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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)
)
Pacific Gas and Electric Co.)
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))

Docket No. 72-26-ISFSI

ASLBP No. 02-801-01-ISFSI

SUMMARY OF FACTS, DATA, AND ARGUMENTS ON WHICH PACIFIC GAS AND
ELECTRIC COMPANY WILL RELY AT THE SUBPART K ORAL ARGUMENT

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Deposition of Truman Burns, February 27, 2003 (Excerpts)

Deposition of Michael Dusaniwskyj, February 27, 2003 (Excerpts)

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I. INTRODUCTION

In accordance with the schedule established in the Atomic Safety and Licensing Board (“Licensing Board”) Memorandum and Order issued on December 26, 2002,¹ Pacific Gas and Electric Company (“PG&E”) hereby submits its “Summary of Facts, Data and Arguments on Which Pacific Gas and Electric Company Will Rely at the Subpart K Oral Argument” (“PG&E Summary”). As required by 10 C.F.R. § 2.1113(a), the PG&E Summary consists of this written summary as well as attachments with supporting facts and data in the form of sworn written testimony and exhibits. In this filing, PG&E demonstrates that there is no genuine dispute of fact to be resolved through an adjudicatory hearing. Consistent with 10 C.F.R. § 2.1115(a)(2), the single contention admitted in this proceeding should be dismissed and the proceeding terminated accordingly.

¹ *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-02-25, 56 NRC 467 (2002).

II. PROCEDURAL HISTORY

On December 21, 2001, PG&E submitted an application for a 10 C.F.R. Part 72 license to possess spent fuel and other radioactive materials associated with spent fuel in an independent spent fuel storage installation (“ISFSI”) located on the Diablo Canyon Power Plant (“DCPP”) site in San Luis Obispo County, California. The NRC published a notice of opportunity for hearing on the application on April 22, 2002.² The Commission received three petitions to intervene under 10 C.F.R. § 2.714, and six requests to participate as interested governmental entities pursuant to 10 C.F.R. § 2.715(c).

On July 19, lead intervenor, the San Luis Obispo Mothers for Peace (“SLOMFP”) (acting on behalf of several other groups), filed a supplemental hearing request setting forth proposed contentions involving: (1) seismic analysis; (2) financial qualifications; and the analysis in the environmental report of (3) malevolent acts of terrorism, (4) the purposes of the proposed action and associated environmental impacts and alternatives, and (5) environmental impacts of transportation of high level waste. In addition, on August 19, 2002, the Port San Luis Harbor District (“District”), an interested governmental entity, submitted a proposed contention regarding emergency planning. Finally, on August 21, 2002, San Luis Obispo County (“County”), also an interested governmental entity, submitted issues similar to those raised in the proposed SLOMFP contentions on financial and security matters.

In a December 2, 2002, Memorandum and Order, the Licensing Board determined that SLOMFP and five other petitioners had established standing, and had submitted one

² Pacific Gas and Electric Co.; Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for a Hearing for a Materials License for the Diablo Canyon Independent Spent Fuel Storage Installation, 67 Fed. Reg. 19,600 (Apr. 22, 2002).

admissible contention, Contention TC-2, relating to PG&E's current financial qualifications (discussed further below).³ The Licensing Board rejected as inadmissible all remaining contentions.⁴ The Licensing Board also has granted interested government entity status to the California Energy Commission, the County, the District, and the Avila Beach Community Services District with respect to the one contention. (The Licensing Board later admitted the California Public Utilities Commission ("CPUC") as a fifth interested governmental entity.⁵ The District filed a petition to withdraw from the proceeding on January 6, 2003, which was granted by the Licensing Board in an Order dated January 16, 2003.)⁶

On December 12, 2002, both PG&E and the NRC Staff invoked the 10 C.F.R. Part 2, Subpart K hybrid hearing procedures with respect to the single admitted contention in this proceeding, Contention TC-2.⁷ Contention TC-2 is the subject of this PG&E Summary and the

³ See *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-02-23, 56 NRC 413 (2002). The admitted intervenors are SLOMFP, Santa Lucia Chapter of the Sierra Club, San Luis Obispo Cancer Action Now, Central Coast Peace and Environmental Council, Peg Pinard, and the Avila Valley Advisory Council. The admitted parties are collectively referred to herein as the "Intervenors."

⁴ The Licensing Board referred to the Commission its ruling on contentions relating to the need for consideration of acts of terrorism and sabotage in the Environmental Report. On January 23, 2003, the Commission accepted the Licensing Board's referral of the security contentions and affirmed the Licensing Board's rejection of those contentions. See *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, CLI-03-01, 57 NRC __ (slip op. Jan. 23, 2003).

⁵ See *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, Order (Granting Motion to Participate as 10 C.F.R. § 2.715(c) Interested Governmental Entity) (slip op. Feb. 13, 2003).

⁶ The four remaining government entities are collectively referred to herein as the "Governmental Participants."

⁷ See "Pacific Gas and Electric Company's Request for Subpart K Oral Argument," dated December 12, 2002; Letter from S.H. Lewis, NRC, to the Administrative Judges, NRC, dated December 12, 2002.

oral argument in accordance with 10 C.F.R. § 2.1109(a), scheduled for the week of May 19, 2003.

III. THE STRICT THRESHOLD FOR AN ADJUDICATORY HEARING IN
A SUBPART K PROCEEDING

The Subpart K procedures were established in response to a congressional mandate found in the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101, *et seq.* (“NWPA”). The NWPA was passed to establish a federal program for funding and development of a permanent disposal repository for spent nuclear fuel and other high-level nuclear waste. *See* H.R. Rep. No. 97-785, pt. 1, at 32 (1982). Congress determined that the operators of civilian nuclear power reactors have “primary responsibility” for interim storage of spent fuel, and that they should do so “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). Congress also declared that the purpose of the NWPA was to promote the “addition of new spent nuclear fuel storage capacity” at civilian reactor sites. *Id.* at § 10151(b)(1). The NWPA directed federal agencies to “encourage and expedite the effective use of available storage, and necessary storage” at reactor sites. *Id.* at § 10152. Congress recognized that several methods could be used to increase the spent fuel storage capacity, specifically including the “use of . . . dry storage capacity.” *Id.* at § 10154(a).

NWPA Section 134(a)-(b), 42 U.S.C. § 10154(a)-(b), further states that for any application for a license “to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor,” the Commission was to provide parties to any hearing on the application with the opportunity to present facts, data, and arguments, by way of written summaries and sworn testimony, and an oral argument. Based on the summaries, sworn testimony, and

argument, the Commission then would designate “any disputed questions of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing” — but only if the Commission finds that “there is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence at an adjudicatory hearing” and “the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.”

The NRC implemented the NWPA through a 1985 rulemaking that added Subpart K to 10 C.F.R. Part 2. *See* Final Rule, Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors, 50 Fed. Reg. 41,662 (Oct. 15, 1985). The statutory requirements related to limiting adjudicatory hearings on spent fuel storage matters are incorporated in the Commission’s regulations at 10 C.F.R. §§ 2.1113 and 2.1115. Section 2.1115(a) specifically provides that the presiding officer shall “[d]esignate any disputed issues of fact, together with any remaining issues of law, for resolution in an adjudicatory hearing,” and “[d]ispose of any issues of law or fact not designated for resolution in an adjudicatory hearing.” Pursuant to 10 C.F.R. § 2.1115(b), an issue may be designated for an adjudicatory hearing only if:

- (1) there is a “genuine and substantial” dispute of fact;
- (2) such dispute “can only be resolved with sufficient accuracy” by the introduction of evidence at an adjudicatory hearing; *and*
- (3) the NRC’s ultimate decision is likely to depend in whole or in part on the resolution of the dispute.

Any issues that do not meet all of these criteria are to be disposed of by the Licensing Board promptly after the oral argument. 10 C.F.R. § 2.1115(a)(2).

