

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**DOCKETED 10/15/03**

COMMISSIONERS

**SERVED 10/15/03**

Nils J. Diaz, Chairman  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield

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In the Matter of )

PACIFIC GAS & ELECTRIC CO. )

Docket No. 72-26-ISFSI

(Diablo Canyon Power Plant Independent )  
Spent Fuel Storage Installation) )  

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**CLI-03-12**

**MEMORANDUM AND ORDER**

The County of San Luis Obispo ("SLOC") and six intervenors led by the San Luis Obispo Mothers for Peace (collectively, "SLOMFP") seek Commission review of two Licensing Board decisions (LBP-02-23 and LBP-03-11) that, cumulatively, rejected challenges to an application by Pacific Gas & Electric Company ("PG&E") to construct and operate an independent spent fuel storage installation ("ISFSI") in San Luis Obispo, California. We deny both petitions for review.

**I. BACKGROUND**

On December 21, 2001, PG&E filed an application for a materials license authorizing storage of spent nuclear fuel in a dry cask storage system at the California site of its two Diablo Canyon commercial nuclear reactors. Numerous petitioners sought to intervene, and five entities asked to participate in the adjudication as interested governmental entities.<sup>1</sup> In addition

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<sup>1</sup>See 10 C.F.R. § 2.715(c).

to the lead petitioner, the Board found that 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 had standing.<sup>2</sup> The Board granted governmental participant status to SLOC and three other entities.<sup>3</sup>

After sorting through the parties' submissions, the Board admitted a single contention, SLOMFP's Contention TC-2, which questioned PG&E's financial qualifications.<sup>4</sup> SLOMFP raised concerns about the impact of PG&E's bankruptcy on its continuing ability to construct, operate, and decommission an ISFSI "by reason of its access to continued funding as a regulated entity or through credit markets."<sup>5</sup> The Board narrowed the contention from that proposed by SLOMFP; specifically, the Board excluded two bases -- the unresolved California Attorney General's lawsuit against PG&E Corporation for alleged fraud and the financial qualifications of any entities other than PG&E that may construct or operate the ISFSI.<sup>6</sup>

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<sup>2</sup>See *Pacific Gas & Electric Co. (Independent Spent Fuel Storage Installation)*, LBP-02-23, 56 NRC 413 (2002).

<sup>3</sup>The Board initially recognized SLOC and the Port San Luis Harbor District as governmental participants. See Licensing Board Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation) (Aug. 7, 2002) at 1 (unpublished). Subsequently, the Board granted governmental participant status to the California Energy Commission and the Avila Beach Community Services District. See LBP-02-23, 56 NRC at 435.

<sup>4</sup>See LBP-02-23, 56 NRC at 441-43. The Board rejected four other technical contentions and referred to the Commission its decision to reject portions of three environmental contentions. Earlier this year the Commission affirmed the Board's denial of admission of the environmental contentions. See CLI-03-01, 57 NRC 1 (2003).

<sup>5</sup>LBP-02-23, 56 NRC at 442.

<sup>6</sup>See *id.* at 443. There are two competing plans of reorganization in the bankruptcy proceeding. Approval of PG&E's plan would require that the ISFSI license be transferred to a new entity, Electric Generation LLC ("Gen"). Approval of the California Public Utility Commission's plan would require PG&E to continue to hold the ISFSI license. Under a pending bankruptcy settlement proposal, PG&E would remain the licensee when it emerges from bankruptcy. See Letter from David Repka, PG&E Counsel, to the Licensing Board at 2 (June 24,

The hearing in this case went forward under the special provisions in 10 C.F.R. Part 2, Subpart K.<sup>7</sup> After considering the Subpart K written submissions and oral arguments of the parties and governmental participants, the Board denied the request for a full-scale evidentiary hearing and terminated the proceeding.<sup>8</sup> SLOMFP and SLOC filed petitions for review of the Board's decisions in LBP-03-11 and LBP-02-23.<sup>9</sup> Both PG&E and the NRC Staff oppose the petitions for review.

