IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-72735

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

AND

COUNTY OF SAN LUIS OBISPO

Petitioners-Appellants,

v.

U.S. NUCLEAR REGULATORY COMMISSION,

Defendants-Appellees,

PACIFIC GAS AND ELECTRIC COMPANY, et al.

Intervenors

PETITONERS' EXCERPTS OF RECORD
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Dated: December 5, 2002

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STATE OF CALIFORNIA
PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

GRAY DAVIS, *Governor*

February 11, 2002

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudication Staff

Re: **In the Matter of Pacific Gas and Electric Company Application for License Transfers and Conforming Administrative License Amendments for Diablo Canyon Power Plant, Units 1 and 2**, Docket Nos. 50-275, 50-323

To Whom It May Concern:

Enclosed for filing in the above-docketed case, please find an electronic version of a document entitled **"RENEWED MOTION TO DISMISS APPLICATIONS, OR IN THE ALTERNATIVE TO HOLD APPLICATIONS IN ABEYANCE, AND NOTICE OF BANKRUPTCY COURT RULING"** ("Renewed Motion").

Thank you for your cooperation in this matter.

Sincerely,

Laurence G. Chaset
Staff Counsel

Enclosure

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of Pacific Gas and Electric Company Application for License Transfers and Conforming Administrative License Amendments for Diablo Canyon Power Plant, Units 1 and 2	Docket Nos. 50-275, 50-323

RENEWED MOTION TO DISMISS APPLICATIONS, OR IN THE ALTERNATIVE TO HOLD APPLICATIONS IN ABEYANCE, AND NOTICE OF BANKRUPTCY COURT RULING

Pursuant to 10 CFR §§2.1306 and 2.1309, the Public Utilities Commission of the State of California ("CPUC"), hereby renews it previously filed motions for summary dismissal of the Application submitted in the captioned dockets, or, in the alternative, to hold the Application in abeyance. In addition, the CPUC provides notice and submits a copy of the Bankruptcy Court's "Memorandum Decision Regarding Preemption and Sovereign Immunity," issued February 7, 2002 ("the Preemption Decision").[1]

As the CPUC previously pointed out on page 6 of its Petition that was filed in this matter on February 6, "The Bankruptcy Court's ruling on certain facial preemption issues . . . will determine whether PG&E's plan is lawful and may move forward at all." In the

[1] Copies of the Preemption Decision are attached to this Renewed Motion as Exhibit A. Exhibit A is not attached to the service copies. The Preemption Decision is also available on the Bankruptcy Court's internet site at http://www.canb.uscourts.gov/.

Preemption Decision, the Bankruptcy Court has determined that PG&E's Plan is not lawful and may not move forward as it is currently designed. Specifically, the Bankruptcy Court held that:

> "... there is no express preemption of nonbankruptcy law that permits a wholesale unconditional preemption of numerous state laws. . . . Thus if [PG&E and its corporate Parent] adhere to their contention that express preemption is available to them, the Disclosure Statement must be disapproved since the Plan could not be confirmed in the face of the vigorous objections made by the State and the Commission."

Preemption Decision, at 3.

Although the Bankruptcy Court did give PG&E the opportunity to amend its Plan and Disclosure Statement to attempt to "establish with particularity the requisite elements of implied preemption" (*Id.*), the Bankruptcy Court's Preemption Decision is fatal to PG&E's Plan as currently proposed, and as proposed to be implemented in the above-captioned proceedings. For instance, it is fatal to PG&E's request for transfer of those portions of its beneficial interest in the CPUC-jurisdictional Nuclear Decommissioning Trusts that are associated with the Diablo Canyon Power Plant ("DCPP"), which relies wholly on the requirement that the Bankruptcy Court either "compel" the CPUC to approve such transfer or to "deem" such approval to have been granted by the CPUC. See the CPUC's Petition, at 14.

The Preemption Decision "rejects outright Proponents' across-the-board, take-no-prisoners preemption strategy in the Plan and Disclosure Statement." Preemption Decision, at 46. PG&E's Application in this matter is mooted by the Preemption

Decision, since PG&E's current Plan, from which its Application flows, has been held to be unconfirmable.

In terms of process, the Bankruptcy Court has ordered PG&E, by February 21, 2002, to:

1. File and serve a response to the term sheet for the Commission's alternative plan, which will be filed on February 13, 2002.

2. File and serve a statement as to whether it intends to seek interlocutory review of the Court's order, or whether it seeks to amend its plan to attempt to meet the requirements for implied preemption. In that regard, the Court ordered that should PG&E seek to further amend its Disclosure Statement, it must do so by "showing what ultimate facts will be proven to lead the court to find that the application of [certain specified provisions of the California Public Utilities Code and Commission decisions] to the facts of PG&E's proposed reorganization are economic in nature rather than directed at protecting public health and safety or other noneconomic concerns, and that those particular laws stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress and the Bankruptcy Code." Preemption Decision, at 40-41.

3. Submit a form of order denying approval of the Disclosure Statement "for the reasons stated" in this Memorandum Decision if that is its desire. *Id.*, at 48-49.

4. File and serve any request for interlocutory certification of the order denying approval of the Disclosure Statement that it wishes to have this court enter. *Id.*, at 49.

Because the Bankruptcy Court has "reject[ed] outright" the preemption strategy upon which the Application herein depends, the Nuclear Regulatory Commission

("NRC") should dismiss the Application. At a minimum, the NRC should hold any proceedings in this matter in abeyance until there is a viable Plan pending before the Bankruptcy Court.

February 11, 2002

Respectfully submitted,

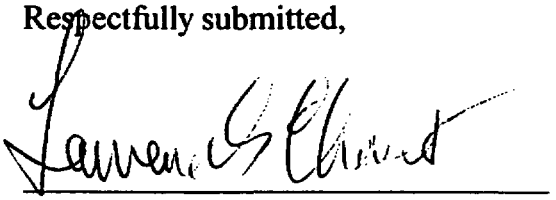

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EXHIBIT A

Original Filed
February 7, 2002

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re	) Bankruptcy Case
	) No. 01-30923DM
PACIFIC GAS & ELECTRIC COMPANY,	)
	) Chapter 11
Debtor.	)
	)

MEMORANDUM DECISION REGARDING
PREEMPTION AND SOVEREIGN IMMUNITY

I. Introduction

On September 20, 2001, Debtor, Pacific Gas and Electric Company ("PG&E"), and its corporate parent, PG&E Corporation ("Corporation", and together with PG&E, "Proponents") filed their first plan of reorganization for PG&E and a disclosure statement.

On December 4, 2001, this court conducted a status conference regarding objections to the September 20th disclosure statement, and by Order Rescheduling Hearings On Approval Of Disclosure Statement ("Rescheduling Order") filed December 5, 2001, the court fixed December 19, 2001, as the date for Proponents to file a revised plan of reorganization and a revised disclosure statement. On December 19, 2001, Proponents filed their First Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code For Pacific Gas and Electric Company (the "Plan") and their First Amended

Disclosure Statement For First Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code For Pacific Gas and Electric Company Proposed By Pacific Gas and Electric Company and PG&E Corporation (the "Disclosure Statement").

The Rescheduling Order directed Proponents to include in the Disclosure Statement a description specifically of

> ... (1) the laws and regulations [Proponents] seek[] to preempt through confirmation of [Proponents' Plan]; (2) the governmental units affected by any such preemption; and (3) how the various transactions contemplated by the [Plan] will affect certain executory contracts and [PG&E's] obligations under those contracts.

That order set forth a schedule for consideration of various objections to the adequacy of the Disclosure Statement, including any objections to be filed by the California Public Utilities Commission ("Commission" or "CPUC"), the Attorney General of the State of California ("State"), and any other governmental unit contending that the Plan is facially invalid based upon sovereign immunity or impermissible federal preemption.

Thereafter the State, the Commission, and various other parties filed their objections, memoranda and supporting papers and Proponents and the Official Committee of Unsecured Creditors ("Committee") filed their memoranda and supporting papers in defense of the Plan and Disclosure Statement. The court conducted a hearing on the sovereign immunity and preemption challenges on January 25, 2002.

During oral argument counsel for Corporation stated "Your honor makes the law." This court doubts that with the stroke of a pen upon an order confirming the Plan it could make federal law and sweep aside a substantial body of nonbankruptcy law. Rather,

the court believes its job is to interpret and apply the law, searching where in the Bankruptcy Code nonbankruptcy law is specifically preempted and where, under controlling case law, the purposes of federal bankruptcy law are frustrated such that federal law must prevail over specific conflicting state law.

For the reasons explained below, the court concludes that there is no express preemption of nonbankruptcy law that permits a wholesale unconditional preemption of numerous state laws, some of which are identified in the Disclosure Statement and some of which are obscured by the phrase "including but not limited to." Thus, if Proponents adhere to their contention that express preemption is available to them, the Disclosure Statement must be disapproved since the Plan could not be confirmed in the face of the vigorous objections made by the State and the Commission.

Nonetheless, the court believes that the Plan could be confirmed if Proponents are able to establish with particularity the requisite elements of implied preemption. If the Disclosure Statement is amended consistent with this Memorandum Decision, the court will approve it and let the Proponents test preemption at confirmation.

The court also believes the Plan as drafted offends sovereign immunity because it seeks affirmative relief against the State and the Commission. If the Plan and Disclosure Statement are amended as Corporation's counsel intimated they would be, then the Plan will overcome the sovereign immunity defense. If, however, Proponents leave unchanged the provisions of the Plan that seek injunctive and declaratory relief against the Commission and the State, they will have to prove that there has been a waiver of

sovereign immunity. In that case the Disclosure Statement must be amended to describe why Proponents believe sovereign immunity has been waived.

II. Preliminary Observations

A. In theory, if no one objected to the Plan and Disclosure Statement, Proponents are probably correct that the Plan could be confirmed. The court would not independently block an unchallenged march to confirmation. But Proponents' request that the court not "kill" the Plan now is not persuasive given the serious clash between state and federal law presented by the Plan and the Commission's and the State's strenuous opposition to it. From the commencement of this case the antagonism between PG&E and the Commission has been palpable. The sweep of preemption in the Plan and Disclosure Statement will not go unchallenged. The situation here is not unlike what the court was presented with in the celebrated public utility bankruptcy of Public Service Company of New Hampshire. There the court chose to decide the preemption issue in an adversary proceeding, before confirmation. See Public Service of New Hampshire v. State of New Hampshire (In re Public Service Company of New Hampshire), 99 B.R. 506, 509 (Bankr. N.H. 1989) ("Public Service") ("In the present case there is no uncertainty or contingency about the dispute arising in concrete form between the [debtor] and the [state].") The magnitude and complexity of this case weigh heavily in favor of addressing the central issues as early as possible. Once Proponents file a revised plan and set forth in a revised disclosure statement how the various state laws and regulations frustrate Congressional purposes and objectives, the stage will be set for Proponents to

attempt to establish that the Plan should preempt conflicting state law at confirmation.

B. As the development of the reorganization plan for PG&E has progressed throughout this case, Proponents have submitted mark-ups of the Plan and the Disclosure Statement as recently as February 4, 2002. Thus, for reasons wholly apart from the preemption and sovereign immunity issues, the plan of reorganization and its accompanying disclosure statement are very much works in progress. For simplicity, however, the court will refer to the Plan and the Disclosure Statement (filed December 19, 2001) for purposes of the analysis that follows. The February 4th submission has not been reviewed.

Also for convenience in this Memorandum Decision, the court's reference to nonbankruptcy "law(s)" will include statutes, regulations, Commission decisions, Commission rules, Commission resolutions and all other state law authorities that Proponents seek to preempt through confirmation of the Plan.

C. The following discussion deals with arguments made by the State and the Commission. To the extent other objectors joined the State and the Commission, their positions are addressed below. The court will only make the following brief comments about other objections.

The California Hydropower Reform Coalition argues, in part, that the rate making authority of the Commission which is not challenged under the Plan will be implicated because its traditional jurisdiction over some of PG&E's properties will cease. It also contends that the Proponents cannot be selective, preempting some state laws but not other state and federal laws.

The court is not persuaded by those arguments. Similarly, the City and County of San Francisco maintains that the deference bankruptcy law pays to state law for the definition of property rights somehow supports its opposition to Proponents' attempted preemption of state laws in the Plan. The court also rejects those arguments. Any other remaining objections by other parties are largely rendered moot in view of the obvious fact that, unless this court's decision is reversed on appeal, the Plan and Disclosure Statement will have to be modified consistent with this Memorandum Decision.

III. Provisions of Plan Calling For Preemption

Proponents' full-scale attack on any state law that interferes with the Plan is anything but subtle:

> Section 1123(a) of the Bankruptcy Code preempts any otherwise applicable non-bankruptcy law that may be contrary to its provisions. Accordingly, a plan may contain certain provisions that would not normally be permitted under non-bankruptcy law. For example, section 1123(a)(5) of the Bankruptcy Code authorizes, among other things, the sale or transfer of assets by [PG&E] without the consent of the State or the [Commission].

Disclosure Statement, 4:18-23.

Then they continue:

> The preemptive effect of the Confirmation Order extends to all statutes, rules, orders and decisions of the [Commission] otherwise applicable to the Restructuring Transactions and the implementation of the Plan. In the Proponents' view, the Confirmation Order supersedes any statute, rule, order or decision that the [Commission] might interpret to otherwise apply to the Restructuring Transactions and the implementation of the Plan whether specified here or not. The statutes, rules, orders or decisions thus preempted include, but are not limited to, the following....

Disclosure Statement, 129:15-20 (emphasis added).

Proponents argue that confirmation of the Plan will have the following results:

> Accordingly, the Proponents contend that the Confirmation Order approving the Plan and authorizing the transactions pursuant to the Plan will preempt 'otherwise applicable nonbankruptcy law' in the following areas: (1) any approval or authorization of the [Commission] or compliance with the California Pubic Utilities Code or [Commission] rules, regulations or decisions otherwise required to transfer public utility property (including authorizations to construct facilities), issue securities and implement the Plan; and (2) the exercise of discretion by any other state or local agency or subdivision to deny the transfer or assignment of any of [PG&E's] property, including existing permits or licenses, or the issuance of identical permits and licenses on the same terms and conditions as the [PG&E's] existing permits and licenses where both the Reorganized Debtor and one or more of ETrans, GTrans and Gen require such permit or license for their post Effective Date operations. Such preemption pursuant to section 1123(a) of the Bankruptcy Code shall occur at the time the Plan is implemented.[1]

Disclosure Statement, 10:9-20.

Later in the Disclosure Statement Proponents set forth a series of California Public Utility Code Sections, Commission Decisions, Commission Resolutions or Commission Rules that they contend will be superseded by confirmation of the Plan.[2] While State and Commission challenge any preemptive effect of confirmation of the Plan, the particular sections of the Public

---

[1] Reorganized Debtor is PG&E post-confirmation; ETrans, GTrans, and Gen are limited liability companies to be formed in connection with confirmation of the Plan.

[2] Although the Rescheduling Order directed Proponents to describe preempted laws and regulations and the affected governmental units specifically, Proponents simply stated: "See Exhibit H to this Disclosure Statement for a list of some of the state agencies and political subdivisions that may be impacted by the Plan." Disclosure Statement, 127:18-19 (emphasis added). "Exhibit I to this Disclosure Statement lists some of the laws, regulations and rules of state agencies and subdivisions that are subject to preemption, along with the relevant agencies." Disclosure Statement, 132:15-17 (emphasis added). In view of the court's decision that Proponents' theory of express preemption must be rejected, and implied preemption applied specifically as to each offending law, the objections by various parties that Proponents did not comply with the precise terms of the Rescheduling Order, although meritorious, will be treated as moot.

Utilities Code, Commission rule and Commission decision that the Commission seems most concerned about are the following (with the brief explanation Proponents make in the Disclosure Statement concerning each particular code section, decision and rule):

> Public Utilities Code § 377: This section, enacted in January 2001, purports to prohibit the transfer of generating assets to Gen as part of the Plan, and to otherwise require [Commission] authorization of the transfer of those assets under Public Utilities Code § 851.
>
> Public Utilities Code § 451: The [Commission] could interpret this section to conflict with the Bankruptcy Court's establishment of the conditions under which the Reorganized Debtor may resume procurement of the net open position or the transfer of any of [PG&E's] assets or businesses to any of ETrans, GTrans or Gen. To that extent, § 451 would be preempted.
>
> Public Utilities Code § 453: The [Commission] could interpret § 453 to preclude the Reorganized Debtor entering into the power sales agreement with Gen, the transportation and storage services agreement with GTrans, and some or all of the transitional service agreements with ETrans, GTrans and Gen. To that extent, § 453 would be preempted.
>
> Public Utilities Code §§ 816-830: These sections govern the issuance by a public utility of debt or equity securities, among other things requiring the approval of the [Commission] prior to the issuance. These sections are preempted because the Confirmation Order will authorize the issuance of securities and the financings that are required for the Restructuring Transactions and the implementation of the Plan.
>
> Public Utilities Code § 851: This section would require approval of the [Commission] before [PG&E] could 'sell, lease, assign, mortgage, or otherwise dispose of or encumber' its property, including certificates of public convenience and necessity, pursuant to the Plan. The Bankruptcy Court's Confirmation Order would preempt the need for this authorization.
>
> [Commission] Resolution L-244: By this Resolution, the [Commission] purported to prohibit [PG&E] from moving its gas transmission assets to FERC jurisdiction under the NGA without express authorization by the [Commission]. The Bankruptcy Court's Confirmation Order would preempt the need for this authorization, even if it were an otherwise lawful requirement. (Footnote omitted.)
>
> [Commission] Gain on Sale 'Rules': Over the years, the

> [Commission] has issued a number of often-inconsistent decisions assigning or allocating the gain on the sale of public utility property to or between shareholders and ratepayers. To the extent that the [Commission] attempts to apply its gain on sale 'rules' in a manner that results in the application of proceeds from property sold pursuant to the Plan other than as provided for in the Plan or that imputes a 'gain on sale' from the transfer of assets or the other Restructuring Transactions or implementation of the Plan, such action would be preempted. (Footnote omitted.)
>
> D.01-12-017 (December 11, 2001), Ordering Paragraph 5: In this Decision, issued December 11, 2001, the [Commission] attempts to exercise control over [PG&E's] property by purporting to 'reserve[] the right to claim a return of the full value of the asset to [PG&E's] ratepayers' should the Bankruptcy Court authorize the transfer of [PG&E's] transmission assets pursuant to the Plan. Inasmuch as this is a direct attempt to interfere with the Plan, this Decision is preempted.

Disclosure Statement, 129:21-131:15.

A core feature of the Plan is referred to by the parties as "disaggregation," meaning PG&E's creation of three new limited liability companies and the separation of all of PG&E's operations primarily into four lines of business based upon PG&E's historical functions: retail gas and electric distribution, to be carried out by Reorganized Debtor; electric transmission, to be carried out by ETrans, LLC ("ETrans"); interstate gas transmission, to be carried out by GTrans, LLC ("GTrans"); and electric generation, to be carried out by Electric Generation, LLC ("Gen", and collectively with ETrans and GTrans, the "LLC's"). Disclosure Statement 6:16-20.

For the disaggregation of the electrical transmission, the Plan contemplates that ETrans and the Proponents:

> shall seek an affirmative ruling of the bankruptcy court, which may be the Confirmation Order, that, pursuant to section 1123 of the Bankruptcy Code, the approval of any California state and local Governmental Entity, including but not limited to, the [Commission], shall not be required in order to, among other things, transfer or operate the ETrans

> Assets, for the transfer and use of various permits, licenses, leases, and other entitlements in connection with the transfer and operation of the ETrans Assets, to transfer operational control of its transmission facilities . . . to issue securities, to assume the ETrans liabilities or to otherwise effectuate the Restructuring Transactions.

Plan, 60:24-61:4.[3]

As shown above, Proponents want the Plan to preempt the Commission's "gain on sale" rules. As a condition precedent to confirmation of the Plan, the Plan requires this court to enter an order prohibiting officials of the Commission and officials of the State ". . . from taking any action related to the allocation or other treatment of 'gain on sale' related to assets transferred or disposed of under the Plan that would adversely impact the Reorganized Debtor."[4] In their response to the preemption and sovereign immunity objections, Proponents concede that the relief sought in connection with the "gain on sale" rules are in the nature of an injunction. At the same time, Proponents have indicated that even that injunctive provision would be amended, and thus be limited to seeking declaratory relief only. For purposes of the present analysis, however, the court will assume that Proponents desire confirmation to constitute an injunction

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[3] Comparable language appears for the transactions involving Reorganized Debtor (Plan, 72:10-18), Gen (Plan, 66:13-22) and GTrans (Plan, 63:11-18).

[4] The Disclosure Statement is conspicuously lacking in any detailed information that describes the operation of those rules and how they would affect the post-confirmation activities of the Reorganized Debtor, the LLC's, or any other entity. More information is needed regardless of the ultimate outcome of the sovereign immunity issue if Proponents wish to attempt to preempt those rules.

against enforcement of those rules.[5]

IV. Issues

In order to decide whether to approve or disapprove the Disclosure Statement, the court must answer the following questions.

A. Does the Bankruptcy Code expressly or impliedly preempt California laws so that Proponents may ignore them and seek to obtain confirmation of the Plan?

B. Does sovereign immunity protect the Commission and the State from the declaratory and injunctive relief requested by Proponents in the Plan?[6]

V. Discussion

---

[5] The specific provisions of the Plan which would carry out the preemptive effect of confirmation appear to be the following: Article VII, Implementation Of The Plan, including § 7.1(k)(ii), (as to ETrans), referring to Bankruptcy Code section 1123; § 7.2(i)(ii) (as to ETrans), referring to Bankruptcy Code section 1123; § 7.3(j)(ii) (as to Gen), referring to Bankruptcy Code sections 1123 and 1142(b); § 7.5(n)(iii) (as to Reorganized Debtor), referring to Bankruptcy Code section 1123; and § 7.5(e), prohibiting assumption of the net open position. In Article VIII, Confirmation and Effectiveness of the Plan, the following subparagraphs of § 8.1, Conditions Precedent to Confirmation are noted: (b) declaring that Proponents and their respective affiliates are not liable for Department of Water Resources contracts; (c) prohibiting assignment of the Department of Water Resources contracts; (d) prohibiting assumption of the net open position; (g) prohibiting officials of the Commission and the State from enforcing the "gain on sale" rules; (h) declaring Commission's affiliate transaction rules not applicable; and (i) calling for approval of the Restructuring Transactions as preempted by Bankruptcy Code section 1123.

[6] The court conducted an emergency telephone conference with counsel for Proponents, the Commission, the State and others two days prior to the oral argument in this matter. Pursuant to the instructions of the court during that conference, any issue about whether sovereign immunity had been waived was deferred and the question will not be addressed in this Memorandum Decision, notwithstanding the fact that Proponents argued the doctrine of waiver extensively in their written submissions.

A. **Preemption.**

1. **Overview**

In Baker & Drake, Inc. v. Public Service Commission of Nevada (In re Baker & Drake, Inc.), 35 F.3d 1348 (9th Cir. 1994) ("Baker & Drake"), the Ninth Circuit Court of Appeals quoted Supreme Court authority on preemption:

> "It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with or are contrary to, federal law.'"

Baker & Drake, 35 F.3d at 1352, quoting Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 712 (1985) (quoting Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824)).

"In considering a preemption claim, we look first to the intent and sweep of the federal statute." Baker & Drake, 35 F.3d at 1352. More elaborately, the Supreme Court has stated that:

> [t]he purpose of Congress is the ultimate touchstone" in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of congressional purpose." Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. Also relevant, however, is the "structure and purpose of the statute as a whole," as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996) (emphasis in original, citations omitted).

As Baker & Drake observed, there are several types of preemption:

> The statute's preemptive intent may be either express or implied:
>
> > Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting

> within Constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. Absent express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Pre-emption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that it will be assumed to preclude enforcement of state laws on the same subject."
>
> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Baker & Drake, 35 F.3d at 1352-53 (emphasis added), quoting Hillsborough County, 471 U.S. at 713 (citations omitted).

Only the two emphasized types of preemption above are at issue: express preemption and the last category of implied preemption. Proponents have not urged the court to consider the "Congress left no room" and "federal law is so dominant" types of preemption.

Express preemption has been defined as "where Congress explicitly defines the extent to which its enactments preempt state law." Williamson v. General Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000), cert. denied, 531 U.S. 929. See also English v. General Elec. Co., 496 U.S. 72, 78 (1990) ("Congress can define explicitly the extent to which its enactments pre-empt state law").

Implied preemption was addressed by Baker & Drake, which examined whether the state law at issue was an obstacle to the accomplishment and execution of the full purposes of the

bankruptcy laws. Baker & Drake reviewed two Supreme Court cases that are critical to this court's analysis of the present controversy: Perez v. Campbell, 402 U.S. 637 (1971), and Midlantic National Bank v. New Jersey Depart. of Environmental Protection, 474 U.S. 494 (1986). Perez concluded that the Bankruptcy Code preempted state law that interfered with a discharge in bankruptcy and Midlantic acknowledged that the Bankruptcy Code does not preempt state environmental laws or regulations reasonably designed to protect the public health or safety from imminent and identifiable harm. Referring to both decisions, the Ninth Circuit set forth a template which this court finds not only helpful, but controlling in resolving this dispute:

> As we view these cases, they suggest that federal bankruptcy preemption is more likely (1) where a state statute facially or purposefully carves an exception out of the Bankruptcy Code, or (2) where a state statute is concerned with economic regulation rather than with protecting the public health and safety.

Baker & Drake, 35 F.3d at 1353. See also Midlantic, 474 U.S. at 506 n. 9 and accompanying text.

One of the cases Proponents feature prominently in their argument is Public Service Company of New Hampshire v. State of New Hampshire (In re Public Service Company of New Hampshire), 108 B.R. 854 (1989) ("PSNH"). There, the court -- years before Baker & Drake -- stated the same principle:

> However, federal preemption is more likely when the state "police power" involved is economic regulation rather than health or safety."

PSNH 108 B.R. at 869. The court then cited one of Proponents' counsel in a discussion about preemption under the Commerce Clause of the Constitution:

> State regulations seemingly aimed at furthering public health or safety, or at restraining fraudulent or otherwise unfair trade practices, are less likely to be perceived as "undue burdens on interstate commerce" than are state regulations evidently seeking to maximize the profits of local businesses. Indeed, where the Supreme Court has held that the national interest in the free flow of commerce supersedes a state interest in public safety, it has generally seemed that the challenged statute contributed only marginally if at all to the public safety.

Id., quoting L. Tribe, American Constitutional Law, p. 437 (2d ed. 1988).

It is important to point out that this court does not read Baker & Drake as holding that there can be no preemption of state law except where express preemption appears in the statute. If that were the holding, this matter would be over and the Disclosure Statement would be disapproved. Rather, the court believes there are clear signals in the decision that suggest that there can be implied preemption. First, the above-quoted reference to "economic regulation rather than . . . protecting the public health and safety" suggests a balancing test. Next, the court stressed that while there can be a reorganization, it just may be difficult:

> Congress in enacting the Bankruptcy Code was not to mandate that *every company* be reorganized *at all costs*, but rather to establish a preference for reorganizations, where they are legally feasible and economically practical.

Baker & Drake, 35 F.3d at 1354 (italics in original; emphasis added).

Further, noting that a Nevada statute at issue was promulgated as part of a safety measure, the court pointed out that if compliance with that statute were to render the debtor financially unable to reorganize, neither it nor the state would be violating any provision of the Bankruptcy Code. But in a

footnote the court pointed out that the debtor had not shown that complying with the statute would make a successful reorganization impossible in its case. Id., n. 5. The powerful inference, therefore, is that under appropriate circumstances the state statute could be preempted with a proper showing of what is necessary to make the reorganization possible.

One more general principle of preemption is particularly apropos: deference to areas of traditional state regulation.

> In all preemption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," . . . we "start with the assumption that the historic police powers of the States were not to be superseded by the [f]ederal [a]ct unless that was the clear and manifest purpose of Congress."

Medtronic, 518 U.S. at 484. See also CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) ("[A] court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.").

Public utility regulation and environmental regulation are both areas where this deference applies. See Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Com'n, 461 U.S. 190, 206 (1983) ("Congress legislated here in a field which the States have traditionally occupied . . . so we start with the assumption that the historic police powers of the States were not to be superseded by the [f]ederal [a]ct unless that was the clear and manifest purpose of Congress"); Fireman's Fund Ins. Co. v. City of Lodi, 271 F.3d 911, 932-33 (9th Cir. 2002) (as amended) ("we are 'highly deferential' to local legislation in areas such as environmental regulation, which 'traditionally has been a matter of state authority'") (citation

omitted).

With this overview in mind, the court turns to Section 1123(a)(5).[7]

2. Preemption under Section 1123(a)(5) generally

a. Language of the Statute

Section 1123(a)(5) provides, in relevant part:

> **§ 1123. Contents of Plan**
>
> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall -
>
> (5) provide adequate means for the plan's implementation, such as -
>
> (B) transfer of all or any part of the property of the estate to one or more entities ...
>
> (D) sale of all or any part of the property of the estate, ...

11 U.S.C. § 1123(a)(5)(B) and (D).

Starting with the words of the statute, paragraph (5) of Section 1123(a) says only that the plan shall "provide adequate means for the plan's implementation, such as [various alternatives]." 11 U.S.C. § 1123(a)(5) (emphasis added). Paragraph (5) can be read simply as a directive to the plan proponent about what must go into the plan. It does not have to be read as an "empowering" statute that, under Proponents' construction, would permit them to do whatever they wanted - "such as" but not limited to the statutory examples - subject only to

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[7] Unless otherwise indicated, all Section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

the requirements of Section 1129.[8]

This construction - interpreting Paragraph (5) as directive rather than empowering - does not read the "notwithstanding" clause out of the statute. As several parties suggest, that clause still serves a useful purpose by preempting any state law that, for example, would prohibit a party from even submitting a plan to the bankruptcy court without first obtaining approval from a debtor's shareholders. The court can imagine other examples, such as labor laws that might obligate a plan proponent to negotiate in good faith with unions before submitting a plan or corporate laws that would require "a resolution of the board of directors" before a plan could be proposed. 124 Cong. Rec. H11103 (Sept. 28, 1978); S17419 (Oct. 6, 1978) (statement of Senator DeConcini).[9]

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[8] Moreover, there is some ambiguity in Congress' use of the words "adequate means" for the plan's implementation. If Congress had meant "any means, provided they are adequate," it could have said so. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 529 and n. 27 (1992) (rejecting "theoretical elegance" of interpreting statute at highest or lowest level of generality in favor of middle ground "fair understanding of congressional purpose").

[9] The court is not at all troubled that the above construction involves a relatively minor role for the "notwithstanding" clause as applied to Paragraph (5). See Medtronic, 518 U.S. at 484 (even where express preemption is clear, "we must nonetheless 'identify the domain expressly pre-empted'"). That clause does not appear to apply at all to some Paragraphs of Section 1123(a). For example, it is doubtful Congress saw any need to preempt nonbankruptcy laws that might contradict Paragraph (2). That paragraph only requires a plan to "specify any class of claims or interests that is not impaired under the plan." What nonbankruptcy law would contradict that provision? See also 11 U.S.C. § 1123(a)(1) (plan shall designate classes) and (a)(3) (plan shall specify treatment of impaired classes). Compare 1123(a)(6) (corporate debtors must include in their charter a ban on issuance of nonvoting securities, notwithstanding any contrary nonbankruptcy law) and 1123(a)(7)

Not only is Proponents' reading unnecessary, it leads to absurd results. At the hearing on January 25, 2002, the court questioned whether under Proponents' reading of Section 1123(a)(5) there would be any limit to what a debtor could do. The court asked counsel about several hypothetical situations, following the Supreme Court's directive to discern "the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." Medtronic, 518 U.S. at 486. The court questioned whether a plan could provide for a debtor to sell liquor to minors (notwithstanding state laws to the contrary), or trade with foreign enemies (notwithstanding federal statutes to the contrary), or dump toxic wastes (notwithstanding environmental laws and Supreme Court precedent), or merge with competitors to create a monopoly or gain some other competitive advantage (in violation of state or federal antitrust laws). There were no satisfactory answers.[10]

Taken in context, Section 1123 looks more like a component of Congress' roadmap that heads towards confirmation. First,

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(governing selection of officer, director, or trustee under the plan, notwithstanding any contrary nonbankruptcy law).

[10] The most offensive plans might be reined in by something like Midlantic's limitation on abandonment of toxic wastes. See Midlantic, 474 U.S. at 494. That decision, however, arose under Section 554, which does not have the "notwithstanding" clause. See 11 U.S.C. § 554. Moreover, Midlantic was strictly limited to state laws or regulations reasonably designed to protect the public health or safety from "imminent" and "identifiable" harm. See Midlantic, 474 U.S. at 506 n. 9 and accompanying text. The potential harm from antitrust violations, for example, might not be imminent and clearly identifiable, but the court does not believe Congress intended to eviscerate all antitrust laws for debtors in bankruptcy (especially solvent debtors). In other words, Midlantic does not cure the problems with Proponents' reading of the statute.

Subchapter II of Chapter 11, entitled "The Plan," begins by stating by whom and when plans may be filed (Section 1121. Who may file a plan); then directs how a plan is to position creditors and owners (Section 1122. Classification of claims or interests); next prescribes what goes into a plan (Section 1123. Contents of plan). That section, and in particular its internal structure, is a "blueprint" the plan proponent is to follow when constructing what has been characterized as resembling a contract. Hillis Motors, Inc. v. Hawaii Automobile Dealers' Association, 997 F.2d 581, 588 (9th Cir. 1993) ("A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract.")

The mandatory rules Congress has established for that contract include the designation of classes of claims or interests (Section 1123(a)(1)); the designation of not impaired classes of claims or interests (Section 1123(a)(2)); the treatment of impaired classes of claims or interests (Section 1123(a)(3)); equal treatment of classes, unless members agree otherwise (Section 1123(a)(4)); adequate means for implementation (Section 1123(a)(5)); corporate charter provisions (Section 1123(a)(6)); and provisions consistent with public policy for selection of officers, directors and trustees (Section 1129(a)(7)).

A plan that lacks any of these seven components (except where one or more may be inapplicable) is structurally defective because the "shall" directive of Section 1123(a) has not been satisfied.[11]

In view of the scant legislative history about Section 1123

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[11] In Section 1123(b) Congress has given plan proponents various options that a plan may contain. Those options are not relevant to this discussion.

discussed, infra, it is apparent that that section is largely a carryover from its counterparts under the former Bankruptcy Act. Section 91 of that Act (former 11 U.S.C. § 91) described provisions a Chapter IX petitioner "may include" in a plan (provisions modifying or altering rights of creditors generally; other provisions not inconsistent with Chapter IX; provisions for rejection of executory contracts or unexpired leases). Section 216 of the Bankruptcy Act (former 11 U.S.C. § 616) contained nine subparagraphs beginning with "shall include in," "shall provide for," or "shall specify." Five subparagraphs provided that the plan "may" deal with, provide for, or include other provisions.[12]

In Chapter XI, Bankruptcy Act Section 356 (former 11 U.S.C. § 756) required inclusion of provisions dealing with unsecured creditors ("An arrangement [Bankruptcy Act practitioners will recall the phrase "plan of arrangement" in Chapter XI practice] within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or some class of them, upon any terms or for any consideration.") Then Bankruptcy Act Section 357 (former 11 U.S.C. § 757) set forth eight subparagraphs specifying provisions an arrangement "may include."

Finally in Chapter XII, Bankruptcy Act Section 461 (former 11 U.S.C. § 861) resembled Section 216 (in Chapter X) and set forth seven "shall" include, provide or specify subparagraphs and six "may" subparagraphs.

Under the Bankruptcy Act there was no counterpart to today's

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[12] See footnote 15, infra, and accompanying text.

disclosure statement. Now in Section 1125 Congress has directed that adequate information be provided that would enable a hypothetical investor typical of holders of claims or interests of a relevant class to make an informed judgment about the plan. In practice it is in the disclosure statement that plan proponents set forth a description of their business, the reasons for their financial difficulties, historical and current financial information, material post-petition events, a summary of assets and liabilities, a description of the plan, and perhaps most importantly, a means for effectuating the plan.[13]

This court is convinced that the contents of the plan's provisions, and in particular those found in Section 1123(a)(5), are derived from the Bankruptcy Act that required the plan to tell creditors what they were going to get and how they were going to get it. That is still the purpose of the section.

From the foregoing the court rejects the notion that Congress, without a hint in the legislative history, in a section of the Bankruptcy Code entitled "Contents Of Plan," and using words calling for "adequate means for the Plan's implementation," intended to permit a debtor's plan -- confirmed by a bankruptcy judge (not by a legislative act, as in most preemption

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[13] For example, the United States Trustee's Guidelines For Region 17 (covering this district) include a requirement that the disclosure statement include:

> (j) MEANS OF EFFECTUATING THE PLAN: The statement should include how the goals of the plan are to be accomplished, e.g., infusion of cash by an investor, sale of real or personal property, continued business operations, or issuance of stock. If an investor is to provide funds, financial information about the investor should be included.

situations)[14] -- to obliterate a whole area of jurisdiction and authority traditionally left to state law. If the PSNH court thought this was a simple matter of "plain meaning" (PSNH, 108 B.R. at 874-879), that interpretation was a far cry from its observation only a few months earlier, that there was an

> . . . ambiguity left in the statute by Congress in the enactment of the 1978 Code. Bankruptcy Code §§ 1123(a)(5); 1129(a)(3) and 1129(a)(6).

Public Service, 99 B.R. at 509.

b. Legislative History of Section 1123

Proponents contend that by inserting the clause "notwithstanding any otherwise applicable law" into Section 1123, Congress expressly exempted all state laws inconsistent with what a plan proposes and a court chooses to confirm. Nothing in the legislative history of Section 1123, however, indicates that its drafters intended for state law to be so expansively preempted. To the contrary, the absence of any meaningful discussion regarding the purpose and consequences of the clause demonstrates that Congress did not draft Section 1123 as a blanket preemption of state law.

Section 1123(a), as initially enacted, did not state that its provisions were applicable "notwithstanding any otherwise applicable nonbankruptcy law." The legislative history of Section 1123 does not indicate that its provisions preempt state law; rather, the legislative history suggests that Section 1123 is

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[14] See, i.e., Schneiderwind v. ANR Pipeline Co., 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988).

derived from Section 216[15] of the Bankruptcy Act (also known as the Bankruptcy Statute of 1898). The House Report pertaining to the Bankruptcy Reform Act of 1978 states that, with respect to sections 1123(a)(5):

> Subsection (a) specifies the matter that a plan of reorganization must contain. . . . Paragraph (4) [now paragraph (5)] of subsection (a) is derived from section 216 of current law, with some modifications. It requires the plan to provide adequate means for the plan's execution. These means may include retention by the debtor of all or any part of the property of the estate, transfer of all or any part of the property of the estate to one or more entities, whether organized pre- or postconfirmation, merger or consolidation of the debtor with one or more persons, sale and distribution of all or any part of the property of the estate, satisfaction or modification of any lien, cancellation or modification of any indenture or similar instrument, curing or waiving of any default, extension of maturity dates or change in interest rates of securities, amendment of the debtor's charter, and issuance of

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[15] Section 216 of the Bankruptcy Act did not contain any provision preempting state law. Subsection 216(10) (the subsection from which section 1123(a)(5) is derived) provided:

> A plan of reorganization under this chapter --
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> * * *
>
> . . . shall provide adequate means for the execution of the plan, which may include: the retention by the debtor of all or any part of its property; the sale or transfer of all of or any part of its property to one or more other corporations theretofore organized or thereafter to be organized; the merger or consolidation of the debtor with one or more other corporations; the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein; the satisfaction or modification of liens; the cancellation or modification of indentures or of other similar instruments; the curing or waiver of defaults; the extension of maturity dates and changes in interest rates and other terms of outstanding securities; the amendment of the charter of the debtor; the issuance of securities of the debtor or such other corporations for cash, for property, in exchange for existing securities, in satisfaction of claims or stock or for other appropriate purposes. . . .

securities.

H.R. Rep. 95-595, 1978 U.S.C.C.A.N. 5963, 6363, 95th Cong., 1st Sess. 1977 (Sept. 8, 1977). The foregoing legislative history of section 1123, as initially enacted, does not indicate that it preempts state law.

In 1980, Congress amended Section 1123(a) to add the phrase "[n]otwithstanding any otherwise applicable nonbankruptcy law." Despite this change, the legislative history accompanying the amendment states that "This amendment makes it clear that the rules governing what is contained in the reorganization plan are those specified in this section; deletes a redundant word; and makes several stylistic changes." H.R. Rep. 96-1195, at 22, 122-23, 96th Cong., 2d Sess. 1980 (July 25, 1980). If the words "notwithstanding otherwise applicable nonbankruptcy law" meant that a debtor could propose a plan contrary to any law, Congress would not have treated the amendment as merely "stylistic." More importantly, the observation that the amendment "makes it clear that the rules governing what is contained in the reorganization plan are those specified in this section" indicates that this section (and no other law) governs what is to be placed into a plan of reorganization.[16] It does not indicate that whatever is placed into a plan of reorganization preempts state law. The legislative history of Section 1123(a) simply does not support the revolutionary significance that PG&E attributes to the amendment.

c. Case Law

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[16] This phrase further supports this court's conclusion that Section 1123(a)(5) is a directive as opposed to an empowering statute.

Proponents cite several cases in support of their reading of Section 1123(a), and they point out that parties opposing the Plan have cited no case to the contrary. Proponents' cases, however, are all distinguishable.

Proponents' two leading cases are PSNH and Universal Cooperatives, Inc. v. FCX, Inc. (In re FCX, Inc.), 853 F.2d 1149 (4th Cir. 1988), cert. denied, 489 U.S. 1011 (1989) ("FCX"). In PSNH the proposed plan of reorganization was very similar to Proponents' Plan. It involved:

> the proposed use of § 1123(a)(5) of the [Bankruptcy] Code to authorize transfer of assets and restructuring of entities [of the public utility therein, PSNH,] in such a fashion as would result in transfer of regulatory jurisdiction over the debtor and its rates from the New Hampshire Public Utilities Commission ["NHPUC"] to the Federal Energy Regulatory Commission ["FERC".]

PSNH, 108 B.R. at 857 (quoting court's earlier order).

The State of New Hampshire apparently opposed PSNH's plan because moving into federal jurisdiction

> would enable PSNH to recover much of its investment in the Seabrook nuclear power plant even before Seabrook operates[,] in contrast to what state law would allow before operation under the "Anti-CWIP" law in New Hampshire.

PSNH, 108 B.R. at 860 (footnotes omitted).

In this context the PSNH court conducted a scholarly, thorough and helpful analysis of the legislative history and statutory framework. Focusing on the history of Section 1129(a)(6), the PSNH court noted that "prior to 1978 public utilities had to have public utility commission approval for plans of reorganization." Id. at 863. Then, with the adoption of the Bankruptcy Reform Act of 1978, regulatory approval was explicitly required for reorganizations involving railroads and

municipalities, but no such explicit requirement applied to non-railroad reorganizations under chapter 11 except that Section 1129(a)(6) requires regulators' approval for any change in rates. See 11 U.S.C. § 943(b)(6) (municipalities), § 1129(a)(6) (rates), § 1172(b) (railroads), and PSNH, 108 B.R. at 864-66. Considering this history and its reading of Section 1123(a)(5) as an "empowering" statute, the PSNH court held that NHPUC did not have an absolute "veto" power over PSNH's plan of reorganization. Id. at 883 and 891.[17]

The PSNH decision relies on express preemption, which has

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[17] The PSNH court stated:

> In my opinion, the reorganization process of chapter 11 cannot work – in the way that Congress envisioned under the drastic overhaul of the reorganization chapters in the 1978 Act [i.e., when it removed the veto power of public utility commissions from Chapter 11 cases generally] – if one party in interest has an effective veto over the necessary restructuring to implement a plan and the reorganization court no longer has an early and direct role in plan formulation and approval.

PSNH, 108 B.R. at 891 (emphasis in original).

After the PSNH decision, Congress considered amending Section 1129(a)(6). As summarized by the legislative history, the amendment would have provided that electric utilities would need state regulators' approval not only for confirmation of any plan but also to "take any other action pertaining to the debtor that would terminate or restrict the existing jurisdiction of the state regulatory authority." H.R. Rep. 101-1015, at 43, 1991 W.L. 4376 (Leg. Hist.), 101st Cong., 2d Sess. 1990 (Jan. 3, 1991).

Congress did not enact this absolute veto power. If Congress' failure to act has any weight at all, it is entirely consistent with the disposition herein. The Bankruptcy Code neither gives an absolute preemption power to Proponents nor an absolute veto power to the State and the Commission. Rather, each alleged instance of implied preemption must be tested to determine whether the particular state law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Baker & Drake, 35 F.3d at 1353 (citation omitted).

been rejected above. Nevertheless, as an alternative basis for its conclusion PSNH relies on implied preemption, and its analysis appears generally consistent with Baker & Drake's observation that federal bankruptcy preemption is more likely "where a state statute is concerned with economic regulation rather than with protecting the public health and safety." Baker & Drake, 35 F.3d at 1353.[18]

According to PSNH: (1) the State of New Hampshire's concerns were purely economic not health or safety (PSNH, 108 B.R. at 890), (2) "the inescapable result of the State's position is that no plan can be confirmed in this case unless it is approved by the [NHPUC]" (id. at 861, emphasis in original),[19] (3) the consequent jurisdictional "stalemate" would be inimical to the "prompt and orderly processes necessary to an effective reorganization 'before the patient dies'" (id. at 856 n. 1, 890 and 891), and (4) the Bankruptcy Code "would seem to indicate" a preemptive intent as to

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[18] It is noteworthy that, having decided that express preemption pertains, the court in PSNH immediately qualified the so-called unconditional preemption:

> In terms of the literal language of § 1123(a)(5) it seems obvious that the section on its face contemplates that restructuring transactions necessary to a plan of reorganization may be provided....

PSNH, 108 B.R. at 881 (emphasis added).

Since there is nothing in the statute about "necessary" it seems the court was really considering implied -- or better yet "applied" -- preemption.

[19] "[If] the PUC has the last say about everything, we may as well close up our tents and send it over to the PUC, let them reorganize this company and when they have approved it, send it over and I'll sign it." PSNH, 108 B.R. at 887 (quoting hearing transcript).

"restructuring provisions of a chapter 11 plan of reorganization" (an express intent, according to PSNH) (id. at 882).[20] The PSNH court specifically reserved some issues for the hearing on plan confirmation:

> 1. Those aspects of the debtor's plan of reorganization . . . or any amended plan containing similar provisions . . . that are necessary and required to effectuate the "restructuring" of the debtor into a reorganized entity or entities capable of achieving a feasible reorganization, subject to the confirmation requirements of § 1129 of the Bankruptcy Code, and are actions specifically covered by § 1123(a)(5) of the Bankruptcy Code, may be approved as part of confirmation . . . notwithstanding any otherwise applicable law that would require approval of such actions by the New Hampshire Public Utilities Commission.
>
> * * *
>
> 3. Whether such restructuring is necessary and required for a feasible reorganization will be a § 1129 issue . . . .
>
> 4. . . . the effect on the public interest of such a plan arguably will be one of the factors to be considered at confirmation . . . .

