

RAS 6691

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

LBP-03-11

DOCKETED 08/05/03

SERVED 08/05/03

Before Administrative Judges:

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

In the Matter of

PACIFIC GAS AND ELECTRIC CO.

(Diablo Canyon Power Plant Independent
Spent Fuel Storage Installation)

Docket No. 72-26-ISFSI

ASLBP No. 02-801-01-ISFSI

August 5, 2003

MEMORANDUM AND ORDER

(Denying Request for Evidentiary Hearing and Terminating Proceeding)

Pending before the Licensing Board in this 10 C.F.R. Part 2, Subpart K proceeding are various party submissions addressing the issue of whether to designate the sole admitted contention of 10 C.F.R. § 2.714 intervenors San Luis Obispo Mothers for Peace, et al., (collectively SLOMFP) for an evidentiary hearing in accordance with 10 C.F.R. § 2.1115. With its Technical Contention 2 (TC-2), lead intervenor SLOMFP and the participating 10 C.F.R. § 2.715(c) interested governmental entities challenge the December 2001 application of Pacific Gas and Electric Company (PG&E) for a 10 C.F.R. Part 72 license to construct and operate an independent spent fuel storage installation (ISFSI) at its Diablo Canyon Power Plant (DCPP) facility near San Luis Obispo, California. Interested governmental participants San Luis Obispo County, California (SLOC), the Avila Beach Community Services District (ABCSD), and the California Public Utilities Commission (CPUC) argue that further exploration of the issues in an evidentiary hearing is warranted. In contrast, SLOMFP, the California Energy Commission

(CEC), PG&E, and the NRC staff contend that there is no need for an adjudicatory hearing, although they disagree about the merits disposition that should be rendered.

Also pending before the Board is a motion by SLOC, ABCSD, CEC, and CPUC requesting that the Board take official notice of certain facts appearing in a May 14, 2003 Washington Post news article regarding the financial condition of wholesale power unit National Energy Group (NEG), which like PG&E is a wholly-owned subsidiary of holding company PG&E Corporation. SLOMFP supports the motion, while PG&E and the staff oppose it.

For the reasons set forth below, the Licensing Board (1) denies the motion to take official notice of certain facts; and (2) finds that (a) SLOC, ABCSD, and CPUC have failed to show there is a genuine and substantial dispute of fact or law that only can be satisfactorily resolved by a further evidentiary hearing, and (b) based on the record before us, relative to the financial assurance challenge posited by SLOMFP contention TC-2 regarding its current request for bankruptcy reorganization under Chapter 11 of the United States Bankruptcy Code, PG&E has met its burden to demonstrate in accordance with 10 C.F.R. § 72.22(e) that it has the financial qualifications to carry out the activities outlined in its pending Part 72 application. Further, because all matters in controversy before the Board in connection with the requested application have been resolved in favor of license issuance without the need for further evidentiary presentations, in accordance with 10 C.F.R. § 2.764(a) we authorize the grant of the requested license, effective immediately upon the completion of all NRC staff license review activities and the requisite findings that all requirements necessary to issue the requested Part 72 ISFSI license have been met,¹ and terminate this proceeding.

¹ Although there are no environmental issues pending before the Board, still incomplete relative to the PG&E Part 72 license application is the staff's National Environmental Policy Act (NEPA) review, as is reflected in a memorandum dated July 2, 2003, to the Board and the other participants to this proceeding notifying them of the staff's transmission to the CEC of a draft of
(continued...)

I. BACKGROUND

A. Procedural Matters

The focus of this 10 C.F.R. Part 2, Subpart K proceeding is the December 21, 2001 application for a twenty-year 10 C.F.R. Part 72 license that would permit PG&E to construct and operate an aboveground dry cask storage facility at its DCPD site near San Luis Obispo, California. Following a September 2002 initial prehearing conference regarding the standing of, and admissibility of contentions proffered by, various 10 C.F.R. § 2.714 petitioners and the participation of 10 C.F.R. § 2.715(c) interested governmental entities, see Tr. at 1-419, in a December 2002 decision the Board granted standing to SLOMFP, the Santa Lucia Chapter of the Sierra Club, San Luis Obispo Cancer Action Now, the Central Coast Peace and Environmental Council, Peg Pinard, and the Avila Valley Advisory Council, with SLOMFP designated as the lead section 2.714 intervenor, see LBP-02-23, 56 NRC 413, 462 (2002). The Board also granted the requests for interested governmental participant status of SLOC, CEC, ABCSD, and the Port San Luis Harbor District (PSLHD).² See id.

¹(...continued)

the staff's environmental assessment (EA) for CEC comments. See Memorandum from James R. Hall, Senior Project Manager, NRC Office of Nuclear Material Safety and Safeguards to Licensing Board and All Parties (July 2, 2003) (Board Notification 2003-01). The July 24, 2003 cover letter to the CEC transmitting an attached copy of the draft EA indicates that once CEC comments on the draft EA were received, they would be considered in making any appropriate revisions to the EA, which if issued in its current form would be accompanied by a Federal Register-published staff finding of no significant impact.

² PSLHD subsequently sought approval to withdraw from the proceedings, see Notice of Intent and Petition of the [PSLHD] to Withdraw from Participation in the Proceedings as an Interested Governmental Entity (Jan. 6, 2003), and the Board accepted the withdrawal, see Licensing Board Order (Accepting 10 C.F.R. § 2.715(c) Participant Withdrawal) (Jan. 16, 2003) (unpublished).

The sole contention admitted by the Board, SLOMFP contention TC-2 entitled “PG&E’s Financial Qualifications Not Demonstrated,” provides, “PG&E has failed to demonstrate that it meets the financial qualifications requirements of 10 C.F.R. § 72.22(e).” See id. at 441. In the proffered basis for this contention, SLOMFP cited a number of circumstances surrounding PG&E’s pending contested bankruptcy, including (1) the fact that under PG&E’s proposed reorganization plan PG&E would no longer own or operate DCPD 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; and (2) the pendency of a billion-dollar lawsuit by the California Attorney General against PG&E’s parent company, PG&E Corporation, that could have serious the consequences for PG&E’s financial qualifications.³ In admitting the contention, the Board found that

SLOMFP has raised relevant and material concerns regarding the impact of PG&E’s bankruptcy on its continuing ability to undertake the new activity of constructing, operating, and decommissioning an ISFSI by reason of its access to continued funding as a regulated entity or through credit markets.

See id. at 442. We also noted in our December 2002 ruling that any matters relative to either the California Attorney General’s unresolved lawsuit against PG&E Corporation for alleged fraud or the financial qualifications of any entities that might in the future construct or operate the ISFSI were not litigable under this contention. See id. at 442-43.

³ During the California energy crisis of 2000, PG&E accumulated a large amount of debt created by an imbalance between electricity costs and revenues, alleged by PG&E to be the result of a flawed electricity deregulation plan. See PG&E Summary at 14-15. In April 2001, PG&E filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code to restructure this debt while continuing to conduct day-to-day operations as a solvent debtor-in-possession under the protection of the bankruptcy court. See id. Further background on the PG&E bankruptcy and the California Attorney General’s lawsuit are provided in our decision in LBP-02-15, 56 NRC 42, 46-47 (2002), denying intervenor requests to stay this proceeding.

