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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the matter of
Pacific Gas and Electric Company
Diablo Canyon Nuclear Power Plant
Unit Nos. 1 and 2
Independent Spent Fuel Storage Installation

Docket # 72-26

INTERVENORS' PETITION FOR REVIEW OF LBP-02-23 and LBP-03-11

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.786 (b), the San Luis Obispo Mothers for Peace, Santa Lucia Chapter of the Sierra Club, San Luis Obispo Cancer Action Now, Peg Pinard, Avila Valley Advisory Council, and Central Coast Peace and Environmental Council hereby petition the Nuclear Regulatory Commission ("NRC" or "Commission") for review of two Atomic Safety and Licensing Board ("ASLB") decisions in this proceeding: LBP-02-23 and LBP-03-11.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

In December of 2001, Pacific Gas & Electric Company ("PG&E"), a bankrupt nuclear utility, applied for a license to build and operate an Independent Spent Fuel Storage Installation ("ISFSI") on the site of the Diablo Canyon nuclear power plant. In LBP-02-23, the ASLB found that Intervenors had standing, and partially admitted one contention, TC-2, which challenges PG&E's failure to make an adequate demonstration of its financial qualifications. On May 19, 2003, according to the procedures established

1 LBP-02-23, Memorandum and Order (Ruling on Standing and Contentions, etc.), 56 NRC 413 (2002); LBP-03-11, Memorandum and Order (Ruling on Request for Evidentiary Hearing and

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in Subpart K of 10 C.F.R. Part 2, the ASLB held an oral argument regarding Intervenors' single admitted contention. In LBP-03-11, the ASLB concluded that the contention has been resolved and terminated the proceeding.

II. THE COMMISSION SHOULD GRANT REVIEW.

A. The ASLB Erred in Denying Admission of Contention TC-1.

The Commission should take review of the ASLB's decision to reject Contention TC-1, regarding the inadequacy of PG&E's seismic analysis for the ISFSI site, because it is based on legal error. Moreover, by allowing the Diablo Canyon ISFSI to be built and operated in an earthquake-vulnerable area, without permitting a challenge to the clearly outdated seismic information on which PG&E relies for its site analysis, the ASLB's decision raises substantial issues of policy and discretion.

Contention TC-1, which is supported by the declaration of an expert seismologist, Mark R. Legg, asserts as follows:

> In Section 2.6 of the SAR, PG&E claims to satisfy Appendix A of 10 C.F.R. Part 100 and 10 C.F.R. § 72.102, which provide criteria for seismic design of nuclear facilities and ISFSIs. However, the seismic analysis presented by PG&E does not consider a number of significant seismic features in the area of the Diablo Canyon plant. As a result, the design basis earthquake for the proposed ISFSI cannot be considered reasonable or conservative for purposes of protecting public health and safety against the effects of earthquakes.

Supplemental Request for Hearing, Etc. at 2 (July 18, 2002) (hereinafter "Intervenors' Contentions"). In the basis statement, the contention identifies and described in detail "a number of serious shortcomings" in PG&E's seismic analysis that can be broken down into three categories: failure to consider the threat posed by large reverse or thrust fault

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earthquakes in the vicinity of the Diablo Canyon site; the assumption that the nearby Hosgri fault system is vertical rather than east-dipping, and placement of the active fault plane in a nonconservative location.

The ASLB refused to admit Contention TC-1, based on a single rationale: that the Intervenors had failed to satisfy the second prong of a two-step "materiality" standard established by 10 C.F.R. §§ 72.40(c)[2] and 72.102(f)(1):[3]

> For a co-located ISFSI, the applicant does not write on a clean slate relative to any seismic requirements. Absent an exemption or new information sufficient to alter the original site evaluation finding, the DE for the nuclear facility is what the applicant must use. As a consequence, a contention challenging the seismic qualifications of such a co-located ISFSI facility must necessarily provide not only a basis to indicate that there are specific concerns about the elements used to calculate the nuclear power plant seismic design criteria, but also a showing that, given those concerns the reactor facility DE itself is now inaccurate to some meaningful degree.

