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RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

PETITION FOR REVIEW OF ATOMIC SAFETY AND LICENSING BOARD ORDER DISMISSING SLOMFP CONTENTION TC-2 CHALLENGE TO PG&E'S DECEMBER 2001 APPLICATION TO CONSTRUCT AND OPERATE AN ISFSI AT ITS DCPP BY THE COUNTY OF SAN LUIS OBISPO UNDER 10 C.F.R. § 2.786(b)(1)

Pursuant to 10 C.F.R. § 2.786(b) of the rules of the Nuclear Regulatory Commission ("NRC" or "Commission"), the County of San Luis Obispo ("SLOC") hereby timely petitions for Commission review of LBP-03-011,[1] the Atomic Safety and Licensing Board's ("Board") Memorandum and Order denying a request for evidentiary hearing and terminating the proceeding on Pacific Gas & Electric Company's ("PG&E") application for a license under Part 72 to construct, operate, and decommission an independent spent fuel storage installation ("ISFSI") at the Diablo Canyon Nuclear Power Plant in San Luis Obispo County. In LBP-03-11, the Board dismissed the only

[1] "Memorandum and Order (Denying Request for Evidentiary Hearing and Terminating Proceeding)," LBP-03-11 (*hereinafter*, "LBP-03-11") was issued on August 5, 2003. A petition for review under 10 C.F.R. § 2.786(b)(1) is timely if that petition is filed within fifteen days of the "issuance of a full or partial initial decision by a presiding officer." Because of its impact on LBP-03-11, this Petition also seeks Commission review of 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), LBP-02-23, 56 NRC 413, 454 (2002), as it relates to the standard to be applied to the admission of issues raised by an interested governmental entity.

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admitted contention in this proceeding and concluded, contrary to law and NRC precedent, that a utility in bankruptcy with no certain plan for reorganization or recovery of rates, is financially qualified to construct, operate and decommission an ISFSI.

For the reasons discussed in detail in SLOC's supporting Brief, the Board's decision raises a substantial question of law and policy which can only be resolved by the Commission. The Board has improperly and illegally truncated the period of time for which an ISFSI applicant must demonstrate financial qualification under 10 C.F.R. § 72.22(e) to accommodate the inability of PG&E and the NRC staff to make the finding that is clearly required by this rule. Moreover, the Board has denied SLOC its hearing rights under Subpart K and improperly shifted the burden of proof from PG&E to SLOC and other parties. Finally, the Board's decision is contrary to the expert testimony on the effects of PG&E's bankruptcy on its ability to fund an ISFSI through rate recovery and is otherwise unsupported by the limited evidence in the record.

For all these reasons, the Commission should take review, vacate the Board's decision in LBP-03-11, and its related decision in LBP-02-23, and find that, absent further scrutiny, PG&E's bankruptcy makes it impossible for the NRC to determine whether PG&E is financially qualified in accordance with 10 C.F.R. § 72.22(e).

Respectfully submitted,

Robert K. Temple, Esq.
Sheldon L. Trubatch,
Counsel for the County of
San Luis Obispo

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Petition for Review of Atomic Safety and Licensing Board Order Dismissing SLOMFP Contention TC-2 Challenge to PG&E's December 2001 Application to Construct and Operate an ISFSI at its DCPP by the County Of San Luis Obispo under 10 C.F.R. § 2.786(b)(1)" have been served upon the following persons by United States mail, first class; and by electronic mail as indicated by an asterisk (*) on this 20th day of August 2003.

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Dated this 20th day of August, 2003

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PACIFIC GAS & ELECTRIC CO.	)	
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(Diablo Canyon Nuclear Power Plant	)	
Independent Spent Fuel Storage Installation)	)	

BRIEF IN SUPPORT OF PETITION FOR REVIEW OF ATOMIC SAFETY AND LICENSING BOARD ORDER DISMISSING SLOMFP CONTENTION TC-2 CHALLENGE TO PG&E'S DECEMBER 2001 APPLICATION TO CONSTRUCT AND OPERATE AN ISFSI AT ITS DCPP BY THE COUNTY OF SAN LUIS OBISPO UNDER 10 C.F.R. § 2.786(b)(1)

Pursuant to 10 C.F.R. § 2.786(b)(1), this brief sets forth the County of San Luis Obispo's ("SLOC" or the "County") bases for seeking U.S. Nuclear Regulatory Commission ("NRC" or "Commission") review of LBP-03-011, the Atomic Safety and Licensing Board's ("Board") "Memorandum and Order (Denying Request for Evidentiary Hearing and Terminating Proceeding),"[1] on Pacific Gas & Electric Company's ("PG&E") application for a license under 10 C.F.R. Part 72 to construct, operate, and decommission an independent spent fuel storage installation ("ISFSI") at the Diablo Canyon Nuclear Power Plant ("DCPP") in San Luis Obispo County. As an interested governmental participant in the proceeding that led up to LBP-03-11, the County has a right to petition the Commission's review of this decision. *Gulf States Utilities* (River Bend Station, Units 1 & 2) ALA-317, 3 N.R.C. 175, 177-80 (1976). The

[1] Issued August 5, 2003, hereinafter referred to as "LBP-03-11" or "Board Order." Citations to the Board Order are signified with "Op. at [page]."