After granting the timely requests of PG&E and the staff to invoke the Subpart K hybrid hearing procedures pursuant to 10 C.F.R. § 2.1109, the Board established a timetable for utilizing those procedures, which provided for an abbreviated discovery period. See LBP-02-25, 56 NRC 467, 476, 478 (2002). On February 13, 2003, the Board granted both a request by the CPUC to participate in the proceedings under 10 C.F.R. §2.715(c), see Request of [CPUC] to Participate as of Right Under 2.715(c) (Jan. 28, 2003), as well as a motion by CEC, SLOC, CPUC, and ABCSD to provide joint responses to discovery, see Motion by [CEC, SLOC, ABCSD, CPUC] to Provide Joint Responses to Discovery (Jan. 28, 2003). See Licensing Board Order (Granting Motion to Participate as 10 C.F.R. § 2.715(c) Interested Governmental Entity) (Feb. 13, 2003) at 1-2 (unpublished). The Board thereafter conducted 10 C.F.R. § 2.715(a) limited appearance sessions for members of the public on March 23-24, 2003, in San Luis Obispo, California.

On April 11, 2003, the parties and interested governmental participants provided the Board with written summaries of the facts, data, and arguments on which they intended to rely at an oral argument, during which the parties and interested governmental participants would discuss whether an evidentiary hearing regarding the admitted contention was merited. See Summary of Facts, Data, and Arguments on which the [IGP⁴] Intend to Rely at the Subpart K Oral Argument (Apr. 11, 2003) [hereinafter IGP Summary]; Summary of Facts, Data, and Arguments on which the [CEC] Intends to Rely at the Subpart K Oral Argument (Apr. 11, 2003) [hereinafter CEC Summary]; Summary of Facts, Data, and Arguments on which [PG&E] Will Rely at the Subpart K Oral Argument (Apr. 11, 2003) [hereinafter PG&E Summary]; NRC Staff

⁴ Although CEC, ABCSD, CPUC, and SLOC originally elected to file joint responses to the other parties' discovery requests, the CEC chose to submit its own written summary apart from the other three interested governmental participants. We refer to ABCSD, CPUC, and SLOC collectively hereinafter as the "IGP."

Brief and Summary of Relevant Facts, Data and Argument upon which the Staff Proposes to Rely at Oral Argument on Technical Contention 2 (Apr. 11, 2003) [hereinafter Staff Summary]. Rather than submitting an initial summary, SLOMFP notified the Board and other parties of its intention to file a response to the other parties' summaries. See Notice by [SLOMFP] of Intent to File Response Pleading (Apr. 11, 2003) [hereinafter SLOMFP Notice]. Pursuant to the Board's timetable set forth in LBP-02-25, the parties timely filed their responses to the other parties' written summaries on April 28, 2003. See Response by [SLOMFP] to Briefs and Factual Summaries Regarding PG&E's Financial Qualifications to Build and Operate Diablo Canyon ISFSI (Apr. 28, 2003) [hereinafter SLOMFP Response]; Response of [PG&E] to the Initial Written Summaries of the [IGP] and the [CEC] (Apr. 28, 2003) [hereinafter PG&E Response]; NRC Staff Brief in Response to Initial Written Summaries of Relevant Facts, Data and Argument upon which the Opposing Parties Propose to Rely at Oral Argument on Technical Contention TC-2 (Apr. 28, 2003) [hereinafter Staff Response]; [CEC] Response to [PG&E] and [NRC] Staff (Apr. 28, 2003) [hereinafter CEC Response]; [IGP] Response to [PG&E] and the [NRC] Staff (Apr. 28, 2003) [hereinafter IGP Response].

The IGP, along with the CEC, thereafter requested that the Board take official notice of facts appearing in a Washington Post news article regarding a PG&E affiliate's financial qualifications. See Motion by the [IGP and CEC] Requesting the [Board] to Take Official Notice under 10 C.F.R. § 2.743(i)(1) (May 15, 2003) [hereinafter IGP/CEC Official Notice Motion]. Then, on May 19, 2003, during a day-long oral argument held in San Luis Obispo, California, the parties and interested governmental entities presented to the Board their positions on whether there were disputed factual or legal issues relative to SLOMFP contention TC-2 that merited further consideration in an evidentiary hearing. See Tr. at 452-617. Thereafter, pursuant to Board authorization granted during the oral argument, see Tr. at 462, on May 27,

2003, both PG&E and the staff filed responses opposing the IGP's official notice motion. See Response of [PG&E] to Motion by the [IGP] Requesting Official Notice (May 27, 2003) [hereinafter PG&E Official Notice Response]; Reply of NRC Staff to [IGP] Motion that Board Take Official Notice of a Newspaper Blurb Regarding Financial Difficulties of PG&E's [NEG] (May 27, 2003) [hereinafter Staff Official Notice Response].

II. ANALYSIS

A. Standards Governing 10 C.F.R. § 2.1115 Determination Regarding the Need for an Evidentiary Hearing to Resolve An Admitted Issue

The Subpart K procedures governing this proceeding were established in response to a congressional mandate found in the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. § 10101 et seq. In licensing proceedings involving the expansion of spent nuclear fuel storage at civilian nuclear power reactor sites, the NWPA provides that parties to the proceeding are to be afforded an opportunity to present facts, data, and arguments, by way of written summaries, sworn testimony, and oral argument. See 42 U.S.C. § 10154(a)-(b). Section 2.1115(a) of 10 C.F.R., which incorporates additional NWPA directives, provides that based on the oral argument and written submissions, the presiding officer shall “[d]esignate any disputed issues of fact, together with any remaining issues of law, for resolution in an adjudicatory hearing,” and “[d]ispose of any issues of law or fact not designated for resolution in an adjudicatory hearing.”

To designate an issue for hearing, there must be:

a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and ... [t]he decision of the Commission is likely to depend in whole or in part on the resolution of that dispute.

Id. § 2.1115(b)(1)-(2). In addition, notwithstanding the agency's rules of practice that place the ultimate burden of proof of any substantive matter at issue (i.e., the admitted SLOMFP

contention) on the applicant, the party seeking adjudication in a Subpart K proceeding bears the burden of demonstrating the existence of disputed material facts requiring an evidentiary hearing. See 50 Fed. Reg. 41,662, 41,667 (Oct. 15, 1985).

Also worth noting in this context is the Commission's explanation regarding the matter of the resolution of factual questions in the context of a Subpart K proceeding:

The short of the matter is that the NWPA and our rule implementing it (Subpart K) contemplate merits rulings by licensing boards based on the parties' written submissions and oral arguments, except where a board expressly finds that "accuracy" demands a full-scale evidentiary hearing. Subpart K's abbreviated hearing approach is in harmony with other NRC rules, such as Subparts L and M, that authorize informal adjudicatory decision-making without the panoply of full trial-type processes. See 10 C.F.R. §2.1201 et seq. (Subpart L); 10 C.F.R. § 2.1301 et seq. (Subpart M).

Licensing boards are fully capable of making fair and reasonable merits decisions on technical issues after receiving written submissions and hearing oral arguments. The Commission is a technically oriented administrative agency, an orientation that is reflected in the make-up of its licensing boards. Most licensing boards have two, and all have at least one, technically trained member. In Subpart K cases, licensing boards are expected to assess the appropriate evidentiary weight to be given competing experts' technical judgments, as reflected in their reports and affidavits. The inquiry is similar to that performed by presiding officers in materials licensing cases, where fact disputes normally are decided "on the papers," with no live evidentiary hearing. See, e.g., Hydro Resources, Inc., CLI-01-4, 53 NRC at 45; Curators of the University of Missouri, CLI-95-01, 41 NRC 71, 118-20 (1995). The NRC's administrative judges, in other words, and the Commission itself, are accustomed to resolving technical disputes without resort to in-person testimony.

