

**RAS 6761**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**DOCKETED 09/02/03**

BEFORE THE COMMISSION

In the Matter of

PACIFIC GAS & ELECTRIC CO.

(Diablo Canyon ISFSI)

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Docket No. 72-26-ISFSI

ASLBP No. 02-801-01-ISFSI

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NRC STAFF'S RESPONSE TO SAN LUIS OBISPO COUNTY'S PETITION FOR REVIEW OF  
LBP-03-011 DISMISSING SLOMFP CONTENTION TC2

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Angela B. Coggins  
Counsel for NRC Staff

September 2, 2003

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SAN LUIS OBISPO COUNTY'S PETITION FOR REVIEW  
OF LBP-03-011 DISMISSING SLOMFP CONTENTION TC-2

INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b)(3), the staff of the Nuclear Regulatory Commission ("Staff") hereby files its response to the petition seeking Commission review of the Licensing Board's decision in LBP-03-011,<sup>1</sup> filed by San Luis Obispo County ("SLOC").<sup>2</sup> For the reasons set forth herein, the Staff submits that SLOC fails to demonstrate that Commission review of the Board's decision is warranted under 10 C.F.R. § 2.786(b)(4). SLOC's Petition, therefore, should be denied.

BACKGROUND

On August 5, 2003, the Licensing Board issued a Memorandum and Order in which it denied a request for an evidentiary hearing on Technical Contention 2 ("TC-2"), the sole admitted

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<sup>1</sup> See *Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-03-011, 58 NRC \_\_\_\_ (August 5, 2003) ("Memorandum and Order, Denying Request for Evidentiary Hearing and Terminating Proceeding").

<sup>2</sup> "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 DCPD by the County of San Luis Obispo Under 10 C.F.R. § 2.786(b)(1)", dated August 20, 2003 ("SLOC's Petition").

contention of 10 C.F.R. § 2.714 intervenors San Luis Obispo Mothers for Peace, et al. (“SLOMFP”), regarding the December 21, 2001 application by Pacific Gas and Electric (“PG&E” or “Applicant”) for a Part 72 license that would permit PG&E to construct and operate an above ground dry cask storage facility at its Diablo Canyon Power Plant (“DCPP”) site. The Licensing Board’s decision provides a detailed history of the litigation of this contention. See 58 NRC \_\_\_, slip. op at 4-6. In brief, SLOMFP’s Contention TC-2 alleged that “PG&E has failed to demonstrate that it meets the financial qualifications requirements of 10 C.F.R. § 72.22(e).” *Id.* at 4. In admitting this contention, the Board found that SLOMFP 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.” *Id.* The Board, however, excluded from the contention any matters relative to either the 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. *Id.*

Subpart K of the Commission’s regulations was subsequently invoked, after which the parties provided the Board with the necessary Subpart K filings and oral argument was held on May 19, 2003. During the oral argument, interested governmental participants (“IGP”) SLOC, the Avila Beach Community Services District (“ABCSD”) and the California Public Utilities Commission (“CPUC”) argued that further exploration of the issues in an evidentiary hearing was warranted. On the other hand, SLOMFP, the California Energy Commission (“CEC”), PG&E and the Staff, while disagreeing on the merits of the contention, contended that there was no need for an adjudicatory hearing.

Following the Board's decision in LBP-03-011, in which the Board determined that an evidentiary hearing on Contention TC-2 was unnecessary, SLOC filed the subject petition for review of the Board decision alleging that it was contrary to law and established precedent and raised substantial questions of law and policy which can only be resolved by the Commission. See SLOC Petition at 5-6. Specifically, SLOC asserts that the Board based its decision upon an incorrect regulatory interpretation; the Board's decision was not supported by substantial evidence; SLOC's Subpart K hearing rights were improperly denied; the Board improperly shifted the burden of proof; and finally, that the Board improperly failed to credit IGP's expert witness' testimony. SLOC Petition at 4. The Staff submits that none of these claims raise a substantial question with respect to the considerations set forth in 10 C.F.R. § 2.786(b)(4).

#### DISCUSSION

##### I. Legal Standards Governing Petitions for Review

In determining whether to grant, as a matter of discretion, a petition for review of a licensing board order, the Commission gives due weight to the existence of a substantial question with respect to the considerations set forth in 10 C.F.R. § 2.786(b)(4). See *Babcock and Wilcox Company* (Pennsylvania Nuclear Service Operations, Parks Township, Pennsylvania), CLI-95-04, 41 NRC 248, 250-251. Those considerations are: (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 that 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); see also,

*Babcock and Wilcox Company*, 41 NRC at 250-251. Although Subpart K has no reviewability rules of its own, the general reviewability standards set out in 10 C.F.R. § 2.786 apply to subpart K by virtue of 10 C.F.R. § 2.1117, which makes the general Subpart G rules applicable “except where inconsistent” with Subpart K. *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27 (2001), n.6.

