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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	
)	Docket No. 72-26-ISFSI
PACIFIC GAS & ELECTRIC CO.)	
)	ASLBP No. 02-801-01-ISFSI
(Diablo Canyon Power Plant Independent)	
Spent Fuel Storage Installation))	
_____)	

**CALIFORNIA ENERGY COMMISSION'S RESPONSE TO PACIFIC GAS &
ELECTRIC COMPANY AND NUCLEAR REGULATORY COMMISSION STAFF**

Introduction and Summary

The California Energy Commission (CEC) responds to the Summaries submitted by Pacific Gas & Electric Company (PG&E) and the Nuclear Regulatory Commission staff (NRC staff). The CEC believes that both parties fail to recognize that the only way the Board can find that PG&E is financially qualified to obtain a license for the ISFSI is by conditioning the license on PG&E's remaining a CPUC-regulated utility with access to revenues recovered through utility rates.

Response to Nuclear Regulatory Commission Staff Summary

The CEC fully understands that the NRC does not regulate commerce, and that the purpose of 10 C.F.R. § 72.22(e) is to address safety issues.¹ The CEC's concerned that the NRC staff's position that PG&E has demonstrated its

¹ See NRC Staff Brief and Summary of Relevant Facts, Data and Argument Upon Which the Staff Proposes to Rely at Oral Argument on Technical Contention 2, dated April 11, 2003.

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financial qualifications to construct, operate, maintain, and decommission the facility in a manner that assures public safety is based on a faulty premise.²

NRC staff state that "... as long as PG&E remains the applicant, ISFSI costs will be recovered by revenues derived from electric rates."³ However, NRC staff, have previously stated that in making their determination on financial qualifications, they considered only one potential outcome of the current PG&E bankruptcy litigation: adoption of the PG&E-proposed reorganization plan. But that plan, if adopted, would *divest* PG&E's Diablo Canyon Power Plant (DCPP) assets, including the proposed ISFSI. If that were to occur, PG&E would no longer be the ISFSI licensee after a decision is reached in the pending bankruptcy proceeding, and a non-regulated entity would be responsible for ISFSI construction and operation. There is no evidence in the record that a non-regulated entity would be financially qualified. Thus, the NRC staff has based its determination that PG&E is financially qualified on the one potential outcome of the bankruptcy proceeding that would clearly *not* allow for ISFSI costs to be recovered by revenues derived from electric rates, and that would guarantee that the ISFSI would be constructed and operated by an entity other than the license applicant in the instant proceeding.

In order to issue a license in this proceeding, the license must be issued to the actual applicant, PG&E, with assurances that it will remain in the hands of the entity requesting the license and that the licensee is financially qualified. The CEC believes that in order for a license to be issued it must be contingent on a plan of reorganization that maintains the facility under the control of PG&E as a CPUC-regulated entity.

² See Summary of Facts, Data and Arguments on Which the California Energy Commission Intends to Rely at the Subpart K Oral Argument, dated April 11, 2003.

³ See *supra* 1 at 9.

Response to PG&E's Summary

PG&E repeatedly asserts that it meets the financial qualification requirements of 10 C.F.R. § 72.22(e), based on its access to electric rates as a CPUC-regulated utility. Yet, PG&E also argues that it will be financially qualified irrespective of the outcome in the pending bankruptcy proceeding.⁴ Indeed, PG&E states that its viability as a financially solvent entity, and proposed reorganization plans being considered in the bankruptcy litigation, are outside the scope of this licensing proceeding. PG&E cannot have it both ways. It is impossible to make a determination of PG&E's financial qualifications for the life of the ISFSI, without knowing from where the funding for the facility will come. PG&E implicitly acknowledges that reality because it relies solely on its ability as a CPUC-regulated entity to meet the financial needs of the facility. To the CEC, the inescapable conclusion is that the Board must condition the ISFSI license on the license-holder's remaining a CPUC-regulated utility. Such a condition would ensure that PG&E has the necessary access to electric rate revenues to fund ISFSI costs.

