

April 11, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD April 18, 2003 (2:39PM)

In the Matter of)
)
PACIFIC GAS AND ELECTRIC CO.)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))
_____)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF
Docket No. 72-26-ISFSI
ASLBP No. 02-801-01-ISFSI

SUMMARY OF FACTS, DATA, AND ARGUMENTS ON WHICH THE
GOVERNMENTAL PARTICIPANTS¹ INTEND TO RELY AT THE
SUBPART K ORAL ARGUMENT

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¹ The Governmental Participants are the Avila Beach Community Services District, the California Public Utilities Commission, and San Luis Obispo County. The California Energy Commission ("CEC") has determined that it will file its own Summary of Facts, Data, and Arguments upon which it intends to rely.

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I. INTRODUCTION

In accordance with the schedule established by the Atomic Safety and Licensing Board ("Board") in its Memorandum and Order LBP-02-25 (Denying Motions for Commission Referral and Reconsideration of Portions of LBP-02-23; Granting Requests to Invoke 10 C.F.R. Part 2, Subpart K Procedures and Establishing Schedule), dated December 26, 2002, the Governmental Participants ("GP") – the Avila Beach Community Services District ("ABCSD"), the California Public Utilities Commission ("CPUC"), and San Luis Obispo County ("SLOC")- - hereby submit their "Summary of Facts, Data, and Arguments on which the Governmental Participants Intend to Rely at the Subpart K Oral Argument" ("Summary"). The GP's Summary addresses the only admitted contention in this proceeding. As required by 10 C.F.R. § 2.113(a), the GP's Summary includes this written summary as well as attachments with supporting facts in the form of sworn written testimony and supporting documents.

This Subpart K proceeding concerns the proposal by Pacific Gas & Electric Company ("PG&E") to construct, operate, and decommission an Independent Spent Fuel Storage Installation ("ISFSI") at the site of the Diablo Canyon Nuclear Power Plant ("Diablo Canyon"), which is located in San Luis Obispo County, California. PG&E is currently subject to rate regulation by the California Public Utilities Commission ("CPUC"). PG&E also has filed for Chapter 11 bankruptcy protection and is currently in the midst of a complex Chapter 11 case in the Bankruptcy Court for the Northern District of California. To emerge from bankruptcy, PG&E has proposed a reorganization plan ("Plan") that would disaggregate its current operations and cause the owner and/or operator of the ISFSI to no longer be an integrated utility regulated by the CPUC. (Reference 1).

PG&E's license application for the ISFSI, as supplemented at the request of the Nuclear Regulatory Commission ("NRC"), inconsistently addresses the impacts of its bankruptcy on the showings required by 10 C.F.R. § 72.22(e). The license application initially submitted by PG&E on December 21, 2001 (Reference 2) addressed the NRC's financial requirements for an ISFSI over its proposed license life. This was accomplished by PG&E discussing its current financial situation as an integrated CPUC-rate-regulated utility and its proposed financial situation as a company no longer subject to CPUC regulation after bankruptcy.² PG&E contemplated that ISFSI expenses would be paid from electric rates while PG&E was an integrated utility regulated by the CPUC, and

² Section 1.5 of PG&E's license application contains the following information:

PG&E will have the financial qualifications to construct and operate the Diablo Canyon ISFSI. ... The funds necessary to cover the costs in the first period [building and operating the ISFSI through 2025] will be derived from electric rates and from electric operating revenues. The costs for the second period [from 2026 until 2040], and continuing costs until all the fuel is removed from the site, will be derived from the DCPD Decommissioning Fund.

Presently, PG&E is an electric utility subject to rates established by the California Public Utilities Commission (CPUC). As long as PG&E remains the licensee (footnote omitted) both capital expenditures and operation and maintenance costs will be covered by revenues derived from electric rates.

.....
On November 30, 2001, PG&E filed with the NRC a request for NRC consent to a transfer of the Part 50 operating license for DCPD to Gen. ...The license transfer application includes financial data for the first five years of operation of Diablo Canyon by Gen, beginning with the assumed implementation of the reorganization plan by the end of 2002. Upon implementation, costs related to the ISFSI will be treated as Diablo Canyon operating expenses. The source of funds to cover these costs will be operating revenues. The financial data included with the license transfer application shows the estimated Diablo Canyon costs for five years, including costs associated with the ISFSI. The data also shows the substantial projected revenues and income of Gen based upon both nuclear and hydroelectric generation, as well as the substantial assets of the company. *In total, this data demonstrates the financial qualifications of Gen to construct and operate the Diablo Canyon ISFSI, and to become the site-specific Part 72 licensee for that facility once the Part 50 license transfer is approved by the NRC and the reorganization plan is implemented. (Emphasis added).*

License application at 4-5.

would be paid out of operating revenues after the reorganization to demonstrate compliance with the NRC's requirements in 10 C.F.R. § 72.22(e). Thus, the initial license application addressed the impacts of bankruptcy by showing that if the Plan were approved, the ISFSI licensee would be financially qualified.

On June 7, 2002, PG&E supplemented the financial information in its ISFSI license application (Reference 3). PG&E continued to acknowledge that it was in bankruptcy, PG&E Response (a), but no longer relied on any financial information regarding the successor ISFSI licensee, which PG&E expected would become the licensee upon PG&E's emergence from bankruptcy. Rather PG&E simply stated that:

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. (footnote omitted). PG&E Response (e).

This "supplemental" financial information substantially altered PG&E's basis for claiming compliance with the 10 C.F.R. 72.22(e) requirements.³ PG&E omitted all references to the financial qualifications of the ISFSI licensee post-bankruptcy and focused exclusively on its current situation, as if it would continue for the entire license period.⁴

³ Note that the NRC noticed the opportunity for hearing in this proceeding on April 22, 2002 (67 Fed. Reg. 19600) ("Notice"), two months before PG&E supplemented its financial information. Also note that the NRC notice depended explicitly on PG&E's license application dated December 21, 2001. The GPs believe that the differences between PG&E's initial license application and its supplemental information are substantial enough to have warranted the NRC's renote of the opportunity for hearing. The initial license application put into question PG&E's claims regarding the financial qualifications of Gen. PG&E's supplement cut off all consideration of the financial qualification of Gen and limited the issues to PG&E's current status as a utility regulated by the CPUC. We note that renoticing would not accomplish anything because the Board, by a conclusory statement, implemented PG&E's narrowing of the scope of the issues presented by its supplement by holding that information regarding the financial qualifications of Gen and other entities that may be formed as part of PG&E's reorganization plan is irrelevant.

⁴ This narrow view of the scope of PG&E's application is echoed in the deposition of Mr. Campbell, PG&E's financial qualifications expert.

Q By Mr. Trubatch: On what basis can you represent to the NRC, that PG&E will have funds to operate the ISFSI in 20 years?

In response to the NRC's Notice the San Luis Obispo Mothers for Peace ("SLOMFP") successfully petitioned to intervene in this proceeding. SLOMFP submitted several contentions. After hearing oral argument on the proposed contentions, only one was admitted by the Board. Contention TC-2 asserts that PG&E has failed to demonstrate that it meets the NRC's financial qualifications requirements in 10 C.F.R. § 72.22(e). The Board admitted this contention to the extent that it raised relevant and material concerns regarding the impact of PG&E's bankruptcy on its continuing ability to undertake the new activity of constructing, operating, and decommissioning an ISFSI by reason of its access to continued funding as a CPUC-regulated utility or through credit markets.⁵

In this Summary, the GP will demonstrate that an impact of the bankruptcy is that PG&E cannot demonstrate that it has a continuing ability to undertake the new activity of constructing, operating, and decommissioning an ISFSI by reason of its access to continued funding as a CPUC-regulated integrated utility.⁶ The record clearly shows that the uncertainty in PG&E's status as a CPUC-regulated integrated utility over the license life of the ISFSI precludes PG&E from demonstrating that it can meet the NRC's financial qualification requirements for an ISFSI. The record also indicates that the NRC staff, in making its compliance determination, found that the information provided by PG&E, on the basis of its status as a utility regulated by the CPUC, was inadequate and had to be supplemented by information which the Board has held is irrelevant. For these reasons, the Board must find for SLOMFP as a matter of law.

In the alternative, the extent to which the NRC found it necessary to rely on inadmissible evidence to supplement PG&E's inadequate information to support a compliance determination is unclear and can only be resolved at an adjudicatory hearing. Such a hearing is necessary because only the Board's power to compel witnesses to answer questions will elicit the testimony necessary for resolving this issue. Moreover, the NRC's decision will depend on the resolution of this issue because the adequacy of the information provided by PG&E is critical to a determination that PG&E has met its burden of demonstrating compliance with the NRC's financial qualifications requirements for an ISFSI.

[A] The Witness: In the context of this proceeding, PG&E is a rate-regulated utility, operating a variety of assets, generating assets and non-generating assets. Its generating assets are expected to be under cost of service regulation.

⁵ LBP-02-023 at 38.

⁶ PG&E does not expect to borrow funds to pay ISFSI-related expenses. "PG&E is not borrowing and will not need to borrow funds to pay ISFSI expenses." PG&E answer to CEC interrogatory # 1. Therefore, there is no need to address the component of the contention that included access to credit markets.

II. PROCEDURAL HISTORY

On April 22, 2002, the NRC published a notice of opportunity for hearing on PG&E's application to construct an ISFSI at the site of the Diablo Canyon Nuclear Power Plant ("DCNPP") in San Luis Obispo County.⁷ SLOMFP, which by consent is now acting as a lead petitioner, the Avila Valley Advisory Council ("AVAC"), Ms. Peg Pinard, and nine other organizations (hereinafter referred to collectively as SLOMFP), filed timely requests for hearing and petitions to intervene in accordance with 10 C.F.R. § 2.714 that, as supplemented, sought to raise various joint contentions challenging the application. In addition, SLOC, the Port San Luis Harbor District ("PSLHD"), CEC, the Diablo Canyon Independent Safety Committee ("DCISC"), and the ABCSD filed requests to participate in any hearing as interested governmental entities in accordance with 10 C.F.R. §2.715(c) and, in the case of SLOC and PSLHD, proffered particular issues they sought to have litigated in this proceeding.