II. SLOC’s Petition Fails to Demonstrate that Commission Review is Warranted in Accordance with the Requirements of 10 C.F.R. § 2.786

The Staff submits that none of the alleged errors identified by SLOC in the Board’s LBP-03-011 decision raise a substantial question with respect to the considerations set forth in 10 C.F.R. § 2.786(b)(4). The Staff will address each in turn, with overlapping arguments addressed together.

A. The Board’s Interpretation of § 72.22(e) is not Contrary to Established Law

SLOC contends that the Board reached a necessary legal conclusion without governing precedent or contrary to established law when the Board held in LBP-03-011 that the applicant adequately demonstrated its financial qualifications to construct and operate an ISFSI despite the fact that the applicant is currently in a pending bankruptcy proceeding. SLOC Petition at 6. SLOC attempts to argue that the Board’s decision implicitly redefines section 72.22(e)<sup>3</sup> of the Commission’s regulations. *Id.* at 5-6. SLOC reaches this tenuous conclusion by arguing that since

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<sup>3</sup> In pertinent part, section 72.22(e) provides:

(e)...The [submitted financial qualifications] information must show that the applicant either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary funds or that by a combination of the two, the applicant will have the necessary funds to cover the following:

- (1) Estimated construction costs;
- (2) Estimated operating costs over the planned life of the ISFSI; and
- (3) Estimated decommissioning costs...

PG&E is currently in bankruptcy and arguably will not remain in bankruptcy for the next 20 years (the licensed life of the ISFSI), the Board did not make the requisite finding that PG&E will have the financial ability to meet section 72.22(e) requirements for the 20-year life of the ISFSI. According to SLOC, the only way the Board could make such a finding under these circumstances is if the Board considered the financial qualifications requirements of any post-bankruptcy entity that emerges in control of DCPD as a result of the bankruptcy reorganization. *Id.*

SLOC's argument, however, is not that the Board's decision was without governing precedent. In fact, SLOC fails to cite to any case law which would call the Board's decision into question. Instead, SLOC simply disagrees with the Board's decision when admitting contention TC-2 to exclude from litigation under this contention any matters relative to the financial qualifications of any entities that might in the future construct or operate the ISFSI post PG&E's bankruptcy proceeding. See LBP-02-23, 56 NRC 413, 442-443 (2002). As such, this argument seeks to improperly expand the scope of this ISFSI proceeding. As the Board explained, "Petitioner concerns regarding entities that may or may not be created in the future to take over operations at DCPD, depending upon whether PG&E's reorganization plan is approved by the bankruptcy court, are irrelevant to and/or outside the scope of the proceeding at this point." 56 NRC at 444. The Board further elaborated that, "[i]n this regard, assuming that the bankruptcy court confirms PG&E's reorganization plan, and that the Commission approves the license transfer of DCPD from PG&E to Gen,<sup>4</sup> PG&E would then be required to amend its ISFSI license application

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<sup>4</sup> Under PG&E's proposed bankruptcy reorganization plan, the majority of the assets and liabilities associated with the current generation business of PG&E, including DCPD, will be contributed to a new subsidiary, Gen, or its subsidiaries. See "Application for License Transfers and Conforming Administrative License Amendments", submitted by PG&E on November 30, 2001, ADAMS Accession No. ML013370300.

to reflect the change in the applicant.” *Id.* at 444, fn. 8. Furthermore, the Board acknowledged that only if and when this chain of events is in fact realized, would issues regarding Gen’s financial qualifications be ripe for litigation. *Id.* Thus, any concern SLOC may have about any future entity which may assume control of DCPD as a result of the bankruptcy reorganization is more appropriately addressed in the license transfer proceeding that would necessarily follow, but is not properly within the scope of the present proceeding. See 10 C.F.R. §§ 72.50 & 2.1300. Consequently, the Board’s decision to properly focus Contention TC-2 on the current applicant’s financial ability to construct, operate and decommission an ISFSI was in no way contrary to established law or without governing precedent, nor does the ruling raise a substantial question regarding any of the other considerations in section 2.786(b)(4) which would require Commission review of the decision.

SLOC’s second argument, in which it claims that the Board’s decision is not supported by substantial evidence, is essentially a restatement of its first argument. SLOC claims that, because no evidence was introduced regarding the financial qualifications of any post-bankruptcy entity that might, in the future, control the DCPD, 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.” SLOC Petition at 7. As explained above, an evaluation of the financial qualifications of an as-of-yet unknown post-bankruptcy entity can only be properly addressed upon an application for a license transfer. The Board’s decision to ensure the Commission’s regulations are appropriately followed fails to raise a substantial question requiring Commission review of the Board’s decision.

Likewise, SLOC's third argument, framed as a denial of SLOC's hearing rights under Subpart K, again raises the same concerns alleged in SLOC's initial argument. SLOC asserts that, "[b]y 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-03-011 should be reversed." SLOC Petition at 7. However, SLOC's disapproval of the Commission's license transfer regulations and its claim that Subpart M is substantively and procedurally "no substitute for Subpart K", is not an argument which falls within the review provisions outlined in section 2.786(b)(4), but instead, is an impermissible attack on Commission regulations and thus, provides no support for a petition for Commission review. See SLOC Petition at 8; *see also* 10 C.F.R. § 2.758(a).

