

April 28, 2003

DOCKETED
USNRC

May 5, 2003 (11:29AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

Docket No. 72-26-ISFSI

ASLBP No. 02-801-01-ISFSI

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO THE INITIAL
WRITTEN SUMMARIES OF THE GOVERNMENTAL PARTICIPANTS
AND THE CALIFORNIA ENERGY COMMISSION

William V. Manheim, Esq.
Richard F. Locke, Esq.
PACIFIC GAS & ELECTRIC COMPANY
77 Beale Street, B30A
San Francisco, CA 94105
(415) 973-6628

David A. Repka, Esq.
Brooke D. Poole, Esq.
WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005-3502
(202) 371-5700

COUNSEL FOR PACIFIC GAS AND ELECTRIC COMPANY

TABLE OF CONTENTS

RESPONSE

I. INTRODUCTION1

II. BACKGROUND — THE CONTENTION AS ADMITTED.....2

III. THE GP SUMMARY5

 A. PG&E’s Demonstration of Financial Qualifications is Consistent with the Requirements of 10 C.F.R. § 72.22(e), NRC Staff Requests for Information, and the Scope of the Admitted Contention5

 B. The Governmental Participants’ “Uncertainty” Arguments Do Not Establish a Genuine and Substantial Dispute of Fact That Must Be Resolved Through an Adjudicatory Hearing9

 1. *There is no “uncertainty” as to PG&E’s ability to presently recover ISFSI costs through rates*10

 2. *There is no “uncertainty” as to PG&E’s financial qualifications post-bankruptcy, and, in any event, the post bankruptcy situation is beyond the scope of the contention in this proceeding*.....12

 3. *PG&E has not relied on financial qualifications information held by the Licensing Board to be outside the scope of this proceeding*13

 C. PG&E Has Provided Information Adequate to Address the Impact of Bankruptcy on its Continuing Ability to Decommission the ISFSI14

IV. THE CEC SUMMARY17

V. CONCLUSION.....19

SWORN TESTIMONY

Mr. Walter L. Campbell.....Tab A

April 28, 2003

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

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO THE INITIAL
WRITTEN SUMMARIES OF THE GOVERNMENTAL PARTICIPANTS
AND THE CALIFORNIA ENERGY COMMISSION

I. INTRODUCTION

In accordance with the schedule established in the Atomic Safety and Licensing Board (“Licensing Board”) Memorandum and Order issued on December 26, 2002,¹ Pacific Gas and Electric Company (“PG&E”) hereby submits its Response to the initial written summary of the Governmental Participants² and the separate written summary of the California Energy Commission (“CEC”).³ The GP Summary essentially presents arguments and conclusions of

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

² See “Summary of Facts, Data, and Arguments on Which the Governmental Participants Intend to Rely at the Subpart K Oral Argument,” dated April 11, 2003 (“GP Summary”). The referenced “Governmental Participants” are the Avila Beach Community Services District, the California Public Utilities Commission (“CPUC”), and San Luis Obispo County.

³ 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 (“CEC Summary”). The CEC is also participating in this proceeding as an interested governmental entity pursuant to 10 C.F.R. § 2.715(c), but chose to file a separate written summary.

law, and therefore on its face does not demonstrate a genuine and substantial factual dispute that can only be resolved through an evidentiary hearing. For reasons previously addressed, and as further discussed below, these arguments also fail on the merits. PG&E has adequately demonstrated its financial qualifications to construct, operate, and decommission the proposed independent spent fuel storage installation (“ISFSI”) at the site of the Diablo Canyon Power Plant (“DCPP”). Similarly, the CEC Summary argues issues beyond the scope of this proceeding and is unpersuasive with respect to PG&E’s financial qualifications to hold a Part 72 ISFSI license. Pursuant to 10 C.F.R. § 2.1115(a), the single admitted contention should be dismissed and the proceeding terminated.

II. BACKGROUND — THE CONTENTION AS ADMITTED

The Governmental Participants seem fundamentally confused regarding the substance and scope of the admitted contention, Contention TC-2, in this proceeding. At times, they argue that PG&E has not properly considered the pending PG&E Plan of Reorganization and the possibility that the power plant and proposed ISFSI may be transferred to a non-electric utility. (*See, e.g.*, GP Summary at 15 n.24, 16, 19.) At others, they argue that PG&E is improperly taking credit for the post-bankruptcy situation. (*See, e.g., id.* at 17, 21.) The fact is, however, that PG&E has addressed the financial qualifications of the current applicant — the electric utility, PG&E — fully consistent with the scope of the admitted contention. Likewise, PG&E has fully addressed whether the current bankruptcy has any impacts on the current financial qualifications of the utility, PG&E. PG&E has therefore fully addressed the admitted contention, and has left review of issues created by and germane to any future license transfer for review in an appropriate *future* licensing context.

The Licensing Board admitted Contention TC-2 as follows:

[N]otwithstanding PG&E's financial qualifications to conduct day-to-day DCP operations, *in its bases two and three [Intervenor San Luis Obispo Mothers for Peace ("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. [Citations omitted.] We, therefore, admit contention SLOMFP TC-2 to this proceeding as supported by these bases establishing a genuine material dispute adequate to warrant further inquiry, but with the caveat that neither the unresolved California Attorney General's lawsuit against PG&E Corporation for alleged fraud nor the financial qualifications of any entities that may in the future construct or operate the ISFSI are litigable matters under this contention as irrelevant to and/or outside the scope of this proceeding.

See Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 442-443 (2002) (emphasis added).