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⁴ See Summary of Facts, Data, and Arguments on Which PG&E Will Rely At the Subpart K Oral Argument, dated April 11, 2003.

Conclusion

The CEC respectfully requests that the Board condition any license issued for the proposed ISFSI upon PG&E remaining a CPUC regulated entity. The only evidence in the record on PG&E's financial qualifications is based solely on the utilities access to electric rate revenues.

WILLIAM M. CHAMBERLAIN, Chief Counsel
JONATHAN BLEES, Assistant Chief Counsel
DARCIE L. HOUCK, Staff Counsel

Dated: April 28, 2003



DARCIE L. HOUCK, Staff Counsel

Attorneys for California Energy Commission
Chief Counsel's Office
1516 Ninth Street, MS 14
Sacramento, CA 95814

CERTIFICATE OF SERVICE

I, Linda Merdinger, hereby certify that copies of the foregoing **CALIFORNIA ENERGY COMMISSION'S RESPONSE TO PACIFIC GAS & ELECTRIC COMPANY AND NUCLEAR REGULATORY COMMISSION STAFF** have been served upon the following persons by United States mail, first class, on the 28th day of April, 2003.

G. Paul Bollwerk, III
Administrative Law Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
Email: gpb@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, D.C. 20555

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

Lorraine Kitman
P.O. Box 1026
Grover Beach, CA 93843
Email: lorraine@bejoseeds.com
l.kitman@bejoseeds.com

County Supervisor Peg Pinard
County Government Center
1050 Monterey Avenue
San Luis Obispo, CA 93408
Email: ppinard@co.slo.ca.us

Diane Curran
Harmon, Curran, Spielberg, & Eisenberg,
LLP
1726 M Street N.W., Suite 600
Washington, D.C. 20036
Email: dcurran@harmoncurran.com

Peter S. Lam
Administrative Law Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
psl@nrc.ca.gov

Jerry R. Kline
Administrative Law Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T3F23
Washington, D.C. 20555
Email: jrk2@nrc.gov
Kjerry@erols.com

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
Email: HEARINGDOCKET@nrc.gov

Lawrence F. Womack
Vice President
Nuclear Services
Diablo Canyon Power Plant
P.O. Box 56
Avila Beach, CA 93424

Seamus M. Slattery, Chairman
Avila Valley Advisory Council
P.O. Box 58
Avila Beach, CA 93424

David A. Repka
Brooke D. Poole
Winston & Strawn
1400 L Street N.W.
Washington, D.C. 20005-3502
bpooles@winston.com
Drepka@winston.com

Thomas D. Green, Esq.
Thomas D. Waylett, Esq.
Counsel for Port San Luis Harbor District
Adamski, Moroski & Green LLP
444 Higuera Street, Suite 300
San Luis Obispo, CA 93401-3875
Email: green@adamskimoroski.com
Waylett@adamskimoroski.com

Barbara Byron
Nuclear Policy Advisor
California Energy Commission
1516 Ninth Street, MS 36
Sacramento, CA 95814
Bbyron@energy.state.ca.us

Stephen H. Lewis, Esq.
Angela B. Coggins, Esq.
Office of General Counsel
Mail Stop – 0-15 D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Email: shl@nrc.gov
abcl@nrc.gov

Klaus Schumann
Mary Jane Adams
26 Hillcrest Drive
Paso Robles, CA 93446


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

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

John L. Wallace
General Manager
District Engineer
Avila Beach Community Services District
P.O. Box 309
Avila Beach, CA 93424

Larry Chaset
California Public Utilities Commission
Legal Division, Room 5138
505 Van Ness Avenue
San Francisco, CA 94102
Email: lau@cpuc.ca.gov

Dated: April 28, 2003


Linda Merdinger

Signature