PSNH, 108 B.R. at 892 - 893 (Appendix ¶¶ 1, 3 and 4) (emphasis added).

The PSNH decision emphasized that "the issue is a narrower one than may first appear." Id. at 861. The essential holding of PSNH is only that the Bankruptcy Code preempts the public utility commission's absolute "veto" power over a bankruptcy restructuring. The PSNH decision noted that, ironically, the bankruptcy restructuring might have been "essential to restoring the enterprise to financial health so it can then comply with ongoing regulatory requirements." Id. at 890 n. 38 and 891 (emphasis in original). Moreover, the PSNH court emphasized that

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[20] According to the PSNH court, the State of New Hampshire "does not really argue to the contrary." PSNH, 108 B.R. at 882. Here the State and the Commission do!

there was no preemption of such ongoing regulatory requirements:

> Nothing in § 1123 or § 1129 of the Bankruptcy Code has the effect of exempting the reorganized entity or entities under a confirmed plan of reorganization from any ongoing applicable regulatory requirements by NHPUC as to the future operations of said entity or entities (save for any questioning of the restructuring itself) once the restructuring necessary and required for a feasible reorganization has been effectuated as part of a confirmed plan of reorganization.

PSNH, 108 B.R. 893 (Appendix ¶ 5).

The PSNH court acknowledged that NHPUC might lose its rate-setting jurisdiction over some reorganized entities because they would come under FERC jurisdiction,

> [but] the argument that "Congress didn't intend to take rate-setting authority from the states" by § 1123 of the Bankruptcy Code is simply misplaced. Congress already considered the public interest when it withdrew considerable regulatory authority from the states in its FERC legislation, as affirmed in the preemption decision by the Supreme Court in Mississippi Power & Light v. State of Mississippi, 487 U.S. 354 [1988] . . . .
>
> Like it or not, Congress has decreed that local rates can be determined by FERC . . . . Congress apparently believes that regional requirements and regulation sometimes have to override local state requirements to have a rational power supply system in the country.

PSNH, 108 B.R. at 872 (footnotes omitted).

The court does not disagree with most of the PSNH analysis. Although the court cannot agree that Section 1123(a)(5) is an "empowering" statute that explicitly preempts or overrides all contrary nonbankruptcy law, the court agrees that restructuring generally is a proper purpose of chapter 11 and that the Bankruptcy Code would seem to indicate at least some preemptive intent in favor of restructuring, which would preempt a state regulator's absolute veto power over bankruptcy restructuring. See PSNH, 108 B.R. at 882. To the extent that PSNH implies a

broader preemption, it may be factually distinguishable because (a) any economic need for PG&E to disaggregate is not immediately obvious, unlike in PSNH, and (b) the objecting parties in this case advance some non-economic concerns, unlike the State of New Hampshire in PSNH. See Baker & Drake, 35 F.3d at 1353 (bankruptcy preemption more likely for economic regulation rather than public health and safety).

No evidence exists at this stage in the reorganization process whether PG&E has an economic need to disaggregate. In PSNH, unlike this case, the court questioned the debtor's solvency and emphasized the need to reorganize "before the patient dies." PSNH, 108 B.R. at 856 n. 1, 890 n. 38, and 891. The Proponents and the Committee have suggested that there is some economic need to disaggregate because the financial markets effectively may require it.[21] The court agrees with PSNH, however, that "[w]hether such restructuring is necessary and required for a feasible reorganization will be a § 1129 issue." PSNH, 108 B.R. at 892, Appendix ¶ 3. Preemption and feasibility can be addressed in that context, but only after further elaboration in a revised Disclosure Statement.

As to non-economic considerations, the State, the Commission and other objectors have argued that Proponents are abusing the bankruptcy process to escape the Commission's jurisdiction. To

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[21] Apparently the Proponents and the Committee believe that PG&E's creditors will need to be paid over time, that this requires debt securities, and that the debt securities will not be acceptable to the financial markets, or perhaps will not trade at par, unless PG&E's business is removed to some extent from the Commission's jurisdiction by disaggregation. The court makes no determination on these issues.

the extent that this is a "facial invalidity" objection the court rejects it. Using bankruptcy reorganization to move from state regulation to federal regulation is not necessarily improper. Proponents have argued without dispute that there is nothing illegal about a disaggregated utility structure, and that if PG&E had founded its business as several separate entities, or if another entity did so now, those entities would be outside the Commission's jurisdiction to the same extent as proposed under the Plan. Moreover, among the purposes of the Bankruptcy Code is giving debtors a fresh start. Perez, 402 U.S. at 649. Applied to corporate debtors the fresh start might entail restructuring their business. The court believes, however, that for Proponents to preempt state law barring disaggregation, they will need to rely on more than just the general policy of Chapter 11 favoring reorganizations. They must show that enforcing such state law would be an "obstacle to the accomplishment and execution of the full purposes of the bankruptcy laws." Baker & Drake, 35 F.3d at 1353. The court does not presently decide whether Proponents must show that disaggregation is necessary to pay past debts, or to avoid incurring future significant debts, or any other standard. These are matters to be shown in general in a revised Disclosure Statement, and to be proven at trial.

Another non-economic consideration raised by several objectors is that there are potential environmental impacts from disaggregation.[22] How disaggregation itself would have any adverse

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[22] It is not clear that environmental impacts are matters of public "safety" or even public "health," although at some point environmental degradation no doubt would have serious health

environmental impact is not immediately obvious. As Proponents point out, the disaggregated entities will still be subject to all the usual zoning and environmental regulations. The objectors argue, however, that disaggregation will remove some lands from the Commission's jurisdiction, that FERC has previously defined its mandate to exclude environmental concerns, that even if FERC were to consider environmental issues most of PG&E's current land holdings will not be subject to either the Commission's or FERC's jurisdiction, and that under California law this would be sufficient to block PG&E's proposed disaggregation or perhaps condition it on some level of environmental commitments.[23] The court finds merit in both arguments. The court agrees with PSNH that Proponents would have a more difficult preemption argument if

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consequences for some or all of us. As noted above, however, preemption is particularly unlikely for environmental matters. Midlantic, 474 U.S. 494; Fireman's Fund, 271 F.3d at 932 - 933 ("highly deferential" to local environmental regulation). See also Baker & Drake, 35 F.3d at 1354 (noting non-economic purposes of state regulation other than health and safety).

[23] The Plan and Disclosure Statement include assurances that PG&E, the LLCs and Land Holdings (another entity to be formed by Proponents after confirmation) will remain subject to any applicable environmental laws and regulations and that Proponents have no intention of changing their environmental policies and standards. See Plan § 7.8 (Regulatory Issues") at 74:5-9 and Disclosure Statement §§ VI.D.4 ("Land Ownership") and L. ("Regulatory Impact of the Plan") at 99:1-3 and 126:16-127.19. The court notes that these commitments do not necessarily bar all development of all land forever, nor is it clear that they must do so to comply with state law. Unlike most other land-holders PG&E has been subject to additional restrictions because of the Commission's jurisdiction over it. The Commission has argued that this is appropriate because, as part of the "regulatory compact," California ratepayers subsidized PG&E's acquisition and non-development of its land. The merits of this argument are not before the court, and the issue is described here only to clarify that the alleged environmental consequences of disaggregation do not render the Plan facially unconfirmable.

they intended to block "ongoing regulatory requirements." PSNH 108 B.R. at 890 n. 38, 891 and 893 (Appendix ¶ 5). On the other hand, the court rejects any argument that preemption is less serious because conceptually it occurs only at the instant of disaggregation. Proponents attempt to distinguish Baker & Drake by arguing that there the Nevada law on point did not impede the event of reorganization, but only the post-confirmation operations of the reorganized debtor. Here they emphasize that once the Plan is confirmed and becomes effective, Reorganized Debtor, the LLC's and all other affiliated entities will comply fully with applicable law just as PG&E is doing now as required by 28 U.S.C. § 959(b). Their theory is that only a single event -- what their counsel calls the "big-bang" of confirmation -- will be exempt from state law that would otherwise prohibit the Restructuring Transactions. The court rejects this theory. State law applies, or it is preempted. It is not a temporal thing, suspended only for a moment. Therefore, the environmental objections do not render the Plan facially unconfirmable but they may be relevant to preemption issues at the confirmation hearing.

In sum, the court cannot agree with PSNH to the extent it suggests a sweeping mandate to preempt whatever plan proponents (and perhaps a single bankruptcy judge) decide should be preempted. The court has found no other cases that suggest such an open-ended preemption. Rather, in all those cases the scope of preemption is limited either by the description of the law being displaced or by the nature of the preemptive statute.

Proponents' other leading case is FCX. FCX held that state law restrictions on the surrender of collateral known as

"patronage certificates" were preempted by the Bankruptcy Code. FCX, 853 F.2d 1149. In distinguishing a decision that reached the opposite conclusion (Calvert v. Bongards Creameries (In re Schauer), 62 B.R. 526 (Bankr. D. Minn. 1986), aff'd, 835 F.2d 1222 (8th Cir. 1987)), FCX stated:

> In re Schauer, however, is distinguishable on two grounds. First, the trustee there did not rely on § 1123(a)(5)(D), but [instead on] § 363(b)(1) and § 704 . . . . Second, and more importantly, § 363(b)(1) and § 704 are substantively different from § 1123(a)(5)(D). . . . § 363(b)(1) and § 704 are no more than "enabling statutes that give the trustee the authority to sell or dispose of property if the debtor[ ] would have had the same right under state law." . . .
>
> In contrast, § 1123(a)(5) is an empowering statute. As stated by Collier: "The alternatives set forth in § 1123(a)(5) are self executing. That is, the plan may propose such actions notwithstanding nonbankruptcy law or agreements." 5 Collier on Bankruptcy ¶ 1123.01, at 1123-10. Section 1123(a)(5)(D) then does not simply provide a means to exercise the debtor's pre-bankruptcy rights; it enlarges the scope of those rights, thus enhancing the ability of a trustee or debtor in possession to deal with property of the estate.

FCX, 853 F.2d at 1154-55.[24]

The court disagrees with FCX to the extent, if any, that it supports an unfettered right to dispose of assets without regard to state law as part of a plan pursuant to Section 1123(a)(5)(D). The court in FCX was not faced with anything similar to relief sought by Proponents in this case, and did not discuss the ramifications of such a reading. In fact, the debtor did not even seek to sell or transfer the patronage certificates to a third

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[24] The Collier treatise provides no analysis or discussion of the issues and simply cites a few cases that also have no meaningful discussion for present purposes. See also PSNH, 108 B.R. at 883 n. 25 (no meaningful discussion in cases other than FCX).

party. It proposed - and was allowed - to force a creditor to accept collateral in violation of that creditor's own articles of incorporation. FCX, 853 F.2d at 1149.

In addition, the court notes that debtors are already empowered to sell property, notwithstanding some nonbankruptcy laws, pursuant to Sections 363(f) and 1129(b)(2)(A)(ii). Those sections have carefully worked-out limitations on sales (such as requiring that any liens attach to the proceeds of sale and that sales be subject to credit bids). See 11 U.S.C. §§ 363(f) and 1129(b)(2)(A)(ii). Therefore, it is not necessary to rely on Section 1123(a)(5)(D) as an empowering statute for any sales of the type that Congress explicitly authorized. Moreover, even if Section 1123(a)(5)(D) were an empowering statute, it would be inappropriate to interpret it in such a way as to ignore the carefully limited powers in Sections 363(f) and 1129(b)(2)(A)(ii).[25]

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[25] The court notes that other sections of the Bankruptcy Code, or nonbankruptcy law, appear to be more appropriately tailored sources of empowerment for the other paragraphs of Section 1123(a)(5). For example, Paragraph (G) of Section 1123(a)(5) suggests that one means of implementing a plan is to provide for "curing or waiving a default." 11 U.S.C. § 1123(a)(5)(G). The curing and waiving powers are covered either by Section 1129(a)(8)(A) (class accepts a plan, thereby waiving defaults) or Section 1129(a)(8)(B) (class is unimpaired because defaults are cured). Moreover, those powers are more precisely tailored to this purpose: Sections 1124(2)(A) and 365(b)(2)(D) specify that the "cure" need not include, for example, any "penalty rate." See 11 U.S.C. §§ 365(b)(2)(D), 1124(2)(A), and 1129(a)(8)(B).

Another example is that Paragraph (H) of Section 1123(a)(5) provides for "extension of a maturity date or a change in an interest rate or other term of outstanding securities." 11 U.S.C. § 1123(a)(5)(H). These powers are covered by Sections 506(b), 1129(a)(7), 1129(a)(8)(A) and 1129(b)(2)(B), which collectively tailor such powers to assure that the interest rate provides

The PSNH decision states that "FCX apparently is the only case that has any meaningful discussion of the provisions of 1123(a)(5) for present purposes." PSNH, 108 B.R. at 883 n. 25. Proponents have not cited any other case.[26] Therefore, the applicable cases reinforce the court's view, based on the statutory language, that Section 1123(a)(5) does not empower Proponents to engage in wholesale preemption of nonbankruptcy law through their Plan. For all of these reasons, Proponents' reliance on PSNH and FCX is insufficient to justify the full scope of relief they seek. At this stage, however, the court cannot say as a matter of law that Proponents will be unable to establish implied preemption of otherwise applicable state laws at the confirmation hearings.

d. Other Bankruptcy Preemption Statutes

Here, Proponents urge this court to adopt an interpretation of Section 1123(a)(5) that would allow plans and orders confirming

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adequate present value, or else that the affected class consents or no junior class receives or retains anything under the plan on account of their claims or interests.

Similarly, nonbankruptcy law such as state and federal antitrust laws may place carefully tailored limits on mergers under Paragraph (C) of Section 1123(a)(5).

[26] Cf. Great Western Bank & Trust v. Entz-White Lumber and Supply, Inc. (In re Entz-White Lumber and Supply, Inc.), 850 F.2d 1338, 1340 n. 3 (9th Cir. 1988) (holding that debtor is entitled to cure default using pre-maturity interest rate pursuant to Section 1124(2), but commenting in dicta that Section 1123 "would appear to allow debtors to cure this type of default even if a party with a claim cured in this way would be impaired under § 1124") and Citibank v. Udhus (In re Udhus), 218 B.R. 513 (9th Cir. BAP 1998) (concept of "cure" used throughout bankruptcy code nullifies default, so cure referred to in Section 1123(a)(5)(G) does not require payment of default interest even where creditor is impaired).

plans -- the terms of which are not codified or even known until a plan and disclosure statement are filed -- to preempt all state law. Generally, unlike Proponents' interpretation of Section 1123(a)(5), other portions of the Bankruptcy Code which preempt state law are self-limiting in scope. In other words, the provisions explicitly describe and set the parameters of state law being exempted, or specifically set forth the nature and scope of the statutory bankruptcy law which preempts the state law. They do not contemplate having parties and the court "make" the preemptive law.

For example, Section 1125(d) provides that a bankruptcy court's determination regarding the adequacy of a disclosure statement is not governed by otherwise applicable non-bankruptcy law. The preemption is not open-ended. Similarly, Section 1124(2) provides that, notwithstanding any law that entitles a claim or interest to receive accelerated payment upon default, a plan may cure the default and reinstate the maturity of the claim or interest. See Entz-White, 850 F.2d 1338. The statute specifically defines the nature of those state laws being preempted.

Likewise, Section 1142(a) defines the type of state law being pre-empted: those laws relating to financial condition. Section 1142(a) provides that "notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition," the debtor or reorganized entity shall carry out the plan and shall comply with orders of the court. Section 1145, which pertains to specified offers or sales of securities under a plan, exempts (with certain exceptions) debtors and plan

proponents from complying with state and local laws requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in a security.

Section 541(c)(1) provides that an "interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in . . . applicable nonbankruptcy law" that restricts the transfer of such interest or that is conditioned on the insolvency or financial condition of the debtor. Section 363(l) provides that a trustee may sell, use or lease property "notwithstanding any provision . . . in applicable law that is conditioned on the insolvency or financial condition of the debtor . . ."). Section 365(e)(1) and (f)(3) allow a trustee to assume or assign leases and executory contracts notwithstanding otherwise applicable law that purports to terminate the contract upon such an assumption or which purports to terminate the contract due to the financial condition of the debtor. Section 545 allows a trustee to avoid the fixing of certain statutory liens. Section 546(c) places limitations on a seller's statutory right to reclaim goods.

In each of these cases, the scope of the preemption is limited either by the description of the law being displaced or by the nature of the preemptive bankruptcy statute. None of these provisions allows a plan or order or law of undefined scope to preempt any and all laws inconsistent with its provisions.

e. Conclusion as to Section 1123(a)(5)

For the foregoing reasons, the court rejects Proponents' interpretation of Section 1123(a)(5) as allowing it to

disaggregate with unfettered preemption of any contrary nonbankruptcy law. The scope of preemption, if any, must be considered in light of the nonbankruptcy laws at issue.

3. **Necessary Modifications To Disclosure Statement**

At the beginning of this Memorandum Decision the court reminded Proponents that the Rescheduling Order directed them to describe specifically laws they sought to preempt and the governmental units affected by such preemption. Now that the matter has been fully briefed, argued and analyzed, and Proponents' express preemption theory rejected, the court believes it appropriate to expand upon the Rescheduling Order and give Proponents some direction as to minimum disclosures necessary to set the stage for their implied preemption confirmation contest.

It would be burdensome, of course, to require Proponents to fill a revised Disclosure Statement with a detailed explanation of each and every law, regulation, decision, ruling, ordinance or other authority Proponents believe stand in the way of confirmation, and further to require Proponents to set forth their entire evidentiary support for their position. That being said, the court will require Proponents to state in summary fashion the reasons why they believe it necessary for each of the Public Utilities Code sections referenced in section III, the gain on sale rules, and Ordering Paragraph 5 of Commission Decision D.01-12-017, to be preempted. Proponents do not need to include specific details at this time. It is sufficient if they prepare the revised disclosures as they would prepare a trial brief, showing what ultimate facts will be proven to lead the court to find that the application of those laws to the facts of PG&E's

proposed reorganization are economic in nature rather than directed at protecting public safety or other noneconomic concerns, and that those particular laws stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress and the Bankruptcy Code.

B. **Sovereign Immunity Implications**

1. As noted in Section III, several provisions of the Plan seek an affirmative ruling of this court under Section 1123 that approval of various state and local governmental units is not required to carry out many of the contemplated transactions. The Plan also seeks an injunction prohibiting members of the Commission and officials of the State from taking certain actions.[27]

In addition, the Plan seeks to exempt PG&E from its statutory obligation to fund the net open position to provide sufficient electric power to serve the public. The Commission argues that this constitutes an attempt to recover money from the State. That duty includes purchasing and paying for power from wholesale suppliers when the demand for power by ratepayers exceeds the utility's own generation capacity. Whether or not the State is

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[27] Apart from the sovereign immunity issues discussed in this Memorandum Decision, at a prior hearing the court considered whether injunctive or declaratory relief could be sought as part of the confirmation process or, as the Commission, the State and others contended, required commencement of an adversary proceeding under Part VII of the Federal Rules of Bankruptcy Procedure. The court accepted Proponents' arguments that Rule 7001(7) authorizes obtaining an injunction or other equitable relief as part of a Chapter 11 plan, without the need for an adversary proceeding. The court's decision on that procedural point has not been reduced to an order to date but it can and will be dealt in any order approving a disclosure statement or any order confirming a plan of reorganization.

obligated to pay for power purchased by the California Department of Water Resources to cover PG&E's net open position, the Plan -- while it may attempt to prevent PG&E from having to pay certain amounts of money -- does not constitute an impermissible attempt to recover money from the State. This is much different from Proponents' attempt to have the Plan prohibit the Reorganized Debtor from assuming the net open position or prohibiting the Reorganized Debtor from accepting, directly or indirectly, an assignment of Department of Water Resources contracts. For the Plan to restrain the Reorganized Debtor from doing such things is the functional equivalent of having the Plan declare that the Reorganized Debtor does not have to comply with certain applicable provisions of nonbankruptcy law. These matters are dealt with in the court's decision concerning implied preemption, supra.

The Plan seeks equitable and injunctive relief. As such it constitutes ". . . the prosecution, or pursuit, of some claim, demand, or request." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 407 (1821). More recently than the early 1800s, the Ninth Circuit held that suits requesting nonmonetary relief do not divest the state of its immunity. Mitchell v. Franchise Tax Board (In re Mitchell), 209 F.3d 1111, 1116 (9th Cir. 2000), quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 58 (1996) ("The Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of a State's treasury"). In Mitchell, the bankruptcy court, the Bankruptcy Appellate Panel[28]

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[28] See Mitchell v. Franchise Tax Board (In re Mitchell), 222 B.R. 877 (9th Cir. BAP 1998), aff'd, 209 F.3d 1111 (9th Cir. 2000).

and the Ninth Circuit determined an adversary proceeding commenced by a debtor to be a "suit" for Eleventh Amendment purposes. And in NVR Homes, Inc. v. Clerks of the Circuit Courts (In re NVR, LP), 189 F.3d 442 (4th Cir. 1999), cert. denied, 528 U.S. 1117 (2000), the court extended the application of this principle to a contested matter commenced against state agencies by motion under Fed. R. Bankr. P. 9014. Rule 7001(7) takes out of the definition of "adversary proceeding" a proceeding to obtain an injunction or other equitable relief when a Chapter 11 plan provides for such relief. But permitting such relief without an adversary proceeding does not change the result for sovereign immunity purposes. Fed. R. Bankr. P. 9014 deals with contested matters "not otherwise governed by [Federal Rules of Bankruptcy Procedure] wherein relief shall be requested by motion." There can be no question but that the attempt to obtain declaratory or injunctive relief through the Plan confirmation process is subject to a properly invoked sovereign immunity defense.

2. Most of Proponents' arguments regarding sovereign immunity are premised upon the notion that the requested relief is proper under Ex Parte Young, 209 U.S. 123 (1908). This court has joined countless others in relying on Ex Parte Young in holding that federal courts can take actions against state officials acting in their representative capacity if they are violating federal law. See Pacific Gas and Electric Co. v. California Public Utils. Comm'n (In re Pacific Gas and Elec. Co.), 263 B.R. 306, 314 (Bankr. N.D. Cal. 2001). With that principle as a starting point, Proponents would have the court believe that an injunction is proper because officials of the Commission or the

State might violate federal law -- an order confirming a plan of reorganization -- sometime in the future.

The Ninth Circuit has held in Goldberg v. Ellett (In re Ellett), 254 F.3d 1135 (9th Cir. 2001), petition for cert. filed, 70 U.S.L.W. 3374 (U.S. Nov. 20, 2001), that discharge orders are binding on states notwithstanding their avoidance of bankruptcy court jurisdiction, whether or not the result would prevent a state from collecting monies otherwise owed to it. Ellett, 254 F.3d at 1141, citing Mitchell, 209 F.3d at 1117. Authorities from other circuits agree that there are no sovereign immunity implications when the bankruptcy court exercises jurisdiction over the res of the bankruptcy estate. Texas v. Walker, 142 F.3d 813 (5th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); State of Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777 (4th Cir. 1997) (confirmation order not a suit against state; state not named as defendant or served with process mandating appearance; order confirming plan, including a provision interpreting Bankruptcy Code § 1146(c), derived not from jurisdiction over the estate or other creditors, but rather from the jurisdiction over debtors and their estates).[29] See Section

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[29] Lurking beneath the surface of the instant dispute is the intimation by Corporation's counsel that officials of the Commission or the State will simply take the position that they may ignore an order confirming a plan of reorganization, and thus they will be free to enforce state law based upon the inability of this court to grant in rem relief that preempts such state law. For example, he stated (without offering any evidence) that they will "impute" things when it comes to rate making. The cases cited in the text contrast an attempt to obtain affirmative relief from a sovereign with a bankruptcy court exercising traditional in rem jurisdiction over the debtor and its assets. That in rem jurisdiction is binding. Stated otherwise, if an order confirming the Plan, or any similar plan found to preempt specific state laws

1141(a) (confirmed plan binds "any creditor", and Section 1142(a) (debtor and ". . . any entity organized . . . for the purpose of carrying out the plan shall carry out the plan . . . ."). The Ninth Circuit visited the Ex Parte Young exception recently in Duke Energy Trading and Marketing, LLC v. Davis, 267 F.3d 1042 (9th Cir. 2001). There again, as only a few weeks earlier in Ellett, the court upheld the ability of the trial court to enjoin a violation of federal law. Similarly, a threatened violation of federal law can be restrained as well. Agua Caliente Bank of Cahuilla Indians v. Hardin, 223 F.3d 1041 (9th Cir. 2000), cert. denied, 121 S.Ct. 1485 (2001).

The problem with their reliance on Agua Caliente, Duke Energy, Ellett and similar cases at the present time is that Proponents can point to no ongoing or threatened violation of federal law. They treat the opposition of the Commission and the State to approval of the Disclosure Statement (based upon sovereign immunity, preemption and numerous other grounds) as a presumed threat just as PG&E did when it sought to enjoin the Commission early in this case and was turned away, in part because it could not point to any actual or threatened violation of federal law. See Pacific Gas and Elec., 263 B.R. at 323. Absent such a real threat or an ongoing violation, Ex Parte Young is not available to support injunctive relief through confirmation. Thus

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and regulations, is entered, the bankruptcy court must take the position that any attempt to circumvent the effectiveness of such an order will be met with an injunction as authorized under Ex Parte Young, just as occurred in Ellett. This bankruptcy court will do exactly that. Otherwise the integrity of the federal court and its order will be undermined. Thus counsel's warning that the state officials are "bound to take the plan seriously" is unquestioned.

the Plan as drafted cannot overcome the sovereign immunity objection.

Finally, State and Commission argue that the Plan is so pervasive a threat to sovereign immunity that Ex Parte Young is not available based upon the exception found in Idaho v. Couer D'Alene Tribe of Idaho, 521 U.S. 261 (1997). In view of the court's rejection of Proponents' wholesale express preemption theory and its refusal to apply an Ex Parte Young exception to the sovereign immunity defense at this time, it is unnecessary to reach this issue.

3. Proponents point to several instances of conduct during this Chapter 11 case that amount to a waiver of sovereign immunity by the Commission and the State. As noted in footnote 6, waiver of sovereign immunity was not an issue the court was willing to consider at the January 25, 2002 hearing. If Proponents believe that the provisions of the Plan seeking injunctive or declaratory relief can be justified because of a waiver of sovereign immunity, then the revised disclosure statement should state with specificity the facts suggesting such a waiver. The issue will be tried as part of confirmation.

VI. Disposition

This Memorandum Decision rejects outright Proponents' across-the-board, take-no-prisoners preemption strategy in the Plan and Disclosure Statement. If Proponents believe the court is in error, they are entitled to attempt to seek review on appeal. To that end, the court will, if requested, enter an order disapproving the Disclosure Statement (or the latest version of it) for the reasons stated herein. Approval of a disclosure

statement is not a final order for purposes of appeal. Everett v. Perez (In re Perez), 30 F.3d 1209, 1217 (9th Cir. 1994), citing Texas Extrusion Corp. v. Lockheed Corp. (Matter of Texas Extrusion Corp.), 844 F.2d 1142, 1154 (5th Cir. 1988), cert. denied, 488 U.S. 926 (1988). Denial of approval of a disclosure statement is likewise interlocutory. Asbestos Claimants v. Aetna Casualty & Surety Co. (In re The Wallace & Gale Co.), 72 F.3d 21, 25 (4th Cir. 1995) ("the bankruptcy court's order denying approval of the disclosure statement was interlocutory"), citing Adams v. First Fin. Dev. Corp. (In re First Fin. Dev. Corp.), 960 F.2d 23, 26 (5th Cir. 1992). Any appeal will be discretionary with the District Court or the Bankruptcy Appellate Panel (28 U.S.C. § 158(a)(3) & (b)) and the court will not impede Proponents if they wish to attempt an appeal of an interlocutory order. In the alternative, the court will consider a proper request to certify the order disapproving the Disclosure Statement under Fed. R. Civ. P. 54(b), made applicable by Fed. R. Bankr. P. 7054(a) and Fed. R. Bankr. P. 9014.

Regardless of any decision about an appeal from this decision, the court and parties in interest need to know Proponents' intentions. Will they eliminate the provisions of the Plan and Disclosure Statement that implicate sovereign immunity? Will they amend the Plan to eliminate the express preemption provisions and amend the Disclosure Statement to meet their prima facie burden of disclosure and proceed to a confirmation hearing in an attempt to carry their burden to show implied preemption as the court recognizes as possible? Will they submit an alternative plan to replace the Plan and Disclosure Statement?

Apart from the foregoing -- and unrelated to the merits of the court's decision here -- the Commission has stated its intention to file its own plan of reorganization.[30] PG&E is entitled to respond to Commission's term sheet.

Accordingly, the following schedule will apply:

A. No later than February 21, 2002, PG&E is to:

1. File and serve its response to Commission's term sheet. The response is to be limited to twenty (20) pages.[31] If Commission does not file the term sheet by the February 13, 2002, deadline, PG&E's counsel may submit a declaration of noncompliance together with an order that will supplement the Exclusivity Order, terminating Commission's right to file a term sheet and extending all plan exclusivity until June 30, 2002.

2. File and serve a statement of its (and Corporation's) intentions as to the future of the plan and disclosure statement process in this Chapter 11 case, addressing the questions raised above.

3. Submit a form of order denying approval of the

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[30] On February 1, 2002, this court entered its Order Further Extending Exclusivity Period For Plan of Reorganization, and on February 3, 2002, its Amended Order Further Extending Exclusivity Period For Plan of Reorganization ("Exclusivity Order"). By that Exclusivity Order the court extended PG&E's exclusivity under Section 1121(c)(3) to June 30, 2002, except for the Commission. The Commission has until February 13, 2002, to file and serve a term sheet regarding its contemplated plan of reorganization, specifying (i) the proposed classification of all claims in interest; (ii) the proposed treatment of all claims in interest; (iii) the proposed means for implementation of any such plan (including, without limitation, specifics how particular claims will be satisfied, reinstated or refinanced); and (iv) a time-line for proposing and seeking approval of the plan it contemplates.

[31] The Committee may also file its response to the Commission's term sheet, subject to the same page limitations.

Disclosure Statement "for the reasons stated" in this Memorandum Decision if that is its desire.

4. File and serve any request for interlocutory certification of the order denying approval of the Disclosure Statement that it wishes to have this court enter.

B. The papers described in the foregoing paragraph A are to be served upon the United States Trustee, counsel for the Committee, and counsel for all parties who filed oppositions to PG&E's Motion For Order Further Extending Exclusivity Period For Plan Of Reorganization and/or any objections to the adequacy of the Disclosure Statement based upon preemption and sovereign immunity grounds.

C. Any party who objected to the adequacy of the Disclosure Statement on the basis of preemption and sovereign immunity may present any opposition it has to any request PG&E may file in accordance with paragraph A.4 for certification of any order denying approval of the Disclosure Statement at the hearing mentioned below.

D. The court will conduct a hearing on February 27, 2002, at 1:30 P.M., to consider all matters addressed in the foregoing. No papers other than those requested are to be filed in connection with that hearing.

Dated: February 7, 2002

S/_____
Dennis Montali
United States Bankruptcy Judge

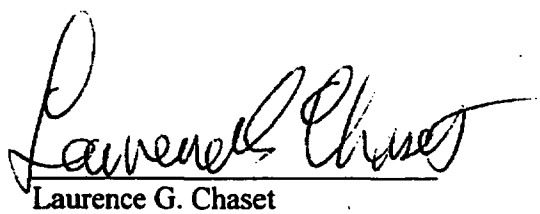
CERTIFICATE OF SERVICE

I hereby certify that in accordance with the Commission's regulation at 10 CFR 2.1313, I have this day caused the foregoing document be served upon the following parties by mailing by first-class mail a copy thereof properly addressed to each such party:

Richard F. Locke, Esq.
Pacific Gas and Electric Company
77 Beale Street, B30A
San Francisco, CA 94105

David A. Repka, Esq.
Winston & Strawn
1400 L Street, NW
Washington, DC 20005

Dated at San Francisco, California, this 11th day of February, 2002.



Laurence G. Chaset

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

February 20, 2002

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudication Staff

Re: **In the Matter of Pacific Gas and Electric Company Application for License Transfers and Conforming Administrative License Amendments for Diablo Canyon Power Plant, Units 1 and 2,** Docket Nos. 50-275, 50-323

To Whom It May Concern:

Enclosed for filing in the above-docketed case, please find an electronic version of a document entitled **"REPLY OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION ("CPUC") TO THE ANSWER OF PACIFIC GAS & ELECTRIC COMPANY TO THE CPUC'S PETITION FOR LEAVE TO INTERVENE, MOTION TO DISMISS APPLICATION, ETC."** ("CPUC Reply").

The original, signed version of this filing, plus an additional hard copy is being sent to you via Federal Express this afternoon. Thank you for your cooperation in this matter.

Sincerely,

Laurence G. Chaset
Staff Counsel

Enclosure

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of Pacific Gas and Electric Company Application for License Transfers and Conforming Administrative License Amendments for Diablo Canyon Power Plant, Units 1 and 2	Docket Nos. 50-275, 50-323

REPLY OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION ("CPUC") TO THE ANSWER OF PACIFIC GAS & ELECTRIC COMPANY TO THE CPUC'S PETITION FOR LEAVE TO INTERVENE, MOTION TO DISMISS APPLICATION, ETC.

Pursuant to 10 CFR §§2.1307(b), the Public Utilities Commission of the State of California ("CPUC"), hereby replies to the Answer of Pacific Gas and Electric Company to California Public Utilities Commission for Leave to Intervene, and Motion to Dismiss Application, or in the Alternative, Request for Stay of Proceedings, and request for Subpart G Hearing Due to Special Circumstances ("PG&E Answer"), that was filed in this matter on February 15, 2002. The PG&E Answer purports to show why the CPUC's Motion to Dismiss should be denied. However, PG&E's Answer mischaracterizes the circumstances that PG&E faces in its Bankruptcy Court proceeding, and sets forth a series of meretricious arguments that the Nuclear Regulatory Commission ("Commission") should simply ignore.

Unfortunately, the undersigned received the PG&E Answer only yesterday, after a 3-day weekend, and the very short five-day time frame that 10 CFR §§2.1307(b) allows for the filing of this Reply makes it physically impossible to rebut each of PG&E's arguments in detail. Accordingly, this Reply will point out the fundamental flaws of PG&E's arguments in summary, bullet point, fashion. With the Commission's leave, the CPUC would be more than glad to expand upon the summary analysis set forth herein and to explain in greater detail why the arguments set forth in the PG&E Answer are misbegotten and wholly erroneous. However, the key reasons why this is so, and why the Commission should ignore the arguments set forth in PG&E's Answer, are as follows:

1. In the PG&E Answer, PG&E repeatedly argues that the CPUC has not identified issues relevant to the findings the Commission must make on the license transfer application. However, contrary to PG&E's assertions, the CPUC's arguments are directed to the precise issues that the NRC must consider for license transfers under 10 C.F.R. § 50.80, namely, assurances of the transferee's financial qualifications to operate DCPP, the transferee's ability to decommission the facility and the ability of the transferee to assure the health, safety and general welfare of the ratepayers it seeks to serve.

2. At page 10 of the PG&E Answer, PG&E states that it is seeking only approval of the proposed license transfer, conditioned upon the confirmation by the Bankruptcy Court of the relevant elements of PG&E's proposed Bankruptcy Reorganization Plan ("Plan"). This is a deceptive and misleading argument. The Commission should deny even a conditional approval of the proposed license transfer.

because even such a limited, conditional approval would lend unnecessary and inappropriate weight to PG&E's efforts, through its Plan, to bilk PG&E's ratepayers out of the value of between $3.85 to $5.15 billion (with a B!) of PG&E assets.[1] Moreover, as the CPUC pointed out in its Renewed Motion to Dismiss Application that was filed in this matter on February 11, 2002, the Bankruptcy Court, in its Preemption Decision of February 7, 2002, has determined that PG&E's Plan is not lawful and may not move forward as it is currently designed. Given that the current version of PG&E's Plan is effectively dead, it would be extremely bad public policy, and it would be counterproductive, for this Commission to unfairly and unreasonably throw its weight behind PG&E's unlawful Plan by granting PG&E's requested license transfer, even on a conditional basis. For the Commission to do so would undermine the ability of the Bankruptcy Court to exercise its reasoned independent judgment on how best to move PG&E out of bankruptcy.

3. The heart of the argument in PG&E's Answer is that its Plan somehow continues to be "viable" before the Bankruptcy Court. *See,* PG&E's Answer, at 11-13. However, whether this Plan has any real life left to it, or not, is a matter that the Bankruptcy Court will evaluate over the next several months. In this regard, PG&E's selective quotations from the bankruptcy court are extremely misleading. In fact, the Bankruptcy Court rejected PG&E's plan for wholesale preemption and sent PG&E back

[1] The CPUC has submitted to the Bankruptcy Court and to the Federal Energy Regulatory Commission a "Comparison of the Estimated Values of Transferred Assets and Consideration to PG&E" under PG&E's proposed Plan that sets forth these numbers. This Comparison is set forth on page 28 of Exhibit D to the CPUC's Petition that was filed on February 6, 2002 in this matter.

to come up with better solutions. Indeed, a few days after the ruling issued, an article in an industry-friendly newspaper highlighted what the Bankruptcy Court ruled:

> "A federal bankruptcy judge delivered a warning blow to PG&E Corp. over its plan to place some of its most profitable assets outside California's control as part of the bankruptcy reorganization of its utility unit. Judge Dennis Montali said the plan put forth by the San Francisco utility for its Pacific Gas & Electric Co. unit amounted to a "full-scale attack" on state authority, a finding that hews to the position of California utility regulators."

Rebecca Smith, "Judge Warns PG&E About Plans For Utility Unit's Reorganization," The Wall Street Journal, February 11, 2002. The language of the Bankruptcy Court's preemption decision of February 7 (a copy of which the CPUC submitted for the Commission's consideration on its Renewed Motion to Dismiss, filed in this matter on February 11, 2002) speaks for itself. The Commission should read that Decision, and should not rely on PG&E's skewed mischaracterization of it.

4. The viability of PG&E's Plan is further called into question by the filing late last week in the Bankruptcy Court of the CPUC's alternate plan of reorganization ("Alternate Plan"). A copy of the Term Sheet setting forth the principal terms of the CPUC's Alternate Plan, filed with the Bankruptcy Court on February 13, 2002, is attached hereto as Exhibit A. A copy of a revised Term Sheet (correcting one small error in its February 13, 2002 filing) that the CPUC filed with the Bankruptcy Court on February 14, 2002 is attached hereto as Exhibit B. For the purposes of the Commission's regulatory concern in this proceeding, the single most important aspect of the CPUC's Alternate Plan is the fact that under this Alternate Plan, PG&E would retain ownership of the Diablo Canyon Power Plant ("DCPP"). Under the Alternate Plan, no license transfer

is required; no Commission approvals are required; this Commission's jurisdiction is not invoked.

5. On page 19 of the PG&E Answer, PG&E states: "there has been no showing that the assignment will create a post-reorganization regulatory gap or that there will be any loss of effective regulation." On its face, this is an absurd contention. A primary reason why the CPUC has opposed PG&E's Plan is that a great deal of very important state regulatory authority will be lost if that Plan were to be confirmed. The details of this drastic regulatory loss, and its significant adverse impacts on the well-being of that large percentage of California's 35 million citizens who live in PG&E's service area, are spelled out in Exhibits A through F of the CPUC's Petition that was filed on February 6, 2002 in this matter.

6. PG&E also attempts to mislead the Commission on an issue of vital importance to the Commission's consideration of any proposed license transfer, namely, the technical and financial qualifications of the proposed transferees, "Gen" and Diablo Canyon, LLC. PG&E states that its Application "demonstrates" such qualifications. However, the CPUC has already effectively rebutted these claims in its Petition that was filed on February 6, 2002 in this matter. *See*, in particular, Exhibit G to that Petition. The fact is, as the CPUC's filing amply shows, these new companies will be less reliable and trustworthy because of the nested LLC structure under which they are created, which structure is expressly and specifically intended to shield PG&E's shareholders from responsibility to the public. Nothing in the PG&E Answer in any way rebuts the CPUC's

showing that these new companies will be far less qualified and able to meet their public responsibilities than the current owner and operator of DCPP.

7. At pages 16-21 of the PG&E Answer, PG&E engages in an exercise of specious hand-waving in an ineffective attempt to dismiss an essential argument set forth in the CPUC Petition, namely, that the Commission cannot approve the license transfer application without the explicit, contemporaneous approval by the CPUC of the transfer of PG&E's beneficial interest of those portions of PG&E's Nuclear Decommissioning Trusts ("Trusts") that are attributable to DCPP. The Commission well knows that DCPP's portion of the Trusts must accompany the license transfer for the Commission to be abler to approve the license transfer. PG&E in effect admits this, and can only plead that the merits of the CPUC's argument in this regard are before the Bankruptcy Court. *See*, PG&E Answer, at 17. However, as noted above, the very viability of PG&E's Plan before the Bankruptcy Court is now in serious doubt. Under such circumstances, the Commission cannot approve a license transfer request, even conditionally, when a fundamental element of that proposed transfer (in this case, the authority to approve the transfer of the DCPP portion of the Trusts) remains under the jurisdiction of another governmental entity (*i.e.*, the CPUC) that opposes the license transfer application. PG&E's arguments on this point simply do not add up.

8. At pages 30-32 of the PG&E Answer, PG&E attempts to dismiss the CPUC concern about the potential threat to public health and safety if DCPP is allowed to operate under market-based rates. However, this argument misses the points, amply set forth at pages 21-43 of, and in Exhibit G to, the CPUC's petition, filed in this matter on

February 6, 2002, that (a) the proposed transferees will not be financially able to meet their basic health and safety-related obligations without approval by the Federal Energy Regulatory Commission of illegal, unjust and unreasonable rates; and (b) the transition to market based rates will clearly impose a financial disincentive to actively pursue comprehensive solutions to present and future security and environmental problems. The Commission must seriously consider these facts, and should ignore PG&E's misguided attempt to blind the Commission to these considerations of fundamental public policy importance.

9. At pages 25-28 of the PG&E Answer, PG&E tries to convince the Commission that its approval action is a mere formality, and that the Commission's role in PG&E's corporate reorganization is limited. PG&E emphasizes the relative non-importance of the Commission's license approval to the State of California, arguing that the approval "would not, in itself, change the regulatory role of the CPUC." *See*, PG&E Answer, at 26. This statement is inherently wrong. While owned by the PG&E utility, the DCPP is under the jurisdiction of the CPUC. However, PG&E contemplates that Plan approval would transfer the plant from the CPUC's jurisdiction. Although the license transfer request is just one step in PG&E's attempt to escape its obligations to California citizens, it is certainly an important step, and the Commission should recognize the significance of the license approval to the state of California. The PG&E Plan is not simply a corporate reorganization involving some name changes. Rather, it is tailored to minimize the company's responsibilities to the PG&E ratepayers. Under the Plan, PG&E will transfer DCPP away from the regulated utility, but transfer the non-useful Humboldt

Bay nuclear plant back to the utility. More than a name change, the Plan is a ruse designed to allow PG&E's corporate parent to maximize corporate profits while turning its back on the ratepayers who have built the utility's infrastructure. PG&E does not address the effect that this proposed transfer will have on ratepayers, who would no longer have a forum in California in which to bring their complaints. Such a loss of regulatory oversight is an important public policy consideration that the Commission cannot ignore.

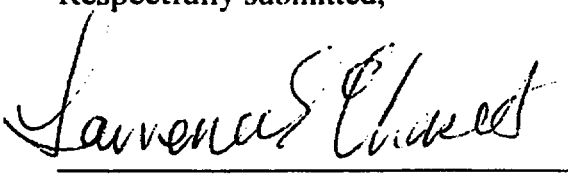
10. At pages 32-33 of the PG&E Answer, PG&E dismisses, as a matter of no importance, the existence of the Diablo Canyon Independent Safety Committee. The DCISC was created out of a settlement between PG&E and the CPUC. However, if the proposed license transfer is approved, PG&E no longer will have to comply with the terms of that settlement. PG&E may have no regard for the very important safety oversight responsibility provided by the DCISC, but the CPUC certainly does, and so should the Commission. The Commission cannot and should not neglect to see the negative public safety implications of any action it might take to approve the proposed license transfer. One of these negative safety implications would be the demise of the DCISC. If the Commission truly cares about public health and safety, it must take this fact into account as it considers the Application before it in this matter. It is irrelevant that the NRC did not create the DCISC; PG&E's arguments evidence yet another instance of PG&E turning its back on California by attempting to bypass its agreements with the state.

10. Finally, contrary to the assertions set forth at pages 5-7 of in the PG&E Answer, waiver of Commission's rules, as requested, is permissible under 10 CFR § 2.1329 when, "because of special circumstances concerning the subject of the hearing, application of the rule would not support the purposes for which it was adopted." *See*, 10 CFR §2.1329(b). The issues here are certainly unusual and compelling, because PG&E would have the Commission ignore the Bankruptcy Court, and completely disregard a wide array of California laws in the name of the requested license transfer. While one purpose of the subpart M hearing is to minimize administrative hurtles, under the present circumstances, PG&E's proposal requires a more detailed procedural review. Additionally, the CPUC has met the requirements of 2.1329(c) by filing detailed support for the proposition that PG&E's plan is highly unorthodox, controversial, and not viable, and that a streamlined Subpart M hearing would not serve the interests of the Commission in evaluating PG&E's unusual license transfer request.

Contrary to PG&E's assertions, the CPUC has most assuredly demonstrated a basis for the denial of PG&E's Application in this matter. For this and all the foregoing reasons, and especially because the Bankruptcy Court has rejected outright the preemption strategy upon which PG&E's Plan and its associated Application herein depends, the Commission should ignore the misleading and erroneous arguments set forth in PG&E's Answer and should proceed to dismiss PG&E's Application on file in this matter. At a minimum, the NRC should hold any proceedings in this matter in abeyance until there is a viable Plan pending before the Bankruptcy Court.

February 20, 2002

Respectfully submitted,



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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, Debtor. Federal I.D. No. 94-0742640	Case No. 01-30923 DM Chapter 11 Case **NOTICE OF CALIFORNIA PUBLIC UTILITIES COMMISSION'S FILING OF PROPOSED PLAN TERM SHEET**

PLEASE TAKE NOTICE that, pursuant to an order of this Court, dated February 3, 2002 (the "Second Exclusivity Order"), the California Public Utilities Commission (the "Commission") hereby files a term sheet (together with all exhibits and attachments thereto, the "Plan Term Sheet") describing the principal terms of a proposed alternate plan of reorganization that the Commission seeks to file in the above-captioned chapter 11 case (the "Alternate Plan"). Attached as Exhibits to the Commission's Plan Term Sheet are the following additional documents:

(1) **Exhibit A** - Proposed classification and treatment of allowed claims;

(2) **Exhibit B** – A detailed analysis o the sources and uses of funds under the Commission's Alternate Plan (including compar.sons with the First Amended Plan of Reorganization proposed by the above-captioned debtor and PG&E Corporation); and

(3) **Exhibit C** – A proposed timeline for the Commission's Alternate Plan.

