BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U 39 E) for Authority to Increase Revenue Requirements to Recover the Costs to Replace Steam Generators in Units 1 and 2 of the Diablo Canyon Power Plant	Application 04-01-009 (Filed January 9, 2004)

CONSOLIDATED RESPONSE OF SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, PUBLIC CITIZEN, ENVIRONMENT CALIFORNIA, GREENPEACE, THE UTILITY REFORM NETWORK, AGLET CONSUMER ALLIANCE AND THE OFFICE OF RATEPAYER ADVOCATES TO PG&E'S MOTIONS TO STRIKE THE TESTIMONY OF GORDON THOMPSON AND JAY NAMSON

Dian M. Grueneich, J.D.
Theresa Cho, Of Counsel
Clyde Murley, M.A.
GRUENEICH RESOURCE ADVOCATES
582 Market Street
San Francisco, CA 94104
(415) 834-2300 telephone
(415) 834-2310 facsimile
dgrueneich@gralegal.com
cmurley@gralegal.com

For:

SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, PUBLIC CITIZEN, ENVIRONMENT CALIFORNIA, GREENPEACE, THE UTILITY REFORM NETWORK, AGLET CONSUMER ALLIANCE, AND THE OFFICE OF RATEPAYER ADVOCATES

August 25, 2004

I. INTRODUCTION

In accordance with Rule 45(f) of the Commission's Rules of Practice and Procedure, San Luis Obispo Mothers for Peace, Sierra Club, Public Citizen, Environment California, Greenpeace, The Utility Reform Network, Aglet Consumer Alliance, and the Office of Ratepayer Advocates ("Joint Parties") hereby respond to PG&E's August 10, 2004 Motion to Strike the Testimony of Gordon Thompson ("Motion 1") and PG&E's August 10, 2004 Motion to Strike the Testimony of Jay Namson ("Motion 2"). Because both Motions contain substantially the same arguments, this Consolidated Response addresses both Motions.

At the heart of PG&E's Motions to Strike is the notion that the Commission has already concluded that the Project is cost-effective and that Intervenors bear the burden of proof to disprove that cost-effectiveness. However, contrary to PG&E's belief, PG&E still has to demonstrate – through hearings – that it has met its burden of proof to show that its cost-benefit analysis of the Project is adequate and complete and that the Project would benefit ratepayers. The Testimony that PG&E would like to strike seeks to demonstrate that PG&E's analysis is deficient for failing to consider categories of potential costs. Such testimony is highly relevant, not speculative, and central to consideration of potential costs from the proposed Project.

PG&E has filed motions to strike the testimony of <u>every</u> party in this case, except its fellow utility, Southern California Edison ("SCE"). From PG&E's viewpoint, no party has met the burden of being able to present credible facts relevant to this case. It is not the case that every party other than PG&E (and SCE) has forgotten how to develop relevant and credible testimony for filing at the Commission, as PG&E claims. Rather,

PG&E is seeking to quash any voices questioning its analysis, factual claims, and policy conclusions. Its approach to litigation before this Commission cannot be countenanced. There is a long history of PG&E making massive errors regarding the Diablo Canyon Nuclear Power Plant ("DCNPP"), with billions of dollars in unnecessary costs borne by ratepayers. Given this history, the Commission must act extremely cautiously with regard to PG&E's latest request to spend ratepayer money on DCNPP. Cutting off intervenor input at this initial stage in the Commission's review is neither prudent nor appropriate. PG&E's Motions to Strike should be soundly and firmly denied.

II. ARGUMENT

A. The Commission is Not Jurisdictionally Barred From Considering the Namson and Thompson Testimony

PG&E claims that the Commission cannot even "consider" the Namson Testimony or the Thompson Testimony (collectively "Testimony") because nuclear plant security and safety issues are solely within the jurisdiction of the Nuclear Regulatory Commission ("NRC"). PG&E seriously mischaracterizes the purpose of the Testimony in claiming that the Testimony requires the Commission to "rule" on safety issues and "interfere with the exclusive jurisdiction" of the NRC or "assess the adequacy of the NRC's current confidential security measures". (Motion 1, at 2; Motion 2, at 3.) Consideration of the Testimony does not require the Commission to issue a ruling directing PG&E to take additional security or seismic measures nor does it require the Commission to pass judgment on any aspect of PG&E's operation of Diablo Canyon.

