

RAS 4787

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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In the Matter of	)	
PACIFIC GAS AND ELECTRIC CO.,	)	
DIABLO CANYON POWER PLANT	)	Docket No. 72-26 - ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	ASLBP No. 02-801-01-ISFSI
	)	
_____	)	

**SUBJECT MATTER UPON WHICH THE COUNTY OF SAN LUIS OBISPO  
DESIRES TO PARTICIPATE PURSUANT TO 10 C.F.R. § 2.715(c)**

**I. INTRODUCTION**

Pacific Gas and Electric Company ("PG&E" or "Applicant") has requested that the U.S. Nuclear Regulatory Commission ("NRC" or the "Commission") issue a license for a term of twenty years to possess spent fuel and other radioactive materials associated with spent fuel in an independent spent fuel storage installation ("ISFSI"), which would be licensed under 10 C.F.R. Part 72 ("Application"). The proposed ISFSI is to be constructed on the grounds of the Diablo Canyon Power Plant ("Diablo Canyon"), which is located in San Luis Obispo County.

The County of San Luis Obispo ("County") made a timely request to participate in any hearing held in this proceeding as provided for in 10 C.F.R. § 2.715(c). The Commission granted the request subject to the County identifying the issues upon which it desires to participate. See *In the Matter of Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-15, p.3 n.3, dated July 15, 2002; and *ASLBP No. 02-801-01-ISFSI Memorandum and Order*, dated August 7, 2002. In order to aid the Atomic Safety and Licensing

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Board Panel (*hereinafter* "Licensing Board") presiding officer in planning the scope and duration of the hearing in this matter, the County has identified herein the subject matter on which it desires to be heard.

See 10 C.F.R. § 2.715(c). The County desires to be heard on the following issues: (1) whether the identity and corporate structure of the Applicant are adequately identified; (2) whether the Applicant's financial qualifications are sufficiently demonstrated; and (3) whether the environmental analysis supporting selection of the site adequately considered alternatives for the purposes of the National Environmental Policy Act of 1969, as amended ("NEPA").<sup>1</sup> The County also desires to participate in any other issues presented to the Licensing Board.

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<sup>1</sup> In section II below, these issues have been labeled either "TC," for technical concerns related to the Application, or "EC," for concerns related to information that should have been addressed in the environmental report accompanying the Application.

## II. DISCUSSION

### **Issue TC 1. The Corporate Identity And Structure Of The Applicant Are Not Adequately Identified.**

In PG&E's ISFSI Application, as amended by supplemental materials filed with the NRC on June 6, 2002, PG&E fails to adequately identify the identity and organizational structure of the Applicant. An application for a license to possess spent fuel and other radioactive materials in an ISFSI must state the identity and organizational structure of the Applicant. 10 C.F.R. § 72.22(d). This requirement is not merely a formality. Identification of an ISFSI applicant's corporate structure and identity is required because the NRC cannot properly evaluate an applicant's financial and technical qualifications without first considering its corporate organization.

The Application is made in the name of Pacific Gas and Electric Company, a wholly owned subsidiary of the PG&E Corporation. The description of the Applicant's business likewise describes the business of Pacific Gas and Electric Company. (See Application, p 3. section 1.2-1.3.) As is acknowledged in the Application, Pacific Gas and Electric Company has filed for bankruptcy and has requested that the Bankruptcy Court confirm a comprehensive reorganization plan ("PG&E's Plan"). If PG&E's Plan is confirmed, PG&E's generating assets, including Diablo Canyon and the proposed ISFSI, would be transferred to a new limited liability corporation, Electric Generation LLC ("Gen"). The Plan also calls for the ownership interest in Diablo Canyon to be transferred to a subsidiary of Gen to be called Diablo Canyon LLC ("DCLLC").