County requests that the NRC, as part of its review, also consider the Board's decision preventing SLOC from effectively participating in the ISFSI proceeding by improperly using the standard for admissibility of interveners' contentions raised under 10 C.F.R. § 2.714, to exclude as inadmissible issues raised by interested governmental participants, participating pursuant to 10 C.F.R. § 2.715(c). LBP-02-23, 56 NRC 413, 454 (2002).

Summary of the Decision of Which Review is Sought

In LBP-03-011, the Board determined that PG&E's pending bankruptcy reorganization under Chapter 11 of the United States Bankruptcy Code did not prevent it from demonstrating financial qualifications in accordance with 10 C.F.R. § 72.22(e) and that contention TC-2 proffered by the San Luis Obispo Mothers for Peace ("SLOMFP") should not be designated for a further hearing. The Board also authorized the NRC staff to issue the license amendment immediately upon completion of all NRC license review activities for the requested Part 72 ISFSI. Op. at 19. Contention TC-2 provided that "PG&E has failed to demonstrate that it meets the financial qualification requirements of 10 C.F.R. 72.22(e)." The Board admitted this contention because it 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.

LBP-02-23, 56 NRC 413, 442 (2002). SLOMFP proffered this contention because PG&E's actions in the bankruptcy precluded it from demonstrating financial qualifications in this proceeding. PG&E took inconsistent positions, by demanding that the Board treat it as a utility regulated by the California Public Utilities Commission

("CPUC"), which enabled to rely on its ability to recover the prudently incurred ISFSI costs from regulated rates without further demonstration of financial qualification. PG&E simultaneously filed a reorganization plan in the bankruptcy court that would result in the transfer of ISFSI responsibilities to a non-CPUC-regulated successor company.

This duality created an impossible situation in the event that the reorganization plan proposed by PG&E is confirmed because the non-CPUC successor company would not be subject to financial qualification review. The only time a meaningful review can be conducted of the financial qualifications of the entity that will actually operate the ISFSI over its planned life is during the ISFSI proceeding, because once spent fuel is placed in the ISFSI there is no place to which it can be removed.

Why the Board's Decision is Erroneous and Requires Review

A petition for review may be granted at the discretion of the Commission, with the Commission giving due weight to the existence of a substantial question regarding:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
(iii) A substantial and important question of law, policy or discretion has been raised;
(iv) The conduct of the proceeding involved a prejudicial procedural error; or
(v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4).

As demonstrated above and in the sections that follow, the Board had to make several erroneous findings of fact and conclusions of law. The most egregious were:

(1) An unsupportable interpretation of 10 C.F.R. § 72.22(e) limiting the scope of the financial qualification period to PG&E's bankruptcy, instead of the licensed life of the ISFSI as required by the plain language in 10 C.F.R. § 72.22(e), Op. at 13 and 14;

(2) a lack of substantial evidence in the record to support a finding of PG&E's financial qualifications;

(3) a gross denial of SLOC's hearing rights by holding that the financial qualification of PG&E's successor entity could be adequately addressed in an informal Subpart M proceeding, even though that proceeding does not address financial qualification of an ISFSI licensee or provide for comparable procedural participation Op. at 14, n. 13;[2]

(4) an improper shift of the burden of proof from PG&E, the applicant, to CPUC, an interested governmental participant, despite the Board's acknowledgement, that, relative to financial qualifications, the devil is in the details, PG&E, Op. at 18; and

(5) an improper failure to credit the expert testimony of CPUC's witness that the PG&E bankruptcy may effect PG&E's ability to recover ISFSI costs in a ratemaking proceeding, Op. at 15. Instead, the Board relied on the inapposite principle that 'reasonable and prudent costs will be recovered through ratemaking,' thereby ignoring the impact of PG&E's bankruptcy, although that was precisely the basis for the admitted contention TC-2, Op. at 17.

These major errors are all necessary to the Board's decision and, when considered in the aggregate, clearly show that LBP-03-11 must be reviewed and vacated by the Commission to preserve the ISFSI financial qualification requirements and the integrity of the Commission's hearing process.

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[2] See Board's improper dismissal of SLOC at LBP-02-23, 56 NRC 413, 454 (2002).