In accordance with the Second Exclusivity Order, copies of this Notice and the Plan Term Sheet have been served by facsimile and overnight mail to counsel for the above-captioned debtor and debtor in possession, counsel for the Official Committee of Unsecured Creditors in this chapter 11 case and the Office of the United States Trustee. In addition, copies have been served by facsimile and overnight mail to counsel for PG&E Corporation. *See* Declaration of Service of Joseph L. Monzione.

The filing of this Notice and the attached Plan Term Sheet shall not be deemed or construed as a waiver of any objections or defenses that the Commission or any other agency, unit or entity of the State of California may have to this Court's jurisdiction over the Commission or such other agency, unit or entity based upon the Eleventh Amendment of the United States Constitution or related principles of sovereign immunity or otherwise, all of which are hereby reserved.

DATED: February 13, 2002

Respectfully,

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AROCLES AGUILAR
MICHAEL M. EDSON
OFFICE OF THE GENERAL COUNSEL
CALIFORNIA PUBLIC UTILITIES COMMISSION

_____
GARY M. COHEN

-AND-

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Attorneys for the California Public Utilities Commission

In re PACIFIC GAS AND ELECTRIC COMPANY, Debtor
Commission's Proposed Term Sheet for Alternate Plan of Reorganization

The following describes the principal terms of a proposed alternate plan of reorganization (the "Alternate Plan") to be filed by the California Public Utilities Commission (the "Commission") in the chapter 11 case of Pacific Gas and Electric Company ("PG&E").[1]

This Proposed Term Sheet is based solely upon publicly available and other information available to the Commission and is subject to modification upon receipt by the Commission of additional information.

The Alternate Plan is based upon, among other things, various assumptions and projections, including, but not limited to, those relating to future actions to be taken by the Commission. Such assumptions and projections are made solely for purposes of describing the Alternate Plan and for no other purpose and are not binding upon the Commission.

Plan Proponent:	The Commission.
Classification and Treatment of Allowed Claims:	*See* Exhibit A.
Plan Funding:	Allowed Claims[2] (together with postpetition interest at the lowest non-default contract rate or, if no contract or non-default rate exists, then at the federal judgment rate)[3] will be satisfied in full through a combination of cash and the reinstatement or refinancing of certain of PG&E's long-term indebtedness.

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[1] The terms hereof have yet to be negotiated with PG&E, the Official Committee of Unsecured Creditors appointed in this chapter 11 case, or other key constituencies. The Commission reserves the right to alter the terms hereof based upon the outcome of such negotiations.

[2] Capitalized terms used and not defined herein shall have the meanings ascribed to such terms in PG&E's First Amended Plan of Reorganization, dated December 19, 2001 (as subsequently amended or modified, the "First Amended Plan").

[3] Consistent with PG&E's First Amended Plan, except as provided by otherwise applicable non-bankruptcy law, postpetition interest will not be paid on the following Allowed Claims: Administrative Expense Claims, Environmental, Fire Suppression and Tort Claims and Chromium Litigation Claims.

Specifically, PG&E's short-term indebtedness incurred during the energy crisis and matured obligations (*i.e.* Allowed Claims in Classes 1, 4f, 5, 6 and 7) together with all Allowed Administrative Claims, Professional Compensation and Reimbursement Claims, Priority Tax Claims, Other Secured Claims (Class 2) and Convenience Claims (Class 10) will be paid in full in cash.[4] PG&E's long-term debt (Classes 3, 4a-e, 4g and 11) will be reinstated pursuant to section 1124(2) of the Bankruptcy Code[5] and shall remain outstanding. All other Allowed Claims (Classes 8, 9 and 12) will be paid in the ordinary course of PG&E's business when and if the same become due and payable.

The holders of PG&E's Preferred and Common Stock Equity Interests (Classes 13 and 14) will retain their respective interests. Accrued and unpaid dividends and sinking fund payments in respect of PG&E's Preferred Stock Equity Interests (approximately $56 million according to PG&E's estimates) will be paid from PG&E's cash on hand and residual revenues.

See Exhibit B for more detail regarding the funding sources and uses under the Commission's Alternate Plan.

Projected Effective Date: No later than January 31, 2003 (the "Effective Date").

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[4] According to PG&E's 8-K filing with the Securities and Exchange Commission on November 30, 2001 (the most recent publicly available information as of the date of this Term Sheet), PG&E has approximately $4.875 billion of cash on hand (including short-term investments). The Commission projects that PG&E's cash balance will increase by approximately $2.98 billion through January 31, 2003 through a combination of (i) PG&E's residual revenues (*i.e.* the excess of retail electric rates over wholesale power, transmission, distribution and other related costs), estimated to equal $1.75 billion for the period December 1, 2001 through January 31, 2003 (note, PG&E has been earning excess revenues over costs since June 2001), and (ii) PG&E's projected retained return on rate base of approximately $1.23 billion. *See* Schedule 3 to Exhibit B for more detail.

[5] All references to the Bankruptcy Code are to title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*

Regulation:	All of PG&E's operations would continue to be regulated by the Commission and the various other federal, State and local agencies currently charged with that responsibility.
Dividend and Other Restrictions:	PG&E would be prohibited from declaring or making cash distributions to PG&E Corporation (including by way of dividends and stock repurchases) for 2001, 2002 and 2003.
Net Open Position:	To be resumed by PG&E upon its satisfaction of FERC's creditworthiness requirements, which is assumed to occur no later than January 2003.
Post-Bankruptcy Rate Structure:	The Commission would establish a cost-of-service rate structure that would provide PG&E with an opportunity to recoup its costs and earn a reasonable return on its assets consistent with State law. This cost-of-service rate structure would become effective after all Allowed Claims and dividend and sinking fund payments in respect of PG&E's Preferred Stock Equity Interests have been satisfied in full (together with postpetition interest, where applicable).
Litigation Trust:	On the Effective Date a litigation trust would be established. PG&E would initially fund the trust with (i) cash in an amount to be determined and (ii) various estate claims and causes of action, including but not limited to (a) claims against PG&E Corporation, (b) affirmative recoveries related to refund claims pending before the FERC, (c) other claims against sellers of electricity in the wholesale market, and (d) the first proceeds of recoveries, if any, in the Rate Recovery Litigation in an amount equal to the residual revenues collected from PG&E's ratepayers since June 2001, which amount is estimated not to exceed $1.75 billion. The proceeds of the litigation trust would be distributed solely to or for the benefit of PG&E's ratepayers; the proceeds would *not* be used to fund distributions to holders of Allowed Claims and Interests.
Executory Contracts/Unexpired Leases:	PG&E shall assume all of the executory contracts and unexpired leases to be assumed, or assumed and assigned to Etrans, Gtrans, Gen and other entities under PG&E's First Amended Plan.
Claims Resolution:	PG&E or reorganized PG&E (as the case may be)

	shall administer the claims resolution process under the supervisio n of a plan administrator to be approved by the Commission. The reasonable fees and expenses incurred by PG&E or reorganized PG&E (as the case may be) and the plan administrator incurred in the conduct of the claims resolution process shall be paid from the operations of PG&E or reorganized PG&E, respectively.
Additional Sources of Liquidity upon Emergence from Chapter 11:	The Alternate Plan assumes that reorganized PG&E will obtain a credit facility sufficient to meet any short-term working capital needs. In addition, the Alternate Plan assumes that PG&E will retain approximately $423 million in cash after making all plan-related distributions required on or before the Effective Date.
Miscellaneous:	Each of the terms described herein is an integral aspect of the Commission's Alternate Plan and, as such, is non-severable from the others. The Commission's Alternate Plan remains subject in all respects, among other things, to the Court's termination of PG&E's plan exclusivity to allow the Commission to file and solicit acceptances to its Alternate Plan and to the preparation, execution and delivery of definitive documentation in form and substance satisfactory to the Commission.

Exhibit A

Classification and Treatment of Allowed Claims

Class	Claim/Interest	Treatment of Allowed Claim/Interest	Estimated Aggregate Amount of Allowed Claims (in millions)[1]	Estimated % Recovery on Allowed Claims
—	Administrative Expense Claims	Same as PG&E's First Amended Plan – paid in full in cash.	$1,300	100%
—	Professional Compensation and Reimbursement Claims	Same as PG&E's First Amended Plan – paid in full in cash.	Unknown	100%
—	Priority Tax Claims	Same as PG&E's First Amended Plan – paid in full in cash.	$54	100%
1	Other Priority Claims	Same as PG&E's First Amended Plan – paid in full in cash.	Nominal	100%
2	Other Secured Claims	Same as PG&E's First Amended Plan – paid in full in cash.	Nominal	100%

[1] Amounts are based on PG&E's estimates contained in the First Amended Disclosure Statement for First Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas And Electric Company Proposed by Pacific Gas And Electric Company and PG&E Corporation, dated December 19, 2001 (as subsequently amended or modified, the "First Amended Disclosure Statement").

		– paid in full in cash.		
3	Secured Claims Relating to First and Refunding Mortgage Bonds	To remain outstanding and be reinstated pursuant to section 1124(2) of the Bankruptcy Code. Accrued and unpaid interest due and owing through the last scheduled interest payment date preceding the Effective Date shall be paid in cash at the lowest non-default contract rate. Any and all other cure amounts resulting from such reinstatement to be determined.	$3,310[2]	100%
4a	Mortgage Backed PC Bond Claims	Same as PG&E's First Amended Plan – the Mortgage Backed PC Bonds will remain outstanding and be reinstated pursuant to section 1124(2) of the Bankruptcy Code. Accrued and unpaid interest due and owing through the last scheduled interest payment date preceding the Effective Date shall be paid in cash at the lowest non-default contract rate. All unpaid fees and expenses of the Issuer and Bond Trustee due and owing under the applicable Loan Agreements will also be paid in full in cash. Any and all other cure amounts resulting from such reinstatement to be determined.	$345	100%
4b	MBIA Insured PC Bond Claims	Same as PG&E's First Amended Plan – the MBIA Insured PC Bonds will remain outstanding and be reinstated pursuant to section 1124(2) of the Bankruptcy Code. Accrued and unpaid interest due and owing through the last scheduled interest payment date preceding the Effective Date shall be paid in cash at the lowest non-default contract rate. All	$200	100%

[2] According to PG&E's First Amended Disclosure Statement, $277 million of such amount is held by PG&E in treasury.

		unpaid fees and expenses of the Issuer and Bond Trustee due and owing under the Loan Agreement will also be paid in full in cash. Any and all other cure amounts resulting from such reinstatement to be determined.		
4c	MBIA Claims	Same as PG&E's First Amended Plan – Allowed MBIA Claims will be paid in cash in an amount equal to the aggregate amount paid by MBIA to the Bond Trustee with respect to the payment of interest on the MBIA Insured PC Bonds during the period from the Petition Date through the last scheduled interest payment date preceding the Effective Date, together with all other amounts due and owing to MBIA under the terms of the MBIA Reimbursement Agreement through the Effective Date, including interest at the non-default contract rate due on such amounts to the extent provided in the MBIA Reimbursement Agreement.	Nominal	100%
4d	Letter of Credit Backed PC Bond Claims	Same as PG&E's First Amended Plan – the Letter of Credit Backed PC Bonds will remain outstanding and be reinstated pursuant to section 1124(2) of the Bankruptcy Code. Accrued and unpaid interest due and owing through the last scheduled interest payment date preceding the Effective Date shall be paid in cash at the lowest non-default contract rate. All unpaid fees and expenses of the Issuer and Bond Trustee due and owing under the applicable Loan Agreements will also be paid in full in cash. Any and all other cure amounts resulting from such reinstatement to be determined.	$610	100%

4e	Letter of Credit Bank Claims	To the extent that PG&E has not reimbursed the applicable Letter of Credit Issuing Bank and the applicable Banks, if any, for drawings made on the related Letter of Credit with respect to the payment of interest on the related series of Letter of Credit Backed PC Bonds to the extent provided in the respective Reimbursement Agreement, each holder of an Allowed Letter of Credit Bank Claim will be paid cash in an amount equal to its *pro rata* share of the aggregate amount paid by the respective Letter of Credit Issuing Bank to the respective Bond Trustee under the terms of the applicable Letter of Credit with respect to the payment of the interest on the Letter of Credit Backed PC Bonds to which such Letter of Credit Bank Claim relates during the period from the Petition Date through the last scheduled interest payment date on such Letter of Credit Backed PC Bonds preceding the Effective Date. Each holder of an Allowed Letter of Credit Bank Claim will also be paid cash in an amount equal to its *pro rata* share of all other amounts then due and owing to the respective Letter of Credit Issuing Bank and the applicable Banks, if any, under the terms of the respective Reimbursement Agreement (other than for reimbursement of drawings on the respective Letter of Credit) through the Effective Date, including interest at the non-default rate due on such amounts to the extent provided in the respective Reimbursement Agreements, any due and owing Forbearance, Extension and Letter of Credit Fees through the Effective Date, and the reasonable fees and expenses of unrelated third-party	Nominal	100%

		professionals retained by the Letter of Credit Issuing Banks, to the extent incurred subsequent to the Petition Date, which with respect to each Letter of Credit Issuing Bank for the period prior to December 1, 2001 shall be in an aggregate amount not to exceed the amount mutually agreed to by PG&E and each Letter of Credit Issuing Bank.		
4f	Prior Bond Claims	Each holder of an Allowed Prior Bond Claim will be paid in cash in an amount equal to its *pro rata* share of (i) the accrued and unpaid interest at the non-default rate due on the outstanding Reimbursement Obligations of PG&E to such holder under the respective Prior Reimbursement Agreement in accordance with the terms thereof through the Effective Date, (ii) all other amounts (other than the Reimbursement Obligations) due and owing to the respective Prior Letter of Credit Issuing Bank under the terms of the respective Prior Reimbursement Agreement through the Effective Date, and (iii) the outstanding Reimbursement Obligations.	$450	100%
4g	Treasury PC Bond Claims	Same as PG&E's First Amended Plan – each Allowed Treasury PC Bond Claim shall remain outstanding and be reinstated in accordance with section 1124(2) of the Bankruptcy Code. Accrued and unpaid interest due and owing through the last scheduled interest payment date preceding the Effective Date shall be paid in cash at the lowest non-default contract rate. All unpaid fees and expenses of the Issuer and Bond Trustee due and owing under the applicable Loan Agreements will also	$80	100%

		be paid in full in cash. Any and all other cure amounts resulting from such reinstatement to be determined.		
5	General Unsecured Claims	Paid in full in cash, together with postpetition interest at the lowest non-default contract rate or, if no such rate exists, then at the federal judgment rate.	$3,510[3]	100%
6	ISO, PX and Generator Claims	Paid in full in cash, together with postpetition interest at the lowest non-default contract rate or, if no such rate exists, then at the federal judgment rate.	$1,070	100%
7	ESP Claims	Paid in full in cash, together with postpetition interest at the lowest non-default contract rate or, if no such rate exists, then at the federal judgment rate.	$420	100%
8	Environmental, Fire Suppression and Tort Claims	Same as PG&E's First Amended Plan – satisfied in full in the ordinary course of PG&E's business at such time and in such manner as PG&E is obligated to satisfy such Allowed Claims under applicable law.	$350	100%
9	Chromium Litigation Claims	Paid in full in cash in the ordinary course of PG&E's business at such time and in such manner as PG&E is obligated to satisfy such Allowed Claims.	$160	100%
10	Convenience Claims	Same as PG&E's First Amended Plan – paid in full in cash.	$60	100%
11	QUIDS Claims	The QUIDS Claims will remain outstanding and be reinstated in accordance with section 1124(2) of	$310	100%

[3] This amount is net of $1,060 billion of QF claims now classified as Administrative Expense Claims. According to counsel for PG&E and PG&E Corporation, the higher amount of General Unsecured Claims inclu led in the First Amended Disclosure Statement ($4,570) was overstated by the s: me $1,060 billion.

		the Bankruptcy Code. Accrued and unpaid interest due and owing through the last scheduled interest payment date preceding the Effective Date shall be paid in cash at the lowest non-default contract rate. Any and all other cure amounts resulting from such reinstatement to be determined.		
12	Workers' Compensation Claims	Same as PG&E's First Amended Plan – paid in full in cash in the ordinary course of PG&E's business at such time and in such manner as PG&E is obligated to satisfy such Allowed Claims under applicable law.	To come	100%
13	Preferred Stock Equity Interests	Same as PG&E's First Amended Plan – each holder of a Preferred Stock Equity Interest will retain its Preferred Stock in PG&E and will be paid in cash any dividends and sinking fund payments accrued in respect of such Preferred Stock through the last scheduled payment date prior to the Effective Date.	$430	100%
14	Common Stock Equity Interests	PG&E Corporation will retain its Common Stock in PG&E.	N/A	N/A

Exhibit B

Sources and Uses of Funds

[See Attached]

PACIFIC GAS AND ELECTRIC COMPANY

SCHEDULE 1

PLAN OF REORGANIZATION
- PROPOSED BY THE COMMISSION -
Dollars in $Millions

SOURCES OF FUNDS	Total
Cash Available to Pay Creditors	
Cash at Emergence @ January 31, 2003 (1)	$ 6,864
Reinstated / Refinanced Debt & Obligations	
Class 3	3,310
Class 4	1,235
Class 11 - QUIDS Claims	310
Subtotal (Debt)	4,855
Class 8 - Environmental, Fire Suppression and Tort Claims	350
Class 9 - Chromium Claims	160
Class 12 - Workers' Compensation Claims (2)	-
Class 13 - Preferred Equity	430
Subtotal (Obligations)	940
Total Reinstated / Refinanced Debt & Obligations	5,795
Total Sources of Funds	**$ 12,659**

Notes:
(1) See Schedule 3 for details.
(2) PG&E's disclosure statement does not disclose an estimate for Class 12 claims.

PACIFIC GAS AND ELECTRIC COMPANY

SCHEDULE 2

PLAN OF REORGANIZATION
- PROPOSED BY THE COMMISSION -
Dollars in $Millions

USES OF FUNDS

	(1) Claims	Adj.	Adjusted Claims	Cash	Reinstated / Refinanced Debt	Reinstated / Refinanced Obligations	Total
Class 1 & 2							
Administrative & Priority	$ 1,300	$ -	$ 1,300	$ 1,300	$ -	$ -	$ 1,300
Professional Fees & Reimbursement							-
Priority Tax Claims	54	-	54	54	-	-	54
Subtotal	1,354	-	1,354	1,354	-	-	1,354
Class 3: Secured Claims - First / Refunded Mortgage Bonds (2)	3,310	-	3,310	-	3,310	-	3,310
Class 4							
(a) Mortgage-Backed PC Bonds	345	-	345	-	345	-	345
(b) MBIA Insured PC Bonds	200	-	200	-	200	-	200
(c) MBIA Claims							-
(d) Letter of Credit Backed PC Bond Claims	610	-	610	-	610	-	610
(e) Letter of Credit Bank Claims							-
(f) Prior Bond Claims	450	-	450	450	-	-	450
(g) Treasury PC Bond Claims	80	-	80	-	80	-	80
Subtotal	1,685	-	1,685	450	1,235	-	1,685
Class 5: General Unsecured Claims (3)	4,570	(1,060)	3,510	3,510	-	-	3,510
Class 6: ISO, PX, Generator Claims	1,070	-	1,070	1,070	-	-	1,070
Class 7: ESP Claims	420	-	420	420	-	-	420
Class 8: Environmental Claims	350	-	350	-	-	350	350
Class 9: Chromium Claims	160	-	160	-	-	160	160
Class 10: Convenience Claims	60	-	60	60	-	-	60
Class 11: QUIDS Claims	310	-	310	-	310	-	310
Class 12: Workers' Compensation Claims	-	-	-	-	-	-	-
Class 13: Preferred Equity	430	-	430	-	-	430	430
Class 14: Common Equity	-	-	-	-	-	-	-
Total Uses of Funds	**$ 13,719**	**$ (1,060)**	**$ 12,659**	**$ 6,864**	**$ 4,855**	**$ 940**	**$ 12,659**

Notes:
(1) Source: PG&E disclosure statement. Amounts include prepetition interest, if any.
(2) $277 million of such amount is held by the Debtor in treasury.
(3) In PG&E's disclosure statement, Class 5 claims and administrative expense claims both include $1.06 billion of QF claims.
As such, Class 5 claims have been adjusted downward by $1.06 billion to reflect reclassification of QF claims to administrative expense claims from Class 5.
Since admininstrative expense claims already include QF claims, no adjustment to administrative expense claims is required.

PACIFIC GAS AND ELECTRIC COMPANY

SCHEDULE 3

PLAN OF REORGANIZATION
- PROPOSED BY THE COMMISSION -
Dollars in $Millions

CASH AVAILABLE FOR CREDITORS -- THE COMMISSION'S ESTIMATE

Cash on Hand @ November 30, 2001 (1)	**$ 4,875**
Return on Capital	
- Return on Rate Base (2)	1,516
- Interest Paid on Class 3 (3)	(282)
Total Retained Return on Rate Base	1,234
Utility Residual Generation Revenue	
+ Month of December 2001	100
+ FY 2002	1,487
+ Month of January 2003	167
Total (December 2001 - January 2003)	1,754
Projected Gross Cash @ January 31, 2003 (5)	**7,862**
- Prepetition Interest (6)	-
- Postpetition Interest, Net of Mortgage Interest in Class 3	(746)
- Nominal Claims + Bankruptcy Costs	(50)
- Preferred Dividends (4)	(56)
- Cash (7)	(423)
+ Mortgage Bonds Held in Treasury	277
+ Draw on New Credit Facility (8)	-
Projected Net Cash @ January 31, 2003	**$ 6,864**

Notes:

(1) Source: PG&E monthly operating report for the month of November 2001.

(2) Assumes a 9.12% return on rate base (as defined by the Commission). This amount represents total return on PG&E's capital as estimated to be retained by the Company from December 1, 2001 to January 31, 2003. Return on rate base is equal to the return built into the base rate for interest, preferred dividends, and return on equity, as defined by the Commission.

(3) Interest paid from December 1, 2001 through January 31, 2003 on Class 3 claims.

(4) Source: PG&E disclosure statement.

(5) Cash available to pay claims, prepetition interest and postpetition interest.

(6) Total claims in Schedule 2 include prepetition interest.

(7) Estimated cash on hand upon exit from chapter 11.

(8) The Commission's plan will provide for a credit facility to fund capital expenditures, working capital and, if necessary, distributions to unsecured creditors. The plan as presented assumes that the credit facility is undrawn at confirmation.

PACIFIC GAS AND ELECTRIC COMPANY

SCHEDULE 4

PLAN OF REORGANIZATION
- PROPOSED BY THE COMMISSION -
Dollars in $Millions

COMPARISON -- SOURCES OF FUNDS

	Commission Plan	PG&E Plan	Variance
Cash Available for Creditors at Emergence	$ 6,864	$ 2,915	$ 3,949
Cash from New Money Notes	-	5,175	(5,175)
Cash from New Mortgage Bonds	-	345	(345)
Cash from New QUIDS	-	310	(310)
Total Cash	6,864	8,745	(1,881)
New Notes	-	2,244	(2,244)
Total Reinstated / Refinanced Debt & Obligations	5,795	1,670	4,125
Total Sources of Funds (1)	$ 12,659	$ 12,659	$ -

Notes:

(1) In PG&E's disclosure statement, Class 5 claims and administrative expense claims both include $1.06 billion of QF claims. As such, Class 5 claims have been adjusted downward by $1.06 billion to reflect reclassification of QF claims to administrative expense claims from Class 5. Since administrative expense claims already include QF claims, no adjustment to administrative expense claims is required.

PACIFIC GAS AND ELECTRIC COMPANY

SCHEDULE 5

PLAN OF REORGANIZATION
- PROPOSED BY THE COMMISSION -
Dollars in $Millions

COMPARISON -- USES OF FUNDS

	Commission Plan			PG&E Plan			
	Cash	Reinstated/ Refinanced Debt	Reinstated/ Refinanced Obligations	Cash (2)	New Notes	Reinstated/ Refinanced Debt	Reinstated/ Refinanced Obligations
Class 1 & 2	$ 1,354	$ -	$ -	$ 1,354	$ -	$ -	$ -
Class 3	-	3,310	-	3,310	-	-	-
Class 4	450	1,235	-	615	180	890	-
Class 5	3,510	-	-	2,106	1,404	-	-
Class 6	1,070	-	-	642	428	-	-
Class 7	420	-	-	252	168	-	-
Class 8	-	-	350	-	-	-	350
Class 9	-	-	160	96	64	-	-
Class 10	60	-	-	60	-	-	-
Class 11	-	310	-	310	-	-	-
Class 12	-	-	-	-	-	-	-
Class 13	-	-	430	-	-	430	-
Class 14	-	-	-	-	-	-	-
Subtotal, Uses of Funds	$ 6,864	$ 4,855	$ 940	$ 8,745	$ 2,244	$ 1,320	$ 350
Total Uses of Funds (1)			$ 12,659				$ 12,659

Notes:

(1) In PG&E's disclosure statement, Class 5 claims and administrative expense claims both include $1.06 billion of QF claims. As such, Class 5 claims have been adjusted downward by $1.06 billion to reflect reclassification of QF claims to administrative expense claims from Class 5. Since admininstrative expense claims already include QF claims, no adjustment to administrative expense claims is required.

(2) Pursuant to the PG&E plan, $5.2 billion of the cash used to settle claims will come from the issuance of New Money Notes.

Exhibit C

Proposed Timeline for
Commission's Alternate Plan

The following is a proposed timeline for the Commission's Alternate Plan:[1]

- **on or before April 15, 2002** – Commission would serve and file with the Bankruptcy Court its Alternate Plan and proposed disclosure statement;[2]
- **on or before May 15, 2002** – Bankruptcy Court would conduct a hearing to consider the adequacy of the Commission's proposed disclosure statement;
- **on or before June 17, 2002** – Commission would begin soliciting votes for its Alternate Plan;
- **on or before September 16, 2002** – Bankruptcy Court would conduct a hearing to consider confirmation of the Commission's Alternate Plan (allows for 60-day solicitation period, if necessary);
- **on or before January 31, 2003** – effective date of Alternate Plan.

---

[1] These dates are good faith estimates only. They are subject to change based upon a number of factors, including, without limitation, the Court's calendar and intervening events in this chapter 11 case.

[2] Assumes full cooperation by, and access to information of, PG&E.

EXHIBIT B

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Attorneys for the California Public Utilities Commission

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, Debtor. Federal I.D. No. 94-0742640	Case No. 01-30923 DM Chapter 11 Case **NOTICE OF FILING OF CALIFORNIA PUBLIC UTILITIES COMMISSION'S PROPOSED PLAN TERM SHEET (WITHOUT EXHIBITS), AS CORRECTED**

PLEASE TAKE NOTICE that the California Public Utilities Commission (the "Commission") hereby files the Commission's Proposed Plan Term Sheet (without exhibits), as corrected. Also included is a "blacklined" version of the corrected Proposed Plan Term Sheet marked to show changes from the brief as filed.

The corrected Proposed Plan Term Sheet corrects one error concerning the amount of the Rate Recovery Litigation proceeds to be paid to PG&E's ratepayers from the Litigation Trust,

which the Commission noticed after the Proposed Plan Term Sheet was filed. We regret this error.

DATED: February 14, 2002

Respectfully,

GARY M. COHEN
AROCLES AGUILAR
MICHAEL M. EDSON
OFFICE OF THE GENERAL COUNSEL
CALIFORNIA PUBLIC UTILITIES COMMISSION

MICHAEL M. EDSON

-AND-

ALAN W. KORNBERG
BRIAN S. HERMANN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

Attorneys for the California Public Utilities Commission

In re PACIFIC GAS AND ELECTRIC COMPANY, Debtor
Commission's Proposed Term Sheet for Alternate Plan of Reorganization

The following describes the principal terms of a proposed alternate plan of reorganization (the "Alternate Plan") to be filed by the California Public Utilities Commission (the "Commission") in the chapter 11 case of Pacific Gas and Electric Company ("PG&E").[1]

This Proposed Term Sheet is based solely upon publicly available and other information available to the Commission and is subject to modification upon receipt by the Commission of additional information.

The Alternate Plan is based upon, among other things, various assumptions and projections, including, but not limited to, those relating to future actions to be taken by the Commission. Such assumptions and projections are made solely for purposes of describing the Alternate Plan and for no other purpose and are not binding upon the Commission.

Plan Proponent:	The Commission.
Classification and Treatment of Allowed Claims:	*See* Exhibit A.
Plan Funding:	Allowed Claims[2] (together with postpetition interest at the lowest non-default contract rate or, if no contract or non-default rate exists, then at the federal judgment rate)[3] will be satisfied in full through a combination of cash and the reinstatement or refinancing of certain of PG&E's long-term indebtedness.

---

1 The terms hereof have yet to be negotiated with PG&E, the Official Committee of Unsecured Creditors appointed in this chapter 11 case, or other key constituencies. The Commission reserves the right to alter the terms hereof based upon the outcome of such negotiations.

2 Capitalized terms used and not defined herein shall have the meanings ascribed to such terms in PG&E's First Amended Plan of Reorganization, dated December 19, 2001 (as subsequently amended or modified, the "First Amended Plan").

3 Consistent with PG&E's First Amended Plan, except as provided by otherwise applicable non-bankruptcy law, postpetition interest will not be paid on the following Allowed Claims: Administrative Expense Claims, Environmental, Fire Suppression and Tort Claims and Chromium Litigation Claims.

Specifically, PG&E's short-term indebtedness incurred during the energy crisis and matured obligations (*i.e.* Allowed Claims in Classes 1, 4f, 5, 6 and 7) together with all Allowed Administrative Claims, Professional Compensation and Reimbursement Claims, Priority Tax Claims, Other Secured Claims (Class 2) and Convenience Claims (Class 10) will be paid in full in cash.[4] PG&E's long-term debt (Classes 3, 4a-e, 4g and 11) will be reinstated pursuant to section 1124(2) of the Bankruptcy Code[5] and shall remain outstanding. All other Allowed Claims (Classes 8, 9 and 12) will be paid in the ordinary course of PG&E's business when and if the same become due and payable.

The holders of PG&E's Preferred and Common Stock Equity Interests (Classes 13 and 14) will retain their respective interests. Accrued and unpaid dividends and sinking fund payments in respect of PG&E's Preferred Stock Equity Interests (approximately $56 million according to PG&E's estimates) will be paid from PG&E's cash on hand and residual revenues.

See Exhibit B for more detail regarding the funding sources and uses under the Commission's Alternate Plan.

Projected Effective Date: No later than January 31, 2003 (the "Effective Date").

---

[4] According to PG&E's 8-K filing with the Securities and Exchange Commission on November 30, 2001 (the most recent publicly available information as of the date of this Term Sheet), PG&E has approximately $4.875 billion of cash on hand (including short-term investments). The Commission projects that PG&E's cash balance will increase by approximately $2.98 billion through January 31, 2003 through a combination of (i) PG&E's residual revenues (*i.e.* the excess of retail electric rates over wholesale power, transmission, distribution and other related costs), estimated to equal $1.75 billion for the period December 1, 2001 through January 31, 2003 (note, PG&E has been earning excess revenues over costs since June 2001), and (ii) PG&E's projected retained return on rate base of approximately $1.23 billion. *See* Schedule 3 to Exhibit B for more detail.

[5] All references to the Bankruptcy Code are to title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*

Regulation:	All of PG&E's operations would continue to be regulated by the Commission and the various other federal, State and local agencies currently charged with that responsibility.
Dividend and Other Restrictions:	PG&E would be prohibited from declaring or making cash distributions to PG&E Corporation (including by way of dividends and stock repurchases) for 2001, 2002 and 2003.
Net Open Position:	To be resumed by PG&E upon its satisfaction of FERC's creditworthiness requirements, which is assumed to occur no later than January 2003.
Post-Bankruptcy Rate Structure:	The Commission would establish a cost-of-service rate structure that would provide PG&E with an opportunity to recoup its costs and earn a reasonable return on its assets consistent with State law. This cost-of-service rate structure would become effective after all Allowed Claims and dividend and sinking fund payments in respect of PG&E's Preferred Stock Equity Interests have been satisfied in full (together with postpetition interest, where applicable).
Litigation Trust:	On the Effective Date a litigation trust would be established. PG&E would initially fund the trust with (i) cash in an amount to be determined and (ii) various estate claims and causes of action, including but not limited to (a) claims against PG&E Corporation, (b) affirmative recoveries related to refund claims pending before the FERC, (c) other claims against sellers of electricity in the wholesale market, and (d) the first proceeds of recoveries, if any, in the Rate Recovery Litigation in an amount equal to the residual revenues collected from PG&E's ratepayers since at least June 2001. The proceeds of the litigation trust would be distributed solely to or for the benefit of PG&E's ratepayers; the proceeds would *not* be used to fund distributions to holders of Allowed Claims and Interests.
Executory Contracts/Unexpired Leases:	PG&E shall assume all of the executory contracts and unexpired leases to be assumed, or assumed and assigned to Etrans, Gtrans, Gen and other entities under PG&E's First Amended Plan.
Claims Resolution:	PG&E or reorganized PG&E (as the case may be) shall administer the claims resolution process under

	the supervision of a plan administrator to be approved by the Commission. The reasonable fees and expenses incurred by PG&E or reorganized PG&E (as the case may be) and the plan administrator incurred in the conduct of the claims resolution process shall be paid from the operations of PG&E or reorganized PG&E, respectively.
Additional Sources of Liquidity upon Emergence from Chapter 11:	The Alternate Plan assumes that reorganized PG&E will obtain a credit facility sufficient to meet any short-term working capital needs. In addition, the Alternate Plan assumes that PG&E will retain approximately $423 million in cash after making all plan-related distributions required on or before the Effective Date.
Miscellaneous:	Each of the terms described herein is an integral aspect of the Commission's Alternate Plan and, as such, is non-severable from the others. The Commission's Alternate Plan remains subject in all respects, among other things, to the Court's termination of PG&E's plan exclusivity to allow the Commission to file and solicit acceptances to its Alternate Plan and to the preparation, execution and delivery of definitive documentation in form and substance satisfactory to the Commission.

In re PACIFIC GAS AND ELECTRIC COMPANY, Debtor
Commission's Proposed Term Sheet for Alternate Plan of Reorganization

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This Proposed Term Sheet is based solely upon publicly available and other information available to the Commission and is subject to modification upon receipt by the Commission of additional information.

The Alternate Plan is based upon, among other things, various assumptions and projections, including, but not limited to, those relating to future actions to be taken by the Commission. Such assumptions and projections are made solely for purposes of describing the Alternate Plan and for no other purpose and are not binding upon the Commission.

Plan Proponent:	The Commission.
Classification and Treatment of Allowed Claims:	*See* Exhibit A.
Plan Funding:	Allowed Claims[2] (together with postpetition interest at the lowest non-default contract rate or, if no contract or non-default rate exists, then at the federal judgment rate)[3] will be satisfied in full through a combination of cash and the reinstatement or refinancing of certain of PG&E's long-term indebtedness.

---

[1] The terms hereof have yet to be negotiated with PG&E, the Official Committee of Unsecured Creditors appointed in this chapter 11 case, or other key constituencies. The Commission reserves the right to alter the terms hereof based upon the outcome of such negotiations.

[2] Capitalized terms used and not defined herein shall have the meanings ascribed to such terms in PG&E's First Amended Plan of Reorganization, dated December 19, 2001 (as subsequently amended or modified, the "First Amended Plan").

[3] Consistent with PG&E's First Amended Plan, except as provided by otherwise applicable non-bankruptcy law, postpetition interest will not be paid on the following Allowed Claims: Administrative Expense Claims, Environmental, Fire Suppression and Tort Claims and Chromium Litigation Claims.

Specifically, PG&E's short-term indebtedness incurred during the energy crisis and matured obligations (*i.e.* Allowed Claims in Classes 1, 4f, 5, 6 and 7) together with all Allowed Administrative Claims, Professional Compensation and Reimbursement Claims, Priority Tax Claims, Other Secured Claims (Class 2) and Convenience Claims (Class 10) will be paid in full in cash.[4] PG&E's long-term debt (Classes 3, 4a-e, 4g and 11) will be reinstated pursuant to section 1124(2) of the Bankruptcy Code[5] and shall remain outstanding. All other Allowed Claims (Classes 8, 9 and 12) will be paid in the ordinary course of PG&E's business when and if the same become due and payable.

The holders of PG&E's Preferred and Common Stock Equity Interests (Classes 13 and 14) will retain their respective interests. Accrued and unpaid dividends and sinking fund payments in respect of PG&E's Preferred Stock Equity Interests (approximately $56 million according to PG&E's estimates) will be paid from PG&E's cash on hand and residual revenues.

See Exhibit B for more detail regarding the fu ıding sources and uses under the Commission's Alternate Plan.

Projected Effective Date: No later than January 31, 2003 (the "Effective Date").

---

[4] According to PG&E's 8-K filing with the Securities and Exchange Commission on November 30, 2001 (the most recent publicly available information as of the date of this Term Sheet), PG&E has approximately $4.875 billion of cash on hand (including short-term investments). The Commission projects that PG&E's cash balance will increase by approximately $2.98 billion through January 31, 2003 through a combination of (i) PG&E's residual revenues (*i.e.* the excess of retail electric rates over wholesale power, transmission, distribution and other related costs), estimated to equal $1.75 billion for the period December 1, 2001 through January 31, 2003 (note, PG&E has been earning excess revenues over costs since June 2001), and (ii) PG&E's projected retained return on rate base of approximately $1.23 billion. *See* Schedule 3 to Exhibit B for more detail.

[5] All references to the Bankruptcy Code are to title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*

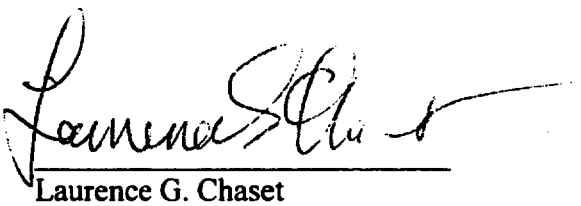
Regulation:	All of PG&E's operations would continue to be regulated by the Commission and the various other federal, State and local agencies currently charged with that responsibility.
Dividend and Other Restrictions:	PG&E would be prohibited from declaring or making cash distributions to PG&E Corporation (including by way of dividends and stock repurchases) for 2001, 2002 and 2003.
Net Open Position:	To be resumed by PG&E upon its satisfaction of FERC's creditworthiness requirements, which is assumed to occur no later than January 2003.
Post-Bankruptcy Rate Structure:	The Commission would establish a cost-of-service rate structure that would provide PG&E with an opportunity to recoup its costs and earn a reasonable return on its assets consistent with State law. This cost-of-service rate structure would become effective after all Allowed Claims and dividend and sinking fund payments in respect of PG&E's Preferred Stock Equity Interests have been satisfied in full (together with postpetition interest, where applicable).
Litigation Trust:	On the Effective Date a litigation trust would be established. PG&E would initially fund the trust with (i) cash in an amount to be determined and (ii) various estate claims and causes of action, including but not limited to (a) claims against PG&E Corporation, (b) affirmative recoveries related to refund claims pending before the FERC, (c) other claims against sellers of electricity in the wholesale market, and (d) the first proceeds of recoveries, if any, in the Rate Recovery Litigation in an amount equal to the residual revenues collected from PG&E's ratepayers since ~~June 2001, which amount is estimated not to exceed $1.75 billion.~~ at least June 2001. The proceeds of the litigation trust would be distributed solely to or for the benefit of PG&E's ratepayers; the proceeds would *not* be used to fund distributions to holders of Allowed Claims and Interests.
Executory Contracts/Unexpired Leases:	PG&E shall assume all of the executory contracts and unexpired leases to be assumed, or assumed and assigned to Etrans, Gtrans, Gen and other entities under PG&E's First Amended Plan.

Claims Resolution:	PG&E or reorganized PG&E (as the case may be) shall administer the claims resolution process under the supervision of a plan administrator to be approved by the Commission. The reasonable fees and expenses incurred by PG&E or reorganized PG&E (as the case may be) and the plan administrator incurred in the conduct of the claims resolution process shall be paid from the operations of PG&E or reorganized PG&E, respectively.
Additional Sources of Liquidity upon Emergence from Chapter 11:	The Alternate Plan assumes that reorganized PG&E will obtain a credit facility sufficient to meet any short-term working capital needs. In addition, the Alternate Plan assumes that PG&E will retain approximately $423 million in cash after making all plan-related distributions required on or before the Effective Date.
Miscellaneous:	Each of the terms described herein is an integral aspect of the Commission's Alternate Plan and, as such, is non-severable from the others. The Commission's Alternate Plan remains subject in all respects, among other things, to the Court's termination of PG&E's plan exclusivity to allow the Commission to file and solicit acceptances to its Alternate Plan and to the preparation, execution and delivery of definitive documentation in form and substance satisfactory to the Commission.

CERTIFICATE OF SERVICE

I hereby certify that in accordance with the Commission's regulation at 10 CFR 2.1313, I have this day caused the foregoing document be served upon the parties by mailing by first-class mail a copy thereof properly addressed to each such party:

Dated at San Francisco, California, this 20th day of February, 2002.



Laurence G. Chaset

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO CA 94102-3298

March 1, 2002

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudication Staff

Re: **In the Matter of Pacific Gas and Electric Company Application for License Transfers and Conforming Administrative License Amendments for Diablo Canyon Power Plant, Units 1 and 2.** Docket Nos. 50-275, 50-323

To Whom It May Concern:

Enclosed for filing in the above-docketed case, please find an electronic version of a document entitled **"REPLY OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION ("CPUC") TO THE ANSWER OF PACIFIC GAS & ELECTRIC COMPANY TO THE CPUC'S RENEWED MOTION TO DISMISS APPLICATION."**

The original, signed version of this filing, plus an additional hard copy is being sent to you via Federal Express this afternoon. Thank you for your cooperation in this matter.

Sincerely,

/s/ Laurence G. Chaset

Laurence G. Chaset
Staff Counsel

Enclosure

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of Pacific Gas and Electric Company Application for License Transfers and Conforming Administrative License Amendments for Diablo Canyon Power Plant, Units 1 and 2	Docket Nos. 50-275, 50-323

REPLY OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION ("CPUC") TO THE ANSWER OF PACIFIC GAS & ELECTRIC COMPANY TO THE CPUC'S RENEWED MOTION TO DISMISS APPLICATION

Pursuant to 10 CFR §§2.1307(b), the Public Utilities Commission of the State of California ("CPUC"), hereby replies to the Answer of Pacific Gas and Electric Company to California Public Utilities Commission Renewed Motion to Dismiss Application, or in the Alternative, to Hold Applications in Abeyance ("Answer to Renewed Motion to Dismiss"), that was filed in this matter on February 25, 2002. In this filing, PG&E erroneously asserts that the CPUC's Renewed Motion to Dismiss, filed in this matter on February 11, 2002, fails to "provide a basis in law or fact for the requested relief." However, as did its previous Answer that was filed in this matter on February 15, 2002, PG&E's Answer to Renewed Motion to Dismiss continues to grossly mischaracterize the circumstances that PG&E faces in its Bankruptcy Court proceeding. Indeed, PG&E is

playing a misguided and deceptive game in its continued urging that the Nuclear Regulatory Commission ("Commission") act precipitously on an Application that the Commission should by all rights dismiss, or, at the very least, set aside until the crucial legal and public policy issues that are currently being addressed in the PG&E Bankruptcy proceeding have been resolved.

As the CPUC pointed out in its Renewed Motion to Dismiss Application that was filed in this matter on February 11, 2002, the Bankruptcy Court, in its Preemption Decision of February 7, 2002, has determined that PG&E's Plan is not lawful and may not move forward as it is currently designed. Although Judge Montali did provide PG&E with an opportunity to amend its plan, which PG&E apparently intends to do on or before March 6, 2002, the fact is that on February 7, the Bankruptcy Court rejected PG&E's plan, which, in order to be confirmed, would require a wholesale preemption of state authority, and sent PG&E back to come up with better solutions.

However, an additional, materially significant event in PG&E's bankruptcy case has occurred since February 7, 2002. Specifically, on February 27, 2002, after a hearing in his court regarding the Term Sheet[1] setting forth the principal terms of CPUC's alternate plan of reorganization ("Alternate Plan"), a copy of which was attached to the

[1] In its Answer to Renewed Motion to Dismiss, PG&E purports to make light of the fact that the CPUC is now very much a key player in the ultimate determination of how PG&E will move out of bankruptcy by relegating its comments on the CPUC's rights to propose an alternative plan of reorganization to a footnote, in which PG&E asserts, without support, that the CPUC's Term Sheets do "not set forth the parameters of a feasible plan." (See, PG&E's Answer to Renewed Motion to Dismiss, at 3, fn 3). Of course, whether or not the CPUC's Alternate Plan is or is not feasible will ultimately be up to Judge Montali, not PG&E. More to the point, however, the fact that on February 27, Judge Montali affirmatively authorized the CPUC to move forward to present a full fledged, competing Alternate Plan by April 15, 2002 highlights the very real possibility that PG&E's own plan of reorganization may not be approved.

CPUC's February 20 Reply filing in this matter, Judge Montali terminated PG&E's exclusive right to present a plan of reorganization, and gave the CPUC the green light to file its Alternate Plan by April 15, 2002. A further status conference in the PG&E Bankruptcy case is scheduled for March 26, 2002.

Moreover, at the hearing on February 27, 2002, the Bankruptcy Court emphasized the fatal effect of its February 7 ruling on PG&E's plan of reorganization, noting that unless and until PG&E files another amended plan, there is no plan for the court to consider. Judge Montali's actual words in this regard were reported in a newspaper article the next day:

> "...Montali this month raised serious doubts about the constitutionality of a key aspect of the PG&E plan -- pre-emption of 37 state laws on utility regulation and environmental protection."
>
> " 'At the moment,' Montali said Wednesday in refusing to foreclose the PUC plan, 'there is no plan.'"

Claire Cooper, "PG&E Talks Set for March," *The Sacramento Bee*, February 28, 2002.

Given that the current version of PG&E's bankruptcy reorganization plan is effectively dead, it would be extremely bad public policy, and it would be counterproductive, for this Commission to unfairly and unreasonably throw its weight behind that plan by granting PG&E's request to transfer ownership of the Diablo Canyon Power Plant ("DCPP"), even on a conditional basis. PG&E's insistence that this Commission act now on its license transfer application is nothing more than a ploy in its larger strategy to unfairly have its way in the Bankruptcy Court. However, there is

simply no need for this Commission to act now, because the core question raised in this proceeding may soon be moot.