Whether these corporate entities will ever be created is currently being litigated in the Bankruptcy Court. Two competing plans of reorganization, one that calls for the creation of these entities and one that essentially leaves PG&E intact, have been submitted to the Bankruptcy Court. In

addition, because the Bankruptcy Court recently granted the Official Committee of Unsecured Creditors ("OCC") leave to file a reorganization plan, it could consider a third plan of reorganization.

Despite the uncertainty regarding the corporate identity and structure of the licensee, PG&E attempts to satisfy the requirements of 10 C.F.R. § 72.22(d) by describing its current business and structure. A description of PG&E's current business and structure does not provide the NRC with basic information about the actual licensee. The NRC needs this information in order to evaluate whether the licensee's corporate organization is sufficiently sound to ensure proper construction, operation and decommissioning of the ISFSI. If PG&E's Plan is confirmed by the Bankruptcy Court, then Gen or DCLLC would be the licensee, owner, and operator of the proposed ISFSI, not PG&E. Any plan confirmed by the Bankruptcy Court will result in a substantially different corporation from the existing Pacific Gas and Electric Company. Until the Bankruptcy Court confirms one of the reorganization plans, the corporate identity and structure of the actual Applicant cannot be identified.

In addition, it would thwart the very purpose of this proceeding to permit PG&E to apply for a license that may be transferred to an unknown corporate entity. The purpose of this license application proceeding is to enable the NRC to evaluate whether the licensee has a sound corporate structure. Considering PG&E's corporate structure, in lieu of the licensee's corporate structure, serves no legitimate purpose. Without knowing what the licensee's corporate structure will be, consideration of this application is premature.

An evaluation of the licensee's corporate structure should only be done after a reorganization plan has been confirmed. At that time, the identity and structure of the entity that will own and/or operate Diablo Canyon will be known. PG&E believes that the Bankruptcy Court will confirm a reorganization plan before this ISFSI license is issued. (PG&E Supplemental and Financial Information

Sheet 1 of 5, fn. 1.) At that point the true “Applicant” can apply for this license. Until that occurs, the application will not satisfy the requirements of 10 C.F.R. § 72.22(d)(3).

**Issue TC 2. The Financial Qualifications Of The Applicant Are Not Adequately Demonstrated.**

An applicant for a license to possess spent fuel and other radioactive materials in an ISFSI must demonstrate that it has certain financial qualifications. The applicant must submit sufficient financial information to demonstrate that it has adequate financial resources to carry out the activities for which the license is sought. The applicant must also have either adequate funds or reasonable assurance of obtaining the funds, or a combination of both, to cover construction costs, operating costs, and decommissioning costs of the proposed ISFSI. 10 C.F.R. § 72.22(e).

Because the proposed ISFSI will be located in the County of San Luis Obispo, the County has a significant interest in ensuring that the financial requirements are met. If a license is issued despite a failure to provide adequate financial assurance, the safe operation and decommissioning of the ISFSI could be compromised. A licensee’s failure to safely operate and/or decommission the ISFSI could cause significant and enduring impacts on the County and its residents as a result of accidents, radiation exposure, or the untimely (or delayed) decommissioning of the facility. In addition, the County and its citizens, as taxpayers, could bear a substantial financial burden should they be required to fund the decommissioning of the facility and decontamination and restoration of the site.

PG&E has failed to provide the NRC with adequate information, in its application and in its supplemental filings, to make an informed decision about the licensee’s financial qualifications. Until the Bankruptcy Court confirms a reorganization plan, any representations regarding the funds that will be

available to finance the construction, operation, and decommissioning of the ISFSI are based on speculation regarding the restructuring of PG&E. PG&E speculates that it or its successor will be in a position to borrow sufficient funds to cover the costs of constructing the ISFSI. However, whether PG&E or its successor will be in a position to borrow money will depend on the credit rating given to the entity that emerges from bankruptcy. At the present time, the credit worthiness and borrowing capabilities of PG&E or its successor cannot be ascertained or assured.