56 NRC at 440-41 (footnotes omitted).

The ASLB's ruling that the DE for a nuclear plant automatically constitutes the DE for any ISFSI to be co-located on the same site has no support in either 10 C.F.R. § 72.102(f) or § 72.40(c). Section 72.102(f) states that the DE for an ISFSI site evaluated under Appendix A to Part 100 is the DE for "a" nuclear power plant, not "the" nuclear

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2 10 C.F.R. § 70.40(c) provides that:

> For facilities that have been covered under previous licensing actions including the issuance of a construction permit under Part 50 of this chapter, a reevaluation of the site is not required except where new information is discovered which could alter the original site evaluation findings.

3 10 C.F.R. § 72.102(f)(1) provides that:

> For sites that have been evaluated under the criteria of Appendix A of 10 CFR Part 100, the DE [Design Earthquake] must be equivalent to the safe shutdown earthquake (SSE) for a nuclear power plant.

power plant with which the ISFSI is co-located.[4] In stark contrast, the Commission recently proposed to change § 72.102(f)(1) to allow ISFSI applicants to use "the" existing geological and seismological criteria for the previously-licensed nuclear power plant.[5] The different uses of the terms "a" and "the" in the 1980 rule and the 2002 proposed rule show a difference in intent by the Commission with respect to each rulemaking.

Moreover, by its own terms, 10 C.F.R. § 72.40(c) is inapplicable to the Diablo Canyon ISFSI. The regulation applies only to "facilities that have been covered under previous licensing actions." The "facility" in question here is the proposed ISFSI, not the Diablo Canyon nuclear plant or the Diablo Canyon site.[6] As clarified in the rulemaking history, 10 C.F.R. § 72.40(c) applies only to those few ISFSI's for which a construction permit was obtained under Part 50, before Part 72 was promulgated.[7] In fact, in promulgating § 72.40(c), the Commission specifically rejected comments suggesting that previous site reviews for nuclear power plant construction permits should automatically govern licensing of co-located ISFSI's:

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4 As the Commission stated in promulgating the rule, "[f]or an ISFSI that is co-located on a power plant site which has been evaluated by the criteria and level of investigations of Appendix A of 10 CFR Part 100, the ISFSI-DE for structures shall be equivalent to the safe shutdown earthquake (SSE) for *a* nuclear power plant." 45 Fed. Reg. 74,693,74,697 (November 12, 1980).

5 67 Fed. Reg. 47,745, 47,754 (July 22, 2002). *See also id.* at 47,748 ("Therefore, the Commission proposes to revise the DE requirements for ISFSI and MRS facilities from the current Part 72 requirements which are equivalent to the SSE for *a* NPP.") (emphasis added). Contrary to the ASLB's assertion in note 6 of LBP-02-23, the Commission's selective use of the words "the" and "a" in these statements supports Intervenors' position.

6 While an ISFSI may share a site with a nuclear plant, by its own terms it is an "independent" facility. *See* 45 Fed. Reg. at 74,698.

7 In the final rule, the NRC noted the existence of three ISFSI's that had been subject to previous NRC licensing actions, including issuance of a Part 50 construction permit. 45 Fed. Reg. at 74,698.

> *25. Prequalification of Reactor Sites and Their Population Distributions.* Some commenters recommended that reactor sites be prequalified with no site specific investigations required for an at-reactor siting of an ISFSI. While a site that has undergone a full safety and environmental review and has been approved for a Part 50 facility is likely to be found acceptable for a property designed ISFSI, 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. at 74,698.[8]

In summary, as conceded by the ASLB in LBP-02-23, Intervenors have met the applicable test for gaining admission of Contention TC-1, by providing "a basis to indicate that there are specific concerns about the elements used to calculate the nuclear power plant seismic design criteria" on which PG&E relies for the ISFSI design. LBP-02-23. The other hurdle constructed by the ASLB is invalid under NRC regulations.

B. The ASLB Erred in Concluding that PG&E is Financially Qualfiied.

The Commission should take review of the ASLB's decision that PG&E is financially qualified, because it makes a safety finding regarding a time period that the ASLB itself excluded from consideration in the proceeding: the period following PG&E's bankruptcy. Moreover, the ASLB's decision to allow the licensing of the Diablo Canyon ISFSI, in the absence of a completed NRC Staff review regarding compliance with the financial qualifications standard, raises substantial questions of NRC policy and discretion.