Under the CPUC's Alternate Plan, PG&E would retain ownership of DCPP. No license transfer would be required. No Commission approvals would be required. This Commission's jurisdiction would not be invoked. It makes no practical or common sense for the Commission to move forward on PG&E's Application in this matter until the fundamental threshold issue of whether DCPP even requires a license transfer at all is conclusively resolved.

In a footnote, PG&E cites Commission precedent to the effect that "the pendency of parallel proceedings before other forums is not adequate grounds to stay an NRC license transfer adjudication." (See, PG&E's Answer to Renewed Motion to Dismiss, at 4, fn 4). However, none of those decisions are apposite here. None of the cited cases dealt with proposed license transfer involving a bankruptcy, much less a contested bankruptcy; none of the cases involved "parallel proceedings before other forums" in which fundamental constitutional questions dealing with the wholesale preemption of state law were at issue; none of the cases cited involved such major and overwhelming legal obstacles to the effectuation of the proposed transfer as are at issue in the proposed transfer of the DCPP license.

Thus, contrary to PG&E's assertions, the CPUC has demonstrated a basis for the denial of PG&E's Application in this matter. The Bankruptcy Court has rejected outright the preemption strategy upon which PG&E's Plan and its associated Application herein depends, and has expressly authorized the CPUC to file its own Alternate Plan under

which no transfer of DCPP's license would be required. These facts, by themselves, give the lie to PG&E's assertion that "nothing in the ongoing Bankruptcy Court proceedings warrants delay in the NRC's consideration of the DCPP license transfer application." (See, PG&E's Answer to Renewed Motion to Dismiss, at 2.)

The Commission should accordingly dismiss forthwith PG&E's Application on file in this matter. At a minimum, the Commission should hold any proceedings in this matter in abeyance until there is a viable Plan pending before the Bankruptcy Court.

March 1, 2002

Respectfully submitted,

/s/ Laurence G. Chaset

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Aroeles Aguilar, Assistant General Counsel
Laurence G. Chaset, Staff Counsel
Gregory Heiden, Legal Counsel
Public Utilities Commission of the State of California
505 Van Ness Avenue
San Francisco, California 94102

Attorneys for the Public Utilities Commission of the State of California

CERTIFICATE OF SERVICE

I hereby certify that in accordance with the Commission's regulation at 10 CFR 2.1313, I have this day caused the foregoing document be served upon the parties by mailing by first-class mail a copy thereof properly addressed to each such party:

Dated at San Francisco, California, this 1st day of March, 2002.

/s/ Laurence G. Chaset

Laurence G. Chaset

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Attorneys for the California Public Utilities Commission

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re	Case No. 01-30923 DM
PACIFIC GAS AND ELECTRIC COMPANY, a California corporation,	Chapter 11 Case
Debtor,	Date: February 27, 2002 Time: 1:30 p.m. Place: 235 Pine Street, 22nd Floor San Francisco, California
Federal I.D. No. 94-0742640	

ORDER TERMINATING EXCLUSIVITY WITH RESPECT TO THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND AUTHORIZING THE CALIFORNIA PUBLIC UTILITIES COMMISSION TO FILE AN ALTERNATE PLAN OF REORGANIZATION

At the date and time set forth above, the Court held a second hearing on the Motion for Order Further Extending Exclusivity Period for Plan of Reorganization (the "Motion") submitted by Pacific Gas and Electric Company, the debtor and debtor in possession in the above-captioned chapter 11 case ("PG&E"). Appearances were as noted in the record.

The Court, having considered the Motion, the opposition submitted to the Motion, the Proposed Term Sheet for Alternate Plan of Reorganization (the "Term Sheet") submitted by the California Public Utilities Commission (the "CPUC"), and the responses thereto, the record in this case, and any admissible evidence and argument presented to the Court, hereby finds as follows:

A. Adequate notice of this proceeding was given to the parties in interest as appropriate under the circumstances.

B. The CPUC has complied with paragraph 3 of the Order Further Extending Exclusivity Period for Plan of Reorganization entered February 2, 2002.

C. PG&E has failed to demonstrate "cause," as it is required to under section 1121(d) of the Bankruptcy Code for an extension of exclusivity with respect to the CPUC.

Based on the foregoing, **IT IS HEREBY ORDERED**, that:

1. The Motion is DENIED as provided herein.

2. With respect to the CPUC, PG&E's exclusivity pursuant to Bankruptcy Code section 1121(c)(3) is hereby terminated, effective as of February 27, 2002.

3. The CPUC is directed to file its alternate plan of reorganization and accompanying disclosure statement as contemplated by the Term Sheet by April 15, 2002.

DATED: MAR 11 2002

DENNIS MONTALI

HONORABLE DENNIS MONTALI
UNITED STATES BANKRUPTCY JUDGE

APPROVED AS TO FORM:

HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN, counsel to Pacific Gas & Electric Company

By: JAMES L. LOPES

1079

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

DOCKETED 4/12/02

SERVED 4/12/02

In the Matter of	)	
PACIFIC GAS AND ELECTRIC CO.	)	Docket Nos. 50-275-LT, 50-323-LT
(Diablo Canyon Power Plant, Units 1 and 2)	)	

CLI-02-12

MEMORANDUM AND ORDER

This is an unusual license transfer proceeding in that two of the four petitioners raise numerous arguments that do not challenge Pacific Gas & Electric Company's (PG&E) instant license transfer application, but rather call into question certain antitrust-related language in the NRC staff's notice of opportunity for hearing (67 Fed. Reg. 2455 (Jan. 17, 2002)). In that notice, the staff indicated that it may reject some of PG&E's requested changes to the antitrust conditions in its current licenses. More specifically, the staff suggested that it might approve changes to the antitrust conditions such that the conditions would apply solely to those entities that would own and operate the Diablo Canyon plant following the transfer, but *not* to any of the other entities that PG&E has proposed retaining or including on the licenses for antitrust purposes. Under PG&E's pending Bankruptcy Reorganization Plan, those other entities would not, after bankruptcy, be involved in activities requiring an NRC license.

Two of the four petitioners to intervene have endorsed the licensee's proposal and object to the staff's contemplated approach. A third petitioner has broadly supported PG&E's

transfer proposal, including, presumably, the proposed amendments to the antitrust conditions. Therefore, the legal underpinning for PG&E's proposal to amend the antitrust license conditions to include entities who would not be engaged in activities requiring an NRC license is central to deciding whether to grant intervention or admit issues for adjudication. *See* 10 C.F.R. §§ 2.1306, 2.1308.

Before proceeding further, we seek briefs from the petitioners and the applicant on the following questions:

1. What is the Commission's authority under the Atomic Energy Act to approve the proposed license transfers and related license amendments where the current licensee (PG&E) as well as a company engaged solely in transmission activities would not, after the transfer, be engaged in activities at Diablo Canyon requiring a license, yet would remain or become named licensees on the Diablo Canyon licenses?

2. Have recent filings and developments in PG&E's bankruptcy proceeding had any effect on the pending motions to hold this license transfer proceeding in abeyance?

The briefs should not exceed 25 pages and should be filed by May 10, 2002.

IT IS SO ORDERED.

For the Commission[1]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of April, 2002

[1] Commissioners Dicus and Merrifield were not present for the affirmation of this Order. If they had been present, they would have approved it.

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

May 10, 2002

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudication Staff

Re: **In the Matter of Pacific Gas and Electric Company Application for License Transfers and Conforming Administrative License Amendments for Diablo Canyon Power Plant, Units 1 and 2**, Docket Nos. 50-275, 50-323

To Whom It May Concern:

Enclosed for filing in the above-docketed case, please find an electronic version of a document entitled "**FURTHER BRIEFING OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION ON THE QUESTIONS POSED BY THE NUCLEAR REGULATORY COMMISSION ON APRIL 12, 2002.**"

The original, signed version of this filing, plus an additional hard copy is being sent to you via Federal Express this afternoon. Thank you for your cooperation in this matter.

Sincerely,

/s/ Laurence G. Chaset

Laurence G. Chaset
Staff Counsel

Enclosure

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of Pacific Gas and Electric Company Application for License Transfers and Conforming Administrative License Amendments for Diablo Canyon Power Plant, Units 1 and 2	Docket Nos. 50-275, 50-323

FURTHER BRIEFING OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION ON THE QUESTIONS POSED BY THE NUCLEAR REGULATORY COMMISSION ON APRIL 12, 2002

Pursuant to Memorandum and Order CLI-02-12, issued by the Nuclear Regulatory Commission ("Commission") in this matter on April 12, 2002, the Public Utilities Commission of the State of California ("CPUC") hereby provides the Commission with the further briefing it requested on the following question:

> "Have recent filings in PG&E's bankruptcy proceeding had any effect on the pending motions to hold this license transfer in abeyance?"

As the Commission is already aware, on April 6, 2001, Pacific Gas and Electric Company ("PG&E") filed a petition for relief under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Northern District of California ("Bankruptcy Court").

In previous filings with the Commission in this matter,[1] the CPUC has explained why the Commission should dismiss the Application submitted in the above-captioned dockets, or, at the very least, to hold the Application in abeyance pending final action by the Bankruptcy Court. Of particular importance in this regard (as was noted in the CPUC's March 1, 2002 filing herein) is the fact that on February 27, 2002, the Court terminated PG&E's exclusive right to file a plan under section 1121 of the Bankruptcy Code, and permitted the CPUC to file an alternate plan of reorganization for PG&E by April 15, 2002.

Recent Developments and Schedule

On April 15, 2002, the CPUC did file with the Bankruptcy Court a Disclosure Statement for its Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for PG&E ("CPUC Plan"), which sets forth the manner in which claims against and equity interests in PG&E would be treated under the CPUC Plan. A copy of the CPUC Plan and Disclosure Statement and any revisions and updates[2] are available at the CPUC's website

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[1] See, Petition of the California Public Utilities Commission for Leave to Intervene, and Motion to Dismiss Application, or, in the Alternative, Request for Stay of Proceedings, and request for Subpart G Hearing Due to Special Circumstances, filed in this matter on February 5, 2002; the Renewed Motion to Dismiss Applications, or in the Alternative, to Hold Applications in Abeyance, and Notice of Bankruptcy Court Ruling, that was filed on February 11, 2002; and Reply of the Reply of the California Public Utilities Commission ("CPUC") to the Answer of Pacific Gas & Electric Company to the CPUC's Petition to Intervene, Motion to Dismiss Application, Etc., that was filed in this matter on February 20, 2002.

2. In order to address objections from other parties, the April 15, 2002 CPUC Plan and Disclosure Statement was amended in a number of relatively minor respects, and on May 8, 2002, the CPUC lodged an amended Disclosure Statement with the Court. The CPUC may further amend, modify or supplement its Plan and Disclosure Statement in a continuing effort to address the objections of other parties. It is not atypical for parties to file amended disclosure statements and plans in complex bankruptcy matters such as PG&E's. We accordingly note that PG&E filed its first Disclosure Statement and Plan in September 2001, its first Amended Disclosure Statement in December 2001, and its second amended Disclosure Statement in March 2002. Between the date of those filings, and also between March 7 and April 8, 2002, when the Court approved PG&E's Disclosure Statement for dissemination, PG&E lodged several revisions to its Disclosure Statement with the Court. In this regard, it is important to recall that PG&E's March 7,2002 filing was necessitated by the Court's ruling on February 7,2002 that

at: www.cpuc.ca.gov. A brief summary of the CPUC Plan, as filed with the Bankruptcy Court, is attached hereto as Exhibit A.[3]

Other important milestones in the PG&E bankruptcy proceeding since the CPUC last briefed the Commission on this issue on March 1, 2002, are the following:

- After several hearings on objections to its disclosure statement, the Court approved PG&E's Disclosure Statement for its Plan of Reorganization on April 24, 2002.

- On May 9, 2002, the Court held a hearing on objections to the CPUC Plan and Disclosure Statement. This hearing was continued to May 15, 2002, in order to resolve the remaining objections.

The expected next steps in the proceeding are the following:

- The Court has set an expedited schedule for the processing of the two competing Plans, with June 17, 2002 being the target date for sending out a joint ballot to creditors and solicitation of votes for the competing plans. Under the Court's procedures, creditors may vote for both plans, but may express a preference for one plan.

- After a 45-60 day vote solicitation period, we expect that votes will be counted at the end of August. After votes are counted and certified, then we will proceed to confirmation hearings, probably in September.

The CPUC is optimistic that the Bankruptcy Court will approve the Disclosure Statement for the CPUC Plan soon after the May 15, 2002 hearing on its Disclosure Statement, and that the schedule set forth above will proceed accordingly.

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it would not approve PG&E's Disclosure Statement in its then-current form. The CPUC brought the Court's February 7 ruling to the Commission's attention in the Renewed Motion to Dismiss Applications, or in the Alternative, to Hold Applications in Abeyance, and Notice of Bankruptcy Court Ruling that was filed in this matter on February 11, 2002.

[3] Exhibit A sets forth the text of the Summary of the CPUC's Plan, as set forth at pages 5-7 of the Disclosure Statement that the CPUC lodged with the Bankruptcy Court on May 8, 2002.

The PG&E Plan Is Not Confirmable; the CPUC Plan Is

The CPUC will be vigorously objecting to PG&E's plan during the confirmation hearings that are expected to start this coming September. Specifically, the CPUC will object to PG&E's plan on grounds that it is unlawful, that it is incapable of being confirmed, and that there is a hidden rate increase contained in PG&E's plan. PG&E's plan is not confirmable, because, among other reasons, it unjustifiably and illegally preempts state law. The detailed explanation of why this is so was presented in Exhibit C to the CPUC's initial February 5, 2002 filing in this matter and will not be repeated here.

By contrast, the CPUC Plan pays creditors in full and returns PG&E to investment grade no later than January 31, 2003. The CPUC firmly believes that its Plan is better for ratepayers, for California's economy and environment, as well as for PG&E's creditors.

The CPUC Plan has the following advantages to ratepayers:

- It restores PG&E's financial viability and allows PG&E to resume purchasing power for its customers by January 2003.
- There is no rate increase.
- Rates can decrease after PG&E's emergence from bankruptcy.
- It protects ratepayers from $8.6 billion in higher generation rates under PG&E's plan.
- It avoids taking nearly $5 billion from ratepayers due to the transfer of valuable assets from PG&E to its shareholders under PG&E's plan.
- It avoids harmful environmental consequences.
- The utility remains integrated and subject to State and Federal laws.
- It ensures safety and reliability of service from an integrated utility.

- PG&E shareholders contribute a total of $3.35 billion:
  - $1.6 billion in foregone profits during 2001, 2002, and January 2003;
  - $1.75 billion from the sale of PG&E common stock.

- It provides for return to cost-of-service ratemaking after allowed claims are paid in full, reinstated and/or refinanced provides security for consumers and investors.

The CPUC Plan has the following advantages for Creditors:

- It provides full payment of debts in cash to creditors sooner than under PG&E's plan and no one is paid with notes.

- It avoids lengthy state jurisdiction battle and related litigation that would result from PG&E's illegal plan.

For the foregoing reasons, the CPUC Plan is in all respects superior to the PG&E plan, and the CPUC is hopeful that the Bankruptcy Court will ultimately confirm its Plan rather than the defective PG&E plan.

The Commission Should Continue to Hold This Matter in Abeyance

As the foregoing discussion of the developments in the PG&E bankruptcy case that have transpired since the CPUC's latest briefing to the Commission on the matter on March 1, 2002, there continues to be no reason for this Commission to act on PG&E's pending Application. There are now two plans of reorganization submitted to the Bankruptcy Court: (1) PG&E's defective plan, which continues to raise serious legal and constitutional problems that cloud its ability to be implemented; and (2) the CPUC Plan, which provides for full payment of all of PG&E's creditors without posing the legal and jurisdictional problems that are an intrinsic element of the PG&E plan.

Most importantly for this Commission's purposes, however, under the CPUC Plan, PG&E would retain ownership of DCPP. No license transfer would be required. No Commission approvals would be required. This Commission's jurisdiction would not be invoked.

It accordingly makes no practical or common sense for the Commission to move forward on PG&E's Application in this matter at this time. Until the Bankruptcy Court approves one or the other of the two completing plans of reorganization that are currently before it, the underlying threshold issue in this case, namely, whether DCPP even requires a license transfer at all, remains unresolved. It would be a waste of administrative resources for the Commission, its staff, as well as for the CPUC and all the other parties who are vitally interested in the outcome of this matter, to participate in any proceedings on PG&E's Application for a license transfer, when there remains substantial and reasonable doubt that any such license transfer will ever be required.

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The Commission should accordingly continue to hold any proceedings in this matter in abeyance, at least until the Bankruptcy Court has made a decision on which of the two competing plans of reorganization it will confirm.

May 10, 2002

Respectfully submitted,

/s/ Laurence G. Chaset

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EXHIBIT A

Summary Of The Plan Of Reorganization

On April 9, 2002, the Commission approved the filing and prosecution of the Plan by a unanimous 5-0 vote. The Commission developed its Plan to restore the Debtor's financial viability and to provide for the payment in full of all Allowed Claims at the earliest possible date. See Section VI.B of this Disclosure Statement for detailed information regarding the payment of Allowed Claims. In short, the Commission's Plan seeks to provide the Debtor with the means to repay in full in Cash (with interest) the short term indebtedness incurred by the Debtor during California's energy crisis. Much of the Debtor's long term indebtedness would remain outstanding and be satisfied through the reinstatement of such indebtedness.

The Commission's Plan provides the Debtor with a purely economic solution to its financial difficulties. Under it, the Debtor's business and operations would remain fully integrated and would continue in all respects to be subject to applicable state and local laws and regulations. In fact, the Plan does not provide for any changes in the Debtor's regulatory environment; none are necessary to the Debtor's reorganization. Upon its emergence from chapter 11, the Debtor will continue to be regulated by the Commission in a manner that will allow it to recover its reasonable, prudently incurred costs of service through rates and will have an opportunity to earn a reasonable rate of return. The statutory rate freeze, which ended on March 31, 2002, no longer stands as an obstacle to the Debtor's cost recovery. Under California regulation, a regulated utility may also propose other regulatory approaches for the Commission's consideration.

The Commission's Plan relies, in large part, upon the "headroom{ XE "headroom" }" in rates enjoyed by PG&E since at least June 2001. This "headroom," which represents the positive difference between the Debtor's retail electric rates and operating costs, including its wholesale power procurement costs, has allowed the Debtor to stockpile massive amounts of Cash which may now be used to repay creditors. In addition, to satisfy the funding gap between the Allowed Claims to be paid on the Effective Date pursuant to the Plan and the Debtor's projected available

Cash, the Commission's Plan provides for the Debtor's issuance and sale, through one or more public or private offerings, of new debt and equity securities, namely, Reorganized Debtor New Money Notes and Common Stock in the Reorganized Debtor. The Commission believes that the sale of these securities, when combined with the Debtor's available Cash upon its emergence from bankruptcy, and the liquidity under its Exit Facility will provide the Debtor with the means to repay its creditors in full and emerge as a viable entity.

The purpose of the Commission's Plan is to enable the Debtor to pay all Allowed Claims in full and emerge from chapter 11 with a strong and sustainable business so that the Debtor's customers can once again be assured of a safe and reliable supply of electricity and gas. It is expected that the Plan will also restore the Debtor to an investment grade credit upon its emergence from chapter 11, thus providing the necessary assurance that the Reorganized Debtor will be able to service the debt issued in connection with or reinstated under the Plan. The Commission is committed to this aspect of the Plan and has included it as a condition precedent to the Plan's Effective Date. The investment grade condition is waivable only after notice and hearing.

The Commission believes that its Plan is workable, fair and in the public interest. The Plan enables the Reorganized Debtor to regain financial viability and to resume full procurement of power for its retail customers. In doing so, the Plan calls for contributions from each of the Reorganized Debtor's significant constituencies: the Reorganized Debtor itself, its ratepayers, and its Parent, which is required under the Plan to contribute to the solution through a dilution in its ownership interest in the Reorganized Debtor. In addition, the Plan requires the Reorganized Debtor to remain subject to Commission and State regulation.

The Commission believes that the Plan will enable the Debtor to reorganize successfully its business consistent with, and in furtherance of, the objectives of chapter 11, and that acceptance of the Plan is in the best interests of the Debtor, its creditors and all parties in interest.

CERTIFICATE OF SERVICE

I hereby certify that in accordance with the Commission's regulation at 10 CFR 2.1313, I have this day caused the foregoing document be served upon the parties by mailing by first-class mail a copy thereof properly addressed to each such party:

Dated at San Francisco, California, this 10th day of May, 2002.

/s/ Laurence G. Chaset

Laurence G. Chaset

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Pacific Gas and Electric Company	)	
Consideration of Approval of Transfer	)	
of Facility Operating Licenses and Conforming	)	Docket Nos. 50-275 & 50-323
Amendments	)	
(Diablo Canyon Nuclear Power Plant, Units 1 & 2)	)	
	)	

PETITION OF THE COUNTY OF SAN LUIS OBISPO
FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING

I. INTRODUCTION

The County of San Luis Obispo and its elected Board of Supervisors ("San Luis Obispo," "County" or "Petitioner") are seeking to intervene in this proceeding and participate in evidentiary hearings to raise and address health and safety issues relevant to this proceeding and the citizens of this County. The County has substantial interests in the outcome of the proceeding that must be recognized and protected. Although the County's request to intervene comes late, the Commission will find that the necessity for intervention has only recently come about due to developments in the PG&E bankruptcy proceeding.

This proceeding involves the request by Pacific Gas and Electric Company ("PG&E") (hereinafter "Application") for U.S. Nuclear Regulatory Commission ("NRC" or the "Commission") authorization to transfer the authority to possess, use and operate Diablo Canyon Nuclear Power Plant Unit 1 ("Unit 1") and Unit 2 ("Unit 2") (collectively, "Diablo Canyon") from PG&E to Electric Generation, LLC ("Gen"), which would operate Diablo Canyon and lease

it from its wholly owned subsidiary, Diablo Canyon, LLC ("Nuclear"), which would own the facility (collectively "Applicants"). These aspects of the proposed license transfer are essential components of the NRC's notice in Pacific Gas and Electric Company, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2; Notice of Consideration of Approval of Transfer of Facility Operating Licenses and Conforming Amendments and Opportunity for a Hearing, 67 Federal Register 2455 (Jan. 17, 2002).

The notice, and PG&E's Application, were based on a new PG&E corporate structure proposed in its bankruptcy proceeding in which two new corporations would be created to own and operate Diablo Canyon. The County's delay in filing this intervention request is supported by good cause because intervention was necessitated by recent actions of the Bankruptcy Court permitting a distinctly different alternate plan for reorganization of PG&E to be submitted by the California Public Utilities Commission ("CPUC").

Intervention is also warranted because San Luis Obispo County's its interests are not represented by any other party and its participation would aid in the development of a complete record. In addition, granting the County leave to intervene would also serve to answer the questions posed by the Commission in Order CLI-02-12. It is the position of the County that the NRC should terminate these proceedings because the recent developments in the Bankruptcy Court have rendered the notice inadequate. In the alternative, these proceedings should be held in abeyance pending the Bankruptcy Court's ruling on the competing reorganization plans.

Should the NRC continue its evaluation of the Application, the NRC should also grant the County's request for a hearing on the important issues of whether the proposed licensees are financially qualified to own and operate Diablo and whether the licensee has adequately demonstrated the availability of off-site power.

Therefore, the County is seeking leave to intervene in this matter and is specifically requesting that the NRC terminate its review of this Application and issue a new notice accurately reflecting the alternative corporate structures that could result from the Bankruptcy Court's ruling. In the alternative, the County requests that this Commission hold this matter in abeyance until the bankruptcy proceeding has been concluded. If the Commission proceeds with its review of this Application, the County requests a hearing on the issues of importance to the County as raised herein.

II. INTERVENTION

A. San Luis Obispo County is a Proper Party to This License Transfer Proceeding

San Luis Obispo County has standing to intervene in this license transfer proceeding pursuant to the Atomic Energy Act and the NRC's implementing decisions and regulations.

> "[W]hen the Commission institutes a proceeding for the granting or amending of a license, 'the Commission shall grant a hearing upon the request of any person whose interest shall be affected by the proceeding, and shall admit any such person as a party to such proceeding.'" *Envirocare, Inc v. NRC*, 194 F.3d 72, 75 (D.C. Cir. 1999), quoting 42 U.S.C. § 2239(a)(1)(A).

The NRC's implementing regulations for license transfers mirror the statutory requirement by providing for intervention, as a matter of right, where the petitioner demonstrates that its "interest may be affected by the proceeding." *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-06, 49 N.R.C. 201, 214 (1999). The criteria for standing, enumerated in 10 C.F.R. § 2.1308(a), have been interpreted by the NRC to require that the petitioner allege a concrete and particularized injury, actual or threatened, which is fairly traceable to and may be affected by the challenged action and is likely to be redressed by a favorable decision such that it can be characterized as being within the "zone of interests" protected by the governing statute. (*North Atlantic*, 49 N.R.C. at 214-225.) In making a standing determination the Presiding Officer must "construe the [intervention] petition in favor of the petitioner." (*Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia) CLI-95-12, 42 NRC 111, 115 (1995).

San Luis Obispo County has numerous interests at stake in this proceeding. Any one of these interests is sufficient to allow standing to intervene. First, because Diablo Canyon is located in the unincorporated part of San Luis Obispo County, the County has a vital public

safety interest in its safe operation and eventual decommissioning. These interests fall squarely within the "zone of interests" protected by the Atomic Energy Act. When considering matters concerning commercial nuclear power plants, the NRC has generally found local government agencies have interests that allow standing. (See *Ohio Edison Co.* (Perry Nuclear Plant, Unit 1), and *Cleveland Electric Illuminating Co.* and *Toledo Edison Co.* (Perry Nuclear Power Plant, Unit 1; Davis Bessie Nuclear Station, Unit 1), LBP-92-19, 36 NRC 98, 103-104 (1992) (granting a local municipal government standing where that government's future reliance on existing antitrust provisions was at stake).

In addition to the County's fundamental interests in the safe operation of Diablo Canyon, the County has a substantial interest in the financial qualifications of the proposed licensees to meet their obligation safely operate the plant and to ensure the adequacy of off-site power to Diablo Canyon should the proposed license transfer be approved. The Application does not evidence the requisite financial qualifications of the proposed licensees to own and operate Diablo Canyon, as required by 10 C.F.R. § 50.33(f). Of principal concern to the County is the potential for these limited liability entities to default on their requirements with respect to operational funding. If, for example, the proposed licensees proved unable to finance an extended outage or safe shutdown at Diablo Canyon, unsafe conditions threatening the health and safety of the citizens of San Luis Obispo County could result.

Under Section 184 of the Atomic Energy Act and 10 C.F.R. § 50.80, the Applicants have the burden of demonstrating that the new proposed licensees, "Gen" and "Nuclear," are financially and technically qualified to be licensed to own and operate the Diablo Canyon

facility. The NRC, in turn, is charged with reviewing the qualifications of the proposed new licensees to ensure that the public health and safety will be adequately protected. The NRC's comprehensive review is particularly important in this case since the proposed new licensees are two newly formed entities organized as limited liability companies.

The transfer of PG&E's transmission facilities is included in PG&E's Reorganization Plan. These transmission facilities are necessary to provide off-site power required for long-term safe shutdown of Diablo Canyon. Under PG&E's proposed corporate restructuring as reflected in its Application, transmission assets would be transferred to a Gen affiliate, yet another limited liability company, E Trans LLC ("E Trans"). The license transfer application does not provide adequate assurance that E Trans will have the resources to maintain its transmission equipment and the financial strength to provide reliable off-site power. The availability of such power under all circumstances is critical to public health and safety because a nuclear plant, unlike other facilities, cannot simply be shut down. The plant must be actively maintained to continue cooling the reactor core even after power operation has ceased. Again, it is the health and safety of the public in the surrounding communities in San Luis Obispo County which are put at risk if the NRC fails to obtain adequate assurance that the E Trans will make paramount its duty to provide emergency power to Diablo Canyon.

Finally, San Luis Obispo County plays an integral role in carrying out Diablo Canyon's emergency plan. The County is legitimately concerned with its ability to fulfill its role in carrying out Diablo Canyon's emergency plan should the NRC authorize a license transfer to limited liability companies which may have inadequate resources. If the NRC were to approve a

license transfer to an undercapitalized limited liability company, the ability of the licensees to safely operate Diablo Canyon could be compromised. Any such compromise would directly affect the safety of the County and its residents.

San Luis Obispo County is subject to suffering a "concrete and particularized injury" which would be directly traceable to the proposed license transfer should the licensees turn out to be under-funded. It is this type of distinct palpable harm which constitutes an injury which can be redressed by the NRC's decision. These adverse impacts could be avoided by the NRC's disapproval of the transfer as proposed, or by its imposition of appropriate license conditions. *See North Atlantic*, CLI-99-06, 49 N.R.C. at 215 ("The threatened injury is fairly traceable to the challenged action [here the grant of the license transfer application] because the alleged increase in risk associated with Little Bay taking over Montaup's interest could not occur without Commission approval of the application; *Quivara Mining Corp.* (Ambrosia Lake Facility Grants, New Mexico), LBP-97-20, 46 NRC 257, 262 (1997), *aff'd* CLI-98-11, 48 NRC 1 (1998), *aff'd sub nom. Envirocare Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

B. <u>This Commission Should Grant San Luis Obispo County's Request to Intervene</u>

The NRC has traditionally relied on several factors to determine whether to accept a late-filed intervention request: (1) whether good cause exists for failure to timely file an intervention request; (2) the availability of other means to protect the petitioner's interests; (3) the extent to which participation by the petitioner will aid in development of a record in the proceeding; (4) the extent to which the petitioner's interests will be represented by the existing parties; and (5) the extent to which petitioner's participation will broaden issues or delay proceedings. *Puget*

Sound Power & Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 & 2), LBP-82-74, 16 NRC 981, 984 (1982). The NRC's rules of practice with respect to late-filed intervention requests in license transfer proceedings suggest that the NRC consider "(1) the availability of other means by which the . . . petitioner's interest will be protected or represented by other participants in a hearing; and (2) the extent to which issues will be broadened or final action on the application delayed [by granting the intervention requested in a late-filed petition]." 10 C.F.R. § 2.1308(b).

Good cause exists for the County's delay in seeking intervention because intervention was necessitated by recent actions of the Bankruptcy Court. These actions occurred subsequent to the deadline for filing intervention requests. The NRC has previously found that new regulatory developments governing a proceeding provide justification for the late filing of an intervention request. *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Station) LBP-80-14, 11 NRC 570, 572-73 (1980).

On April 6, 2001, PG&E filed a petition for relief pursuant to Chapter 11 of the Bankruptcy Code. In Bankruptcy Court, PG&E also filed a Reorganization Plan and Disclosure Statement which describe the proposed restructuring of the corporation. PG&E's reorganization plan includes a proposal to disaggregate PG&E's assets which has the effect of transferring regulation from the California Public Utilities Commission ("CPUC") to the Federal Energy Regulatory Commission ("FERC").

The Bankruptcy Code provides for an exclusivity period during which only the debtor is permitted to submit a reorganization plan for consideration by the court. Accordingly, for a period of time PG&E's plan was the only Plan before the Bankruptcy Court. During that time period, there was substantial public involvement in the process with objections to the original reorganization plan filed by a number of parties, including the California Public Utilities Commission and San Luis Obispo County.

Ultimately, the CPUC requested and was granted leave of the Bankruptcy Court to file an alternate reorganization plan in an Order filed March 3, 2002. (Order Terminating Exclusivity with Respect to the California Public Utilities Commission and Authorizing the California Public Utilities Commission to File an Alternate Plan of Reorganization, Case No. 01-30923DM, dated February 27, 2002, included here as Attachment A. The two Reorganization Plans are quite different in their treatment of Diablo Canyon. PG&E's Plan is dependent upon NRC approval of the license transfer application because it includes the transfer of Diablo Canyon to other corporate utilities. In stark contrast, the CPUC plan does not contemplate any transfer of ownership or operation of Diablo Canyon.

The end result of this process is that instead of having one reorganization plan under consideration, as was the case when PG&E filed its license transfer application, the Bankruptcy Court is now reviewing two distinctly different reorganization plans which could dramatically affect the status, structure, and financial strength of the proposed licensees. Here, as in the *Cincinnati Gas and Electric* case, the Bankruptcy Court's rulings made after the close of the

intervention period governing issues which are critical to this license transfer proceeding provide reasonable justification for San Luis Obispo's late-filed intervention request.

Petitioner's participation in this proceeding will also aid in development of the record. Because PG&E is in bankruptcy, and the Bankruptcy Court is considering competing reorganization plans, the proposed transfer of the Diablo Canyon's operating licenses to Gen and Nuclear presents a number of fundamental policy questions, some of which are matters of first impression for the NRC. These policy questions include NRC consideration of: (1) the impact of designating two limited liability companies as the licensed facility owner and operator where their predecessor in interest is currently the subject of bankruptcy proceedings; (2) the financial and technical wherewithal of the successor licensees and affiliates under two different currently proposed comprehensive Plans of Bankruptcy Reorganization ("reorganization plans"); and (3) public policy and decision-making in those collateral proceedings.

In addition, because the bankruptcy proceeding is pending, this proposed license transfer is significantly different from the transfer of commercial nuclear power plant licenses to other holding companies that have been previously reviewed and approved by the NRC. Unlike other license transfers, the Bankruptcy Court for the Northern District of California (the "Bankruptcy Court") has exclusive jurisdiction over the current licensee's assets. Accordingly, the Bankruptcy Court will ultimately decide what financial resources would be available to the proposed licensees to safely operate and to ultimately decommission Diablo Canyon. (See *In re Pacific Gas and Electric Co.* Case No. 01-30923DM (Bankr.N.D. Cal., filed April 6, 2001.) The County of San Luis Obispo's input on these matters of first impression will help to ensure that a

complete record is made without resulting in significantly broadening the scope of the proceedings because they are directly related to issues currently before the NRC and subject to the NRC's jurisdiction.

Petitioner's interest cannot be adequately represented by the four parties that have already filed for intervention. None of the parties are governmental agencies charged with protecting the health and safety of the public living around Diablo Canyon. The interests of San Luis Obispo County are unique in this regard. As previously discussed, San Luis Obispo's interests include the County's participation in emergency response operations, the fundamental geographic interests in the safe operation of Diablo Canyon, as well as the financial qualifications of Gen and Nuclear to meet their obligation to ensure the adequacy of off-site power to Diablo Canyon.

III. ISSUES RAISED BY CLI-02-12

In CLI-02-12, the NRC asked the Parties to brief the two questions that follow:

> 1. What is the Commission's authority under the Atomic Energy Act to approve the proposed license transfers and related license amendments where the current licensee (PG&E) as well as a company engaged solely in transmission activities would not, after the transfer, be engaged in activities at Diablo Canyon requiring a license, yet would remain or become named licensees on the Diablo Canyon licenses?
> 2. Have recent filings and developments in PG&E's bankruptcy proceeding had any effect on the pending motions to hold this license transfer proceeding in abeyance?

The Petitioner offers its perspective on these issues because of their significant role in the NRC's deliberations and for completeness should the NRC admit the County as a Party to this proceeding.

A. It is the NRC's Obligation to ensure that license conditions are imposed consistent with the NRC's statutory authority

With respect to the first question raised in CLI-02-12, the short answer is that as long as entities are named as licensees they are subject to the NRC's jurisdiction independent of their activities. Therefore, it is the NRC's obligation under the Atomic Energy Act to ensure that license conditions are imposed consistent with the NRC's statutory authority, *i.e.*, to protect the public health and safety, common defense and security, and the environment. The NRC has the authority to issue license provisions to govern non-licensees which have a past relationship with licensees where the non-licensed entity has emerged from a formerly licensed entity and where any continuing liability or obligation is consistent and proportional with the non-licensed entity's liabilities or obligations when it was licensed. Just as current and former co-tenants are

potentially subject to joint and several liability under current NRC policy,[1] the NRC can impose liability on former licensees to ensure that decommissioning funding obligations are met, *North Atlantic*, CLI-99-06, 49 N.R.C. 201 (1999). In the absence of special conditions imposed by the NRC, the corporate structure of Gen and Nuclear, as limited liability companies, results in the entities realizing a financial gain without accepting any of the related financial risks. This corporate restructuring creates a situation in which the citizens of San Luis Obispo could be forced to compensate for financial shortfalls which Gen or Nuclear might experience. At a minimum, the transfer should be conditioned on the proposed licensees obtaining written consent by its parent companies to be subject to potential joint and several liability to the same extent as any of its limited liability subsidiaries.

B. <u>The License Transfer Proceedings Should be Held in Abeyance</u>

With respect to the second question raised in CLI-02-12, it is San Luis Obispo County's position that this proceeding should be terminated because the published notice was rendered inadequate by subsequent developments in the Bankruptcy Court which were beyond the NRC's control. For a notice to be legally sufficient it must give adequate notice of what the agency is proposing to authorize. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests). Since the Bankruptcy Court will determine the structure of the company that will emerge from bankruptcy, and therefore, the structure of the

[1] The NRC's Policy Statement on Restructuring provides that the NRC "reserves the right, in highly unusual situations where adequate protection of public health and safety would be compromised if such action were not taken, to consider imposing joint and several liability on co-owners of more than *de minimis* shares when one or more co-owners have defaulted." 62 Fed. Reg. at 44,074, 44,077 (Aug. 19, 1997).

successor licensees, until the Bankruptcy Court acts to determine that statute, the NRC cannot give the legally required adequate notice. Should the Bankruptcy Court adopt a reorganization plan that is different from the one on which the NRC's notice was based, the issues before the NRC in determining whether to authorize a license transfer may be very different from the issues presented by the Application on which the notice was based. For this reason, this proceeding must be terminated and a new notice must be issued after the Bankruptcy Court has acted.

At a minimum, these license transfer proceedings should be held in abeyance. As previously discussed, the Bankruptcy Court is currently reviewing two distinctly different reorganization plans that could dramatically affect the status, structure, and financial strength of the proposed licensees. The PG&E Reorganization Plan, in so far as it relates to Diablo Canyon, is dependent upon NRC approval of the license transfer application. Because the Bankruptcy Court has yet to decide the structure and relationship of the corporate entities that will emerge from Bankruptcy, and whether the FERC or CPUC will have jurisdiction over rates set for energy capacity and production from Diablo Canyon, the assertions in the Application relative to the future financial health of Gen, Nuclear or PG&E are currently in flux. While the NRC does not traditionally withhold its reviews to await collateral proceedings in other forums,[2] this case is unique because the Bankruptcy Court has jurisdiction to decide issues that are essential elements of the Application. These issues must be decided by the bankruptcy court before the NRC can make a determination as to whether the Applicants have made the necessary showing of

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[2] *Power Authority of the State of N.Y.* (James A. FitzPatrick Nuclear Plant, Indian Point 3), CLI-00-22, 52 NRC 289 (2000); *Niagara Mohawk Corp.* (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-99-30, 50 NRC 333, 343-44 (1999); *Consolidated Edison Co. of N.Y.* (Indian Point Units 1 & 2), CLI-01-08, 53 NRC 223, 228-30 (2001). The NRC has, however, demonstrated sensitivity in other cases to whether its decisions, if rendered, could improperly influence the outcome of reviews in other forums.

conformance with NRC regulations. Therefore, the PG&E bankruptcy proceeding must be concluded before the NRC can make an informed ruling on the Applicant's requests.

Moreover, because the CPUC plan does not contemplate any transfer of ownership or operation of Diablo Canyon, if the CPUC plan is 'the Plan' which is ultimately adopted by the Bankruptcy Court, the issue before the NRC regarding a license transfer may well be moot. Until the Bankruptcy Court has completed its review and selected the reorganization plan it will implement, it is premature for the NRC to act on the Application. If the NRC stays the present proceedings, it will conserve its resources until such time as this application is ripe for NRC review.

IV. ISSUES FOR HEARING

Section 184 of the Atomic Energy Act and 10 C.F.R. § 50.80 provides that no license shall be transferred unless the Commission consents in writing. In order to approve the transfer of an operating license pursuant to 10 C.F.R. § 50.80, the NRC must determine that the proposed transferee is qualified to be the holder of the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission. 10 C.F.R. § 50.80(c)(1) and (2). The Commission has described the scope of its review of a proposed license transfer as follows:

> The NRC will continue to review transfers to determine their potential impact on the licensee's ability to maintain adequate technical qualifications and organizational control and authority over the facility and to provide adequate funds for safe operation and decommissioning. Such consent is clearly required when a corporate entity seeks to transfer a license it holds to a different corporate entity.
>
> Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44071, 44077 (August 19, 1997)(hereinafter cited as "Policy Statement on Restructuring").

In reviewing a proposed license transfer, the NRC considers (1) the financial qualifications of the proposed transferee related to both funding for plant operations and decommissioning funding assurance; (2) the technical qualifications of the proposed transferee; (3) the organizational control and authority over the facility; and (4) other technical issues such as the provision of off-site power to the facility, emergency planning support, exclusion area control, and insurance coverage. See 10 C.F.R. §§ 50.33(f) and 50.34.[3]

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[3] Until recently, the NRC also performed an antitrust review in connection with proposed transfers of operating licenses that had been issued under Section 103 of the Atomic Energy Act. In *Kansas Gas and Electric Co., et al* (Wolf Creek Nuclear Station), CLI-99-19, 49 NRC 441, 446 (1999), the NRC ruled that it would no longer conduct general post-operating license antitrust reviews in connection with proposed license transfers. The NRC has determined, however, that unique license-specific anti-trust questions raise issues regarding the Commission's authority over non-licensees that

Pursuant to 10 C.F.R. § 2.1306(b)(2), San Luis Obispo requests that the issues described below be set for hearing.[4] In brief, these issues are as follows:

1. Whether Gen and Nuclear or any alternative corporate structure which may be adopted by the Bankruptcy Court will have adequate financial qualifications to ensure safe operation of Diablo Canyon.

2. Whether adequate provisions have been made for ensuring an available source of off-site power to the facility.

3. Whether the NRC should stay its review of the license transfer application while PG&E's bankruptcy proceeding is on going.

Each of these issues is within the scope of the proceeding on a license transfer application as defined by the Commission, and each is relevant to the determination the NRC must make to approve the transfer under 10 C.F.R. § 50.80. In accordance with 10 C.F.R. § 2.1306(b)(2), each of the issues is set forth below. A concise statement is provided of the alleged facts or expert opinions which support the County's position and on which County intends to rely at hearing, together with references to supporting sources and documents.

Issue 1: Financial Qualifications for Operations

Under 10 C.F.R. § 50.80, Gen and Nuclear are required to demonstrate that they are financially qualified to be licensed to own and operate Diablo Canyon. In the Application, Gen does not claim that it qualifies for exemption from financial qualification review as an "electric

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must be reviewed. See In the Matter of *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Station, Units 1 and 2), CLI-02-12 (2002). The Petitioner's perspective on this issue is addressed below.

[4] In the interest of promptly submitting this Motion, the Petitioners have not yet had their experts prepare testimony and supporting affidavits. The County has, however, had experts perform a review of the Application and they support the contentions raised herein. The Petitioner will supplement this intervention request with the required expert testimony well in advance of any hearing.

utility" within the NRC's definition of that term in 10 C.F.R. § 50.2. See Application at 8. Thus, in accordance with 10 C.F.R. §§ 50.80 and 50.33(f)(2), Gen and Nuclear must submit information which demonstrates that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the licenses for Diablo Canyon 1 and 2. In addition, they must submit estimated total annual operating costs for the first five years of operation and indicate the source of funds to cover these costs.[5]

As newly-formed entities organized for the primary purpose of operating a facility, Gen and Nuclear are further required to submit information showing: (1) the legal and financial relationships they have with or propose to have with their owners; (2) their financial ability to meet any contractual obligation to their owners which they have incurred or propose to incur; and (3) any other information considered necessary by the Commission to enable it to determine Gen's and Nuclear's financial qualifications. 10 C.F.R. § 50.33(f)(3).

In several respects, Gen and Nuclear have failed to demonstrate the requisite financial qualifications to own and operate Diablo Canyon as required by 10 C.F.R. § 50.33(f):

A. The Application does not provide sufficient information to demonstrate that Gen and Nuclear have adequate funding to ensure safe operation of Diablo Canyon during the licensing period. Contrary to 10 C.F.R. § 50.33(f)(2), Gen and Nuclear have no basis for providing a projected income statement or other projection of costs and revenues for the five year period

[5] Additional guidance on the information necessary to establish financial qualifications is presented in Appendix C to 10 C.F.R. Part 50.

following the transfer because the bankruptcy court has not approved a plan, therefore, there are no rate-setting directions from either the FERC or CPUC to make such projections possible.

B. The Application fails to provide an adequate cost/revenue projection in accordance with the NRC's "Standard Review Plan on Financial Qualifications and Decommissioning Funding Assurance," NUREG-1577, Rev. 1. Under the Standard Review Plan ("SRP"), new entities such as Gen and Nuclear which do not qualify as "electric utilities" are required to provide a five-year cost/revenue projection to demonstrate reasonable assurance of sufficient funds to cover the costs of safe operation. The projections contained in Enclosure 8 of the Application appear deficient because the projected revenues appear to be based on above-market-price Power Purchase Agreements ("PPA"). It is not clear that these rates would be approved by the FERC or CPUC. The margins considered in these rates are particularly significant because non-regulated entities with no transmission or distribution assets or other continuing source of revenues, Gen and Nuclear are particularly susceptible to financial difficulty in the event of poor operational performance of the generating units.

C. The Application fails to demonstrate that Gen and Nuclear possess adequate resources to cover the costs of an extended outage at Diablo Canyon or meet other obligations for the facility. For newly formed non-utilities such as Gen and Nuclear, the NRC's SRP on financial qualifications requires a demonstration of available cash or cash equivalents which would be sufficient to pay fixed operating costs during an outage of *at least six months*. SRP at section III.1.b (emphasis added). In the absence of a specific ruling by the Federal Bankruptcy Court, it is unclear how Gen and Nuclear, or their parent company, can make such a commitment. In addition, the Application and PG&E's reorganization plan fail to show how the new licensees

will fund construction and operation of an independent spent fuel storage installation that PG&E has committed to build.[6]

D. Gen's and Nuclear's corporate structures, as limited liability companies, are not sufficiently explained or documented to demonstrate the requisite financial qualifications of the new entities to be licensed to own and operate Diablo Canyon. Under 10 C.F.R. § 50.33(f)(3), Gen and Nuclear must submit information showing the legal and financial relationships with their owners. See also Appendix C of 10 CFR Part 50. In the absence of a ruling from the Bankruptcy Court, Gen and Nuclear cannot submit sufficient information as to their proposed financial and legal relationships with their owners to demonstrate that their corporate structure would provide adequate protection of public health and safety in the event of a radiological accident or premature shutdown. Gen and Nuclear, as limited liability companies, have a corporate structure which presumptively cannot be breached in the event of financial problems or bankruptcy. The Application fails to provide adequate assurances that Gen's and Nuclear's parent would be financially responsible for covering any shortfall in resources needed to ensure the safety of the plant or adequate funds for decommissioning in the event of premature shutdown. Section 50.33(f)(4) specifies that the NRC may request additional financial assurance information when necessary. Accordingly, should the NRC decide to rule in favor of the Application before a decision from the Bankruptcy Court, the NRC should impose a condition should requiring Gen and Nuclear to obtain guarantees from its parent company, in a form acceptable to the NRC, that in all events, the parent will be financially responsible for providing whatever funds are necessary to provide reasonable assurance of public health and safety.