An Atomic Safety and Licensing Board was established.⁸ Subsequently, an Initial Prehearing Order (unpublished) was issued on June 6, 2002, and a prehearing conference was scheduled to be held in the San Luis Obispo, California area.⁹ Thereafter, Ms. Peg Pinard and AVAC declared in an early July 2002 amended joint petition that Ms. Pinard was seeking to intervene as a private citizen, rather than in her capacity as a member of the San Luis Obispo Board of Supervisors, and that AVAC wished to intervene in the proceeding as a private organization rather than a governmental entity.¹⁰ For its part, acting as a lead petitioner on behalf of Ms. Pinard, AVAC, and the nine other organizations named above, SLOMFP supplemented its petition by challenging the PG&E license application with five technical and three environmental contentions.

Beginning on September 10, 2002, the Board conducted a two-day initial prehearing conference, during which it heard oral presentations regarding the standing of each of the petitioners, the participation of DCISC as an interested governmental entity, and the admissibility of the eight contentions and four issues raised by Petitioners and the interested governmental entities.¹¹ Following the initial prehearing conference, ABCSD

⁷ 67 Fed. Reg. 19600.

⁸ Board Order dated May 31, 2002.

⁹ See Licensing Board Memorandum and Order (Schedule for Initial Prehearing Conference) (June 26, 2002) (unpublished); Licensing Board Memorandum and Order (Initial Prehearing Conference Status and Participation as Interested Governmental Entity) (July 26, 2002) (unpublished).

¹⁰ See Petitioners' Amended Hearing Request and Petition to Intervene (July 8, 2002) at 2 [hereinafter Pinard/AVAC Amended Petition].

¹¹ See Transcript of September 10-11, 2002 ISFSI Proceeding Prehearing Conference ("Tr.") at 1-419.

resubmitted its request for section 2.715(c) participant status. Neither PG&E nor the staff objected to ABCSD's participation as a section 2.715(c) interested governmental entity.

The Board found that some of the petitioners and DCISC lacked standing, and the Board rejected the contentions proffered by SLOC and PSLHD. SLOC, PSLHD, CEC, and ABCSD were admitted as interested governmental entities 10 C.F.R. § 2.715(c). The Board admitted for litigation only SLOMFP Contention TC-2.¹² Subsequently, PSLHD withdrew from the proceeding. Also, on motions by CPUC and the other governmental entities including the CEC, the Board admitted CPUC as an interested governmental entity and permitted all governmental entities to respond jointly to discovery requests.¹³

During the discovery period, interrogatories were filed by the NRC on SLOMFP and the GP, by PG&E on SLOMFP and the GP, by SLOC on the NRC and PG&E, and by the CEC on the NRC and PG&E. Also, the GP deposed the NRC's expert witness Mr. Michael A. Dusaniwskyj and PG&E's expert witness Mr. Walter Campbell. PG&E deposed the GP's expert witness Mr. Truman Burns. Excerpts from the interrogatory responses and depositions are supplied, as needed.

Documents were produced by PG&E and a request was made at Mr. Dusaniwskyj's deposition for the NRC staff's analysis of PG&E's claim that it had complied with the financial qualifications requirements in 10 C.F.R. §72.22(e). NRC staff counsel, Ms. Angela Coggins objected to the production of that document as privileged but stated that she would convey the GP's request to her superiors. That document has not been produced.¹⁴

¹² Memorandum and Order LBP-02-023 (Ruling on Standing and Contentions of 10 C.F.R. § 2.714 Petitioners and Admission of 10 C.F.R. § 2.715(c) Interested Governmental Entities and Their Issues) (December 2, 2002) (hereinafter LBP-02-023).

¹³ Order (Unpublished) (Granting Motion to Participate as 10 C.F.R. § 2.715(c) Interested Governmental Entity) (February 13, 2003).

¹⁴ Dusaniwskyj deposition at 18:15 to 19:15.

III. CRITERIA FOR ISSUES REQUIRING AN ADJUDICATORY HEARING

The NRC's criteria for designating issues for a Subpart K adjudicatory hearing are set forth in 10 C.F.R. § 2.1115. Any disputed issues of fact, together with any remaining issues of law may be designated as disputed issues requiring resolution in an adjudication, provided the following criteria are met:¹⁵

- ?? There is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing, 10 C.F.R. § 2.1115(b)(1); and
- ?? The decision of the Commission is likely to depend in whole or in part on the resolution of that dispute. 10 C.F.R. § 2.1115(b)(2).

The GP will demonstrate below that there are genuine and substantial disputes of fact regarding PG&E's claims to have satisfied the NRC's financial qualifications requirements for an ISFSI. The GP will demonstrate that these substantial disputes of fact are real issues that can be resolved with sufficient accuracy only by the introduction of evidence at an adjudicatory hearing. Moreover, the GP will show that the NRC's decision depends on the resolution of these disputes.

In particular, the GP will show that the factual issues in this proceeding are quite different from the issues that arise in the more typical situation apparently contemplated by the NRC for these types of proceedings. In the typical case, the Board is expected to apply its technical expertise to resolve technical issues based on competing experts' technical views. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386 (2001). By contrast, the record of this proceeding to date shows that the witnesses provided by PG&E and the NRC staff have not been as forthcoming as the GP believe is necessary for an accurate resolution of the financial qualification issues. This is not a proceeding in which the Board can weigh affidavits or submissions by technical experts, analyze the parties' technical submissions carefully, and make intricate and well-supported findings. *Carolina Power & Light Co.*, 53 NRC at 388. Rather, the record of the depositions of the witnesses shows that only the power of the Board to compel responses can provide the factual evidence necessary to resolve the substantial factual disputes. Moreover, the record shows that cross-examination at an adjudicatory hearing will be the only opportunity for the Board to have the benefit of challenges to the details of the bases for PG&E's claims and the NRC staff's conclusions regarding PG&E's alleged compliance with the NRC's requirements. The GP also will demonstrate that if any one of these issues were to be resolved in a way that showed that the NRC's financial qualifications requirements for an ISFSI were not met by PG&E, the Commission's decision would depend on that negative finding because the Commission could not issue PG&E the requested ISFSI license under these conditions.

¹⁵ 10 C.F.R. § 2.1115(a)(1).

IV. FINANCIAL QUALIFICATIONS REQUIREMENTS THAT MUST BE MET BY AN ISFSI APPLICANT

The financial qualifications requirements that must be met by an applicant for an ISFSI are established in 10 C.F.R. § 72.22(e). It provides in pertinent part:

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 prior to licensing that decommissioning will be carried out after the removal of spent fuel and/or high level radioactive waste from storage.

Where an applicant does not rely on possessing the necessary funds to construct, operate, and decommission an ISFSI,¹⁶ the applicant must provide adequate information

¹⁶ PG&E does not anticipate paying ISFSI expenses out of cash on hand. However, PG&E also has stated that it has substantial cash on hand, and that this cash would be sufficient to cover operating costs associated with the development, construction, operation, and decommissioning of the ISFSI during the pendency of the bankruptcy proceeding. PG&E further stated its belief that some portion of this cash would be available, with the approval of the Bankruptcy Court, to pay costs necessary to preserve and maintain the Diablo Canyon generating asset. See, PG&E response to CEC interrogatory number 1.

The NRC found PG&E's statements about cash on hand to be sufficiently uncertain that the NRC did not rely on PG&E's statements regarding cash on hand as part of its compliance determination. In response to SLOC interrogatory number 1, the NRC stated:

The NRC staff did not rely on statements by PG&E that it currently has funds on hand to cover ongoing investments and costs associated with development, construction, and operation of the ISFSI.

When asked why the NRC made this statement, Mr. Dusaniwskyj stated:

The application didn't state clearly or very much about the idea that they have the funds on hand. Dusaniwskyj deposition at 7:16-17.

Under these conditions, the alternative of funding ISFSI activities from cash on hand does not appear to be presented in this proceeding.

that enables the NRC to make the predictive findings that the applicant has "reasonable assurance of obtaining the necessary funds" to undertake those activities. Thus, the NRC is required to determine that an applicant will have reasonable assurance of obtaining the necessary funds from the time each of the three activities (construction, operation, and decommissioning) is scheduled to begin, through the conclusion of each of these activities. One aspect of such an NRC determination is an independent evaluation of the period of time the applicant has stated will be needed to construct and then to decommission the ISFSI. For operation, the NRC staff must assume at least the twenty-year period of the initial license, unless some other license period has been specified, which is not the case here. See Reference 2; 10 C.F.R. § 72.42(a). Moreover, the NRC must determine that the applicant's estimates of the costs for constructing, operating and decommissioning an ISFSI are reasonable in order to determine that the applicant has reasonable assurance of obtaining the "necessary" funds. Finally, the NRC must determine that the necessary financial arrangements have been made, "prior to licensing," to provide reasonable assurance that decommissioning will be carried out. Part 72 makes it a requirement that adequate financial arrangements to cover the cost of decommissioning should be made before a license is issued."¹⁷

In presenting its evidence to show that it is financially qualified to become an ISFSI licensee, an applicant cannot be expected to foresee the unforeseeable or to speculate about possible changes in its circumstances, where there is no basis for such speculation. However, where the applicant knows that its circumstances are uncertain over the licensed life of the ISFSI, an applicant's failure to discuss the impacts of the that uncertainty would result in an inaccurate and incomplete license application with respect to the reasonable assurance finding that the NRC is called on to make.

