingly, the environmental effects of transportation of fuel and waste to and from nuclear power reactors, with respect to normal conditions of transport and accidents in transport, also have been addressed on a generic basis in connection with nuclear plant operation. *See* 10 C.F.R. § 51.52; NUREG-75/038, WASH-1238, Environmental Survey of Transportation of Radioactive Materials to and from

---

[67] As discussed previously, PG&E has a statutory duty to store the spent fuel produced by DCPP at the plant. In the NWPA, 42 U.S.C. § 10101 *et seq.*, Congress determined that the operators of civilian nuclear power plants have "primary responsibility" for interim storage of spent nuclear fuel pending federal development of a permanent disposal repository. The NWPA further specified that operators should meet their responsibility "by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical." 42 U.S.C. § 10151(a)(1).

Nuclear Power Plants, December 1972; NUREG-75/038, Supplement 1 to WASH-1238, April 1975.[68]

In contrast, the purpose of the proposed ISFSI is to provide spent fuel *storage* such that spent fuel can be removed from the DCPP spent fuel pools and stored until it can be moved to a permanent federal repository. To be within the scope of a NEPA review, there must be a close causal relationship between potential environmental effects and the proposed federal action. In *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983), the Supreme Court stated:

> Our understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms "environmental effect" and "environmental impact" in § 102 be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law.

Here the proposed federal action — issuance of a Part 72 license to store existing spent fuel at DCPP in an ISFSI — does not proximately lead to the subsequent offsite transportation.

---

68 In connection with its license renewal regulations, the NRC Staff also considered on a generic basis whether the environmental impact values contained in Table S-4, "Environmental Impact of Transportation of Fuel and Water from One Light-Water-Cooled Nuclear Power Reactor" (codified at 10 C.F.R. § 51.52(c)) are still appropriate for use in license renewal reviews, and concluded that the impacts of transporting certain spent fuel, and the cumulative impacts of transporting high-level waste to a single repository, were consistent with the impact values contained in Table S-4. If fuel enrichment or burnup conditions are not met, the applicant must submit an assessment of the implications for the environmental impact values reported in § 51.52. *See* 10 C.F.R. Part 51, Subpart A., Appendix B, Table B-1, "Summary of Findings on NEPA Issues for License Renewal of Nuclear Plants;" NUREG-1437, Addendum 1, Generic Environmental Impact Statement, License Renewal of Nuclear Plants, Main Report, Section 6.3 — Transportation, Table 9.1, Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants. *See also* NUREG-1555, Environmental Standard Review Plan, at §§ 3.8, 7.4; NRC Regulatory Guide 4.2, "Preparation of Environmental Reports for Nuclear Power Stations," at § 7.2 (January 1975); NRC Regulatory Guide 4.2, Supp. 1, "Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses," at § 4.21 (September 2000).

Because of the lack of a close causal connection, transportation is not a "reasonably foreseeable" impact of the proposed Part 72 license, and no analysis of offsite transportation impacts is required under NEPA. For these reasons, this basis for the proposed contention is specious and should be rejected.

4. *The ER Need Not Consider The Environmental Impacts Of Destructive Acts Of "Malice Or Insanity" Against Transportation Casks.*

As discussed above with respect to Proposed Contention EC-1, this security issue is not appropriate for litigation in this proceeding because (1) it constitutes an impermissible challenge to NRC's security regulations that is prohibited by 10 C.F.R. § 2.758; (2) the NRC is currently conducting an evaluation of its physical security program, the contention is barred on the grounds that it is (or is about to be) the subject of general rulemaking by the Commission; and (3) NEPA does not require an evaluation of environmental impacts of acts of sabotage, terror, or warfare. Thus, this basis should be rejected.

5. *The ER Need Not Address Alternatives To Transportation.*

SLOMFP contends that the ER must address "a reasonable array of alternatives for spent fuel transportation, including deferral of transportation." (SLOMFP Contentions at 40.) This aspect of the contention is also beyond the scope of this proceeding. Under NEPA, only alternatives that serve the purpose of the proposed action need be considered. *See City of Angoon v. Hodel,* 803 F.2d 1016, 1021 (9th Cir. 1986), *cert. denied,* 484 U.S. 870 (1987) ("when the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing may be achieved"). The purpose of PG&E's proposal is storage, and the alternatives discussed in the ER therefore relate to storage. Like offsite transportation impacts, the alternatives to offsite transportation would relate to a transportation approval, or to an approval for an offsite storage facility or repository, none of which is the proposed licensing

action at issue here. *See also* 10 C.F.R. § 51.45(b)(3)(requiring a discussion in the ER of alternatives *to the proposed action*). Accordingly, this basis should be rejected.

V. CONCLUSION

For the reasons set forth above, SLOMFP's proposed contentions should not be admitted. The requests for hearing and petitions to intervene should be denied.