There may, of course, be issues, such as those involving witness credibility, that cannot be resolved absent face-to-face observation and assessment of the witness. Or there may be issues involving expert or other testimony where key questions require follow-up and dialogue to be answered "with sufficient accuracy." In these kinds of cases, Subpart K contemplates further evidentiary hearings. Many issues, however, particularly those involving competing technical or expert presentations, frequently are amenable to resolution by a licensing board based

on its evaluation of the thoroughness, sophistication, accuracy, and persuasiveness of the parties' submissions.

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 385-90 (2001), petitions for review denied, 47 Fed. Appx. 1 (2002) (per curiam).

With this background in mind,⁵ we turn to the participants' written submissions and oral argument presentations.

B. Positions of Parties and Section 2.715(c) Participants Regarding Need for Further Evidentiary Hearing on SLOMFP Contention TC-2

1. SLOMFP Position

SLOMFP argues that because no material dispute exists, no evidentiary hearing is warranted. See Tr. at 464. Given the procedural and substantive posture of the instant licensing proceeding, SLOMFP asserts the Board cannot find that PG&E satisfies the financial assurance requirements of 10 C.F.R. § 72.22(e). See id.

SLOMFP contends that rather than making a predictive finding that PG&E will have sufficient funds to operate the proposed ISFSI safely for the entire term of the license as required by section 72.22(e)(2), see id. at 466, the staff has made a reasonable assurance finding only for "current and near-term expenditures related to the ISFSI," SLOMFP Response at 3 n.2 (quoting Staff Summary, Affidavit of Michael A. Dusaniwskyj at 4 (Apr. 11, 2003)). Accordingly, SLOMFP argues that because the staff has failed to make the required safety finding that PG&E is in compliance with section 72.22(e), absent a waiver of that regulation the Board has no basis upon which to approve the issuance of the requested license. See Tr. at 465.

⁵ See also Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 254-55 (2000), petition for review denied, CLI-01-11, 53 NRC at 390-92.

SLOMFP further asserts that notwithstanding PG&E's reliance on electric rates and/or operating revenue as sources of funding for the ISFSI, PG&E has failed substantively to demonstrate its financial qualifications. See SLOMFP Response at 2-3. With respect to PG&E's ability to recoup funds from the rate base, SLOMFP points out that PG&E concedes that its ability to do so depends on the outcome of the pending bankruptcy case. See id. at 3. Moreover, SLOMFP contends that PG&E attempts to show it will have access to the rate base only while the bankruptcy case is pending, rather than over the license term of the ISFSI as required by section 72.22(e)(2). See id. According to SLOMFP, if the PG&E reorganization plan is approved by the bankruptcy court, then PG&E will rely on its successors' ability to generate operating revenues or on cash it has on hand. See id. at 4. Again, SLOMFP challenges PG&E's apparent willingness to provide assurances of adequate funding for the facility through cash on hand or operating revenues only for a limited period of time during the bankruptcy. See id.

SLOMFP further argues that if the Board were to approve the issuance of the ISFSI license, and PG&E were to commence construction in 2005 as planned using cash reserves, and the bankruptcy court were then to approve the PG&E reorganization plan, and the CPUC subsequently were to deny PG&E rate recovery, PG&E would be forced to rely on operating revenues for covering the costs of the ISFSI. See id. at 5. If each of these contingencies occurs, because neither PG&E nor the staff represents that such revenues will be sufficient to ensure safe operation of the facility, SLOMFP argues that the issue of PG&E's financial qualifications "will have fallen through the cracks of the regulatory system" to the public's detriment. Id.

In addition, SLOMFP questions PG&E's ability adequately to support decommissioning of the ISFSI. See id. at 6. In SLOMFP's view, PG&E has failed sufficiently to resolve concerns

raised by the CPUC relative to (1) PG&E's recently missed \$10 million payment into the DCPD decommissioning fund; (2) the potential effects of reorganization on the fund; and (3) possible reluctance on the part of the CPUC to permit the transfer of the decommissioning fund to a non-CPUC regulated entity. See id. at 6-7.

2. CEC Position

The CEC agrees with SLOMFP that an evidentiary hearing is not warranted in this proceeding. See Tr. at 473. In making that assertion, however, the CEC requests that the Board condition approval of the PG&E license on the bankruptcy court's adoption of the CPUC reorganization plan -- under which PG&E would remain the licensee of DCPD and the ISFSI -- rather than the PG&E plan. See CEC Summary at 14.

The CEC's position is based in part on its concern about the adequacy of the staff's finding of PG&E's financial assurance. In particular, given staff statements that (1) the staff considered the information submitted in the PG&E application describing the utility's bankruptcy plan; and (2) the staff's consideration of the application was based on PG&E's current status as a CPUC-regulated entity with access to ratepayer functions, which in the CEC's view are contradictory in nature, the CEC asserts it remains unclear on what basis the staff relied in reaching its determination. See CEC Summary at 11, 12. The CEC further argues that while the pending bankruptcy creates uncertainty with respect to the future control of the ISFSI and future sources of funding, additional uncertainty as to the identity and financial qualifications of the eventual licensee would be created in the event the bankruptcy court approves the PG&E reorganization plan. See id. at 12; Tr. at 598, 600. On the one hand, according to the CEC, PG&E can demonstrate its financial qualifications only through access to the rate base and ratepayer funding. On the other hand, the CEC maintains, the CPUC plan is the only viable reorganization plan that ensures PG&E will retain access to electric rate revenues. As a

consequence, the CEC concludes, the Board must condition Part 72 license issuance on the licensee remaining a CPUC-regulated entity. See Tr. at 13-14; see also CEC Response at 3.

3. IGP Position⁶

The IGP contend the Board should find, as a matter of law, that the impact of bankruptcy on PG&E's ability to construct, operate, and decommission the proposed ISFSI precludes PG&E from demonstrating its financial qualifications in satisfaction of section 72.22(e). See IGP Summary at 43. In the alternative, the IGP request that the Board hold an evidentiary hearing to compel further testimony from the staff. See id.

With respect to PG&E's ability to fund the construction and operation of the ISFSI, relying on the sworn declaration of CPUC Public Utilities Regulatory Analyst Truman L. Burns, see id. Appendix (Sworn Testimony of Truman L. Burns (Apr. 10, 2003)), the IGP assert that even during the pendency of the bankruptcy, PG&E may not have access to continued funding from electric rates as a CPUC-regulated utility. See id. at 27. According to the IGP, there is a "substantial likelihood" that because PG&E is in bankruptcy and anticipates that its successor will not be regulated by the CPUC, the CPUC would not permit PG&E to pay for ISFSI construction costs through rate recovery. Id. at 20 n.30. The IGP further maintain that after it emerges from bankruptcy, PG&E will not be able to demonstrate financial assurance for ISFSI construction and operation because it cannot know whether it will be a CPUC-regulated entity post-bankruptcy. See id. at 28-29, 31. In addition, according to the IGP, PG&E cannot establish its ability to meet the section 72.22(e) requirements without relying on inadmissible evidence, i.e., the financial details concerning PG&E's successor under its bankruptcy plan. See id. at 29-30. Further, in response to PG&E's references to its large income figures versus

⁶ Although the IGP jointly filed a summary of their common position, the CPUC and the ABCSD each presented their own additional views at the May 19 oral argument. As a consequence, we first set forth the shared arguments of the IGP.

the relatively small ISFSI-related costs, the IGP argue that PG&E's "[g]eneralized blather about big numbers of dollars" does not demonstrate its ability to cover ISFSI expenses over the twenty-year license term. IGP Response at 6.

