

April 28, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

May 7, 2003 (2:45PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

GOVERNMENT PARTICIPANTS' RESPONSE  
TO PACIFIC GAS & ELECTRIC COMPANY AND  
THE NUCLEAR REGULATORY COMMISSION STAFF

Lionel B. Wilson, Esq.  
Arocles Aguilar, Esq.  
Laurence G. Chaset, Esq.  
Public Utilities Commission of  
the State of California  
505 Van Ness Avenue, Rm 5131  
San Francisco, CA 94102  
Telephone 415.355.5595  
Facsimile: 415.703.2262

James B. Lindholm, Esq.  
Timothy McNulty, Esq.  
Office of the County Counsel  
County Government Center Rm 386  
San Luis Obispo, CA 93408  
Telephone: 805.781.5400  
Facsimile: 805.781.4221

Christopher Helenius, Esq.  
President, Board of Directors  
Avila Beach Community Services District  
P.O. Box 309  
Avila Beach, CA 93424  
Telephone:  
Facsimile:

Robert K. Temple, Esq.  
Sheldon L. Trubatch, Esq.  
Offices of Robert K. Temple, Esq.  
2524 N. Maplewood Avenue  
Chicago, Illinois 60647-1929  
Telephone: 773.292.0492  
Facsimile: 773.292.0497

Counsel for the County of San Luis Obispo

GOVERNMENT PARTICIPANTS' RESPONSE  
TO PACIFIC GAS & ELECTRIC COMPANY AND  
THE NUCLEAR REGULATORY COMMISSION STAFF

The Government Participants ("GP")<sup>1</sup> hereby respond to the summaries of facts, data and argument ("Summaries") submitted by Pacific Gas & Electric Company ("PG&E")<sup>2</sup> and the Nuclear Regulatory Commission ("NRC") staff<sup>3</sup> in this proceeding. Both Summaries are based on an incredible, contra-factual fiction. Despite the fact of PG&E's bankruptcy, and despite PG&E's statements in the bankruptcy case that the Diablo Canyon Nuclear Power Plant ("DCPP") can no longer be regulated by the CPUC if it is transferred to a non-utility business entity, as proposed in PG&E's bankruptcy reorganization plan, PG&E claims, and the NRC staff supports this claim, that it should nonetheless be treated as utility regulated by the CPUC for the twenty-year license period PG&E has proposed for an Independent Spent Fuel Storage Facility ("ISFSI") at the site of DCPP. This position not only makes a sham of this proceeding (in which the issue is whether, in accordance with the NRC's ISFSI licensing requirements, PG&E has demonstrated reasonable assurance that it can construct, operate, and decommission an ISFSI over its licensed life), but is also flatly contrary to PG&E's license application,

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<sup>1</sup> The Governmental Participants taking part in this response are the Avila Beach Community Services District, the California Public Utilities Commission, and San Luis Obispo County.

<sup>2</sup> "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").

<sup>3</sup> "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," April. 11, 2003 (*hereinafter*, "NRC Summary").

which was incorporated in the NRC's Notice, and which set the metes and bounds of this proceeding.

PG&E and the NRC staff have taken the position that PG&E must be considered as a rate-regulated utility licensed by the NRC for the purposes of determining whether PG&E meets the financial qualifications requirements in 10 C.F.R § 72.22(e) because PG&E is the applicant named in the application. This hyper-technical, legalistic and narrow-minded reading should be rejected.

The simple fact is that the NRC's Notice of this proceeding references PG&E's ISFSI license application. While the identity of the license applicant may be important, it does not establish the metes and bounds of the issues for this proceeding. It is clearly the license application that is the source of most of the issues proposed to be placed in contention.

In this case, the ISFSI license application, as discussed in detail in the GP Summary,<sup>4</sup> relies in part on PG&E's proposed reorganization and the predicted financial qualifications of the post-bankruptcy ISFSI licensee. In preparing and submitting this application, PG&E apparently recognized that to demonstrate financial qualifications over the twenty-year ISFSI license period it would be necessary for PG&E to address the reality that PG&E was in bankruptcy now but would be out of bankruptcy long before the ISFSI would start to operate. Somewhat later, at the request of the NRC, PG&E submitted some of its financial qualifications information in a supplemental filing. In that supplemental filing, details about the financial qualifications of PG&E's proposed

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<sup>4</sup> "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").

non-CPUC regulated successor ISFSI licensee disappeared. However, the NRC expert who reviewed PG&E's application for financial qualification has testified that he considered both PG&E's initial and supplemental license application in reaching his decision. The NRC staff's summary repeats that inconsistent and improper reliance on both versions of PG&E's application. Notwithstanding the reality of PG&E's bankruptcy status, and notwithstanding that PG&E's own bankruptcy reorganization plan has proposed that DCPD be spun off to a non-regulated business entity, NRC staff takes the position that PG&E should be treated as a utility that will be regulated by the CPUC for at least the next twenty years. NRC Summary at 10.