Moreover, if it were, PG&E's response clearly illustrates the impacts of its bankruptcy on its continuing ability to demonstrate that it can fund ISFSI activities as a regulated utility. PG&E's answer, as it must be, is limited to the period of its pending bankruptcy case. PG&E can make no representations regarding the disposition of cash on hand post-bankruptcy, because PG&E may not have any control over the disposition of that cash, post-bankruptcy. Thus, for example, PG&E could not rely on possessing the necessary funds to cover the estimated operating costs over the planned life of the ISFSI.

Even if we were to continue to indulge in the fiction that PG&E should be treated as a CPUC-regulated integrated utility, as it exists today, in bankruptcy, over the entire ISFSI operating period, PG&E has acknowledged that it would need the approval of the Bankruptcy Court to spend any of its cash on hand to pay costs related to the ISFSI. At the very least, PG&E's ability to obtain such approval would be a factual issue relevant to PG&E's ability to make the necessary "reasonable assurance" showing that it possesses the necessary funds in a way that makes them available to pay for ISFSI costs.

¹⁷ 45 Fed. Reg. 74693 (November 12, 1980).

V. PG&E'S BANKRUPTCY HAS THE IMPACT OF PREVENTING PG&E FROM DEMONSTRATING ITS CONTINUING ABILITY TO CONSTRUCT, OPERATE, AND DECOMMISSION AN ISFSI

A. Statement of Contention and Bases

To determine the scope of evidence admissible in this proceeding, it is first necessary clearly to establish the scope of the contention and supporting bases. SLOMFP Contention TC-2 was admitted by the Board.¹⁸ It provides, "PG&E has failed to demonstrate that it meets the qualifications requirements of 10 C.F.R. § 72.22(e)."

The Board admitted two bases in support of TC-2: Bases 2 and 3.¹⁹ They provide:

Basis 2: PG&E is Bankrupt

PG&E filed for bankruptcy on April 6, 2001, and it filed its reorganization plan on September 20, 2001. As of today, the utility is still enmeshed in the toils of an uncertain and highly contested proceeding. Whether PG&E itself will emerge as a viable entity and if so with what remaining resources is unknowable at this point.

The NRC has not directly addressed the implications of the ongoing bankruptcy of a license applicant in the context of an ISFSI. The Atomic Safety and Licensing Board has, however, considered the issue in the context of a non-utility power plant operating license in *Gulf States Utilities Company*, (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460 (1995). At issue in *Gulf States* was an independent operating licensee (Entergy Operations) that was entirely dependent on payments from *Gulf States*, a company perilously close to bankruptcy due to then-pending litigation. In disputing the Intervenor's contention that this dependence was a textbook case for financial qualification, *Gulf States* and the NRC staff contended that the bankruptcy courts would adequately protect the public interest, and require continued payments to Entergy, or at the very least, provide sufficient funds to safely shut down and decommission the plant. *Id.*, 41 NRC at 471. The ASLB concluded in response that whether the bankruptcy courts would favor safe nuclear operation over other creditors was a factual question that could not be resolved by summary judgment. *Id.* at 472. The Board discounted staff assurances that both Palo Verde and Seabrook "operated" through bankruptcy. *Id.* at 470-71.

¹⁸ LBP-02-023 at pp. 36-37.

¹⁹ LBP-02-023 at p. 36.

Although the Part 72 financial qualifications requirements are apparently less rigorous than the analogous part 50 provisions, the Commission has ruled that it will not “grant an [ISFSI construction and operation license] to an applicant of dubious financial qualifications.” *Private Spent Fuel Storage Facility*, (Independent Spent Fuel Storage Facility), 52 NRC 23, 30 (NRC 2000).

Basis 3: PG&E’s Status as a Utility Does Not Establish Reasonable Assurance of Financial Qualification in its license application

PG&E relies on its status as a regulated electric utility to demonstrate its financial qualifications. PG&E asserts that PG&E is an electric utility subject to rates established by the California Public Utilities Commission (CPUC). As long as PG&E remains the licensee, both capital expenditures and operations and maintenance costs will be covered by revenues derived from electric rates. License Application at 5.

While PG&E acknowledges that it is bankrupt, it does not address the question of how its bankruptcy might affect its financial qualifications to build and operate the ISFSI. *Id.* Apparently, PG&E believes that the fact that it is able to petition for recovery of its costs from the CPUC is sufficient to demonstrate its financial qualifications. Intervenors believe that PG&E is incorrect, in a number of significant respects.

First, in California, construction work in progress (“CWIP”) is not generally recoverable in rates. Under California’s Construction Work in Progress rate setting rules, PG&E is not entitled to recover ongoing construction costs from the rate base until operation is underway.

Second, PG&E’s ability to recover operating costs from the rate base is questionable. While the facts that PG&E is a regulated utility might normally constitute sufficient evidence of its financial qualifications to operate the proposed ISFSI, in this case there are substantial uncertainties that PG&E will not have normal recourse to the ratemaking system, due to (a) its bankruptcy, and (b) pending litigation by the California Attorney General against PG&E’s parent, PG&E Corporation, charging that under PG&E Corporation’s direction, PG&E has made illegal and fraudulent use of the ratemaking system.

Third, as noted above, PG&E has become bankrupt because it has incurred costs in excess of what it has been able to recover from the rate base. PG&E must retire enormous debts from the bankruptcy. This raises the question of 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 corners.²⁰

The Board noted that, "An ISFSI applicant is required by 10 C.F.R. § 72.22(e) to demonstrate in its application its financial qualifications to carry out the activities for which the license is sought." LBP-02-23 at p. 36. However, the Board found that:

[N]otwithstanding PG&E's financial qualifications to conduct day-to-day DCPD operations, in its bases two and three SLOMFP has raised relevant and material concerns regarding the impact of PG&E's bankruptcy on its continuing ability to undertake the new activity of constructing, operating, and decommissioning an ISFSI by reason of its access to continued funding as a regulated entity or through credit markets. *See*, SLOMFP contentions at 14-17; *Id.* Exh. 3, at 127 (PG&E Corp. 2001 Annual Report).²¹

²⁰ Supplemental Request for Hearing and Petition to Intervene by San Luis Obispo Mothers For Peace, et al., dated July 18, 2002, at pp. 14-16.

²¹ LBP-02-023 at 36-37. The Board's discussion of its reasons for rejecting SLOMFP's Contention TC-3 also is relevant. The Board stated:

As we explained in our discussion above regarding contention SLOMFP TC-2, we find that SLOMFP's concerns relative to the bankruptcy reorganization proceeding and its effects on PG&E's financial capacity to construct, operate, and decommission the proposed ISFSI are relevant to this proceeding and warrant further inquiry. However, as PG&E itself has recognized, petitioner concerns regarding entities that may or may not be created in the future to take over operations at DCPD, depending on whether PG&E's reorganization plan is approved by the bankruptcy court, are irrelevant and/or outside the scope of the PG&E proceeding at this point. [FN 8]

[FN 8] In this regard, assuming that the bankruptcy court confirms PG&E's reorganization plan, and that the commission approves the license transfer of DCPD from PG&E to Gen, PG&E would then be required to amend its ISFSI license application to reflect the change in applicant. If this chain is in fact realized, then issues regarding Gen's financial qualifications would be ripe for litigation, and SLOMFP seemingly would be free to submit any concerns about GEN (sic) or other newly-accountable entities as a late-filed contention. LBP-02-023 at 40.

The GP disagrees with the Board's suggestion that if authorization of the license transfer were to precede issuance of the ISFSI license, that a late-filed contention would be appropriate. The GP believe that the entire hearing would be required to be renoticed. This is because the change from the original notice might not simply be an administrative matter of changing the name of the applicant. If PG&E were to be reorganized as it

As a result, the Board concluded that TC-2 should be admitted as supported by Bases 2 and 3, focused on “. . .the impact of PG&E’s bankruptcy on its continuing ability to undertake the new activity of constructing, operating, and decommissioning an ISFSI by reason of its access to continued funding as a regulated entity or through credit markets.” LBP-02-23, pp. 36-37 (*citation omitted*). The Board made clear that the focus of this contention is to remain on the current CPUC regulated license applicant in bankruptcy, and not on “any entities that may in the future construct or operate the ISFSI.” *Id.* at 37.

B. Evidentiary Implications of the Board’s Decision Admitting Contention TC-2 and Supporting Bases 2 and 3

In discussing its reasons for admitting this contention, and the two supporting bases, the Board noted that SLOMFP had asserted that PG&E had placed its reliance on its ability to recover costs as a CPUC-regulated utility. The Board found that this is “not only insufficient to establish reasonable assurance of financial qualification, but also disingenuous” because PG&E would not operate the ISFSI but would transfer it to an entity not regulated by the CPUC. Moreover, the Board: (1) refused to rely on PG&E’s assertions that “any expenses it incurs, including the costs of the proposed ISFSI, are recoverable from the rate base, regardless of its past debts” and that PG&E’s “access to credit is irrelevant;” and (2) noted the NRC staff’s position that the “contention is admissible relative to the SLOMFP concerns about PG&E’s access to credit and its ability to recover costs through rates.”²²

The formulation of SLOMFP’s Contention TC-2, the discussion in the supporting Bases 2 and 3, and the Board’s reasons for admitting that contention and its supporting bases, imply that evidence is admissible in this proceeding if it addresses the impacts of PG&E’s bankruptcy on PG&E’s ability, by reason of its access to continued funding as an integrated utility regulated by the CPUC, to obtain the necessary funds for covering the estimated costs of constructing, operating, or decommissioning an ISFSI (as required by 10 C.F.R. §72.22(e)).²³ The scope of bankruptcy-related impacts on which evidence

contemplates, the entire basis for its financial qualifications showing may be changed. To the extent that the current reference to the license application in the notice of December 21, 2001 differs substantially in matters of financial qualification, a new notice would be necessary to provide real notice of the issues presented.

²² LBP-02-023 at 36-37.