In challenging PG&E's ability adequately to fund the ISFSI decommissioning, the IGP point to PG&E's failure to make a \$10 million payment into the decommissioning trust fund in 2000 to suggest that PG&E may not maintain the decommissioning funding levels authorized by the CPUC on an ongoing basis. See IGP Summary at 34. The IGP also argue that PG&E erroneously relies on CPUC-authorized rates to fund decommissioning, considering that under the PG&E reorganization plan, its successor would not be a CPUC-regulated entity. See id. at 34-35. Another possible consequence of reorganization as proposed by PG&E, according to the IGP, is PG&E's inability to use monies collected for decommissioning of DCPD to decommission the ISFSI, which would force PG&E to fund decommissioning through other monies in the trust fund (i.e., operating revenues). See id. at 35. Further impacting PG&E's financial assurance demonstration, the IGP contend, is the unresolved issue of whether PG&E can transfer its beneficial interest in the decommissioning trust fund through the bankruptcy court without CPUC approval. See id. at 36. Finally, the IGP argue that PG&E cannot make its required showing under section 72.22(e) relative to decommissioning without relying on evidence the Board has deemed irrelevant or outside the scope of the proceeding, that is, information regarding the details of the financial qualifications of PG&E's successor under its bankruptcy plan. See id. at 36-37.

Alternatively, the IGP posit that there remain genuine and substantial factual disputes that can be resolved only by the introduction of evidence in an adjudicatory hearing. See id. at 38. For instance, the IGP assert that to the extent PG&E's written summary introduces more detailed information concerning expected revenues and its continuing ability to fund the

construction and operation of the ISFSI, that information must be subjected to cross-examination at a hearing, because it would not have been previously evaluated by the IGP's experts. See id. at 39, 41. A second unresolved factual issue, according to the IGP, is the extent to which the staff considered what they label as inadmissible information in making its "conclusory" financial assurance determination. See id. at 39-40; Tr. at 481-82. The IGP contend that absent a hearing, this factual issue cannot be resolved because of the staff's "marked unwillingness to provide specific answers" to the IGP's questions on this point during discovery. Id. at 40; see also Tr. at 482. With respect to decommissioning, the IGP argue that the issue of at what rate the post-bankruptcy ISFSI licensee would continue contributing to the decommissioning fund if it were no longer a CPUC-regulated entity cannot be resolved by the Board without expert opinions presented at a hearing. See IGP Summary at 42. Finally, the IGP aver that the decision of the Commission is likely to depend on the resolution of these factual matters. See id. at 41, 42.

At the oral argument, the CPUC additionally took the position that under normal circumstances, the proposed ISFSI -- "probably a useful and reasonable project" -- would likely be paid for through rates. Tr. at 489. PG&E's pending bankruptcy and proposed post-bankruptcy corporate structure, however, creates an anomalous situation in which the CPUC may not approve the use of funds collected from ratepayers to cover the ISFSI's construction costs. See id. at 490. Based on what appears to be two irreconcilable positions taken by PG&E before the bankruptcy court, on the one hand, and the Commission, on the other, the CPUC asserts that the Board should postpone making any decision on the ISFSI license application until after the bankruptcy proceeding is concluded. See id. at 492-93.

The ABCSD expressed a similar concern regarding what it viewed as PG&E's inconsistent positions and also suggested that the Board delay the proceeding pending the

resolution of the bankruptcy proceeding. See id. at 501. If, however, the Board chose to proceed, the ABCSD, in agreement with the other IGP, argued that an adjudicatory hearing was necessary. See id. at 501-02.

4. PG&E Position

PG&E asserts that the Board can dismiss contention TC-2 without holding an evidentiary hearing because the contention does not raise factual issues that are either substantial or central to the Commission's decision. See PG&E Summary at 6-7.

Relying for support on the affidavits of PG&E Lead Budget Coordinator Robert L. Kapus and PG&E Business and Financial Planning Director Walter L. Campbell, see id. exhs. A & B (Affidavit of Robert L. Kapus (Apr. 8, 2003) and of Walter L. Campbell (Apr. 9, 2003)); see also PG&E Response exh. A (Supplemental Affidavit of Walter L. Campbell (Apr. 25, 2003)), PG&E estimates (in 2001 dollars) that it will cost \$63 million to construct the ISFSI, \$69 million to operate a 50-cask facility for the initial license term (from the present until 2025),⁷ and \$12.5 million to decommission the ISFSI.⁸ See PG&E Summary at 8. PG&E asserts that it will obtain the necessary funds to cover the construction and operating costs of the facility from either electric rates or electric operating revenues, without resorting to borrowing money to pay ISFSI expenses. See id. at 9-10. Because the costs associated with the ISFSI represent reasonable and prudent DCCP operating expenses and are in the public interest, PG&E expects to cover those costs through traditional cost-of-service rates, as it is presently entitled to pursuant to an April 4, 2002 CPUC order. See id. at 10. PG&E further argues that its substantial operating

⁷ PG&E estimates the operating costs of the ISFSI during a second license period from 2026 to 2040, which would include an additional eighty-eight casks, to be \$107 million. See PG&E Summary at 8.

⁸ Factoring in allowances for financial contingencies, the decommissioning cost estimate is \$13.9 million. See PG&E Summary at 21. The costs for demolition and disposal of non-contaminated materials are estimated to be an additional \$6.5 million. See id.

revenues -- over \$10 billion for the 12-month period ending December 31, 2002 -- would be more than adequate to cover the expenses associated with the ISFSI, which would be incurred in phases. See id. In addition, PG&E maintains that the \$3 billion it currently possesses as cash on hand would be sufficient to cover ongoing costs associated with the development, construction, operation, and decommissioning of the ISFSI while PG&E remains in bankruptcy, although much of that cash is designated to repay PG&E's creditors and could only be used with bankruptcy court approval. See id. at 11-12. Moreover, in the event the CPUC disallows the recovery of ISFSI costs through rates, PG&E avers that any expenses would be sufficiently covered by cash on hand or electric operating revenues. See id. at 12. Thus, PG&E argues, not only is PG&E currently able to pay the necessary costs associated with the ISFSI pending resolution of the bankruptcy proceeding, but there is also reasonable assurance that it will continue to be able to pay those costs following the outcome of the case and the company's emergence from bankruptcy (in whatever form). See id. at 14. Notwithstanding the IGP's argument that there exists a substantial likelihood that the CPUC will disallow rate recovery of ISFSI construction costs while PG&E remains in bankruptcy, PG&E asserts that the IGP's argument fails to establish a genuine and substantial issue. See PG&E Response at 11-12.

In response to IGP allegations regarding the uncertainty of PG&E's future ability to recover costs related to the ISFSI, PG&E contends that NRC regulations do not require PG&E to provide financial projections of revenues for the full twenty-year ISFSI license term. See id. at 18. Rather, the reasonable financial assurance required by section 72.22(e) is provided primarily by PG&E's current status as a rate-regulated entity and secondarily by the company's financial position as demonstrated in its most recent annual report. See Tr. at 558, 559. Moreover, PG&E argues, inquiries concerning the uncertain financial qualifications of a possible

future non-utility licensee are speculative and premature at this juncture. See PG&E Summary at 19.

