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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	
)	
Pacific Gas and Electric Co.)	Docket No. 72-26-ISFSI
)	
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation))	ASLBP No. 02-801-01-ISFSI

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY IN OPPOSITION TO SAN LUIS
OBISPO COUNTY PETITION FOR REVIEW OF LBP-02-23 AND LBP-03-11

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I. INTRODUCTION

On August 20, 2003, San Luis Obispo County ("County") filed a Petition for Review relating to aspects of two decisions of the Nuclear Regulatory Commission ("NRC") Atomic Safety and Licensing Board ("Board"): LBP-02-23, issued December 2, 2002,¹ LBP-03-11, issued August 5, 2003.² Pursuant to 10 C.F.R. § 2.786(b)(3), Pacific Gas and Electric Company ("PG&E") hereby responds in opposition to the Petition for Review.

II. BACKGROUND

This Subpart K proceeding relates to PG&E's December 21, 2001, application for a site-specific license under 10 C.F.R. Part 72 to possess spent fuel, and other radioactive materials associated with spent fuel, generated at the Diablo Canyon Power Plant ("DCPP") in an independent spent fuel storage installation ("ISFSI"). The County was admitted to this

¹ *Pac. Gas & Elec. Co. (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (2002).*

² *See Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC __ (slip op. Aug. 5, 2003).*

proceeding as an interested governmental entity on August 7, 2002, and participated with respect to the one admitted contention originally proposed by the San Luis Obispo Mothers for Peace (“SLOMFP”) and its aligned entities. Further background on this proceeding is included in PG&E’s response, also filed today, to the Petition for Review filed by SLOMFP *et al.*

III. ARGUMENT

Under 10 C.F.R. § 2.786(b)(4), the Commission may, in its discretion, grant a petition for review giving due weight to the existence of a substantial question with respect to the following considerations:

- (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.

The County has not set forth any issue that raises a *substantial question* with respect to any of these considerations.³ The County merely re-argues the merits of their earlier positions, without raising a “substantial and important question of law.” Nor has the County demonstrated that any of the Board’s legal conclusions are “without governing precedent or . . . a departure from or contrary to established law.”

Furthermore, the Commission’s Subpart K regulations clearly place a difficult burden on intervenors in Subpart K proceedings to demonstrate the need for an evidentiary

³ The Petition for Review appears to be based on considerations (ii) or (iii). No meaningful showing is made that would be responsive to considerations (i), (iv), or (v).

hearing. *See* 10 C.F.R. § 2.1115(b). Any issues that do not meet that burden are to be disposed by the Board promptly after the oral argument. *See* 10 C.F.R. § 2.1115(a)(2).⁴ Whether or not the County disagrees with the Board's conclusion, there is no basis whatsoever on which to conclude that an evidentiary hearing is warranted on Contention TC-2.

A. The Board Did Not Improperly Interpret 10 C.F.R. § 72.22(e): The County first seeks review of LBP-03-11 and LBP-02-23, claiming that the Board did not properly require a showing of financial qualifications over the planned life of the ISFSI and that this was contrary to 10 C.F.R. § 72.22(e). (Petition at 5-6.) However, this argument fails to demonstrate a substantial question warranting review.

Contention TC-2, as drafted by SLOMFP *et al.*, focused on the impact of the current, pending PG&E bankruptcy (a condition not expected to last 20 years). The Board did not "interpret" 10 C.F.R. § 72.22(e) to limit the scope of the contention. Rather, it reviewed the proposed contention and admitted the two bases that it determined to meet the requirements of 10 C.F.R. § 2.714(b)(2). Those two bases related entirely to "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 continued funding as a rate regulated entity or through credit markets." LBP-02-23, 56 NRC at 442.⁵ The contention itself, therefore, ultimately defined the necessary finding in the hearing. The County's argument is based on a straw man: that the Board somehow interpreted the regulations and determined that it "does not

⁴ *See also Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 26 n.5 (2001)* ("[T]he statutory criteria [of the Nuclear Waste Policy Act of 1982] are quite strict and are designed to ensure that the hearing is focused exclusively on real issues").