The Testimony presents evidence on two categories of potential costs that PG&E did not include in its cost/benefit analysis. It is the position of Doctors Namson and Thompson based on facts, knowledge of their respective fields, and their expert opinions

that there is a strong probability that these costs will be imposed in the future. The Commission is asked to review PG&E's assumptions on the cost of continued operation of Diablo Canyon. This decision does not require the Commission to take action to implement any new standard or to pass judgment on any decision that is not within its jurisdiction.

PG&E cites to *Pacific Gas and Electric Company v. the State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983) and *Bennett v. Pacific Gas and Electric Company*, 25 CPUC 2d 374 (1987)[1] to argue that the Commission cannot even "consider" matters within the jurisdiction of the NRC. (Motion 1, at 8, Motion 2 at 5-6.) Neither decision supports PG&E's Motions to Strike.

PG&E v. SERC does not prohibit this Commission from considering the costs of seismic or security measures at Diablo Canyon; the case supports the Joint Parties' position. In that case, the United States Supreme Court upheld Section 25524.2 of the California Public Resources Code which requires the SERC to determine whether there is "adequate capacity" for interim storage of a nuclear plant's spent fuel before issuing a permit for the construction of a nuclear power plant, holding that "the statute lies outside the [federally] occupied field of nuclear safety regulation." (*PG&E v. SERC*, 461 U.S. at 217.) In its detailed review of the legislative history of federal regulation of nuclear power plants, the Supreme Court ruled that "the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns." (Id., at 205; see, 205-213 (discussion of states' rights to regulate economics of nuclear power plants).)

[1] Copies of these decisions are attached hereto.

The Supreme Court rejected the argument that Section 25524.2 was pre-empted by federal law because the statute was aimed at reducing radiological hazards, holding that Section 25524.2 was not pre-empted by federal law because the purpose of the Section was to assess the potential future costs of disposal of nuclear waste produced by nuclear power plants. (Id., at 216.) The Supreme Court noted that the California Legislature's rationale for Section 25524.2 was that "without a permanent means of disposal, the nuclear waste problem could become critical, leading to unpredictably high costs to contain the problem or, worse, shutdowns in reactors." (Id., at 212-213.) The Court determined that this was a proper exercise of state power holding, "it is clear that the States have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a State so inclined to halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings." (Id., at 216.)

Finally, the Supreme Court rejected the argument that Section 25524.2 conflicted with federal law on nuclear waste disposal even though the Section placed a moratorium on construction of new nuclear power plants within the state of California until the federal government found a permanent waste disposal option. (Id., at 217.) The Court stated that the fact that the NRC continued to license nuclear plants did not mean that it was "economically wise" to construct nuclear power plants. (Id., at 218.) The Supreme Court ruled that Section 25524.2 did not purport to impose waste disposal standards on nuclear power plants, and thus there was no conflict with federal law. (Id., at 218-219.)

PG&E grossly mischaracterizes the holding of *PG&E v. SERC*, its application to this proceeding, and the nature of the Testimony. If the State of California can pass a law

imposing a moratorium on the construction of any new nuclear power plants pending the resolution of the permanent nuclear waste storage problem – a moratorium that is still in effect today – then there is no conceivable bar to the Commission's consideration of the Testimony at issue. The highest legal authority in this country has given this Commission the right to do so.

PG&E also mischaracterizes the facts of *Bennett v. PG&E*. In that case, a ratepayer filed a complaint with this Commission, asking the Commission to set aside the Certificates of Public Convenience and Necessity ("CPCN") for the Diablo Canyon nuclear power plant on the grounds that: the CPCNs had lapsed and were void; PG&E had presented no practical evacuation plan; PG&E was incompetent to construct, operate, and maintain a nuclear power plant; PG&E had not demonstrated a method to safeguard the health and safety of Californians from radioactive waste material; and the CPCNs were obtained based on fraud and deceit. (25 CPUC 2d. 374, at 1-2.) The Complainant argued that the Commission had jurisdiction over safety issues in the construction and operation of the plant. (Id., at 9-10.) In denying rehearing of a decision dismissing the complaint, the Commission declined to address the adequacy of the evacuation plan or PG&E's competence, because "[t]he crux of Bennett's complaint concerns regulation of the radiological safety aspects involved in the construction and operation of a nuclear plant." (Id., at 6.)

