

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
 BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
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May 6, 2003 (9:09AM)

In the matter of
 Pacific Gas and Electric Company
 Diablo Canyon Nuclear Power Plant
 Unit Nos. 1 and 2
 Independent Spent Fuel Storage Installation

Docket # 72-26

OFFICE OF SECRETARY
 RULEMAKINGS AND
 ADJUDICATIONS STAFF

April 28, 2003

**RESPONSE BY SAN LUIS OBISPO MOTHERS FOR PEACE,
 SANTA LUCIA CHAPTER OF THE SIERRA CLUB, SAN LUIS OBISPO
 CANCER ACTION NOW, PEG PINARD, AVILA VALLEY ADVISORY COUNCIL,
 AND CENTRAL COAST PEACE AND ENVIRONMENTAL COUNCIL TO
 BRIEFS AND FACTUAL SUMMARIES REGARDING PG&E'S FINANCIAL
 QUALIFICATIONS TO BUILD AND OPERATE DIABLO CANYON ISFSI**

I. INTRODUCTION

Intervenors, the San Luis Obispo Mothers for Peace ("SLOMFP"), Santa Lucia Chapter of the Sierra Club, San Luis Obispo Cancer Action Now, Peg Pinard, Avila Valley Advisory Council, and Central Coast Peace and Environmental Council and the Environmental Center Of San Luis Obispo ("ECOSLO") hereby respond to the summaries of facts, data, and legal arguments filed by the other parties to this Subpart K proceeding regarding the financial qualifications of Pacific Gas & Electric Company ("PG&E") to build and operate an Independent Spent Fuel Storage Installation ("ISFSI") at the site of the Diablo Canyon nuclear power plant.¹

¹ Summary of Facts, Data, and Arguments on Which Pacific Gas and Electric Company will Rely at the Subpart K Oral Argument (April 11, 2003) (hereinafter "PG&E Summary"); Summary of Facts, Data, and Arguments on Which the California Energy Commission Intends to Rely at the Subpart K Oral Argument (April 11, 2003) (hereinafter "CEC Summary"); Summary of Facts, Data, and Arguments on Which the Governmental Participants Intend to Rely at the Subpart K Oral Argument (April 11, 2003) (hereinafter "GP Summary"); NRC Staff Brief and Summary of Relevant Facts, Data, and Argument on the Staff Proposes to Rely at Oral Argument on Technical Contention 2 (April 11, 2003) (hereinafter "NRC Staff Summary").

Intervenors begin by noting that the set of financial qualifications contentions that they submitted included challenges to the financial qualifications of the successor corporations whose creation PG&E deems necessary for its financial survival, and for which PG&E seeks the approval of the bankruptcy court. The Atomic Safety and Licensing Board (“ASLB”) rejected those contentions, ruling that the only issue that may be litigated is the question of PG&E’s financial qualifications. *Pacific Gas & Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 442-3, 444-5 (2002). This puts the parties in the absurd position of litigating the financial qualifications of an entity which has effectively conceded that it is not financially viable by filing a bankruptcy petition, and which seeks to replace itself as soon as possible with different corporate entities. Under the circumstances, it is not surprising that neither PG&E’s nor the NRC Staff’s experts are willing or able to represent that PG&E is financially qualified to operate the proposed ISFSI for its entire twenty-year license term. Given that the NRC’s regulations require a determination of financial qualifications over the entire lifetime of the ISFSI, the ASLB has no alternative but to conclude that PG&E has failed to satisfy its burden of proving that it is financially qualified to build and operate the proposed ISFSI.

II. ARGUMENT

A. Undisputed Facts Show That PG&E Lacks a Reasonable Assurance of Being Able to Recover Costs of Building and Operating the Proposed ISFSI.

As described in PG&E’s license application, PG&E relies on two sources of funds for construction and operation of the proposed ISFSI: “electric rates” and “electric operating revenues.” *See* Affidavit of Walter L. Campbell, par. 8 (April 9, 2003), attached to PG&E

Summary as Exhibit 2 (hereinafter "Campbell Affidavit"). But PG&E has failed to demonstrate that PG&E has a reasonable basis for relying on either of these funding sources.

(1) PG&E's prospects of electric rate recovery are uncertain.