²³ As discussed above, the record in this proceeding shows that PG&E does not intend to rely on the present possession of adequate funds to cover the estimated costs of constructing, operating, and decommissioning an ISFSI. The record also shows that PG&E does not intend to rely on access to continued funding in the credit markets to undertake ISFSI-related activities. “PG&E is not borrowing and will not need to borrow

may be introduced is determined by the regulator requirements addressed by Contention TC-2, Bases 2 and 3, and the Board's instructions. Contention TC-2 addresses PG&E's compliance with the NRC's ISFSI requirements over its entire life-cycle, *i.e.*, construction, operation and decommissioning. Basis 2 addresses the fact that PG&E is bankrupt and Basis 3 addresses the impact of bankruptcy on PG&E's normal recourse to the ratemaking system as an integrated utility regulated by CPUC.

The Board's instructions, by using the terms "continuing" and "continued," recognized that the scope of bankruptcy-related impacts covered the entire period of the ISFSI life-cycle. Thus, evidence may be admitted regarding the impact of bankruptcy on PG&E's continuing ability, as a CPUC-regulated licensee, to adequately pay for the construction, operation, and decommissioning of the ISFSI over its entire licensed life. In particular, evidence may be admitted regarding the impacts of bankruptcy on PG&E's ability, as a CPUC-regulated utility, to pay for construction costs over the entire construction period, to pay for operation costs over the twenty year operational period, and to pay for decommissioning costs at the end of that twenty year period.

Moreover, the Board's admission of Bases 2 and 3 for Contention TC-2 shows that a bankruptcy-related impact on which evidence may be introduced is the possibility that the ISFSI licensee may not be regulated by the CPUC over the entire life of the ISFSI. The absence of the ratemaking oversight of CPUC may therefore affect PG&E's ability to demonstrate the reasonable assurance required by 10 C.F.R. § 72.22(e).²⁴ These

funds to pay ISFSI expenses." PG&E answer to CEC interrogatory Number 1. Under these circumstances, the relevant and material concerns identified by the Board can be simplified as stated.

²⁴ PG&E is expected to take the position that this proceeding is about PG&E as a regulated utility under cost-of-service regulation. See, for example, Campbell deposition at 13:12-24 and 14:3. PG&E is expected, therefore, to request this Board to limit testimony regarding its bankruptcy to the impacts of that bankruptcy on PG&E's ability to recover its ISFSI-related costs from rates or from operating revenues. PG&E is expected to oppose any evidence showing that an impact of the bankruptcy is substantial uncertainty in PG&E's ability to demonstrate that it can meet the requirements in 10 C.F.R. § 72.22(e) due to the uncertainty in PG&E's status as an integrated utility regulated by the CPUC over the life-cycle of the ISFSI. PG&E is expected to support this position through its interpretation of the Board's decision in LBP-02-023 and the Board's direction that the financial qualifications of any successor to PG&E are irrelevant.

Any such PG&E arguments are contrary to law, contrary to fact, and contrary to the GP's understanding of the Board's decision. Any such PG&E arguments would be contrary to law because they would contradict the NRC's Notice for this hearing. It is black letter law that a notice sets the metes and bounds of a proceeding, so that the specific issues which arise from that notice cannot be characterized in a way that is inconsistent with that notice. In this case, the Notice is based on PG&E's license application of December

bases addresses the extent to which the bankruptcy impacts PG&E's ability to rely on its status as an integrated utility regulated by the CPUC and on its normal recourse to the CPUC's ratemaking system. These Bases are derived from PG&E's position that the ultimate ISFSI licensee should not be regulated by the CPUC because PG&E believes that its reorganization, and emergence from bankruptcy, requires it to disaggregate the current CPUC-regulated integrated utility into one CPUC-regulated and three non-CPUC-regulated entities, such that the ISFSI licensee would no longer be regulated by the CPUC.²⁵ Such evidence would not be excludable as either irrelevant or outside the

21, 2001. That license application acknowledged that PG&E was in bankruptcy, addressed the only reorganization plan under consideration at that time, and based on that reorganization plan, concluded that the successor to PG&E would meet the NRC's ISFSI requirements in 10 C.F.R. § 72.22(e). Under these conditions, the Board cannot exclude as irrelevant, evidence on issues that have been placed into the proceeding by the scope of the NRC's Notice. The NRC, through its incorporation of PG&E's license application into the Notice has included in the hearing the issue of PG&E's continuing status as an integrated utility regulated by the CPUC. Thus, the Board's directions regarding this contention must be read consistent with that Notice to include as an impact of bankruptcy the uncertainty in PG&E's status over the life of the ISFSI.

Any such PG&E argument would be contrary to fact and make this proceeding a sham. PG&E has argued that the only way it can successfully exit from its current bankruptcy is through its reorganization plan. The CPUC has proposed an alternative reorganization plan. The bankruptcy court may adopt either plan or an alternative or the parties in the bankruptcy proceeding may negotiate a consensual plan. Although the outcome is uncertain, and PG&E's status as a utility regulated by the CPUC is uncertain, the one consequence of all this activity that is certain is that PG&E will not remain as it is now, an integrated utility regulated by the CPUC and in bankruptcy, over the life of the ISFSI. Nevertheless, the NRC's regulations require PG&E to demonstrate now that it will meet the NRC's financial qualifications requirements for an ISFSI over the life of the ISFSI. This demonstration requires PG&E to predict the future as best it can, which means that PG&E cannot ignore the inescapable fact that the ongoing bankruptcy creates uncertainty in PG&E's status as a CPUC-regulated integrated utility. If this Board were to permit PG&E to ignore this fact and to exclude evidence regarding it, this Board would be making a mockery of the Commission's concerns for public health and safety as reflected in 10 C.F.R. § 72.22(e).

Finally, any such PG&E argument would be inconsistent with the reasons provided by the Board in adopting this contention. In particular, the Board's exclusion of evidence regarding the financial qualifications of any successor to PG&E as irrelevant does not apply to evidence that the future status of PG&E as an integrated utility regulated by the CPUC is uncertain. Recognition of that uncertainty does not require any discussion of the financial qualifications of the possible successor entity to PG&E.

²⁵ See Reference 1.

scope of this proceeding because it would not address the financial qualifications of the successor to PG&E that would be the ISFSI licensee. However, the Board's Order precludes the admission into evidence PG&E's speculation that the deregulated entity would meet the NRC's financial qualifications requirements for an ISFSI.²⁶

Finally, the Board's direction excluded from the litigable matters under this contention the financial qualifications of any entities that may in the future construct or operate an ISFSI because the financial qualifications of any successor ISFSI-licensee are "irrelevant to and/or outside the scope of this proceeding." Because this is a proceeding on Contention TC-2, PG&E's compliance with the NRC's financial qualifications requirements in 10 C.F.R. § 72.22(e), the financial qualifications of any successor ISFSI-licensee to PG&E cannot be considered in making a determination that the NRC's financial qualifications requirements have been met. Thus, PG&E cannot introduce into evidence any projections about the financial qualifications of a successor ISFSI licensee. And to the extent that the NRC staff has relied on such evidence, it must be concluded that PG&E has failed to provide sufficient relevant evidence, within the scope of this proceeding, to demonstrate that it complies with the NRC's requirements.

C. Legal Arguments In Response to Contention

The evidence in this proceeding shows that PG&E has not carried its burden of demonstrating that it meets the NRC's ISFSI financial qualification requirements in 10 C.F.R. § 72.22(e) for several reasons.

First, PG&E has not taken into account the impacts of its bankruptcy on its access to continued funding as an integrated regulated utility. Despite its initial license application, PG&E now relies exclusively on its status as an integrated regulated utility for the entire ISFSI license period of twenty years. However, PG&E is not just a regulated utility. It is a regulated utility *in bankruptcy*. An impact of this bankruptcy is that there is substantial uncertainty over PG&E's ability to pay for ISFSI-related costs through the rate regulation process until the bankruptcy court determines the corporate structure for PG&E.

²⁶ PG&E's application cross-references its application to transfer the license for DCPD and notes that financial information for the first five years after that license transfer includes an estimate for operating the ISFSI. That information is clearly excluded by the Board's order because that information addresses the financial qualifications of the ISFSI licensee successor to PG&E. That information also would be irrelevant under any circumstances because: (1) it is offered in a proceeding under 10 C.F.R. Part 2, Subpart M, which has very different criteria from those in 10 C.F.R. Part 2, Subpart K for considering the adequacy of financial information; and (2) information offered under Subpart M applies to only five years of plant operation and not the twenty years of ISFSI operation.

Second, there is a high level of uncertainty that PG&E will continue in its current status as an integrated utility regulated by the CPUC. Two reorganization plans are pending before the bankruptcy court. PG&E's plan is based on the premise that to be successful, a reorganization will require the successor ISFSI licensee to no longer be an integrated utility regulated by the CPUC. Even if PG&E's position is incorrect regarding the outcome of the bankruptcy proceeding, there is no doubt that currently the continuing status of PG&E as a utility regulated by the CPUC is uncertain. Under these circumstances, an impact of the bankruptcy is that PG&E cannot demonstrate that it has the continuing ability to construct, operate, and decommission an ISFSI over its licensed life in accordance with 10 C.F.R. § 72.22(e). PG&E cannot demonstrate that it has a continuing ability to construct, operate, and decommission an ISFSI by reason of its access to continued funding as an integrated utility regulated by the CPUC.

Third, PG&E has not, and cannot, carry its burden of demonstrating its continuing ability to construct, operate, and decommission an ISFSI by reason of its status as an integrated utility regulated by the CPUC without relying on evidence which the Board has determined to be either irrelevant or outside the scope of the proceeding. PG&E's initial application for an ISFSI license contains PG&E's projections of five years of income expected by its proposed successor, which would be the ISFSI licensee. The Board has determined that such information is irrelevant and outside this proceeding. Nevertheless, the record appears to show that the NRC staff has had to rely on that information to make its determination that PG&E has met the requirements in 10 C.F.R. § 72.22(e).²⁷ This is consistent with the NRC's need to make a predictive finding about the ISFSI licensee's financial qualifications for at least 20 years. For these reasons, this Board must find as a matter of law, that PG&E has not and cannot demonstrate, by introducing only admissible evidence, that it is financially qualified to construct, operate and decommission an ISFSI.