The NRC made clear in the 1985 rulemaking that the threshold for an adjudicatory hearing in Subpart K is quite high:

The Commission continues to believe that the statutory criteria are sufficient. As the Commission pointed out in connection with the proposed rules, the statutory criteria are quite strict and are designed to ensure that the hearing is focused exclusively on real issues. They are similar to the standards under the Commission's existing rule for determining whether summary disposition is warranted. They go further, however, in requiring a finding that adjudication is necessary to resolution of the dispute and in placing the burden of demonstrating the existence of a genuine and substantial dispute of material fact on the party requesting adjudication.

50 Fed. Reg. at 41,667. *See also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-84 (2001) (quoting 50 Fed. Reg. at 41,667 (1985)).

As a result, in the present case the Intervenors and Governmental Participants bear the heavy burden of demonstrating that they are entitled to an adjudicatory hearing. The Intervenors and Governmental Participants must demonstrate a *genuine* and *substantial* fact issue in dispute that can *only* be resolved in an adjudicatory process *and* that the NRC's decision is likely to depend on the resolution of that dispute. While the NRC's summary disposition regulation, 10 C.F.R. § 2.749, requires only a factual issue that is "material" to justify an evidentiary hearing, the Subpart K requirement goes further — an adjudicatory hearing is to be held only if the issue is "substantial" and the NRC's decision "is likely to depend in whole or in part" on the resolution of the factual dispute. As acknowledged by the Commission in the rulemaking, the Subpart K threshold is clearly a much stricter threshold than the summary disposition standard.

In this case, the Licensing Board can dispose of Contention TC-2 on the basis of the sworn testimony and written submissions because the issues raised in the contention are neither substantial nor central to the Commission's decision. Additionally, upon a review of

facts it is clear that there is no basis whatsoever to conclude that an adjudicatory hearing on Contention TC-2 is warranted.

IV. SUMMARY OF FACTS AND ARGUMENTS

The NRC's requirements with respect to information to demonstrate the financial qualifications of an applicant for a site-specific Part 72 license are set forth in 10 C.F.R. § 72.22(e). The applicant is required to submit:

[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 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.

Contention TC-2, asserting that PG&E has not provided sufficient information under this regulation to demonstrate its financial qualifications, lacks merit for the reasons discussed below.

A. *PG&E Has Provided Estimates of the Construction Costs, Operating Costs Over the Planned Life of the ISFSI, and Decommissioning Costs.*

PG&E has met the requirement of 10 C.F.R. § 72.22(e) to provide estimates of ISFSI construction costs, ISFSI operating costs, and costs associated with decommissioning of the ISFSI after the removal of spent fuel and other high level and reactor-related radiological

waste.⁸ The estimates were set forth in the Application⁹ and PG&E's June 7 Supplement.¹⁰ See, e.g., Application, §§ 1.3, 1.5, 10.0; Attachment F, Chapter 4. Specifically, PG&E has estimated the following costs associated with the ISFSI:

- Costs of Construction/Support Equipment (present - 2025) \$63 million
- Operating Costs - including 50 Storage Casks (present - 2025) \$69 million
- Operating Costs - including 88 Storage Casks (2026 - 2040) \$107 million
- Decommissioning Costs (excluding financial contingencies) \$12.5 million

Kapus Aff. ¶ 8. (All estimates are in 2001 dollars.)

PG&E's estimates of construction and operating costs were based on engineering judgment, information obtained from other NRC licensees that had constructed or are constructing ISFSIs, and data obtained from the proposed ISFSI vendor in 2000. *Id.* ¶ 9. PG&E's decommissioning cost estimates were based on a site-specific study prepared by a qualified expert consultant in 1997. The decommissioning study was submitted in PG&E's 1999 General Rate Case before the CPUC. *Id.* ¶ 12. In his deposition, the witness of the

⁸ ISFSI decommissioning is distinguished from decommissioning of the nuclear power plant. The latter includes the removal of the spent fuel and other high level radioactive waste from the site. Funding for power reactor decommissioning is addressed in accordance with the requirements of 10 C.F.R. § 50.75. For NRC purposes, decommissioning also does not include *non-radiological* decommissioning or dismantlement of the ISFSI. See, e.g., 10 C.F.R. § 72.3.

⁹ See PG&E Letter DIL-01-002 from L.F. Womack, PG&E, to NRC Document Control Desk, "License Application for Diablo Canyon Independent Spent Fuel Storage Installation," dated December 21, 2002 ("Application").

¹⁰ See PG&E Letter DIL-02-08 from L.F. Womack, PG&E, to NRC Document Control Desk, "Supplemental General and Financial Information — 10 C.F.R. 72.22," dated June 7, 2002 ("June 7 Supplement").

Governmental Participants in this proceeding has indicated that he has no affirmative objection to any of these estimates. Burns Dep. at 11-12 (excerpts appended hereto as Exhibit B).

The Licensing Board in this case has already held that the requirements related to financial data for power plants, included in 10 C.F.R. Part 50, do *not* apply to an ISFSI to be licensed under Part 72. See LBP-02-23, 56 NRC at 445-46. Accordingly, no further cost estimates are required. There is no genuine and substantial dispute in this proceeding with respect to the adequacy of PG&E's cost estimates for purposes of compliance with 10 C.F.R. § 72.22(e).

B. PG&E Has Demonstrated Its Financial Qualifications With Respect to the Costs of Construction and Operation of the ISFSI.

In the supplementary information submitted by PG&E in connection with its Part 72 application, PG&E stated:

PG&E will have the financial qualifications to construct and operate the Diablo Canyon ISFSI. PG&E is an electric utility presently subject to rates established by the California Public Utilities Commission. The funds necessary to cover the construction and operating costs will be derived from electric rates and from electric operating revenues. The costs for decommissioning will be derived from the DCPD Decommissioning Fund.*

* As noted above, a Plan of Reorganization for PG&E is pending. As discussed in the 10 CFR 72 license application (Section 1.5, pages 4-6), the basis for financial qualifications will change if the Plan is implemented and the 10 CFR 72 applicant is amended. Note, however, financial qualifications issues germane to the Plan are being addressed in the DCPD license transfer review.

June 7 Supplement, Enclosure 1 at 3. Accordingly, PG&E has identified the source of the funds necessary to cover costs associated with constructing and operating the proposed ISFSI. PG&E will obtain the necessary funds either from specific authorized components of electric rates or from overall electric operating revenues. Campbell Aff. ¶ 8.

PG&E in its present form is a public utility. As such, PG&E expects to pay the costs associated with the ISFSI as normal operating expenses, covered by electric operating revenues, and is already doing so. *Id.* ¶ 9. Pursuant to the CPUC's order of April 4, 2002, returning PG&E's retained generation to the cost-of-service rate base, PG&E is, pending resolution of the bankruptcy proceeding, presently entitled to recovery of prudent Diablo Canyon expenses through traditional cost-of-service rates. *Id.*; *see also* Decision 02-04-016, Opinion Adopting Revenue Requirements for Utility Retained Generation, 2000 Cal. PUC LEXIS 1110 (Apr. 4, 2002). PG&E believes that costs associated with the ISFSI represent reasonable and prudent Diablo Canyon operating expenses. The expenditures are prudent to preserve the generating asset, are in the public interest, and are consistent with PG&E's obligations under the NWPA. *Campbell Aff.* ¶ 10. Accordingly, PG&E expects to fully recover the ISFSI costs through cost-of-service rates.