## II. DISCUSSION

Under 10 C.F.R. § 2.786(b)(4), the Commission may grant a petition for review if it raises 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.<sup>10</sup>

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2003). See also *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-10, 58 NRC \_\_ (Sept. 8, 2003). As part of its bankruptcy Plan of Reorganization, PG&E applied to the NRC on Nov. 30, 2001, to transfer its licenses for the Diablo Canyon power plants to Gen. The NRC Staff issued an order approving the license transfer application, with conditions that make completion of the transfer contingent on the outcome of the bankruptcy proceeding. See "Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2); Order Approving Transfer of Licenses and Conforming Amendments," 68 Fed. Reg. 33,208 (June 3, 2003), announcing Staff order dated May 27, 2003.

<sup>7</sup>See 10 C.F.R. §§ 2.1101 - 2.1117; see also *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-86 (2001).

<sup>8</sup>See LBP-03-11, 58 NRC \_\_ (Aug. 5, 2003).

<sup>9</sup>A governmental participant has the right to petition for review. See 10 C.F.R. § 2.715(c); *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-317, 3 NRC 175, 177 (1976).

<sup>10</sup>10 C.F.R. § 2.786(b)(4).

SLOMFP asserts that in LBP-02-23 the Board erred by denying admission of Contention TC-1 (inadequate seismic analysis); unlawfully excluded Contention EC-2 (nondisclosure of purpose of ISFSI); and erred by rejecting Contention EC-3 (inadequate consideration of transportation-related impacts). Further, SLOMFP contends that the Board erred in concluding that PG&E is financially qualified for the ISFSI license. For the seismic and financial qualification issues, SLOMFP urges review because of substantial questions of policy and discretion; and for the other issues, legal error. SLOC also challenges the Board's financial qualifications decision in LBP-03-11, but does so on the ground that the Board made several erroneous findings of fact and conclusions of law.<sup>11</sup>

We deny review of all issues the petitioners raise, for the Board's decisions do not implicate substantial questions of policy and discretion. Nor did the Board misapply the law or misread the facts. Only two issues warrant further Commission comment.

#### **A. Contention TC-1 (Seismic)**

An appeal may not be based on new arguments not raised before the Board.<sup>12</sup> SLOMFP, however, has attacked the Board's decision on seismic issues -- *i.e.*, its rejection of Contention TC-1 -- for reasons raised for the first time in its petition for review. Our rules state that for sites that have been evaluated under the criteria for nuclear power plants, the design earthquake must

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<sup>11</sup>SLOC also requested the Commission to review the Board's decision to use the 10 C.F.R. § 2.714 contention standards to evaluate issues raised by interested governmental participants. SLOC made the request in the introductory remarks of its petition for review and again in a final footnote. In neither place did SLOC relate why it thought the Board's decision was erroneous or why Commission review should be exercised, as required by our regulations. See 10 C.F.R. § 2.786(b)(2)(iii)-(iv). This is not enough to trigger plenary Commission appellate review. See *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786 (1979). See also *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 132, N. 81 (1995); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001).

<sup>12</sup>See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 221 (1997).

be equivalent to the safe shutdown earthquake for a nuclear power plant.<sup>13</sup> Accordingly, in Contention TC-1, SLOMFP addressed alleged inadequacies of the seismic source characterization for the design basis earthquake at the Diablo Canyon power plant site. The Board reasonably found that SLOMFP's concerns do not show the original seismic findings "inaccurate to some meaningful degree."<sup>14</sup>

Nevertheless, in its petition for review, SLOMFP contends that the Board's ruling that, absent new information sufficient to alter the original site evaluation, the design earthquake for a nuclear power plant constitutes the design earthquake for any co-located ISFSI has no support in the regulations. SLOMFP makes a weak semantic argument based on the choice of article ("a" versus "the") used in 10 C.F.R. § 72.102(f). We need not consider SLOMFP's new semantic argument, first raised in the petition for review. In any event, SLOMFP's interpretation of the regulation is strained and illogical. The Board correctly interpreted the regulation as addressing the design earthquake for a power plant at the same site as the ISFSI.

#### **B. Contention TC-2 (Financial Qualifications)**

Because of apparent confusion, evidenced by the petitions for review, about what the Board's financial qualifications ruling in LBP-03-11 does and does not do, we will briefly address that issue.

The possible impact of PG&E's bankruptcy on its ISFSI application gave rise to serious concerns by both SLOMFP and the interested governmental participants in this adjudication. When the Board admitted SLOMFP's financial qualifications contention, it correctly stated that the mere fact of PG&E's filing for bankruptcy does not by itself indicate that it is no longer

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<sup>13</sup>10 C.F.R. § 72.102(f)(1).