More specifically, basis two, as designated by SLOMFP and the Licensing Board, raised several issues related to PG&E's current cost recovery through electric rates, as follows: (1) construction work in progress generally is not recoverable in rates, until operation is under way; (2) PG&E's ability to recover operating costs from the rate base is "questionable," due to its bankruptcy and pending litigation against PG&E's parent; and (3) PG&E is in bankruptcy because it incurred costs in excess of what it has been able to recover from the rate base, and, thus it is unclear whether any rates recovered by PG&E will be sufficient to "make it whole again."⁴ Basis three, as designated by the Licensing Board,⁵ concerned the ability of PG&E, during the pending bankruptcy, to borrow sufficient funds to cover the costs of construction, and to demonstrate that its income stream would be adequate to cover construction and operation. As admitted by the Licensing Board, the focus of the contention is on the present situation: PG&E,

⁴ See "Supplemental Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace [et al.]," dated July 18, 2002, at 14-15 ("SLOMFP Contentions").

⁵ This issue was designated as basis (5) by SLOMFP. See SLOMFP Contentions at 15-17.

as a utility in bankruptcy, is the ISFSI license applicant. The aspects of PG&E's financial qualifications at issue under bases two and three in this proceeding are, therefore, PG&E's ability to construct, operate, and decommission the ISFSI pending resolution of the bankruptcy case, by virtue of (1) its access to continued funding as a cost-of-service rate-regulated entity; and (2) its access to credit markets.⁶

With the narrow confines of admitted Contention TC-2 in mind, PG&E herein responds to the primary recurring points raised in the GP Summary.⁷ In addition, PG&E responds below to the CEC Summary.

⁶ The Governmental Participants have misread the Licensing Board decision admitting the contention. They state (at 13):

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"

A close reading of LBP-02-23 reveals, however, that the Governmental Participants are attributing too much to the Licensing Board. The Licensing Board statements utilized in the quotation above merely repeated SLOMFP's assertions, *without* passing upon their validity. The Licensing Board admitted the contention to explore whether, pending resolution of the bankruptcy case, PG&E has access to the rate process and whether access to the credit markets is necessary. The Board decidedly did not inquire into the ramifications of a bankruptcy-related license transfer. *See* LBP-02-23, 56 NRC at 441.

⁷ In Footnote 24, it appears that the Governmental Participants argue that the scope of this proceeding is not limited to the admitted contention, but to the scope of the proceeding as delineated in the NRC's April 22, 2002, notice of hearing. However, once contentions are admitted, the scope of an NRC proceeding is indeed governed by those contentions. *See, e.g., Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 & 2), LBP-93-15, 38 NRC 20, 21 (1993); *General Elec. Co.* (GETR Vallecitos), LBP-83-19, 17 NRC 573, 578 (1983). Accordingly, the proceeding is limited to the matters put at issue by the parties and accepted for consideration by the Licensing Board.

III. THE GP SUMMARY

The Governmental Participants make a number of legal and conclusory arguments, none of which establishes a “genuine and substantial” dispute of fact that can only be resolved through an adjudicatory hearing. Rather, these arguments can be dismissed based on the record established to date in this Subpart K proceeding.

A. PG&E’s Demonstration of Financial Qualifications is Consistent with the Requirements of 10 C.F.R. § 72.22(e), NRC Staff Requests for Information, and the Scope of the Admitted Contention.

The Governmental Participants allege that PG&E and its witnesses have not been “forthcoming” with respect to the financial qualifications issues in this proceeding. (GP Summary at 7.) This is simply untrue. PG&E and its witnesses have been completely “forthcoming” — PG&E has focused on the financial qualifications of the current ISFSI applicant, PG&E. As has been amply stated, PG&E is currently an electric utility that recovers DCPD costs through traditional cost-of-service rates. *See, e.g.*, PG&E Summary at 10.⁸ PG&E has further indicated, several times, that a proposed Plan of Reorganization for PG&E is currently pending before the U.S. Bankruptcy Court. *If* the plan is confirmed, and *if* the license transfer is approved by the NRC, and *if* the Plan is implemented, then the name of the applicant in the 10 C.F.R. Part 72 application here at issue will need to be amended or, alternatively, the ISFSI license will need to be transferred (if it has already been issued to PG&E). *See, e.g.*, PG&E Letter DIL-02-08 from L.F. Womack, PG&E, to NRC Document Control Desk, “Supplemental General and Financial Information — 10 C.F.R. 72.22,” dated June 7, 2002, Encl. 1 n.1 (“June 7 Supplement”). In either scenario, the basis for ISFSI financial qualifications will

⁸ *See* “Summary of Facts, Data, and Arguments on Which Pacific Gas and Electric Company Will Rely at the Subpart K Oral Argument,” dated April 11, 2003 (“PG&E

change. This constitutes full disclosure as to the status of activities potentially affecting PG&E. However, the Licensing Board has indicated in this case that the financial qualifications of any successor to PG&E under the PG&E (or any other) Plan of Reorganization is an issue that will be addressed as a transfer matter if and when it becomes ripe. *See* LBP-02-23, 56 NRC at 443. This proceeding is presently focused on PG&E, the electric utility applicant.