⁵ The Board in LBP-02-23 also excluded any issue with respect to the financial qualifications of any successor entity. This issue was only raised vaguely in one basis for proposed Contention TC-2. The Board's exclusion of the matter was based, not on 10 C.F.R. § 72.22(e), but on the fact that a successor entity is not presently the ISFSI applicant.

have to determine that PG&E will be financially qualified over the life of the ISFSI.” The Board, in its ultimate decision, actually needed only to address the contention and find that the current bankruptcy does not adversely affect PG&E’s access to funds for the ISFSI.⁶

The County’s argument also ignores the substantial record in the case which more than adequately supports the Board’s decision in LBP-03-11 on the admitted contention and adequately addresses the requirements of 10 C.F.R. § 72.22(e). The record shows that the current applicant, PG&E, is a rate-regulated electric utility with access to the rate process to recover ISFSI costs. *See, e.g.,* PG&E Summary at 9-13.⁷ As the Board determined, there was no real challenge made in the hearing to this fact. LBP-03-11, slip op. at 23-25.⁸ Rather, the entire argument below was based on speculation concerning the future possibility, post-bankruptcy, of a reorganization of PG&E such that the ISFSI licensee would no longer be rate-regulated. However, the NRC’s oversight and licensing processes are sufficiently flexible, and pervasive, to allow the agency to address a material new development such as this when and if it actually occurs. *See* PG&E Summary at 18-20.

Finally, the Board clearly did not err in concluding that PG&E is not required by 10 C.F.R. § 72.22(e) to provide detailed financial projections for the next 20 years. LBP-03-11, slip op. at 26. For a power reactor operating license applicant (non-electric utility), only a five-year projection is required by 10 C.F.R. § 50.33(f)(2) — and this requirement does not apply to a Part 72 applicant. LBP-02-23, 56 NRC at 445-46, quoting *Private Fuel Storage, L.L.C.*

⁶ *See Commonwealth Edison Co. (Braidwood Power Station, Units 1 & 2), LBP-86-31, 24 NRC 451, 455 (1986) (“The [B]oard’s jurisdiction is limited to determining the admitted contentions and any additional issues which the [B]oard raises sua sponte through the procedures specified by the Commission”).*

⁷ *See “Summary of Facts, Data and Arguments on Which Pacific Gas and Electric Company Will Rely at the Subpart K Oral Argument,” dated April 11, 2003 (“PG&E Summary”).*

⁸ *Compare* Tr. 494-96 (statements by counsel for the California Public Utilities Commission (“CPUC”).

(Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 30 (2000). Rather, the Board is required to address the contention (as discussed above) and make a financial qualifications finding. That finding is necessarily a predictive one of reasonable, rather than absolute, assurance.⁹ The Board's finding was consistent with Section 72.22(e), the scope of the admitted contention, the record in the case, and substantial Commission precedent.

B. The Board's Decision Is Well Supported: The County next argues that the Board's decision is not supported for reasons which are re-casted versions of the first argument. The County argues that: (1) "PG&E did not introduce evidence regarding its financial qualification post-bankruptcy"; (2) the NRC Staff found that PG&E would be qualified "only so long as PG&E is the applicant;" and (3) the Staff offered no opinion on PG&E's post-bankruptcy financial qualifications. (Petition at 7.) This argument also fails to show any error in the Board's conclusion that no further evidentiary hearings on Contention TC-2 are warranted.

As discussed above, the issue raised by Contention TC-2 was PG&E's financial qualifications during the pendency of the bankruptcy — not the financial qualifications, after the bankruptcy, of either PG&E or a hypothetical successor. The record addresses the point of the contention — in detail. *See, e.g.,* PG&E Summary at 14-20. Moreover, PG&E is the applicant and the Staff's focus on financial qualifications only "so long as PG&E is the applicant for the ISFSI" (Petition at 7) is therefore entirely appropriate. No Staff finding on a post-bankruptcy successor is required in the present case.

⁹ *See, e.g., Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 517 (2001) ("[a]s we have cautioned in the past, however, we do not expect 'absolute certainty' in the financial arena; it is enough for Applicants to rely on 'plausible assumptions and forecasts'"); *Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point 3), CLI-00-22, 52 NRC 266, 300 (2000); *PFS*, CLI-00-13, 52 NRC at 30 ("outside the reactor context it is sufficient for a license applicant to identify adequate mechanisms to demonstrate reasonable assurance, such as license conditions and other commitments"); *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219-220 (1999) ("[s]peculation of some sort is unavoidable when the issue at stake concerns predictive judgments about an applicant's future financial capabilities").