Nowhere does the Testimony ask the Commission to regulate the "radiological safety aspects" of the nuclear plant. The Commission is asked to assess whether PG&E's assumption that the safety and seismic standards will not change in the next twenty years is valid and to order PG&E to conduct a probabilistic analysis of future costs associated

with these issues, in order to have an adequate record on the potential costs of the proposed Project. (See, Thompson Testimony, at 49; Namson Testimony, at 10.) The question is whether, in seeking to pass the costs of the Diablo Canyon power plant steam generator project on to ratepayers, PG&E has presented to the Commission all potential costs. Addressing these issues does require a substantive ruling requiring PG&E to address the costs or a ruling on whether PG&E should be ordered to incur these costs. Because the Diablo Canyon nuclear power plant is subject to cost of service ratemaking this question is squarely within the jurisdiction of the Commission and at the heart of this proceeding.

The fact that certain issues are within the jurisdiction of another agency does not prevent the Commission from considering evidence related to these issues for the purpose of making decisions on questions that are within the Commission's jurisdiction. If the Commission were to accept PG&E's claim, it is difficult to imagine how the Commission could perform a minimally adequate review of any of the costs or benefits of the Diablo Canyon nuclear power plant since the NRC regulates virtually every aspect of the operation of the facility, including the actual date of the decommissioning, the need for and the duration of plant outages, and capital improvements.

In its Application, PG&E itself asks the Commission to make several critical assumptions regarding future actions of other agencies, including NRC approval of a three year license recapture for Unit 1, even though PG&E has not yet submitted an application to the NRC. PG&E asks the Commission to agree with PG&E's assumption that there is an 80 percent probability that the license recapture will be granted. PG&E calculates that the license recapture increases the benefits of the Project by $100 to $200

million depending on the scenario. (PG&E Testimony at 5-25.) PG&E lists anticipated capital improvements in Chapter 5-A, but does not state whether any require NRC approval and therefore not subject to this Commission's consideration. PG&E also asks the Commission to assume that PG&E will obtain all necessary permits for its proposed Interim Spent Fuel Storage Installation, but neglects to mention that the California Coastal Commission has not yet issued a permit for the facility. (PG&E Testimony at 5A-6.)

In other words, PG&E asks this Commission to make assumptions regarding future NRC or other agency action when such assumptions increase the benefits of the Steam Generator Replacement Project ("Project"), but to reject out of hand assumptions that would increase the costs of the Project. If it is indeed true that the Commission cannot "consider" any topic that is under the jurisdiction of another agency, then PG&E should apply this principle consistently throughout the entire Application, including the assumption that the NRC most likely will approve the license recapture for Unit 1. This issue is clearly within the sole jurisdiction of the NRC, yet PG&E asserts that the Commission can analyze the economic impacts of an NRC decision that has not yet occurred.

B. <u>Speculative Nature of the Testimony</u>

PG&E argues that the Commission should strike the Testimony because it is speculative. (Motion 1 at 11-13; Motion 2, at 8-9.) The Commission is required to review the costs and benefits of operating Diablo Canyon through 2025. By its very nature, such a proposition necessarily requires "speculation" about future events based on limited information, such as a 20-year forecast of natural gas prices, or the assumption that no

significant capital expenditures will be required after 2015, or the assumption that Diablo Canyon will operate at a 90.6 percent capacity throughout its lifetime, or the assumption that the NRC will approve a three year license recapture for Unit 1. (See, PG&E Testimony, Chapter 6; 5-25.) It is for this reason that the Commission receives expert testimony, allows their cross-examination and then makes decisions based on the Commission's judgment as to the credibility of the facts and opinions in the record. In reviewing any forecast of any type of cost twenty years into the future, the Commission should err in favor accepting a broad array of evidence, not rejecting evidence prematurely, before it is even subject to cross-examination.