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[6] According to PG&E's estimates, "The total cost of building and operating the Diablo Canyon ISFSI for the first period, from now to 2025, is estimated to be $132 million." PG&E Independent Spent Fuel Storage Installation License Application, p. 4 (Dec. 21, 2001).

Issue 2: Provision of Off-Site Power

NRC regulations require adequate assurance of the availability of off-site power and grid stability. Specifically, an applicant for transfer of an operating license must demonstrate that adequate provisions for off-site power are made to satisfy General Design Criterion 17 ("GDC-17") of 10 C.F.R. Part 50, Appendix A and the NRC's station blackout rule, 10 C.F.R. § 50.63.

The Application notes that the license transfer will not result in a change to the physical interconnections for off-site power and that the special provisions for nuclear facilities will remain in effect for PG&E and for the California Independent System Operator ("CAL ISO"). Application at page 15. The Application, however, does not provide sufficient information to demonstrate compliance with the applicable requirements, based on the lack of reliable detail on the financial strength of E-Trans and assets which will be available for E Trans to maintain transmission lines and facilities necessary to reliably supply off-site power to Diablo Canyon.[7]

Issue 3: Stay Pending Outcome of Bankruptcy Proceedings

NRC regulations require adequate assurance of the availability of off-site power and financial assurance for safe plant operation. In the absence of a predictable corporate structure, it is impossible to determine whether the proposed licensees and their affiliates will be adequately funded and backed as required to carry out their duties under the NRC license. This is one of the reasons why San Luis Obispo requests that the NRC proceedings should be stayed pending the outcome of the bankruptcy proceeding.

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[7] Prior experience at Diablo Canyon makes this issue of particular concern to local residents. See NRC Information Notice 2000-06, Off-site Power Voltage Inadequacies.

V. SERVICE FOR PLEADINGS RESULTING FROM INTERVENTION

Pursuant to 10 C.F.R. § 2.708(e) and 2.1306(b)(1), the following are designated as the persons on whom service of the pleadings and other papers in this proceeding should be made:

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VI. CONCLUSION

The proposed transfer of the Diablo Canyon operating license to entities which may be created as a result of reorganization raises a host of significant issues which deserve full and deliberate consideration. Petitioner has requested intervention, identified the request standing and identified through its experts critical issues that must be addressed in this proceeding. Petitioner has also demonstrated why Petitioner's late-filed requests should be granted.

This license transfer proceeding should be delayed until the details of the bankruptcy reorganization are known and that the NRC can give adequate notice of its hearings. In the alternative, bcause the federal Bankruptcy Court will be thoroughly examining many of the issues of concern to the NRC, and its decision could significantly affect the corporate entity permitted to emerge from bankruptcy, the Commission should conserve the resources of the agency and the public and defer the hearing in this case until completion of the Bankruptcy Court's review. Finally, if such a deferral is not ordered, the Commission should grant this request for hearing and authorize the County of San Luis Obispo to participate as a party in the license transfer hearings.

Respectfully submitted,

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James B. Lindholm, Jr., Esq.
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Office of the County Counsel for the
County of San Luis Obispo

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Pacific Gas and Electric Company	)	
Consideration of Approval of Transfer	)	
of Facility Operating Licenses and Conforming	)	Docket Nos. 50-275 & 50-323
Amendments	)	
(Diablo Canyon Nuclear Power Plant, Units 1 & 2)	)	
	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing MOTION OF THE COUNTY OF SAN LUIS OBISPO FOR LEAVE TO INTERVENE AND A HEARING were served upon the following persons by e-mail delivery, with a follow-on copy with exhibits by regular mail, in accordance with the requirements of 10 C.F.R. § 2.1313:

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May 28, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
Pacific Gas and Electric Co.	)	Docket Nos. 50-275-LT
	)	50-323-LT
(Diablo Canyon Power Plant,	)	
Units 1 and 2)	)	

REPLY OF THE COUNTY OF SAN LUIS OBISPO TO THE ANSWER BY PACIFIC GAS AND ELECTRIC COMPANY TO THE PETITION OF THE COUNTY OF SAN LUIS OBISPO FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.1307(b), the County of San Luis Obispo ("County" or "Petitioner") hereby files its reply to the answer of Pacific Gas and Electric Company ("PG&E") to the late-filed Petition for Leave to Intervene and Request for Hearing ("Petition") filed on May 10, 2002, by the County.[1] The County's Petition relates to PG&E's application, pursuant to Section 184 of the Atomic Energy Act of 1954, as amended ("AEA"), and 10 C.F.R. § 50.80, for Nuclear Regulatory Commission ("NRC" or "Commission") approval of a transfer of the operating licenses for the Diablo Canyon Power Plant, Units 1 and 2 ("DCPP") ("Application"). As discussed below, the County has clearly demonstrated that its late-filed request should be granted based upon the factors set forth in 10 C.F.R. § 2.1308. Moreover, the County has specified, with adequate basis and

[1] "Answer of Pacific Gas and Electric Company to the Late-Filed Petition of the County of San Luis Obispo for Leave to Intervene and Request for a Hearing, dated May 20, 2002 (*hereinafter* "Answer").

in accordance with 10 C.F.R. § 2.1306, at least one issue justifying a Subpart M hearing.

By virtue of its exclusive obligations to the citizens in the vicinity of the DCPP and its unusually extensive responsibilities for emergency preparedness related to all activities at the DCPP site, participation by the County will ensure that the NRC's decision making process has the "welcome and valuable" benefits that were explicitly recognized by the Commission almost twenty-five years ago as resulting from the participation of state, county and local governments. (43 Federal Register 17798, April 26, 1978). In that regard, it must be noted at the outset that the County's petition has not been filed to prevent the facility license from being transferred. Rather, the County believes that a license transfer may be appropriate after the NRC has had an opportunity to hear and consider the relevant issues, perspectives, and concerns that are unique to the County of San Luis Obispo. In addition, any license transfer should only be approved after the Bankruptcy Court has rendered a final decision adopting a reorganization plan for PG&E and after the Commission compels the licensee to address the County's issues as part of the NRC decision making process. Therefore, the late-filed Petition should be granted.

II. ARGUMENT

PG&E correctly states that the proposed DCPP license transfer is specifically based upon the reorganization plan submitted by PG&E in bankruptcy proceedings.[2] PG&E is also correct that the NRC's Notice of Consideration of Approval of the proposed DCPP license transfer addressed only the PG&E Plan because, at the time, it was the only plan proposed.[3] PG&E also correctly acknowledges that, after its Application was filed, the Bankruptcy Court subsequently authorized the California Public Utilities Commission ("CPUC") to submit an alternative reorganization plan (the "CPUC Plan").[4] In addition, PG&E correctly states that the NRC can condition the DCPP license transfer approval on receipt by PG&E of other necessary approvals for any aspect of the Plan that the NRC considers essential to the license transfer approval.

What PG&E fails to acknowledge, however, is that circumstances have changed radically

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[2] PG&E's first Reorganization Plan was filed on September 20, 2001. PG&E Letter DCL-01-119, Enclosure 1.

[3] The NRC's Notice of the proposed license transfer based on PG&E's Plan was issued on January 17, 2002, and comments were due by February 6, 2002. Pacific Gas and Electric Co., Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2; Notice of Consideration of Approval of Transfer of Facility Operating Licenses and Conforming Amendments and Opportunity for a Hearing, 67 Federal Register 2455 (Jan. 17, 2002).

[4] On March 2, 2002, the Bankruptcy Court terminated exclusivity with respect to reorganization plans, and granted the CPUC leave to file the "CPUC Plan." Order Terminating Exclusivity with Respect to the California Public Utilities Commission and Authorizing the California Public Utilities Commission to File an Alternate Plan of Reorganization, Case No. 01-30923DM, dated February 27, 2002. On April 15, 2002, the CPUC filed the CPUC Plan with the Bankruptcy Court. California Public Utilities Commission's Plan for Reorganization under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company, dated April 15, 2002. *See* Order Terminating Exclusivity, dated March 11, 2002. On May 15, 2002, the Bankruptcy Court approved the CPUC Plan and set forth a schedule for the creditor vote solicitation process.

since the NRC published its Notice, requiring the County to file this intervention request.[5] After the Notice was published, the CPUC Plan, which would not require a license transfer, was approved by the Bankruptcy Court. Now both reorganization plans are under consideration. Nonetheless, PG&E urges the NRC to speculate on the outcome of this hotly contested litigation in the Bankruptcy Court. Moreover, PG&E urges the NRC to issue an Order authorizing a license transfer, as if the implementation of PG&E's Plan by the Bankruptcy Court were a foregone conclusion, notwithstanding the uncertainty in the actual outcome of the litigation.

PG&E also erroneously suggests that the NRC could authorize a license transfer conditioned upon its Plan being approved by the Bankruptcy Court. (Answer at 18.) PG&E apparently relies on prior instances where license conditions have been issued by the NRC to obligate the new licensee to take specific actions or to await the outcome of a routine regulatory review that is part of a related transaction. By contrast, the entire proceeding before the NRC, as well as the present review of issues raised in the Commission's Order CLI-02-12, are unprecedented situations in which PG&E seeks license conditions that are contingent on the outcome of contested litigation.[6] Not only could such action by the NRC be seen as potentially prejudicing the Bankruptcy Court's proceedings, but also, by continuing this proceeding without permitting the County to participate, the NRC would

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[5] Subsequent events, as detailed below, also include PG&E's own submission of a modified Reorganization Plan, which calls into question PG&E's commitment to the financial statements filed in support of the Application. *See* Plan of Reorganization under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company, dated April 19, 2002 (*hereinafter*, PG&E's April 19, 2002 Reorganization Plan).

[6] In the closest analogous case, the NRC declined to dismiss on a summary judgment motion the contention of an intervener that the financial stability of a licensee was in question because the licensee was partially funded by a utility that was in the midst of contested bankruptcy litigation. *Gulf States Utilities Company* (River Bend Station, Unit

deny the County the opportunity to ensure that its citizens are protected from the uncertainties surrounding PG&E's Plan.

PG&E acknowledges that the plant's location within the boundaries of the County is sufficient to establish *injury in fact* with respect to radiological safety matters. *See, e.g., Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293-95 (2000) ("Indian Point 3"); (finding standing for the Town of Cortlandt, where the plant was located within the boundaries of that entity). (Answer at 4.) Therefore, PG&E does not contest the County's stated interests in this proceeding to the extent those interests relate to public health and safety or the protection of the environment. The same logic applies equally to the County's interests in the common defense and security of its citizens.

PG&E contends, however, that the County failed to meet the standards governing late-filed intervention requests and failed to set forth at least one issue appropriate for litigation in this forum. These contentions are without merit.

A. The County's Petition Meets the Standards Governing Late-Filed Intervention Requests

The Commission considers three factors when reviewing a late-filed intervention petition or hearing request:

(1) Good cause for failure to file on time;

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1), LBP-95-10, 41 NRC 460 (1995).

(2) The availability of other means by which the requestor's or petitioner's interest will be protected or represented by other participants in a hearing; and

(3) The extent to which the issues will be broadened or final action on the application delayed.

10 C.F.R. § 2.1308(b)(1)-(2). None of these factors is determinative. Pursuant to Commission practice regarding the comparable requirements in 10 C.F.R. 2.714(a), all of the factors are to be considered. *See, Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 509 (1982).

1. Good Cause to Intervene Late was Clearly Demonstrated by the County

Newly arising information has long been recognized as providing good cause for admission of late-filed contentions. *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC 77 (2000); *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982). Because requests for late-filed intervention are evaluated under the same criteria that are applied in evaluating admissibility of late-filed contentions, newly arising information also provides good cause for granting a late-filed intervention petition. *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), LBP 99-03, 49 NRC 40, 46 (1999).

In this case developments in the bankruptcy proceeding occurred after the close of the comment period. This new information radically changed the posture of PG&E's Application and necessitated the County's intervention. Those developments are as follows:

- On March 2, 2002, the Bankruptcy Court terminated exclusivity and granted the CPUC leave to file an alternative reorganization plan;[7]
- On April 15, 2002, the CPUC filed an alternative reorganization plan in the Bankruptcy Court;[8]
- On April 19, 2002, PG&E filed a significantly revised reorganization plan;[9] and
- On May 15, 2002, the Bankruptcy Court approved the CPUC Plan and set forth a schedule for the creditor vote solicitation process.[10]

In bankruptcy proceedings, the debtor is normally entitled to a 120-day period in which only the debtor may submit a reorganization plan for consideration by the Court. 11 U.S.C. § 1121(b). This period is referred to as the exclusivity period and may be extended by the Court. *Id.* at 11 U.S.C. § 1121(d). As a result of these exclusivity provisions, PG&E's Reorganization Plan was the only plan being considered by the Court until March 2, 2002, when the Bankruptcy Court terminated exclusivity and granted the CPUC leave to file a competing plan. Subsequently, on April 15, 2002, the CPUC filed an alternative reorganization plan in the Bankruptcy Court. Only after the County had an opportunity to review the CPUC Plan, was it possible to determine that intervention was necessary and appropriate. *See id.* at 47-48 (finding late-filing reasonable where an intervener needs

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7 Order Terminating Exclusivity with Respect to the California Public Utilities Commission and Authorizing the California Public Utilities Commission to File an Alternate Plan of Reorganization, Case No. 01-30923DM, dated February 27, 2002 (filed March 2, 2002) (*hereinafter* March 2, 2002 Bankruptcy Court Order).

8 California Public Utilities Commission's Plan for Reorganization under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company, dated April 15, 2002.

9 PG&E's April 19, 2002 Reorganization Plan. This reorganization plan is accompanied by a new disclosure statement that includes so many caveats that it calls into question the reliability of PG&E's financial projections even if its latest reorganization plan was approved. *See, e.g.*, Disclosure Statement for Plan of Reorganization, pp. 250-267 (April 19, 2002); Modifications to the Disclosure Statement for Plan of Reorganization under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company Proposed by Pacific Gas and Electric Company and PG&E Corp. [Dated April 19, 2002] filed May 14, 2002.

10 Case No. 01-30923DM, Bankruptcy Court Order dated May 15, 2002.

specifics of a proposed action in order to prepare to intervene intelligently). The two reorganization plans are quite different because the CPUC Plan, unlike the PG&E Plan, does not call for any license transfer with respect to DCPP. The CPUC Plan would render PG&E's request for a license transfer moot. With two plans under consideration, the County also recognized that the Bankruptcy Court might adopt a modified plan, with terms different from either the PG&E or the CPUC Plans. Therefore, CPUC's filing of the alternative reorganization plan was the appropriate "trigger point" for the County's decision to file an intervention petition. *Private Spent Fuel*, 49 NRC at 48.

The County also realized that the introduction of a competing plan in the bankruptcy proceeding provided PG&E with an incentive to make modifications to its Plan. Because the proponents of a plan solicit votes from the creditors, plan proponents, like PG&E, may make modifications to satisfy creditors. 11 U.S.C. § 1125-1126. Reorganization plans are also susceptible to modification because, before any plan can be implemented, it must be confirmed by the Bankruptcy Court. 11 U.S.C. § 1120. Accordingly, the Bankruptcy Code permits a proponent of a plan to modify it without leave of court prior to confirmation and with leave of court after confirmation and before substantial consummation. 11 U.S.C. § 1127. In this case, the date of the confirmation hearing on PG&E's Plan has not even been set. Obviously, modifications to PG&E's Plan could alter the corporate structure and/or financing upon which the NRC currently relies in considering PG&E's Application.

In light of the increased threat of modification and the uncertain nature of PG&E's Plan, the County filed its Petition for Intervention on May 10, 2002. Thus, because the County took

substantially less than the 45 days from the appropriate trigger point to file its petition, the County did not sleep on it rights. *Private Spent Fuel,* 49 at 47. Moreover, in order to file its Petition earlier, the County would have had to speculate that: (1) the Bankruptcy Court would terminate the period of exclusivity and consider an alternative reorganization plan; and (2) the contents of an unknown and then as-yet-unfiled CPUC Plan would be very different from the plan filed by PG&E. Only after the details of the alternative reorganization plans could be compared, was it possible to determine that the County needed to petition to intervene in this proceeding. For these reasons, the subsequent developments in the Bankruptcy Court established good cause for this late intervention.

Even if there is still some question about whether good cause for delay has been shown, the NRC may consider whether lateness will result in a substantial delay to the proceedings. If no substantial delay will occur, this fact may be considered by the NRC in assigning the relative weight to be given to the good cause demonstration. *Puget Sound Power and Light Co.*, (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 985 (1982). Granting the County's request for intervention at this early stage in the proceeding will not result in substantial delay. *Private Fuel Storage*, 49 NRC at 49. Intervention by the County will simply ensure the timely consideration of relevant issues.

2. No Other Adequate Means are Available for Protecting the Petitioner's Interest

PG&E illustrates its failure to appreciate the unique role and obligations of the County by summarily suggesting that the availability of other means to protect the County's interest is a fact that is entitled to relatively less weight. In support of its position PG&E relies on *Texas Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 74 (1992). Its reliance on *Texas Utilities* is misplaced for a number of reasons.

First, *Texas Utilities* involved private petitioners. The limited interests of private petitioners are clearly much narrower than the broad public interests which arise from the obligations of a public entity like the County of San Luis Obispo. Although the Commission may have acknowledged the value of specific contributions from intervention by a private party, the Commission has repeatedly acknowledged the unqualified value of intervention by an interested public entity. Accordingly, San Luis Obispo should be accorded greater weight in recognition of its efforts to protect the public's interests as opposed to a private petitioner's efforts to protect a private interest.

Second, *Texas Utilities* involved an intervention request made pursuant to 10 C.F.R. § 2.714(a) which calls for a Subpart G hearing. This request is brought pursuant to 10 C.F.R. § 2.1306(b), which calls for a Subpart M hearing. Because a Subpart G hearing is more formal than a Subpart M hearing, the weight given to a Subpart G factor may not be the same in an informal Subpart M hearing. The informality of the Subpart M hearing suggests that when intervening late, but well in advance of a hearing, the same level of detail required to intervene in a formal Subpart

G hearing need not be required.

Finally, *Texas Utilities* involved balancing the five factors in 10 C.F.R. § 2.714(a). By contrast, this case involves balancing the three factors in 10 C.F.R. § 2.1306(b). Consistent with the above discussion, the Commission's reduction in the number of factors to be considered in determining whether to admit a late-filed intervention petition in a Subpart M proceeding as compared with a Subpart G proceeding is a clear indication of the Commission's intent to modify the evaluation process. Accordingly, weights on factors considered under Subpart G are not appropriately applied to comparable factors in a Subpart M hearing.

In this Subpart M hearing, San Luis Obispo's need to protect its interests should be heavily weighed because of the integral role San Luis Obispo plays in emergency response procedures. San Luis Obispo, as a California county, is charged with the leadership role in implementing the PG&E Emergency Plan and in coordinating off-site response agencies. In other states, this is not a responsibility that falls on local government. These unique obligations support the Commission's longstanding appreciation of the value of participation by state, county and local governments, as discussed above. Moreover, none of the other organizations that filed timely petitions to intervene represents the citizens of the county in which DCPP is located or shares all of the County's views with respect to the contentions the County intends to raise. The County's responsibility for the health and welfare of its citizens requires the County to ensure that whoever is licensed to operate DCPP has the appropriate financial qualifications. Accordingly, contrary to PG&E's opinion regarding the value of the County's participation, the Commission's stated policy shows that this

factor is entitled to great weight.

3. The County's Participation Will Enhance the NRC's Consideration of the Proper Scope of the Issues and Will Not Unduly Delay Final Action on the Application

In its Petition for Leave to Intervene, the County identified unique issues and their affect upon the citizens of the County. By contrast, PG&E summarily asserts that the issues raised by the County are irrelevant because it believes that its Plan will be confirmed and implemented by the Bankruptcy Court. PG&E refuses to consider the reality that the viability of the proposed new entities is by no means assured.

The Bankruptcy Court proceeding is in an early stage. Currently, there are two reorganization plans making their way to a confirmation hearing, but the date for such a hearing has not been set. Discovery has not yet begun in that proceeding. As is typical in bankruptcy proceedings, it is quite possible that neither reorganization plan currently under consideration, PG&E's or the CPUC's, will be confirmed as currently configured. *See* 11 U.S.C. § 1127 (providing that the proponent of a plan may seek to modify its reorganization plan and any holder of a claim or interest may accept or reject a plan as modified).[11] The NRC proceeding cannot, therefore, be treated as a mere formality that rubber stamps PG&E's representations regarding the ultimate structure of the entity that emerges from Bankruptcy Court. The County must be permitted to adequately represent its citizens to assure that the corporate structure ultimately accepted by the NRC is one that adequately protects the citizens' health, welfare and environment. The County can best accomplish this by intervening in this proceeding to ensure that these concerns are included in the scope of the

issues to be considered at hearing. Because those issues are important, any time taken to consider them cannot be treated as delay but must be considered as appropriate to the process.

The County's participation will also contribute to the making of the record. The County will use its resources to bring the appropriate expertise to bear with respect to the contentions it has raised at the appropriate time. The County has a fiduciary obligation to spend taxpayers' money responsibly and as necessary for effective participation in the NRC's hearing. At this early stage of the proceeding, there is no need to identify the experts on whom the County will rely because the County has appropriately identified facts and matters of law that alone are sufficient to support admissible contentions. As demonstrated in the County's Petition, and as further discussed below, the County has met the requirements of 10 C.F.R. § 2.1306(b). Any suggestion that it must also meet heightened requirements in 10 C.F.R.§ 2.714(a)(iii), (Answer at 8), is incorrect.

Upon balancing these factors, the Commission should, consistent with its policy, give the greatest weight to the inability of any other Party to adequately represent the County's obligation to protect the health, welfare and environment of its citizens. Since the County has also identified several litigable issues appropriately addressed in this proceeding, the Commission should admit the County as a Party to this proceeding.

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11 Indeed, PG&E is on at least its second revision of its own reorganization plan. PG&E's April 19, 2002 Reorganization Plan.

B. The County's Petition Has Clearly Identified Litigable Issues

Contrary to PG&E's assertion, the Petition satisfies the Commission's criteria in 10 C.F.R. § 2.1306 with respect to the issues raised for review in this forum. Adequate specificity and bases have been provided to demonstrate the presence of genuine disputes. PG&E's challenges to these issues are addressed below.

1. Genuine Disputes Exist Regarding Financial Qualifications for Operation

PG&E disagrees with the County's contention that the Application fails to provide sufficient information upon which the NRC could reasonably conclude that the new entities will have sufficient funding to maintain operations. However, PG&E's only response to this assertion is a statement that the assumptions on which it relies in making its five-year projections are internally consistent. (Answer at 11.) PG&E unreasonably concludes that the County is mistaken in claiming that no projections of costs and revenues can be made at this time. (*Id.*)

The problem with PG&E's conclusion is that it does not address the County's contention. Clearly, PG&E is entitled to make assumptions and perform mechanical calculations based on its assumptions. The County questions the adequacy and correctness of those assumptions. The adequacy and correctness of PG&E's assumptions and projections are the types of issues that should be raised at hearing. No additional expertise or specificity is needed regarding the explication of these issues at this time, especially since PG&E's Application is currently a moving target. Once the target has reached a final resting place, the County will rely on appropriate experts as needed at the hearing.

The County is also legitimately concerned about PG&E's reliance on above-market prices in the unapproved Power Purchase Agreements. PG&E contends that no issue is presented because the Bankruptcy Court and the Federal Energy Regulatory Commission ("FERC") will decide those rates and the NRC can condition the license transfer on PG&E's obtaining the approvals of those rates. (Answer at 11-12.) Here, again, PG&E side-steps the real issue by assuming that the Bankruptcy Court and FERC will do its bidding by setting rates consistent with PG&E's requests.

The County's concern is that PG&E's Plan may not one approved by the Bankruptcy Court and FERC.[12] To ensure that the proposed transferee is financially viable, the NRC must consider the possibility that rates will be set lower than PG&E has requested and whether license conditions can adequately address this possibility.

With regard to the County's concerns about the financial robustness of Gen, PG&E's answer suffers the same infirmities as discussed above. (Answer at 12.) Once again PG&E unreasonably assumes the eventual approval of its unadopted Plan by the Bankruptcy Court and FERC. A hearing before the NRC is needed to consider whether, in the absence of definitive decisions by other regulatory and judicial bodies, the NRC can make the necessary findings and proceed to grant a license transfer consistent with the uncertainty presented by the range of possible alternatives that may be approved outside the NRC proceeding. Moreover, PG&E's reliance on hydroelectric resources for power production and financial stability also presents an issue in view of California's history of cyclical droughts that have substantially reduced hydroelectric production. (*See id.*)

The remaining issues raised by PG&E, with respect to contentions regarding its financial stability, also assume that the PG&E Plan will be accepted. However, the NRC cannot make a reasoned decision if it limits the scope of this proceeding to a review of a PG&E Plan that is subject to modification and is competing with another plan for confirmation.

2. Genuine Disputes Exist Regarding the Availability of Off-Site Power

In response to the County's concern regarding the availability of reliable sources of off-site power, PG&E again assumes that its Plan will be implemented as proposed in support of its claim that ETrans will be financially viable. (Answer at 17.) This response once again ignores the uncertainties raised by the alternative plan under active consideration outside the NRC proceeding.

PG&E describes in great detail the physical facilities that would be transferred to ETrans under its Plan and leaves to an innocuous looking footnote the observation that "implementation of the Plan primarily involves legal paperwork such as establishing contracts and agreements." (Answer at 16, n. 10.) The details of these contracts are important issues for hearing. In particular, because the California Independent System Operator ("ISO") uses economic and not safety criteria to dispatch electrical load, the contract between the ISO and ETrans must recognize the need for DCPP, as a nuclear power plant, to have uninterruptible power supplied through properly maintained transmission facilities.

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12 Under the CPUC Plan, the CPUC, not the FERC, would have ratesetting authority for the bulk of PG&E's generating assets.

3. The Appropriateness of a Stay Presents a Litigable Issue

Contrary to PG&E's assertion, neither a prior request for relief in the form of a stay by other participants nor PG&E's claim to have addressed this issue in prior pleadings preclude the consideration of a stay request as a proper matter upon which to have a hearing. (Answer at 10, 17-18.) Indeed, the Commission's Order in CLI-02-12 requesting the parties' views on the impacts of recent developments on the pending stay motions clearly shows that the appropriateness of a stay and the terms and conditions under which it should be granted are proper subjects for a hearing in this proceeding. As noted above, PG&E has relied on conclusory arguments to contend that a request for a stay does not present a litigable issue. (Answer at 17-18.) Consistent with the rest of its Answer, PG&E buttresses its view with yet another affirmation of its belief that the unadopted PG&E Plan will be confirmed. As a result, PG&E concludes that because a stay is not necessary, it is not necessary to litigate the stay issue. PG&E believes that the NRC should remain narrowly focused on its initial hearing Notice despite the fact that events outside the NRC could radically change the very foundation of the Application that the NRC is being asked to approve. To support that narrow view, PG&E just repeats the mantra that its Plan will be confirmed.

The County is concerned that the NRC may reach a decision which cannot accommodate the uncertainty associated with PG&E's Plan. Because the contents of the initial hearing Notice were established before that uncertainty arose, the County has tried to balance this NRC proceeding by requesting that it be stayed until the uncertainty, created by events outside of PG&E's and the NRC's control, is resolved. The County believes that a stay is necessary to give the NRC time to issue a new Notice that recognizes the current reality and gives everyone with standing and a legitimate

interest an adequate opportunity to protect their interests.

The NRC's Notice of this license transfer application dated January 17, 2002, has been rendered inadequate by subsequent developments in the Bankruptcy Court. Because the license transfer application relies on a corporate and financial structure that may be modified substantially or rejected in its entirety by the Bankruptcy Court, the NRC hearing will need to be terminated or renoticed. Persons whose interests may be affected by the NRC's adoption of the new restructuring were not given adequate notice and have consequently been denied an opportunity to address the NRC regarding those issues as required. 10 C.F.R. § 2.1036(b)(2)(ii). It is important to note that because PG&E does not take issue with this contention it is no longer at issue in this proceeding. *Private Spent Fuel*, 49 NRC at 50. Accordingly, opposition to this argument appears to have been waived.

III. CONCLUSION

For the foregoing reasons, the County's petition for intervention should be granted and this proceeding should be stayed until the details of what the NRC is being asked to approve are understood and the NRC has had a chance to re-notice the proceeding. The County has provided adequate justification to support its late-filed Petition. The County has demonstrated the unique interests which it has to protect in this proceeding, and it has raised issues appropriate for resolution here. On this basis, the County renews its request for intervention and for a stay in this proceeding pending a decision regarding the Bankruptcy Court's confirmation of a reorganization plan for PG&E. In the event that a stay is not granted, the County again requests that it be permitted to participate as a Party in a hearing with respect to the issues it has identified.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Pacific Gas and Electric Company	)	
Consideration of Approval of Transfer	)	
of Facility Operating Licenses and Conforming	)	Docket Nos. 50-275 & 50-323
Amendments	)	
(Diablo Canyon Nuclear Power Plant, Units 1 & 2)	)	
	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing REPLY OF THE COUNTY OF SAN LUIS OBISPO TO THE ANSWER BY PACIFIC GAS AND ELECTRIC COMPANY TO THE PETITION OF THE COUNTY OF SAN LUIS OBISPO FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING were served upon the following persons by e-mail delivery, if an e-mail address is available, with a follow-on copy by regular mail posted on the same day, in accordance with the requirements of 10 C.F.R. § 2.1313:

Richard A. Meserve, Chairman
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Washington, DC 20555-0001

Edward McGaffigan, Commissioner
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Dated at Chicago, Illinois, this 28th day of May, 2002

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June 4, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
Pacific Gas and Electric Co.	)	Docket Nos. 50-275-LT
	)	50-323-LT
(Diablo Canyon Power Plant,	)	
Units 1 and 2)	)	

ADDENDUM TO REPLY OF THE COUNTY OF SAN LUIS OBISPO TO THE ANSWER BY PACIFIC GAS AND ELECTRIC COMPANY TO THE PETITION OF THE COUNTY OF SAN LUIS OBISPO FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING

The County of San Luis Obispo ("County") hereby offers an addendum to its "Reply to the Answer By Pacific Gas and Electric Company to the Petition of the County of San Luis Obispo for Leave to Intervene and Request for Hearing" filed on May 28, 2002, by the County ("Reply"). The County's Reply explained at length the changing nature of the Bankruptcy Proceeding[1] which is controlling whether a license transfer will be required, as well as the structure and financial resources available to PG&E's successor companies.

The extraordinary and dynamic nature of these proceedings is further demonstrated by the "Report and Recommendations Regarding Competing Plans of Reorganization for Pacific Gas and Electric Company" filed with the Bankruptcy Court by "The Official Committee of Unsecured Creditors Appointed

in the Pacific Gas and Electric Company Chapter 11 Bankruptcy Case," a copy of which is enclosed as Exhibit A, hereto (*hereinafter* "Report and Recommendations of Unsecured Creditors Committee").[2] Following an analysis of the competing reorganization plans (PG&E's and the alternative reorganization plan filed by the California Public Utilities Commission (the "CPUC Plan")) the Unsecured Creditors Committee recommends that 'either [reorganization] plan, if confirmed, is superior to the other available options." Report and Recommendations of Unsecured Creditors Committee at p. 13. Moreover, Unsecured Creditors Committee finds that the CPUC Plan is the reorganization plan that could be consummated more quickly. *Id.*

The County files this Addendum because the continuing activity in the Bankruptcy Court clearly supports that County's request that this proceeding should be stayed until the Bankruptcy Court confirms a reorganization plan for PG&E.

Respectfully submitted,

Robert K. Temple, Esq.
Sheldon L. Trubatch, Esq.

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1 Case No. 01-30923DM (Bankrupt. N.D Cal. 2001).

2 By order of the Bankruptcy Court entered May 31, 2002, the Unsecured Creditors Committee was authorized to include the Report and Recommendations of Unsecured Creditors Committee with the solicitation materials mailed to creditors of PG&E.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Pacific Gas and Electric Company	)	
Consideration of Approval of Transfer	)	
of Facility Operating Licenses and Conforming	)	Docket Nos. 50-275 & 50-323
Amendments	)	
(Diablo Canyon Nuclear Power Plant, Units 1 & 2)	)	
	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing ADDENDUM TO REPLY OF THE COUNTY OF SAN LUIS OBISPO TO THE ANSWER BY PACIFIC GAS AND ELECTRIC COMPANY TO THE PETITION OF THE COUNTY OF SAN LUIS OBISPO FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING were served upon the following persons by e-mail delivery, if an e-mail address is available, with a follow-on copy by regular mail posted on the same day, in accordance with the requirements of 10 C.F.R. § 2.1313:

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 06/25/02

COMMISSIONERS

SERVED 06/25/02

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
PACIFIC GAS AND ELECTRIC CO.	)	Docket Nos. 50-275-LT, 50-323-LT
(Diablo Canyon Power Plant, Units 1 and 2)	)	

CLI-02-16

MEMORANDUM AND ORDER

I. INTRODUCTION

This proceeding involves a November 30, 2001 application seeking the Commission's authorization for Pacific Gas and Electric Co. ("PG&E") to transfer its licenses for the Diablo Canyon Power Plant, Units 1 and 2 (collectively, "DCPP") in connection with a comprehensive Plan of Reorganization which PG&E filed under Chapter 11 of the United States Bankruptcy Code.[1] Under the restructuring plan PG&E submitted to the bankruptcy court, the transfer of the licenses would be to a new generating company named Electric Generation LLC ("Gen"), which would operate DCPP, and to a new wholly-owned subsidiary of Gen named Diablo Canyon LLC ("Diablo"), which would hold title to DCPP and lease it to Gen.[2]

[1] *See* 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the Atomic Energy Act of 1954 ("AEA") and gives its consent in writing). *See also* 10 C.F.R. § 50.80, which restates the requirements of the AEA, sets forth the filing requirements for a license transfer application, and establishes a two-part test for approval of applications: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations, and Commission orders.

[2] Other components of the restructuring include separating PG&E's electric transmission business to ETrans LLC and its gas transmission assets and liabilities to GTrans LLC. ETrans and

In response to its published notice of the Diablo Canyon application,[3] the Commission received four petitions to intervene and requests for hearing. The petitioners are the Northern California Power Agency ("NCPA"); the Official Committee of Unsecured Creditors of PG&E ("Committee"); the California Public Utilities Commission ("CPUC"); and the following group: the Transmission Agency of Northern California, M-S-R Public Power Agency, Modesto Irrigation District, the California Cities of Santa Clara, Redding, and Palo Alto, and the Trinity Public Utility District (collectively, "TANC"). Two of the petitioners, TANC and NCPA, are concerned primarily with the treatment, after license transfer, of antitrust conditions in the current licenses.[4] The Committee has expressed interest in the financial qualifications of the future licensees, but supports PG&E's reorganization plan. CPUC vigorously opposes license transfer to the extent it proceeds according to PG&E's Plan. Pursuant to 10 C.F.R. § 2.1316, the NRC Staff is not a party to this proceeding.

Approximately three months after the published deadline, the County of San Luis Obispo ("County") submitted its intervention petition and request for a hearing. The County has expressed concern regarding both technical and financial qualifications of the transferees and E Trans, but has not raised any issues in the antitrust arena.

GTrans will also become indirect wholly-owned subsidiaries of PG&E Corporation, which will change its name. PG&E will retain most of the remaining assets and liabilities and will continue to conduct local electric and gas distribution operations and related customer services. After disaggregation of the businesses, PG&E Corporation will declare a dividend and distribute the common stock of PG&E to its public shareholders, thus separating PG&E from PG&E Corporation. PG&E expects that value realized will provide cash and increased debt capacity to enable it to repay creditors, restructure existing debt, and emerge from the bankruptcy. *See* "Answer of Pacific Gas and Electric Company to California Public Utilities Commission Petition for Leave to Intervene, Motion to Dismiss Application or, in the Alternative, Request for Stay of Proceedings, and Request for Subpart G Hearing," at 2-3 (Feb. 15, 2002).

[3]*See* 67 Fed. Reg. 2455 (Jan. 17, 2002).

[4]At our request the parties have submitted briefs regarding both the antitrust issue and developments in the bankruptcy proceeding that might affect pending motions to dismiss this license transfer proceeding or hold it in abeyance. *See* CLI-02-12, 55 NRC __ (Apr. 12, 2002).

Today we consider and decide the petitions to intervene and requests for hearing of CPUC, the Committee, and the County and various requests to dismiss or abate this license transfer proceeding.[5] For the reasons set forth below, we deny the intervention petitions of CPUC and the County, but grant those entities participant status in this license transfer proceeding. We also deny the Committee's petition and the pending motions to dismiss or suspend this proceeding.

II. DISCUSSION

A. Preliminary Procedural Matters

1. Motions to Suspend or Dismiss

Three of the four timely intervention petitions and the County's petition included requests to dismiss this proceeding or hold it in abeyance because of the parallel proceedings in the bankruptcy court and at FERC. Only the petition of the Committee omitted such a request. CPUC cited the uncertainty whether PG&E's Plan is lawful until the bankruptcy court renders a ruling on various questions of state law preemption and whether to permit the filing of CPUC's alternate plan of reorganization. NCPA sought abeyance of this proceeding only until the Plan is finalized for submission to the creditors and the bankruptcy court approves such submission. Since the transfer cannot take place without confirmation of the plan, NCPA suggested that the case before the Commission is not ripe for adjudication, for it rests on contingent future events that may not occur as anticipated, or may not occur at all. TANC emphasized the waste of resources in persisting with the license transfer adjudication because both the Federal Energy Regulatory Commission ("FERC") and the bankruptcy court need to approve PG&E's transfer plan and one of the petitioners (CPUC) is vigorously contesting the plan in both places.

To assist us in ruling on the requests to hold this proceeding in abeyance, we sought from the petitioners and the applicant briefs addressing the question, "Have recent filings and developments in PG&E's bankruptcy proceeding had any effect on the pending motions to hold this

[5] In a separate order we will consider the antitrust-based intervention petitions of TANC and NCPA.

license transfer proceeding in abeyance?"[6] The responses indicate (1) that the bankruptcy court has approved the disclosure statement for PG&E's Plan; (2) that the court heard objections to CPUC's alternate plan in early May; (3) that June 17, 2002 is the target date to send ballots to creditors regarding the two proffered plans of reorganization; (4) that confirmation hearings will probably occur in September, 2002; and (5) that a plan could be confirmed by the end of the calendar year. In short, the bankruptcy matter is progressing and there have been no developments that suggest that PG&E's Plan cannot be confirmed.

Those petitioners in favor of abeyance all offered kindred reasons for their position. NCPA believed that, before proceeding with the license transfer case, we should await an indication that PG&E's plan is more likely to be confirmed than CPUC's plan. CPUC asserts that, until a plan is approved by the bankruptcy court, we should hold this proceeding in abeyance because the threshold issue of whether the Diablo Canyon plants require a license transfer remains unresolved. As no license transfer is necessary under the CPUC plan, this proceeding could become moot. TANC still desires to suspend this proceeding and states that the situation is analogous to that in *Nine Mile Point*, where we did suspend a license transfer proceeding in view of contractual arrangements likely to render the proposed transfer moot in the near future.[7] PG&E and the Committee oppose holding the proceeding in abeyance.

Unlike *Nine Mile Point*, we do not here face imminent mootness, but merely the "common" situation of "multiforum" transfer reviews.[8] The Commission repeatedly has refused to suspend license transfer proceedings merely because related proceedings at the NRC, in state court, or in state or other federal agencies are pending.[9] "[I]t would be productive of little more than untoward

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[6]*See* CLI-02-12, 55 NRC at __, slip op. at 2.

[7]*See Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 342-44 (1999).

[8]*Id.* at 343.

[9]*See Indian Point 3*, CLI-00-22, 52 NRC at 288-90 (denying motions for stay pending

delay were each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval."[10] Our general policy is to expedite our adjudicatory proceedings, particularly in the time-sensitive license transfer area.[11] PG&E's bankruptcy case is moving forward in due course; it could yield a final decision late this year. We thus see no reason here to deviate from our usual practice of completing our license transfer reviews promptly despite the pendency of related matters elsewhere. Accordingly, we deny the pending motions to hold this proceeding in abeyance. However, we instruct all remaining petitioners and parties to inform the Commission promptly of any court or administrative decision that directly impacts, or renders moot, the instant proceeding.

2. Request for Subpart G Hearing[12]

CPUC has requested that we conduct this adjudicatory proceeding under 10 C.F.R. Part 2, Subpart G, rather than under the Subpart M procedures which normally apply to license transfer adjudications. Because of the complex nature of the legal, policy and factual issues it raises, CPUC asserts that the application of Subpart M, especially in cross examination and discovery, would not serve the purposes for which the rule was intended; *i.e.*, a full and fair hearing on the license transfer on an expedited basis.

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decisions by New York courts, Internal Revenue Service, FERC, and New York State Department of Environmental Conservation); *Indian Point 2*, CLI-01-8, 53 NRC 225, 228-30 (2001) (denying request to suspend proceeding until completion of *Indian Point 3* license transfer and decision on 10 C.F.R. § 2.206 enforcement petition); *Nine Mile Point*, CLI-99-30, 50 NRC at 343-44 (granting short suspension pending decisions on rights of first refusal, but denying further suspension until conclusion of New York Public Service Commission proceeding).

[10]*Nine Mile Point*, CLI-99-30, 50 NRC at 344 (*quoting Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974).

[11]*See* "Final Rule: Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,721-22 (Dec. 3, 1998); *see also Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998).

[12]NCPA has requested that we conduct this license transfer proceeding under 10 C.F.R. Part 2, Appendix A, Section X, Proceedings for the Consideration of Antitrust Aspects of Facility License Applications. We will consider that request in a later order.

Our regulations expressly prohibit a request for a Subpart G proceeding for a license transfer adjudication.[13] Recognizing this, CPUC invokes 10 C.F.R. § 2.1329, which authorizes the Commission to waive a rule when, "because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted." In addition to its "complex nature of the ... issues" argument, CPUC contends that the "matters in this license transfer are not strictly 'financial in nature' as contemplated in the promulgation of Subpart M."[14] We have denied requests for Subpart G hearings that petitioners have made on these same grounds in other license transfer proceedings.[15] Our Subpart M rules cover all license transfer issues:

> Our subpart M rules are intended to apply to more than just those cases presenting only financial issues. We expected when promulgating Subpart M that most issues would be financial ... However, we also predicted that Petitioners would raise other categories of issues as well (such as foreign ownership, technical qualifications, and appropriate critical staffing levels) ... For that reason, when promulgating Subpart M, we expressly declined to adopt [a commenter's] suggestion that we limit the scope of Subpart M proceedings to financial matters.[16]

We still consider this to be sound policy. Accordingly, we deny CPUC's request.

B. CPUC's Petition

To intervene as of right in a licensing proceeding, a petitioner must demonstrate standing; *i.e.*, that its "interest may be affected by the proceeding."[17] In a license transfer proceeding, the petition to intervene must also raise at least one admissible issue.[18] PG&E

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[13]*See* 10 C.F.R. § 2.1322(d); *Indian Point* 2, CLI-01-19, 54 NRC at 130, and references cited therein.

[14]Petition of the California Public Utilities Commission for Leave to Intervene, and Motion to Dismiss Application, or in the Alternative, Request for Stay of Proceedings, and Request for Subpart G Hearing Due to Special Circumstances," at 3 (Feb. 5, 2002) (hereinafter, "Petition").

[15]*See, e.g., Indian Point* 2, CLI-01-19, 54 NRC at 130; *Indian Point 3*, CLI-00-22, 52 NRC at 290-91 (2000); *Vermont Yankee*, CLI-00-20, 52 NRC at 162.

[16]*Indian Point 3*, CLI-00-22, 52 NRC at 290-91 (citation omitted).

[17]*See* AEA § 189a, 42 U.S.C. § 2239(a).

maintains in its response to CPUC's petition that CPUC has neither demonstrated its standing nor articulated an admissible issue. We agree. For the reasons set out in detail below, we deny CPUC's petition to intervene.

1. Standing of CPUC

To demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

(1) identify an interest in the proceeding by
(a) alleging a concrete and particularized injury (actual or threatened) that
(b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
(c) is likely to be redressed by a favorable decision, and
(d) lies arguably within the "zone of interests" protected by the governing statute(s).

[18] *See* 10 C.F.R. § 2.1306.

(2) specify the facts pertaining to that interest.[19]

"The burden of setting forth a clear and coherent argument for standing and intervention is on the petitioner."[20]

CPUC's petition says little about its standing. Without citing any California statutes, CPUC points to its responsibility for regulating electric corporations within the State of California and asserts that it has "a statutory mandate to represent the interests of electric consumers throughout California in proceedings before the Commission" and "currently exercises regulatory authority over DCPP."[21] It maintains that "these fundamental interests and responsibilities. . .are directly threatened by the proposed license transfer."[22] But CPUC provides no facts, or even legal argument, suggesting that it represents California citizens on nuclear safety issues, as opposed to electricity rate issues. The "zone of interests" test for standing in an NRC proceeding does not encompass economic harm that is not directly related to environmental or radiological harm.[23]

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[19]*See* 10 C.F.R. §§ 2.1306, 2.1308; *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000) and references cited therein.

[20]*Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999). *See U.S. Enrichment Corp.* (Paducah, KY), CLI-01-23, 54 NRC 267, 272 (2001) ("petitioners bear the burden to allege facts sufficient to establish standing").

[21]Petition at 4.

[22]*Id.*

[23]*See Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-6 (1976) (Zone of interests created by the AEA is avoidance of a threat to health and safety of the public as a result of radiological releases). *See also International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, NY), CLI-98-23, 48 NRC 259, 265 (1998) (rejecting standing for petitioners who asserted a bare economic injury, unlinked to any radiological harm); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, NM), CLI-98-11, 48 NRC 1, 9, 11 (1998), *aff'd sub nom. Envirocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999) (Purely competitive interests, unrelated to any radiological harm to itself, do not bring petitioner within zone of interests of AEA; fact that economic interest or motivation is involved will not preclude standing, but petitioner must also be threatened by environmental harm). In addition, the Commission has long held that ratepayer interests do not confer standing. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332 n. 4 (1983) *citing Portland General Elec. Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976).