Why Commission Review Should Be Granted

This Petition for Commission review should be granted because, the Board has improperly interpreted 10 C.F.R. § 72.22(e) to limit the showing of financial qualification to the period for which the applicant PG&E was able to present evidence and not for the life of the facility as required by the NRC's rules. Moreover, this Petition for review should be granted because the Board made its decision on the basis of inadequate evidence, denied SLOC its hearing rights under Subpart K, improperly shifted the burden of proof from PG&E to the CPUC, and failed to properly credit the expert evidence offered by CPUC – admitted experts in the ratemaking process which currently sets rates for PG&E at DCPP. Finally, the Commission must grant review and reverse this decision to restore the public's confidence in the Commission's adjudicatory process.

A. The Board Improperly Interpreted 10 C.F.R. § 72.22(e) to Limit the Scope of the Period for which Financial Qualification Must Be Demonstrated

Review will be granted where the Board has reached a necessary legal conclusion without governing precedent or is contrary to established law. 10 C.F.R. § 2.786(b)(4)(ii). Both reasons apply here. By interpreting 10 C.F.R. § 72.22(e) to limit the scope of time for which an applicant must demonstrate financial qualification to operate an ISFSI to a period substantially less than its planned life, the Board has stated a necessary legal conclusion which is without precedent and contrary to a plain reading of the Commission's regulations. 10 C.F.R. § 72.22(e) requires the NRC to determine that an applicant for an ISFSI is financially qualified to construct an ISFSI, operate an ISFSI "over its planned life," and decommission it. (*Emphasis added.*) These findings must be made before an ISFSI is constructed because once spent fuel is placed in an ISFSI, there is still no place to which it can be removed if the applicant cannot meet the financial

qualifications. The safety significance of this matter also shows that it involves a substantial and important question of law that only the Commission can address to ensure public health and safety. 10 C.F.R. § 2.786(b)(4)(v).

SLOMFP argued that the Board must make 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)" but that PG&E and the NRC staff offered evidence only on PG&E's access to ratemaking during the bankruptcy proceeding. Op. at 6-7. The IGPs argued that PG&E could not demonstrate compliance with 10 C.F.R. § 72.22(e)(2) without introducing information about its financial qualification post-bankruptcy, but such information had been ruled inadmissible by the Board. Op. at 8-9. PG&E argued that Section 72.22(e) does not require financial projections of revenues for the full twenty-year ISFSI license term. Op. at 10. The NRC staff concurred. Op. at 11.

The Board did not directly decide the issue. The Board implicitly determined that 10 C.F.R. § 72.22(e)(2) does not mean what it clearly says when the scope of the admitted contention was interpreted to be limited to the period during which PG&E would be in bankruptcy. Op. at 13, 15.[3] By so doing, the Board concluded that it does not have to determine that PG&E will be financially qualified over the life of the ISFSI, as required by the rule. This interpretation makes a mockery of the Commission's concern that an applicant demonstrate it is financially qualified before an ISFSI is built. Accordingly, the Commission must take review of this interpretation and vacate it as contrary to the rule.

[3] The Board took a *literalist* view of Section 72.22(e)(2) and stated that "Part 72 does not incorporate even the five-year projection that is required under 10 C.F.R. Part 50."

B. The Board's Decision Is Not Supported By Substantial Evidence in the Record

PG&E claimed that it met the financial qualification requirements because it currently is a regulated utility and should be treated as such, despite its announced expectation that it would be succeeded by an unregulated company as a result of its reorganization in bankruptcy. PG&E did not introduce evidence regarding its financial qualification post-bankruptcy. Op. at 10. Recognizing PG&E's position, the NRC staff found that PG&E would be financially qualified only "so long as PG&E is the applicant for the ISFSI." Op. at 11. The NRC staff offered no opinion on PG&E's post-bankruptcy financial qualification. SLOMFP and the IGPs argued there was no evidence in the record to support a finding that PG&E would be financially qualified for the life of the ISFSI, as required by the Commission's rules. Op. at 7-9. The Board wrongly decided that evidence regarding PG&E's financial qualifications during bankruptcy is sufficient to meet the 72.22(e) financial qualifications demonstration. Op. at 13-15.

C. SLOC's Hearing Rights Under Subpart K Were Improperly Denied by the Board

Review will be granted where the Board has reached a necessary legal conclusion that is contrary to established law. Here, the Board has done just that. By stating that any post-bankruptcy financial qualification issues associated with the ISFSI could be considered in a Subpart M license transfer proceeding, the Board failed to provide due process in this proceeding and LBP-03-11 should be reversed.[4] The IGPs contended that

[4] Note that SLOC has asked the Commission to consider several substantial questions of law, not the least of which is the appropriate standard to be applied to the admission of an issue raised by an interested governmental participant acting under 10 C.F.R. § 2.715(c). The County briefed this issue in its "Motion by the County of San Luis Obispo under 10 C.F.R. § 2.730(a) for Referral to the Commission of that Part of LBP-02-23 that Amended 10 C.F.R. § 2.715(c) to Improperly Apply to Issues Proffered by Interested Governmental Entities the Criteria in 10 C.F.R. § 2.714(B) for the Admissibility of

the hearing would not present an opportunity to consider the financial qualification of any unregulated successor to PG&E under its bankruptcy plan. The Board held that PG&E's post-bankruptcy situation was not relevant to this proceeding, and improperly relied on the availability of a hearing on a license transfer under 10 C.F.R. Part 2, Subpart M. Op. at 14 and fn. 13. This improper reliance on a future Subpart M proceeding to address what is required in this proceeding denies the IGPs of their Subpart K hearing rights.