Construction Costs

10 C.F. R. § 72.22(e)(1) requires an applicant to provide sufficient information to demonstrate that it is financially qualified to construct an ISFSI.

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:

(2) Estimated construction costs.

²⁷ In the alternative, the record shows that the extent to which the NRC relied on irrelevant information provided by PG&E is uncertain and must be resolved at an adjudicatory hearing.

PG&E's statements regarding the source of funds to pay construction costs are a moving target. In the initial license application, PG&E stated that:

Presently, PG&E is an electric utility subject to rates established by the California Public Utilities Commission (CPUC). As long as PG&E remains the licensee (footnote omitted), both capital expenditures and operation and maintenance costs will be covered by revenues derived from electric rates.

.....

Upon implementation (of the reorganization), costs related to the ISFSI will be treated as Diablo Canyon operating expenses. The source of funds to cover these costs will be operating revenues.²⁸

In its supplemental letter of June 7, 2002, to the NRC,²⁹ PG&E's position was:

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 operation costs will be derived from electric rates and from electric operating revenues. The costs for decommissioning will be derived from the DCPD Decommission Fund. [FN2]

FN2: 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 application is amended. Note, however, financial qualifications issues germane to the Plan are being addressed in the DCPD license transfer review.

Thus, PG&E no longer intended to rely on the recovery of ISFSI construction costs from rates while it was still regulated by the CPUC but now recognized that it might need to rely on a combination of rates recovery and operating revenues. PG&E's position changed again in response to an interrogatory from the CEC. The CEC asked:

Interrogatory 1: Please state the basis and explain the rationale for PG&E's position that it is financially qualified pursuant to 10 C.F.R. § 72.22(e) to own, operate, and decommission the proposed independent spent fuel storage installation (ISFSI).

²⁸ License Application, Section 1.5, Financial Qualifications, at 4.

²⁹ Reference 3.

PG&E responded in pertinent part, as follows:

PG&E Response to Interrogatory 1:

Pending the resolution of the bankruptcy proceeding, PG&E expects to pay the costs associated with the ISFSI as normal operating expenses, covered by operating revenues. . . . PG&E believes that the costs associated with the ISFSI represent reasonable and prudent Diablo Canyon operating expenses that are in the public interest and that are consistent with PG&E's obligations under the Nuclear Waste Policy Act.

.....

Regardless of rate recovery and accounting treatment for ISFSI expenses, PG&E has the financial qualifications to pay costs associated with the ISFSI pending resolution of the bankruptcy proceeding.

.....

Following resolution of the bankruptcy proceeding, the financial viability of the emerging companies will have been confirmed by the Bankruptcy Court. . . . The qualifications of PG&E and Electric Generation LLC, post-bankruptcy, are beyond the scope of this proceeding.

This response shows that PG&E's most recent position is that it cannot address its financial qualifications to construct an ISFSI beyond the bankruptcy case. During the bankruptcy case, PG&E claims that it has sufficient operating revenues to fund ISFSI construction even if, contrary to its expectations, those expenses are not recovered from rates. Following the conclusion of bankruptcy case, PG&E asserts that the bankruptcy court will have found the successor ISFSI licensee "financially viable" and acknowledges that details about the financial viability of the successor ISFSI licensee are inadmissible in this proceeding.

For the reasons discussed below, the information provided by PG&E to date does not adequately address the impact of PG&E's bankruptcy on its continuing ability to undertake the new activity of constructing an ISFSI by reason of its access to continued funding as a CPUC-regulated integrated utility.

One impact of PG&E's bankruptcy is that, during the pendency of the bankruptcy, PG&E's continuing ability to fund construction by reason of access to continued funding as a CPUC-regulated integrated utility is highly uncertain. Not only has PG&E apparently recognized that the pending bankruptcy requires a change in strategy from relying exclusively on rate recovery to a mixture of rate recovery and self-funding from operating revenues but, also, expert testimony from the CPUC's expert shows that the

recovery of costs from rates is uncertain due to the bankruptcy.³⁰ This uncertainty is far different from the theoretical possibility that an expenditure may be excluded from rate recovery as imprudent. Here, the uncertainty is created by PG&E's own actions and is not remote and speculative. Thus, an impact of the bankruptcy is an increased uncertainty in the extent to which PG&E must rely on operating revenues other than rates to fund construction costs during the bankruptcy period.³¹

A second impact of the bankruptcy is that PG&E cannot demonstrate its continuing ability, post-bankruptcy, to fund construction by reason of its access to continued funding as a CPUC-regulated integrated utility. Construction is expected to proceed far beyond the conclusion of the bankruptcy case. Because PG&E insists that it be treated as the applicant, PG&E must demonstrate that it has the continuing ability to fund construction post-bankruptcy by reason of access to continued funding as a CPUC-regulated integrated utility. PG&E cannot and has not made this demonstration because PG&E does not and cannot know that it will be a regulated entity post-bankruptcy.³²

³⁰ The CPUC's expert has testified that because PG&E is in bankruptcy and because it expects the ISFSI-licensee successor to PG&E not to be regulated by the CPUC, there is a substantial likelihood that the CPUC will not permit rate recovery to be used to defray construction expenditures. He said:

What we're trying to say, is because of the pendency of the bankruptcy and the uncertainty of who will be owning Diablo Canyon and the decommissioning trust funds, we don't think it's appropriate for ratepayer funds now or in the future to be used for something that ultimately won't be for ratepayers' direct benefit.

It would be really GEN's responsibility in the long run. And not knowing which [bankruptcy reorganization] plan is going to be confirmed, raises the question for us.

Essentially, we don't want to be fixing someone else's car that they are about to buy. Burns Deposition at 36:18 – 37:3.

See, also, Burns Testimony at Par. 12.

³¹ Burns Testimony at Par. 13. It should also be noted that PG&E has refused to provide a detailed showing that it has sufficient operating revenues to demonstrate reasonable assurance that it can fund construction costs but has relied on broad generalizations that do not permit a detailed analysis of the impact of the bankruptcy on the availability of operating revenues to pay for construction.

³² PG&E's attempt to indirectly address the financial qualification of any successor is of no avail for two reasons: (1) confirmation of the financial viability of PG&E's successor by the Bankruptcy Court will not satisfy NRC requirements because the Bankruptcy Court's criteria are different from the NRC's ISFSI financial qualification criteria in 10

Thus, an impact of the bankruptcy is that PG&E cannot demonstrate any continuing ability to fund construction by virtue of access to continued funding as a CPUC-regulated integrated utility.

Finally, a third impact of bankruptcy is that PG&E cannot carry its burden of demonstrating its continuing ability to construct an ISFSI by reason of its status as an integrated utility regulated by CPUC without relying on evidence which the Board has determined to be either irrelevant or outside the scope of the proceeding.³³ In determining whether PG&E had complied with NRC requirements, the NRC staff could not rely solely on PG&E's claim of current regulation by the CPUC. Testimony by the NRC staff member responsible for evaluating PG&E's claim of financial qualification, Mr. Dusaniwskyj, shows that he relied not only on PG&E's current status as a regulated utility but also on the totality of the submittal provided by PG&E, including the cross-references to the financial data in PG&E's license transfer application submitted to the NRC as a necessary element of implementing PG&E's reorganization plan.³⁴ That data addresses the details of the financial qualifications of the PG&E's successor. Thus, an impact of PG&E's bankruptcy is that PG&E cannot provide adequate information that enables the NRC staff to make a compliance determination unless that information includes material that this Board has ruled irrelevant to this proceeding.

C.F.R. §72.22(e); and (2) this Board has precluded the admission of any evidence regarding the finances of any PG&E successor post-bankruptcy.

³³ Burns Testimony at Par. 14.

³⁴ Mr. Dusaniwskyj responded as follows to a question about how the NRC staff determined that it has reasonable assurance that PG&E will have the necessary funds to construct and operate the ISFSI, in light of the ongoing bankruptcy case and the uncertain future:

The way we resolve that, since recognizing that PG&E is in a bankruptcy proceeding, that they present to use what they believe to be their bankruptcy plan to get out of bankruptcy. If - - I believe that is the correct the term, that if all those things were to fall into place, and then again, we're talking about future event. It again, was deemed reasonable to assume that if an entity wants to build some kind of ISFSI, that any cost derived for that would come from revenues.

Dusaniwskyj Deposition at 33:7 – 33:15. See, also, Dusaniwskyj Deposition at 83:5 – 83: 25.

This and other responses in the record show that the NRC staff improperly considered details of the financial qualifications of the post-bankruptcy entity that PG&E has proposed will be the ISFSI-licensee. This Board has ruled that such information is irrelevant to this proceeding on financial qualification.

For all these reasons, PG&E's demonstration of financial qualification must fail as a matter of law.

Operating Costs

10 C.F. R. § 72.22(e)(2) requires an applicant to provide sufficient information to demonstrate that it is financially qualified to operate an ISFSI over its planned life.

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:

(2) Estimated operating costs over the planned life of the ISFSI[.]

PG&E has addressed operating costs in the same way it has addressed construction costs. Although operating costs may be incurred for a longer period than are construction costs, they do not present substantially different issues as long as the periods of construction and operation extend beyond the conclusion of the bankruptcy case, which they do. Accordingly, for the reasons discussed above regarding construction, the information provided by PG&E does not adequately address the impact of PG&E's bankruptcy on its continuing ability to undertake the new activity of operating an ISFSI by reason of its access to continued funding as an integrated CPUC-regulated utility. When those bankruptcy-related impacts are taken into account, they preclude PG&E from demonstrating its continuing ability to undertake the new activity of operating an ISFSI by reason of its access to continued funding as an integrated CPUC-regulated utility because these impacts prevent PG&E from showing that there is reasonable assurance it can obtain the necessary funds to cover the estimated operating costs over the planned operating life of the ISFSI.³⁵

Decommissioning Costs

10 C.F.R. § 72.22(e)(3) requires PG&E to demonstrate that it will have the necessary funds available to cover the estimated decommissioning costs of an ISFSI.