In the basis for Contention TC-2, the Intervenors quoted from PG&E's 2001 Annual Report and asserted that PG&E's financial qualifications are in question due to its limited access to credit markets while in bankruptcy. However, PG&E is not borrowing and will not need to borrow funds to pay ISFSI expenses. *Id.* ¶ 12. From a cash flow perspective, PG&E is currently paying the costs associated with the ISFSI out of normal operating revenues and expects to continue to do so. *Id.* PG&E's recent, publicly-available financial statements demonstrate that PG&E has operating revenues that are substantial and more than sufficient to provide cash flow to pay ISFSI expenses. *Id.* ¶ 13. For example, PG&E's most recent Form 10-K/A, dated March 5, 2003, shows for PG&E, the utility, capital expenditures of over \$1.5 billion, operating revenues of over \$ 10 billion, and earnings available for common stock of over \$ 1.7

billion, for the 12-month period ending December 31, 2002. *Id.* ¶¶ 13, 20 (citing Exh. A, Form 10-K/A, Exh. 13 at 78, 81).¹¹

To put this issue in perspective, costs related to the development and construction of the ISFSI for 2002 and 2003 have been estimated in PG&E's 2003 General Rate Case currently pending before the CPUC to be less than \$6.0 million and \$8.0 million, respectively. Kapus Aff. ¶ 10. Going forward, annual ISFSI expenses have been projected in the 2003 General Rate Case to be approximately \$8.9 million in 2004, and \$20.9 million in 2005 when construction and initial cask procurement would begin. *Id.* PG&E expects annual costs in years subsequent to 2005 to be less than the 2005 peak. Costs of construction and loading in 2006 are currently projected to be less than \$12.0 million (in 2002 dollars), and annual costs associated with equipment, cask procurement, operations and maintenance fees, and other fixed expenses in years subsequent to 2006 range (by year) from \$1.0 million to \$6.0 million (all in 2002 dollars). *Id.* ¶ 11. PG&E's anticipated operating revenues should be more than sufficient to cover the cash flow associated with these costs.¹²

PG&E also currently has substantial cash on hand that would be sufficient to cover ongoing costs associated with development, construction, operation, and decommissioning of the Diablo Canyon ISFSI during the pendency of the bankruptcy proceeding. Campbell Aff. ¶

¹¹ PG&E originally filed its Form 10-K with the Securities and Exchange Commission on February 26, 2003. The company has subsequently filed two amendments to the Form 10-K, dated March 5, 2003, and March 11, 2003. Neither amendment changed the consolidated financial statements cited herein. The consolidated financial statements were restated in the March 5, 2003, amendment, and that, more recent, submission is used here. The March 5 Form 10-K/A is appended hereto as Exhibit A.

¹² In this regard, it is important to note that — as discussed in the Application — the ISFSI, once authorized, will actually be built in phases. *See, e.g.*, Application, Environmental Report §§ 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 ISFSI construction costs.

14. (PG&E does not expect to decommission the ISFSI during the pendency of the bankruptcy proceeding.) PG&E's current cash on hand is in excess of \$3 billion. *Id.* (citing Exh. A, Form 10-K/A, Exh. 13 at 79.) While the majority of this cash is presently ear-marked to repay creditors, some portion of this cash would be available, with the approval of the Bankruptcy Court, to pay costs necessary to preserve and maintain the estate. *Id.* PG&E believes that preserving the power plant as an operating, revenue-generating asset would fall in this category, and that ISFSI-related costs could therefore be paid. *Id.*

As with any NRC licensee that recovers costs associated with an NRC-licensed activity through cost-of-service rate regulation, PG&E's expenses are subject to prudence review by the CPUC. Any disallowances that might result from such a review would be covered by cash on hand or electric operating revenues. *Id.* ¶ 11. While disallowances might reduce earnings, any such disallowances would not be material to PG&E's financial qualifications with respect to the ISFSI — given the substantial assets (including cash) and earnings of PG&E as an operating utility as discussed above. *Id.* There is no basis to assume that the mere potential for prudence review and disallowances undermines the NRC's ability to find, at the present time, the necessary reasonable assurance of PG&E's financial qualifications to construct and operate the ISFSI.¹³ Such an assumption would render it impossible for any rate-regulated entity to demonstrate financial qualifications, since all rate-regulated utilities are subject to prudence reviews.

¹³ As with any issue that arises during the conduct of licensed activities, the NRC maintains an active oversight role with respect to financial issues that might arise in the future and impact regulatory compliance or safety. *See, e.g.*, Proposed Rule, Financial Information Requirements for Applications to Renew or Extend the Term of an Operating License for a Power Reactor, 67 Fed. Reg. 38,427, 38,428 (June 4, 2002) (discussing NRC regulatory provisions and processes to evaluate a licensee's financial qualifications at several points).

Construction-work-in-progress (“CWIP”) regulations applicable to capital costs also do not apply to the ISFSI or preclude a finding of financial qualifications. For rate-recovery purposes in the present CPUC rate-regulated environment, PG&E is not accounting for incurred Diablo Canyon ISFSI expenses as capital costs that would be subject to CWIP regulations. *Id.* ¶ 15. Rather, it is treating those costs as operating expenses, presently recoverable through electric rates. *Id.* This reflects a reasonable, conservative accounting treatment, based on PG&E’s assessment that this approach matches the period for recovery through rates to the time period in which a benefit (electrical generation) is being received by rate payers. *Id.* Capitalizing the costs of dry cask storage would spread the costs to future generations of ratepayers, generations that would not be causing the costs to be incurred. *Id.*

The CPUC, in PG&E’s ongoing 2003 General Rate Case, may of course review PG&E’s accounting treatment with respect to the ISFSI expenses and provide for timing of rate recovery consistent with a different accounting treatment. *Id.* ¶ 16. However, neither the possibility nor even the fact of such a review would be material to PG&E’s financial qualifications. The CPUC will ultimately determine the accounting treatment to be utilized and the timing of recovery through the rate-process will be based on that determination. *Id.* Even assuming that some portion of ISFSI expenses are eventually treated as capital costs, and recovery deferred accordingly, PG&E will have sufficient cash flow (based on assets and operating revenues) to pay costs associated with the ISFSI as discussed above. *Id.*

Accordingly, there is no genuine and substantial dispute in this proceeding with respect to PG&E’s sources of funding for construction and operation of the ISFSI. There is no issue that would require an evidentiary hearing for resolution.

C. *PG&E's Filing for Chapter 11 Bankruptcy Does Not Negate Its Financial Qualifications With Respect to the ISFSI.*

Neither the fact of PG&E's bankruptcy filing nor the conditions leading to that filing preclude a finding, with reasonable assurance, of PG&E's financial qualifications with respect to the proposed ISFSI. For the reasons discussed above, PG&E presently has the ability to pay the necessary costs associated with the ISFSI pending resolution of the bankruptcy case and there is reasonable assurance that it will continue to be able to pay those costs after completion of the case and the company's emergence from bankruptcy (in whatever form). Many of the arguments made in support of Contention TC-2 seem predicated on little more than the mere fact of PG&E's bankruptcy. However, the Licensing Board in this case has already held that this fact alone does not establish a lack of financial qualifications. *See* LBP-02-23, 56 NRC at 442. In this regard, the Licensing Board specifically recognized that DCPD continues to operate notwithstanding the bankruptcy filing. *Id.*¹⁴

PG&E filed for reorganization under Chapter 11 of the United States Bankruptcy Code, not for liquidation under Chapter 7. PG&E remains a going concern — a solvent debtor-in-possession — continuing to conduct day-to-day operations under the protection of the

¹⁴ In *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597-98 (1988), the Commission found that the combination of bankruptcy and anti-CWIP regulations did present "special circumstances" under 10 C.F.R. § 2.758 to support a waiver of the Commission's rule obviating a financial qualifications review for an electric utility applicant — as bankruptcy and financial qualifications might relate to low power testing. However, even under Section 2.758 the Commission found that these factors alone did not establish a "significant safety problem." *Id.* at 599-601. Later, in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 23 (1989), the Commission found no basis in these factors for a waiver with respect to a financial review prior to a full power license. The Commission noted that rate relief would follow after the grant of the full power license and noted public financial information demonstrating the applicant's "short-term or medium-term solvency." *Id.* at 242. The Commission also noted the NRC Staff's ongoing role in monitoring compliance. *Id.* at 245.