Moreover, the inescapable need to consider the post-bankruptcy financial qualifications of the successor ISFSI license is clearly illustrated by the PG&E Summary. Although PG&E acknowledges that this Board has ruled as irrelevant all speculation about the financial qualifications of the successors to PG&E, PG&E again claims that the ISFSI licensee successor to PG&E will have adequate revenues to cover ISFSI costs. PG&E Summary at 17. See, also, PG&E Summary at 9 ("PG&E will obtain the necessary funds either from specific authorized components of electric rates *or from overall operating revenues.*" Campbell Aff. ¶ 8.") (*emphasis added*). This Board should not permit PG&E to flout the Board's instruction by attempting to rely on information which this Board has declared out of bounds.

Moreover, PG&E does not, because it cannot, rely on its successor's ability to fund an ISFSI from rates as a utility regulated by the CPUC, but, rather it relies on operating revenues not based on rate recovery to fund ISFSI construction, operation and decommissioning. PG&E's projection of post-bankruptcy revenues extends over

only five years, and not the twenty that would be needed to support a finding that it complies with the requirements in 10 C.F.R. § 72.22(e). In this regard, the Board should also dismiss, as contrary to the plain language in 10 C.F.R. § 72.22(e), PG&E's argument that if the operating revenues for a reactor need to be projected for only five years after a proposed license transfer, projections for greater than five years are not necessary to demonstrate the financial qualifications of an ISFSI licensee. PG&E Summary at 18. The NRC's regulations are clear and do not support this argument.

PG&E states several times that its bankruptcy and the record so far in this proceeding do not demonstrate uncertainty about the ISFSI licensee's financial qualifications for the next twenty years. However, the only reason relied on by PG&E in support of this counter-factual claim is that PG&E must be considered a regulated utility for the reason that PG&E applied for an ISFSI as a regulated utility. This position is inconsistent with the predictive finding required by 10 C.F.R. § 72.22(e). That rule requires the NRC to consider the financial situation of the ISFSI licensee over the life of the license.

PG&E is in bankruptcy. That is not comparable to a remote and speculative possible change in an applicant's financial status, as suggested by PG&E and the NRC staff. PG&E Summary at 14; NRC Summary at 12. Nor is it an uncertainty that can be addressed at a future licensing proceeding. Under the NRC's rules, this is the proceeding in which financial qualification is to be established. Contrary to the NRC staff's assertion that Intervenors seek to have the NRC "regulate commerce," (NRC Summary at 10), the Intervenors and interested governmental entities are merely asking the NRC staff to provide the clear evidence that supports its conclusion that PG&E is

qualified to construct, operate for twenty years, then safely decommission an ISFSI. It has failed thus far to do so.

Finally, nowhere in PG&E's application is there a detailed showing that despite the creditor claims that led to bankruptcy, there will be sufficient funds from operating revenues to construct, operate, and decommission an ISFSI over its twenty-year licensed life. PG&E refers in general to large dollar amounts of income and expenditure (PG&E Summary at 16) but does not provide a basis for showing that its ability to afford ISFSI expenses this year means it can afford them for the next twenty years. Nor does the NRC staff indicate where PG&E has provided such detailed information. Under the circumstances, PG&E has not even met its primary burden of going forward, much less its ultimate burden of persuasion. Generalized blather about big numbers of dollars is not evidence that supports the findings called for in 10 C.F.R. § 72.22(e). Moreover, the balance sheet offering of an entity in bankruptcy with no certain path forward fails to meet the predictive requirements of the NRC's regulations governing financial qualifications for an ISFSI applicant.

The bottom line of the Summaries filed by PG&E and the NRC staff is that this Board should ignore the bankruptcy behind the curtain at the end of the yellow brick road of CPUC regulation and proceed as if PG&E itself had not recognized the need to rely on the financial qualifications of the post-bankruptcy ISFSI licensee in order to make meaningful statements about its financial qualifications over the next twenty years. However, as amply demonstrated in the GP Summary and the CEC Summary,<sup>5</sup> the

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<sup>5</sup> "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").

plain fact is that the bankruptcy creates significant uncertainty, which precludes the NRC from making the necessary findings without considering information which this Board has already ruled irrelevant.

Finally, the GP Summary clearly demonstrated that the NRC staff has not been forthcoming about the evidence it relied on in making its determination that PG&E is financially qualified to construct, operate and decommission an ISFSI. The extent to which the NRC staff had to rely on PG&E's inadmissible information to reach the conclusion stated in the NRC Summary is unknown. However, a determination of what, precisely, the NRC staff did rely on in reaching its conclusions is critical to any finding regarding whether PG&E provided sufficient admissible evidence to demonstrate that either, (i) it met the requirements in 10 C.F.R. § 72.22(e), or (ii) it failed to do so, as contended in Contention TC-2. Because only the Board can compel the NRC staff to testify fully, the Board should hold hearings to compel the NRC witnesses to divulge the information they relied on in reaching their decision regarding PG&E's satisfaction of 10 C.F.R. § 72.22(e). It is only through an adjudicatory hearing that the Board can test the evidence on which the NRC staff and PG&E have asked it to rely, and it is only through a hearing that the Board can make its determination on an issue which is central to whether PG&E is qualified to undertake the new activity of constructing, operating and decommissioning an ISFSI while it is in bankruptcy. See 10 C.F.R. § 2.1115(b) (requiring a hearing when there (1) is a "genuine and substantial" factual dispute; (2) that "can only be resolved with sufficient accuracy" through the introduction of evidence at a hearing; and (3) the NRC's ultimate licensing decision will be based on the resolution of this dispute).