NRC financial qualifications regulations for ISFSI's require the applicant to

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8 The only concession the Commission would make to these commenters was a clerical one: an ISFSI applicant would be allowed to incorporate by reference information previously submitted in other licensing actions into an ISFSI application. *Id.* In substantive respects, the ISFSI application must be reviewed afresh.

demonstrate, among other things, that it will have the necessary funds to cover estimated operating costs "over the planned life of the ISFSI." 10 C.F.R. § 70.22(e)(2). PG&E has not attempted to demonstrate that its successor will have the necessary funds to cover operating costs over the entire operating life of the ISFSI, nor has the NRC Staff reviewed the application to that standard. Instead, they have addressed the narrow question of whether PG&E will be financially qualified as long as it remains in bankruptcy.[9] Nevertheless, in LBP-03-11 the ASLB makes a reasonable assurance finding with respect to the entire 20-year life of the proposed ISFSI. *Id.*, slip op. at 27 note 18.

The ASLB's finding is both legally defective and irrational. First, the ruling is legally defective because it addresses a situation that the ASLB previously had ruled irrelevant to the case: succession of PG&E by Gen or another company.[10]

Second, as conceded by the ASLB, its finding is based on "speculation." *Id.*, citing *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-06, 49 NRC 201, 219-20 (1999) (hereinafter "*Seabrook*"). The speculation engaged in by the ASLB in LBP-03-11 goes far beyond the sort of speculation approved by the Commission in *Seabrook.* In that case, the Commission found that while a certain financial qualifications contention was based on "speculation that future electric market conditions

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9 *See* Response by San Luis Obispo Mothers for Peace et al to Briefs and Factual Summaries Regarding PG&E's Financial Qualifications to Build and Operate Diablo Canyon ISFSI at 4, 6 (April 28, 2003).

10 *See* LBP-03-11, slip op. at 21 ("in admitting the contentiont he Board essentially eliminated from consideration concerns based on the post-bankruptcy structure of P&E"); LBP-02-23, 56 NRC at 443 (ruling that "financial qualifications of any entities that may in the future construct or operate the ISFSI" are "irrelevant to and/or outside the scope of this proceeding"); *Id.*, 56 NRC at 443-444 (rejecting Contentions TC-3 and TC-4 because they relate to financial qualifications of PG&E's proposed successor and are therefore irrelevant and outside the scope of the proceeding).

in New England and at Seabrook may preclude [the applicant] from meeting its revenue projections," the contention was supported by "ample references" to the NRC decisions, Securities and Exchange Commission filings, and an affidavit from the applicant's competitor. *Id.* at 219. Here, in contrast, the ASLB has no "factual assertions" on which to rely. Instead, the ASLB simply references the "CPUC ratemaking process or the license transfer proceeding as the basis for such reasonable assurance during the post-bankruptcy period." LBP-02-23, slip op. at 27 note 18. While there is evidence in the record that the CPUC ratemaking process may assure the adequacy of funding during operation if PG&E remains the licensee of the ISFSI after bankruptcy, the record contains no such evidence regarding the financial qualifications of any other entity that may succeed PG&E.

Thus, in LBP-03-11, the ASLB made predictive factual findings about the financial qualifications of PG&E's successor to operate the Diablo Canyon throughout the entire ISFSI license term, at the same time that it refused to allow Intervenors or any other party to submit evidence about the subject. Moreover, the record contains no evidence from PG&E or the NRC Staff on the issue of financial qualifications in the post-bankruptcy portion of the ISFSI license term if PG&E is not the licensee. This constitutes artibrary and capricious decisionmaking in the extreme.

Moreover, in light of the facts that (a) PG&E was bankrupt at the time of its ISFSI application, (b) PG&E did not intend to stay in bankruptcy for 20 years, and (c) PG&E itself had proposed that the ISFSI would be operated by another corporation after the conclusion of the bankruptcy, it was irrational for the ASLB, in LBP-02-23, to limit the

scope of the hearing to PG&E's financial qualifications. The tellingly absurd result is that the ASLB has no basis whatsoever for its finding that the financial assurance standard is satisfied for the entire 20-year term of the ISFSI license.

Finally, the ASLB's decision is not supported by any safety review by the NRC Staff regarding the sufficiency of resources to cover operating costs throughout the ISFSI's entire license term. While the NRC has a policy of refusing to allow the Staff's review to be the subject of a contention, that policy has not been interpreted to render the Staff's review irrelevant or unnecessary.[11] Intervenors submit that while the ASLB has an important role to play in reviewing the technical work of the agency staff, it is not appropriate for the ASLB to act as a substitute when the Staff fails to do its job.