bankruptcy process. Campbell Aff. ¶ 17. PG&E's bankruptcy filing does not reflect a shortfall in revenues to cover the cost of operating its utility assets. Rather, it addresses a focused problem of restructuring the debt created as a result of procurement of electric power on the open market during the California energy crisis of 2000. *Id.* The debt resulted from an imbalance between electricity costs and revenues, created by a flawed electricity deregulation plan. That imbalance has been addressed pending the resolution of the bankruptcy proceeding by measures that include rate relief, lower electricity market prices, and changes with respect to electricity procurement. PG&E's recent, publicly-available financial statements discussed above demonstrate PG&E's present substantial operating income. *Id.* This confirms PG&E's ability to cover the relatively small costs anticipated in connection with the ISFSI. *Id.* The bankruptcy proceeding fundamentally relates not to current and prospective revenues and cash flow, but to restructuring the debt previously created and repaying creditors. *Id.* As discussed above, PG&E will pay the costs associated with the ISFSI during the pendency of the bankruptcy proceeding out of normal operating revenues. The Bankruptcy Court does not review all of PG&E's operating expenses and Bankruptcy Court approval is not necessary for PG&E to pay ongoing ISFSI expenses. *Id.* ¶ 18.

The bankruptcy procedures requiring notification and approval of the Creditors Committee and the Bankruptcy Court for new capital projects do not mandate notification and review of operating expenses, nor do they even mandate notification and review of all capital expenditures (there is a threshold for such notification and review of capital costs). *Id.* ¶ 19. The Bankruptcy Court has, nonetheless, already approved PG&E's contract with its primary ISFSI vendor, Holtec International. On October 6, 2001, the Bankruptcy Court issued an order authorizing PG&E to (1) assume a Letter Agreement, between PG&E and Holtec, for licensing

support and engineering work related to the ISFSI; and (2) enter into a new contract under which Holtec will complete the design and licensing work for the ISFSI and deliver to Diablo Canyon casks, canisters, and related equipment.¹⁵ *Id.* Therefore, the Bankruptcy Court has previously authorized PG&E to commit to incurring a substantial component of the expenditures associated with the ISFSI.

The Bankruptcy Court has also specifically approved other, substantial capital expenditures and PG&E is making such expenditures as necessary to protect and preserve its assets. *See* Case No. 01-30923, “Order Approving Motion for Authority to Resume Power Procurement, Including Procurement of the Residual Net Short Position, and to Incur Post-Petition Secured Debt Related Thereto,” dated December 23, 2002. *Id.* ¶ 20. For perspective, PG&E has incurred capital expenditures of over \$ 1.5 billion in calendar year 2002. *Id.* (citing Exh. A, Form 10-K/A, Exh. 13 at 81.) PG&E’s annual capital expenditures for 2003 are expected to total approximately \$1.75 billion. *Id.* For comparison purposes, the 2002 and 2003 ISFSI expenses are less than 1 percent of PG&E’s capital budget for these years. *Id.* Access to capital pending the resolution of the bankruptcy case is not a genuine or substantial issue for the ISFSI project. *Id.*

In the basis for Contention TC-2, the Intervenors claimed that “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.” However, this argument confuses day-to-day cash flows and ongoing rate recovery with the bankruptcy reorganization to address past debts. *Id.* ¶ 21. With respect to operating

¹⁵ Documents relating to the PG&E bankruptcy proceeding, including the referenced Order, can be found on a web site maintained by PG&E at the direction of the Bankruptcy Court: http://www.pge.com/court_docs/.

expenses, PG&E is presently the Part 72 applicant. Expenses incurred by PG&E are currently recoverable through rates, including the proposed ISFSI costs. *Id.* ¶¶ 9, 21. This process is available without regard to the “debts” created during the California energy crisis. With respect to the “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 would, by definition, provide the 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.

Post-bankruptcy, under the CPUC Plan of Reorganization PG&E would continue to be the ISFSI Part 72 licensee as previously proposed and would continue to be a rate-regulated electric utility with access to the rate base. Burns Dep. at 15-17.¹⁶ *See* Exh. B. With respect to PG&E’s proposed Plan of Reorganization, upon confirmation and implementation of the plan the new licensee would be Electric Generation LLC. This entity would not have access to cost-of-service rates, but would recover costs from revenues based on the sale of electricity (largely in accordance with the terms of a proposed bilateral Power Sales Agreement with Reorganized PG&E). This scenario is described in PG&E’s June 7 Supplement to the Application. The adequacy of the licensee’s revenues in this scenario to cover nuclear costs (including DCP and the ISFSI) is demonstrated by financial information that has been provided to the NRC in the NRC Part 50 license transfer application related to the power plant, dated November 30, 2001. Following resolution of the bankruptcy proceeding, the financial viability of the emerging companies therefore will have been reviewed by the NRC in addition to being confirmed by the Bankruptcy Court. However, as noted above, the qualifications of Electric Generation LLC,

¹⁶ *See also* Disclosure Statement for CPUC Plan of Reorganization, at 4.

after the bankruptcy reorganization, are beyond the scope of Contention TC-2 and the present ISFSI licensing proceeding. *See* LBP-02-23, 56 NRC at 442-43, 444-45.

The Governmental Participants, in response to PG&E's discovery requests in this proceeding, have not challenged PG&E's present access to the cost-of-service rate process.¹⁷ Instead, they have focused on alleged "uncertainty" with respect to PG&E's *future* ability to recover costs.

First, the Governmental Participants seem to be questioning PG&E's lack of a showing of revenues for the next 20 years. However, under the NRC's regulations, PG&E is not required to provide financial projections of revenues for the full 20 year ISFSI license term. For a power reactor operating license applicant (non-electric utility), only a five-year projection of costs and revenues is required by 10 C.F.R. § 50.33(f)(2). And even this requirement does not apply to a Part 72 license applicant. LBP-02-23, 56 NRC at 445-46, *quoting Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 30 (2000).

PG&E also is not required in the license application to anticipate every scenario that may develop over the 20-year license term or to address every "uncertainty" that might exist. In this regard, it is important to recognize that an NRC finding of financial qualifications is not one of absolute certainty. Rather — like many NRC licensing findings — it is one of "reasonable assurance." *See, e.g., Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 517 (2001) ("[a]s we have cautioned in the

¹⁷ *See* "California Energy Commission's, Avila Beach Community Services District's, California Public Utilities Commission's, and San Luis Obispo County's Response to Pacific Gas and Electric's [sic] First Set of Interrogatories and Request for Production Directed to the Governmental Participants," dated February 20, 2003, responses to Interrogatory 3.

past, however, we do not expect “absolute certainty” in the financial arena; it is enough for Applicants to rely on “plausible assumptions and forecasts”); *Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point 3), CLI-00-22, 52 NRC 266, 300 (2000); *PFS*, CLI-00-13, 52 NRC at 30 (“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”). Moreover, the NRC’s reasonable assurance finding is necessarily a predictive finding. *See, e.g., N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219-220 (1999) (“[s]peculation of some sort is unavoidable when the issue at stake concerns predictive judgments about an applicant’s future financial capabilities”). The evidence of record presented by PG&E demonstrates that any “uncertainties” created by such issues as the lack of 20-year projections, the possibility of future prudency reviews, or the potential for CPUC determinations related to accounting treatment of ISFSI expenses, will not be material to PG&E’s overall financial qualifications.