Respectfully submitted,

David A. Repka, Esq.
Brooke D. Poole, Esq.
WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005-3502

William V. Manheim, Esq.
Richard F. Locke, Esq.
PACIFIC GAS & ELECTRIC COMPANY
77 Beale Street, B30A
San Francisco, CA 94105

ATTORNEYS FOR PACIFIC GAS &
ELECTRIC COMPANY

Dated in Washington, District of Columbia
this 19th day of August 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
Pacific Gas and Electric Co.	)	Docket No. 72-26-ISFSI
	)	
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO SUPPLEMENTAL REQUEST FOR HEARING AND PETITION TO INTERVENE OF SAN LUIS OBISPO MOTHERS FOR PEACE ET AL." have been served as shown below by electronic mail, this 19th day of August 2002. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

Administrative Judge G. Paul Bollwerk, III
Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: gpb@nrc.gov

Administrative Judge Peter S. Lam
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: psl@nrc.gov

Administrative Judge Jerry R. Kline
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: jrk2@nrc.gov
kjerry@erols.com

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
e-mail: dcurran@harmoncurran.com

Lorraine Kitman
P.O. Box 1026
Grover Beach, CA 93483
e-mail: lorraine@bejoseeds.com
l.kitman@bejoseeds.com

Karen D. Cyr, Esq.
Stephen H. Lewis, Esq.
Angela B. Coggins, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
e-mail: OGCMailCenter@nrc.gov
shl@nrc.gov
abc1@nrc.gov

Seamus M. Slattery, Chairman
Avila Valley Advisory Council
P.O. Box 58
Avila Beach, CA 93424
e-mail: Jslat1@aol.com

Peg Pinard
714 Buchanan Street
San Luis Obispo, CA 93401

Klaus Schumann
Mary Jane Adams
26 Hillcrest Drive
Paso Robles, CA 93446
e-mail: jayklaus@email.msn.com

Thomas D. Green, Esq.
Thomas D. Waylett, Esq.
Adamski, Moroski & Green LLP
444 Higuera Street, Suite 300
San Luis Obispo, CA 93401-3875
e-mail: green@adamskimoroski.com
waylett@adamskimoroski.com

James B. Lindholm, Jr., Esq.
County Counsel for San Luis Obispo County
County Government Center
1050 Monterey Avenue, Room 386
San Luis Obispo, CA 93408
e-mail: jlindholm@co.slo.ca.us

Robert K. Temple, Esq.
2524 N. Maplewood Avenue
Chicago, IL 60647
e-mail: nuclaw@mindspring.com

San Luis Obispo Mothers for Peace
P.O. Box 164
Pismo Beach, CA 93448
e-mail: beckers@thegrid.net
jzk@charter.net

Brooke D. Poole, Esq.
Counsel for Pacific Gas
& Electric Company

ATTACHMENT 1

April 6, 2001

The Honorable Gray Davis
Governor of California
Sacramento, California 95814

Dear Governor Davis:

The U.S. Nuclear Regulatory Commission (NRC) is the Federal agency responsible for the regulatory oversight of safety at commercial nuclear power plants. Pacific Gas and Electric Company (PG&E), the licensee for the Diablo Canyon Nuclear Station (Diablo Canyon) Units 1 and 2, and Humboldt Bay Unit 3, has informed us that it has filed a petition for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code. The purpose of this letter is to inform you of our ongoing regulatory oversight functions under this situation.

Please be assured that the NRC is closely monitoring day-to-day operations at the Diablo Canyon units to ensure that NRC-licensed activities continue to be conducted in a safe manner. (Humboldt Bay Unit 3 is no longer operating.) Our ongoing regulatory oversight and our inspections to date confirm that the present financial situation has had no impact on PG&E's ability to operate its units safety and in accordance with our requirements. Our inspectors are particularly sensitive to signs of curtailment of required activities that may impinge on safety. The NRC has inspectors assigned full time at Diablo Canyon, and we will augment their efforts with additional inspectors from our Region IV Offices if circumstances warrant.

Our concern in any bankruptcy proceeding is to ensure that (1) there are sufficient funds to enable NRC-licensed activities at the impacted facility to be conducted in a safe manner, and (2) adequate decommissioning funds are maintained to enable decommissioning to be safely completed at such time as operation is permanently terminated. Representatives from PG&E have informed us that they have adequate operating funds to conduct safe operation of Diablo Canyon in accordance with our regulations. With respect to decommissioning funds, nuclear utilities are required to deposit funds for their nuclear plants over the estimated life of the plants into accounts established specifically for this purpose. The most recent reports PG&E show that its decommissioning accounts for its nuclear facilities are sufficiently funded. In our view, such funds are expected to be protected from creditor's claims in bankruptcy proceedings. To ensure that the NRC's interests and responsibilities and the licensee's obligations with respect to public health and safety are properly recognized in the bankruptcy proceeding, the Commission will ask the U.S. Department of Justice to intervene on its behalf at the appropriate time.

Please do not hesitate to contact me with any concerns regarding this matter.