Relative to covering the costs of decommissioning, PG&E asserts that its ongoing contributions to the DCPD decommissioning fund (collected through electric rates) specifically include monies for decommissioning the proposed ISFSI. See id. at 21-22. In this regard, PG&E intends to demonstrate financial assurance for decommissioning by using the external sinking fund method, pursuant to 10 C.F.R. § 72.30(c)(5). See id. at 22. While PG&E proposes to deposit ISFSI decommissioning monies into the decommissioning fund established for DCPD, the ISFSI funds would be distinguished and segregated from the DCPD funds. See id. Responding to claims in connection with the uncertain outcome of the bankruptcy proceeding's effect on PG&E's financial assurance of decommissioning, although acknowledging the basis for financial assurance may change following the bankruptcy court's decision, PG&E argues it would be premature for the Board to address that change at the present time. See id. at 23. Relative to the \$10 million missed DCPD decommissioning fund payment, PG&E explains that this missed contribution resulted from the company's cash flow problems during the 2000 California energy crisis, and although it is not now feasible simply to deposit the \$10 million into the fund because of tax implications, the issue is being dealt with in the CPUC ratemaking process. See PG&E Response at 15.

PG&E additionally contends that, contrary to the suggestion of the IGP, it does not rely on inadmissible information contained in the Part 50 license transfer application to demonstrate its financial qualifications with respect to the ISFSI application. See PG&E Response at 14.

5. Staff Position

As does PG&E, the staff argues that SLOMFP contention TC-2 raises no genuine and substantial dispute with respect to a material issue that would warrant an evidentiary hearing.

See Staff Summary at 7. Relying on PG&E representations that ISFSI costs would be covered by revenues generated from electric rates or external financing (if needed), the staff indicates it has concluded PG&E has met the financial requirements of section 72.22(e) for construction, operation, and decommissioning of the proposed ISFSI. See id. at 8. Rather than offering any genuine dispute, according to the staff, the other parties merely attempt to second guess this staff determination of financial assurance. See id. In defense of its review, which it supports with the affidavit of NRC economist Michael A. Dusaniwskyj, see id. unnumbered attach. (Affidavit of Michael A. Dusaniwskyj (Apr. 11, 2003)), the staff observes that the finding was made by staff economists after a review of the information provided by PG&E and, based on their educational training and work-related experience, in their judgment PG&E had demonstrated its financial qualifications. See id. While the staff acknowledges it was aware of the ongoing bankruptcy proceeding and the potential consequences of that proceeding while it was conducting its review, the staff asserts that so long as PG&E is the applicant for the ISFSI license, there is reasonable assurance based on PG&E's ability to recover costs through electric generation and rate recovery. See id. at 9.

Responding to the IGP argument that PG&E cannot demonstrate it will have revenues sufficient to construct, operate, and decommission the ISFSI over the proposed twenty-year license term, the staff contends the regulations do not require PG&E to make such a demonstration. See Staff Response at 6; Tr. at 516-17. Instead, the regulations require the staff to find reasonable assurance of financial qualification, which can be based on plausible assumptions and forecasts and necessarily requires some predictive judgments about an applicant's future financial situation. See Staff Response at 6. The staff avers the information required by section 72.22(e) was fully provided by PG&E in its license application and in its June 7, 2002 response to the staff's oral request for additional information. See id. at 7. In

addressing the concern of staff reliance on inadmissible evidence, the staff maintains its determination was based on PG&E's current organizational structure and status as a CPUC-regulated utility, without regard to the outcome of the pending bankruptcy proceeding, although such consideration may arise in the future in the event a bankruptcy determination results in a proposed successor licensee. See id. at 8-9.

C. IGP Motion to Take Official Notice

On May 15, 2003, the IGP along with the CEC filed a motion requesting that the Board take official notice of certain facts appearing in a May 14, 2003 Washington Post news article concerning the financial condition of NEG, PG&E's wholesale power unit. See IGP/CEC Official Notice Motion at 1. According to the IGP/CEC motion, the Washington Post reported that NEG had defaulted on \$2.9 billion in bonds, was likely to file for Chapter 11 bankruptcy protection, and had suffered a first quarter loss of \$261 million. See id. Further, the IGP/CEC motion avers, this first quarter loss contributed to all but \$93 million of a PG&E first quarter loss totaling \$354 million. See id.

At the May 19 oral argument, SLOMFP voiced its general support for the IGP/CEC motion, but declined to submit additional filings on the matter. See Tr. at 461. In opposing the motion, PG&E argues that the facts in the article are irrelevant to the instant licensing proceeding in that NEG is a wholly-owned subsidiary of PG&E's parent holding company, PG&E Corporation, and is a completely separate legal entity from applicant PG&E Company. See PG&E Response to Official Notice Motion at 1-2. Further in this regard, the NEG first quarter loss referenced in the article, according to PG&E, contributed to a loss suffered by PG&E Corporation, not by applicant PG&E. See id. at 2. The staff takes a similar position. Besides noting that mere publication of "facts" in the Washington Post does not render them facts, the staff asserts it is "far from apparent" what relevance NEG's financial problems have

on the instant proceeding, given the distant affiliation between NEG and applicant PG&E. See Staff Response to Official Notice Motion at 2-3.

D. Licensing Board Determinations

In reviewing the arguments of the parties and interested governmental participants relative to SLOMFP contention TC-2, two related points should be noted. As the agency's procedural rules make clear, the central focus of an adjudicatory proceeding such as this one are the contentions, or issue statements, that an intervening party raises relative to a license application like that proffered by PG&E. See 10 C.F.R. § 2.714(b)(2)(iii). And in this instance, as we noted in our December 2002 decision, see LBP-02-23, 56 NRC at 442, the contention admitted by the Board had as its focus the purported impact that the PG&E bankruptcy had upon its ability to meet the 10 C.F.R. Part 72 financial assurance requirements, particularly as that bankruptcy impacts PG&E's status as a regulated utility that otherwise would have access to revenues derived from its rate base or from credit markets to fund ISFSI construction and operation.⁹

⁹ In that same ruling, we also observed that the mere fact of PG&E's filing for bankruptcy protection did not by itself indicate that it was no longer financially qualified to continue day-to-day operations at the DCPD facility, noting that the Commission, after closely monitoring the operations at DCPD, had found PG&E's financial situation had no impact on its ability to operate the facility safely and in accordance with agency regulations. See LBP-02-23, 56 NRC at 442. Nonetheless, because intervenor SLOMFP had raised relevant and material concerns regarding PG&E's financial ability to undertake the new activity of constructing, operating, and decommissioning the ISFSI, the Board admitted its contention TC-2. See id.

Also regarding its admission of SLOMFP contention TC-2, the Board notes an apparent misstatement in its decision regarding one of the numbers of the bases upon which it acted. Although its opinion correctly cited the page numbers in the SLOMFP contentions pleading that includes the relevant discussion that the Board found provided support for an admissible contention, i.e., pages 14-17, it referred to those pages as relating to bases "two and three." Id. In fact, they relate to bases three and five. Although there is a discussion regarding basis four on page fifteen as well, it clearly was rejected by the Board as a basis for the contention given that it relates to the type of "post-bankruptcy" matter that was found to be outside the scope of the proceeding. See id. at 443.