More fundamentally, the Governmental Participants rely on an “uncertainty” created by the bankruptcy proceeding and the prospect of a transfer of the ISFSI license to an entity that is not rate-regulated. However, while the prospect for such a transfer certainly exists, there is no requirement that an ISFSI licensee be an electric utility that recovers costs through cost-of-service rates. The NRC licenses both electric utilities and non-electric utilities, both under Part 50 and Part 72.¹⁸ Concerns related to the financial qualifications of a future non-utility licensee are, at this point, purely hypothetical and premature. The NRC will continue its regulatory oversight during construction and operation of the ISFSI, can respond to any

¹⁸ *See, e.g.,* Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44,071 (Aug. 19, 1997).

regulatory or safety issues if such issues were ever to arise, and will appropriately consider the financial qualifications of any license transferee when that issue is placed before the agency by PG&E.¹⁹

In sum, the Intervenors and Governmental Participants have not raised any issue associated with the current bankruptcy proceeding that creates a significant “uncertainty” with respect to PG&E’s present financial qualifications as an electric utility. Likewise, the “uncertainty” surrounding the potential restructuring of PG&E does not preclude a present finding of reasonable assurance that PG&E can cover the costs associated with the ISFSI. There is no dispute of fact that would necessitate an adjudicatory hearing. As a matter of law, the Licensing Board should conclude that it need not await the outcome of the bankruptcy case to issue the Part 72 license to PG&E. To conclude otherwise would suggest that no license could ever be issued to an entity that might undergo restructuring in the future — not only where a restructuring is proposed to resolve a bankruptcy case as here, but also, for example, where restructuring might be necessary to address pending state electricity restructuring and deregulation legislation.

¹⁹ As discussed above, and in the Application and June 7 Supplement, *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 (or transfer the Part 72 license) such that Electric Generation LLC would become the applicant/licensee. Capital and operating costs related to DCPD and the ISFSI would be covered by revenues from merchant sales of electricity. ISFSI expenses, which constitute only a small portion of DCPD expenses, are inherently addressed in the financial projections submitted in conjunction with the Part 50 license transfer application. Those matters are beyond the present scope of review since they are subject to review in the Part 50 license transfer context.

D. PG&E Has Demonstrated the Necessary Financial Arrangements for Radiological Decommissioning of the ISFSI.

As discussed above, PG&E has estimated the cost of the radiological decommissioning of the ISFSI, after removal of spent fuel, as \$12.5 million (in 2001 dollars) as referenced in the Application. See Part 72 Application, Attachment F, "Preliminary Decommissioning Plan," at 4-1. With allowances for financial contingencies, the estimate is \$13.9 million (in 2001 dollars). See June 7 Supplement, Enclosure 1, at 5. This estimate does not include the costs of demolition and disposal of non-contaminated materials, which are estimated at \$6.5 million (in 2001 dollars). Application, Attachment F, at 4-1. The ISFSI decommissioning expenses currently are not anticipated to be incurred until after 2040. *Kapus Aff.* ¶ 14.

Presently, as a rate-regulated public utility, PG&E collects contributions in rates for decommissioning of DCP. *Campbell Aff.* ¶ 22. The contributions are collected and deposited in the external nuclear decommissioning trust funds for DCP established and maintained in accordance with 10 C.F.R. § 50.75(e)(1)(ii). *Id.* PG&E is required to report to the NRC on the status of the nuclear decommissioning trust funds every two years. *Id.*; see 10 C.F.R. § 50.75(f)(1). The NRC has reserved the right to review the adequacy of the funding for radiological decommissioning of the power plant, and to take additional actions as appropriate, including modification of the schedule for collection of funds. See 10 C.F.R. 50.75(e)(2).

PG&E's ongoing collections for decommissioning specifically include monies for radiological decommissioning of the proposed DCP ISFSI. June 7 Supplement, Enclosure 1, at 5. In its 1999 General Rate Case before the CPUC, PG&E prepared and submitted a site-specific decommissioning cost study for DCP. *Campbell Aff.* ¶ 23. This study included

specific line items for decommissioning of the ISFSI. Kapus Aff. ¶ 12. Decommissioning contributions collected through rates based on the 1999 rate case have been based on this estimate. Campbell Aff. ¶ 23. As with other ratemaking issues, decommissioning contributions are periodically evaluated by the CPUC. *Id.* ¶ 24. Accordingly, decommissioning contributions are being addressed in PG&E's ongoing 2002 Nuclear Decommissioning Cost Triennial Proceeding. *Id.* For this rate proceeding, PG&E's consultant has prepared a revised site-specific decommissioning cost estimate that again includes the DCPD ISFSI. The estimates have been specifically updated to reflect PG&E's selection subsequent to the earlier rate proceeding of the Holtec International HI-STORM 100 Storage System. (The earlier estimate was based on an assumption of dry cask technology of a different vendor.) *Id.* ¶ 24. Application, Attachment F, at 4-1. PG&E fully expects that appropriate contributions for ISFSI decommissioning will be established by the CPUC based on the record in the decommissioning cost rate proceeding. Campbell Aff. ¶ 24.

In accordance with 10 C.F.R. § 72.30(c)(5), PG&E — as an electric utility — presently proposes to utilize the external sinking fund method of financial assurance for the ISFSI. *Id.* ¶ 25. The ISFSI decommissioning funds (or monies) are deposited in the nuclear decommissioning trust funds established for DCPD. *Id.* These monies are identifiable and can — as an accounting matter — be segregated from funds ear-marked for decommissioning the power plant, for removal of spent fuel, or for non-radiological decontamination and demolition. *Id.* While the ISFSI funds are maintained in the DCPD decommissioning trust funds rather than a separate ISFSI trust fund, nothing in 10 C.F.R. §§ 50.75 or 72.30 requires a separate trust fund for the ISFSI so long as the monies are identifiable and reserved for the stated purpose. *See also* Dusaniwskyj Dep. at 89-90 (excerpts appended hereto as Exhibit C).

In its discovery responses the Intervenors have suggested that the possibility of a future transfer of DCPD and the ISFSI to a licensee that does not collect decommissioning funds through cost-of-service rates — such as would occur if PG&E’s Plan of Reorganization is confirmed by the Bankruptcy Court — creates “uncertainty” with respect to PG&E’s financial assurance of decommissioning. The Governmental Participants specifically argue that PG&E has therefore failed to establish, before licensing, the required financial arrangements to provide reasonable assurance that decommissioning will be carried out. However, this argument confuses the arrangements presently being proposed with what might be proposed in the future in an amended application or a Part 72 license transfer application.

PG&E is currently the proposed ISFSI licensee. It is a CPUC rate-regulated entity collecting contributions for ISFSI decommissioning through the rate making process. As discussed above, if the CPUC Plan of Reorganization is approved, PG&E will continue to be a entity regulated by the CPUC with rates based on PG&E’s cost-of-service. No change with respect to decommissioning funding would be involved. Conversely, if PG&E’s Plan of Reorganization is confirmed, PG&E will amend the ISFSI license application or transfer the license (if the license has already been issued). The basis for financial assurance with respect to ISFSI decommissioning may change, but that change can be addressed through the NRC licensing process appropriate at the time.²⁰ The NRC’s financial assurance regulation does not require financial arrangements prior to licensing for various scenarios that may develop in the future. The NRC’s licensing process is sufficiently flexible, and sufficiently pervasive, to allow

²⁰ For example, the transferee may no longer be an electric utility eligible for contributions to the decommissioning fund based on cost-of-service rates. The existing decommissioning funds may be transferred and the adequacy of the funds collected to the date of transfer may need to be considered. Likewise, the need for a surety or other form

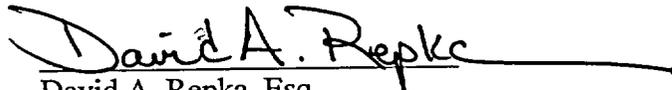
the agency to address material new developments when and if they occur. The Governmental Participants' "uncertainty" argument fails to raise a genuine and substantial issue with respect to PG&E's funding arrangements for radiological decommissioning of the ISFSI, just as it fails with respect to construction and operating costs.

of funding assurance would be addressed. *See, e.g.*, 10 C.F.R. § 72.30(c)(3). However, that is a licensing issue that can be addressed at that time.