Contrary to the Governmental Participants' assertion (at 16), PG&E is not here relying on financial projections related to any successor ISFSI licensee. To the extent that PG&E has referenced the financial projections related to its proposed Plan of Reorganization (as, for example, in the December 21, 2001, ISFSI Application⁹), it has done so simply to demonstrate that the financial qualifications of the successor entities envisioned by that Plan are being addressed in a forum appropriate for their review. The Governmental Participants have never substantively challenged those projections in that forum.¹⁰

In a similar vein, the Governmental Participants demonstrate some confusion regarding PG&E's proffered financial qualifications information. Specifically, they claim that PG&E "substantially altered" its basis for compliance with 10 C.F.R. § 72.22(e) in the June 7

Summary"); Decision 02-04-016, Opinion Adopting Revenue Requirements for Utility Retained Generation, 2000 Cal. PUC LEXIS 1110 (Apr. 4, 2002).

⁹ *See* PG&E Letter DIL-01-002 from L.F. Womack, PG&E, to NRC Document Control Desk, "License Application for Diablo Canyon Independent Spent Fuel Storage Installation," dated December 21, 2001 ("Application").

¹⁰ The Governmental Participants imply that, to make a finding of "reasonable assurance" of financial qualifications pursuant to 10 C.F.R. § 72.22(e), the NRC must conclude there is a virtual guarantee of funding through the twenty-year license term. (*See* GP Summary at 17.) It bears repeating that NRC regulations do not require financial projections for the full 20-year ISFSI license term. *See* PG&E Summary at 18. PG&E is also not required in its present application to anticipate every financial scenario that may develop over the 20-year license term. Those scenarios will be addressed in an appropriate regulatory or licensing context if and when they mature.

Supplement to the financial qualifications information provided in the Application.¹¹ In fact, there was no change of basis between the two submissions; the June 7 Supplement simply clarified information provided to the NRC in the Application. Stated simply: PG&E, the present applicant, is a public utility. It expects to fully recover the costs associated with the ISFSI through cost-of-service rates. *See* Supplemental Affidavit of Walter L. Campbell ¶ 4 (appended hereto as Attachment A).

PG&E has stated that the costs will be recovered from electric rates or operating revenues, or a combination of the two. *Id.* ¶ 5. From a cash flow perspective (because rate recovery is not an instantaneous process), PG&E will cover the costs associated with the ISFSI as normal operating expenses, covered by normal electric operating revenues. *Id.* Also, to the extent there are either any disallowances resulting from a prudence review by the CPUC (as can occur in any prudence review) or delays in the recovery of costs (as could occur if the CPUC chooses to treat expenditures as capitalized costs recoverable over time), ISFSI expenses will be covered by electric operating revenues or cash on hand. *Id.* As a practical matter, any difference between current cash disbursements and current cash receipts for a specific activity must be funded by either cash generated by other operating activities (simply referred to as “operating revenues”), cash on hand, or cash raised by financing. *Id.* Either scenario could affect earnings,

¹¹ The Governmental Participants allege, without citation to a reference or other authority, that “[t]he record . . . 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.” (GP Summary at 4.) This assertion is simply untrue. PG&E submitted the June 7 Supplement following a request by the NRC Staff, in a May 21, 2002, telephone conference with PG&E, for a re-packaging of the financial qualifications information in a form that reflected the individual regulatory requirements. Moreover, the Licensing Board has not held that the information in the June 7 Supplement, which addresses the *current utility applicant’s* financial qualifications, is irrelevant to this proceeding.

but not financial qualifications. *Id.*; see PG&E Summary at 10-11. As demonstrated by the financial statements included in the record, the scale of the ISFSI costs is simply not material to PG&E's overall current financial position and outlook. (In fact, PG&E has paid for more than \$13.9 million in ISFSI costs since the beginning of 2001 — in spite of being in bankruptcy for most of that period.) Supp. Campbell Aff. ¶ 5. Accordingly, PG&E's references to both rates and operating revenues, and even cash on hand, do not reflect a change in position regarding PG&E's access to the cost-of-service ratemaking process. *Id.* Rather, the references reflect only different accounting perspectives and the realities of the ratemaking process and PG&E's financial position. *Id.*

The Governmental Participants allege that the basis for PG&E's financial qualifications changed because PG&E "omitted all references to the financial qualifications of the ISFSI licensee post-bankruptcy and focused exclusively on its current situation." (GP Summary at 3.) In fact, as discussed above and in the PG&E Summary, PG&E has focused on the financial qualifications of the current applicant, PG&E — and relies upon the financial qualifications of PG&E in its current form in the current application — at the request of the NRC Staff in its review (thus, the June 7 Supplement) and consistent with the decision of the Licensing Board. (See PG&E Summary at 9-13.) As noted by the Licensing Board in LBP-02-23, if the NRC considers an amended application or license transfer as the result of the confirmation of the PG&E Plan of Reorganization, then issues regarding the financial qualifications of any new licensees would be appropriate.¹² Until that time, only the financial

¹² See LBP-02-23, 56 NRC at 444 n.8 ("[A]ssuming that the bankruptcy court confirms PG&E's reorganization plan, and that the Commission approves the license transfer of DCP 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 of events is in fact realized, then issues regarding Gen's financial qualifications would be ripe for litigation, and

qualifications of PG&E are at issue in this proceeding. PG&E has amply demonstrated that the cost estimates in the Application and June 7 Supplement provided for construction, operation, and decommissioning of the ISFSI are reasonable and conform to NRC requirements. (See PG&E Summary at 9-24.) PG&E has further demonstrated that it has access to the ratemaking process. It is not “disingenuous” to proceed on this basis.¹³

In sum, PG&E, the electric utility applicant, has provided financial qualifications information consistent with NRC requirements. There is no genuine and substantial dispute of fact with respect to the financial qualifications information submitted by PG&E.