The standing discussion in CPUC's petition, labeled "interests," demonstrates that the interests CPUC protects are economic in nature; *i.e.*, ratepayer interests. The nine or so pages of the "interests" discussion deal with PG&E's bankruptcy plan and submissions to FERC, CPUC's alternative reorganization plan, the preemption of California statutes sought by PG&E, and CPUC's motion to stay the NRC proceedings. The discussion contains only two references to public health and safety, the subject of the NRC's license transfer review. Both references are very general. First, CPUC states that its own alternative reorganization plan does not require the bankruptcy court or FERC to reject the application of century-old state regulatory statutes "critical to health, safety, and welfare of thirty million citizens."[24] Second, CPUC cites a case which held that the Bankruptcy Code does not preempt state statutes or regulations "intended to protect the public safety and welfare."[25] These bare mentions of health and safety cannot be used to establish standing where the essence of CPUC's concern is economics, not safety.[26]

CPUC's focus is on the alleged illegality of PG&E's bankruptcy Plan and unfairness of the power sale agreement ("PSA") on which the Plan is founded. The Plan requires preemption of certain California laws and, according to CPUC, would amount to a "regulatory jailbreak" -- PG&E's escape from CPUC and State rate regulation.[27] The preemption issue is before the bankruptcy court. CPUC's challenge to the fairness of the PSA is before FERC, an economic regulatory agency which considers rate-related, not safety-related issues.[28] This NRC license transfer

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[24]Petition at 7.

[25]*Id.* at 10.

[26]*Cf. Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

[27]*See* Petition at 5 and reference cited therein.

[28]The Federal Power Act, Subchapter II, 16 U.S.C. § 824 *et seq.*, gave FERC's predecessor, the Federal Power Commission, jurisdiction over the transmission of electric energy at wholesale in interstate commerce. The Act prohibits unreasonable rates with respect to any

proceeding is not an appropriate forum to resolve CPUC's economic controversy with PG&E. In short, CPUC's cursory standing submission fails to show an independent health and safety interest and fails to articulate a sufficient interest in economic matters *that have a potential to produce radiological harm.*[29]

CPUC does allude generally to safety in the separate "issues" portion of its petition.[30] But, as we have seen, CPUC's "interests" (*i.e.*, standing) discussion is essentially silent on health and safety. The Commission is entitled to take CPUC's standing claim at face value. We cannot be expected "to sift through the parties' pleadings to uncover and resolve arguments not made by the parties themselves."[31] In any event, as we explain below, even if we were willing to glean from the "issues" discussion enough information to grant standing to CPUC, we could not permit CPUC to intervene because it has not submitted an admissible issue. We turn to the admissibility issue next.

2. Admissibility of CPUC's Issues

Our rules specify that, to demonstrate that issues are admissible in a Subpart M proceeding, a petitioner must

> (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
> (2) demonstrate that those issues fall within the scope of the proceeding,
> (3) demonstrate that those issues are relevant to the findings necessary to a grant of the license transfer application,
> (4) show that a genuine dispute exists with the applicant regarding the issues, and
> (5) provide a concise statement of the alleged facts or expert opinions supporting the petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.[32]

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transmission or sale subject to FERC's jurisdiction. *See* 16 U.S.C. § 824d.

[29]*See* note 23, *supra*.

[30]*See* Petition at 21, 23.

[31]*See Zion Nuclear Power Station*, CLI-99-4, 49 NRC at 194.

[32]*See* 10 C.F.R. § 2.1306; *Indian Point 2*, CLI-01-19, 54 NRC at 133-34 (2001) and references cited therein.

All of CPUC's proposed issues are either immaterial to license transfer or too vague to define a genuine dispute with the applicant. Commission rules require articulation of detailed threshold issues to trigger an agency hearing.[33] Vague, unparticularized issues are impermissible.[34]

We turn now to the issues CPUC has proposed in this case and consider their admissibility under 10 C.F.R. § 2.1308. For convenience, we have treated issues in the four categories CPUC enumerated: financial qualifications issues, decommissioning funding, California's regulatory responsibilities, and public safety and welfare concerns.

a. Financial Qualifications Issues

CPUC avers generally that the proposed transferee is not financially qualified to be the NRC's licensee for DCPP.[35] CPUC claims that Gen's finances are "highly questionable" and it is "uncertain that Gen will have the resources to carry out the critical plant maintenance and public safety-related functions that will enable [Diablo Canyon] to meet the Commission's rigorous regulatory requirements."[36]

According to CPUC, it is "imprudent in the extreme to license untested, financially unstable entities" like Gen to own and operate a commercial nuclear reactor.[37] CPUC argues that FERC cannot approve the rates in the proposed PSA which underpins PG&E's bankruptcy reorganization plan. If, as CPUC urges, FERC permits the collection of only cost-based rates for the power DCPP produces, rather than the allegedly "unjust and unreasonable" rates proposed in the Plan, the

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[33]*See Indian Point* 3, CLI-00-22, 52 NRC at 295; *Vermont Yankee*, CLI-00-20, 52 NRC at 164.

[34]*See Indian Point* 3, CLI-00-22, 52 NRC at 295.

[35]*See* 10 C.F.R. § 50.33(f)(2)-(3).

[36]Petition at 21.

[37]*Id.*

"house of cards on which PG&E's applications ... are based, will quickly collapse. *In such event*, Gen will not be a financially viable entity" and thus not qualified to hold the DCPP licenses.[38]

The stressed phrase in the previous sentence is the key to our rejection of this issue. Before us is a financial plan -- albeit contingent on FERC and bankruptcy court approval -- which includes a long-term power sale contract at specified rates. Although CPUC contests this characterization, the rates, according to the applicant, are market-based; moreover, the rates are currently before FERC, the responsible agency, for approval or rejection.[39] *CPUC has not argued that the transferee's funding would be insufficient if FERC and the bankruptcy court approve the proffered PSA.* For example, CPUC does not contend that the estimated capacity factors or cost estimates are unrealistic, that revenues under the PSA are insufficient for safe operation of the plants, that the PSA would be unenforceable, or that monies earned by the transferee would be

[38] *Id.* at 22-3 (emphasis added).

[39] CPUC says that the proposed rates are fundamentally unreasonable and unjust to California retail customers who will foot the bill. To support its proposed issues before the NRC, CPUC relies primarily on the "declaration" of David R. Effross, a public utilities regulatory analyst employed by CPUC, and its filings before FERC and the bankruptcy court. (Applicants have not challenged Mr. Effross' expertise.) PG&E's benchmark analysis, presented to FERC, misses the mark, according to the declaration of Mr. Effross. The PSA, he says, must be evaluated in comparison with otherwise applicable rates -- the proper comparison is with utility-retained generation (such as in the alternative reorganization plan CPUC has formulated for PG&E to emerge from bankruptcy without disposing of its electric generation assets.) Rates determined on a traditional cost-of-service basis are approximately one-half of those in the PG&E plan. According to Mr. Effross, PG&E's benchmark analysis in support of the PSA contains several defects, including the following: (1) PG&E uses a comparison period in which the California wholesale electricity markets exhibited extreme dysfunction; (2) PG&E uses comparison contracts the negotiation of which PG&E previously contended was subject to the exercise of market power; (3) PG&E used a regional market instead of the relevant national market; (4) negotiation of the comparison contracts took place in the 18 months during which the California market was at its most dysfunctional; (5) the comparison group contracts are not comparable in either size or technology; (6) in addition to the fixed high revenues it will receive for the next 12 years, Gen will receive PG&E's electric generation assets for a fraction of their value; and (7) PG&E's argument that a supplier of 7100 MW of generation in northern California does not have market power "fails the straight face test." *See* "Declaration of David R. Effross," Ex. G to Petition (Feb. 5, 2002) at ¶¶ 12, 13, 21, 24, 27, 28, 30, 32. Issues like these plainly are for FERC, not the NRC, to decide.

uncollectible from the buyer. These are the kinds of issues the NRC typically considers in license transfer cases.[40]

CPUC, though, essentially challenges the economic reasonableness and fairness of the PSA. Indeed, in its reply to PG&E's answer in our proceeding, CPUC characterizes its financial qualifications argument succinctly as a FERC fairness issue: "[T]he proposed transferees will not be financially able to meet their basic health and safety-related obligations without approval by the Federal Energy Regulatory Commission of illegal, unjust and unreasonable rates."[41] This issue statement plainly illustrates why CPUC's financial concerns are outside NRC's bailiwick and not relevant to this license transfer proceeding. NRC's role in evaluation of the transferee's financial qualifications is to decide whether the Plan as proposed, including the PSA, will meet our financial qualifications regulations. *CPUC has made no allegation that the Plan will not do so.* CPUC asks, in essence, for a revision of the PSA, a matter not within NRC's jurisdiction.[42] FERC is the appropriate forum for addressing this issue and the matter is currently pending before that agency.[43]

PG&E's license transfer application includes, as required by 10 C.F.R. § 50.33(f)(2), data regarding costs and revenues for the first five years of operation after the requested license transfer. The fact that these projections are grounded on a contested PSA does not defeat

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[40] *See, e.g., Indian Point 2*, CLI-01-19, 54 NRC at 135-38.

[41] "Reply of the California Public Utilities Commission ("CPUC") to the Answer of Pacific Gas & Electric Company to the CPUC's Petition for Leave to Intervene, Motion to Dismiss Application, Etc." at 7 (Feb. 20, 2002).

[42] *See Indian Point 2*, CLI-01-19, 54 NRC at 139-40.

[43] Mr. Effross asserts that Gen's finances are "highly questionable." *See* "Declaration of David R. Effross," Ex. G to Petition (Feb. 5, 2002) at ¶ 5. However, his analysis centers on persuading FERC that (1) it should allow Gen to collect only cost-based rates rather than market-based rates for DCPP and (2) that the benchmark analysis PG&E performed to justify its requested market-based rates is severely flawed. *See* note 39, *supra*. His declaration does not concretely challenge PG&E's financial qualifications in the event that FERC and the bankruptcy court approve, respectively, the PSA and the Plan.

PG&E's position, for the NRC Staff can condition the license transfer on any portion of the PSA that is essential to the demonstration of financial qualifications of the proposed license transferee. Then, should FERC not approve the financial foundation of the license transfer application, the transfer will not occur.

b. Decommissioning Funding

A reactor licensee must provide assurance of adequate resources to fund the decommissioning of a nuclear facility by one of the methods described in 10 C.F.R. § 50.75(e).[44] PG&E currently has in place a Nuclear Decommissioning Trust, consisting of monies set aside for the decommissioning of the two Diablo Canyon units and the idle Humboldt Bay Nuclear Unit No. 3. PG&E desires to transfer to a newly created holding company, Diablo Canyon LLC, the beneficial interest in those portions of the decommissioning trust that are associated with the DCPP. CPUC maintains that since PG&E does not have the legal authority to make this transfer, the proposed licensee will have no decommissioning funding assurance, and, therefore, the Commission cannot approve the requested license transfer.[45]

CPUC also argues that the bankruptcy court cannot require CPUC to authorize a transfer, as PG&E has requested. (This issue is now before the bankruptcy court for consideration.) Further, the funds are not transferable, except on sale of a plant, and then only with prior approval of CPUC. According to CPUC, the trust monies cannot be assigned without its approval, and it will not give that approval because it believes that assignment is not in the public interest.[46]

In addition, CPUC argues that since the trust also provides for decommissioning of the Humboldt Bay unit, as well as the two Diablo Canyon units, there are practical difficulties and

[44] *See* 10 C.F.R. § 50.75(a). The regulations also specify the minimum amount of funds necessary to demonstrate reasonable assurance of funds for decommissioning. *See* 10 C.F.R. § 50.75(c).

[45] *See* Petition at 12-13.

[46] *See* Petition at 13.

potential inequities in allocating the trust among the three nuclear units. The trust documents themselves do not provide for such an allocation. CPUC asserts that a detailed study of likely decommissioning costs is needed to apportion the trust monies. Otherwise, CPUC says, it is likely that a facility will have inadequate funds to decommission properly, resulting in impact on ratepayers and potential health, safety, and welfare concerns.

When we examine CPUC's concerns relating to decommissioning funding, we find no litigable issue. CPUC's argument focuses principally on whether PG&E should be permitted to transfer the beneficial interests in the trust fund to a non-CPUC regulated entity and who has the authority to permit such transfers.[47] As with its financial qualifications issue, CPUC does not assert that, if the license transfer application were approved as proposed by PG&E, the transferee would not meet the Commission's decommissioning funding requirements. CPUC's concerns about maintaining its regulatory authority over the decommissioning trusts are not within the NRC's area of expertise and are more appropriately resolved by the bankruptcy court and FERC. Nor are they issues that the NRC need decide in considering the transfer application. Licensee's application proposes to transfer the beneficial interests in the trust fund to Diablo Canyon LLC. Thus the Staff's review is based on the assumption that this transfer will take place. The NRC can condition the license transfer on PG&E's lawful transfer of the decommissioning funds (through the bankruptcy proceeding or otherwise) and segregation from the trust of the proper decommissioning funding amount, as described in our regulations.

CPUC's request for a detailed study of the likely actual costs of decommissioning amounts to an impermissible challenge to a generic decision made by the Commission in its

[47] *See* Petition at 15-19. PG&E has asked the bankruptcy court to compel CPUC to approve the transfer. *Id.* at 14; PG&E's Answer at 17. PG&E is also seeking approval from FERC of the transfer of those portions of the trust under FERC jurisdiction. *Id.*

decommissioning rulemaking not to require site-specific cost estimates.[48] We do not permit attacks on our regulations in a licensing proceeding, absent a proper request for a waiver of a regulation, pursuant to 10 C.F.R. § 2.1329.[49] Absent such a waiver, a showing of compliance with 10 C.F.R. § 50.75 conclusively demonstrates sufficient assurance of decommissioning funding.[50] We therefore decline to admit this aspect of CPUC's decommissioning funding issue.

We turn briefly to another facet of CPUC's decommissioning funding issue -- namely, the allegation that assignment of the trusts' assets pursuant to the PG&E Plan, and, presumably, the associated license transfers themselves, would not be in the "public interest."[51] The public interest is not a suitable standard for an NRC hearing:

> This issue is too broad and vague to be suitable for adjudication. Moreover, NRC's mission is solely to protect the public health and safety. It is not to make general judgments as to what is or is not otherwise in the public interest -- other agencies, such as the Federal Energy Regulatory Commission and state public service commissions, are charged with that responsibility.[52]

Accordingly, we decline to admit the public interest aspects of the decommissioning funding issue.

c. California's Regulatory Responsibilities

CPUC asserts that transfer of the DCPP licenses would reduce California's regulatory responsibilities over nuclear power to the detriment of the public health, safety and welfare of the

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[48]*See Indian Point 2*, CLI-01-19, 54 NRC at 143; *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217, n.8 (1999); *Indian Point 3*, CLI-01-19, 52 NRC at 303; *Vermont Yankee*, CLI-00-20, 52 NRC at 165-6.

[49]Based on its argument regarding conducting these proceedings under 10 C.F.R. Part 2, Subpart G, we conclude that CPUC is aware of the requirements of 10 C.F.R. § 2.1329. *See* Section II.A.2 of this order, *supra*.

[50]*See Indian Point 2*, CLI-01-19, 54 NRC at 142; *Seabrook*, CLI-99-6, 49 NRC at 217 (1999). PG&E proposes to meet § 50.75 by prepaying, by means of existing trust funds, an amount sufficient to cover the decommissioning costs at the expected time of termination of operation. *See* 10 C.F.R. § 50.75(e)(1)(i). Prepayment is the strongest and most reliable of the funding devices described in 10 C.F.R. § 50.75(e)(1). *See Seabrook*, CLI-99-6, 49 NRC at 218.

[51]*See* Petition at 17-19.

[52]*Indian Point 2*, CLI-01-19, 54 NRC at 149.

citizens of California. But issues regarding preemption of certain California laws must be resolved by the bankruptcy court, for PG&E's Plan requires either approvals by CPUC that it is loath to give or a court decision to allow PG&E to implement its plan notwithstanding CPUC's opposition. These are not matters for the NRC.

CPUC cites numerous state interests in regulating utilities that PG&E is seeking to "trump" through bankruptcy court approval of its Plan and FERC approval of the rates proposed in the PSA. These include (1) a basic interest in regulating public utilities (which would be thwarted by a transfer of the Diablo Canyon licenses to an unregulated limited liability company); (2) an interest in ensuring universal service and fair and just utility rates; (3) an interest in protecting financial integrity and dedication of service; (4) an interest in preventing loss of in-state generation facilities; (5) an interest in preventing, through affiliate transaction rules, improper inter-company transactions; (6) an interest in preventing misuse of the holding company structure; and (7) an interest in requiring utilities to share gains on sale with ratepayers. According to CPUC, state regulation has significant advantages over federal regulation.

We decline to admit this issue for two reasons. First, NRC approval of the license transfers would not alter the regulatory role of the CPUC. It is true that the bankruptcy court and/or FERC might make decisions preliminary to the license transfers that would alter the CPUC's role. But the Commission's possible endorsement of an application that is based on receiving those preliminary approvals is obviously not the root of CPUC's apparent discomfiture. Second, there is no basis for CPUC's argument that its oversight is necessary for the protection of public health and safety with respect to radiological risks. This role is reserved to the NRC.[53]

d. Public Safety and Welfare Concerns

[53]*See Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm.*, 461 U.S. 190, 205-13 (1983) (Federal government maintains complete control of safety and "nuclear" aspects of energy generation, whereas states exercise their traditional authority over economic questions such as ratemaking and the need for additional generating capacity).

CPUC alleges generally that the public safety and welfare are threatened by the proposed license transfers. Through deprivation of concurrent state jurisdiction over an NRC-regulated facility, says CPUC, important safeguards to public health and safety will be lost.[54] CPUC's generalized complaint that public health and safety will suffer in the absence of concurrent state jurisdiction over an NRC-regulated facility cites no safety concern that is directly connected to the proposed license transfers. To support this issue, CPUC offers only speculation and suspicions about several marginally related topics. As an example, CPUC refers to the threat of terrorist attacks, but such attacks are neither caused by nor result from the proposed license transfers. Plant security is an ongoing operational issue and is decidedly outside the scope of a license transfer proceeding.[55]

CPUC also contends that the transferee "will *certainly* attempt to reduce operating expenses, which, in turn, could *very conceivably* affect plant safety and reliability, and lead to disaster."[56] The challenge regarding the cost-cutting that CPUC predicts is insufficient, as it is mere guess, unrooted in factual information, and it does not specifically dispute any information in the license transfer application.[57] CPUC has provided no support other than conjecture for its thesis that the transferee will subordinate safety to profits. Moreover, if the plants' safety becomes compromised, our enforcement and investigation programs are sufficient to identify the problem and prescribe corrective action (including, in extreme cases, plant shutdown).[58]

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[54]This issue overlaps significantly with the issue described immediately above (in Section II.B.2.c.)

[55]In the aftermath of the September 11, 2001, attacks on New York City and the Pentagon, the NRC has undertaken a comprehensive review of all aspects of security at nuclear facilities. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 378-9 (2001).

[56]Petition at 54 (emphasis added).

[57]*See Dominion Nuclear Connecticut Inc.*, CLI-01-24, 54 NRC at 361 (2001).

[58]*See Oyster Creek*, CLI-00-6, 51 NRC at 209.

As another example, CPUC says that it can "safely presume" that the transferee will try to downsize its workforce, follow the "industry trend" and not hire the full complement of staff from the current owner, and probably increase its use of overtime. According to CPUC, "[s]afety and reliability can only be negatively affected by the *likely* implementation of such policies."[59] But PG&E's license application itself states that, after license transfer, there will be no operational changes and essentially no staff or management changes. CPUC has not provided a sound basis to dispute the information provided in the application.[60] Accordingly, we decline to admit this issue.

We also note that the NRC has regulations requiring specific staffing levels and qualifications for the key positions necessary to operate a plant safely.[61] We will not assume that licensees will contravene our regulations.[62] And CPUC's reference to the purported "industry trend" on staffing after license transfers is a bare assertion, without supporting documentation. Moreover, we are reviewing the proposed Diablo Canyon license transfer in this proceeding, not the entire nuclear power generation industry.

Further, CPUC distrusts the relationship between the transferee and its parent, and alleges that profits will flow upward to the parent, which is isolated from responsibility for plant operation and safety.[63] CPUC asserts that "Diablo, as a nested LLC, will provide a source of profit to Parent in good times, but will be forced to stand on its own when profits go negative . . . the LLC structure

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[59]Petition at 55 (emphasis added).

[60]*See Oyster Creek*, CLI-00-6, 51 NRC at 209; *Dominion Nuclear Connecticut, Inc.*, CLI-01-24, 54 NRC at 363 (generalized challenges regarding cost-cutting are insufficient without specifically disputing the information in the application).

[61]*See* 10 C.F.R. § 50.54(m).

[62]*See Indian Point 3*, CLI-00-22, 52 NRC at 313; *Oyster Creek*, CLI-00-6, 51 NRC at 207.

[63]*See* Petition at 54-55, 56.

will allow the holding company to bankrupt Diablo and avoid financial responsibility."[64] To the extent that CPUC is raising an issue concerning Diablo's financial qualifications to be a licensee, CPUC fails to provide any specific challenge to the financial information provided in the transfer application. As such, this issue is inadmissible. Further, to the extent that CPUC is raising a challenge to the fact that Diablo will be a limited liability company, we note that the Commission has consistently ruled that limited liability companies are not precluded from owning and operating nuclear power plants.[65] Vague allegations about the "character" of the transferee and its business relationships are insufficient to support admissibility of this issue.[66]

Lastly, CPUC states that the proposed license transfers will signal the "death knell" of the Diablo Canyon Independent Safety Committee. CPUC's concerns about the possible dissolution of the Diablo Canyon Independent Safety Committee -- which does not operate under the auspices of the NRC -- are beyond the scope of NRC's authority. Thus, this issue is not admissible.

e. Summary

In summary, for the reasons given above, we find that CPUC has not submitted any admissible issues. Every issue that CPUC has proffered is either too broad and vague for our consideration or simply lies outside the scope of an NRC license transfer review. Ratepayers' economic interests, without specific ties to radiological risk, are not cognizable in an NRC license transfer proceeding.

3. Status of CPUC

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[64] *Id.* at 56.

[65] *See Vermont* Yankee, CLI-00-20, 52 NRC at 173; *Oyster Creek*, CLI-00-6, 51 NRC at 208 (limited liability companies are no different from corporations in that both are structured to limit the liability of their shareholders); *Northern States Power Co.* (Monticello Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 57 (2000).

[66] *See Dominion Nuclear Connecticut, Inc.*, CLI-01-24, 54 NRC at 365-7.

Although CPUC has raised no issues within the scope of a license transfer review with the level of specificity required under Subpart M,[67] the Commission "has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc."[68] We believe that the CPUC, as a California state agency representing the interests of consumers of electricity, might provide us with useful insights. We therefore permit the CPUC to participate in this proceeding as an agency of an interested State, in a manner analogous to that described in 10 C.F.R. § 2.715(c),[69] if we grant a hearing after considering the still-pending petitions of NCPA and TANC or if timely filed and admissible late issues arise. In this Subpart M proceeding, participation may include introduction of evidence on admitted issues, submitting proposed questions to the presiding officer, and filing proposed findings.

C. Committee's Petition

In its petition, the Committee has recited its interests in this proceeding, but has not even attempted to formulate an admissible issue for our consideration. Indeed, the Committee, which has entered into an agreement with PG&E in which the Committee pledged to support the Plan, has no dispute with the applicant.

The gist of the Committee's petition is:

> As the representative of the collective interests of PG&E's unsecured creditors, the Committee has an interest in ensuring that [the Diablo Canyon power plants'] operating licenses are transferred to a financially capable licensee that has all the necessary qualifications to continue to operate [the power plants] in a safe, reliable and efficient manner, particularly in light of the fact that approximately 40% of the consideration to be received ... by unsecured creditors under the [reorganization plan] will be in the form of long-term notes of at least 10 years in duration (including long-term notes in [one of the transferees]). The Committee submits that it is entitled to intervene in this proceeding as a matter of right because its interests in

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[67] *See* 10 C.F.R. § 2.1306(b)(2)(iv).

[68] *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 344 (1999); *Indian Point 3*, CLI-00-22, 52 NRC at 295.

[69] *Cf.* 10 C.F.R. § 2.715(c). In proceedings conducted under 10 C.F.R. Part 2, Subpart G, the presiding officer will afford representatives of an interested State, county, or agencies thereof a reasonable opportunity to participate.

> ensuring the financial capability of the transferee could be directly impacted if the license transfers adversely affect health and safety.[70]

Although the Committee alludes generally to health and safety considerations, it points to no likely adverse effects of the proposed license transfers. In short, it does not challenge any part of the application. Accordingly, we deny the Committee's petition to intervene without reaching the question of its standing.

The Committee has requested that we exercise our power to allow discretionary intervention. Our policy is to allow such discretionary intervention for a petitioner who is not entitled to intervention as a matter of right but who may nevertheless make some contribution to the proceeding. We have long permitted such intervention for petitioners who lack standing and we have set out factors bearing on the exercise of this discretion.[71] We have never, however, endorsed this practice for petitioners who do not specify any issues of concern to them. As opined by a Licensing Board 20 years ago, we did not intend that a petitioner should be entitled to discretionary intervention without an issue of its own worthy of exploration in an adjudication.[72] Accordingly, we deny the Committee discretionary intervention in this proceeding. Nevertheless, we wish to point out that there are other means by which the Committee can contribute to this proceeding if we grant a hearing; specifically, by serving as witnesses for other parties or by *amicus* filings at appropriate times.[73]

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[70] "Petition to Intervene of the Official Committee of Unsecured Creditors of Pacific Gas and Electric Company," at 4 (Feb. 6, 2002).

[71] *See Pebble Springs*, CLI-76-27, 4 NRC at 614-17 (1976) (Answering in the affirmative a certified question whether intervention may be permitted as a matter of discretion to petitioners who lack standing to intervene in a proceeding as a matter of right); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 177-78 (1998), *aff'd* CLI-98-13, 48 NRC 26, 34-35 (1998).

[72] *See Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 194 (1982).

[73] *See Private Fuel Storage*, CLI-98-13, 48 NRC at 35.

D. The County's Petition

We turn finally to the County's late-filed intervention petition. The County undoubtedly has governmental standing.[74] As the Diablo Canyon nuclear units are located within its boundaries, the County, as it points out, has a vital public safety interest in the plants' safe operation and eventual decommissioning. If the licensee is not financially qualified, unsafe conditions could threaten the health and safety of the County's citizens. The County's position is analogous to that of an individual living or working within a few miles of the plant.[75] Nevertheless, we deny the County's intervention petition, as the County has not advanced a legitimate reason for the tardy filing of its petition.

Our Subpart M regulations provide that untimely intervention petitions may be denied unless the petitioner establishes good cause for failure to file on time.[76] In addition to good cause, 10 C.F.R. § 2.1308(b) provides that, in reviewing a late petition, the Commission will consider "(1) The availability of other means by which the ... petitioner's interest will be protected or represented by other participants in a hearing; and (2) The extent to which the issues will be broadened or final action on the application delayed."[77] However, good cause is the most important element of our late-filing standards.[78]

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[74]PG&E does not contest the County's standing in this proceeding.

[75]*See Indian Point 3*, CLI-01-19, 54 NRC at 295; *Vermont Yankee*, CLI-00-22, 52 NRC at 164.

[76]*See* 10 C.F.R. § 2.1308(b); *Seabrook*, CLI-99-6, 49 NRC at 222-23 (denying late-filed intervention petition alleging failure to read regulations carefully as reason for tardiness).

[77]10 C.F.R. § 2.1308(b)(1)-(2).

[78]*See Power Authority of N. Y.* (James A FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 515 (2001). *Cf.* 10 C.F.R. § 2.714(a) for 10 C.F.R. Part 2, Subpart G proceedings and *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1), LBP-91-38, 34 NRC 229, 246-47 (1991); *aff'd in part on other grounds and appeal denied*, CLI-92-11, 36 NRC 47 (1992).

The County says that the trigger point for its untimely filing was a bankruptcy court decision permitting CPUC to file an alternate plan of reorganization that is distinctly different from PG&E's Plan. The County asserts that the new "regulatory" developments governing a proceeding amount to "good cause" justifying late intervention. To support its position, the County cites *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980). But that case is inapposite. In *Zimmer*, the Licensing Board considered a situation where the NRC's criteria for emergency planning had undergone vast changes since the beginning of the proceeding, and the scope of relief that the Commission could consider had expanded accordingly. In other words, the emergency planning questions at issue in *Zimmer* had changed materially. Here, by contrast, there has been no change in the PG&E license transfer application. It is impossible to see how CPUC's submission of a competing bankruptcy plan changes the license transfer plan before us.

What the County seemingly ignores is that no license transfer at all will be needed if the bankruptcy court approves CPUC's plan of reorganization. The critical -- and unchanged -- fact is that PG&E's license transfer application at the NRC is still founded on its own Plan, which is independent of the new development in the bankruptcy case. Moreover, nothing in the County's petition to intervene depends on the CPUC plan; all of the County's objections are associated with PG&E's license transfer application, which has been before the Commission for many months. Recent developments in the bankruptcy proceeding, while new to the bankruptcy case, simply do not constitute *new information related to the Diablo Canyon license transfer application.*[79] Thus, the County has not established good cause -- or, indeed, any cause -- for untimely presentation of its issues, all of which the County could have filed long ago in a timely petition based on PG&E's application, which incorporated the Plan the County opposes.[80]

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[79]We note also that changes in the bankruptcy case are not "regulatory" developments, the basis of the Licensing Board's holding in *Zimmer.*

[80]In its reply to PG&E's answer to the County's intervention petition, the County adds that PG&E's Plan has undergone significant revision; however, the County describes neither the nature of the changes nor their significance. *See* Reply at 7. The County does not illuminate how these

In the absence of good cause for its late filing, the County must show strong countervailing reasons that override the lack of good cause.[81] But the County has not provided such reasons. The other Subpart M factors -- the factor relating to the broadening of issues or the delaying of final action and the factor relating to the adequacy of existing participants to represent the petitioner's interests -- cut in opposite directions, as they frequently do. The issues would be broadened by the County's participation, possibly resulting in a delay of the final action by lengthening any potential hearing. On the other hand, the County's interests, essentially the same as CPUC's, would not be represented at the hearing because we have rejected CPUC's intervention petition.[82] The County, in any event, raises no litigable issues. General concerns about Gen's financial viability and about ETrans' financial ability to provide offsite power at Diablo Canyon do not suffice for intervention.[83] We will, however, refer the County's petition to the NRC

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changes justify its tardy filing and we are not willing to guess. The County also tries to justify its late attempt to intervene by speculating that the bankruptcy court *could* adopt a modified plan, different from either of the two pending plans. If that happens, though, and material alterations in PG&E's transfer application result, the County is free to submit late-filed issues at the appropriate time.

[81]*See Seabrook*, CLI-99-6, 49 NRC at 223.

[82]The two timely intervention petitions we do not decide today, NCPA's and TANC's, primarily involve antitrust issues.

[83]The County contradicts statements (regarding, for example, cost and revenue projections, ability to weather financially a 6-month outage, and ability to fund a planned independent spent fuel storage installation) that PG&E made in its license transfer application, but provides no foundation for its opposition. The County merely states that, in the interest of saving time, it has not had its experts prepare supporting affidavits, but its experts allegedly have performed a review of the application and support the County's issues. *See* "Petition of the County of San Luis Obispo for Leave to Intervene and Request for Hearing" at 17, note 4 (May 10, 2002). In its Reply, the County continues to insist that it will bring the "appropriate expertise" to bear with respect to its contentions "at the appropriate time." *See* Reply at 13. The appropriate time has come and gone. A late petitioner "should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 166, and references cited therein. "Vague assertions regarding petitioner's ability or resources ... are insufficient." *Id.* When an applicant makes a statement that, for example, it is financially qualified to be the licensee and provides the required 5-year cost and revenue projections, it is insufficient for an intervention petitioner to state, without more, that the applicant is not financially qualified. That is essentially what the County does in this case.

Staff as comments, pursuant to 10 C.F.R. § 2.1305. We direct the Staff to consider whether the County's comments call into question the proposed license transferees' ability to operate the Diablo Canyon power plants safely.[84]

In summary, besides having no tenable cause for its delay in filing an intervention petition, the County has provided no admissible issues. Accordingly, we deny the County's untimely petition. For reasons similar to those given above, we afford the County, like CPUC, participant status if we grant a hearing later in this proceeding.

III. CONCLUSION

For the reasons set forth above, the Commission (1) *denies* CPUC's petition to intervene and request for hearing; (2) *denies* the Committee's petition to intervene and alternative request for discretionary intervention; (3) *denies* the County's late-filed petition to intervene; (4) *denies* CPUC's motion that any hearing be conducted under 10 C.F.R. Part 2, Subpart G; (5) *denies* all motions to abate or dismiss this proceeding; (6) *directs* the remaining petitioners and parties to inform the Commission promptly of any court or administrative decision that directly impacts this proceeding; (7) *reserves* ruling on the remaining petitions to intervene; (8) *permits* CPUC and the County to participate as governmental entities if we grant a hearing in this proceeding; and (9) *refers* the petitions of the County and CPUC to the NRC Staff as comments for appropriate consideration.

IT IS SO ORDERED.

For the Commission

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[84]Likewise, we refer CPUC's petition to the Staff, with the same instructions for its consideration. *See Duquesne Light Co.* (Beaver Valley Power Station, Units 1 and 2), CLI-99-23, 50 NRC 21, 22 (1999); CLI-99-25, 50 NRC 224, 226 (1999).

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 25th day of June, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275/323-LT
	)	
(Diablo Canyon Power Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-16) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 25th day of June 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-02-23

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of	Docket No. 72-26-ISFSI
PACIFIC GAS AND ELECTRIC CO.	ASLBP No. 02-801-01-ISFSI
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)	December 2, 2002

MEMORANDUM AND ORDER
(Ruling on Standing and Contentions of 10 C.F.R. § 2.714 Petitioners and Admission of 10 C.F.R. § 2.715(c) Interested Governmental Entities and Their Issues)

Pending before the Licensing Board are various requests and petitions filed in connection with the December 21, 2001 application of Pacific Gas and Electric Company (PG&E) under 10 C.F.R. Part 72 for permission to construct and operate an independent spent fuel storage installation (ISFSI) at its Diablo Canyon Power Plant (DCPP) site in San Luis Obispo, California. Responding to an April 2002 notice of opportunity for a hearing, see 67 Fed. Reg. 19,600 (Apr. 22, 2002), various petitioners, including the San Luis Obispo Mothers for Peace (SLOMFP, which by consent is acting as a lead petitioner, the Avila Valley Advisory Council (AVAC), Peg Pinard, and nine other organizations (hereinafter referred to collectively as SLOMFP), have filed timely requests for hearing and petitions to intervene in accordance with 10 C.F.R. § 2.714 that, as supplemented, seek to interpose various joint contentions challenging the application. In addition, San Luis Obispo County, California (SLOC), the Port San Luis Harbor District (PSLHD), the California Energy Commission (CEC), the Diablo Canyon Independent Safety Committee (DCISC), and the Avila Beach Community Services District

(ABCSD) have filed requests to participate in any hearing as interested governmental entities in accordance with 10 C.F.R. § 2.715(c) and, in the case of SLOC and PSLHD, proffered particular issues they wish to have litigated in this proceeding. For its part, PG&E opposes (1) the intervention of various of the section 2.714 petitioners as lacking standing and of all the petitioners for failing to submit a litigable contention; (2) the section 2.715(c) participation of DCISC; and (3) the admissibility of the SLOC and PSLHD issues. On the other hand, the NRC staff favors (1) granting SLOMFP and the other section 2.714 petitioners party status because they have standing and have filed admissible contentions relating to PG&E's financial qualifications to operate its proposed ISFSI facility; and (2) affording section 2.715(c) interested governmental entity status to all those seeking that designation, albeit without admitting the SLOC and PSLHD issues.

For the reasons stated below, although finding that some of the section 2.714 petitioners lack standing, we conclude that the remainder not only fulfill that jurisprudential requirement, but also have set forth one admissible contention -- relating to PG&E's current financial qualifications in light of its pending bankruptcy -- so as to warrant admission as parties, with SLOMFP as the lead intervenor. Further, we find that, with the exception of DCISC, section 2.715(c) interested government entity status should be afforded to those requesting that designation, but that the SLOC and PSLHD-proffered issues are dismissed for failing to meet the section 2.714 standards governing contention admissibility.

I. BACKGROUND

A. PG&E ISFSI Application and the Resulting Hearing Requests/Intervention Petitions

The object of the various pending section 2.714 hearing petitions and section 2.715(c) participation requests is the December 2001 application of PG&E for a twenty-year 10 C.F.R. Part 72 license that would enable it to build and utilize an ISFSI at which it can store all of the spent fuel and associated nonfuel hardware resulting from the operation of Units 1 and 2 at its DCPP facility over the term of the current operating licenses, which expire in 2021 and 2025, respectively. See [PG&E], [DCPP ISFSI] License Application ¶ 3.0, at 7-8 (Dec. 21, 2001) (ADAMS Accession No. ML020180153) [hereinafter Application]. Included with the application were a safety analysis report (SAR) and an environmental report (ER). The total spent fuel storage design capacity of the proposed dry cask storage facility is 4400 spent fuel assemblies, or up to 140 casks (i.e., 138 casks with two spare locations). See id. at 8.

As was noted above, the staff's April 2002 notice indicating this application was being docketed and offering an opportunity for a hearing regarding its contents evoked a number of timely requests for hearings and petitions to intervene in accordance with 10 C.F.R. § 2.714(a).[1] In its answer to the various filings submitted by the petitioners, the staff asserted that SLOMFP and all nine other organizations that initially filed a joint petition, but not Ms. Pinard and AVAC,

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[1] See Letter from Lorraine Kitman to Nuclear Regulatory Commission (May 8, 2002); Request for Hearing and Petition of San Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council for Leave to Intervene and Request for Hearing (May 22, 2002) [hereinafter Pinard/AVAC Petition]; Request for Hearing and Petition for Leave to Intervene of San Luis Obispo Mothers for Peace, et al. (May 22, 2002) [hereinafter SLOMFP Petition].

Relative to the Kitman petition referenced above, by means of an amended hearing request the Board subsequently was informed that, rather than participating as an independent party, petitioner Lorraine Kitman would take part in this proceeding in her capacity as a SLOMFP member. See Petitioners' Amended Hearing Request and Petition to Intervene (July 8, 2002) at 1 [hereinafter Pinard/AVAC Amended Petition]; see also LBP-02-15, 56 NRC __, __ n.2 (slip op. at 3 n.2) (July 15, 2002). As a consequence, we dismiss her petition.

had satisfactorily demonstrated their standing to intervene. See NRC Staff's Response to Requests for Hearing and Petitions to Intervene Filed by [Kitman, SLOMFP, Pinard, and AVAC] (May 30, 2002) at 6-9 [hereinafter Staff Response to SLOMFP Petition]. While taking the same position with respect to Ms. Pinard and AVAC, PG&E, did not agree with the staff's assertion that SLOMFP and the other nine petitioners had met the Commission's requirements for standing to intervene. Although PG&E in its initial answers did not challenge the standing of SLOMFP, the Santa Lucia Chapter of the Sierra Club (SLCSC), and San Luis Obispo Cancer Action Now (SLOCAN), it argued that the Cambria Legal Defense Fund (CLDF), the Central Coast Peace and Environmental Council (CCPEC), the Environmental Center of San Luis Obispo (ECSLO), Nuclear Age Peace Foundation (NAPF), the San Luis Obispo Chapter of Grandmothers for Peace International (SLOCGPI), Santa Margarita Area Residents Together (SMART), and the Ventura County Chapter of the Surfrider Foundation (VCCSF) have not demonstrated standing. See Answer of [PG&E] to [SLOMFP] Petition for Leave to Intervene and Request for Hearing (June 3, 2002) at 8-17 [hereinafter PG&E Response to SLOMFP and Kitman Petition]; Answer of [PG&E] to [Pinard and AVAC] Petition for Leave to Intervene and Request for Hearing (June 3, 2002) at 3-8 [hereinafter PG&E Response to Pinard/AVAC Petition].

The Licensing Board issued an initial prehearing order that, among other things, directed that steps be taken to make available to the section 2.714 petitioners any confidential information relative to the PG&E application and established a July 19, 2002 deadline for each of the petitioners to submit supplements to their hearing requests/intervention petitions specifying their contentions and labeling them by subject matter areas (e.g., technical, environmental). See Licensing Board Memorandum and Order (Initial Prehearing Order) (June 6, 2002) at 2-3 (unpublished). In response, PG&E filed a motion for a protective order requesting that the disclosure of certain confidential proprietary information to SLOMFP counsel and experts be governed by an appropriate protective order and non-disclosure agreement. See [PG&E] Motion for Protective Order (June 17, 2002) at 1-2. There being no objection from SLOMFP, in a June 19, 2002 issuance, the Board granted PG&E's protective order motion.[2]

[2] At about the same time, SLOMFP filed with the Board a motion to stay the ISFSI licensing proceeding pending the resolution of ongoing proceedings in connection with PG&E's bankruptcy reorganization in federal bankruptcy court, a California Attorney General's suit against PG&E's parent company in state court, and the DCPP license transfer application before the agency. See Petitioners' Motion for Stay of Licensing Proceeding (June 25, 2002) at 1-2. The Board also received two additional requests to stay the ISFSI licensing proceeding from Lorraine Kitman and Klaus Schumann and Mary Jane Adams. See E-mail from Lorraine Kitman to Richard Meserve, Chairman, Nuclear Regulatory Commission (June 11, 2002); E-mail from Klaus Schumann to Richard Meserve, Chairman, Nuclear Regulatory Commission (June 12, 2002). Both PG&E and the staff opposed the motions to stay the proceeding. The Board subsequently denied the three stay requests. See LBP-02-15, 56 NRC __, __ (slip op. at 1-2 (July 15, 2002).

See Licensing Board Memorandum and Order (Protective Order Governing Disclosure of Proprietary Information) (June 19, 2002) at 1 (unpublished). Additionally, in a series of June and July 2002 issuances, the Board established the time and place for an initial prehearing as the first full week in September in the San Luis Obispo, California area. See Licensing Board Memorandum and Order (Schedule for Initial Prehearing Conference) (June 26, 2002) at 1-2 (unpublished); Licensing Board Memorandum and Order (Initial Prehearing Conference Status and Participation as Interested Governmental Entity) (July 26, 2002) at 1 (unpublished).

Thereafter, Peg Pinard and AVAC declared in an early July 2002 amended joint petition that Ms. Pinard was seeking to intervene as a private citizen, rather than in her capacity as a member of the San Luis Obispo Board of Supervisors, and that AVAC wished to intervene in the proceeding as a private organization rather than a governmental entity. See Petitioners' Amended Hearing Request and Petition to Intervene (July 8, 2002) at 2 [hereinafter Pinard/AVAC Amended Petition]. For its part, acting as a lead petitioner on behalf of Ms. Pinard, AVAC, and the nine other organizations named above, SLOMFP supplemented its petition by challenging the PG&E license application with five technical and three environmental contentions. See Supplemental Request for Hearing and Petition to Intervene by [SLOMFP, AVAC], Peg Pinard, [CLDF, CCPEC, ECSLO, NAPF, SLOCGPI, SLOCAN, SMART, SLCSC, and VCCSF] (July 18, 2002) at 1-40 [hereinafter SLOMFP Contentions].

In response to these supplemental filings, PG&E declared that although it would not challenge Ms. Pinard's standing as an individual, it still believed AVAC had not established its standing to intervene. See Answer of [PG&E] to Amended [Pinard and AVAC] Petition for Leave to Intervene and Request for Hearing (July 18, 2002) at 1 [hereinafter PG&E Response to Pinard/AVAC Amended Petition]. In addition, PG&E urged the Board to reject all eight proposed contentions submitted by SLOMFP and thus deny the section 2.714 petitioner hearing request.

See Response of [PG&E] to [SLOMFP] Supplemental Request for Hearing and Petition to Intervene (Aug. 19, 2002) at 1-2 [hereinafter PG&E Response to SLOMFP Contentions]. Although agreeing with PG&E relative to Ms. Pinard's standing, the staff differed regarding standing for AVAC and the admissibility of certain contentions submitted by SLOMFP, declaring that two of the eight contentions should be admitted into the proceeding. See NRC Staff's Response to Amended Petition to Intervene Filed by [Pinard and AVAC] (Aug. 12, 2002) at 2-5 [hereinafter Staff Response to Pinard/AVAC Amended Petition]; NRC Staff's Response to [SLOMFP Contentions] (Aug. 19, 2002) at 1 [hereinafter Staff Response to SLOMFP Contentions].

B. Requests for 10 C.F.R. § 2.715(c) Interested Governmental Entity Status

In addition to the SLOMFP intervention challenge, four purported state and local government organizations -- SLOC, PSLHD, CEC, and DCISC -- filed requests prior to the scheduled initial prehearing conference to participate in the proceeding as interested governmental entities under 10 C.F.R. § 2.715(c). See [SLOC] Request to Participate as of Right under 2.715(c) (June 20, 2002) at 1-2; Request of [PSLHD] to Participate as of Right under 2.715(c) (July 19, 2002) at 1-3; [CEC] Request to Participate as of Right Pursuant to 10 C.F.R. § 2.715(c) (Aug. 16, 2002) at 1-4; [DCISC] Request to Participate as of Right under 10 C.F.R. 2.715(c) (Aug. 20, 2002) at 1-5 [hereinafter DCISC Request]. Each of the four expressed its intent to participate in the proceeding, although without necessarily taking a position on all of the issues before the Board.

With regard to these potential section 2.715(c) participants, the staff did not object to the participation of either SLOC, PSLHD, CEC, or DCISC as interested governmental entities. See NRC Staff's Response to [SLOC] Request to Participate as of Right under 2.715(c) (July 10, 2002) at 1-2; NRC Staff's Response to [PSLHD] Request to Participate as of Right

under 2.715(c) (Aug. 5, 2002) at 1-3; NRC Staff's Response to [CEC and DCISC] Request to Participate as of Right under 2.715(c) (Aug. 26, 2002) at 1-3 [hereinafter Staff Response to DCISC Request]. Similarly, PG&E did not object to the participation of SLOC, PSLHD, or CEC. See Letter from David A. Repka, Counsel for PG&E, to Licensing Board (July 2, 2002); Response of [PG&E] to Request of [PSLHD] to Participate as of Right under 10 C.F.R. 2.715(c) (July 29, 2002) at 1-2; Response of [PG&E] to Request of [CEC] to Participate as of Right under 10 C.F.R. 2.715(c) (Aug. 26, 2002) at 1-2. PG&E did, however, oppose DCISC's participation as an interested governmental entity. See Response of [PG&E] to Request of [DCISC] to Participate as of Right under 10 C.F.R. 2.715(c) (Aug. 30, 2002) at 1-7 [hereinafter PG&E Response to DCISC Request]. The Board granted the requests of SLOC and PSLHD, see Licensing Board Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation) (Aug. 7, 2002) at 1 (unpublished), but scheduled argument on the question of DCISC participation, see Licensing Board Memorandum and Order (Initial Prehearing Conference Argument Schedule) (Sept. 3, 2002) at 1 (unpublished).