B. The Board Did Not Improperly Shift the Burden of Proof from PG&E to CPUC

SLOC next claims that "[t]he 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." SLOC Petition at 9. Again, however, SLOC's alleged error fails to meet any of the necessary requirements outlined in section 2.786(b)(4) of the Commission's regulations and instead seeks to undermine the regulatory structure of Subpart K. As the Board explained in LBP-03-011, Subpart K was devised such that "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." 58 NRC \_\_\_, slip op. at 8, *citing*



50 Fed. Reg. 41,662, 41,667 (Oct. 15, 1985). Thus, the Board's decision was not "clearly erroneous" as SLOC asserts, but the Board followed established agency precedent in rendering this decision. See *Carolina Power & Light Company* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-384 (2001). Accordingly, this argument fails to raise substantial questions requiring Commission review.

C. The Board Properly Weighed the Competing Expert Witness' Testimony

SLOC's final argument<sup>5</sup> is that the Board failed to accord the testimony of Mr. Truman Burns', a CPUC employee and the IGP expert, appropriate evidentiary weight. SLOC Petition at 9-10. According to SLOC, Mr. Burns' testimony established that there is a substantial likelihood that the CPUC would not permit current rate recovery to defray ISFSI construction costs, and thus, the Board was in error when it relied upon the Commission's general premise that, for rate-regulated licensees, reasonable and prudent costs associated with safe facility operation will be recovered through the ratemaking process. SLOC Petition at 10.

SLOC's displeasure with the weight the Board accorded Mr. Burns' testimony, or the Board's decision that a full evidentiary hearing was unnecessary after reviewing the experts' affidavits, fails to raise a substantial question regarding the considerations outlined in section 2.786(b)(4). As the Commission has previously explained, "[i]n Subpart K cases, licensing boards

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<sup>5</sup> Although SLOC references in the introductory paragraph of its Petition, and again in footnote 4 of its Petition, that it also seeks to challenge the Board's ruling regarding the standard of admissibility for issues raised by interested governmental participants, these vague references fail to state why, in SLOC's view, the Board's decision was erroneous in that regard or why Commission review of that decision should be exercised. Therefore, SLOC fails to comply with section 2.786(b)(2)(iii) & (iv) and provides no argument to which the Staff may respond. For the Staff's position on the appropriate admissibility standards for issues raised by section 2.715(c) participants, see "NRC Staff's Position Regarding Issues Proffered by 10 C.F.R. § 2.7159c Interested Governmental Entities", dated September 25, 2002.

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." *Carolina Power & Light Company* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386 (2001). Thus, the Board did not err when it determined the appropriate weight given to Mr. Burns' testimony, nor did it err in its decision that no further evidentiary hearing was necessary for it to make its decision.

Moreover, in this instance, contrary to SLOC's claims, the Board did not "denigrate" Mr. Burns' testimony, but considered his testimony in reaching its decision. The Board simply determined that the challenges posed by the IGP and SLOMFP (including Mr. Burns' testimony) failed to establish the need for further adjudicatory proceedings or to counter a PG&E financial assurance showing. 58 NRC \_\_\_\_, slip op. at 27. In reaching this conclusion, the Board acknowledged Mr. Burns' testimony regarding the potential disallowance by the CPUC of all or part of the ISFSI costs through rate recovery, but also noted PG&E's assertion that to cover potential ISFSI costs during the bankruptcy proceeding it intends to rely not only upon rate recovery, but also upon operating revenues and cash on hand. 58 NRC \_\_\_\_, slip op. at 26-27. While SLOC may disagree with the Board's decision, it has pointed to no erroneous finding of fact or substantial policy question, or to any other factor enumerated in section 2.786(b)(4), that would require Commission review of LBP-03-011. Instead, the Board fulfilled its Subpart K mandate and the Staff submits that the Commission should defer to the Licensing Board's judgment on whether the Board would benefit from hearing live testimony and from direct questioning of experts or other witnesses. See *Carolina Power & Light Company*, 53 NRC at 386.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Petitioners have failed to point out any substantial question with respect to the considerations outlined in section 2.786(b)(4) which would require Commission review of LBP-03-011. Thus, SLOC's Petition for Review should be denied.

Respectfully submitted,

***/RA/***

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Dated at Rockville, Maryland  
this 2nd day of September, 2003

UNITED STATES OF AMERICA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO SAN LUIS OBISPO COUNTY'S PETITION FOR REVIEW OF LBP-03-011 DISMISSING SLOMFP CONTENTION TC2", have been served upon the following persons by United States mail, first class, or through the Nuclear Regulatory Commission's internal mail distribution as indicated by an asterisk (\*); and by electronic mail as indicated by a double asterisk (\*\*) on this 2<sup>nd</sup> day of September, 2003.

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