B. The Governmental Participants’ “Uncertainty” Arguments Do Not Establish a Genuine and Substantial Dispute of Fact That Must Be Resolved Through an Adjudicatory Hearing.

The principal argument of the Governmental Participants appears to be that a perceived “uncertainty” in PG&E’s status as a CPUC-regulated public utility prevents PG&E from demonstrating that it can currently meet the NRC’s financial qualifications requirements. (See, e.g., GP Summary at 4, 9.) The “uncertainty” argument appears to revolve around three points:

- PG&E’s *current* ability to finance ISFSI-related costs through the rate regulation process;

SLOMFP [or any other participant] seemingly would be free to submit any concerns about Gen or other newly accountable entities as a late-filed contention.”)

¹³ For example, the possibility certainly exists that PG&E will be the ISFSI licensee in the long term. As has been discussed, the CPUC proffered in the bankruptcy proceeding an alternate plan of reorganization, under which PG&E would remain a utility subject to rate regulation by the CPUC. Were that plan to be approved by the bankruptcy court, no license transfer would take place and PG&E, the utility, would remain the NRC licensee for both the power plant and the proposed ISFSI. (See PG&E Summary at 17.)

- PG&E's financial qualifications *post-bankruptcy*, particularly if it is no longer an integrated utility regulated by the CPUC; and
- the scope of the information relied upon by the NRC in making its financial qualifications determination on the ISFSI application, and, specifically, whether the NRC relied upon information provided by PG&E in connection with the Part 50 license transfer application filed in connection with the proposed PG&E Plan of Reorganization.

To the extent the Governmental Participants focus on the post-bankruptcy situation, this argument is beyond the scope of the admitted contention. *See* LBP-02-23, 56 NRC at 442-43. To the extent that the Governmental Participants focus on the present impact of Chapter 11 bankruptcy reorganization on PG&E, the utility applicant, they address the issue raised in Contention TC-2. However, the record amply demonstrates that the "uncertainty" argument in this context does not present a genuine and substantial issue with respect to PG&E's current financial qualifications.

1. *There is no "uncertainty" as to PG&E's ability to presently recover ISFSI costs through rates.*

The Governmental Participants argue that an impact of the pending 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." (GP Summary at 16.) For example, the Governmental Participants argue that the CPUC may disallow recovery for the purpose of defraying construction expenses. (GP Summary at 20 n.30.) However, the evidence demonstrates that there is no uncertainty regarding PG&E's ability to finance the ISFSI while the bankruptcy is pending. PG&E in its prior testimony

asserted that costs associated with the ISFSI represent reasonable and prudent DCPD operating expenses recoverable through rates, and nothing has been raised that would dispute that conclusion. *See* PG&E Summary, Exh. 2, Affidavit of Walter L. Campbell ¶ 10.

As stated in the PG&E Summary (at 12), any disallowance that might result from a CPUC prudence review in the rate process would be covered by cash on hand or electric operating revenues. Quite simply, PG&E has demonstrated its ability to finance the ISFSI even if rate recovery is partially — or fully — precluded by the CPUC. *Supp. Campbell Aff.* ¶ 5. There is no basis to assume that the mere potential for disallowances resulting from the rate process undermines the NRC’s ability to find, at the present time, the necessary reasonable assurance of PG&E’s financial qualifications to construct and operate the ISFSI.¹⁴

The Governmental Participants allege that their expert has testified that there is a “substantial likelihood” that the CPUC will not permit rate recovery for ISFSI construction expenses, while ultimate ownership of DCPD is in question. The basis for such disallowance would be that ratepayers should not fund an expenditure that may not directly benefit them in the future. (GP Summary at 20 n.30.) However, this argument also does not establish a genuine and substantial issue. Issues regarding PG&E’s proposed accounting and ratemaking treatment of the ISFSI costs as current operating expenses (rather than capitalized costs) are appropriately being addressed in PG&E’s 2003 General Rate Case as part of the conventional ratemaking process. *Supp. Campbell Aff.* ¶ 6. For example, because the CPUC recognizes the possibility of a transfer of DCPD to a non-rate-regulated entity, it apparently is concerned that present ratepayers should not pay ongoing ISFSI expenses. *Id.* As discussed in the PG&E Summary (at 13), PG&E believes its accounting treatment to be appropriate, and therefore is addressing this

¹⁴ Such a possibility is faced by *all* public utilities subject to cost-of-service rate regulation.

issue in the rate case. Supp. Campbell. Aff. ¶ 6. However, given the amounts involved, and PG&E's revenues, there is no reason to conclude that a determination by the CPUC that the expenditures should be capitalized for ratemaking purposes would affect PG&E's current financial qualifications. See Campbell Aff. ¶ 13; Campbell Supp. Aff. ¶ 6.¹⁵

2. *There is no "uncertainty" as to PG&E's financial qualifications post-bankruptcy, and, in any event, the post-bankruptcy situation is beyond the scope of the contention in this proceeding.*

The Governmental Participants also claim that uncertainty exists as to PG&E's ability, post-bankruptcy, to fund ISFSI construction "by reason of its access to continued funding as a CPUC-regulated integrated utility." (GP Summary at 20.) The Governmental Participants appear to allege that PG&E *cannot* be financially qualified to construct, operate, and decommission the ISFSI unless it is a CPUC-regulated utility that can demonstrate revenues for the full 20-year license term. PG&E addressed this argument in the PG&E Summary (at 19-20). The NRC has previously considered the argument that cost-of-service rates are preferable from a safety standpoint, and does not presume that cost-of-service rates are essential to protect the public health and safety. See *generally* Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Power Industry, 62 Fed. Reg. 44,071 (Aug. 19, 1997). In that Policy Statement, the Commission made the determination — pending further experience — that its financial qualifications regulations are sufficient to assure safety for plants with market-based rates. *Id.* at 44,076.

