

May 27, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

June 3, 2003 (3:28PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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  
MOTION BY THE GOVERNMENTAL PARTICIPANTS  
REQUESTING OFFICIAL NOTICE

On May 15, 2003, the Governmental Participants in this proceeding<sup>1</sup> filed a motion requesting that the Atomic Safety and Licensing Board ("Licensing Board") take official notice, pursuant to 10 C.F.R. § 2.743(i)(1), of a *Washington Post* article related to first quarter 2003 financial results for the PG&E National Energy Group ("NEG"). Pacific Gas and Electric Company ("PG&E") opposes the motion, because the "facts" identified in the article have no relevance to the issue in controversy in this licensing proceeding.

The issue in the present case under Contention TC-2 relates to: ". . . the impact of PG&E's bankruptcy on its continuing ability to undertake the new activity of constructing, operating, and decommissioning the [Independent Spent Fuel Storage Installation ("ISFSI")] by reason of its access to continued funding as a regulated entity or through credit markets." LBP-02-23, 56 NR6 413, 442 (2002). PG&E is the applicant in

<sup>1</sup> The "Governmental Participants" supporting the motion are the Avila Beach Community Services District, the California Energy Commission, the California Public Utilities Commission, and San Luis Obispo County.

the proceeding. PG&E is the electric utility subsidiary of the holding company, PG&E Corporation. It is the bankruptcy and financial qualifications of PG&E — the regulated electric utility and solvent debtor-in-possession under Chapter 11 of the Bankruptcy Code — that is at issue in this case.

PG&E NEG is a separate, wholly-owned subsidiary of PG&E Corporation. NEG is headquartered in Bethesda, Maryland. NEG and its subsidiaries hold various power generation, natural gas transmission, and energy trading businesses. Because NEG is a completely separate legal entity, the financial performance of the NEG businesses, and even a potential bankruptcy filing for NEG as reported in the *Washington Post*, can have no impact on either the assets or the liabilities of PG&E, the electric utility. Additionally, pending resolution of the PG&E bankruptcy (the period relevant to Contention TC-2), the assets of the utility are protected by basic bankruptcy law and cannot be transferred to the holding company or a separate affiliate (even if that affiliate is losing money or initiates its own bankruptcy proceeding).<sup>2</sup> Therefore, the information about NEG is not a matter that is material and relevant to the financial qualifications of PG&E.

In the motion the Governmental Participants specifically cite first quarter losses at NEG and NEG's contribution to overall losses for PG&E Corporation (misleadingly attributed in the motion to "PG&E"). This information does not address the financial performance of PG&E, the utility applicant in this case, PG&E's access to the

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<sup>2</sup> PG&E NEG was specifically created and interposed between PG&E Corporation and the NEG subsidiaries in 2001. This reorganization has been described as a "ringfencing" of NEG relative to PG&E Corporation. The reorganization was approved by the Federal Energy Regulatory Commission ("FERC") in January 2001. FERC's approval was upheld by the United States Court of Appeals for the Ninth Circuit on May 15, 2003. *California ex rel. Lockyer v. FERC*, Nos. 02-70336, 02-70578, 2003 Westlaw 21098637, at \* \_\_\_ (9th Cir. filed May 15, 2003).

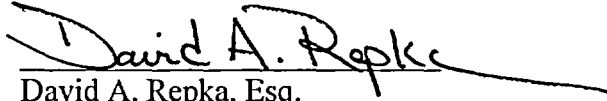
rate process to cover ISFSI costs, or whether access to credit markets is important to PG&E's financial qualifications. At the oral argument on May 19, 2003, the Governmental Participants attempted to establish relevance by pointing to certain modifications made to the pending PG&E Plan of Reorganization ("Plan") and submitted to the Bankruptcy Court based on a letter to PG&E Corporation from Standard and Poors Rating Services ("S&P"). The letter specifies conditions S&P deemed necessary for the new companies that would emerge from the Plan in order for those companies to obtain investment grade credit ratings.<sup>3</sup> However, by definition these conditions relate to the post-bankruptcy successor companies under the PG&E Plan and are irrelevant to PG&E, the current electric utility applicant in this Part 72 licensing proceeding. These conditions have no bearing on PG&E's access to the rate process.

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<sup>3</sup> The S&P submitted letter and related changes to the Plan were discussed in a letter from PG&E to the NRC on the Part 50 docket (DCL-03-030, "Supplemental Information Related to License Transfer Application"), dated March 14, 2003. The modification mentioned by the Governmental Participants involved an additional infusion of capital from PG&E Corporation to the new companies to be created under the Plan, as necessary to achieve investment grade ratings.

The Governmental Participants motion is seeking to introduce immaterial and irrelevant information to improperly broaden and confuse the issue in the present case. Accordingly, the motion should be rejected.

Respectfully submitted,



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Dated in Washington, District of Columbia  
this 27th day of May 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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION BY THE GOVERNMENTAL PARTICIPANTS REQUESTING OFFICIAL NOTICE" have been served as shown below by electronic mail, this 27th day of May 2003. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

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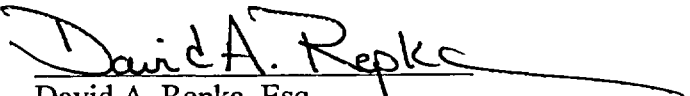
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