V. CONCLUSION

The strict threshold established by the NWPA and 10 C.F.R. § 2.1115(b) has not been met. The record supporting PG&E's position is substantial. Based upon the record and arguments above, it is clear that the Intervenor and Governmental Participants have failed in Contention TC-2 to raise an issue that is genuine and substantial, that is central to the Commission's decision on the Part 72 license application, and that can only be resolved through an evidentiary hearing. Similarly, the Intervenor and Governmental Participants have not raised any valid issue of law that would preclude a finding that reasonable assurance presently exists that PG&E has the financial qualifications necessary to design, construct, operate, and eventually decommission the proposed DCPD ISFSI. The Licensing Board should promptly dismiss Contention TC-2 in accordance with 10 C.F.R. § 2.1115(a).

Respectfully submitted,



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PACIFIC GAS & ELECTRIC COMPANY
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ATTORNEYS FOR PACIFIC GAS &
ELECTRIC COMPANY

Dated in Washington, District of Columbia
this 11th day of April 2003

A

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)	ASLBP No. 02-801-01-ISFSI
Spent Fuel Storage Installation))	

Affidavit of Robert L. Kapus

I, Robert L. Kapus, being duly sworn, state as follows:

1. I am employed as Lead Staff Budget Coordinator by Pacific Gas and Electric Company ("PG&E"). My responsibilities include development of the budget and other financial reports for Humboldt Bay Power Plant ("HBPP"), financial aspects of the independent spent fuel storage installation ("ISFSI") projects at Diablo Canyon Power Plant ("Diablo Canyon") and HBPP, and preparation of decommissioning cost studies for Diablo Canyon and HBPP.

2. On December 2, 2002, the Atomic Safety and Licensing Board ("Licensing Board") in this proceeding admitted a single contention, Contention TC-2, relating to PG&E's current financial qualifications to construct, operate, and decommission the proposed Diablo Canyon ISFSI. The purpose of this affidavit is to respond to the issues raised by the Intervenors in connection with Contention TC-2.

3. In this affidavit I will specifically address the ISFSI expense cash flows and supporting cost estimates as submitted to the NRC in the December 21, 2001, ISFSI license Application and the June 7, 2002, supplement to that Application.

Professional Qualifications

4. I earned a Bachelor of Science degree in structural engineering from the Oregon Institute of Technology in 1973.

5. I have been employed by PG&E since November 1986.

6. In my seventeen years with PG&E, I have worked extensively in the area of budget preparation and economic project forecasting. Prior to my employment at PG&E, I worked for approximately thirteen years as a senior cost engineer on numerous projects for Bechtel Power Corporation. During that time I was responsible for the preparation of cost trend reports, cost studies, and project cash flows for both nuclear and fossil power plants under construction and operation.

7. A copy of my complete professional qualifications is included as Attachment A to this affidavit.

ISFSI Cost Estimates

8. PG&E has addressed the requirement of 10 C.F.R. § 72.22(e) to provide estimates of ISFSI construction costs, ISFSI operating costs, and costs associated with decommissioning of the ISFSI after the removal of spent fuel and other high level and reactor-related radiological waste. The estimates were set forth in the December 21, 2001, Application, and the PG&E June 7, 2002, supplement. *See, e.g.*, Application §§ 1.3, 1.5, 10.0; Attach. F, Chapter 4. Specifically, PG&E has estimated the following costs associated with the ISFSI:

- Costs of Construction/Support Equipment (present-2025) \$63 million
- Operating Costs - including 50 Storage Casks (present-2025) \$69 million
- Operating Costs - including 88 Storage Casks (2026-2040) \$107 million

- Decommissioning Costs (excluding financial contingencies) \$12.5 million

9. PG&E's estimates of construction and operating costs were based on engineering judgment, information obtained from other NRC licensees that had constructed or are constructing ISFSIs, and data obtained from the proposed ISFSI vendor in 2000.

10. Costs related to the development and construction of the ISFSI for 2002 and 2003 have been estimated in PG&E's 2003 General Rate Case currently before the CPUC to be less than \$6.0 million and \$8.0 million, respectively. *See* Exhibit 10, Table 4-13, "One Time O&M Forecast Adjustments," filed in the 2003 General Rate Case. Going forward, annual ISFSI expenses have been projected in the 2003 General Rate Case to be approximately \$8.9 million in 2004, and \$20.9 million in 2005 when construction and initial cask procurement would begin. These estimates are based on the contract between the vendor and PG&E for development of the ISFSI, and derive from cash flow information from the vendor based on licensing, development, and the fabrication and delivery schedule for casks and auxiliary equipment.

11. PG&E expects annual costs subsequent to 2005 to be less than the 2005 peak. Costs of construction and loading in 2006 are currently projected to be less than \$12.0 million (in 2002 dollars), and annual costs associated with equipment, cask procurement, operations and maintenance fees, and other fixed expenses in years subsequent to 2006 range (by year) from \$1.0 million to \$6.0 million (in 2002 dollars.) PG&E's anticipated operating revenues (discussed in the Affidavit of Walter L. Campbell) should be more than sufficient to cover the cash flow associated with these costs.

12. PG&E's decommissioning cost estimate was based on a site-specific study prepared by a qualified expert consultant, TLG Services, Inc., in 1997. The study was submitted in PG&E's 1999 General Rate Case before the California Public Utilities Commission

("CPUC"). This study included specific line items for costs associated with decommissioning of the ISFSI. For the purposes of the ISFSI Application, PG&E utilized the TLG estimate and applied an escalation factor to reach the \$12.5 million estimate in 2001 dollars. With allowances for certain financial contingencies, the estimate is \$13.9 million (in 2001 dollars).

13. PG&E's ISFSI decommissioning estimate does not include the cost of removal of spent fuel, which is addressed as a power plant decommissioning cost. The ISFSI estimate also does not include the costs of demolition and disposal of non-contaminated materials, which are estimated at \$6.5 million (in 2001 dollars).

14. The ISFSI decommissioning expenses currently are not anticipated to be incurred until after 2040. Note that in the 1997 TLG study, the decommissioning of the ISFSI was projected to occur in 2034. The 1997 study was updated by TLG in February 2002, and utilizes the current projection of 2040.

Conclusions

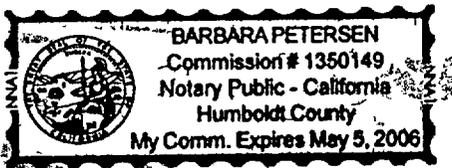
15. For the reasons discussed above, I am confident that PG&E has met the requirement of 10 C.F.R. § 72.22(e) to provide estimates of ISFSI construction costs, ISFSI operating costs, and costs associated with decommissioning of the ISFSI after the removal of spent fuel and other high level and reactor-related radiological waste.

16. The information presented above is true and correct to the best of my knowledge and belief.


Robert L. Kapus

Sworn and subscribed to before me this 8th day of April 2003.