Moreover, PG&E is not required under NRC regulations to provide financial projections of revenues for the full 20-year ISFSI license term. For a power reactor operating

¹⁵ PG&E is also not convinced that this issue is fully ripe, given that the PG&E Plan of Reorganization is not confirmed.

license applicant that is a non-electric utility, only a five-year projection of costs and revenues is required by 10 C.F.R. § 50.22(f)(2). As the Licensing Board has recognized in this proceeding, even this requirement does not apply to a Part 72 license applicant. LBP-02-23, 56 NRC at 445-46. This “uncertainty” argument, therefore, does not establish a genuine and substantial issue.

PG&E has also demonstrated, in the Part 50 license transfer application, that the new licensee under the PG&E Plan of Reorganization would be financially qualified to construct, operate, and decommission the ISFSI. That entity, Electric Generation LLC (“Gen”), would recover costs from revenues based on the sale of electricity.¹⁶ The Governmental Participants themselves complain that PG&E and/or the NRC are somehow relying on this showing. The Licensing Board has already concluded, however, that this is an issue for another time and/or forum. (Indeed, as noted above, PG&E is currently an electric utility, and could remain such following its exit from bankruptcy.) Accordingly, until the issue is ripe for consideration, it is beyond the scope of this proceeding and PG&E is not currently relying on the Part 50 license transfer application.

3. *PG&E has not relied on financial qualifications information held by the Licensing Board to be outside the scope of this proceeding.*

Finally, with respect to “uncertainty,” the Governmental Participants also argue as follows:

[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.

¹⁶ PG&E has demonstrated the financial qualifications of Gen in the Part 50 proceeding by including the required financial projections, which include the costs of construction and operation of the ISFSI.

(GP Summary at 21.) The Governmental Participants claim that the NRC Staff did not rely only on PG&E's status as a rate-regulated utility to evaluate its financial qualifications in connection with the ISFSI application, but also considered the information provided by PG&E in the NRC license transfer application. (*Id.*) However, this allegation does not raise a genuine and substantial issue.

As discussed above, given the parameters of the approval under consideration — an ISFSI license to *PG&E, the rate-regulated utility* — the NRC need only consider the financial qualifications of *PG&E* to find reasonable assurance of financial qualifications pursuant to 10 C.F.R. § 72.22(e). PG&E does not presently rely on information in the Part 50 license transfer application to demonstrate PG&E's financial qualifications in connection with the ISFSI application. The NRC, in turn, need not consider that information. Accordingly, the Governmental Participants have not demonstrated a genuine and substantial issue.

C. PG&E Has Provided Information Adequate to Address the Impact of Bankruptcy on its Continuing Ability to Decommission the ISFSI.

The Governmental Participants argue that PG&E cannot provide reasonable assurance, prior to licensing, that “the necessary financial arrangements have been made to decommission the ISFSI.” (GP Summary at 24.) However, as discussed in the PG&E Summary (at 21-24), and as summarized below, the Governmental Participants have not raised a genuine issue with respect to decommissioning funding. PG&E has met all applicable NRC requirements under Part 72 related to funding for radiological decommissioning of an ISFSI. (*See* PG&E Summary at 21-24.)

First, the Governmental Participants argue that PG&E's one-time failure “to make a \$10 million payment,” which had been authorized by the CPUC and collected in rates, to the nuclear decommissioning trust funds suggests that PG&E will not maintain the requisite level of

decommissioning funding in the future. The Governmental Participants are referring to a circumstance in 2000 in which PG&E did not make a decommissioning fund contribution. Supp. Campbell Aff. ¶ 7. Due to the company's cash flow issues during the California energy crisis of 2000, and as part of cash conservation efforts, PG&E in 2000 did not make a \$10 million contribution to the DCPD nuclear decommissioning trust funds. *Id.* While decommissioning contributions were collected through the rate process, PG&E determined in the months leading up to the bankruptcy filing (in April 2001) that there were higher priorities for available cash. *Id.* PG&E, however, understands that this past contribution was reasonably collected with the intent of paying for nuclear decommissioning activities. It is not feasible to simply now apply the \$10 million to the trust funds, due to Internal Revenue Service rules concerning tax-deductible contributions to the trust. *Id.* ¶ 8. The issue therefore is being addressed in the CPUC rate process. *Id.*

Specifically, as discussed in the PG&E Summary (at 21-22), PG&E currently has an ongoing Nuclear Decommissioning Cost Triennial Proceeding before the CPUC. This proceeding addresses funds for decommissioning of both the power plant and the ISFSI. *Id.* at 22. The result of the proceeding will be a determination of PG&E's prospective revenue requirements related to decommissioning, based on revised site-specific cost estimates and the present status of the nuclear decommissioning trust funds (which do not include the \$10 million contribution from 2000). Supp. Campbell Aff. ¶ 8. Accounting for the prior \$10 million (plus accrued interest) will be resolved in that ratemaking process (such as by an offset against the future nuclear decommissioning revenue requirement), and adequate funding will be assured. *Id.*

Moreover, the Governmental Participants have not demonstrated that PG&E will miss additional payments or that the mere possibility of such an event affects financial

qualifications. As discussed by Mr. Campbell in his affidavit filed in connection with the PG&E Summary (at ¶ 17), PG&E's bankruptcy resulted from a specific, highly unique cash flow situation due solely to the California energy crisis in 2000. The conditions that created that shortfall have been eliminated by a number of steps, including returning PG&E to cost-of-service rate regulation. The bankruptcy now relates to restructuring debt created at that time — not to a present or future shortfall in revenues to cover expenses. Until a Plan of Reorganization is implemented, PG&E expects to continue to make decommissioning contributions based on cost-of-service electric rates that include a component for decommissioning both the power plant and the ISFSI. Nothing further is required by 10 C.F.R. § 72.30(c)(5).