Further, in accord with a Licensing Board order establishing a deadline for the timely submission of issues by potential interested governmental entities, see Licensing Board Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation) (Aug. 7, 2002) at 1-2 (Aug. 7, 2002) (unpublished) [hereinafter Board Order on Interested Governmental Entity Issue Identification], PSLHD has sought to raise an issue of its own regarding DCPP's emergency response plan (ERP), see Response of [PSLHD] to [Licensing Board] Order of August 7, 2002 (Aug. 19, 2002) at 2-4 [hereinafter PSLHD Issues]. SLOC also submitted one environmental and two technical issues it seeks to litigate in the proceeding. See Subject Matter upon which [SLOC] Desires to

Participate Pursuant to 10 C.F.R. § 2.715(c) (Aug. 21, 2002) at 3-11 [hereinafter SLOC Issues]. PG&E and the staff, however, have objected to the admission of all four issues proffered independently by SLOC and PSLHD. See Response of [PG&E] to Issues Proffered by [SLOC] and [PSLHD] (Sept. 4, 2002) at 3-17 [hereinafter PG&E Response to SLOC and PSLHD Issues]; Response of NRC Staff to [PSLHD Issues] (Sept. 4, 2002) at 2-4 [hereinafter Staff Response to PSLHD Issues]; Response of NRC Staff to [SLOC Issues] (Sept. 5, 2002) at 2-8 [hereinafter Staff Response to SLOC Issues].

C. Initial Prehearing Conference and Post-Conference Filings

Beginning on September 10, 2002, the Board conducted a two-day initial prehearing conference, during which it heard oral presentations regarding the standing of each of the petitioners, the participation of DCISC as an interested governmental entity, and the admissibility of the eight contentions and four issues raised by Petitioners and the interested governmental entities. See Tr. at 1-419. Also, during the initial prehearing conference a representative from the Avila Beach Community Services District appeared and advised the Board that by letter dated August 16, 2002, addressed to the "Nuclear Regulatory Commission," ABCSD had requested section 2.715(c) participant status, but had received no response to its inquiry. See Tr. at 68-70. The Board Chairman advised ABCSD that its request had not been received by the Board, but that ABCSD could submit such a request directly to the Board and the participants then would have an opportunity to comment on its request. See id. at 70-72. Following the initial prehearing conference, ABCSD resubmitted its request for section 2.715(c) participant status and stated that it did not have any new issues it wished to raise on its own. See Letter from John L. Wallace, ABCSD General Manager, to Licensing Board Chairman Bollwerk (Sept. 17, 2002); Letter from John L. Wallace, ABCSD General Manager, to Licensing Board Chairman Judge Bollwerk (Oct. 7, 2002). Further, neither PG&E nor the staff objected to ABCSD's

participation as a section 2.715(c) interested governmental entity, see NRC Staff's Response to [ABCSD] Request to Participate under 2.715(c) (Oct. 10, 2002) at 1-3; Response of [PG&E] to Request of [ABCSD] to Participate as an "Interested Party" Pursuant to 10 C.F.R. § 2.715(c) (Oct. 15, 2002) at 2, which also is supported by SLOC, see Response of [SLOC] to Request of [ABCSD] to Participate as an "Interested Government" Pursuant to 10 C.F.R. 2.715(c) (Oct. 18, 2002) at 1-3.

Also during the initial prehearing conference, there was substantial discussion concerning whether issues submitted by section 2.715(c) participants must meet the same contentions admissibility requirements set forth in 10 C.F.R. § 2.714(b)(2) or something less rigorous. See generally Tr. at 119-69. The Board accepted the staff's offer to brief the issue more thoroughly and afforded all of the participants an opportunity to respond to the staff's comments. See id. at 169-72; see also Licensing Board Memorandum and Order (Schedules for Submissions Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Entities; Forwarding Additional Participant Submissions for Record Inclusion) (Sept. 17, 2002) at 1 (unpublished). In its filing, the staff has argued that the section 2.714(b)(2) standard for contentions also applies to issues submitted by interested governmental entities. See NRC Staff's Position Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Entities (Sept. 25, 2002) at 2-9 [hereinafter Staff Position on Section 2.715(c) Participant Issues]. PG&E and, seemingly, ABCSD agree with the staff's position. See Position of [PG&E] Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Entities (Oct. 9, 2002) at 4-14 [hereinafter PG&E Position on Section 2.715(c) Participant Issues]; Letter from John L. Wallace, ABCSD General Manager, to Licensing Board Chairman Bollwerk (Oct. 7, 2002) at 2. SLOC, CEC, and PSLHD, on the other hand, have opposed this staff interpretation of the regulations as applied to interested governmental entities. See Position of [SLOC]

Regarding the Criteria for Considering Issues Raised by Governmental Entities under 10 C.F.R. § 2.715(c) (Oct. 9, 2002) at 5-12 [hereinafter SLOC Position on Section 2.715(c) Participant Issues]; [CEC] Response to [Staff's] Position Regarding Issues Proffered by 10 C.F.R. § 2.715(c) Interested Governmental Participants (Oct. 9, 2002) at 1-8 [hereinafter CEC Position on Section 2.715(c) Participant Issues]; Position of [PSLHD] Regarding the Criteria for Considering Issues Raised by Governmental Entities under 10 C.F.R. § 2.715(c) (Oct. 9, 2002) at 2-3 [hereinafter PSLHD Position on Section 2.715(c) Participant Issues].

Against this background, we now address the standing of each of the petitioners; the participation of entities seeking section 2.715(c) participant status; and the admissibility of the proffered contentions/issues, including the question of the appropriate admission standard applicable to issues introduced by section 2.715(c) participants.

II. ANALYSIS

A. Standing of Section 2.714 Organizational and Individual Petitioners

DISCUSSION: Pinard/AVAC Petition at 3-7; SLOMFP Petition at 2-5; Staff Response to SLOMFP Petition at 6-9; PG&E Response to SLOMFP Petition at 8-17; PG&E Response to Pinard/AVAC Petition at 3-8; Pinard/AVAC Amended Petition at 2; PG&E Response to Pinard/AVAC Amended Petition at 3-6; Staff Response to Pinard/AVAC Amended Petition at 2-5; Tr. at 20-32, 38-43, 45-56, 62-68.

RULING: A person who wishes to intervene in a Commission proceeding must file a petition that "set[s] forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in [§ 2.714(d)(1)], and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(1)-(2). In determining whether a petitioner has sufficient interest to intervene in a proceeding, the Commission has traditionally applied judicial concepts of standing. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983) (citing Portland General Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976)). Contemporaneous judicial standards for standing require a petitioner to demonstrate that (1) it has suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury can be fairly traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999). An organization that wishes to intervene in a proceeding may do so either in its own right by demonstrating harm to its organizational interests, or in a representational capacity by demonstrating harm to its members. See Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120) LBP-98-9, 47 NRC 261, 271 (1998). To intervene in a representational capacity, an organization must show not only that at least one of its members would fulfill the standing requirements, but also that he or she has authorized the organization to represent his or her interests. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 168, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998).

In certain types of proceedings, a petitioner may be presumed to have fulfilled the first of the required three standing showings based on geographical proximity to the facility, without having specifically to plead that element, if the petitioner resides within, or frequently comes into contact with, the facility's zone of possible harm. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, aff'd, CLI-01-17, 54 NRC 3 (2001). Whether such a presumption applies depends upon whether there is an "'obvious potential for offsite consequences.'" See id. at 148 (quoting Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)). Moreover, the zone of possible harm varies, depending on the type of proceeding. For instance, although petitioners living within a fifty-mile radius of a nuclear facility have been presumed to have standing in reactor construction permit and operating license cases, the requisite proximity may be considerably closer in other proceedings, such as those involving reactor spent fuel pool expansion and reracking. See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit No. 3), LBP-00-02, 51 NRC 25, 28 (2000). Although in the Private Fuel Storage ISFSI licensing proceeding, standing was granted to a petitioner based on geographical proximity, the Licensing Board in that case did not specify the limits of the required proximity to the facility. See Private Fuel Storage, LBP-98-7, 47 NRC at 169 (granting standing to petitioners residing less than four miles from proposed ISFSI).

1. Geographic Proximity to DCPP

In the instant case, although there appears to be no dispute relative to the various section 2.714 petitioners compliance with standing elements two and three, various of the organizational petitioners represented by SLOMFP base their conformity with standing element one solely on the geographic proximity of members' residences to DCPP and/or to potential transportation routes that may be used to transport spent fuel away from the DCPP site.

Referencing Table H-7 of the Department of Energy's draft environmental impact statement (Draft EIS) for the proposed Yucca Mountain high-level waste (HLW) geologic repository, they argue that health impacts from radiation doses resulting from cask-handling accidents can occur up to fifty miles. See SLOMFP Petition at 2-3 (citing 2 Office of Civilian Radioactive Waste Management, U.S. Dep't of Energy, [Draft EIS] for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, DOE/EIS-250D, app. H, at H-29 (July 1999)). Although these section 2.714 petitioners do not necessarily seek to establish a presumption of fifty miles, see Tr. at 26, they nonetheless assert that even small environmental impacts such as those reflected in that table can be sufficient to confer standing. For its part, as was noted in section I.A. above and discussed in more detail below, PG&E contests the standing of certain of these petitioners. The staff, however, does not oppose the grant of standing to any of the twelve section 2.714 petitioners.

All the parties seemingly are in agreement that, in the context of our standing determination, prior agency rulings regarding spent fuel pool expansion proceedings provide at least some guidance to the Board here, in particular the Shearon Harris case in which the Licensing Board found that the closest boundary of a section 2.714 governmental petitioner seventeen miles from the facility at issue provided it with standing. See Shearon Harris, LBP-99-25, 50 NRC at 29-31; see also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118-19 (1987); id., LBP-87-17, 25 NRC 838, 842, aff'd in part and reversed in part on other grounds, ALAB-869, 26 NRC 13 (1987) (residence within ten miles of facility found sufficient for standing); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454-55 (1988), aff'd, ALAB-893, 27 NRC 627 (1988) (standing of individual living within 10 miles of facility conceded by parties); Millstone, LBP-00-02, 51 NRC at 28 (granting standing to individual with part-time residence

located ten miles from facility). Nonetheless, in referencing the DOE draft EIS table, SLOMFP would more than double the largest expanse of the area that to date has been found to encompass individuals who would be considered potentially subject to an spent nuclear fuel (SNF) storage-related impact that would be sufficient to fulfill the "injury in fact" component of the standing equation. We are unable to accept this expansion, however.

Assuming that the cask handling accidents that are the benchmark for that table equate fairly to the cask handling aspects of operations at the DCPP facility, the impacts set forth by the table nonetheless are not sufficient to show standing. To be sure, there is authority indicated that to establish injury in fact it is not necessary to proffer radiation impacts that amount to a regulatory violation. See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 417 (2001) (citing Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996)). On the other hand, simply showing the potential for any radiological impact, no matter how trivial, is not sufficient to meet the requirement of showing a "distinct and palpable harm" under standing element one. As it is relevant here, bearing in mind that the radiological consequences set forth in the table are those for the entire 2000 census population of 28,000 estimated to live within a fifty-mile radius of the facility, and utilizing the cask handling event from the table that has the maximum dose consequences (i.e., a 7.1 meter drop of pressurized water reactor fuel assemblies), for any individual member of that population, the average dose consequences are in the neighborhood of 3×10^{-3} (0.003) millirem. This is a number that, in addition to being an average for the population of the entire area so as likely to be considerably less at the fifty-mile area's outer boundary, is four or five orders of magnitude below average natural background radiation levels. To whatever extent a "minor" radiological exposure arising from an applicant's proposed

activities is sufficient to afford standing, this clearly falls below the level that can be considered substantial enough for standing purposes.

Accordingly, based on the showing now before us,[3] in considering each of the petitioners' claims of standing based on geographical proximity to DCPP, we utilize the seventeen-mile mark established in the Shearon Harris proceeding as our guide.

a. San Luis Obispo Mothers for Peace

SLOMFP bases its standing on the affidavits of four of its members, Susan Biesek, Elaine Holder, Nancy Walker, and Jill ZamEk. All four members have authorized SLOMFP to represent their interests in this proceeding. See SLOMFP Petition, exh. 1-4. In their affidavits, Ms. Biesek and Ms. Walker both state that they reside within ten miles of DCPP, and Ms. Holder and Ms. ZamEk both state that they reside within twenty miles of the facility. Id. PG&E does not contest the standing of SLOMFP to intervene, based on its representation of members Ms. Biesek and Ms. Walker. The staff, as noted above, does not object to the standing of any of the twelve section 2.714 petitioners.

Regarding SLOMFP we find that, as is the case with the rest of the section 2.714 petitioners, standing elements two and three have been fulfilled and that, with respect to element one, SLOMFP has established its standing to intervene in this proceeding based on its representation of members Ms. Biesek and Ms. Walker, who both reside well within seventeen miles of DCPP.

[3] As we noted above, the participant claiming standing has the burden of demonstrating it meets the requisite three-factor test, and so our determination here is based on the showing made by the petitioners, who failed to carry their burden relative to establishing that there should be a 50-mile benchmark for ISFSI standing claims.

b. Santa Lucia Chapter of the Sierra Club

SLCSC asserts standing through its member, Peter Wagner. Mr. Wagner states that he lives within fifteen miles of DCPP and authorizes SLCSC to represent his interests in this proceeding. See SLOMFP Petition, exh. 6. PG&E does not oppose this petitioner's standing.

Based on its representation of Mr. Wagner, who resides within seventeen miles of DCPP, we find that SLCSC has sufficiently demonstrated its standing to intervene in this proceeding.

c. San Luis Obispo Cancer Action Now

SLOCAN seeks standing through representation of its member, Virginia Monteen. In her declaration, Ms. Monteen states that she resides and works in the town of San Luis Obispo, which is located ten miles from DCPP. See SLOMFP Petition, exh. 7. She also states that she travels the roads of San Luis Obispo on a daily basis, including U.S. Highway 101 that could serve as a potential transportation route for SNF away from DCPP. See id. She has authorized SLOCAN to intervene on her behalf in this proceeding. See id. PG&E does not challenge this petitioner's standing to intervene, based on the geographical proximity of Ms. Monteen's residence and place of work to DCPP.

We conclude that SLOCAN has established its standing through Ms. Monteen, who lives and works within seventeen miles of the facility.

d. Peg Pinard

Ms. Pinard seeks to intervene in this proceeding as an individual citizen on her own behalf. She states that her home lies within ten to fifteen miles of DCPP. See Amended Petition, Decl. of Peg Pinard. PG&E does not contest Ms. Pinard's standing.

We find that Ms. Pinard has standing to intervene in this proceeding based on the location of her residence within seventeen miles of DCPP.

e. Avila Valley Advisory Council

AVAC asserts standing as the representative of its member, Seamus Slattery. Mr. Slattery resides within ten miles of DCPP and has authorized AVAC to represent him in this proceeding. See Amended Petition, Decl. of Seamus Slattery. Although there was some initial confusion as to whether AVAC sought to participate in the proceeding as an interested governmental entity under 10 C.F.R. § 2.715 (c), in its amended petition, AVAC clarified that it was seeking to intervene as a private organization under section 2.714. See id. at 2. AVAC is an unincorporated association, whose purposes include the advocation for the interests of Avila Valley residents through intervention in legal proceedings. See Amended Petition, AVAC Bylaws art. III, § 5; Tr. at 31. PG&E contests AVAC's standing on the basis that apart from its bylaws, AVAC has not demonstrated that it has the independent authority to represent itself or others in legal proceedings as a private organization. PG&E maintains that AVAC has failed to show that it has any authority to act beyond its capacity as a quasi-governmental advisory body.

We do not find PG&E's argument on this point persuasive. We are not aware of any legal authority that requires an organization to establish that it has independent litigating authority to represent itself or its members in adjudicatory proceedings, and PG&E has not proffered any such support for its assertion. This agency's previous decisions have only required organizations who wish to intervene in a representational capacity to show that at least one of its members would fulfill the standing requirements and that the organization has been authorized by the member to represent his or her interests. See, e.g., Private Fuel Storage, LBP-98-7, 47 NRC at 168. Here, Mr. Slattery resides within ten miles of DCPP, which is sufficient to confer standing on him individually if he wanted to participate in that capacity, and he has authorized AVAC to represent his interests in this proceeding. Moreover, even if PG&E is correct in arguing that AVAC is required to demonstrate its authority to litigate on behalf of

itself or its members, section 369.5(a) of the California Code of Civil Procedure provides that "[a] partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known." Cal. Civ. Proc. Code § 369.5(a) (2002). Thus, by virtue of its status as an unincorporated association, California Code section 369.5(a) provides AVAC with independent litigating authority.

Consequently, we find that AVAC has established its standing to intervene in this proceeding.

f. Environmental Center of San Luis Obispo

The ECSLO asserts standing through its member, Pamela Heatherington. Ms. Heatherington resides within thirty miles of the facility and has authorized ECSLO to intervene on her behalf in this proceeding. See SLOMFP Petition, exh. 5. Her affidavit states that she is concerned for her and her family's health and safety and the value of her property. Id. PG&E challenges this petitioner's standing based on the distance of Ms. Heatherington's home from DCPP.

Ms. Heatherington's home lies well beyond the seventeen-mile mark that we have established as our benchmark here. Because her affidavit does not present any additional information aside from her stated concerns, we have no basis to extend that zone of cognizable injury beyond seventeen miles. Therefore, we find that the ECSLO has not demonstrated its standing to intervene in this proceeding.

g. Central Coast Peace and Environmental Council

CCPEC bases its standing on the geographical proximity of its member, Bruce Miller. Mr. Miller resides in San Luis Obispo, within one-quarter mile of U.S. Highway 101, which is the main evacuation route for DCPP through the city, and the Union Pacific railroad tracks. See SLOMFP Petition, exh. 14. He also travels the highway on a daily basis and regularly travels

near the railroad tracks. See id. According to his affidavit, Mr. Miller has authorized the CCPEC to represent him in this proceeding and is concerned that his health and safety may be injured by his proximity to spent fuel casks that may be shipped from DCPP through San Luis Obispo en route to Yucca Mountain. Id.

Although Mr. Miller presents his claimed injuries in terms of his concern about transportation, it is facially apparent from the description in his affidavit that he resides well within seventeen miles of DCPP. Therefore, we find that CCPEC has established standing to intervene in this proceeding.

h. Cambria Legal Defense Fund

The CLDF seeks to establish its standing through the geographical proximity of its founder and director, Suzy Ficker, to DCPP. Ms. Ficker resides twenty-seven miles from the facility. See SLOMFP Petition, exh. 9. She also states that the organization is concerned that construction of the ISFSI would jeopardize the health and safety of its members and their families, as well as the value of their properties. See id. PG&E opposes CLDF's standing on the basis of Ms. Ficker's distance from DCPP.

Ms. Ficker resides more than seventeen miles from the facility. As was the case with Ms. Heatherington above, Ms. Ficker's affidavit fails to show why the zone of possible harm should be extended in this proceeding. We conclude, therefore, that the CLDF has not established its standing to intervene in this proceeding.

i. Santa Margarita Area Residents Together

SMART asserts standing through the representation of its member, Jude Ann Rock, whose home is represented to lie within twenty miles of DCPP. See SLOMFP Petition, exh. 8. Ms. Rock states that the organization is concerned for the health and safety of its members and

their families and the value of their properties. See id. PG&E contests the standing of SMART based on the distance of Ms. Rock's home from the plant.

Based on her affidavit, it appears Ms. Rock's residence is located more than seventeen miles from DCPP. Although her home lies only three miles beyond the distance previously acknowledged as conferring standing, this petitioner has made no showing as to why the zone of possible harm should be extended. Statements consisting only of generic, unsubstantiated concerns for health, safety, and property devaluation are insufficient to expand the zone of possible harm beyond seventeen miles. Without more, we cannot grant SMART standing to intervene in this proceeding.

2. Geographical Proximity to Transportation Routes

Three other petitioner organizations -- San Luis Obispo County Chapter of the Grandmothers for Peace International, Nuclear Age Peace Foundation, and Ventura County Chapter of the Surfrider Foundation -- base their argument regarding standing element one solely on the geographical proximity of their members' homes to transportation routes that could potentially be used to transport spent fuel away from DCPP to the proposed Yucca Mountain HLW repository facility or the proposed Private Fuel Storage ISFSI in Skull Valley, Utah. Specifically, SLOCGPI asserts standing in this regard through its member Molly Johnson. Although Ms. Johnson lives and works more than twenty-five miles from DCPP, she does reside within three miles of Highway 46, which she asserts is a major road over which spent fuel from DCPP may be transported to the proposed Yucca Mountain facility or the proposed Private Fuel Storage facility in Utah. See SLOMFP Petition, exh. 11. For its part, NAPF contends it has standing through its member David Kreiger, a resident of Santa Barbara, California, which is some 100 miles to the south of the DCPP. According to Mr. Kreiger, he regularly travels on and lives within five miles of U.S. Highway 101, a main area highway, and regularly walks or drives

near area railroad tracks, either of which could be a spent fuel transportation route. See id. exh. 12. Finally, VCCSF claims to have standing through its member, Paul Jenkin. In addition to residing within three-quarter miles of both U.S. Highway 101 and the railroad tracks in Ventura, California, which is more than 100 miles from the DCPP, Mr. Jenkin purportedly regularly travels on Highway 101 and walks or drives near the area railroad tracks. See id. exh. 13.

In response, PG&E argues that any transportation issues are purely conjectural and speculative at this time and, moreover, are beyond the scope of this ISFSI licensing proceeding. Thus, PG&E contests the standing of any petitioner asserting standing based upon proximity to potential transportation routes. The staff, as noted above, does not oppose the standing of any of the petitioner organizations.

Citing the Licensing Board's decision in Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61 (1996), as support, the petitioners argue that even if the Board were to deny admission of transportation-related contention because it is beyond the scope of the proceeding, the Board could nonetheless grant petitioners standing to raise the contention. See Tr. at 66. While the petitioners accurately describe the Yankee Rowe Board's order as stating that the findings of standing and admissibility of contentions are discrete determinations, Yankee Rowe is not altogether helpful to their case. The petitioners in Yankee Rowe were able to establish standing to intervene based on their members who not only used potential transportation routes, but also lived within ten miles of the facility and recreated along waterways that received effluent discharges from the plant. Yankee Rowe, LBP-96-2, 43 NRC at 69. In that case, the Licensing Board held that once the petitioners had established their standing to intervene, they consequently had standing to pursue any contention they wished to raise. See id. at 69-70.

Here, the section 2.714 petitioners' transportation route-related standing claims fall short. As has been noted previously relative to transportation route-related standing claims, mere geographical proximity to potential transportation routes is insufficient to confer standing; instead, the section 2.714 petitioners must demonstrate a causal connection between the licensing action and the injury alleged. Compare Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 419-20 (2001) (transportation route-related standing established based on environmental report discussion of transportation impacts) with Northern States Power Co. (Pathfinder Atomic Plant, Byproduct Material License No. 22-08799-02), LBP-90-3, 31 NRC 40, 42-43 (1990) (petitioner who resided one mile from likely transportation route denied standing) and Exxon Nuclear Co., Inc. (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 NRC 518, 519-20 (1977) (assertion of injury because spent fuel would travel on railway tracks very near property insufficient to establish standing). Although the petitioners cite Savannah River as support for their standing, that case can be distinguished from the one here. In Savannah River, the petitioners did not base their standing solely on geographical proximity to likely transportation routes. Rather, they were able to demonstrate a nexus between the licensing proceeding and the risk of injury. See Savannah River, LBP-01-35, 54 NRC at 419. Any person traveling alongside a truck shipment of mixed oxide (MOX) fuel would receive a small, but unwanted, dose of ionizing radiation, even in the absence of a vehicular accident. See id. at 420. Here, the substance of what these petitioners have claimed in the declarations of the individuals whose interests they would represent is more akin to what the petitioners in the above-cited Pathfinder and Exxon cases asserted.[4] In both

[4] In Exxon, LBP-77-59, 6 NRC at 519, a petitioner who sought to intervene claimed that if the license for the proposed reprocessing facility were approved, it was likely that spent fuel would be shipped by way of the railroad located very near her home and rental property. In addition, if an accident were to occur in that vicinity, it could result in bodily harm, loss of life, or loss of income to her. See id. In Pathfinder, LBP-90-3, 31 NRC at 42, a petitioner who lived one mile from a likely transportation route claimed that an accident involving a truck shipment of

cases, the Licensing Boards denied standing, in part because the injuries alleged were too speculative in nature and in part for lack of a causal relationship between the injury claimed and the proceeding. See Pathfinder, LBP-90-3, 31 NRC at 43; Exxon, LBP-77-59, 6 NRC at 520.

B. Participation by Section 2.715(c) Interested Governmental Entities

DISCUSSION: DCISC Request at 1-4; PG&E Response to DCISC Request at 3-7; Staff Response to DCISC Request at 2-3; Tr. at 32-37, 43-47, 56-61.

RULING: As we noted earlier in section I.B, in addition to the individual and organizational petitioners seeking to intervene in this proceeding pursuant to section 2.714, five proclaimed state or local governmental bodies -- San Luis Obispo County, California, the Port San Luis Harbor District, the California Energy Commission, the Diablo Canyon Independent Safety Committee, and the Avila Beach Community Services District -- have sought leave to participate as interested governmental entities under the dictates of 10 C.F.R. § 2.715(c). Previously, the Board has granted that status to SLOC and PSLHD. With this issuance, we do the same for CEC and ABCSD, whose requests for section 2.715(c) status are unopposed. With respect to DCISC, however, as also was noted above, PG&E has objected to its denomination as a section 2.715(c) participant. Relying principally on the Commission's decision in Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202-03 (1998), PG&E asserts that DCISC is the type of "advisory body" that the Commission there made clear does not merit such a designation.

In its initial filing, DCISC described its origin and responsibilities as follows:

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radioactive waste could result in, among other things, an increased risk of contracting cancer or other debilitative disease.

> The Safety Committee was initially created by the California Public Utilities Commission ("CPUC") under the terms of the Diablo Canyon Settlement Agreement (CPUC Decision D.88-12-083) as an independent three-member committee specifically to monitor the safety of PG&E's operation of Diablo Canyon.
>
> > "An Independent Safety Committee shall be established consisting of three members, one each appointed by the Governor of the State of California, the Attorney General and the Chairperson of the [CEC], respectively, serving staggered three-year terms. The Committee shall review Diablo Canyon operations for the purpose of assessing the safety of operations and suggesting any recommendations for safe operations. Neither the Committee nor its members shall have any responsibility or authority for plant operations, and they shall have no direct authority to direct PG&E personnel. The Committee shall conform in all respects to applicable federal laws, regulations and Nuclear Regulatory Commission ("NRC") policies."
>
> As stated by the CPUC in its decision, the Safety Committee was intended by the parties to the Settlement Agreement to provide an "added level of assurance to the public that Diablo Canyon will continue to operate safely."

DCISC Request at 2-3 (footnotes omitted). Further, during the initial prehearing conference, in support of its assertion that it should be granted section 2.715(c) status, DCISC made the point that:

> I can assure you that the [DCISC], pursuant to California law, is a state agency, an agency of the state and is a governmental agency. It's appointed by state officials.
>
> It's open -- it's subject to the open meeting laws for state agencies, that was just referenced, the Brown Act or the Bagley-Keene Act. The members file conflict-of-interest statements, like all public officials, state and federal, do.
>
> And, again, it's the position of the -- of DCISC is clearly distinguishable from that of a general, regional planning agency and, in fact, was created specifically to oversee the safety of operations at this plant, which is integral to what you have before you in these proceedings.

Tr. at 58. And in this regard, the DCISC-cited Bagley-Keene Open Meeting Act, Cal. Gov. Code § 11121(c), which imposes open meeting requirements on any "state body," defines that term as "[a]ny advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons."

In considering these purported indicia of "governmental entity" status, we do so under the Commission's Yankee Rowe determination, which declares:

> Not all organizations with governmental ties are entitled to participate in our proceedings as governmental "agencies." The federal, state and local governments are replete with numerous boards, commissions, advisory committees, and other organizations -- all of which have governmental or quasi-governmental responsibilities. We do not, however, understand section 2.715(c) to authorize automatic participation in our adjudications by each and every subpart of state and local government. [The regional planning board in question] is, by its own admission, an advisory body and lacks executive or legislative responsibilities. We conclude that advisory bodies, by their very nature, are so far removed from having the representative authority to speak and act for the public that they do not qualify as governmental entities for purposes of section 2.715(c).

Yankee Rowe, CLI-98-21, 48 NRC at 202-03 (citation omitted). The essence of the Yankee Rowe criterion is whether a purported governmental body has legislative or executive responsibilities, i.e., the authority to impose (by rule, order, or otherwise) or implement/enforce (by order, monetary penalty, or otherwise) requirements. In this instance, as the DCISC describes its functions, responsibility, and authority, it does not appear to embrace either of these necessary elements. Nor do we think that the California state open meeting statute and its definition of a "state body" compel a different result. To be sure, the NRC affords deference to bona fide executive, statutory, or judicial declarations regarding the status of a particular entity

as being part of a state or local governmental system, see Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 148-49 (1987), but in this instance, the definition itself, while imposing certain "sunshine" requirements on DCISC, also recognizes that the body upon which these requirements are being levied is an "advisory committee," exactly the type of entity the Commission has made clear is not encompassed within section 2.715(c). Accordingly, we deny the DCISC request for section 2.715(c) status.

This is not to say the DCISC is hereafter precluded from any meaningful participation in this proceeding. As has been noted in a similar situation, see id. at 149-51, DCISC may continue to have input into this proceeding through participation as an amicus curiae. In this regard, we will direct that it remain on the agency service list for this proceeding and that all participants continue to provide its representative with electronic and hard copies of their filings in this proceeding. To the extent DCISC finds there are any matters about which it wishes to provide its written, or in appropriate circumstances, oral comments, it can do so by requesting leave of the Board to file or provide those comments. In any instance in which it wishes to file written comments regarding a particular filing, it must submit those comments, along with a motion for leave to file, within the time frame provided for a response to that pleading or, if there is no time established for a response, within seven days of the filing. Thereafter, in the absence of a Board directive establishing a different schedule, any other participant to the proceeding shall have seven days to file a response to the DCISC motion for leave to file and to the substance of the proposed DCISC amicus curiae submission.

C. Contentions/Issues

To intervene in a proceeding, in addition to establishing standing, an individual or organization seeking party status must also set forth at least one admissible contention. See 10 C.F.R. § 2.714(b)(1). Section 2.715(c) participants have the opportunity to interpose issues as

well. Having found that a number of petitioners have standing and that several of the governmental entities come within the ambit of section 2.715(c), we next consider the admissibility of each contention/issue proffered by the petitioners and the section 2.715(c) interested governmental entities.

1. Section 2.714 Contention Admissibility Standards

To be admissible, a contention submitted by a section 2.714 petitioner must state with specificity the issue of law or fact to be raised or controverted. See 10 C.F.R. § 2.714(b). Furthermore, each contention must be accompanied by: (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion the petitioner will rely upon to prove the contention, including references to specific sources and documents that will be relied upon to establish those facts and opinions; and (3) sufficient information to show that a genuine dispute on a material issue of law or fact exists with the applicant, which consists of either (a) references to specific portions of the application (including the applicant's environmental and safety reports) that are disputed and the reasons supporting the dispute, or (b) identification of each instance where the application purportedly fails to contain information on a relevant matter as required by law and the reasons supporting the allegation. See id. § 2.714(b)(2)(i)-(iii). If the contention fails to satisfy any one of these requirements, the contention must be denied. See id. § 2.714(d)(2)(ii).

In addition to the threshold requirements set forth in section 2.714(b)(2), there are a number of other criteria that govern the admissibility of contentions. For example, a Licensing Board must reject a contention that, even if proven, would not entitle the petitioner to any relief and would, thus, make no difference in the outcome of the proceeding. See id. A contention will also be deemed inadmissible if it challenges an existing Commission rule or attempts to litigate an issue that is, or clearly is about to become, the subject of a Commission rulemaking. See id.

§ 2.758; see also Private Fuel Storage, LBP-98-7, 47 NRC at 179 (citing Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974)). Furthermore, contentions that concern matters outside the scope of the proceeding, as defined by the notice of hearing or opportunity for hearing, must also be denied. See, e.g., Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

With these general principles in mind, we consider each of the contentions and issues submitted by the petitioners.

2. Admissibility of SLOMFP Contentions

As was noted in section I.A above, the Board requested that contentions be labeled by general subject matter area, a framework we utilize in discussing the admissibility of each of the proffered SLOMFP issue statements. Further, in reiterating and discussing these contentions,[5] we refer to lead intervenor SLOMFP as their sponsor, although they were proffered jointly by all the section 2.714 petitioners.

a. SLOMFP Technical Contentions

SLOMFP Technical Contention (TC)-1: Inadequate Seismic Analysis

CONTENTION: In Section 2.6 of the SAR, PG&E claims to satisfy Appendix A of 10 C.F.R. Part 100 and 10 C.F.R. § 72.102, which provide criteria for seismic design of nuclear facilities and ISFSIs. However, the seismic analysis presented by PG&E does not consider a number of significant seismic features in the area of the Diablo Canyon plant. As a result, the design basis earthquake for the proposed ISFSI cannot be considered reasonable or conservative for purposes of protecting public health and safety against the effects of earthquakes.

[5] The language of the SLOMFP contentions is replicated from the July 2002 SLOMFP supplemental petition, albeit without the internal footnotes.

DISCUSSION: SLOMFP Contentions at 2-11; PG&E Response to SLOMFP Contentions at 5-19; Staff Response to SLOMFP Contentions at 7-9; Tr. at 347-418.

RULING: In proffering this contention, which it supports with the affidavit of Dr. Mark R. Legg, SLOMFP asserts there are a number of "serious shortcomings" in the SAR and the ER for the Diablo Canyon ISFSI that bring into question the design basis earthquake utilized for the ISFSI. SLOMFP Contentions at 2. According to SLOMFP, these include PG&E's failure to consider the threat posed by large reverse or thrust fault earthquakes in the vicinity of the site as well as its reliance on the incorrect assumptions that the Hosgri fault zone is purely strike-slip and is vertical rather than east dipping, which could cause PG&E to place the fault in a nonconservative position. Although various of the interested governmental entities support admission of this issue statement, both PG&E and the staff challenge its admissibility on the basis that SLOMFP has failed to assert how, even if true, the alleged deficiencies create a health and safety issue for the facility.

PG&E indicates that the matters upon which SLOMFP seeks to rely were, in fact, considered in accordance with 10 C.F.R. Part 100, App. A, as part of (1) the operating licensing review for the DCPP, during which the safe shutdown earthquake (SSE) was postulated based on an earthquake with a magnitude of 7.5 on the Richter Scale; and/or (2) the subsequent 1984-1991 Diablo Canyon Long Term Seismic Program that sought to confirm the seismic design bases for the facility, which resulted in a determination that the maximum or controlling earthquake associated with the Hosgri fault would have a magnitude of 7.2. Further in this regard, both PG&E and the staff direct the Board's attention to 10 C.F.R. §§ 72.40(c), 72.102(f), which provide, respectively:

> (c) For facilities that have been covered under previous licensing actions including the issuance of a construction permit under Part 50 of this chapter, a reevaluation of the site is not

> required except where new information is discovered which could alter the original site evaluation findings.
>
> * * * * *
>
> (f) The design earthquake (DE) for use in the design of structures must be determined as follows:
> (1) For sites that have been evaluated under the criteria of Appendix A of 10 CFR Part 100, the DE must be equivalent to the [SSE] for a nuclear power plant.

Both PG&E and the staff argue that these regulations bar the admission of contention SLOMFP TC-1 given SLOMFP has not provided sufficient information to alter the original site evaluation to the degree it has not provided a basis to establish that the SSE or maximum/controlling earthquake number should be something other than what was previously established. In response, although acknowledging "it's true that we don't have a number at this point," Tr. at 413, SLOMFP nonetheless maintains it has provided enough information to meet its burden as to the admission of this contention.

As the members of this Board have indicated in another context, "issues of law or fact raised in a contention must be material to the grant or denial of the license application in question, i.e., they must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief." Private Fuel Storage, LBP-98-7, 47 NRC at 179. As we also indicated in that instance, "[a]gency case law further suggests this requirement of materiality mandates certain showings in specific contexts." Id. at 180. While in other circumstances, the showing made by SLOMFP regarding its contention TC-1 might be sufficient to establish the requisite materiality, and so an admissible contention, it falls short here. As the Part 72 regulations quoted above make clear, for a co-located ISFSI, the applicant does not write on a clean slate relative to any seismic requirements. Absent an exemption or new

information sufficient to alter the original site evaluation finding, the DE for the nuclear facility is what the ISFSI applicant must use.[6] As a consequence, a contention challenging the seismic

[6] Contrasting the existing language of section 72.102(f)(1), which states that an ISFSI DE must be equivalent to the SSE "for a nuclear power plant," and the language of a pending proposed rule that would add a new section 72.103(b) that declares that for a site west of the Rocky Mountains "[i]f an ISFSI or [monitored retrievable storage installation (MRS)] is located on a [nuclear power plant (NPP)] site, the existing geological and seismological design criteria for the NPP may be used," 67 Fed. Reg. 47,745, 47,754 (July 22, 2002), SLOMFP argues that the specificity of the new section 72.103(b) language creates the inference that the existing rule was not intended to provide for incorporation of the co-located NPP's SSE. See Tr. at 351-52. We do not agree. In connection with this new provision, as the statement of considerations accompanying the proposed rule explains at several different junctures:

> In comparison with a NPP, an operating dry cask ISFSI or MRS facility, storing [SNF], is a passive facility in which the primary activities are waste receipt, handling, and storage. An ISFSI or MRS facility does not have the variety and complexity of active systems necessary to support safe operations at a NPP. Further, the robust cask design required for non-seismic considerations (e.g., drop event, shielding), assure low probabilities of failure from seismic events. In the unlikely occurrence of a radiological release as a result of a seismic event, the radiological consequences to workers and the public are significantly lower than those that could arise at a NPP. This is because the conditions required for release and dispersal of significant quantities of radioactive material, such as high temperatures or pressures, are not present in an ISFSI or MRS. This is primarily due to the low heat-generation rate of spent fuel that has undergone more than one year of decay before storage in an ISFSI or MRS, and to the low inventory of volatile radioactive materials readily available for release to the environment. The long-lived nuclides present in spent fuel are tightly bound in the fuel materials and are not readily dispersible. Short-lived volatile nuclides, such as [Iodine]-131, are no longer present in aged spent fuel. Furthermore, even if the short-lived nuclides were present during a fuel assembly rupture, the canister surrounding the fuel assemblies is designed to confine these nuclides. Hence, the Commission believes that the seismically induced risk from the operation of an ISFSI or MRS is less than at an operating NPP. Therefore, the Commission proposes to revise the DE requirements for ISFSI and MRS facilities from the current part 72 requirements, which are equivalent to the SSE for a NPP.
>
> * * * * *
>
> The Commission does not intend to require new ISFSI or MRS

applicants that are co-located with a NPP to address uncertainties because the criteria used to evaluate existing NPPs are considered to be adequate for ISFSIs, in that the criteria have been determined to be safe for NPP licensing, and the seismically induced risk of an ISFSI or MRS is significantly lower than that of a NPP . . . .

* * * * *

If an ISFSI or MRS is located at a NPP site, the existing geological and seismological design criteria for the NPP may be used instead of [probabilistic seismic hazards analysis (PSHA)] techniques or suitable sensitivity analysis because the risk due to a seismic event at an ISFSI or MRS is less than that of a NPP. If the existing design criteria for the NPP is used and the site has multiple NPPs, then the criteria for the most recent NPP must be used to ensure that the seismic design criteria used is based on the latest seismic hazard information at the site.

qualifications of such a co-located ISFSI facility must necessarily provide not only a basis to indicate that there are specific concerns about the elements used to calculate the nuclear power plant seismic design criteria, but also a showing that, given those concerns, the reactor facility DE itself is now inaccurate to some meaningful degree.[7] In this instance, despite having provided information concerning the first consideration, by failing to make any showing regarding the latter point, SLOMFP has failed to put forth an admissible contention.

SLOMFP TC-2: PG&E's Financial Qualifications Not Demonstrated

CONTENTION: PG&E has failed to demonstrate that it meets the financial qualifications requirements of 10 C.F.R. § 72.22(e).

DISCUSSION: SLOMFP Contentions at 11-19; PG&E Response to SLOMFP Contentions at 19-32; Staff Response to SLOMFP Contentions at 9; Tr. at 251-90; 294-319, 327-39, 342-43.

RULING: Supported by the declaration of Dr. Michael F. Sheehan, SLOMFP claims that PG&E has failed to demonstrate that it is financially qualified to cover the costs of construction,

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67 Fed. Reg. at 47,746, 47,748, 47,751 (emphasis supplied). Thus, the language of the proposed rule is intended to reflect an additional option for a co-located ISFSI applicant, i.e., it can use appropriate analyses, such as a PSHA or suitable sensitivity analyses, for determining the DE in lieu of using the SSE for the co-located NPP, which is the only avenue afforded under the existing rule.

[7] Although SLOMFP counsel declared SLOMFP's concerns would change the DCPP DE/SSE figure, see Tr. at 401, that certainly is not self-evident nor are we willing to assume that is the case absent some specific, adequately supported technical showing by SLOMFP.

operation, and decommissioning of the proposed ISFSI. SLOMFP argues that because PG&E is currently involved in a contested bankruptcy, it is questionable whether PG&E will emerge from the bankruptcy proceedings as a viable entity, and if so, with what resources. SLOMFP further asserts that PG&E reliance on PG&E's ability to recover its costs from the California Public Utilities Commission (CPUC) as a regulated electric utility is not only insufficient to establish reasonable assurance of financial qualification, but also disingenuous. This is so, according to SLOMFP, because under PG&E's proposed reorganization plan PG&E would no longer own or operate DCPP or the ISFSI, but would transfer those functions to a new generating company, Electric Generation LLC (Gen), rendering PG&E's ability to recover operating costs from the rate base irrelevant. SLOMFP also declares that PG&E has not demonstrated its ability to cover the costs of construction and operation of the ISFSI through borrowing sufficient funds or through incoming revenue. Finally, SLOMFP claims that PG&E's financial qualifications are further compromised by the California Attorney General's pending billion-dollar lawsuit against PG&E's parent company, PG&E Corporation, and the consequences the lawsuit could have for PG&E.

The staff, PSLHD, and CEC, support the admission of all or part of contention SLOMFP TC-2. In this regard, although the staff did not find all of SLOMFP's proffered bases to be appropriate for litigation in this proceeding, the staff submits that the contention is admissible relative to the SLOMFP concerns about PG&E's access to credit and its ability to recover costs through rates. PG&E, on the other hand, opposes the admission of this contention arguing that the mere fact of bankruptcy does not alone establish a basis for this contention. PG&E asserts that it remains a viable going concern and that the NRC is satisfied that PG&E has adequate operating and decommissioning funds safely to operate and decommission DCPP. According to PG&E, any expenses it incurs, including the costs of the proposed ISFSI, are recoverable from

the rate base, regardless of its past debts. Thus, PG&E contends its access to credit is irrelevant. Similarly irrelevant to this proceeding, PG&E asserts, are the financial qualifications of Gen, assuming that PG&E's reorganization plan is approved by the bankruptcy court and the Commission then approves the DCPP license transfer to Gen, as well as the pending California Attorney General lawsuit against PG&E's parent company.

An ISFSI applicant is required by 10 C.F.R. § 72.22(e) to demonstrate in its application its financial qualifications to carry out the activities for which the license is sought. In pertinent part, section 72.22(e) provides:

> (e) . . . The [submitted financial qualifications] information must show that the applicant either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary funds or that by a combination of the two, the applicant will have the necessary funds available to cover the following:
>
> (1) Estimated construction costs;
>
> (2) Estimated operating costs over the planned life of the ISFSI; and
>
> (3) Estimated decommissioning costs . . . .

We agree with PG&E that the mere fact of PG&E's filing for bankruptcy does not by itself indicate that it is no longer financially qualified to continue day-to-day operations at the DCPP facility. In fact, when the petition for bankruptcy was first filed in April 2001, NRC Chairman Meserve assured California Governor Davis that the Commission was closely monitoring the operations at DCPP and was satisfied that PG&E's financial situation had no impact on its ability to operate the facility safely and in accordance with agency regulations. See PG&E Response to SLOMFP Contentions, attach. 1 (Letter from Richard A. Meserve, NRC Chairman, to Governor Gray Davis (Apr. 6, 2001)). Yet, notwithstanding PG&E's financial qualifications to conduct day-to-day DCPP operations, in its bases two and three 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. See SLOMFP Contentions at 14-17; id. exh. 3, at 127 (PG&E Corp. 2001 Annual Report). 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.

SLOMFP TC-3: PG&E May Not Apply for a License for a Third Party

CONTENTION: In its License Application, PG&E first asserts that it, as the applicant, is financially qualified. It then goes on to assert, however, that it has applied to transfer its Part 50 operating license to a yet-to-be-created limited liability company, Electric Generation LLC ("Gen"), which will then transfer it further to yet another yet-to-be-created entity, Diablo Canyon LLC. License Application at 5. "Gen" is one of the proposed offsprings of a restructuring proposal being considered in the bankruptcy proceeding. See Application for Consent to License Transfers and Conforming License Amendments for Diablo Canyon Power Plant, Units 1 and 2 at 4 (November 30, 2001) (hereinafter "License Transfer Application"). The License Transfer Application and Enclosure 8 are attached as Exhibit 5. PG&E also asserts that revenue and income projections for Gen, "as well as the substantial assets of the company," demonstrate Gen's financial qualifications to construct and operate the Diablo Canyon ISFSI. Id.

As discussed in Contention TC-4 below, it is not all clear whether Gen or some other entity will be the owner and licensee of the proposed ISFSI under PG&E's reorganization plan, even if that reorganization plan is approved, which it may well not be.

The crux of the problem is that PG&E may not apply for a license for a third party that does not constitute the "applicant." There is no corporate entity, other than PG&E, that has applied for a license to build and operate the proposed ISFSI. In the absence of an alternative applicant, PG&E's attempt to demonstrate the financial qualifications of a third-party shell corporation that is a non-applicant must fail.

DISCUSSION: SLOMFP Contentions at 19-20; PG&E Response to SLOMFP Contentions at 32-34; Staff Response to SLOMFP Contentions at 10-12; Tr. at 260-63, 275-78, 290, 299, 312-13, 327-39, 342-43.

RULING: In this contention, which also is supported by the declaration of Dr. Michael F. Sheehan, SLOMFP argues that PG&E is attempting to apply for the ISFSI license on behalf of an entity that would be created to operate DCPP if and when the bankruptcy court approves PG&E's reorganization plan. SLOMFP asserts that because section 72.22 requires the applicant to demonstrate its financial qualifications, PG&E must demonstrate that it — and not a non-existent "third-party shell corporation" — is financially qualified to construct and operate the ISFSI. SLOMFP Contentions at 20.