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:

³⁵ Burns Testimony at Par. 15.

(3) Estimated decommissioning costs, and the necessary financial arrangements to provide reasonable assurance prior to licensing that decommissioning will be carried out after the removal of spent fuel and/or high-level radioactive waste from storage.

PG&E addressed this requirement in its application, as follows:

PG&E has established an external sinking fund account for decommissioning DCPD Units 1 and 2. This account contains monies for decommissioning the Diablo Canyon ISFSI. This financial assurance mechanism is prepared in conformance with the guidance of NRC Regulatory Guide 3.66 (Reference 3) and complies with the requirements of 10 CFR72.3(c).

The status of this account is provided in the PG&E March 20001 Decommissioning Funding Report to the NRC, as required by 10 CFR 50.75(f)(1). As shown therein, and based upon current guidelines and assumptions, PG&E is confident that this trust fund account will contain sufficient funds to accommodate the decommissioning of the Diablo Canyon ISFSI.³⁶

PG&E's cost estimate for decommissioning Diablo Canyon claims to include costs for decommissioning the ISFSI despite the fact that PG&E is not yet an ISFSI licensee. Nevertheless, PG&E has stated that the trust fund for the decommissioning of the plant will contain sufficient funds to "accommodate" decommissioning of the ISFSI. This PG&E statement is based on the assumptions that PG&E will continue to fund the trust fund at specified rates and that the amount of monies so accumulated will exceed the amount needed to meet the NRC's requirements for decommissioning Diablo Canyon. PG&E did not address the extent to which these monies also would be needed to address other decommissioning requirements.³⁷

³⁶ DIL-01-002, Attachment F, Diablo Canyon ISFSI Preliminary Decommissioning Plan, Chapter 5.

³⁷ Deposition of Mr. Dusaniwskyj at page 22:12-21:

We also recognize that the licensee has other obligations to the EPA, the state public utility commission, above and beyond that required by the NRC.

We also recognize that many licensees, PG&E, as I recall, as one of them, winds up putting in a tremendous amount more than it required by NRC requirements for decommissioning.

That PG&E relies on regulated rates to recover its payments to the decommissioning trust fund for Diablo Canyon was stated explicitly in PG&E's supplemental filing:

PG&E has established an external sinking trust fund for decommissioning DCPD Units 1 and 2. PG&E is a public utility that recovers anticipated decommissioning costs through rates established by the California Public Utilities Commission. As discussed in the Preliminary Decommissioning Funding Report to the NRC, the DCPD decommissioning trust contains monies for the decommissioning the Diablo Canyon ISFSI based on the detailed decommissioning cost estimate for the site.³⁸

The information provided by PG&E does not adequately address the impact of PG&E's bankruptcy on its continuing ability to access funding necessary to undertake the new activity of decommissioning an ISFSI. When the bankruptcy-related impacts are taken into account, it is clear that PG&E cannot demonstrate a continuing ability to access adequate funds necessary to undertake the new activity of decommissioning an ISFSI. PG&E simply cannot provide reasonable assurance that, prior to licensing, the necessary financial arrangements have been made to decommission the ISFSI after the end of its useful life. The following impacts of the bankruptcy on the decommissioning fund clearly demonstrate the funding inadequacies that PG&E has failed to address and/or remedy.

First, PG&E's application would lead one to believe that PG&E will maintain the decommissioning funding levels authorized by the CPUC on a forward and ongoing basis. History suggests that this may not be the case, as PG&E has already failed to make a \$10 million payment, which had been authorized by the CPUC and collected in rates, to its decommissioning trust fund.³⁹ PG&E cited the need to implement "cash conservation" measures in support of its failure to make a \$10 million payment that was due into the Fund in 2000. PG&E did not report this missed payment in its ISFSI license application. Although PG&E's memorandum stated that some of those missing funds would later be credited to the Fund, PG&E has not provided any evidence that its bankruptcy will not cause it to miss additional payments.⁴⁰

As far as it is concerned, it can be all in one fund. But as far as the accounting is kept separate, we accept that.

³⁸ DIL-02-008, PG&E Response (e).

³⁹ PG&E Memorandum of October 18, 2001 from Revenue Requirements (Reference 4). PG&E's expert on financial qualifications was not aware of this missed payment and, thus, it was not considered by him. Campbell Deposition at 9:13-22.

⁴⁰ Burns Testimony at Par. 16.

Under PG&E's Plan of Reorganization PG&E would have been removed from CPUC jurisdiction and ratemaking authority long before decommissioning of the ISFSI would be scheduled. PG&E has even asserted in the bankruptcy case that it cannot successfully exit bankruptcy if it continues to be regulated by the CPUC. Under these circumstances, PG&E's statement "PG&E is a public utility that recovers anticipated decommissioning costs through rates established by the California Public Utilities Commission" will cease to be true long before the decommissioning of the proposed ISFSI occurs. Under these circumstances, PG&E's reliance on CPUC authorized rates to fund the decommissioning of the ISFSI is misplaced. CPUC rates cannot provide the basis for a finding that PG&E has provided reasonable assurance that the necessary financial arrangements have been made for decommissioning that is to occur more than twenty years from now.

Another impact of PG&E's bankruptcy on its continuing ability to undertake the decommissioning of an ISFSI is that if PG&E is reorganized as it has proposed, the financial analysis relied on by PG&E may no longer be valid. The NRC has reminded PG&E that monies collected for decommissioning DCPD cannot be used to decommission the ISFSI.⁴¹ PG&E responded by telling the NRC that PG&E would rely on other monies in the Fund. PG&E's reliance on other monies in the fund would necessarily include use of funds that have been authorized by the CPUC and collected from California ratepayers for other uses. PG&E would have to fund the Fund from operating revenues and has been precluded by this Board from attempting to demonstrate that, under those conditions, funds can continue to be collected at a high enough rate to decommission both the plant and the ISFSI.⁴² PG&E has not addressed this impact of bankruptcy and, so, has not provided sufficient information to demonstrate compliance with the decommissioning requirement for the ISFSI.

There is also a live issue in the bankruptcy case as to whether PG&E can in fact transfer its beneficial interest in the Decommissioning Trust through the bankruptcy court. The CPUC and SLOC contend that PG&E cannot, because the terms of the trust agreement provide that transfer of the beneficial interest is subject to the exclusive approval of the CPUC. The resolution of this issue impacts PG&E's showing of financial qualifications to decommission an ISFSI. The CPUC, SLOC and other named Counties in the bankruptcy case have filed a Motion for Summary Judgment in the Bankruptcy Court, that will, if well taken, preclude the transfer of any interest in the trust without prior approval of the CPUC. Where the legality of the proposed transfer of funds is at

⁴¹ The NRC staff did caution PG&E that decommissioning costs for the ISFSI cannot come from decommissioning trust funds dedicated toward the eventual decontamination of Diablo Canyon Power Plant Units 1 & 2. PG&E then stated that the decommissioning trust funds will come from other decommissioning trust funds. NRC response to SLOC interrogatory Number 1.

⁴² Burns Testimony at Par. 17.

issue in the Bankruptcy Court, PG&E cannot provide reasonable assurance in this proceeding that the funds in question will be available to decommission the proposed ISFSI.⁴³

Finally, PG&E cannot carry its burden of demonstrating its continuing ability to decommission an ISFSI by reason of its status as a utility regulated by CPUC without relying on evidence which the Board has determined to be either irrelevant or outside the scope of the proceeding. In determining whether PG&E had complied with NRC requirements, the NRC staff could not rely solely on PG&E's claim of current regulation by the CPUC. Testimony by the NRC staff member responsible for evaluating PG&E's claim of financial qualification, Mr. Dusaniwskyj, shows that he relied not only on PG&E's current status as a regulated utility but also on the totality of the submittal provided by PG&E, including the cross-references to the financial data in PG&E's license transfer application submitted to the NRC as a necessary element of implementing PG&E's reorganization plan. That data addresses the details of the financial qualifications of PG&E's successor. Thus, an impact of PG&E's bankruptcy is that PG&E cannot provide adequate information that enables the NRC staff to make a compliance determination unless that information includes material that this Board has ruled irrelevant to this proceeding.

For all these reasons, PG&E's demonstration of financial qualification must fail as a matter of law and the Board should grant summary judgment finding that PG&E cannot demonstrate compliance with 10 C.F.R. §72.22(e) unless the uncertainties about its status are resolved sufficiently to enable predictive findings to be made over the licensed life of an ISFSI.

⁴³ See Burns Testimony at Par. 18.

VI. ALTERNATIVE DEMONSTRATION OF NEED FOR HEARING

Should the Board determine that summary judgment should not be granted as a matter of law until further hearings have been held on significant issues, the evidence shows that there are genuine and substantial disputes of fact regarding the impacts of PG&E's bankruptcy on its access to continued ISFSI funding as a regulated utility. The record also shows that those disputes can be resolved with sufficient accuracy only by the introduction of evidence in an adjudicatory hearing because only the Board has the authority to require the witnesses for PG&E and the NRC to testify fully. Finally, the decision of the Commission is likely to depend on the resolution of that dispute because each issue addresses PG&E's ability to demonstrate that it can continue to obtain funding as a CPUC-regulated utility to undertake the construction, operation, and decommissioning of an ISFSI, as required by 10 C.F.R. § 72.22(e), despite the impacts of bankruptcy. Accordingly, a hearing should be held on each of those issues.