The Governmental Participants next claim that PG&E's financial analyses relative to decommissioning "may no longer be valid." (GP Summary at 25.) Specifically, the Governmental Participants allege that the NRC has "reminded PG&E that monies collected for decommissioning DCPD cannot be used to decommission the ISFSI," and that PG&E responded it would rely on "other monies in the fund." (*Id.*) The Governmental Participants claim that PG&E's reliance on "other monies in the fund" would include the use of funds authorized by the CPUC and collected from ratepayers for other uses. (*Id.*) As carefully explained in its initial written summary, PG&E is not relying on "other monies in the fund" to meet its ISFSI funding assurance obligations. (*See* PG&E Summary at 22.) Rather, PG&E's ongoing collections for decommissioning specifically include monies for radiological decommissioning of the power plant *and* the proposed ISFSI, based on estimates that are periodically updated. While the ISFSI decommissioning monies are part of the overall decommissioning collections and are maintained in the DCPD decommissioning trust funds, the monies can — as an accounting matter — be segregated from funds specifically approved for decommissioning the power plant, and the

Governmental Participants make no specific showing otherwise. *See* Campbell Aff. ¶ 25. Note that the power plant decommissioning trust fund has remained fully funded with respect to NRC-required minimums, and — again — the Governmental Participants do not suggest otherwise. Supp. Campbell Aff. ¶ 7.

Finally, the Governmental Participants allude to a “live issue” in the bankruptcy proceeding “as to whether PG&E can in fact transfer its beneficial interest in the Decommissioning Trust through the bankruptcy court.” (*Id.*) This issue, however, is completely irrelevant to the issue before the Licensing Board — the issuance of a Part 72 license to PG&E. Transfer of PG&E’s beneficial interest in the fund is a license transfer issue. In any event, resolving that issue is not within the NRC’s area of expertise and should be addressed in a forum appropriate for the issue.¹⁷

IV. THE CEC SUMMARY

The California Energy Commission (“CEC”), in its initial written summary, likewise fails to demonstrate a genuine and substantial issue. The CEC principally argues that PG&E can only comply with the requirements of 10 C.F.R. § 72.22(e) if the proposed reorganization plan of the CPUC, currently pending before the bankruptcy court alongside the PG&E Plan, is adopted by that court and implemented. (CEC Summary at 8, 12-14.) As discussed above, under the CPUC plan, PG&E would remain a rate-regulated utility and the NRC licensee for both DCPD and the proposed ISFSI. The CEC’s argument fails to establish a

¹⁷ The Commission declined to consider this issue in the Part 50 license transfer proceeding, holding that the decommissioning fund transfer issue was more appropriately considered by the bankruptcy court and the Federal Energy Regulatory Commission. As the Commission noted in that proceeding, “The NRC can condition the license transfer on PG&E’s lawful transfer of the decommissioning funds (through the bankruptcy proceeding or otherwise) . . .” *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant), CLI-02-16, 55 NRC 317, 341 (2002).

material issue, because its focus is on post-bankruptcy matters, not on the application at issue.¹⁸ The CEC has not addressed the matters in dispute as admitted in Contention TC-2 — PG&E's *current* access to rates or the relevance of PG&E's *current* access to credit markets. For the reasons discussed above with respect to the Governmental Participants, the CEC's focus on the outcome of the bankruptcy case is beyond the scope of this proceeding.¹⁹

The CEC also discusses its perception (at 9-12) that it is “unclear as to what the NRC Staff have [sic] actually relied upon to reach a conclusion that PG&E has demonstrated compliance with the NRC financial qualification requirements.” As stated above, PG&E is relying on its current status as an electric utility to demonstrate reasonable assurance of its financial qualifications. However, it discussed in the Application the fact of bankruptcy and the possibility that the PG&E Plan of Reorganization could result in a different licensee for both the power plant and the proposed ISFSI. The NRC does not exist in a vacuum; it is reasonable that the Staff is aware of developments with respect to the bankruptcy and the proposed PG&E Plan.²⁰ However, as evidenced by the June 7 Supplement, PG&E is presently relying on the financial qualifications of PG&E, the electric utility, for compliance with 10 C.F.R. § 72.22(e).

¹⁸ The CEC's argument, like some of the arguments of the Governmental Participants, implies that only rate-regulated utilities can demonstrate financial qualifications. As discussed above and in the PG&E Summary (at 19), there is no requirement that an ISFSI licensee be an electric utility that recovers costs through cost-of-service rates. The NRC licenses non-electric utilities, under both 10 C.F.R. Parts 50 and 72.

¹⁹ The CEC argues that “PG&E's Plan, if adopted, would create even more uncertainty as to the financial ability of PG&E, or any successor to PG&E, of being able to meet NRC safety requirements.” (CEC Summary at 12.) This is not correct. PG&E provided, in the Part 50 license transfer application, the required information demonstrating the proposed licensee's financial qualifications. The CEC has not challenged that information in the license transfer proceeding.