Notary Public



My Commission expires: May 5, 2006

ATTACHMENT A

PROFESSIONAL QUALIFICATIONS OF ROBERT KAPUS

Experience:

1986-Present — Pacific Gas and Electric Company

Lead Staff Budget Coordinator, Diablo Canyon Power Plant

- Prepare annual budget requirements for Diablo Canyon Power Plant (“DCPP”) and Humboldt Bay Power Plant (“HBPP”)
- Prepare forecasts for annual expenditures and long-term projects for DCPP and HBPP
- Review and approve fossil and nuclear job estimates for budget, scope and financial analyses
- Prepare and review assumptions for decommissioning cost studies, based on engineering input, for DCPP and HBPP
- Review and update decommissioning cash flows based on project work schedules for DCPP and HBPP
- Serve as Lead Staff Cost Engineer for HBPP

1974-1986 — Bechtel Power Corporation

Various Positions

Project Cost Engineer, San Onofre Nuclear Generating Station June 1985-October 1986

- Prepared cost trend reports and cost studies
- Prepared forecasts of field maintenance activities
- Prepared project maintenance cash flows

Project Cost Engineer, Limerick Generating Station September 1981-May 1985

- Prepared cost trend reports and cost studies
- Prepared forecasts of total engineering/construction costs for nuclear power plant
- Prepared project cash flows

*Project Cost Engineer, Coyote Fossil Project
March 1977-August 1981*

- Prepared cost trend reports and cost studies
- Prepared forecasts of total engineering/construction costs for nuclear power plant
- Prepared project cash flows

*Lead Staff Cost Engineer, Susquehanna Steam Electric Station
October 1974-February 1977*

- Reviewed cost trend reports and cost studies
- Prepared forecasts of total construction costs for nuclear power plant
- Prepared project cash flows

*Cost Engineer, Arkansas Nuclear One
January-September 1974*

- Prepared scope changes related to the construction of nuclear power plant
- Prepared Project Financial Status Report
- Forecasted home office expenditures

Education:

*Oregon Institute of Technology,
Bachelor of Science, Structural Engineering, 1973*

B

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)	ASLBP No. 02-801-01-ISFSI
Spent Fuel Storage Installation))	

Affidavit of Walter L. Campbell

I, Walter L. Campbell, being duly sworn, state as follows:

1. I am employed as Director of Business and Financial Planning by Pacific Gas and Electric Company ("PG&E"). In this capacity, I supervise preparation of financial forecasts, rate of return testimony, analysis of financial policies, and other economic analyses. I also coordinate preparation of major business planning studies, such as the company's annual business plan. I report to the Chief Financial Officer of PG&E.

2. On December 2, 2002, the Atomic Safety and Licensing Board ("Licensing Board") in this proceeding admitted a single contention, Contention TC-2, relating to PG&E's current financial qualifications to construct, operate, and decommission the proposed independent spent fuel storage installation ("ISFSI") at Diablo Canyon. The purpose of this affidavit is to respond to the issues raised by the Intervenors in connection with Contention TC-2.

3. In this affidavit I will specifically provide testimony regarding PG&E's financial qualifications to pay for costs associated with the design, construction, operation, and decommissioning of the ISFSI.

Professional Qualifications

4. I earned a Bachelor of Arts degree in history from Pomona College in 1980, and a Master's degree in Public and Private Management from the Yale School of Organization and Management in 1985.

5. I have been employed by PG&E or one of its affiliates since 1985.

6. Prior to assuming my current position at PG&E, I held positions of increasing responsibility in the areas of financial analysis and forecasting. During the course of my employment at PG&E, I have specifically prepared and directed the preparation of long-term financial forecasts for PG&E. In Fall 2000, I was selected as Director of Business and Financial Planning and have served in that capacity since.

7. A copy of my complete professional qualifications is included as Attachment A to this affidavit.

PG&E's Financial Qualifications as a Rate-Regulated Utility

8. In the supplementary information submitted by PG&E in connection with its Part 72 Application, PG&E stated that it will have financial qualifications to construct, operate and decommission the Diablo Canyon ISFSI as follows:

PG&E is an electric utility presently subject to rates established by the California Public Utilities Commission ["CPUC"]. The funds necessary to cover the construction and operating costs will be derived from electric rates and from electric operating revenues. The costs for decommissioning will be derived from the DCPD Decommissioning Fund.

Accordingly, PG&E has identified the source of the funds necessary to cover costs associated with constructing and operating the proposed ISFSI. PG&E will obtain the necessary funds

either from specific authorized components of electric rates or from overall electric operating revenues.

9. PG&E in its present form is a public utility. As such, PG&E expects to pay the costs associated with the ISFSI as normal operating expenses, covered by electric operating revenues, and is already doing so. Pursuant to the CPUC's Order of April 4, 2002, returning PG&E's retained generation to the cost-of-service rate base, PG&E is, pending resolution of the bankruptcy proceeding, currently entitled to recovery of prudent Diablo Canyon expenses through traditional cost-of-service rates. *See* Decision 02-04-016, Opinion Adopting Revenue Requirements for Utility Retained Generation, 2000 Cal. PUC LEXIS 1110 (Apr. 4, 2002).

10. As with any NRC licensee that recovers costs associated with an NRC-licensed activity through cost-of-service rate regulation, PG&E's expenses are subject to prudence review by the CPUC. PG&E believes that costs associated with the ISFSI represent reasonable and prudent Diablo Canyon operating expenses. The expenditures are prudent to preserve the generating asset, are in the public interest, and are consistent with PG&E's obligations under the Nuclear Waste Policy Act.

11. Any disallowances that might result from a CPUC prudence review would be covered by cash on hand or electric operating revenues. While disallowances might reduce earnings, any such disallowances would not be material to PG&E's financial qualifications with respect to the ISFSI — given the substantial assets (including cash) and earnings of PG&E as an operating utility.

12. In the basis for Contention TC-2, the Intervenors in this proceeding asserted that PG&E's financial qualifications are in question due to its limited access to credit markets while in bankruptcy. However, PG&E is not borrowing and will not need to borrow funds to pay

ISFSI expenses. PG&E is currently paying the costs associated with the ISFSI out of normal operating revenues and expects to continue to do so.

13. PG&E's recent, publicly-available financial statements demonstrate that PG&E has operating revenues that are substantial and more than sufficient to provide cash flow to pay ISFSI expenses. For example, PG&E's most recent Form 10-K/A, (amendment 1 to the Form 10-K filed in February 2003) dated March 5, 2003, shows for PG&E, the utility, capital expenditures of over \$1.5 billion, operating revenues of over \$10 billion, and earnings available for common stock of over \$ 1.7 billion, for the 12-month period ending December 31, 2002. *See* Form 10-K/A, Exh. 13 at 78, 81.

14. Furthermore, PG&E also currently has substantial cash on hand that would be sufficient to cover ongoing costs associated with development, construction, operation, and decommissioning of the Diablo Canyon ISFSI during the pendency of the bankruptcy proceeding. PG&E's current cash on hand is in excess of \$3 billion. *See* Form 10-K/A, Exh. 13 at 79. While the majority of this cash is presently ear-marked to repay creditors, some portion of this cash would be available, with the approval of the Bankruptcy Court, to pay costs necessary to preserve and maintain the estate. PG&E believes that preserving the power plant as an operating, revenue-generating asset would fall in this category, and that ISFSI-related costs could therefore be paid.

15. For rate-recovery purposes in the present CPUC rate-regulated environment, PG&E is not accounting for incurred Diablo Canyon ISFSI expenses as capital costs that would be subject to construction-work-in-progress ("CWIP") regulations. Rather, it is treating those costs as operating expenses, presently recoverable through electric rates. This reflects a reasonable, conservative accounting treatment, based on PG&E's assessment that this approach

matches the period for recovery through rates to the time period in which a benefit (electrical generation) is being received by ratepayers. Capitalizing the costs of dry cask storage would spread the costs to future generations of ratepayers, generations that would not be causing the costs to be incurred.

16. The CPUC, in PG&E's ongoing 2003 General Rate Case, may review PG&E's accounting treatment with respect to the ISFSI expenses and provide for timing of rate recovery consistent with the different accounting treatment. However, neither the possibility nor even the fact of such a review would be material to PG&E's financial qualifications. The CPUC will ultimately determine the accounting treatment to be utilized and the timing of recovery through the rate process will be based on that determination. Even assuming that some portion of ISFSI expenses are eventually treated as capital costs, and recovery deferred accordingly, PG&E will have sufficient cash flow (based on assets and revenues) to pay costs associated with the ISFSI as discussed above.