PG&E argues that any assumptions about future regulatory requirements are speculative and cannot be made. (Motion 1, at 12; Motion 2, at 2.) PG&E appears to set a standard for Commission review that holds anything other than an actual NRC order as speculation; a standard which PG&E itself does not follow. (See PG&E Testimony, at 5-25.) PG&E's standard means that the Commission can never consider anything other than existing permit requirements when analyzing long-term cost-effectiveness of plants under its jurisdiction. PG&E cites no prior Commission ruling for this standard.

Such a limitation would severely abrogate the Commission's scope of responsibility since it is clear that existing requirements may change over 5, 10, 15, and 20 years and that in doing a cost-benefit analysis, one must look to see what changes may occur. That is what a probability analysis does: review the potential of a change happening against the range of potential costs. Experts can offer expert opinion on whether future events may occur and the Commission can then make a determination as to whether the resulting costs should be considered. (See, e.g., PG&E Testimony, Chapter

5.) The Namson Testimony seeks probability analysis on the potential need for a seismic retrofit and the costs of such a retrofit; even if the probability is only 20 percent, it should be factored into the cost-benefit analysis. Similarly, the Thompson Testimony addresses the potential for regulatory changes in the future and then does PG&E's work for it in presenting a possible range of measures and costs.

PG&E complains that it is unfair to introduce this testimony because it is barred by federal law from discussing current security standards under 10 Code of Federal Regulations (CFR) Section 73.21(c). (Motion 1, at 12.) It is true that PG&E is prohibited from revealing a specified list of information regarding current security measures, such as the combinations to locks, information on the location of security equipment, or information on the limitations of the communications equipment.[2] (10 CFR §73.21(b).) However, PG&E has not explained in any level of detail how this prevents it from responding to Dr. Thompson's expert testimony that future security measures could be required by the NRC, or on the specifics of Dr. Thompson's estimate of possible measures and costs. (Motion 1, at 13.) Again, these are questions to be fleshed out in further testimony and hearings, not on a Motion to Strike.

None of the decisions cited by PG&E support the proposition that the Commission should grant these Motions to Strike because the Testimony is "speculative". Decision 01-05-059 granted a CPCN to PG&E after full hearings and briefing. The Commission conducted a through review of all evidence and arguments in determining what weight to give to the evidence. (D.01-05-059, at 67-73.) Decision 01-04-013 was a final resolution of a complaint after evidentiary hearings and briefs. That Decision upheld the ALJ's rejection of proposed exhibits primarily on the grounds that

[2] The United States Code sections cited by PG&E are not directly relevant to this issue.

the documents were not authenticated. (D.01-04-013, at 10.) The Commission rejected one exhibit on the ground that evidence on financial mismanagement of the defendant was not relevant to the issue of the location of complainant's water pipes and meter. (Id, at 10.) PG&E's citation to *People v. Babbitt*, 45 Cal.3d 660 (1988) also should be rejected. *Babbitt* is a criminal case. Evidentiary standards in criminal court cases are irrelevant to the Commission's obligations in this proceeding.

PG&E also argues that the Namson Testimony is irrelevant because the Testimony does not specify the exact measures to be taken or attempt to quantify the cost. (Motion 2, at 8.) PG&E argues that the Thompson Testimony is speculative because Dr. Thompson has discussed specific measures and estimated their costs. (Motion 1, at 12-13.) The Testimony has been offered to show that PG&E's Application is deficient because it does not include foreseeable potential costs. PG&E has had the opportunity to file rebuttal testimony and can seek to show either that there is no likelihood of the costs occurring or that the costs would be insignificant. PG&E, not intervenors, bears the burden of proving that its cost-benefit analysis for this project is complete and reasonable. It would be a critical miscarriage of the Commission's process if it were to conclude now – without hearing any testimony - that PG&E's omission of the potential costs addressed in the Testimony is utterly irrelevant to the Project's cost-effectiveness. Granting PG&E's Motions to Strike the Testimony would prohibit any consideration by the Commission of this evidence. The purpose of hearings and briefs and the entire administrative process is to give the Commission the opportunity to assess the merits of the evidence, to decide what weight to give to the evidence, and to assess the credibility of the experts on the witness stand. The Commission can and should decide whether the

evidence of any party is relevant and worthy of consideration after cross-examination and briefs, not before. In the Motions, PG&E is essentially asking the Commission to issue a decision, without the benefit of full hearings, that there will be no additional costs associated with security or seismic measures over the next 20 years without the benefit of full hearings. Given the well documented track record of enormous cost overruns at Diablo Canyon due to erroneous assumptions, the Commission must give serious consideration to the full range of potential costs.

