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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY IN OPPOSITION TO SLOMFP ET AL. PETITION FOR REVIEW OF LBP-02-23 AND LBP-03-11

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I. INTRODUCTION

On August 20, 2003, San Luis Obispo Mothers for Peace et al. (collectively, "Petitioners")[1] filed a Petition for Review relating to aspects of two decisions of the Atomic Safety and Licensing Board ("Board") in this matter: LBP-02-23, issued December 2, 2002,[2] and LBP-03-11, issued August 5, 2003.[3] 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.

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1 The Petitioners include the San Luis Obispo Mothers for Peace ("SLOMFP"), the Santa Lucia Chapter of the Sierra Club, San Luis Obispo Cancer Action Now, Peg Pinard, the Avila Valley Advisory Council, and the Central Coast Peace and Environmental Council.

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

3 *See Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC __ (slip op. Aug. 5, 2003). The Commission should deem waived any arguments not clearly articulated in the petition for review. *See Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 46 (2001).

II. BACKGROUND

This proceeding has been conducted under the Nuclear Regulatory Commission ("NRC") hearing procedures in 10 C.F.R. Part 2, Subpart K. The 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").

In LBP-02-23, the Board determined that Petitioners had established standing and had submitted one admissible contention, relating to PG&E's current financial qualifications.[4] The contention addressed 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. Petitioners, PG&E, the NRC Staff, and the interested governmental entities subsequently submitted written presentations, and, on May 19, 2003, made oral presentations to the Board regarding this contention.

On August 5, 2003, the Board issued LBP-03-11, in which it concluded that the Petitioners and the governmental participants failed to demonstrate any genuine and substantial dispute of fact or law that can only be resolved in an evidentiary hearing with respect to the single admitted contention. The Board resolved the contention in PG&E's favor and terminated the proceeding. The Board found that, notwithstanding its current bankruptcy status, PG&E met its burden under Part 72 to establish that it has the financial qualifications to construct, operate and decommission the ISFSI by virtue of its ability to cover ISFSI-related costs and expenses through rate recovery, cash on hand, or operating revenues.

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[4] The Licensing Board also granted interested governmental entity status to several governmental bodies.

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.

Petitioners have not set forth any issue that raises a *substantial question* with respect to any of these considerations.[5] The Petitioners merely re-argue the merits of their earlier positions, without raising a "substantial and important question of law." Nor have Petitioners demonstrated that any of the Board's legal conclusions are "without governing precedent or . . . a departure from or contrary to established law."

A. Proposed Contention TC-1: Petitioners first seek review of the Board's decision in LBP-02-23 finding proposed Contention TC-1 to be inadmissible. This contention sought only to re-raise certain seismic matters that were comprehensively addressed under 10 C.F.R. Part 50 at the time of licensing DCPP (the power plant). Petitioners have failed to show any error of fact or law, or any other substantial and important question of law, policy or discretion, that would justify Commission review of the Board's decision rejecting this proposed contention.

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[5] The Petition for Review appears grounded in considerations (ii) and (iii). No meaningful showing is made that would be responsive to considerations (i), (iv), or (v).

Proposed Contention TC-1 was entirely focused on the adequacy of the limiting seismic source characterization for the design basis earthquake used at the DCPP site. The Board thoroughly considered the proposed contention and concluded — consistent with 10 C.F.R. §§ 72.102(f) and 72.40(c) — that the Design Earthquake ("DE") for the co-located nuclear power plant is appropriate for the design of the ISFSI. LBP-02-23, 56 NRC at 440. In addition — consistent with 10 C.F.R. § 2.714(b)(2) — the Board found inadequate basis in the contention to reopen the prior seismic evaluation finding. *Id.* at 441; *see also* PG&E Response to Supplemental Petition, at 5-19.[6]

Section 72.102(f) clearly defines the design earthquake for a co-located ISFSI as equivalent to the design earthquake for the power plant. That regulation provides that "[f]or sites that have been evaluated under the criteria of Appendix A of 10 C.F.R. Part 100 [applicable to nuclear power plants], the [ISFSI] DE must be equivalent to the safe shutdown earthquake (SSE) for a nuclear power plant." As the Board concluded, the effect of this regulation is that the ISFSI applicant is not "writing on a clean slate relative to seismic requirements." There is no need to revisit issues thoroughly evaluated in licensing the power plant (such as the limiting seismic source). Instead, for an admissible contention, there would need to be a demonstration that new information has been discovered that could alter the original site evaluation findings in a way that would affect the ISFSI design. This the proposed contention, including the proffered basis, failed to do. LBP-02-23, 56 NRC at 441; *see also* Tr. 365-74, 398-99, 402-06, 412.

The Petitioners now rely principally on a semantic argument that Section 72.102(f) does not apply because of the use in the regulation of the article "a" rather than "the."

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6 *See* "Response of Pacific Gas and Electric Company to Supplemental Request for Hearing and Petition to Intervene of San Luis Obispo Mothers for Peace et al.," dated August 19, 2002 ("PG&E Response to Supplemental Petition").