The PG&E Bankruptcy

17. PG&E filed for reorganization under Chapter 11 of the United States Bankruptcy Code. PG&E remains a going concern — a solvent debtor-in-possession — continuing to conduct day-to-day operations under the protection of the bankruptcy process. PG&E's bankruptcy filing does not reflect a shortfall in revenues to cover the cost of operating its utility assets. Rather, it addresses a focused problem of restructuring the debt created as a result of procurement of electric power on the open market during the California energy crisis of 2000. The debt for the utility resulted from an imbalance between electricity costs and revenues, created by a flawed electricity deregulation plan. That imbalance has been addressed pending the resolution of the bankruptcy proceeding by measures that include rate relief, lower electricity

market prices, and changes with respect to electricity procurement. PG&E's recent, publicly-available financial statements, discussed above, demonstrate PG&E's present substantial operating income. This confirms PG&E's ability to cover the much smaller anticipated costs associated with the ISFSI. The bankruptcy proceeding fundamentally relates not to current and prospective revenues and cash flow, but to restructuring debt previously created and repaying creditors.

18. As discussed above, PG&E will pay the costs associated with the ISFSI during the pendency of the bankruptcy proceeding out of normal operating revenues. The Bankruptcy Court does not review all of PG&E's operating expenses and Bankruptcy Court approval is not necessary for PG&E to pay ongoing ISFSI expenses.

19. The bankruptcy procedures requiring notification and approval of the Creditors Committee and the Bankruptcy Court for new capital projects do not mandate notification and review of all capital expenditures (there is a threshold for such review). The Bankruptcy Court has, nonetheless, already approved PG&E's contract with its primary ISFSI vendor, Holtec International ("Holtec"). On October 6, 2001, the Bankruptcy Court issued an order authorizing PG&E to (1) assume a Letter Agreement, between PG&E and Holtec, for licensing support and engineering work related to the ISFSI; and (2) enter into a new contract under which Holtec will complete the design and licensing work for the ISFSI and deliver to Diablo Canyon casks, canisters, and related equipment. *See* Case No. 01-30923, "Order Re: Debtor's Application for Order Approving Assumption of Executory Contract and Entering Into New Contract for Licensed Used Nuclear Fuel Storage System," dated October 6, 2001.

20. The Bankruptcy Court has also specifically approved other, substantial capital expenditures and PG&E is making such expenditures as necessary to protect and preserve its

assets. *See* Case No. 01-30923, “Order Approving Motion for Authority to Resume Power Procurement, Including Procurement of the Residual Net Short Position, and to Incur Post-Petition Secured Debt Related Thereto,” dated December 23, 2002. For perspective, PG&E has incurred capital expenditures of over \$1.5 billion in calendar year 2002. PG&E’s annual capital expenditures for 2003 are expected to total approximately \$1.75 billion. *See* Form 10-K/A, Exh. 13 at 81. For comparison purposes, the 2002 and 2003 ISFSI expenses are less than 1 percent of PG&E’s capital budget for these years. Access to capital pending the resolution of the bankruptcy case is not, in my opinion, a significant issue for the ISFSI project.

21. In the basis for Contention TC-2, the Intervenor claimed that “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.” However, this 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.”

Financial Arrangements for ISFSI Decommissioning

22. As a rate-regulated utility, PG&E currently collects contributions in rates for decommissioning Diablo Canyon. The contributions are collected and deposited in the external nuclear decommissioning trust funds for Diablo Canyon established and maintained in accordance with 10 C.F.R. § 50.75(e)(1)(ii). PG&E is required to report to the NRC on the status of the nuclear decommissioning trust funds every two years. *See* 10 C.F.R. § 50.75(f)(1).

23. PG&E's ongoing collections for decommissioning specifically include monies for radiological decommissioning of the proposed ISFSI. In its 1999 General Rate Case before the CPUC, PG&E prepared and submitted a site-specific decommissioning cost study for Diablo Canyon. As stated in the Affidavit of Robert L. Kapus at ¶ 12, this study included specific line items for ISFSI decommissioning. Decommissioning contributions collected through rates to date based on the 1999 rate case have been based on this estimate.

24. As with other ratemaking issues, decommissioning contributions are periodically evaluated by the CPUC. Accordingly, decommissioning contributions are being addressed in PG&E's ongoing 2002 Nuclear Decommissioning Cost Triennial Proceeding. For this rate proceeding, PG&E's consultant, TLG Services Inc., has prepared a revised site-specific decommissioning cost estimate that again includes the Diablo Canyon ISFSI. The estimates have been specifically updated to reflect current cost data and PG&E's selection subsequent to the 1999 rate proceeding of the Holtec International HI-STORM 100 Storage System. (The earlier estimate was based on an assumption of a dry cask technology of a different vendor that, according to the study, would have involved greater non-radiological decommissioning costs for the ISFSI pad.) PG&E fully expects that appropriate contributions for ISFSI decommissioning will be established by the CPUC based on the record in the decommissioning cost rate proceeding.

25. In accordance with 10 C.F.R. § 72.30(c)(5), PG&E, as an electric utility, currently proposes to utilize the external sinking fund method of financial assurance for the ISFSI. The ISFSI decommissioning monies are deposited in the nuclear decommissioning trust funds established for Diablo Canyon. These monies are identifiable and can — as an accounting

matter — be segregated from funds ear-marked for decommissioning the power plant, for removal of spent fuel, or for non-radiological decontamination and demolition.

Conclusions

26. For the reasons discussed above, I believe that PG&E has demonstrated the requisite financial qualifications as a public utility to construct, operate and decommission the proposed ISFSI in fulfillment of NRC requirements. I believe that costs associated with the ISFSI represent reasonable and prudent Diablo Canyon operating expenses that are fully recoverable through cost-of-service rates. However, the possibility of disallowances resulting from a prudence review by the CPUC would not be material to the NRC financial qualifications finding, given the substantial assets and earnings of PG&E as an operating utility. Finally, I am confident that PG&E has demonstrated the necessary financial arrangements for decommissioning of the ISFSI.

27. I also understand that, if the PG&E Plan of Reorganization is confirmed by the Bankruptcy Court, and the Diablo Canyon operating license transfer approved by the NRC, some of the details of the financial qualifications showing for the ISFSI will change. However, any changes are not presently within the scope of my testimony.

28. The information presented above is true and correct to the best of my knowledge and belief.

Walter L. Campbell
Walter L. Campbell

Sworn and subscribed to before me this 9th day of April 2003.

Amy Emko Dong
Notary Public



My Commission expires: Jan. 14, 2007.

Director of Financial Policies

Financial Planning and Analysis Department — 1988-1990

- Prepared financial analyses of major investment and regulatory initiatives
- Supervised several financial analysts
- Responsible for all of utility's financial forecasting

Senior Financial Analyst

Financial Planning and Analysis Department — 1986-1988

- Prepared of testimony before the CPUC and the FERC regarding rate of return and other financial issues
- Prepared financial analyses of major investment and regulatory initiatives
- Supervised two financial analysts
- Oversaw preparation of long-term financial forecasts

Financial Analyst

Financial Planning and Analysis Department — 1985-1986

- Assisted in preparation of testimony before the California Public Utilities Commission ("CPUC") and the Federal Energy Regulatory Commission ("FERC") regarding rate of return and other financial issues
- Prepared financial analyses of major investment and regulatory initiatives

Education:

Pomona College,

B.A., History, 1980

Yale School of Organization and Management,

Master's Degree in Public and Private Management, 1985

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)	ASLBP No. 02-801-01-ISFSI
Spent Fuel Storage Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "SUMMARY OF FACTS, DATA, AND ARGUMENTS ON WHICH PACIFIC GAS AND ELECTRIC COMPANY WILL RELY AT THE SUBPART K ORAL ARGUMENT" have been served as shown below by electronic mail, this 11th day of April 2003. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

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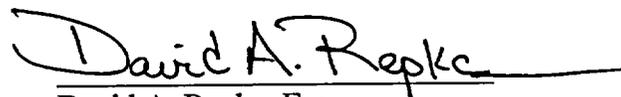
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