Sincerely,

/RA/

Richard A. Meserve

Identical letters sent to:

The Honorable Spencer Abraham
Secretary of Energy
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, DC 20585

The Honorable Curtis L. Hebert, Jr., Chairman
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

The Honorable John Ashcroft, Attorney General
Department of Justice
Tenth Street and Constitution Avenue, N.W.
Washington, DC 20530

The Honorable Laura Ungar, Chairman
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

The Honorable Bob Smith, Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20501

cc: Senator Harry Reid

The Honorable George V. Voinovich, Chairman
Subcommittee on Clean Air, Wetlands, Private
Property and Nuclear Safety
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

cc: Senator Joseph I. Lieberman

The Honorable Joe Barton, Chairman
Subcommittee on Energy and Air Quality
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

cc: Representative Rick Boucher

The Honorable W. J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

cc: Representative John D. Dingell

cc:
NRC Resident Inspector
Diablo Canyon Nuclear Power Plant
c/o U.S. Nuclear Regulatory Commission
P.O. Box 369
Avila Beach, CA 93424

Dr. Richard Ferguson, Energy Chair
Sierra Club California
1100 11th Street, Suite 311
Sacramento, CA 95814

Ms. Nancy Culver
San Luis Obispo
Mothers for Peace
P.O. Box 164
Pismo Beach, CA 93448

Chairman
San Luis Obispo County Board of
Supervisors
Room 370
County Government Center
San Luis Obispo, CA 93408

Mr. Truman Burns
Mr. Robert Kinosian
California Public Utilities Commission
505 Van Ness, Room 4102
San Francisco, CA 94102

Mr. Steve Hsu
Radiologic Health Branch
State Department of Health Services
P.O. Box 942732
Sacramento, CA 94327-7320

Diablo Canyon Independent Safety
Committee
ATTN: Robert R. Wellington, Esq.
Legal Counsel
857 Cass Street, Suite D
Monterey, CA 93940

Regional Administrator, Region IV
U.S. Nuclear Regulatory Commission
Harris Tower & Pavilion
611 Ryan Plaza Drive, Suite 400
Arlington, TX 76011-8064

Christopher J. Warner, Esq.
Pacific Gas & Electric Company
Post Office Box 7442
San Francisco, CA 94120

Mr. David H. Oatley, Vice President
Diablo Canyon Operations and
Plant Manager
Diablo Canyon Nuclear Power Plant
P.O. Box 3
Avila Beach, CA 93424

Telegram-Tribune
ATTN: Managing Editor
1321 Johnson Avenue
P.O. Box 112
San Luis Obispo, CA 93406

Mr. Ed Bailey, Radiation Program Director
Radiologic Health Branch
State Department of Health Services
P.O. Box 942732 (MS 178)
Sacramento, CA 94327-7320

Mr. Robert A. Laurie, Commissioner
California Energy Commission
1516 Ninth Street (MS 31)
Sacramento, CA 95814

Mr. Gregory M. Rueger
Senior Vice President, Generation and
Chief Nuclear Officer
Pacific Gas and Electric Company
Diablo Canyon Nuclear Power Plant
P. O. Box 3
Avila Beach, CA 94177

Humboldt Bay Unit 3

cc:
Chief, Fuel Cycle and Decommissioning
Branch, Region IV
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 400
Arlington, TX 76011-8064

Mr. Peter H. Kaufman
Deputy Attorney General
State of California
110 West A Street, Suite 700
San Diego, CA 92101

Christopher J. Warner, Esq.
Pacific Gas & Electric Company
Post Office Box 7442
San Francisco, CA 94120

Mr. Thomas A. Moulia
Humboldt Bay Plant Manager
Humboldt Bay Nuclear Power Plant 1000
King Salmon Avenue
Eureka, CA 95503

Chairman, Humboldt County Board
of Supervisors
County Courthouse
825 Fifth Street
Eureka, CA 95501

Mr. Steve Hsu
Radiologic Health Branch
State Department of Health Services
Post Office Box 942732
Sacramento, CA 94327-7320

Regional Administrator, Region IV
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 400
Arlington, TX 76011-8064

Public Affairs Officer, Region IV
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 400
Arlington, TX 76011-8064

U.S. Environmental Protection Agency
Region IX Office
ATTN: Regional Radiation
Representative
75 Hawthorne Street
San Francisco, CA 94105

Mr. Truman Burns
California Public Utilities Commission
505 Van Ness, Room 4102
San Francisco, CA 94102

Mr. Robert Kinosian
California Public Utilities Commission
505 Van Ness, Room 4102
San Francisco, CA 94102

Redwood Alliance
P.O. Box 293
Arcata, CA 95521

Dr. Rich Ferguson, Energy Chair
Sierra Club California
1100 11th Street, Suite 311
Sacramento, CA 94814

Diablo Canyon Nuclear Power Plant
ATTN: Lawrence F. Womack
Vice President
Nuclear Technical Services
P. O. Box 3
Avila Beach, CA 93424

Mr. Ed Bailey, Radiation Program Director
Radiologic Health Branch
State Department of Health Services
P.O. Box 942732 (MS 178)
Sacramento, CA 94327-7320

Mr. Robert A. Laurie, Commissioner
California Energy Commission
1516 Ninth Street (MS 31)
Sacramento, CA 95814