Although the PG&E and the staff both contest the admissibility of this contention, SLOC, CEC, and PSLHD support its admissibility. PG&E and the staff maintain that the applicant for the license application before the Commission is PG&E in its existing corporate form, not Gen or any other entity that may or may not be created in the future. Thus, they argue, the application that has been submitted by PG&E is factually accurate, and any inquiries into the financial qualifications of Gen are beyond the scope of this proceeding and would be more appropriately raised in the license transfer proceeding before the Commission concurrently.

As we explained in our discussion above regarding contention SLOMFP TC-2, we find that SLOMFP's concerns relative to the bankruptcy reorganization proceedings and its effects on PG&E's financial capacity to construct, operate, and decommission the proposed ISFSI are relevant to this proceeding and warrant further inquiry. However, as PG&E itself has recognized, petitioner concerns regarding entities that may or may not be created in the future to take over operations at DCPP, depending on whether PG&E's reorganization plan is approved by the bankruptcy court, are irrelevant to and/or outside of the scope of this proceeding at this point.[8]

[8] In this regard, assuming that the bankruptcy court confirms PG&E's reorganization plan, and that the Commission approves the license transfer of DCPP 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 SLOMFP seemingly would be free to submit any concerns about GEN or other newly-accountable entities as a late-filed contention.

Therefore, as it seeks to challenge the efficacy of the PG&E application on the basis of the information that application provides on these matters, contention SLOMFP TC-3 is not admitted either.

SLOMFP TC-4: Failure to Establish Financial Relationships between Parties Involved in Construction and Operation of ISFSI

CONTENTION: Newly formed entities that seek ISFSI licenses must conform to the requirements of 10 C.F.R. § 72.22, and also follow the Commission's guidance in 10 C.F.R. Part 50, including 10 C.F.R. § 50.33(f) and Appendix C. See Private Fuel Storage Facility (Independent Spent Fuel Storage Facility), LBP-98-7, 47 NRC 142, 187 (1998), citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302 (1997). Assuming that PG&E lawfully can seek to demonstrate the financial qualifications of a third party that does not constitute the license applicant for an ISFSI (see Contention TC-3 above), PG&E has failed to satisfy these requirements, because it has not provided an adequate description of the financial relationships between the corporate entities that will own, operate, and lease the proposed ISFSI.

DISCUSSION: SLOMFP Contentions at 20-23; PG&E Response to SLOMFP Contentions at 34-40; Staff Response to SLOMFP Contentions at 12; Tr. at 260-63, 275-78, 290-91, 299, 312-13, 327-39, 342-43.

RULING: With its contention TC-4, which is supported by the declaration of Dr. Michael F. Sheehan, SLOMFP argues that PG&E has failed to demonstrate that Gen, the proposed DCPP license transferee, is financially qualified to construct and operate the proposed ISFSI. SLOMFP further contends that the financial relationships between Gen and several other corporate entities that may have an interest in DCPP and the proposed ISFSI are not clearly defined, leaving it uncertain which entity would be liable or financially accountable in the event of an accident or other problem. PG&E and the staff oppose the admission of this contention, generally echoing their replies to contention SLOMFP TC-3, while SLOC, CEC, and PSLHD support the issue statement's admission.

For the reasons we rejected contention SLOMFP TC-3 above, we similarly deny the admission of contention SLOMFP TC-4. SLOMFP's concerns center on Gen's financial

qualifications and relationships between Gen and other entities that may be created as part of PG&E's bankruptcy reorganization plan, if confirmed. Indeed, SLOMFP's disputes appear to be based on information largely found in PG&E's license transfer application, which is currently being considered by the Commission in a separate proceeding. As such, in terms of providing a basis for denying the PG&E application, at this time those concerns are irrelevant to and/or beyond the scope of this ISFSI licensing proceeding, in which PG&E is the sole applicant.[9] Contention SLOMFP TC-4 thus is rejected as inadmissible.

SLOMFP TC-5: Failure to Provide Sufficient Description of Construction and Operation Costs

CONTENTION: PG&E has failed to provide a sufficient description or breakdown of costs for construction, and operation, and therefore it does not satisfy 10 C.F.R. § 72.22.

DISCUSSION: SLOMFP Contentions at 23; PG&E Response to SLOMFP Contentions at 40-43; Staff Response to SLOMFP Contentions at 12; Tr. at 292, 298-300, 320-21.

RULING: In proffering contention SLOMFP TC-5, which is supported by the declaration of Dr. Michael F. Sheehan as well, SLOMFP asserts it is impossible to evaluate the reasonableness of PG&E's cost estimates for building and operating the ISFSI because PG&E has failed to provide any detailed description of the associated costs, in violation of 10 C.F.R. Part 50, Appendix C, Section II, and 10 C.F.R. § 72.22. PG&E opposes the admission of this contention, arguing that Part 50, Appendix C does not apply in this proceeding and that it has complied with the requirements set forth in section 72.22. The staff, on the other hand, asserts that because SLOMFP has identified a specific regulatory requirement and a perceived

[9] As we noted above, see supra note 8, any concerns relating to the financial qualifications of Gen, or of any other entities other than PG&E, are not yet ripe for litigation in the instant proceeding.

deficiency in PG&E's ISFSI license application, the Board should admit contention SLOMFP TC-5. SLOC, CEC, and PSLHD also support admitting the contention.

Appendix C of Part 50 describes the financial data, including estimated costs of construction, that must be provided by applicants who wish to construct nuclear production, utilization, or testing facilities. In the context of this ISFSI licensing proceeding, however, Appendix C is not directly applicable. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 30 (2000) (finding that outside the reactor context, the requisite showing of financial qualifications under Part 72 is considerably more flexible than under Part 50 and that Part 72 applicants are not required to meet the detailed requirements of Part 50). Instead, section 72.22 is more pertinent for our purposes.

As we noted in connection with our discussion of contention SLOMFP TC-2 above, with regard to the necessary financial disclosures, section 72.22(e) requires an applicant to demonstrate that it either possesses or has reasonable assurance of obtaining sufficient funds to cover the ISFSI's estimated construction, operating, and decommissioning costs. See 10 C.F.R. § 72.22(e). In addition, an applicant must "state the place at which the activity is to be performed, the general plan for carrying out the activity, and the period of time for which the license is requested." Id. Beside the fact that section 72.22(e) does not require PG&E to itemize or break down the estimated costs of construction or operation, the only specific problem identified by SLOMFP with the information provided -- the purported PG&E failure to provide income information for years four and five of possible ISFSI operation in the November 30, 2001 license transfer application enclosure eight materials that are referenced on page five of the December 21, 2001 Part 72 license application, see SLOMFP Contentions at 23 -- is really not a PG&E failure at all. As the license transfer application materials included as exhibit five to the

July 2002 SLOMFP supplemental petition indicate, enclosure eight contained proprietary material that was not included in the publically available version of the application. See SLOMFP Contentions, exh. 5, at 4 (Nov. 30, 2001 Letter from Gregory M. Rueger, PG&E Senior Vice President-Generation and Chief Nuclear Officer, to NRC Commission and Staff). Although we provided SLOMFP an opportunity to seek any Part 72 license application associated-proprietary materials it wanted, as far as we are aware it made no request relative to this particular document. See Memorandum and Order (Protective Order Governing Disclosure of Proprietary Information) (June 19, 2002) attach. A, at 1-2 (unpublished). As a consequence, this purported missing information does not, in our estimation, provide a legitimate basis for the contention. SLOMFP thus having failed to establish purported material deficiencies in the application, we deny the admission of contention SLOMFP TC-5.

b. SLOMFP Environmental Contentions

SLOMFP Environmental Contention (EC)-1: Failure to Address Environmental Impacts of Destructive Acts of Malice or Insanity.

CONTENTION: The Environmental Report's discussion of environmental impacts is inadequate because it does not include the consequences of destructive acts of malice or insanity against the proposed ISFSI.

DISCUSSION: SLOMFP Contentions at 24-28; PG&E Response to SLOMFP Contentions at 43-50; Staff Response to SLOMFP Contentions at 13-14; Tr. at 76-114.

RULING: Supported by the declaration of Dr. Gordon R. Thompson, SLOMFP argues that the ER is inadequate because it does not contain any discussion of the environmental impacts of destructive acts of malice or insanity. While conceding that this omission is consistent with the Commission's practice of not considering the environmental impacts of such acts, SLOMFP argues that in light of the events surrounding September 11, 2001, there is a "demonstrable need" for the Commission to revisit its policy. SLOMFP Contentions at 25. Specifically, SLOMFP points to interviews with terrorists who candidly admit that nuclear power

stations are top targets for attacks in the United States. SLOMFP also cites the agency's 1994 vehicle bomb rulemaking, 59 Fed. Reg. 38,889 (1994), as evidence that the Commission has begun to acknowledge the foreseeability of destructive acts of malice or insanity.

While PSLHD and SLOC support admitting contention SLOMFP EC-1, both PG&E and the staff oppose its admission. PG&E and the staff assert contention SLOMFP EC-1 is inadmissible as a matter of law because it challenges existing NRC regulations governing ISFSI physical security. In addition, they declare that, in light of the agency's current re-evaluation of its security requirements and programs, contention SLOMFP EC-1 concerns matters that are, or are about to become, the subject of general rulemaking by the Commission.

Current NRC regulations do not require licensees to plan for or to design their facilities to protect against all acts of destruction or sabotage. Pursuant to 10 C.F.R. §§ 72.24(o), 72.180, an applicant, such as PG&E, is required to describe physical security protection plans for its ISFSI, which must meet the requirements set forth in 10 C.F.R. § 73.51. Section 73.51 requires a licensee to implement plans that will provide "high assurance that activities involving [SNF] and high-level radioactive waste do not constitute an unreasonable risk to public health and safety." 10 C.F.R. § 73.51(b)(1). When section 73.51 was adopted in 1998, the Commission specifically rejected a proposal that would have required ISFSIs to be protected against malevolent attacks by either land-based or airborne vehicles. See 63 Fed. Reg. 26,955, 26,956 (May 15, 1998). In doing so, the Commission acknowledged that spent fuel storage installations carried with them a lower potential for off-site consequences as compared to other types of facilities, and thus, would not be held to the same stringent safety requirements as production facilities, for example. See id. Moreover, pursuant to 10 C.F.R. § 50.13, even applicants who wish to construct and operate a power reactor facility are

> not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks

> and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 379 (2001).

Contention SLOMFP EC-1 thus appears to directly challenge the Commission's rules regarding destructive acts of malice or insanity by enemies of the United States. As we have noted above, contentions that question existing NRC regulations are inadmissible as a matter of law. SLOMFP does argue that because its contention EC-1 is an environmental contention based on the National Environmental Policy Act (NEPA), rather than a safety contention based on the Atomic Energy Act and implementing NRC regulations, 10 C.F.R. § 2.758 does not apply and this Board may admit the contention. In our view, however, whether contention SLOMFP EC-1 is characterized as a safety contention or as an environmental issue statement is of no moment, because "the rationale for 10 CFR § 50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities." Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 487 (2001), referral accepted, CLI-02-3, 55 NRC 155 (2002). Therefore, we find that contention SLOMFP EC-1 is inadmissible.

However, in light of the Commission's ongoing "top to bottom" review of the agency's safeguards and physical security programs, including those related to ISFSIs, which was commenced following the events of September 11,[10] we will refer our ruling on contention SLOMFP EC-1 to the Commission for its consideration.

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[10] See CLI-02-23, 56 NRC __, __ (slip op. at 4-5) (Nov. 21, 2002) (in denying request by SLOMFP and other petitioners to suspend this proceeding, discussing ongoing comprehensive security review).

SLOMFP EC-2: Failure to Fully Describe Purposes of Proposed Action or to Evaluate All Reasonably Associated Environmental Impacts and Alternatives

CONTENTION: NRC regulations at 10 C.F.R. § 51.45(b) require a license applicant to describe, among other things, a statement of the purposes of the proposed action. PG&E's Environmental Report fails to meet this requirement because it does not completely disclose the purposes of the proposed ISFSI. In describing the need for the facility, the ER states that additional spent fuel storage capacity is needed at Diablo Canyon to accommodate the additional spent fuel that will be generated through the operating life of each unit. ER at 1.2-1. Yet, the capacity of the proposed ISFSI would be two or three times greater than what is needed to fulfill that purpose.

It appears that PG&E may have an additional, unstated purpose, i.e., to provide spent fuel storage capacity during a license renewal term. PG&E implies, in setting forth its financial qualifications in Section 1.5 of the License Application, that the proposed ISFSI could be used to accommodate spent fuel offloaded from the spent fuel pools after the present license terms of Diablo Canyon Units 1 and 2 have expired. However, if PG&E proceeds with its publicly stated plan to obtain license renewals for these units, the capacity of the proposed ISFSI would accommodate spent fuel generated during a substantial part of the license renewal term. Thus, the excess capacity of the proposed ISFSI -- beyond that needed to accommodate the additional spent fuel that will be generated during the remaining license terms of the two Diablo Canyon units -- could serve two different purposes. Neither purpose is discussed explicitly in the ER, and the License Application discusses only one of the purposes -- namely, offloading the pools. Moreover, the discussion in the License Application is so oblique that PG&E's true purpose cannot be divined. Accordingly, the ER must be revised to fully disclose the purposes of the proposed facility.

A revision of the statement of purpose for the proposed ISFSI would require significant changes to the ER. As the courts have recognized, the statement of purpose and need in an EIS determines the range of alternatives that must be considered. City of Carmel-by-the-Sea v. U.S. Department of Transportation, 123 F.3d 1142, 1155 (9th Cir. 1995); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991); City of New York v. United States Department of Transportation, 715 F.2d 732, 743 (2nd Cir. 1983). As the Court observed in [Citizens] Against Burlington, "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." 938 F.2d at 196.

If, as it appears, the purposes of the proposed ISFSI could include providing for spent fuel storage during an extended or renewed license term, then it is appropriate to consider whether previous environmental analyses support renewed authorization to continue storing spent fuel at the Diablo Canyon site in the manner currently provided. In particular, the ER must "contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv). The Intervenors recognize that consideration of environmental impacts of spent fuel storage in a license renewal term is generally precluded in license renewal cases, because these environmental impacts were previously addressed in NUREG-1437, Generic Environmental Impact Statement for License

Renewal of Nuclear Plants (1996). See, in particular, Section 6.4.6.3. However, the NRC's NEPA regulations create an exception to this prohibition, by requiring consideration of "new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(iv).

In this case, the ER should address new information showing that (a) previous NRC environmental analyses of the risks of high-density pool storage of spent fuel considerably underestimate the risk of a spent fuel pool fire; and (b) in light of the terrorist attacks of September 11, 2001, and other events, the adequacy of design for both pool storage and dry storage has been demonstrated to be inadequate to protect against the potentially catastrophic effects of destructive acts of malice or insanity. The ER should consider a range of alternatives for extended spent fuel storage that will avoid or mitigate these risks.

DISCUSSION: SLOMFP Contentions at 28-38; PG&E Response to SLOMFP Contentions at 50-58; Staff Response to SLOMFP Contentions at 15-16; Tr. at 174-219.

RULING: SLOMFP proffers a number of bases in connection with its contention EC-2, which is supported by the declaration of Dr. Gordon R. Thompson. SLOMFP submits that the ER understates the ISFSI's capacity relative to the storage needed during the current DCPP operating license terms and, as a result, the statement of purpose must be revised to incorporate a discussion of storage during an extended term following license renewal. SLOMFP also contends that there is new information that shows not only that the risks of spent fuel pool fires are higher than previously estimated, but also that pools and casks alike are vulnerable to destructive acts of malice or insanity. In addition, according to SLOMFP, the NRC has acknowledged the potential for sabotage-induced pool fires. SLOMFP further argues that previous environmental analyses are inadequate and that the ER needs fully to address impacts and alternatives. Both PG&E and the staff oppose the admission of this contention, while SLOC and PSLHD support its admission.

SLOMFP calculates, based on the remaining fuel cycles at DCPP, that the capacity of the ISFSI should be two to three times smaller than what has been proposed by PG&E and infers that PG&E most likely is contemplating license renewal. PG&E, however, has very plainly stated that the proposed ISFSI "is designed to store all of the spent fuel and associated nonfuel

hardware resulting from the operation of the Diablo Canyon Power Plant Units 1 and 2 through 2021 and 2025 respectively," Application ¶ 3.0, at 8, and supplied calculations that confirm that statement, see PG&E Response to SLOMFP Contentions at 53-54. The staff too has concluded that the proposed storage capacity is mathematically consistent with what would be needed to store all of the spent fuel generated over the lifetimes of DCPP Units 1 and 2, including capacity needed to support decommissioning at that juncture. Notwithstanding SLOMFP's assertion that PG&E could use the decommissioning-related capacity for storage during a renewal term, see Tr. at 177, we fail to see how an application that accurately describes what the proposed capacity will be and provides a logical basis for that capacity is deficient so as to create a material dispute for contention admission purposes.[11] Cf. Shearon Harris, LBP-99-25, 50 NRC at 34 (particularized showing needed to demonstrate applicant will act contrary to terms of regulatory requirement). Consequently, we find that revision of the ER's statement of purpose is unnecessary, as is further consideration of other alternatives.

Further, in response to the information proffered by SLOMFP regarding the risks of spent fuel pool fires, PG&E and the staff counter that this new information is beyond the scope of this proceeding. As we observed in section II.C.1 above, contentions that concern matters outside the scope of the proceeding, as defined by the notice of hearing or opportunity for hearing, must be denied. The notice of opportunity for hearing for this proceeding indicated that at issue is PG&E's application for a Part 72 license to possess SNF and other radioactive materials associated with SNF a dry cask storage system at an ISFSI. See 67 Fed. Reg. at 19,600. Environmental impacts regarding spent fuel pool fires thus are, on their face, beyond the scope

[11] This is particularly so in this instance, given that the 20-year term of the proposed DCPP ISFSI license would need to be extended prior to the beginning of any DCPP operating license renewal period, thus seemingly affording an opportunity for hearing consideration of the impacts upon the ISFSI renewal of any reactor-renewal driven expansion.

of this licensing proceeding, at least absent a demonstration of how an issue associated with wet storage is applicable here, which SLOMFP has not provided.

In several of the contention's bases, SLOMFP also rehashes arguments concerning acts of destruction or sabotage that were advanced in support of contention SLOMFP EC-1. Because we have previously addressed these arguments in our discussion of that contention above, we will not repeat our reasons for rejecting them here. At the same time, we also will refer our ruling on this contention to the Commission to the extent destruction and sabotage matters are proffered in support of admission of this contention.

Finally, SLOMFP argues that the previous analyses conducted in NUREG-0575, Final Generic Environmental Impact Statement on Handling and Storage or Spent Light Water Power Reactor Fuel (Aug. 1979) and 1 NUREG-1437, Generic Environmental Impact Statement for License Renewal (May 1996), are inadequate because they do not consider the potential for spent fuel pool accidents. SLOMFP further challenges other technical studies reviewed by the NRC on the basis they do not consider the more severe consequences of a partial pool drainage in addition to total and instantaneous pool drainage. PG&E and the staff once again assert that this basis be rejected on the grounds that impacts associated with spent fuel pool accidents are beyond the scope of this proceeding and that it is an impermissible challenge to NRC regulations.

As we noted in our earlier discussion of this contention, SLOMFP has not demonstrated how environmental impacts of spent fuel pool accidents are relevant to this ISFSI licensing proceeding. Without such a showing, we find that these additional concerns relative to spent fuel pool accidents are beyond the scope of this proceeding. Because SLOMFP has failed to provide any basis for contention SLOMFP EC-2 that satisfies the requirements of section 2.714(b) for this contention, we must deny its admission.

SLOMFP EC-3: Failure to Evaluate Environmental Impacts of Transportation

CONTENTION: In violation of NEPA, PG&E's ER completely fails to evaluate the reasonably foreseeable environmental impacts of transporting spent fuel away from the Diablo Canyon ISFSI at the end of the license term of the ISFSI, either to a repository or another interim storage site. In failing to address these reasonably foreseeable impacts, PG&E violates [NEPA], and NRC implementing regulations at 10 C.F.R. § 51.45(b)(1) (requiring ER to address the impacts of the proposed action on the environment) and 10 C.F.R. § 72.108 (requiring the applicant to address the impacts of spent fuel transportation within the "region" of the proposed ISFSI).

DISCUSSION: SLOMFP Contentions at 39-40; PG&E Response to SLOMFP Contentions at 58-67; Staff Response to SLOMFP Contentions at 16-18; Tr. at 219-37.

RULING: Again relying on the support of Dr. Gordon Thompson, with this contention SLOMFP challenges the adequacy of the PG&E ER's discussion of transportation-related impacts, specifically those that would arise from the transport of any spent fuel to a final geologic repository, such as the proposed Yucca Mountain, Nevada facility, or an interim storage facility, such as the proposed Skull Valley, Utah Private Fuel Storage ISFSI. According to SLOMFP, such SNF transportation is reasonably foreseeable at the end of the proposed DCPP ISFSI's twenty-year license. As such, SLOMFP claims its impacts must be considered in the ER, including a discussion of impacts arising from normal conditions, reasonably foreseeable severe and beyond design basis accidents, and sabotage/terrorist attacks and an analysis of transportation alternatives, including transportation deferral. Alternatively, according to SLOMFP, if there is some generic EIS that already addresses these matters, then the PG&E ER must identify that source and explain why and to what extent it applies. SLOC, PSLHD, and CEC support admission of this contention as well.

Admission of contention SLOMFP EC-3 is opposed by PG&E and the staff on a number of grounds. According to the staff, the hearing notice for this proceeding limits its subject matter to ISFSI facility construction and operation, so that subsequent transportation activities are outside its scope. Further, citing 10 C.F.R. § 72.108 and its regulatory history, both PG&E and

the staff maintain the NEPA responsibility arising under that provision to address regional transportation impacts is inapplicable to this proceeding. This is so, PG&E asserts, because section 72.108 was intended only to encompass impacts of transporting SNF into a region, and so in this instance the proposed action covers only onsite, rather than offsite, transportation impacts in that fuel is not moved offsite in connection with this co-located ISFSI. Similarly, the staff declares that no section 72.108 evaluation is necessary consistent with 10 C.F.R. § 72.40(a), (c), which indicate that absent new information any Part 72, Subpart E siting evaluation requirement, including section 72.108, need not be revisited if covered by a prior licensing action, including a Part 50 construction permit. Further, according to PG&E, any offsite transportation impacts, including accidents, are considered in either the Department of Energy's EIS for the proposed Yucca Mountain HLW repository or the NRC EIS for the proposed Skull Valley, Utah ISFSI facility. Moreover, PG&E asserts that any transportation impacts are reasonably foreseeable impacts arising from operation of the DCPP, not the ISFSI, as is reflected in operation-related generic analyses of such impacts in Table S-4, 10 C.F.R. § 51.52, and WASH-1238/NUREG-75/038, Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants (Dec. 1972 & Supp. 1, Apr. 1975). Finally, PG&E declares that neither sabotage/terror/warfare impacts nor transportation alternatives, such as deferral, need be addressed, the former for the reasons discussed above regarding contention SLOMFP EC-1, and the latter because the alternatives suggested by SLOMFP would not serve the purpose of the proposed action, which is SNF storage.

The applicability of section 72.108 requirement to assess regional transportation impacts under section 72.40(a)(2) is subject to the section 72.40(c) caveat that, in the absence of new information, such a Subpart E siting analysis that has been provided as part of a previous licensing action need not be reevaluated. Although the DCPP construction permit analysis of

transportation impacts appears to predate Table S-4's applicability, PG&E had indicated such analysis nonetheless was done in the licensing documents, see Tr. at 230, and, with the exception of its already rejected assertion that sabotage/terror/warfare impacts need be included, nothing provided by SLOMFP has challenged that analysis. Accordingly, we find this contention inadmissible as failing to show a material factual or legal dispute, although we once again will refer our ruling in this regard to the Commission to the extent terrorism and sabotage matters are proffered in support of its admission.

3. Interested Governmental Entity Issues

a. Admission Requirements for Issues Raised by Section 2.715(c) Participants

DISCUSSION: Staff Position on Section 2.715(c) Participant Issues at 2-9; PG&E Position on Section 2.715(c) Participant Issues at 4-14; SLOC Position on Section 2.715(c) Participant Issues at 5-12; PSLHD Position on Section 2.715(c) Participant Issues at 2-3; CEC Position on Section 2.715(c) Participant Issues at 1-7; Tr. at 119-21, 125-29, 131-33, 146-48, 150-60, 165, 167-68.

RULING: Before ruling on the admissibility of the issues raised by PSLHD and SLOC, we first address the question of whether issues submitted by 10 C.F.R. § 2.715(c) participants must meet the same stringent requirements as contentions proffered by section 2.714 intervenors. Both PG&E and the staff argue that any new issues interested governmental entities wish to raise should be held to the same standard as contentions submitted by section 2.714 intervenors. SLOC, on the other hand, asserts that the standard should be less rigorous. According to SLOC, given the unique role that interested governmental entities play in protecting the public's health and safety, they should be permitted to bring their own issues of concern to the Board's attention, even if those issues would not qualify as contentions under section 2.714(b). For its part, PSLHD adopts the position and arguments of SLOC, while CEC

argues that it is within the Board's discretion to permit a more flexible standard than the section 2.714(b) requirements when considering the admission of issues submitted by interested governmental entities.

For the reasons set forth below, we find that subjecting new issues submitted by section 2.715(c) interested governmental entities to the requirements set forth in section 2.714(b) is most consistent with agency case law and the purposes of sections 2.714 and 2.715(c).

On their face, sections 2.714(b) and 2.715(c) do not indicate with what level of specificity interested governmental entities must plead their issues. Section 2.714(b)(2) delineates only what "the petitioner" must provide with respect to each contention and nowhere mentions "interested governmental entities" or "section 2.715(c) participants." Section 2.715(c) states that a qualifying interested governmental entity will be given a reasonable opportunity to participate in the proceedings, including the ability to introduce evidence, interrogate witnesses, and advise the Commission without requiring it to take a position with respect to the issues being litigated. With respect to the issues that an interested governmental entity does take a position on, the provision indicates the presiding officer may require the entity, prior to the hearing, to indicate with "reasonable specificity" on which issues it wishes to participate. Section 2.715(c) does not, therefore, explicitly address how new issues raised independently by an interested governmental entity -- as opposed to mere participation in discussions regarding contentions submitted by a section 2.714 petitioner -- are to be pled. Because the text of the regulations leaves this question essentially unanswered, we turn to the agency's case law and regulatory history for guidance.

Prior to 1989, section 2.714(b) merely required petitioners to submit a list of contentions along with a statement of the basis for each contention with reasonable specificity. See 51 Fed.

Reg. 24,365, 24,366 (July 3, 1986) (statement of considerations for proposed rule to raise contentions admission threshold). In practice, a petitioner could meet this low threshold by simply copying the contentions submitted by another petitioner in a completely unrelated proceeding involving a different facility. See id. At the same time, in connection with interested governmental entities, Appeal Board and Licensing Board decisions preceding the 1989 revisions to section 2.714(b) recognized that interested governmental entities could participate in a proceeding without offering contentions of their own. See Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 246-47 (1981). They also determined, however, that once admitted as a section 2.715(c) participant, "an 'interested state' must observe the procedural requirements applicable to other participants." River Bend, ALAB-444, 6 NRC at 768. Thus, with respect to late-filed contentions, the Licensing Board in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1139-40 (1983), held that a county, notwithstanding its status as a section 2.715(c) participant, could not interject new issues into the case more than one year after the hearing without satisfying section 2.714(a)(1)'s test for late-filed contentions. Even more directly on point is the Licensing Board's decision in the above-cited Diablo Canyon operating license proceeding, in which the Governor of California sought to participate in the proceeding as an interested governmental entity on certain subject matters. Diablo Canyon, LBP-81-5, 13 NRC at 246. The Licensing Board there stated that while the Governor was not required to proffer contentions of his own and was free to participate in the litigation of any admitted contentions, "if the Governor wishes to raise specific issues not otherwise accepted by the Board he must comply with the requirements of 10 CFR 2.714(b) for acceptable contentions, just as any other party must." Id. at 246-47 (citing River Bend, ALAB-444, 6 NRC 760 (1977)). Thus, prior to 1989, once admitted

to the proceeding as an interested governmental entity, a section 2.715(c) participant that wished to file timely or untimely contentions of its own was required to meet the same procedural standards as those required of a section 2.714 intervenor.

The 1989 revisions to section 2.714(b) substantially raised the threshold for the admissibility of petitioner contentions. Section 2.715 (c) was not amended, however, leaving it unclear what effect the 1989 revisions were intended to have on issues submitted by section 2.715(c) participants. Relying on the existing case law prior to 1989 that held section 2.715(c) participants to section 2.714's procedural requirements when they wished to interject new issues into the proceeding, the staff argues that the revised section 2.714 contention admission requirements also apply to section 2.715(c) participants and that there is no evidence that indicates otherwise.

Although there seems to be little case law on this issue, at least one Licensing Board decision after the effective date of the 1989 rule change appears to support the staff's position. In Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427 (1990), the Commonwealth of Massachusetts was admitted to the proceeding as a section 2.714 intervenor. After another intervenor withdrew, the Commonwealth attempted to adopt the withdrawn party's contention as its own and continue litigating it. The Licensing Board held that once a sponsoring intervenor drops out of the proceeding, its contention does not have a life of its own, and not even "the Commonwealth's avowed status as an 'interested state' avail[s] to it any special power to pick up issues dropped by other intervenors. If it wishes to have issues heard in an NRC proceeding, it 'must observe the procedural requirements applicable to other participants.'" Id. at 430-31 (quoting River Bend, ALAB-444, 6 NRC at 768-69 (1977)) (emphasis added). This post-1989 rule change determination provides some support for

holding interested governmental entities to the contention admissibility standards of section 2.714(b) for any new issues they wish to litigate.

Consideration of the policy rationales underlying sections 2.714(b) and 2.715(c) further support this conclusion. As proposed, the purpose of the 1989 amendments to section 2.714 was to "sharpen the issues in dispute throughout the prehearing and hearing phases and ensure that the resources of all parties are focused on real rather than imaginary issues." 51 Fed. Reg. at 24,366. Section 2.715(c) and its statutory source, section 274(l) of the Atomic Energy Act, 42 U.S.C. § 2021(l), were designed "to accord to States the privilege of fully participating in licensing proceedings and advising the Commission on the resolution of issues considered therein without being obliged in advance to set forth any affirmative contentions of its own (as is required of private intervenors)." Project Management Corp., Tennessee Valley Authority, Energy Research and Development Administration (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 393 (1976). As a consequence, requiring interested governmental entities to conform to the requirements of section 2.714(b) for any new issues they wish to litigate is in no way contrary to the intent of section 2.715(c), nor does it hold them "hostage" to the issues raised by private parties, as SLOC argues. SLOC Position on Section 2.715(c) Participant Issues at 12. Rather, it preserves the underlying purposes of both provisions by preventing parties from having to expend resources on litigating unsubstantiated issues, while at the same time affording interested governmental entities a full opportunity to be heard on the issues being litigated without imposing on them the burden of having to submit a formal contention just to be able to participate in the proceedings.

Moreover, because the ultimate burden of proof rests with the applicant in this type of action, it is not clear as a procedural matter against what standard we would judge the applicant's response to an "informal" issue that did not meet the requirements of

section 2.714(b). In other words, if interested governmental entities were allowed to introduce issues under a standard less rigorous than section 2.714(b), is the applicant then to be permitted to respond to the issue with a less comprehensive showing? The staff has indicated that any party choosing to respond to the issue, including the applicant and the staff, would be obligated to respond to any issue raised with the same degree of evidence as if it were a contention admitted under section 2.714(b). Ultimately, permitting section 2.715(c) participants to interject "informal" issues for litigation would not only undermine the purposes of section 2.714(b), but would remove any incentive for governmental entities to participate in the proceedings as full intervenor parties.

As was noted very recently in the previously referenced PG&E license transfer case, "[t]he Commission 'has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc.'" Pacific Gas & Electric Co. (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 345 (2002) (quoting Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 344 (1999)). We thus welcome the input of SLOC, PSLHD, CEC, and ABCSD (as well as DCISC, albeit under a different procedural regime) on any contentions that are admitted for litigation in this proceeding. For any new issues these interested governmental entities wish to raise on their own, however, they must satisfy the standards for contentions set forth in section 2.714(b).

Having thus established the standard for admissibility of issues proffered by section 2.715(c) participants, we turn to the issues independently submitted by PSLHD and SLOC.

b. PSLHD Issue

PSLHD Emergency Planning (EP-1): Emergency Response Plan Adequacy

CONTENTION: Although PSLHD is aware of 10 C.F.R. § 72.32(c), PSLHD has significant concerns regarding the adequacy of the San Luis Obispo County Nuclear Power Plant Emergency Response Plan (ERP) and believes the ERP should be considered in PG&E's current application.

DISCUSSION: PSLHD Issues at 14; Staff Response to PSLHD Issues at 2-4; PG&E Response to SLOC and PSLHD Issues at 3-7; Tr. at 129-30, 137-41, 144-46, 164-66

RULING: PSLHD submits only one issue for consideration, which we refer to as Emergency Planning (EP)-1.[12] PSLHD argues that the existing ERP is more than twenty years old and does not reflect significant demographic and physical changes to the Diablo Canyon area that have occurred since its drafting. PSLHD outlines five areas of particular concern: (1) radio reception for local emergency alert system stations is poor or non-existent in Avila Valley; (2) evacuation time estimates would be more accurate if the latest technology were used; (3) risk factors such as terrorist attacks, human error, and seismic events may have been downplayed in the ERP; (4) population estimates and established emergency escape routes for Avila Valley contained in the ERP are outdated; and (5) the ERP does not accurately recognize population shifts in the emergency planning zones, particularly during summer weekend holidays.

While SLOC, CEC, and SLOMFP support admitting issue PSLHD EP-1, both PG&E and the staff oppose its admission. In their pleadings, the PG&E and the staff both cite 10 C.F.R. § 72.32(c), which provides:

> (c) For an ISFSI that is:
> (1) located on the site, or

[12] Although the Board directed otherwise, see Board Order on Interested Governmental Entity Issue Identification at 2, because PSLHD did not provide a concise statement outlining its concern, this issue statement is the Board's paraphrase of PSLHD's summary discussion regarding its issue.

> (2) located within the exclusion area as defined in 10 CFR part 100, of a nuclear power reactor licensed for operation by the Commission, the emergency plan required by 10 CFR 50.47 shall be deemed to satisfy the requirements of this section.

The staff points out that because the emergency planning requirements set forth in section 50.47, which apply to reactors, are much more demanding than those pertaining to ISFSIs, the existing EP for the reactor is sufficient for ISFSIs that will be located on the site of a previously-licensed reactor, such as the one being proposed by PG&E. In addition, PG&E argues that PSLHD's challenges to the ERP are beyond the scope of this proceeding because they only concern general ongoing operational matters, and not matters directly related to the proposed ISFSI.

Because section 72.32(c) relieves PG&E of having to draft a new EP or amend an existing EP, any issues or contentions that seek such relief are essentially a challenge to that regulation and so are inadmissible pursuant to 10 C.F.R. § 2.758. They seemingly are outside the scope of this proceeding as well. Although concerns regarding the EP approved for DCPP are beyond the scope of this proceeding and are not open to relitigation at this time, arguably an emergency planning concern that relates specifically to the proposed ISFSI might be admissible. PSLHD, however, has failed to demonstrate in its pleading how its concerns about changes to the demographics and physical characteristics of Avila Valley within the past twenty years would specifically impact emergency planning as it relates to the possession of spent fuel in the proposed ISFSI. For these reasons, we find that issue PSLHD EP-1 is inadmissible.

c. SLOC Issues

(i) SLOC Technical Issues

SLOC TC-1: The Corporate Identity and Structure of the Applicant are Not Adequately Identified

DISCUSSION: SLOC Issues at 3-5; PG&E Response to SLOC Issues at 7-9; Staff Response to SLOC Issues at 3-5; Tr. at 271-74, 290, 298-314, 323-327, 339-42, 344-47.

RULING: With this issue, SLOC seeks to challenge the adequacy of the PG&E application to the extent that it identifies other corporate entities that would be created in the event the pending bankruptcy reorganization gains judicial approval. According to SLOC, the possibility exists that with such approval, one or more of these new entities would be responsible for the construction, operation, and decommissioning the ISFSI. As a consequence, SLOC maintains, until the reorganization is approved, any financial qualifications evaluation relative to this application must be postponed. SLOMFP, PSLHD, and CEC support the admission of this issue. Both PG&E and the staff, however, oppose accepting this issue, asserting it is essentially identical to contention SLOMFP TC-3 and should be rejected for the same reasons.

For the reasons we have provided above relative to contention SLOMFP TC-3, this issue is not admitted for further consideration at this time.[13]

[13] Moreover, to the extent the basis of this contention appears to mirror the concerns about the continuation of this proceeding expressed as grounds for the request to stay this proceeding previously ruled on by the Board, it likewise fails to provide grounds for further consideration in this proceeding. See supra note 2.

SLOC TC-2: The Financial Qualifications of the Applicant Are Not Adequately Demonstrated

DISCUSSION: SLOC Issues at 5-6; PG&E Response to SLOC Issues at 9-12; Staff Response to SLOC Issues at 5; Tr. at 271-74, 292-93, 298-314, 323-27, 339-42, 344-47.

RULING: With this issue, SLOC challenges the adequacy of the financial qualifications information provided by PG&E in its Part 72 application to the extent it relies upon the credit worthiness/borrowing capabilities and the electric utility status of its bankruptcy reorganization successor. SLOMFP, CEC, and PSLHD support its admission. PG&E and the staff oppose admission of this issue, the former essentially for the reasons it gave in response to contention SLOMFP TC-2, while the latter contends that it is inadmissible because of its post-bankruptcy reorganization focus.

Although this issue is similar to contention SLOMFP TC-2 in its concerns about PG&E assertions about credit worthiness and utility status as a financial qualifications basis in light of the pending bankruptcy proceeding, we agree with the staff that, in contrast to the admitted portions of issue SLOMFP TC-2, its post-bankruptcy reorganization focus renders it inadmissible at this juncture.

(ii) SLOC Environmental Issue

SLOC EC-1: The ER does not contain an adequate analysis of alternatives: the ER fails to adequately consider and analyze (A) alternative sites and associated security measures, and (B) alternative security plans.

DISCUSSION: SLOC Issues at 7-11; PG&E Response to SLOC and PSLHD Issues at 12-17; Staff Response to SLOC Issues at 6-8; Tr. at 121-24, 130-31, 133-46, 160-66.

RULING: Although bearing a general introduction regarding the need to discuss alternatives, the crux of this issue is provided in sub-issues (A) and (B). With regard to its sub-issue EC-1.A, SLOC argues that PG&E failed to consider important factors, such as vulnerability to offshore attacks post-September 11, when selecting the site for its ISFSI. SLOC

also asserts that the ER's failure to evaluate security-related features for alternative sites and failure to consider reasonable alternatives violates 10 C.F.R. § 72.94 and NEPA, respectively. SLOC contends in sub-issue SLOC EC-1.B that PG&E's cost-benefit analysis may have failed to take into account the costs SLOC would bear in training its security personnel and implementing the ERP. Moreover, SLOC argues, because failure of the ISFSI's physical security plan could have substantial environmental consequences for the county's citizens, PG&E should be required to evaluate whether alternative security measures would reduce the ISFSI's exposure to offshore attack. Finally, SLOC asserts that review of the ERP is necessary so that SLOC can better understand and prepare for its increased responsibilities under the ERP.

While SLOMFP, CED, and PSLHD support the acceptance of SLOC EC-1 in its entirety, both PG&E and the staff oppose the admission of any part of the issue into this proceeding. In their view, sub-issue SLOC EC-1.A largely incorporates the same post-September 11 security arguments advanced in contention SLOMFP EC-1. As we noted in our discussion of SLOMFP's contention EC-1 above, current NRC regulations do not require licensees to plan for or to design their facilities to protect against attacks by enemies of the United States. See also 10 C.F.R. §§ 50.13, 73.51(b)(1). Because sub-issue SLOC EC-1.A appears to challenge the Commission's rules regarding acts of destruction and sabotage, it must be denied as a matter of law, regardless of whether the issue is characterized as a safety issue or as an environmental one under NEPA. As was the case previously, however, we make this aspect of this issue a part of our referral to the Commission.

Likewise, for the reasons that we found issue PSLHD EP-1 to be inadmissible, we find sub-issue SLOC EC-1.B to be inadmissible. As we discussed relative to issue PSLHD EP-1 above, for ISFSIs that will be located on the site of a previously-licensed reactor, section 72.32(c) relieves a licensee of having to create a new ERP or amend an existing ERP.

SLOC's concern about the adequacy of the existing DCPP ERP is, therefore, a challenge to an agency regulation that renders issue SLOC EC-1.B inadmissible. Furthermore, the subject of emergency planning is outside the scope of this proceeding, unless it can be demonstrated that there are specific concerns with the ERP that are directly related to the proposed ISFSI. SLOC has raised none that provide an adequate basis for its issues.[14] We, therefore, deny the admission of sub-issue SLOC EC-1.B as well.

III. ADMINISTRATIVE MATTERS

[14] The only concern that SLOC has voiced that even comes close to being specific to the ISFSI is its statement that it does not understand what increased responsibilities it may bear once the ISFSI is operational. Although, as the Board suggested during the prehearing conference, this certainly should be the subject of additional consultation between PG&E and SLOC, see Tr. at 162-63, as presented it is not matter that establishes the basis for an admissible issue.

As we observed during the initial prehearing conference, see Tr. at 245, this ISFSI licensing proceeding is subject to the hybrid hearing process delineated in 10 C.F.R. Part 2, Subpart K, if any party wishes to invoke those procedures. See also 67 Fed. Reg. at 19,602. Pursuant to Subpart K, following a discovery period of up to ninety-days, which can be extended upon a showing of exceptional circumstances, the parties simultaneously submit a detailed written summary of all facts, data, and arguments upon which each party intends to rely to support or refute the existence of a genuine and substantial dispute of fact regarding any admitted contentions. See 10 C.F.R. §§ 2.1111, 2.1113(a). Subsequently, the presiding officer conducts an oral argument, in which the parties address whether an adjudicatory proceeding is warranted because there are specific facts in genuine and substantial dispute that can be resolved with sufficient accuracy only by the introduction of evidence. See id. § 2.1115(b). Thereafter, the presiding officer issues a decision that designates the disputed issues of fact for an evidentiary hearing and resolves any other issues. See id. § 2.1115(a).

Within ten days of an order granting a hearing request in a proceeding such as this one, a party may invoke Subpart K procedures by filing a written request for oral argument. See id. § 2.1109(a)(1). Accordingly, if PG&E, SLOMFP, or the staff wish to invoke the Subpart K procedures, it must file a request within ten days of the date of this order, or on or before Thursday, December 12, 2002. If such a request is received, the Licensing Board thereafter will issue an order regarding further scheduling.

IV. CONCLUSION

We find that petitioners SLOMFP, SLCSC, SLOCAN, CCPEC, AVAC, and Ms. Peg Pinard have made showings sufficient to establish their standing to intervene as of right in this proceeding. Further, we find that one of these six petitioners' eight contentions -- SLOMFP TC-2

-- is supported by bases adequate to warrant further inquiry so as to be admitted for litigation in this proceeding. Accordingly, pursuant to 10 C.F.R. § 2.714, we grant the hearing requests/intervention petitions of these petitioners and admit them as parties to this proceeding. We also grant SLOC, PSLHD, CEC, and ABCSD interested governmental entity participant status in accord with 10 C.F.R. § 2.715(c). However, because the issues raised by SLOC and PSLHD do not satisfy the section 2.714 contention admissibility standards, we do not admit any issues raised independently by these interested governmental entities for litigation in this proceeding.

For the foregoing reasons, it is this second day of December 2002, ORDERED, that:

1. Relative to the contention specified in paragraph three below, the hearing requests/intervention petitions of SLOMFP, SLCSC, SLOCAN, CCPEC, AVAC, and Peg Pinard are granted and they are admitted as parties to this proceeding, with SLOMFP acting as lead intervenor.

2. The hearing request/intervention petitions of ECSLO, CLDF, SMART, SLOCGPI, NAPF, and VCCSF are denied and the hearing request/intervention petition of Lorraine Kitman is dismissed as withdrawn.

3. Contention SLOMFP TC-2 is admitted for litigation in this proceeding as outlined in section II.C.2.a above.

4. The following SLOMFP contentions are rejected as inadmissible for litigation in this proceeding: TC-1, TC-3, TC-4, TC-5, EC-1, EC-2, and EC-3.

5. The SLOC, PSLHD, CEC, and ABCSD requests for interested governmental entity participant status under 10 C.F.R. § 2.715(c) are granted.

6. The DCISC request for interested governmental entity participant status under 10 C.F.R. § 2.715(c) is denied, although DCISC may participate in this proceeding as an amicus curiae in accordance with the procedures set forth in section II.B above.

7. The following issues submitted by interested governmental entities are rejected as inadmissible for litigation in this proceeding: issue PSLHD EP-1 and issues SLOC TC-1, SLOC TC-2, and SLOC EC-1.

8. In accordance with 10 C.F.R. § 2.730(f), the Licensing Board's rulings in sections II.C.2.b and II.C.3.c.(ii) above regarding the post 9/11sabotage/terrorism aspects of contentions SLOMFP EC-1, SLOMFP EC-2, SLOMFP EC-3, and issue SLOC EC-1 are referred to the Commission for further consideration and action, as appropriate.

9. The parties are to file any request for oral argument under 10 C.F.R. § 2.1109(a)(1) in accordance with the schedule established in section III above.

10. Pursuant to the provisions of 10 C.F.R. § 2.714a(a), as it rules upon an intervention petition, this memorandum and order may be appealed to the Commission within ten days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD[15]

Original Signed By
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Original Signed By
Jerry R. Kline
ADMINISTRATIVE JUDGE

Original Signed By
Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 2, 2002

[15] Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel or the representative for (1) applicant PG&E; (2) petitioners SLOMFP, et al.; (3) SLOC, PSLHD, CEC, DCISC, and ABCSD; and (4) the staff.

Opinion of Judge Lam Dissenting in Part and Concurring in Part With Respect to Licensing Board Rulings Rejecting SLOMFP Contentions EC-1, EC-2 and EC-3, and SLOC Issue EC-1

I join in this memorandum and order in all respects except for the Licensing Board's determination to deny admission of SLOMFP's contentions EC-1, EC-2, and EC-3, and SLOC issue EC-1 as they relate to the need for consideration of acts of terrorism and sabotage in the PG&E ER for its proposed ISFSI. I would admit this aspect of these NEPA-based contentions for further litigation. See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 444-47 (2001), petition for interlocutory review granted, CLI-02-4, 55 NRC 158 (2002). Nonetheless, given the significance of the matter involved, I concur in the Board's determination to refer its rulings rejecting this facet of these contentions to the Commission for its further consideration.