For these reasons, since PG&E has not met its burden of going forward or proving that it can meet the requirements in 10 C.F.R. § 72.22(e), its application must be denied as a matter of law. PG&E can refile its application when the bankruptcy case is complete and meaningful projections of financial qualifications can be made for the next twenty years. In the alternative, should the Board desire to determine for itself whether the NRC staff had to rely on inadmissible information in PG&E's license application, it should hold an adjudicatory hearing to resolve that factual issue.

Respectfully submitted,



Lionel B. Wilson, Esq  
Arocles Aguilar, Esq.,  
Laurence G. Chaset, Esq.  
Counsel for  
California Public Utilities Commission



Robert K. Temple, Esq.  
Sheldon L. Trubatch,  
Counsel for the County of San Luis  
Obispo



Christopher Helenius, President  
Avila Beach Community Services District

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Spent Fuel Storage Installation) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Government Participants' Response to Pacific Gas & Electric Company and the Nuclear Regulatory Commission Staff" have been served as shown below by electronic mail (\*), this 28<sup>th</sup> 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.

G. Paul Bollwerk, III  
Administrative Judge\*  
Atomic Safety & Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3F23  
Washington, D.C. 20555  
E-mail: [gpb@nrc.gov](mailto:gpb@nrc.gov)

Jerry R. Kline\*  
Administrative Judge\*  
Atomic Safety & Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3F23  
Washington, D.C. 20555  
E-mail: [jrk2@nrc.gov](mailto:jrk2@nrc.gov)  
[kjerry@erols.com](mailto:kjerry@erols.com)

Peter S. Lam  
Administrative Judge\*  
Atomic Safety & Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3F23  
Washington, D.C. 20555  
E-mail: [psl@nrc.gov](mailto:psl@nrc.gov)

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

Office of the Secretary\*  
ATTN: Rulemakings & Adjudications  
Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, D.C. 20555  
E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov)

County Supervisor Peg Pinard\*  
County Government Center  
1050 Monterey Avenue  
San Luis Obispo, California 93408  
E-mail: [ppinard@co.slo.ca.us](mailto:ppinard@co.slo.ca.us)

Lorraine Kitman\*  
P.O. Box 1026  
Grover Beach, CA 93483  
E-mail: [lorraine@bejoseeds.com](mailto:lorraine@bejoseeds.com)  
[l.kitman@bejoseeds.com](mailto:l.kitman@bejoseeds.com)

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

General Counsel\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
E-mail: [OGCMailCenter@nrc.gov](mailto:OGCMailCenter@nrc.gov)  
[ABC1@nrc.gov](mailto:ABC1@nrc.gov); [SHL@nrc.gov](mailto:SHL@nrc.gov)

Diane Curran\*  
Harmon, Curran, Spielberg, &  
Eisenberg, LLP  
1726 M Street N.W., Suite 600  
Washington, D.C. 20036  
E-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Klaus Schumann  
Mary Jane Adams  
26 Hillcrest Drive  
Paso Robles, CA 93446  
e-mail: [jayklaus@email.msn.com](mailto:jayklaus@email.msn.com)

David A. Repka,\* Brooke D. Poole\*  
Winston & Strawn  
1400 L Street N.W.  
Washington, D.C. 20005-3502  
E-Mail: [bpoole@winston.com](mailto:bpoole@winston.com)  
[drepka@winston.com](mailto:drepka@winston.com)

Robert R. Wellington, Esq.\*  
Robert W. Rathie, Esq.\*  
Wellington Law Offices  
857 Cass Street, Suite D  
Monterey, California 93940  
E-Mail: [info@dcisc.org](mailto:info@dcisc.org)

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

Darcie L. Houck, Staff Counsel  
California Energy Commission  
Chief Counsel's Office  
1516 Ninth Street, MS 14  
Sacramento, CA 95814  
e-mail: [Dhouck@energy.state.ca.us](mailto:Dhouck@energy.state.ca.us)

Barbara Byron  
Nuclear Policy Advisor  
California Energy Commission  
1516 Ninth Street, MS 36  
Sacramento, CA 95814  
e-mail: [Bbyron@energy.state.ca.us](mailto:Bbyron@energy.state.ca.us)

Ms. Rochelle Becker\*  
San Luis Obispo Mothers for Peace  
P.O. Box 164  
Pismo Beach, CA 93448  
E-Mail: [beckers@thegrid.net](mailto:beckers@thegrid.net)  
[Jzk@charter.net](mailto:Jzk@charter.net)

Dated this 28<sup>th</sup> day of April 2003



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Robert K. Temple, Esq.