PG&E relies principally on its ability to recover funds from the rate base. PG&E Summary at 10; Campbell Affidavit pars. 9, 10. However, PG&E qualifies this reliance by stating that its ability to recover funding depends on the outcome of the bankruptcy case. Campbell Affidavit, par. 9. While PG&E does not elaborate on the question of how the bankruptcy case could affect PG&E's ability to recover ISFSI costs from the CPUC ratemaking process, CPUC witness Truman Burns explains that, if the outcome of the bankruptcy case is the reorganization of PG&E, "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." Sworn Testimony of Truman L. Burns, par. 12 (April 10, 2003), attached to GP Summary (hereinafter "Burns Testimony").

Under the circumstances, it is not surprising that the only time period for which PG&E attempts to vouch for its ability to recover ISFSI costs from the rate base is the limited time when the bankruptcy case is pending.² PG&E makes no attempt to demonstrate it will have access to the rate base over the long term, as required by 10 C.F.R. § 70.22(e)(2) (requiring demonstration that applicant will have the necessary funds to cover estimated operating costs "over the planned life of the ISFSI.")

² See Campbell Affidavit, par. 9. Similarly, the NRC Staff is only willing to make a "reasonable assurance" finding for "current and near-term expenditures related to the ISFSI."

(2) PG&E vouches for electric operating revenues only during pendency of bankruptcy.

In the event that PG&E's reorganization plan is approved by the bankruptcy court, funding of the proposed ISFSI will depend on PG&E's successors' ability to generate electric operating revenues. As stated by Mr. Campbell, "[a]ny disallowances that might result from a CPUC prudence review would be covered by cash on hand or electric operating revenues." Campbell Declaration, par. 11. Mr. Campbell, however, is only willing to vouch for the sufficiency of cash on hand or operating revenues during the bankruptcy period.³ Mr. Campbell makes no representations regarding PG&E's successors' ability to cover the costs of the proposed ISFSI after the bankruptcy concludes. Given that the bankruptcy proceeding may conclude well before the construction and operation of the proposed ISFSI are finished, the pendency of the bankruptcy case is not a sufficient period of time to forecast PG&E's ability to recover the costs of building and operating the proposed ISFSI.

(3) Financial assurance finding could drop ISFSI between regulatory cracks.

As discussed above, the crux of PG&E's case is that it can recover adequate funding from the rate base. The factual circumstances described in subsections II.A(1) and (2), however, demonstrate that it is not possible for the ASLB to make a determination that PG&E is

Affidavit of Michael A. Dusaniwskyj, pars. 7 and 13 (April 11, 2003), attached to NRC Staff Summary (hereinafter "Dusaniwskyj Affidavit").

³ For example, Mr. Campbell states that PG&E has "substantial cash on hand that would be sufficient to cover ongoing costs associated with development, construction, operation and decommissioning of the Diablo Canyon ISFSI during the pendency of the bankruptcy proceeding." Campbell Affidavit, par. 14 (emphasis added). Similarly, he states that PG&E "will pay the costs associated with the ISFSI during the pendency of the bankruptcy proceeding out of normal operating revenues." Campbell Affidavit, par. 18 (emphasis added). Mr. Campbell

financially qualified, because PG&E may cease to exist shortly, thus potentially eliminating its access to the rate base. In that event, financial assurance to build and operate the ISFSI will depend on the ability of PG&E's successor to generate sufficient revenue – a contingency that neither PG&E nor the NRC Staff is willing to vouch for. Under the circumstances, the ASLB has no basis for concluding that PG&E is financially qualified.

If the ASLB were to allow construction and operation of the proposed ISFSI to proceed, based on this record, it could well be equivalent to dropping the PG&E financial assurance issue between the proverbial regulatory cracks. Suppose, for instance, that the ASLB assumes that PG&E will continue to be regulated by the CPUC and finds that PG&E is reasonably likely to recover the costs of building and operating the proposed ISFSI through the rate base. Suppose also that, license in hand, PG&E begins construction in 2005 as scheduled, using cash reserves. *See* PG&E Summary at 11. If the bankruptcy court later allows PG&E to reorganize and the CPUC consequently denies rate recovery, PG&E will need to recover construction and operating costs from operating revenues rather than the rate base. In that event, neither PG&E nor the NRC Staff represents that revenues will be sufficient to ensure that construction and operation can be conducted safely.