<sup>14</sup>See LBP-02-23, 56 NRC at 441.

financially qualified to continue day-to-day operations at the Diablo Canyon facility.<sup>15</sup> The Board thus admitted the financial qualifications contention only 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."<sup>16</sup> The Board later ruled that, as a rate-regulated utility, PG&E was entitled to certain presumptions regarding its financial qualifications; specifically, that as a regulated entity, reasonable and prudent costs of safe operation will be recovered through the ratemaking process.<sup>17</sup>

SLOMFP faults the Board for, among other things, "mak[ing] a safety finding regarding a time period that the [Board] itself excluded from consideration in the proceeding: the period following PG&E's bankruptcy."<sup>18</sup> According to SLOMFP, the Board "addressed the narrow question of whether PG&E will be financially qualified as long as it remains in bankruptcy."<sup>19</sup> SLOMFP is troubled that there is no evidence in the record regarding the financial qualifications of any other entity that might be PG&E's successor. Similarly, SLOC believes that "PG&E took inconsistent positions, by demanding that the Board treat it as a utility regulated by the California Public Utilities Commission [with the ability to recover costs] from regulated rates without further demonstration of financial qualification" and "fil[ing] a reorganization plan in the bankruptcy court

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<sup>15</sup> See *id.* at 442.

<sup>16</sup> *Id.*

<sup>17</sup> See LBP-03-11, 58 NRC at \_\_\_, slip op. at 22; and *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).

<sup>18</sup> "Intervenors' Petition for Review of LBP-02-23 and LBP-03-11" at 5 (Aug. 18, 2003).

<sup>19</sup> *Id.* at 6.

that would result in the transfer of ISFSI responsibilities to a non-CPUC-regulated successor company.”<sup>20</sup>

SLOMFP’s and SLOC’s arguments miss the mark. The Board sensibly admitted only the portion of SLOMFP’s contention that deals with the *current applicant*, i.e., PG&E. PG&E happens to be in bankruptcy, but it is still a rate-regulated utility and entitled to the corresponding presumption about financial qualification. After reviewing written submissions and hearing oral arguments, the Board concluded that no evidence effectively rebutted the presumption. The Commission declines to second-guess plausible Board findings of fact.<sup>21</sup>

The Board did not, however, make any *findings* about the post-bankruptcy period when it merely recited the two most probable outcomes of the bankruptcy proceeding; specifically, that PG&E would remain the licensee or that the ISFSI license would need to be transferred to another entity. If PG&E remains the licensee, of course, the presumption regarding financial qualifications of rate-regulated utilities would still apply. On the other hand, for another entity to become the license holder, PG&E would have to request the NRC to transfer the ISFSI license. As the Board noted, such a transfer request would be subject to a hearing, at which the question of the new entity’s financial qualifications could be litigated.<sup>22</sup> And the proposed transferee must provide as much financial information as if the application were for an initial license.<sup>23</sup>

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<sup>20</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 DCP by the County of San Luis Obispo under 10 C.F.R. § 2.786(b)(1)” at 2-3 (Aug. 20, 2003). See note 6.

<sup>21</sup> See, e.g., *Shearon Harris*, CLI-01-11, 53 NRC at 382.

<sup>22</sup> LBP-03-11, 58 NRC at \_\_, slip op. at 22.

<sup>23</sup> See 10 C.F.R. §§ 72.50(b)(1) and 72.22(e).

In summary, the Commission denies review of the Board's financial qualifications ruling, which addresses only the current applicant and the current situation -- PG&E as debtor-in-possession during bankruptcy reorganization. The Board's order does not make any findings about the qualifications of any possible successor entity, nor does it cut off hearing rights in the event an entity other than PG&E ultimately desires to become the ISFSI licensee.

### III. CONCLUSION

The Commission *denies* SLOMFP's and SLOC's petitions for review of LBP-02-23 and LBP-03-11.

IT IS SO ORDERED.

For the Commission

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Andrew L. Bates  
Acting Secretary of the Commission

Dated at Rockville, Maryland,  
this 15<sup>th</sup> day of October, 2003.