By the same token, agency precedent also makes clear that what is not at issue in our proceedings is the adequacy of the manner in which the staff conducts its review of a technical/safety matter such as that raised under SLOMFP contention TC-2.¹⁰ See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 And 2), ALAB-728, 17 NRC 777, 807 (1983). Thus, arguments contending that the PG&E application cannot be granted based on a staff failure to perform as a result of what it did or did not consider in reaching a licensing determination, see IGP Summary at 39-41; CPUC Summary at 8-12, are not ones that support the need for an additional evidentiary presentation under section 2.1115.¹¹

More to the point are intervenor and IGP/CPUC arguments with regard to whether an additional evidentiary presentation is needed under section 2.1115 or whether, absent such a hearing, they should prevail on SLOMFP contention TC-2 as that issue statement is directed to the impact of the PG&E bankruptcy on its financial ability to construct and operate the planned ISFSI. And in this regard, although now criticized by some of the participants, see Tr. at 614, in admitting the contention the Board essentially eliminated from consideration concerns based on the post-bankruptcy structure of PG&E. That structure could take one of two forms, roughly as outlined by the competing proposals now before the bankruptcy court. Under one, the CPUC

¹⁰ This, of course, is not to say that the staff's application review efforts are totally irrelevant relative to safety matters admitted for litigation. Clearly, the staff's position on whether some aspect of an application that is challenged by a contention meets the agency's regulatory requirements, which generally is presented to the Board as an evidentiary input, is the product of the staff's review process. But commonly it is the substantive sufficiency of that product, not the particular process by which it was generated, that is the matter of concern to the Board as it seeks to determine to what degree the staff's position does or does not support/corroborate a particular contention as it challenges an application.

¹¹ Additionally, while the IGP now make claims about a lack of a promised staff response to discovery requests for information relative to this matter, see Tr. at 488, these concerns were never presented to the Board during the allotted discovery period in the form of a motion to compel or any other request for Board relief.

plan, PG&E would remain a regulated entity subject to CPUC control. Certainly the CPUC, and apparently the CEC as well, do not object to (and seemingly endorse) this approach. See Tr. at 474-75, 489, 496. This perhaps should not come as a surprise, as it is wholly consistent with the Commission's general approach to financial assurance for regulated entities, i.e., the premise "that reasonable and prudent costs of safely operating a nuclear power plant will be recovered through the ratemaking process." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 13, rev'd on other grounds, CLI-88-10, 28 NRC 573 (1988). If the CPUC bankruptcy plan (or something like it) should prevail, PG&E both would remain the ISFSI licensee and subject to state ratemaking authority, creating the financial assurance situation contemplated by the Commission.¹² Nothing on the evidentiary record presented by the participants now suggests that such a post-bankruptcy result has any relevance to the financial qualifications of PG&E relative to its ISFSI application or requires imposition of the type of post-bankruptcy contingent license condition requested by the CEC.

The same is true with respect to the other reasonably foreseeable bankruptcy proceeding result -- adoption of the PG&E reorganization plan under which any ISFSI license would be transferred to new entity Gen. It is apparent that for this to occur, there would have to be a PG&E application requesting NRC permission to amend the Part 72 ISFSI license to transfer it to Gen, which likewise would be subject to a hearing at which, presumably, the issue of Gen's financial qualifications could be litigated.¹³ As such, in the context of SLOMFP

¹² Although not part of the evidentiary record before us, we do note that the possibility that this outcome may accrue seems to have increased, based on post-hearing information submitted to the docket indicating that a pending bankruptcy settlement proposed by PG&E and the CPUC staff would result in PG&E remaining the licensee for any DCPD ISFSI and subject to CPUC ratemaking authority. See Letter from David Repka, PG&E Counsel, to the Licensing Board at 2 (June 24, 2003).

¹³ Of course, at that hearing the various intervenor and IGP concerns about such
(continued...)

contention TC-2, the impacts of this post-bankruptcy result clearly are irrelevant to, as well as outside of the scope of, this proceeding, as are the various intervenor and IGP concerns based on alleged uncertainties relative to the post-bankruptcy period during which a nonregulated entity might be responsible for funding ISFSI construction, operation, and decommissioning.¹⁴

¹³(...continued)

matters as the funding mechanism for ISFSI construction, operation, and decommissioning by a nonregulated entity could be raised as financial assurance issues. It should also be added that, to the extent that hearing would be conducted under the more informal procedures of 10 C.F.R. Part 2, Subpart M, this is not a reason to allow future license transfer issues to be introduced into this Subpart K proceeding.

¹⁴ It has been suggested that this post-bankruptcy scenario deserves additional attention in the context of this proceeding because of the possibility that the bankruptcy court may do something in ruling on the PG&E reorganization plan that would impede the Commission from granting a license transfer from PG&E to a newly created entity such as Gen, leaving the ISFSI license, and any ISFSI stored fuel, in regulatory limbo. See Tr. at 601-07, 611. As is the case with a utility subject to a ratemaking process governing revenue for facility operation, the possibility exists that the outcome of the bankruptcy process could generate additional questions about the financial qualifications of a designated PG&E successor in interest. As with the ratemaking process, however, see Seabrook, ALAB-895, 28 NRC at 13-14, the bankruptcy process is a mechanism with the apparent ability to fashion an appropriate remedy (whether initially or upon reconsideration) that takes into account the various competing financial and regulatory interests. As such, we are unable to conclude that the record "accuracy" considerations identified by the Commission in connection with the need to conduct an evidentiary hearing under Subpart K are served by conducting such a proceeding to explore the possibility that something untoward can happen before the bankruptcy court.

Moreover, as to the suggestion this situation counsels that we await the conclusion of the bankruptcy proceeding, see Tr. at 607, putting aside the fact that we have previously denied a closely-related request, see LBP-02-15, 56 NRC at 48-51, we think it is worth noting that these same considerations certainly are in play relative to the transfer application proceeding regarding the PG&E operating licenses for DCP. Nonetheless, subsequent to a Commission issuance denying a stay in that proceeding and a February 2003 Commission decision resolving hearing requests regarding that application, see Pacific Gas and Electric Co. (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19 (2003); Pacific Gas and Electric Co. (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 333-34 (2002), in a May 29, 2003 submission that is not part of the evidentiary record of this proceeding, the staff advised us that in a May 27, 2003 order it had approved the operating license transfers, albeit conditioned on, among other things, action by the bankruptcy court in the pending proceeding that does not make material changes to the circumstances described in the PG&E application regarding the creation of Gen. See 68 Fed. Reg. 33,208, 33,209 (June 3, 2003). Certainly, such a showing would be relevant to effectuating any subsequent ISFSI license transfer as well.

What then are left for consideration are the concerns about PG&E's financial assurance to construct and operate the facility during the period that it will continue in bankruptcy. In this regard, intervenor SLOMFP and the IGP have raised several different items they assert either establish, or require a further evidentiary hearing on, the lack of financial qualifications on the part of PG&E during its bankruptcy. We examine each below.

As was noted previously, both intervenor SLOMFP and the IGP assert that while in bankruptcy, PG&E's prospects of electric rate recovery are uncertain, which manifests itself in two ways. See IGP Summary at 23, SLOMFP Response at 3. First, PG&E is asserted to have changed its strategy for paying ISFSI construction costs and operating costs from strictly relying on rate recovery to a combination of rate recovery and electric operating revenues, thus demonstrating its uncertainty about its ability to fund these costs. See IGP Summary at 25-27. Also, there is a statement by CPUC analyst Burns asserting that, because the ISFSI-licensee successor to PG&E may not be regulated by the CPUC, there is a substantial likelihood the CPUC will not permit current rate recovery to be used to defray construction expenditures. See id. at 27-28 & n.30. Further, there are questions raised about the lack of a detailed PG&E showing of operating revenues, in lieu of which PG&E is asserted to have relied only upon broad generalizations that do not permit a detailed examination of whether there are available operating revenues to pay for construction or upon post-discovery information that could not be contested by IGP experts. See id. 28 & n.31, 39. Finally, as to decommissioning costs, concerns have been expressed about PG&E's failure to make a \$10 million CPUC-authorized and collected payment to its decommissioning trust fund from rates, the staff's reminder that its ISFSI decommissioning funds cannot come from DCPD decommissioning trust funds, and the uncertainty about whether PG&E can transfer its beneficial interest in its decommissioning trust through the bankruptcy court. See id. at 34-36.

