

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

REPLY OF NRC STAFF TO INTERESTED GOVERNMENTAL PARTICIPANTS'
MOTION THAT BOARD TAKE OFFICIAL OF A NEWSPAPER BLURB
REGARDING FINANCIAL DIFFICULTIES OF PG&E'S NATIONAL ENERGY GROUP

BACKGROUND

On the eve of oral argument under 10 C.F.R. Subpart K in this proceeding, the Interested Governmental Participants ("IGPs") filed a "Motion by the Governmental Participants Requesting the Atomic Safety and Licensing Board to Take Official Notice under 10 C.F.R. § 2.743(i)(1)," ("Motion"), dated May 15, 2003. The IGPs paraphrased a blurb from the May 14, 2003, edition of *The Washington Post*, but did not attach the blurb. The blurb dealt with financial difficulties facing the National Energy Group ("NEG"), which was described as a "... unit of utility company PG&E ..." Pursuant to 10 C.F.R. § 2.743(i)(1), the IGPs requested the Atomic Safety and Licensing Board ("Board") to take official notice of the facts set forth in the blurb.

Since the Motion was filed so shortly before the oral argument (held on May 19, 2003), the Board afforded the NRC staff ("Staff") and Pacific Gas and Electric Co. ("Licensee") the opportunity

¹ See *The Washington Post*, Wednesday, May 14, 2003, p. E2, "Chapter 11 Likely for Bethesda Firm." The Staff does not dispute the IGPs' paraphrasing of the facts section of the Motion. See p. 2 of this reply.

to either reply to the Motion as part of oral argument or subsequently in writing.² The Staff requested until May 27, 2003 to reply and its request was granted by the Board from the bench. The Licensee orally replied, but also requested, and was granted, the opportunity to file a written reply by the same date. The Staff herein addresses the Motion.

DISCUSSION

Section 2.743(i)(1) states:

The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this subparagraph shall be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

As the Staff reads the Motion, the IGPs request that official notice be taken of the following statement as evidence:

... Pacific Gas & Electric's ("PG&E") wholesale power unit, The National Energy Group ("NEG") has defaulted on payment of \$2.9 billion in bonds, that had been used to finance the construction of power plants, and is likely to seek Chapter 11 protection, probably through a prepackaged arrangement with the bondholders, or be forced into bankruptcy by them.

Motion, p. 1. The Staff views the remainder of the Motion as argument for official notice of these facts.

The Staff would have no objection to the Board's taking official notice of the fact of publication of the news blurb. The Staff opposes, however, the Board's taking official notice of the facts for evidentiary purposes in this proceeding. The publication of these "facts" in *The Washington Post* does not make them facts. The IGPs have presented to the Board and parties one sentence from a newspaper blurb and that sentence relates to NEG, an entity separate from

² Order (Opportunity to Respond to Motion to Take Official Notice), dated May 16, 2003.

the Licensee. The IGPs appear to be asserting that there is some significance to this proceeding of NEG's asserted financial difficulties. As basis for the Motion, the IGPs state:

This development is relevant for this proceeding because a first quarter loss of \$261 million at NEG contributed to PG&E's first quarter loss of \$354 million (leaving \$93 million in loss attributed to other PG&E activities), instead of a PG&E profit of \$631 million for the comparable quarter last year.

Motion, p. 1. It would be perilous for the Board to accord evidentiary status to the proffered facts because their significance is truly unclear amidst a huge Chapter 11 bankruptcy proceeding record. This is particularly so in that bankruptcy law is not an area peculiarly within the technical or scientific expertise of an Atomic Safety and Licensing Board. See 10 C.F.R. § 2.743(i)(1).

In its Application for licensing of an ISFSI, the Licensee has described NEG as a subsidiary of PG&E Corporation,³ which is also the parent of the Licensee. PG&E Corporation is not, however, in bankruptcy. Given the separation between NEG and the Licensee, it is far from clear what NEG's reported financial difficulties mean in this proceeding, which involves one contention, TC-2, raised initially by intervenor San Luis Obispo Mothers for Peace, *et al.* ("SLOMFP"). In TC-2 SLOMFP asserts: "PG&E has failed to demonstrate that it meets the financial qualifications requirements of 10 C.F.R. § 72.22(e)." See *Pacific Gas & Electric Company (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-02-023, 56 NRC 413, 441-43 (2002). The Board admitted Contention TC-2 on two of the bases asserted by SLOMFP, specifically that:

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.