C. The ASLB Unlawfully Excluded Contention EC-2.

The Commission should take review of the ASLB's decision to exclude Contention EC-2, because it fails to apply an appropriate legal standard under the National Environmental Policy Act ("NEPA"). Contention EC-2 asserts that the Environmental Report ("ER") for the proposed ISFSI fails to satisfy 10 C.F.R. § 51.45(b), because it does not completely disclose one of the apparent purposes of the proposed ISFSI: to provide spent fuel storage capacity during a license renewal term.[12] As

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11 *See*, e.g., *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985); *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), LBP-77-20, 5 NRC 680, 681 (1977).

12 As explained in the contention:

> In describing the need for the facility, the ER states that additional spent fuel storage capacity is needed at Diablo Canyon to accommodate the additional spent fuel that will be generated through the operating life of each unit. ER at 1.2-1. Yet, the capacity of the proposed ISFSI would be *two or three times* greater than what would be needed to fulfill

demonstrated in a viewgraph attached to the contention as Exhibit 9, PG&E has informally announced its plan to conduct "50 more years of operation." *Id.*

PG&E's failure to acknowledge this additional purpose for the proposed ISFSI constitutes a significant deficiency, because it results in the unreasonable narrowing of the alternatives that are considered in the ER.[13] If the scope of the project is to provide for spent fuel storage during a license renewal term, the alternatives considered should include all reasonable measures for avoiding or minimizing the risks of spent fuel storage during that period, including alternatives to pool storage, which provides a major source of storage capacity. In weighing these alternatives, the ER should consider new information about the heightened risks of pool storage in comparison to dry storage. Intervenors' Contentions at 33-38.

In dismissing Contention EC-2, the ASLB ruled that Intervenors had raised no "material dispute," because the application accurately described what the proposed capacity would be and provided a logical basis for that capacity. 56 NRC at 450. The ASLB also rejected the contention on the ground that it asserted, without a "particularized showing," that PG&E would not comply with NRC regulations. *Id.*, citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 34

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that purpose.

Intervenors' Contentions at 29 (emphasis added).

13 It is well-established that the statement of purpose in an EIS establishes the range of alternatives to be considered. *City of Carmel-by-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1995); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991); *City of New York v. United States Department of Transportation*, 715 F.2d 732, 743 (2nd Cir. 1983).

(1999). Neither the accuracy of PG&E's representations nor the legality of PG&E's behavior is at issue. The question is whether the purpose of the proposed action is reasonably described. PG&E does not deny that it is considering applying for license renewal; in fact, it has publicly stated to the California Public Utilities Commission that it is in the process of preparing a license renewal feasibility study. To ignore the very real potential that the extra dry storage capacity at the proposed ISFSI will be used during license extension violates the "rule of reason" under which NEPA decisions are judged. *Busey, supra,* 938 F.2d at 195.[14]

D. The Licensing Board Erred in Rejecting Contention EC-3

The ASLB committed legal error in refusing to admit Contention EC-3, which challenges the adequacy of the ER to consider transportation-related impacts. The ALSB rejected the contention on the sole ground that it was precluded under 10 C.F.R. § 72.40(c). 56 NRC at 453. As discussed above with respect to Contention TC-1, Section 72.40(c) does not apply to the proposed ISFSI. Therefore, the contention should have been admitted.

III. CONCLUSION

For the foregoing reasons, the Commission should take review and reverse the ASLB's decisions regarding the issues described above.

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14 In footnote 11, the ASLB asserts that if and when PG&E applies for license renewal, Intervenors will have an opportunity to challenge any reactor-renewal-driven expansion of spent fuel storage capacity. The ASLB misses the point of the contention, which is that the instant license application constitutes PG&E's reactor-renewal-drive expansion of spent fuel storage capacity at Diablo Canyon. Once the ISFSI is built, consideration of reasonable alternatives appropriate to the license renewal term will be foreclosed.

Respectfully submitted,

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August 18, 2003

CERTIFICATE OF SERVICE

I certify that on August 18, 2003, copies of the foregoing Intervenors' Petition for Review of LBP-02-23 and LBP-03-11 were served on the following by first-class mail:

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