²⁰ Indeed, the NRC Staff has before it PG&E's November 30, 2001 application for transfer of the Part 50 licenses for DCP.

The NRC Staff need not rely on the Part 50 license transfer application — or any other developments in parallel proceedings — to find that PG&E has met the requirements for licensing the ISFSI at the present time.

In sum, the CEC's issues do not demonstrate a genuine and substantial dispute of fact with respect to an issue within the scope of the proceeding and pertinent to the admitted contention, that can only be resolved through an adjudicatory hearing.

V. CONCLUSION

The NRC's licensing process is sufficiently rigorous as well as flexible to allow the agency to address material new developments if and when they occur. The Governmental Participants' "uncertainty" arguments are essentially legal arguments that wholly fail to establish a genuine and substantial issue of fact with respect to PG&E's financial qualifications for the construction, operation, and decommissioning of the ISFSI, that can only be resolved through an

evidentiary hearing. Accordingly, the Licensing Board should resolve Contention TC-2 in PG&E's favor, in accordance with 10 C.F.R. § 2.1115(a).²¹

Respectfully submitted,



David A. Repka, Esq.
Brooke D. Poole, Esq.
WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005-3502

William V. Manheim, Esq.
Richard F. Locke, Esq.
PACIFIC GAS & ELECTRIC COMPANY
77 Beale Street, B30A
San Francisco, CA 94105
ATTORNEYS FOR PACIFIC GAS &
ELECTRIC COMPANY

Dated in Washington, District of Columbia
this 28th day of April 2003

²¹ In its Memorandum and Order (Section 2.1109(b) Oral Argument Schedule) dated April 16, 2003, the Licensing Board requested that the parties advise the Licensing Board of the tentative order of presentation and time allocation between the parties/interested governmental participants on each "side." PG&E and the NRC Staff have agreed that they will split their allotted three hours such that PG&E will have two hours and the NRC Staff one.

A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
Pacific Gas and Electric Co.)	Docket No. 72-26-ISFSI
)	
(Diablo Canyon Power Plant Independent)	ASLBP No. 02-801-01-ISFSI
Spent Fuel Storage Installation))	

Supplemental Affidavit of Walter L. Campbell

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

1. I am employed as Director of Business and Financial Planning by Pacific Gas and Electric Company ("PG&E"). My professional qualifications are set forth in my previous Affidavit in this proceeding, filed on April 11, 2003, as an attachment to the "Summary of Facts, Data, and Arguments on Which Pacific Gas and Electric Company Will Rely at the Subpart K Oral Argument."

2. On December 29, 2002, the Atomic Safety and Licensing Board ("Licensing Board") in this proceeding established a schedule pursuant to which the admitted parties and interested governmental participants were directed to submit detailed written summaries of the facts, data, and arguments upon which they intend to rely to support or refute the existence of a genuine and substantial dispute of fact regarding the single contention admitted in this proceeding, Contention TC-2. Initial written summaries were filed on April 11, 2003. The purpose of this supplemental affidavit is to address several points raised by certain interested governmental participants (the Avila Beach Community Services District, the California Public Utilities Commission ("CPUC"), and San Luis Obispo County) in their initial written summary with respect to Contention TC-2.

3. In this affidavit I will specifically provide testimony regarding PG&E's financial qualifications to pay for costs associated with the design, construction, operation, and decommissioning of the proposed independent spent fuel storage installation ("ISFSI").

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

4. PG&E, the present Part 72 license applicant, is a public utility. It expects to fully recover the costs associated with the ISFSI through cost-of-service rates. This expectation has not changed.

5. I have stated that the costs will be recovered from electric rates or operating revenues, or a combination of the two. See Affidavit of Walter L. Campbell ¶¶ 9-11. From a cash flow perspective (because rate recovery is not an instantaneous process), PG&E will cover the costs associated with the ISFSI as normal operating expenses, covered by normal electric operating revenues. Also, to the extent there are either any disallowances resulting from a prudence review by the CPUC (as can occur in any prudence review), or delays in the recovery of costs (as can occur because the CPUC chooses to treat expenditures as capitalized costs recoverable over time), ISFSI expenses will be covered by electric operating revenues or cash on hand. As a practical matter, any difference between current cash disbursements and current cash receipts for a specific activity must be funded by either cash generated by other operating activities (simply referred to as "operating revenues"), cash on hand, or cash raised by financing. As demonstrated by the financial statements included in the record, these scenarios may affect earnings, but not financial qualifications. The scale of the ISFSI costs is simply not material to PG&E's overall current financial position and outlook. (In fact, PG&E has paid for more than \$13.9 million in ISFSI costs since the beginning of 2001 — in spite of being in bankruptcy for most of that period.) Accordingly, my references to both electric rates and operating revenues, and even cash on hand, do not reflect a change in position regarding PG&E's access to the cost-

of-service ratemaking process. Rather, the references reflect only different accounting perspectives and the realities of the ratemaking process and PG&E's financial position.

6. The interested governmental participants have raised issues regarding PG&E's proposed accounting and ratemaking treatment of the ISFSI costs as current operating expenses rather than capitalized costs. Such issues are being appropriately addressed in PG&E's 2003 General Rate Case as part of the conventional ratemaking process. For example, because the CPUC recognizes the possibility of a transfer of the facility to a non-rate-regulated entity, it apparently is concerned that present ratepayers should not pay ongoing ISFSI expenses. As discussed in my earlier affidavit, PG&E believes its accounting treatment to be appropriate, and therefore is addressing this issue in the rate case. However, given the amounts involved, and PG&E's revenues, there is absolutely no reason to conclude that a determination by the CPUC that the expenditures should be capitalized for ratemaking purposes would affect either PG&E's current financial qualifications or those of any successor. *See, e.g., Campbell Aff.* ¶ 13.