As these concerns recognize, PG&E cites two basic funding sources to cover its potential costs during its bankruptcy proceeding¹⁵ -- rate recovery and operating revenues.¹⁶ In each instance, however, we are unable to conclude that the challenges posed by the IGP and SLOMFP either establish the need for further adjudicatory proceedings or are sufficient to counter a PG&E financial assurance showing.

As to rate making, it is apparent that PG&E has invoked the rate making process and expects to pay the costs associated with the ISFSI as normal operating expenses, covered by electric operating revenues, and is already doing so. As PG&E notes, pursuant to a CPUC April 4, 2002 order returning PG&E's retained generation to the cost-of-service rate base, pending resolution of the bankruptcy proceeding, PG&E currently is entitled to recovery of prudent Diablo Canyon expenses through traditional cost-of-service rates. And to that end, costs related to the development and construction of the ISFSI for 2002 and 2003 have been estimated in PG&E's 2003 General Rate Case currently pending before the CPUC to be less than \$6.0 million and \$8.0 million, respectively. Additionally, annual ISFSI expenses are

¹⁵ Although PG&E has not provided a specific cost figure for its bankruptcy period, which seemingly would encompass a relatively limited period of time compared to the overall period of ISFSI construction and operation, as was noted previously, in its application and a June 7, 2003 supplement PG&E provided estimates (in 2001 dollars) of total ISFSI construction costs, ISFSI operating costs, and costs associated with decommissioning of the ISFSI after the removal of spent fuel and other high level and reactor-related radiological waste as follows: costs of construction/support equipment -- \$63 million (present - 2025); operating costs - including 50 storage casks -- \$69 million (present - 2025); operating costs - including 88 storage casks -- \$107 million (2026 - 2040); decommissioning costs (excluding financial contingencies) \$12.5 million. See PG&E Summary at 8. For purposes of the contention before us, those figures are not in dispute. See LBP-02-23, 56 NRC at 445-46 (rejecting SLOMFP contention TC-5 challenging PG&E ISFSI construction and operation cost estimates).

¹⁶ As the Board noted in admitting SLOMFP contention TC-2, as part of the basis for the contention intervenor SLOMFP quoted from PG&E's 2001 Annual Report and asserted that PG&E's financial qualifications were in question due to its limited access to credit markets. See LBP-02-23, 56 NRC at 442. PG&E now declares, however, that it is not borrowing and will not need to borrow to pay ISFSI expenses given that its operating revenues are more than sufficient to provide cash flow for ISFSI expenses. See PG&E Summary at 10.

projected to be approximately \$8.9 million in 2004, and \$20.9 million in 2005 when construction and initial cask procurement would begin, and costs of construction and loading in 2006 projected to be less than \$12.0 million (in 2002 dollars). Thereafter, annual costs associated with equipment, cask procurement, operations and maintenance fees, and other fixed expenses in years subsequent to 2006 range (by year) from \$1.0 million to \$6.0 million (all in 2002 dollars). See PG&E Summary at 11. Additionally, decommissioning contributions are being addressed in PG&E's ongoing 2002 Nuclear Decommissioning Cost Triennial Proceeding, a rate proceeding for which PG&E has provided a revised site-specific decommissioning cost estimate that again includes the DCPD ISFSI. See id. at 22. In each instance, PG&E indicates, it has expressed to the CPUC its belief these costs associated with the ISFSI represent reasonable and prudent DCPD expenses and, accordingly, it expects full recovery through rates. See id. at 10, 22.

Of course, as IGP witness Burns suggests, the possibility always exists that a utility regulatory commission prudence review could result in a disallowance of all or part of those costs. Given, however, the Commission's general premise that reasonable and prudent costs associated with safe facility operation will be recovered through the ratemaking process, see Seabrook, ALAB-895, 28 NRC at 13, and PG&E's placement before the CPUC of its accounting and other bases for treating its costs as rate recoverable,¹⁷ see PG&E Summary at 13, 22, we

¹⁷ In this regard, PG&E indicates that to the degree this is an argument that construction-work-in-progress (CWIP) regulations applicable to capital costs could apply to the ISFSI to preclude a finding of financial qualifications, for rate-recovery purposes in the present CPUC rate-regulated environment, PG&E is not accounting for incurred Diablo Canyon ISFSI expenses as capital costs that would be subject to CWIP regulations. Rather, it is treating those costs as operating expenses, currently recoverable through electric rates. It also recognizes that the CPUC, in PG&E's ongoing 2003 General Rate Case, can review PG&E's accounting treatment with respect to the ISFSI expenses and provide for timing of rate recovery consistent with a different accounting treatment. See PG&E Summary at 13. Nonetheless, even assuming some portion of ISFSI expenses are eventually treated as capital costs and

(continued...)

do not consider this an adequate basis upon which to require further evidentiary proceedings or for a finding that PG&E lacks the requisite financial assurance.

As PG&E notes, however, there is the associated question of whether there are sufficient operating revenues to cover the cash flow associated with these costs or a CPUC rate disallowance during bankruptcy.¹⁸ PG&E declares it currently is paying the costs associated with the ISFSI out of normal operating revenues and expects to continue to do so, as demonstrated by its most recent Form 10-K/A, dated March 5, 2003, which shows for PG&E capital expenditures of over \$1.5 billion, operating revenues of over \$10 billion, and earnings available for common stock of over \$1.7 billion, for the twelve-month period ending December 31, 2002. See id. at 10-11. Also, according to PG&E, it currently has substantial cash on hand -- \$3 billion -- that would be sufficient to cover ongoing costs associated with development, construction, operation, and decommissioning of the Diablo Canyon ISFSI during

¹⁷(...continued)

recovery is deferred accordingly, as is discussed below, the record now before us indicates PG&E will have sufficient cash flow (based on assets and operating revenues) to pay costs associated with the ISFSI.

¹⁸ In this regard, we note that relying upon PG&E's assertions about timing, IGP witness Burns declares that given the time it will take to complete ISFSI construction, ISFSI operating costs are essentially post-bankruptcy costs. See Burns Affidavit at A-4. As we have noted, however, post-bankruptcy matters are not within the parameters of SLOMFP contention TC-2 as admitted.

Concerns about timing also are at the heart of the IGP claim that the Board's ruling on the scope of the contention is inconsistent with the asserted Part 72 requirement to make a financial assurance finding that covers the entire 20-year life of a Part 72 license. Putting aside the fact that Part 72 does not incorporate even the five-year projection that is required under 10 C.F.R. Part 50 for a reactor licensee, compare 10 C.F.R. § 50.33(f)(2) with id. § 72.22(e), we think that our determination here is consistent with predictive nature of that finding, see North Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219-20 (1999) ("'[s]peculation' of some sort is unavoidable when the issue at stake concerns predictive judgments about an applicant's future financial capabilities"), as we rely on the CPUC ratemaking process or the license transfer proceeding as the basis for such reasonable assurance during the post-bankruptcy period that is likely to occupy most of the 20 years of ISFSI operation.

the pendency of the bankruptcy proceeding (although it does not expect to decommission the ISFSI during the pendency of the bankruptcy proceeding). See id. at 11-12. While acknowledging the majority of this cash currently is ear-marked to repay creditors, PG&E maintains some portion of this cash would be available, with the approval of the bankruptcy court, to pay costs necessary to preserve and maintain the estate. See id. at 12.