The County's argument on the financial qualifications of PG&E "for the life of the ISFSI" also ignores the record with respect to PG&E, post-bankruptcy. As explained in the record and by the Board in its decision (LBP-03-11, slip op. at 20-21), if PG&E remains the licensee post-bankruptcy,¹⁰ there will be no change to its status as a rate-regulated electric utility. In this scenario, where there is no reorganization, there is absolutely nothing in the record to suggest that the *applicant* in the case will *not* be qualified over the life of the ISFSI. Given that the license would be issued to PG&E, the record amply supports the Board's predictive finding on the contention and a Staff finding on 10 C.F.R. § 72.22(e).

C. The County's Hearing Rights Have Not Been Impacted: The County argues that the Board's treatment of post-bankruptcy financial qualifications issues as beyond the scope of the current proceeding denies them "due process" and "Subpart K hearing rights." (Petition at 7-8.) This argument does not raise a substantial issue. The County's hearing rights regarding the financial qualifications of the ISFSI licensee post-bankruptcy have not been impacted.

Should the PG&E Plan of Reorganization be implemented following issuance of the Part 72 ISFSI license, PG&E will be required to submit a license transfer application pursuant to 10 C.F.R. § 72.50. Such an application must include, among other things, information regarding financial qualifications equivalent to that which would be submitted in an application for an initial license. *See* 10 C.F.R. § 72.50(b)(1).¹¹ The County would then have the opportunity to challenge the license transfer application, including the financial qualifications information proffered therein, in a proceeding under 10 C.F.R. Part 2, Subpart M. Hearing

¹⁰ The Board observed correctly that it appears increasingly likely that this will be the case in light of the pending proposed settlement reached between PG&E and the CPUC staff in the bankruptcy case. *Id.* at 21 n.12.

¹¹ The County's allegation that the license transfer application would address the financial qualification to operate a facility "for five years" (Petition at 8) is therefore incorrect, as the standard under 10 C.F.R. § 72.22(e) will apply.

procedures under Subpart M satisfy the requirements of Section 189 of the Atomic Energy Act of 1954, as amended ("AEA"), and therefore provide for "due process" to all participants thereunder. Moreover, contrary to the County's statement (at 8), any hearing granted under Subpart M would indeed be an oral hearing.¹² The Board did not in any way improperly truncate the County's hearing rights.

D. The Board Properly Applied the Burden of Proof: The County next contends that the Board "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." (Petition at 9.) The County misunderstands the Board's holding. Notwithstanding the agency's rules that place the ultimate burden of proof of any substantive matter at issue (*i.e.*, Contention TC-2) 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.¹³ The Board correctly determined that the testimony submitted by the interested governmental entities did not demonstrate a genuine and substantial dispute of fact that *must* be resolved in a further adjudicatory hearing. PG&E developed substantial information in the record with respect to its financial qualifications to construct, operate and decommission the ISFSI. Based on this record, the Board properly concluded that the contention does not raise a substantial question justifying evidentiary hearings. *Compare Shearon Harris*, CLI-01-11, 53 NRC at 385. The County fails to show that any finding of fact was "clearly erroneous." 10 C.F.R. § 2.786(b)(4)(i).

¹² See 10 C.F.R. § 2.1308(d)(2). The parties in a Subpart M proceeding would need to unanimously agree to conduct a hearing consisting of written comments.

¹³ See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-84 (2001), *aff'd sub nom. Orange County v. Nuclear Regulatory Comm'n*, 2002 WL 31098379 (D.C. Cir. Sept. 19, 2002) (*per curiam*), quoting Final Rule, Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors, 50 Fed. Reg. 41,662, 41,667 (Oct. 15, 1985).

E. The Board Accorded Appropriate Weight to Expert Testimony: The County contends that certain testimony of CPUC employee Truman Burns was accorded less than appropriate weight on the issue of whether PG&E will be able to recover ISFSI costs through the ratemaking process. (Petition at 9-10.) This argument, by its terms focused on the weight assigned to testimony, does not demonstrate clear error or otherwise raise a substantial issue for review. The record demonstrates that the Board considered the testimony of Mr. Burns and came to the logical conclusion that any “uncertainty” that may exist in rate recovery does not preclude a finding of PG&E’s financial qualifications.