PG&E also attempts to demonstrate its financial qualifications by relying on its status as an electric utility. See 10 C.F.R. § 50.2. Ordinarily, an electric utility is expected to recover prudently incurred costs through rates approved by a governmental rate-setting agency. The NRC applies stringent financial qualification requirements to non-electric utilities. PG&E seeks to avoid these requirements by representing that it is an electric utility. However, it should not be relieved of these requirements because if PG&E's reorganization plan is implemented the ISFSI licensee will not be an electric utility.

It is essential to reasoned decision making that the NRC fully explore these issues and all other assumptions upon which PG&E relies in representing that it is financially qualified. Because significant questions remain unanswered regarding the successor organization's ability to fund the safe construction, operation, and decommissioning of the proposed ISFSI, the County expects to explore the bases for the Applicant's claim of financial qualification.

**Issue EC 1. The Environmental Report Does Not Contain An Adequate Analysis of Alternatives.**

An applicant for a license to possess spent fuel and other radioactive materials in an ISFSI must submit an Environmental Report ("ER") with its application. 10 C.F.R. § 51.60(b)(1)(iii). The ER must contain a description of the proposed action, a statement of its purposes, a description of the environment affected, and a discussion of additional environmental considerations listed in 10 C.F.R. § 51.45(b). The application must also address the siting evaluation factors contained in subpart E of Part 72. 10 C.F.R. § 51.61.

Alternatives to the proposed action are among the considerations that must be discussed in the environmental report. 10 C.F.R. § 51.45(b). "... The discussion of alternatives shall be sufficiently complete to aid the Commission in developing and exploring, pursuant to section 102(2)(E) of NEPA, 'appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.' To the extent practicable, the environmental impacts of the proposal and the alternatives should be presented in comparative form." 10 C.F.R. § 51.45(b)(3).

The NRC has characterized the consideration of alternatives as the most important environmentally related task under NEPA, *Florida Power & Light Company*, (St. Lucie Nuclear Power Plant, Unit 2), ALAB-435, 6 NRC 541, 543-44 (1977), and has stated that a hard look for superior alternatives is a condition precedent to a licensing determination that an applicant's proposal is acceptable under NEPA. *Public Service Company of New Hampshire*, (Seabrook Station, Units 1 & 2), ALAB-471m 7 NRC 477, 513 (1978). Even where it is believed that a proposed action does not significantly affect the quality of the human environment, an Atomic Safety and Licensing Board must

make the determination, based on all of the evidence presented during a hearing, as to whether alternatives must be considered. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), LBP –85-34, 22 NRC 481, 491 (1985).

“The environmental report shall [also] include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects. [T]he analysis in the environmental report should also include consideration of the economic, technical, and other benefits and costs of the proposed action and of alternatives. The analyses for environmental reports shall, to the fullest extent practicable, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, those considerations or factors shall be discussed in qualitative terms. The environmental report should contain sufficient data to aid the Commission in its development of an independent analysis.” 10 C.F.R. § 51.45(c).

The Applicant’s ER does not satisfy the requirements of 10 C.F.R. § 51.45. In particular, the ER does not contain an adequate discussion or analysis of available alternatives that would reduce potential environmental impacts. It also does not include an adequate analysis of the economic, technical, and other costs and benefits of the proposed action and its alternatives. The ER fails to adequately consider alternative sites and related alternative security plans.

**Issue EC 1.A. The ER Fails To Adequately Consider And Analyze Alternative Sites And Associated Security Measures.**

An environmental report must contain a discussion, consideration, and balancing of the environmental impacts of alternatives to the proposed action and alternatives available for reducing or avoiding adverse environmental effects. 10 C.F.R. § 51.45. The ER fails to do so because it does not adequately consider and analyze alternative sites and security measures associated with those alternative sites.