Financial Arrangements for ISFSI Decommissioning

7. In 2000, PG&E did not make a decommissioning fund contribution related to the power plant. Specifically, due to the company's cash flow issues during the California energy crisis of 2000, and as part of cash conservation efforts, PG&E did not make a \$10 million contribution to the Diablo Canyon Power Plant nuclear decommissioning trust funds. While decommissioning contributions were collected through the rate process with the intent of paying for nuclear decommissioning activities, PG&E determined in the months leading up to the bankruptcy filing (in April 2001) that there were higher priorities for available cash. (The power plant decommissioning trust funds have remained fully funded with respect to NRC-required minimums.)

8. It is not feasible to now apply the \$10 million to the trust funds, due to Internal Revenue Service rules concerning tax-deductible contributions to the trust. Because the contribution was reasonably collected with the intent of paying for nuclear decommissioning activities, the \$10 million is being addressed in the CPUC rate process. Specifically, PG&E currently has an ongoing Nuclear Decommissioning Cost Triennial Proceeding before the CPUC. This proceeding addresses funding for decommissioning of both the power plant and the ISFSI. The result of the proceeding will be a determination of PG&E's revenue requirements related to decommissioning, based on revised site-specific cost estimates and the present status of the nuclear decommissioning trust funds (which do not include the \$10 million contribution from 2000). The CPUC has issued a Draft Resolution approving with modifications PG&E's prior request to treat the \$10 million (plus accrued interest) as an offset against a future nuclear decommissioning revenue requirement. PG&E has commented on the Draft Resolution and alternatively suggested that \$6.09 million of the \$10 million will be used to pay for previously unrecovered security costs at the Humboldt Bay Power Plant imposed following the terrorist attacks of September 11, 2001. The remainder would be used as an offset against a future nuclear decommissioning revenue requirement. Regardless of the ultimate treatment as a result of the decommissioning rate case, appropriate decommissioning funding contributions will be made and ratepayers effectively will be made whole with respect to the \$10 million.

Conclusions

9. I continue to believe that PG&E has demonstrated the requisite financial qualifications as a public utility to construct, operate and decommission the proposed ISFSI in fulfillment of NRC requirements. I believe that costs associated with the ISFSI represent reasonable and prudent operating expenses that are fully recoverable through cost-of-service rates. However, the possibility of either disallowances resulting from a prudence review by the

CPUC or significant delays in recovery of costs due to a determination that the costs should be capitalized would not be material to the NRC financial qualifications finding, given the substantial assets and earnings of PG&E. (See, e.g., Campbell Aff. ¶¶ 13-14 (noting that PG&E's recent financial statements demonstrate operating revenues of over \$10 billion, earnings available from common stock of over \$1.7 billion, and cash on hand in excess of \$3 billion for PG&E for the 12-month period ending December 31, 2002)). Finally, I am confident that PG&E will continue to fulfill NRC requirements with respect to contributions to the nuclear decommissioning trust funds.

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

Walter L. Campbell
Walter L. Campbell

Sworn and subscribed to before me this 25th day of April 2003.



Elizabeth J. Diamond
Notary Public

My Commission expires: May 16, 2006

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 "RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO 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 28th 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.

Administrative Judge G. Paul Bollwerk, III
Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: gpb@nrc.gov

Administrative Judge Peter S. Lam
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: psl@nrc.gov

Administrative Judge Jerry R. Kline
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: jrk2@nrc.gov
kjerry@comcast.net

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
e-mail: dcurran@harmoncurran.com

Lorraine Kitman
P.O. Box 1026
Grover Beach, CA 93483
e-mail: lorraine@bejoseeds.com
l.kitman@bejoseeds.com

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

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
e-mail: jlindholm@co.slo.ca.us

San Luis Obispo Mothers for Peace
P.O. Box 164
Pismo Beach, CA 93448
e-mail: beckers@thegrid.net
jzk@charter.net

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

Karen D. Cyr, Esq.
Stephen H. Lewis, Esq.
Angela B. Coggins, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
e-mail: OGCMailCenter@nrc.gov
shl@nrc.gov
abc1@nrc.gov

Peg Pinard
714 Buchanan Street
San Luis Obispo, CA 93401

Laurence G. Chaset
Legal Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
e-mail: lau@cpuc.ca.gov

Karla Bittner, Chair
Ted Ivarie, Vice Chair
Marylou Gooden, Secretary
Avila Valley Advisory Council
P.O. Box 65
Avila Beach, CA 93424
e-mail: kdbitt@charter.net

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

Robert R. Wellington, Esq.
Robert W. Rathie, Esq.
Wellington Law Offices
857 Cass Street, Suite D
Monterey, CA 93940
e-mail: info@dcisc.org

Christopher Helenius, President
Avila Beach Community
Services District
P.O. Box 309
Avila Beach, CA 93424
e-mail: AVILACSD@aol.com

Sheldon L. Trubatch, Esq.
4222 River Road
Washington, DC 20016
e-mail:
lawofficesofsheldontrubatch@starpower.net



Brooke D. Poole, Esq.
Counsel for Pacific Gas
& Electric Company