Mr. Burns’ testimony included his opinion, with little detail, that there is a “substantial likelihood” that the CPUC will not permit rate recovery for ISFSI construction expenses while ultimate ownership of DCPD is in question.¹⁴ Mr. Burns did not specify any costs associated with the ISFSI which are currently subject to CPUC review that have been, or are reasonably expected to be, disallowed. More importantly, his testimony failed to demonstrate how any disallowance would affect PG&E’s financial qualifications given the record with respect to PG&E’s assets, revenues, and cash flows. As PG&E stated in its papers before the Board, as a rate-regulated utility, PG&E’s expenses are subject to prudence review by the CPUC. *See* PG&E Summary at 12-14. Any disallowances that might result from such a review would be covered by cash on hand or electric operating revenues. Disallowances could reduce PG&E’s earnings, but would not be material to PG&E’s financial qualifications with respect to the ISFSI, given its substantial assets and earnings. *Id.*

¹⁴ The basis for such disallowance would be that ratepayers should not fund an expenditure that may not directly benefit them in the future. *See* “Summary of Facts, Data and Arguments on Which the Governmental Participants Intend to Rely at the Subpart K Oral Argument,” dated April 11, 2003, at 20 n.30.

The Board found, in effect, that the mere possibility of disallowances does not undermine the NRC's ability to find the necessary reasonable assurance of PG&E's financial qualifications to construct and operate the ISFSI. LBP-03-11, slip op. at 24-25. The Board recognized the Commission's "general premise" that reasonable and prudent costs will be recovered through the rate process. *Id.* at 25. Furthermore, in the absence of any more specific showing from the County and other petitioners, the Board found the record to be sufficient to demonstrate that PG&E has sufficient cash flow (based on assets and operating revenues) to pay costs associated with the ISFSI even in the case of a disallowance or a deferral of recovery based on a different accounting treatment. *Id.*, at 26-27. The County has not provided any basis for disturbing the Board's factual determinations.

F. Contention Standards for Governmental Participants: The County argues in passing (Petition at 2, 7 n.4) that the Commission should review the Board's decision in LBP-02-23 to apply the contention pleading (or "basis") requirements of 10 C.F.R. § 2.714 to issues proffered by interested governmental entities. On this issue also the County has failed to demonstrate a basis for Commission review.¹⁵

The Board reasonably determined in LBP-02-23 that governmental entities participating pursuant to 10 C.F.R. § 2.715(c) should be held to the same requirements for the submission of contentions as Section 2.714 petitioners. To hold Section 2.715(c) participants to a lesser standard would undermine the purposes of Section 2.714(b). *See* LBP-02-23, 56 NRC at 453-460. Moreover, a review of the Board's decision reveals that the Board found that each of the County's proposed issues were either beyond the scope of this proceeding or constituted an

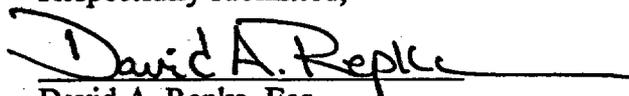
¹⁵ Apart from the merits of this argument, the Commission could also deem this argument waived because the asserted basis for review was not clearly articulated in the petition for review. *See Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 46 (2001).

impermissible challenge to NRC regulations. See LBP-02-23, 56 NRC at 458-59, 443-44 (County Contention TC-1); 459, 442-43 (County Contention TC-2); 460, 458-59 (County Contention EC-1.B).¹⁶ Therefore, reconsideration of the "basis" standard for admission of issues would not change the conclusion of inadmissibility. In the absence of any substantial question, clear error, or prejudice, review of this aspect of LBP-02-23 is not appropriate.

IV. CONCLUSION

For the reasons above, the Commission should deny the Petition for Review.

Respectfully submitted,



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Dated in Washington, District of Columbia
this 2nd day of September 2003

¹⁶ County Contention EC-1.A concerned security issues. The Board ruled this contention inadmissible as a challenge to NRC regulations (*Id.* at 447-48, 460), but referred to the Commission for further consideration. The Commission affirmed the Board's rejection of this contention in CLI-03-01, 57 NRC 1 (2003).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY IN OPPOSITION TO SAN LUIS OBISPO COUNTY PETITION FOR REVIEW OF LBP-02-23 AND LBP-03-11" have been served as shown below by electronic mail, this 2nd day of September 2003. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

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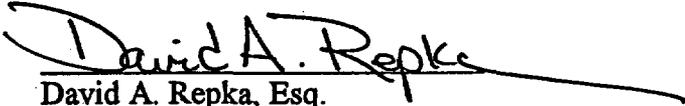
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