With respect to operating revenues, although it is suggested that a PG&E change to rely on a combination of rate recovery and electric operating revenues demonstrates an impermissible uncertainty about its ability to fund these costs, we find this argument wholly inadequate as a basis for either an additional evidentiary hearing or a finding that PG&E lacks financial assurance. Somewhat better conceived, although ultimately unsuccessful, is the additional SLOMFP and IGP argument that “the devil is in the details” relative to these figures to the degree that, while large, these numbers do not provide the kind of enumerated view of the day-to-day details of PG&E cash flow necessary to establish whether operating revenue and cash on hand really are available for funding ISFSI costs. As the Commission has noted, while there may be instances when issues involving expert or other testimony on key questions require evidentiary hearing follow-up and dialogue to be answered “with sufficient accuracy,” many issues, particularly those involving competing technical or expert presentations, frequently are amenable to resolution by a licensing board based on its evaluation of the thoroughness, sophistication, accuracy, and persuasiveness of the parties’ submissions. See Shearon Harris, CLI-01-11, 53 NRC at 386. In this instance, given the technical sophistication of the CPUC (upon which SLOMFP relies for its claims) and its continued, detailed oversight of PG&E’s financial situation, we find its inability to provide us with any specific, concrete concern about PG&E’s current cash flow vis a vis its proposed ISFSI insufficient to merit convening a further

evidentiary proceeding or to provide a basis for finding, on the record before us, that PG&E lacks the requisite financial qualifications relative to ISFSI costs during bankruptcy.

As to decommissioning costs, the concerns expressed about PG&E's failure to make a \$10 million CPUC-authorized and collected payment to its decommissioning trust fund from rates and the staff's reminder that its ISFSI decommissioning funds cannot come from DCPD decommissioning trust funds likewise are inadequate to trigger further evidentiary proceedings or to merit a finding that PG&E lacks financial assurance relative to its Part 72 application. As PG&E makes clear, the former issue is being dealt with in the CPUC's ongoing Nuclear Decommissioning Cost Triennial Proceeding, while the latter has been addressed by PG&E in clarifying that, while ISFSI decommissioning funds are part of the overall decommissioning collections and are maintained in DCPD decommissioning trust funds, as an accounting matter the ISFSI decommissioning funds are segregated from DCPD decommissioning funds. See PG&E Response at 16-17. Nor is the purported uncertainty about a decommissioning fund transfer a relevant matter here since it is a post-bankruptcy matter that can be dealt with in the context of any license transfer proceeding.

Finally, on the matter of the May 15, 2003 motion requesting that the Board take official notice of a newspaper article, the newspaper article information in question does not meet the definition of matters that may be officially noticed in that it is not "a matter beyond reasonable controversy" and is not "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 75 (1991) (quoting Government of Virgin Islands v. Gereau, 523 F.2d 140, 147 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976) (citations omitted)). Moreover, it is not apparent the information at issue has any real connection to the matter before us, given the information has no relevance to the ability of PG&E to fund ISFSI

construction, operation, and decommissioning during the time it is in a protected bankruptcy status.

III. CONCLUSION

Pursuant to 10 C.F.R. § 2.1115, based on the record before us, we conclude SLOMFP, the IGP, and the CEC have failed to demonstrate there is any genuine and substantial dispute of fact or law that only can be resolved with sufficient accuracy in an evidentiary hearing with respect the SLOMFP contention TC-2 challenge to PG&E's December 2001 application to construct and operate an ISFSI at its DCP. At the same time, we find that, notwithstanding its current bankruptcy status, under the circumstances here PG&E has met its burden to establish that it has the financial qualifications to carry out the activities outlined in its pending Part 72 application by virtue of its ability to cover ISFSI-related costs and expenses through rate recovery, cash on hand, or its substantial operating revenues.

We thus having resolved the only outstanding matter at issue in this cause, we terminate this proceeding.

For the foregoing reasons, it is this fifth day of August 2003, ORDERED, that:

1. The May 15, 2003 IGP/CEC motion to take official notice under 10 C.F.R. § 2.743(i)(1) is denied.
2. With respect to SLOMFP contention TC-2, PG&E's Financial Qualifications Not Demonstrated, in accordance with 10 C.F.R. § 2.1115(b), because (a) there is no genuine and substantial dispute of fact or law that only can be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing; and (b) PG&E has met its burden to

demonstrate in accordance with 10 C.F.R. § 72.22(e) that it has the financial qualifications to carry out the activities outlined in its pending Part 72 application; and,

3. There being no remaining disputed issues of fact or law requiring resolution in an adjudicatory hearing and all issues in this proceeding having been resolved in favor of granting the December 2001 PG&E Part 72 license application, (a) the staff is authorized to issue the license amendment requested by PG&E immediately upon the completion of all NRC staff license review activities and the requisite findings that all requirements necessary to issue the requested Part 72 ISFSI license have been met, see 10 C.F.R. § 2.764(a); and (b) pursuant to section 2.1115(a)(2), this proceeding is dismissed.

In accordance with 10 C.F.R. § 2.760, this decision will constitute the final decision of the Commission forty (40) days from the date of issuance, or on Monday, September 15, 2003, unless a petition for review is filed in accordance with 10 C.F.R. § 2.786, or the Commission directs otherwise. Within fifteen (15) days after service of this decision, any party may file a petition for review with the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). The filing of a petition for review is mandatory for a party to have exhausted its administrative remedies before seeking judicial review. Within ten (10) days after service of a petition for review, any party to the proceeding may file an answer supporting or opposing Commission

review. The petition for review and any answers shall conform to the requirements of 10 C.F.R. § 2.786(b)(2)-(3).

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁹

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 5, 2003

¹⁹ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PG&E; (2) intervenors SLOMFP; (3) SLOC, CPUC, CEC, ABCSD, and the Diablo Canyon Independent Safety Committee; and (4) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC CO.) Docket No. 72-26-ISFSI
DIABLO CANYON POWER PLANT)
)
(Independent Spent Fuel Storage)
Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING REQUEST FOR EVIDENTIARY HEARING AND TERMINATING PROCEEDING) (LBP-03-11) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Stephen H. Lewis, Esq.
Angela B. Coggins, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Lorraine Kitman
P.O. Box 1026
Grover Beach, CA 93483

Docket No. 72-26-ISFSI
LB MEMORANDUM AND ORDER
(DENYING REQUEST FOR
EVIDENTIARY HEARING AND
TERMINATING PROCEEDING) (LBP-03-11)

Peg Pinard
San Luis Obispo County Supervisor
County Government Center
1050 Monterey Avenue
San Luis Obispo, CA 93408

Diane Curran, Esq.
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

David A. Repka, Esq.
Brooke D. Poole, Esq.
Winston & Strawn LLP
1400 L Street, NW
Washington, DC 20005-3502

Klaus Schumann
Mary Jane Adams
26 Hillcrest Drive
Paso Robles, CA 93446

Barbara Byron
Nuclear Policy Advisor
California Energy Commission
1516 Ninth Street, MS 36
Sacramento, CA 95814

Karla Bittner, Chair
Avila Valley Advisory Council
P.O. Box 65
Avila Beach, CA 93424

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

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

Robert R. Wellington, Esq.
Robert W. Rathie, Esq.
Wellington Law Offices
857 Cass Street, Suite D
Monterey, CA 93940

Darcie L. Houck, Esq.
California Energy Commission
Chief Counsel's Office
1516 Ninth Street, MS 14
Sacramento, CA 95814

Docket No. 72-26-ISFSI
LB MEMORANDUM AND ORDER
(DENYING REQUEST FOR
EVIDENTIARY HEARING AND
TERMINATING PROCEEDING) (LBP-03-11)

Lawrence G. Chaset, Esq.
Legal Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of August 2003