As a result, the PG&E financial assurance issue will have fallen through the cracks of the regulatory system, and the public will be left “holding the bag” of living near a completed and operating nuclear facility for which the financial qualifications of the licensee to operate the facility throughout its life have not been demonstrated. The ASLB should not allow this result.

also stated that in his opinion, “[access to capital pending the resolution of the bankruptcy is not . . . a significant issue for the ISFSI project.” Campbell Declaration, par. 20 (emphasis added).

It should find instead that at this juncture, PG&E's application is insufficient to support the issuance of a license for the proposed ISFSI.

B. Temporal scope of NRC Staff Review Insufficient

As discussed above in note 2, the scope of the NRC Staff's financial qualifications review extends only to PG&E's "near-term ISFSI activities." Dusaniwskyj Affidavit, pars. 7 and 13. On its face, the scope of the Staff's review is inadequate to support the issuance of a license to PG&E, because the time frame for consideration of financial qualifications to sustain operating costs, as set forth in 10 C.F.R. § 70.22(e)(2) covers the "planned life of the ISFSI." Therefore, as a matter of law, the NRC Staff's safety review is inadequate to support the issuance of a license to PG&E.⁴

C. Adequacy of Decommissioning Funding Not Demonstrated.

In his declaration, Mr. Burns has raised a number of concerns about the sufficiency of PG&E's application to demonstrate the adequacy of decommissioning funding. These concerns include PG&E's recent failure to make a \$10 million payment into the fund, the possible effect of PG&E's reorganization on the future of the decommissioning fund, and the possible reluctance of the CPUC to allow transfer of the decommissioning fund to an entity not regulated by the

⁴ Intervenors acknowledge that if the Staff had performed a complete review and the Intervenors merely disagreed with the result, the disagreement would not, by itself, be sufficient grounds for denying the license application. These circumstances, however do not concern a disagreement between the parties. By limiting its review to only "near-term" issues, the Staff has failed to complete its safety review of whether PG&E has satisfied 10 C.F.R. § 70.22(e)(2). This review must be finished before the NRC can grant a license to PG&E. Nor is the gap something that can be filled by the ASLB: the Staff, with its technical expertise, must perform the review in the first instance. Under the circumstances, the ASLB has no alternative but to reject the application as unsupported by an adequately comprehensive NRC Staff safety review.

CPUC. Burns Declaration, pars. 16-18. The Intervenors believe that PG&E's failure to resolve these concerns fatally undermines the adequacy of its application for an ISFSI license.

III. CONCLUSION

For the foregoing reasons, the ASLB should find that PG&E's application is insufficient to demonstrate its financial qualifications to build and operate the proposed ISFSI, and that the issuance of the application is not supported by a Staff review that is adequate in scope.

Accordingly, the application should be denied.

Respectfully Submitted,



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April 28, 2003

CERTIFICATE OF SERVICE

I certify that on April 28, 2003, copies of Response by San Luis Obispo Mothers for Peace, Santa Lucia Chapter of the Sierra Club, San Luis Obispo Cancer Action Now, Peg Pinard, Avila Valley Advisory Council, and Central Coast Peace and Environmental Council to Briefs and Factual Summaries Regarding PG&E's Financial Qualifications to Build and Operate Diablo Canyon ISFSI were served on the following by electronic mail and/or first-class mail, as indicated below:

<p>Administrative Judge G. Paul Bollwerk, III, Chair Atomic Safety and Licensing Board Panel Mail Stop-T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-00001 By e-mail: gpb@nrc.gov</p>	<p>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 By e-mail to: shl@nrc.gov, abcl@nrc.gov</p>
<p>Administrative Judge Jerry R. Kline Atomic Safety and Licensing Board Panel Mail Stop-T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-00001 By e-mail to: jrk2@nrc.gov</p>	<p>Robert R. Wellington, Esq. Diablo Canyon Independent Safety Committee Office of Legal Counsel 857 Cass Street, Suite D Monterey, CA 93940 dcsafety@dcisc.org</p>
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