³ See Attachment A to ISFSI Application, "PG&E Year in Review & Financial Statistical Report (2000)," pp. 1-3.

Id. It is far from apparent how the asserted fact that NEG has defaulted on bonds due and that it is likely to petition for reorganization under Chapter 11 of the Bankruptcy Code or be forced into bankruptcy by the affected bondholders might affect the Licensee's ability to comply with 10 C.F.R. § 72.22(e). On this basis, the Board should deny the IGPs' Motion.

Official notice is simply one manner of receipt of evidence. Accordingly, the standards for admission of evidence, in general, apply to official notice.⁴ In this proceeding, the hybrid hearing procedures of 10 C.F.R. Subpart K apply. Oral argument pursuant to 10 C.F.R. § 2.1113 was held on May 19, 2003. The parties have already submitted detailed written summaries of all the facts, data, and arguments on which they relied at oral argument either to support or refute the existence of a genuine and substantial dispute of fact. See 10 C.F.R. § 2.1113(a). Additionally, in this proceeding the Board requested responses to the initial written summaries and all parties filed such responses. Considering the stage of this proceeding, the IGP's bear a particularly heavy burden of demonstrating how the facts of which they seek official notice either support or refute the existence of a genuine and substantial dispute of fact. Further, since these facts have first been submitted through the May 15, 2003 Motion, they have not gone through the scrutiny of the contention admission process to determine the materiality of the facts.⁵

The IGPs assert that:

This development is relevant for this proceeding because a first quarter loss of \$261 million at NEG contributed to PG&E's first quarter loss of \$354 million (leaving \$93 million in loss attributed to other PG&E activities), instead of a PG&E profit of \$631 million for the comparable quarter last year.

Motion, p. 1. These numbers are the IGPs' assertion, they are not part of the newspaper blurb.

In any event, the fact that *The Washington Post* reported certain matters regarding NEG, in no way

⁴ The official notice provision of NRC's regulations is part of 10 C.F.R. § 2.743, titled "Evidence."

⁵ See, LBP-02-023, 56 NRC 413, 437-38 (2002).

demonstrates the materiality of the blurb to PG&E's capability to fund construction, operation, and decommissioning of the ISFSI.

CONCLUSION

The Board should not take official notice of the asserted facts set forth in *The Washington Post's* blurb. The asserted facts have not been demonstrated to be material to the one admitted contention that has now been argued to the Board. Taking official notice of these asserted facts would simply encumber the record with facts whose materiality has not been demonstrated.

Respectfully submitted,

/RA/

Stephen H. Lewis
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of May, 2003

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Spent Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "REPLY OF NRC STAFF TO INTERESTED GOVERNMENTAL PARTICIPANTS' MOTION THAT BOARD TAKE OFFICIAL OF A NEWSPAPER BLURB REGARDING FINANCIAL DIFFICULTIES OF PG&E'S NATIONAL ENERGY GROUP" have been served upon the following persons by United States mail, first class, or through the Nuclear Regulatory Commission's internal mail distribution as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 27th day of May, 2003.

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

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

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

Jerry R. Kline* **
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555
E-mail: jrk2@nrc.gov
kjerry@comcast.com

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

Office of the Secretary* **
ATTN: Rulemaking and Adjudication Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

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

County Supervisor Peg Pinard **
County Government Center
1050 Monterey Avenue
San Luis Obispo, California 93408
E-mail: ppinard@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

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

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

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

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

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

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

John L. Wallace**
General Manager & District Engineer
Avila Beach Community Services District
P.O. Box 309
Avila Beach, CA 93424
E-mail: JohnW@lwa.com

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

/RA/

Stephen H. Lewis
Counsel for NRC Staff