This trivial argument certainly does not merit Commission review. Section 72.102(f)(1), in defining the seismic criteria for a site that has been evaluated for a nuclear power plant, can only reasonably be read to encompass an SSE for a nuclear power plant *at the same site.* As recognized by the Board, this reading is confirmed by the Statement of Considerations for the Commission's recent proposed rule revising 10 C.F.R. § 72.103.[7] Section 72.102(f) establishes a conservative standard (a power plant standard) for the co-located ISFSI, and effectively precludes re-litigating matters already resolved for that site.

Petitioners also take issue with the applicability of 10 C.F.R. § 72.40(c). However, the Board in its decision did not rely on that regulation. The Board instead concluded that there was inadequate basis shown in the proposed contention that "the reactor facility DE itself is now inaccurate to some meaningful degree." LBP-02-23, 56 NRC at 441. In effect, the Licensing Board simply found that there was insufficient basis in the proposed contention to show a "genuine dispute" exists in connection with the ISFSI design. *See* 10 C.F.R. § 2.714(b)(2)(iii). In any event, Petitioners' argument regarding the inapplicability of Section 72.40(c) is a new argument, first raised in the Petition.[8] *Compare* Tr. 350. Therefore, it is an

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[7] LBP-02-23, 56 NRC at 440 n.6. The proposed rule would give an applicant for a Part 72 site-specific license for dry cask storage, located in the western United States or in areas of known seismic activity, and co-located with a nuclear power plant, an option of using certain revised methods for seismic analysis, in addition to *the already existing option* of utilizing deterministic design criteria for *the* co-located nuclear power plant. *See, e.g.,* 67 Fed. Reg. 47,745, 47,747, col. 1-2; 47,750, col. 3; 47,754, col. 2 (July 22, 2002). The proposed rule also reflects the Commission's judgment that "the criteria used to evaluate existing NPPs [nuclear power plants] are considered to be adequate for ISFSIs, in that the criteria have been determined to be safe for NPP licensing, and the seismically induced risk of an ISFSI or MRS is significantly lower than that of a NPP." *Id.* at 47,748. The Commission, on August 15, 2003, issued a Staff Requirements Memorandum on SECY-03-0118, approving the final rule.

[8] An appeal may not be based on new arguments offered by the party on appeal and not previously raised before the Board. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 82-83 (1985).

inappropriate basis for appeal.[9] Accordingly, there is no basis for review of this aspect of the Board's decision.

B. Contention TC-2: Petitioners next argue that the Commission should review the Board's decision in LBP-03-11, denying an evidentiary hearing on the admitted Contention TC-2, relating to PG&E's financial qualifications. Petitioners, however, merely rehash their earlier arguments and do not demonstrate any "obvious errors" in the Board's conclusions in LBP-03-11. *See Babcock & Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), CLI-95-4, 41 NRC 248, 251 (1995). Accordingly, the Commission should decline to consider this issue.

The Commission's Subpart K regulations clearly establish that an issue may be designated for an evidentiary hearing *only if*:

- there is a genuine and substantial dispute of fact; *and*
- the dispute can be resolved with sufficient accuracy only through introduction of evidence at an adjudicatory hearing; *and*
- the NRC's decision is likely to depend in whole or in part on the resolution of the dispute.

10 C.F.R. § 2.1115(b). Any issues that do not meet *all* of these criteria are to be disposed by the Board promptly after the oral argument. *See* 10 C.F.R. § 2.1115(a)(2).[10] Petitioners may disagree with the Board's conclusion, but there is no basis whatsoever on which to conclude that an evidentiary hearing is warranted on Contention TC-2.

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[9] Section 72.40(c) also is not, by its terms, limited to three facilities. Furthermore, in the rulemaking language cited by the Petitioners, the important point is the Commission's conclusion that "the pre-qualification of sites licensed under Part 50 without *review in relation to the proposed design of the ISFSI* does not seem prudent." 45 Fed. Reg. 74,693, 74,698 (1980) (emphasis added). This language envisions review of the ISFSI seismic design relative to the existing design basis earthquake — not reopening the seismic source and DE as contemplated by proposed Contention TC-1.

[10] *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 1983] are quite strict and are designed to ensure that the hearing is focused exclusively on real issues").

Petitioners find "legally defective and irrational" (Petition at 6) the Board's finding that PG&E has established financial qualifications to construct, operate and decommission the ISFSI based on funds available through rate recovery, cash on hand, or operating revenues. Petitioners inconsistently argue that the Board improperly addressed the post-bankruptcy period, and made a "safety finding" for that period, but also that PG&E has not demonstrated that it will have the funds to cover costs over the *entire operating life* of the ISFSI. It is plain that the Board's decision was neither legally defective nor irrational.

The focus of the admitted contention was on financial qualifications *during the bankruptcy period* – that is, continuing access to the rate process or credit markets. The Board addressed PG&E's financial assurance during the pendency of the bankruptcy, as bounded by the contention, and correctly found PG&E, in bankruptcy, to be financially qualified with respect to the proposed ISFSI. LBP-03-11, slip op. at 24, 26-30.