Construction

10 C.F.R. § 72.22(e)(1) requires PG&E to demonstrate that it will have the necessary funds available to cover the estimated construction costs of an ISFSI. For the following reasons, there are genuine and substantial disputes of fact regarding this issue that can only be resolved at an adjudicatory hearing. Moreover, the decision of the Commission is likely to depend on the resolution of these disputes of fact because they address PG&E's ability to demonstrate that it can continue to obtain funding as a regulated utility to undertake the construction of an ISFSI, as required by 10 C.F.R. § 72.22(e), despite the impacts of bankruptcy.

PG&E has made general statements about its expected revenues as a regulated utility but has not shown in detail that revenues will sufficiently exceed other costs to provide sufficient funds to pay for construction of the ISFSI. To the extent that PG&E presents more detailed information in its summary regarding its continuing ability to fund construction as a CPUC-regulated utility, that information will not have been subjected to inspection, evaluation and cross-examination by the GP's experts and, thus, will provide an uncertain basis for PG&E's claims. Moreover, in the absence of prior access to that information, GP's experts cannot have been expected to raise factual issues regarding PG&E's claims. Thus, for the NRC's ISFSI licensing process not to constitute a blatant denial of due process, the bases for PG&E's claims that it can continue to fund construction must be subjected to a hearing.

Another factual issue that can only be resolved at an adjudicatory hearing is the extent to which the NRC staff found it necessary to consider inadmissible information provided by PG&E's to support a compliance determination.⁴⁴ As discussed above,

⁴⁴ Mr. Dusaniwskyj testified that he read PG&E's entire application and found the information in it to be reasonable. Dusaniwskyj deposition at 20:18-21. Some of that information addresses the financial qualifications of PG&E's successor ISFSI licensee under PG&E's reorganization plan. Mr. Dusaniwskyj also stated that he considered that

testimony by the NRC staff expert, Mr. Dusaniwskyj appears to show that the NRC staff found it necessary to rely on PG&E's inadmissible information regarding the financial qualifications of the ISFSI licensee successor to PG&E. Nevertheless, if the Board should find that the extent of the NRC staff's necessary reliance on inadmissible evidence is uncertain, and, thus, the extent to which PG&E's admissible evidence is adequate to support a compliance determination is uncertain, the Board must hold a hearing on this issue. A determination of this factual uncertainty is necessary in order for the Board to determine whether PG&E's admissible evidence is sufficient to support a compliance determination. If the record shows that the NRC staff found it necessary to rely on inadmissible information provided by PG&E in order to make a compliance finding, such a determination would be dispositive of the Board's determination of this matter.

This issue cannot be resolved without a hearing for the following reasons. Mr. Dusaniwskyj's testimony shows that no written analysis was prepared by the NRC staff to analyze PG&E's claim of regulatory compliance.⁴⁵ A review of Mr. Dusaniwskyj's deposition demonstrates a marked unwillingness to provide specific answers to questions regarding the bases for the NRC staff's conclusions with respect to PG&E's financial qualifications to construct an ISFSI. Thus, the record does not provide an adequate basis which would enable this Board to determine the extent to which the NRC staff, by having to rely on inadmissible information proffered by PG&E, found PG&E's admissible evidence inadequate for determining compliance. Only an adjudicatory hearing can resolve this matter because it is only at a hearing that the Board can compel the NRC staff's witness to testify in sufficient detail to resolve this uncertainty.

Moreover, the decision of the Commission is likely to depend on the resolution of this factual matter because it addresses a fundamental principle established by the Board for this hearing. Information about the financial qualification of any entity that may in the future construct or operate the ISFSI is irrelevant and/or outside the scope of this proceeding. Accordingly, any determination that PG&E's information does not provide adequate evidence to support a compliance determination unless irrelevant information is

the "application basically stated that this is what they perceived to be a future event, to which they would be coming out of bankruptcy. And from there, would be conducting business with which to derive revenues to pay for expenses." Dusaniwskyj deposition at 34:15-19. See, also, Dusaniwskyj deposition at 37:11-14, 38:8-10 and 39:20-23. We also note that Mr. Dusaniwskyj inconsistently stated that he made a reasonable assurance finding that PG&E will have ISFSI operating funds for twenty years based on its status as a regulated utility and the staff's need to make a new financial qualification finding if PG&E's status as a regulated utility were to change. Compare Dusaniwskyj deposition 46:18-49:3 with 51:21-53:8. Thus, the extent to which Mr. Dusaniwskyj found it necessary to rely on inadmissible information is not clear from the record.

⁴⁵ Deposition of Mr. Dusaniwskyj, pages 15-16:

Q. By Mr. Trubatch: So you have told us that there's no written record of how your reach a decision that 72.22(e) is satisfied.

A. [By Mr. Dusaniwskyj] That is correct.

considered necessarily will cause the Commission to determine that PG&E cannot establish compliance with the ISFSI requirements in 10 C.F.R. § 72.22(e) because an impact of bankruptcy is the need to consider such information to make a compliance determination.

Operation

10 C.F.R. § 72.22(e)(2) requires PG&E to demonstrate that it will have the necessary funds available to cover the estimated operating costs of an ISFSI. PG&E's claim that it has demonstrated compliance with this requirement relies on the same information that it relied on to claim compliance with the requirements on construction costs. Therefore, for the reasons discussed above regarding the need for a hearing on the factual issues related to PG&E's claims of compliance with the construction cost requirement, a hearing also is required on the same issues as they relate to PG&E's claim of compliance with operating cost requirements.

Decommissioning

10 C.F.R. § 72.22(e)(3) requires PG&E to demonstrate that it will have the necessary funds available to cover the estimated decommissioning costs of an ISFSI. For the following reasons, there are genuine and substantial disputes of fact regarding this issue that can only be resolved at an adjudicatory hearing. Moreover, the decision of the Commission is likely to depend on the resolution of these disputes of fact because they address PG&E's ability to demonstrate that it can continue to obtain funding as a regulated utility to undertake the decommissioning of an ISFSI, as required by 10 C.F.R. § 72.22(e), despite the impacts of bankruptcy.

PG&E claims that the Fund is collecting monies sufficient to pay for the decommissioning of DCPD and the ISFSI. However, the rate at which the ISFSI licensee would continue to contribute to the Fund if it were no longer regulated by the CPUC is not clear but is critical. This issue cannot be resolved without a hearing because it will require a probing of expert opinions by competing experts and the Board does not have sufficient expertise in this area to resolve differences of expert opinion on this matter. Moreover, the decision of the Commission is likely to depend on the resolution of this factual matter because it addresses a critical factual issue regarding the availability of decommissioning funds for the ISFSI. Accordingly, should the Board fail to grant summary judgment on SLOMFP Contention TC-2 as a matter of law, a hearing on this issue is required.

VII. CONCLUSION

For the foregoing reasons, this Board must find, as a matter of law, that the impact of PG&E's bankruptcy on its continuing ability to undertake the new activity of constructing, operating, and decommissioning an ISFSI by reason of its access to continued funding as a CPUC-regulated integrated utility, is that the bankruptcy creates a high level of uncertainty that precludes PG&E from demonstrating reasonable assurance that it can satisfy the NRC's financial qualifications requirements in 10 C.F.R. § 72.22(e). In the alternative, the Board must find that the NRC staff's apparent need to rely on information proffered by PG&E, but ruled inadmissible by this Board, implies that the admissible evidence proffered by PG&E is inadequate to an unknown degree to support a finding of compliance with 10 C.F.R. § 72.22(e). An adjudicatory hearing on this factual issue is necessary to enable the Board to compel the testimony of the NRC staff.

The undisputed evidence clearly shows that PG&E's ongoing bankruptcy creates substantial uncertainty, over the periods of time that must be considered for constructing, operating and decommissioning the proposed ISFSI, in PG&E's continuing ability to fund these activities by reason of its status as a CPUC-regulated utility. Regarding construction, the CPUC has testified that the ongoing bankruptcy and possible transfer of an ISFSI to an unregulated successor to PG&E raises issues as to whether these construction costs may be included in the rate base. Regarding operation, because PG&E has insisted that it will no longer be a CPUC-regulated integrated utility over the ISFSI's operating life, the NRC staff cannot make the predictive finding that PG&E will be financially qualified to operate the ISFSI over that operating life by reason of its access to continued funding as a CPUC-regulated integrated utility. Finally, regarding decommissioning, SLOC and the CPUC have taken the position in the bankruptcy case that PG&E's interest in the Decommissioning Trust Fund is not part of the bankruptcy estate. As a result, if the bankruptcy court agrees with the CPUC and SLOC, the bankruptcy court lacks jurisdiction to order transfer of such interest and any transfers are subject to CPUC regulation. Therefore, because the bankruptcy creates uncertainty about whether PG&E will have access to continued funding as a CPUC-regulated integrated utility, the bankruptcy precludes the NRC from making the predictive finding, before licensing, that PG&E will have access to decommissioning funding.

Respectfully submitted,


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REFERENCES

- Reference 1: Pacific Gas & Electric Company Plan of Reorganization, dated September 2001, filed in *In re Pacific Gas and Electric Co.*, Case No. 01-30923 DM (Bankr. N.D. Cal. filed April 6, 2001).
- Reference 2: Diablo Canyon Power Plant, Independent Spent Fuel Storage Installation License Application, dated December 21, 2001.
- Reference 3: PG&E Letter DIL-02-008, Supplemental General and Financial Information, dated June 7, 2002.
- Reference 4: PG&E Memorandum -- Kent M. Harvey and Dinyar B. Mistry, Subject: 2001 Nuclear Decommissioning Accruals and Cash Contributions, dated October 18, 2001.

SUMMARY OF FACTS, DATA, AND ARGUMENTS ON WHICH THE
GOVERNMENTAL PARTICIPANTS INTEND TO RELY AT THE
SUBPART K ORAL ARGUMENT

APPENDIX:

SWORN TESTIMONY OF TRUMAN L. BURNS

What is your name and business address?