In conducting site evaluations, it appears that PG&E only seriously considered areas that had previously been evaluated and met geological standards.<sup>2</sup> Use of this methodology would necessarily result in a failure to consider other significant factors, such as vulnerability to offshore attacks, in selecting the most reasonable location for the ISFSI. In particular, the ER does not include evaluations of security-related features for alternative sites, even though an evaluation of “design basis external man-induced events,” including associated “security requirements,” is necessary to address such events. 10 C.F.R. § 72.94. Failure to consider reasonable alternatives not only violates NEPA, it also poses a potential threat to the health and safety of the citizens of San Luis Obispo County. This deficiency leaves the County vulnerable to environmental impacts that might be avoided by a thorough analysis of alternative ISFSI sites and associated security features.

**Issue EC 1.B. The ER Fails To Consider And Analyze Alternative Security Plans.**

As part of its ER, PG&E is required to consider “the economic, technical, and other benefits

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<sup>2</sup> See ER Section 2.6.1, Principal Findings – ISFSI Site, pp. 2.6-1 – 2.6-2 and ER Section 8.1, Site Selection Criteria, pp. 8.1-1 – 8.1-9.

and costs of the proposed action and of alternatives” and “quantify the various factors considered.” 10 C.F.R. § 51.45(c). The County is concerned that PG&E may have failed to consider these factors in developing its emergency response plan. In particular, it does not appear that PG&E’s evaluation of alternative security measures (and related alternative emergency response plans) took into account the implementation costs that would be borne by the County.<sup>3</sup> Nor is it clear that PG&E considered the increased security training that would be required by siting the ISFSI at Diablo Canyon. Therefore, PG&E’s security and emergency response plans should be made available for review as part of this proceeding to ensure that PG&E has conducted the requisite cost benefit analysis.

It appears that the ISFSI Physical Security Plan (“Security Plan”) is premised upon the ability to control access to the ISFSI protected area, despite the exposure of this facility to offshore attack. Since the events of September 11, 2001, the County is legitimately concerned that an ISFSI near the Pacific Coast may well present an attractive target for attack. In order to fulfill its obligations under 10 C.F.R. Parts 51 and 72, PG&E should be required to analyze whether alternative security measures addressing this deficiency should be included in the Security Plan. Failure of the Security Plan could have substantial environmental consequences to the citizens of San Luis Obispo County.

Finally, review of the emergency response plan is important because the County needs to determine whether it is prepared to fulfill its increased responsibilities under PG&E’s emergency plan once the ISFSI is in operation. The County is the lead agency responsible for emergency preparedness in the vicinity of Diablo Canyon. As a result, the County must be fully apprized of PG&E’s emergency response plans in the event of a natural emergency, an accident, or a deliberate attack. The County also needs to properly equip and train its emergency personnel so that they can fulfill their obligations as off-

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<sup>3</sup> See ER Section 8.1.1.1, Area Requirements, p. 8.1-1.

site responders. Therefore, the County wishes to examine, at hearing, the alternative security measures and the proposed licensee's reliance on the County for implementation of its emergency response and security plans.

### III. CONCLUSION

PG&E's Application does not adequately identify the corporate identity, structure and financial qualifications of the proposed facility licensee. The ER is also deficient because it does not adequately analyze the environmental impacts of the ISFSI. In addition, the ER fails to adequately consider alternative sites and security plans. These deficiencies in the Application and Environmental Report require the County to participate in any hearing related to these issues. The County also wishes to participate, as provided for under 10 C.F.R. § 2.715(c), in any other issues that are raised before the Licensing Board.

Respectfully submitted,



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**UNITED STATES OF AMERICA  
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing "SUBJECT MATTER UPON WHICH THE COUNTY OF SAN LUIS OBISPO DESIRES TO PARTICIPATE PURSUANT TO 10 C.F.R. § 2.715(C)" have been served upon the following persons by United States mail, first class, as indicated by an asterisk (\*); and by electronic mail as indicated by a double asterisk (\*\*), on this 21 day of August, 2002.

Administrative Judge \* \*\*

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Dated at Chicago, Illinois, this 21<sup>st</sup> day of August, 2002

  
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