The Board also considered the possible outcomes of PG&E's post-bankruptcy situation. It noted that, if PG&E remained a rate-regulated utility, its continuing financial qualifications could be presumed. This is a presumption consistent with NRC regulations, and not improper "speculation" as suggested by Petitioners. If, on the other hand, the PG&E Plan of Reorganization were to be approved and implemented, the DCPP license would be transferred to a new entity, Gen. The Board observed that concerns related to the financial qualifications of Gen have been addressed in a parallel proceeding under 10 C.F.R. Part 2, Subpart M. LBP-03-11, slip op. at 23-24. However, the Board *did not* make predictive findings regarding the financial qualifications of any *successor* of PG&E, nor did it need to in order to correctly resolve the contention as admitted.

Apparently challenging LBP-02-23, Petitioners also argue the "irrationality" of the Board's decision to limit the scope of the hearing to PG&E's financial qualifications – and not to consider the qualifications of any successor entities. The Board's decision was not irrational. The Board considered the application before it – that of PG&E, the regulated utility. If the license is transferred to an entity other than PG&E, the financial qualifications of that entity with respect to the ISFSI would be appropriately considered in the context of a license transfer proceeding pursuant to 10 C.F.R. Part 2, Subpart M.

Finally, Petitioners argue that the Board's decision is not supported by any NRC Staff safety review regarding the sufficiency of PG&E's financial qualifications. (Petition at 8.) The fact that the Staff has not yet issued a Safety Evaluation Report ("SER") in connection with the application is not dispositive, and does not render the Board decision defective. The "mere pendency of confirmatory staff analyses regarding litigated issues does not automatically foreclose board resolution of those issues." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1171 (1984). In this case, the Board had ample basis, including comprehensive written summaries and testimony from PG&E experts, to make the financial qualifications finding based on the record.

C. Proposed Contention EC-2: Petitioners next argue that the Board "unlawfully excluded" Proposed Contention EC-2, which argued that an "unstated purpose" of the ISFSI is to provide capacity for spent fuel storage during a license renewal term and that PG&E's Environmental Report ("ER") therefore should be revised to reflect this purpose. On appeal, the Petitioners merely restate that argument, contending that the scope of alternatives in the ER must be expanded to include license renewal issues and wet storage issues. (Petition at 9.) Petitioners

have not raised any substantial question with respect to any of the considerations in Section 2.786(b)(4).

As PG&E discussed in its initial response to this proposed contention (PG&E Response to Supplemental Petition at 50-55), the proposed ISFSI is sized to accommodate all used fuel generated by the two DCPP units during the present operating license terms, with all fuel off-loaded to the ISFSI to support decommissioning. The Board found that this description "accurately describes what the proposed capacity will be and provides a logical basis for that capacity." *See* LBP-02-23, 56 NRC at 450. Even assuming that the proposed ISFSI has the capacity to accommodate spent fuel generated during a renewal term, DCPP *cannot* operate past the expiration dates of its current operating licenses absent NRC approval of a renewed license pursuant to 10 C.F.R. Part 54. This would follow a separate licensing process (including a separate environmental review). Environmental issues related to fuel storage for fuel generated during a renewed license term would be addressed in accordance with 10 C.F.R. Parts 51 and 54. The Petitioners have not presented any meaningful argument that the Board was in error.[11] The Commission should decline to review this issue.

D. Contention EC-3: The Petitioners again fail to demonstrate any issue appropriate for Commission review. Proposed Contention EC-3 argued that PG&E's environmental report was inadequate because it did not evaluate the impacts of transporting spent fuel *away from DCPP* at the end of the ISFSI license term, either to a high level waste repository or to another interim storage facility. However, as discussed in PG&E's reply to the proposed contention, there is no legal basis for this contention, because: (1) NRC regulations (specifically, 10 C.F.R. §

[11] Moreover, consideration of the "heightened risks of pool storage in comparison to dry storage" (Petition at 9) is plainly outside the scope of the proceeding, which pertains only to the current Part 72 *dry* storage application. The Board correctly recognized (LBP-02-23, 56 NRC at 451) that the Petitioners failed to demonstrate how issues associated with wet storage were relevant to this proceeding.

72.108) do not require discussion of transport away from an ISFSI that is co-located with a nuclear plant; (2) environmental impacts related to transportation to an interim or permanent repository would be appropriately addressed in the environmental assessments for the destination facilities; (3) offsite transportation impacts have been previously addressed in the context of licensing plant operation; and (4) neither alleged consequences from acts of terrorism nor alternatives to transportation need to be addressed in an ISFSI environmental report. PG&E Response to Supplemental Petition at 58-67.

Petitioners now argue that the Board erred in concluding that the contention was barred by 10 C.F.R. § 72.40(c). However, the Board did not rely on Section 72.40(c), standing alone, to reject the contention. LBP-02-23, 56 NRC at 453. Rather, the Board recognized Section 72.108, as well as the prior transportation reviews completed in connection with plant operation. The Board also cited the fact that nothing in the proposed contention challenged those prior reviews. *Id.* These considerations, even without reference to Section 72.40(c), precluded admission of the contention. Accordingly, there is no issue warranting review.

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY IN OPPOSITION TO SLOMFP ET AL. 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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