1-My name is Truman L. Burns. My business address is 505 Van Ness Avenue, San Francisco; California, 94102.

What is your background and qualifications supporting the testimony you are offering in this case?

2-I am employed by the California Public Utilities Commission (CPUC) in its Office of Ratepayer Advocates (ORA) as a Public Utilities Regulatory Analyst V.

3-I received a Bachelor of Arts Degree in Political Science and English and a Master of Arts Degree in Political Science, State Politics and Policy Specialization, from the University of California, Davis. I received a *Juris Doctorate* Degree from the University of San Francisco, and am a member of the California Bar.

4-I joined the CPUC's Special Economics Projects Branch in 1986. During my employment with the CPUC, I have performed various tasks, and have spent most of my time on electric utility regulation. I have testified before the CPUC regarding Pacific Gas & Electric Company's (PG&E) Diablo Canyon Nuclear Power Plant (DCPP) (on the topics of nuclear decommissioning trust funds, target capacity factor, long-term operating costs, utility retained generation capital and operating costs) and Southern California Edison's San Onofre Units 2 & 3 (on the topics of utility retained generation capital and operating costs) and San Onofre Unit 1 nuclear power plant (on the topics of environmental costs and rate case recovery).

What is the purpose of your testimony?

5-I have been asked to provide expert testimony regarding Contention TC-2 in this proceeding. That contention addresses PG&E's demonstration of compliance with the Nuclear Regulatory Commission's ("NRC") financial qualifications requirements for independent spent fuel storage installation ("ISFSI"). It is my understanding that those NRC requirements require PG&E to demonstrate that it either has or will have sufficient funds to construct, operate and decommission an ISFSI over its entire licensed life (in this case, 20 years).

6-In my testimony I will address the impact of PG&E's bankruptcy on its ability, as a CPUC-regulated integrated utility, to demonstrate that it will have sufficient funds available from rates and operating revenues, when needed, to construct, operate and decommission an ISFSI. I will address each of the three activities separately.

What documents have you reviewed in advance of preparing your testimony?

7-In preparing to give this testimony, I have reviewed the financial qualification portion of PG&E's ISFSI license application to the NRC, the interrogatories and answers by the interested government participants and parties to this proceeding, and the transcripts of the depositions of the NRC's expert, Mr. Michael Dusaniwskyj, and PG&E's expert, Mr. Walter Campbell.

What is the current method for PG&E's recovery of the costs of constructing, operating, and decommissioning as ISFSI, whether those costs are characterized as capital investment or operating expenses?

8-Currently, PG&E is an integrated utility regulated by the CPUC. I understand that PG&E has requested the NRC to rely on PG&E's current status as a utility regulated by the CPUC when determining whether PG&E is financially qualified to construct, operate and decommission an ISFSI. I also understand that PG&E expects to pay for constructing and operating an ISFSI from monies either recovered from rates or from operating revenues. I further understand that PG&E does not rely on having the funds on hand now but on its ability to demonstrate that it will have sufficient funds available to undertake these activities when required. I also understand that PG&E will not seek to fund any of these activities by borrowing money in the credit markets.

9-I also understand that PG&E expects to pay for the costs of decommissioning an ISFSI from funds that are currently accumulating in the Diablo Canyon Nuclear Facilities Decommissioning Master Trust ("Fund") for the DCCP. In this regard, I understand that although the Fund is not collecting monies specifically for decommissioning an ISFSI, PG&E believes that the amount of monies in the Fund, if they continue to be collected at the current rate, will exceed the amount of monies needed to decommission DCCP in accordance with the requirements established by the NRC and, therefore, will contain sufficient funds to also decommission an ISFSI.

How will PG&E's current status affect its ability to construct, operate or decommission an ISFSI?

10-I understand that PG&E is in bankruptcy and that both it and the CPUC have each proposed a reorganization plan to the Federal Bankruptcy Court. I also understand that both plans have been modified since they were proposed initially. I understand that these plans are the subject of ongoing litigation in the Federal Bankruptcy Court.

11-I understand that under PG&E's proposed reorganization plan, the DCPD would be the principal asset of a new company that would not be regulated by the CPUC. I also understand that under the reorganization plan proposed by CPUC, the CPUC would continue to regulate the integrated utility that owns DCPD.

How will PG&E's bankruptcy impact its continuing ability, as a CPUC-regulated integrated utility, to undertake the continuing activity of constructing an ISFSI?

12-I understand that PG&E has requested that construction costs through 2005 be recovered from rates and that PG&E contends that these costs have been prudently incurred. In my expert view, an impact of the bankruptcy is that it creates substantial uncertainty regarding the CPUC's determination of whether construction costs for an ISFSI have been incurred prudently and may be recovered from rates. This uncertainty stems from the possibility that a result of the bankruptcy could be the transfer of ISFSI ownership to an entity no longer regulated by the CPUC. Under these conditions, the CPUC could determine that monies collected from ratepayers should not be applied to a facility that may no longer be used for the ratepayers' direct benefit. Thus, I conclude that an impact of PG&E's bankruptcy is substantial uncertainty in PG&E's ability to demonstrate that it can fund construction of the ISFSI with monies recovered from rates.

13-I also understand that PG&E, in the alternative, claims that it can fund ISFSI construction from a combination of rate recovery and operating revenues. None of the material provided by PG&E so far indicates what proportion of ISFSI costs PG&E expects would be recovered from rates and what portion it would expect to recover from operating revenues. Therefore, another impact of the bankruptcy is that there is uncertainty in PG&E's ability to demonstrate that it can fund construction of an ISFSI with a combination of monies from rates and operating revenues because there is uncertainty over whether any monies will be recovered from rates and in the proportion of ISFSI costs which PG&E expected to be paid for by monies recovered from rates. Thus, I conclude that an impact of PG&E's bankruptcy is substantial uncertainty in PG&E's ability to demonstrate that it can fund construction of the ISFSI with a combination of monies recovered from rates and operating revenues.

14-Another impact of bankruptcy is that PG&E expects the ISFSI licensee to no longer be regulated by the CPUC before the end of the construction period. This means that over the construction period, PG&E cannot rely on monies recovered from rates to demonstrate that it will have sufficient funds to construct an ISFSI. After the ISFSI is transferred to the non-CPUC regulated licensee, it will rely on operating revenues to fund ISFSI construction. In the absence of details about the structure of the ISFSI licensee and its revenues and expenditures, it is impossible for any qualified analyst to determine that the ISFSI licensee will have sufficient funds to construct an ISFSI. Thus, I conclude that an impact of PG&E's bankruptcy is substantial uncertainty in PG&E's ability to demonstrate that it can fund construction of the ISFSI over the construction period with monies recovered from operating revenues.

How will PG&E's bankruptcy impact its continuing ability, as a CPUC-regulated integrated utility, to undertake the continuing activity of operating an ISFSI?

15-Regarding ISFSI operation, an impact of bankruptcy is that PG&E expects the ISFSI licensee to no longer be regulated by the CPUC before the beginning of the operation period. This means that over the operation period, PG&E cannot rely on monies recovered from rates to demonstrate that it will have sufficient funds to operate an ISFSI. After the ISFSI license is transferred to the non-CPUC regulated licensee, it can rely on only operating revenues to fund ISFSI operation. In the absence of details about the structure of the ISFSI licensee and its revenues and expenditures, it is impossible for any qualified analyst to determine that the ISFSI licensee will have sufficient funds to operate an ISFSI. Thus, I conclude that an impact of PG&E's bankruptcy is substantial uncertainty in PG&E's ability to demonstrate that it can fund operation of the ISFSI from operating revenues.

How will PG&E's bankruptcy impact its continuing ability, as a CPUC-regulated integrated utility, to undertake the continuing activity of decommissioning an ISFSI?

16-Regarding ISFSI decommissioning, PG&E believes that if the Fund continues to accumulate monies at the current rate, that it will contain sufficient monies to both meet the NRC's decommissioning requirements and to decommission an ISFSI. I understand that PG&E did not make a \$10 million payment to the Fund. The continuing bankruptcy could cause PG&E not to make further payments to the Fund, so that there would be substantial doubt about PG&E's ability to demonstrate that the Fund would contain sufficient monies to both meet the NRC's decommissioning requirements, California's decommissioning requirements, and to decommission an ISFSI. Thus, I conclude that an impact of PG&E's bankruptcy is that there is uncertainty in PG&E's ability to demonstrate that it can adequately fund the decommissioning trust fund for an ISFSI.

17-Another impact of the bankruptcy on ISFSI decommissioning is that PG&E would no longer be able to rely on its status as a utility regulated by the CPUC, if PG&E's proposed bankruptcy plan were to be approved by the bankruptcy court. This means that after the Fund is transferred to the new ISFSI licensee, the amount of monies required to be collected for the Fund would no longer be regulated by the CPUC. However, the information I have reviewed does not address the process that would be established to show that the monies collected by the Fund would be sufficient to meet the NRC's decommissioning requirements, California's decommissioning requirements, and to decommission an ISFSI. Thus, I conclude that an impact of PG&E's bankruptcy is that there is uncertainty in PG&E's ability to demonstrate that it can adequately fund the decommissioning trust fund for an ISFSI.

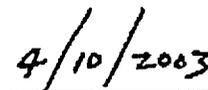
18-A final impact of the bankruptcy on decommissioning is that under PG&E's reorganization plan the Fund will be required to be transferred to the ISFSI licensee. I also understand that, by the terms of the trust agreement, the CPUC has exclusive authority to approve any transfer of the Fund, and that it is unlikely that the CPUC would

transfer the fund to an ISFSI licensee that is not regulated by the CPUC. Thus, I conclude that an impact of PG&E's bankruptcy is that there is uncertainty in PG&E's ability to demonstrate that it will have decommissioning funds available for an ISFSI.

This concludes my prefiled testimony in this matter.

Original signed and sworn to by:


Truman L. Burns


Date

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 the Governmental Participants Intend to 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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