Substantively and procedurally Subpart M is no substitute for Subpart K. Subpart M addresses license transfer issues, including financial qualification to operate a facility for five years but does not address the financial qualification to operate an ISFSI for twenty years and then decommission it; and does not provide for oral presentations. The Board's statement that the informality of the Subpart M procedure "is not a reason to allow future license transfer issues to be introduced into this Subpart K proceeding," Op. at 14, fn.13, is sophistry. No one except the Board is suggesting that Subpart M license transfer issues be inserted into this Subpart K proceeding. All that the IGPs requested is that the financial qualification issues for an ISFSI should be considered in their proper forum, this Subpart K proceeding, and not be put off to an improper forum under a Subpart M proceeding.

Contentions Proffered by Private Litigants," filed December 11, 2002. The Board denied the County's request in Memorandum and Order (Denying Motions for Commission Referral and Reconsideration of Portions of LBP-02-23; Granting Requests to Invoke 10 C.F.R. Part 2, Subpart K Procedures and Establishing Schedule), LBP-02-25, 56 NRC ____, 2002 WL 31927752 (2002). The issues raised here are precisely the substantial questions that the Commission should resolve itself. *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3) CLI-01-03, 53 N.R.C. 22, 27 (2001).

D. The Board Improperly Shifted the Burden of Proof from PG&E to the CPUC

PG&E continued to support its claim that it was financially qualified during its bankruptcy by referring to large sums of monies on hand and generated through the sale of electricity. Op. at 17-18. SLOMFP and the IGPs stated that it was not enough to discuss large numbers but that PG&E needed to provide details showing that monies would, in fact be available for the ISFSI. Op. at 18. At the hearing, IGPs, the CPUC and the Avila Beach Community Services District, reminded the Board that PG&E is in bankruptcy because it has more debts than assets and PG&E must be required to show that, after servicing these debts, it will still be financially qualified for the purposes of 10 C.F.R. § 72.22(e). The Board acknowledged that the devil is in the details relative to the financial figures relied on by PG&E to demonstrate financial qualification but then improperly shifted the burden of proof from PG&E to CPUC when it held that CPUC should have provided details showing that PG&E is not financially qualified. Op. at 18. This decision was clearly erroneous because CPUC is not the ISFSI applicant.

E. The Board Improperly Failed to Credit IGPs' Expert Witness's Testimony

Truman Burns, an employee of the CPUC, testified as an expert witness on the likely impact of PG&E's bankruptcy on its ability to recover ISFSI costs through the ratemaking process. Mr. Burns testified that there is a substantial likelihood that the CPUC would not permit current rate recovery to defray construction expenses. Op. at 15. In weighing this testimony, the Board characterized it as a suggestion that "the possibility always exists that a utility regulatory commission prudence review could result in a disallowance of all or part of those costs." Op. at 17. This denigration of Mr. Burns' expert testimony is inconsistent with the statement of contention TC-2, as admitted by the

Board, which focuses on the impact of PG&E's bankruptcy. Having ignored the reason for this proceeding, the Board then compounded its error by relying on the "Commission's general premise that reasonable and prudent costs associated with safe facility operation will be recovered through the ratemaking process." Op. at 17. Reliance on that general premise is clearly inapposite here because that premise did not take into account PG&E's current bankruptcy situation. Accordingly, Mr. Burns' testimony must be accorded its appropriate weight and the Board's determination that PG&E's access to the rate process makes it financially qualified must be reversed.

Conclusion

It is clear that the Board misinterpreted the Commission's financial qualification requirements for an ISFSI applicant, deprived SLOMFP and the IGPs of their hearing rights,[5] and distorted the Commission's decision criteria to find that PG&E is financially qualified for the period of its bankruptcy and that is sufficient for compliance with 10 C.F.R. § 72.22(e). The Commission must take review and reverse this travesty, including the errors reflected in both LBP-03-11 and LBP-02-23, and restore public confidence by enforcing the integrity of its adjudicatory processes.

Respectfully submitted,

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San Luis Obispo

[5] The Commission must also reverse the Board's imposition of the contention criteria on issues raised by interested governments by reversing that aspect of LBP-02-23.