Finally, an important consideration for the Commission is the right of the public to hear and consider the Testimony in the Commission proceedings. The Commission has an obligation to the public to fully consider information presented to it, as a matter of sound decision making based on a full administrative record, and to give ratepayers the opportunity to decide what the costs and benefits of this Project really are. We cannot kid ourselves; this is no ordinary utility-owned power plant. It is a nuclear power plant and nuclear waste repository and in this proceeding the Commission will decide whether it is cost effective to continue to expend very significant amounts of ratepayer money to operate this nuclear power plant for an additional decade.

C. The Question of Whether Security And Seismic Costs Are Avoided in The No Project Scenario is a Question of Fact That Cannot Be Resolved on a Motion to Strike

PG&E argues that the Testimony should be stricken because seismic and security upgrades would be required even if the Project is not approved and the plant ceases operations in 2013 and 2014. (Motion 1, at 13-14; Motion 2, at 9-10.[3]) PG&E assumes

[3] PG&E alleges "If the NRC requires a seismic retrofit for DCPP based on Dr. Namson's concerns, it is likely to occur before Units 1 and 2 ceases operation and perhaps even later to protect the spent fuel. Therefore, any additional seismic protection measures that the NRC may require (and none are expected), would not have any bearing on the analysis of the costs and benefits of the SRGPs." (Motion 2, at 7.)

that the costs are the same with or without the Project, without providing a factual basis for this assertion. If this nuclear plant shuts down in 2014, there will be ten fewer years of nuclear waste generated that must be stored on-site. The Thompson Testimony projects O&M costs associated with additional security, some of which could be avoided if the Diablo Canyon ceases operations in 2014. (Table VIII-2.) Also, every additional year that the plant operates extends the possibility that new requirements will be imposed and additional costs incurred. PG&E asks the Commission to make a factual determination regarding the future costs of plant operation in the Commission's ruling on these Motions to Strike. This is exactly the kind of determination that should be made in a final decision after all of the evidence is presented and examined.

Finally, PG&E argues that the Testimony is outside the scope of this proceeding because the June 24, 2004 Scoping Ruling of Commissioner Brown in this proceeding specifies that the issues to be decided are the costs and benefits of the Project, including the costs and/or benefits of delaying or not performing the Project. PG&E seems to be arguing that: 1) seismic and security upgrades would be required even if the Project is not approved and that 2) therefore there is no conceivable way that these costs are relevant to this case. However, as discussed above, PG&E has the burden of showing that such seismic and security upgrades would in fact be required even if the Project is not approved. This is a question of fact to be considered by the Commission with the aid of hearings and briefs.

Additionally, in the February 13, 2004 Protest of the San Luis Obispo Mothers for Peace (pages 5-6), the March 26, 2004 Notice of Intent to Claim Compensation of the San Luis Obispo Mothers for Peace, Sierra Club and Public Citizen (page 5) and during

the February 27, 2004 Prehearing Conference (RT, at 10.), the Joint Parties stated their intent to address these issues in testimony and briefs. Commissioner Brown's Scoping Ruling did not limit the scope of the issues to be presented by the Joint Parties. PG&E presented substantively the same arguments in its February 23, 2004 Response to Protests and Prehearing Conference Statement, that it presents here. PG&E could have challenged the Scoping Ruling on these grounds prior to the preparation and submittal of the Testimony. Instead, it chose to wait until substantial resources had already been committed to this effort in reliance on the Scoping Memorandum.

D. The Commission Cannot Rule on Specific Factual Issues on a Motion to Strike

PG&E makes several points regarding the credibility of certain statements in the Testimony. (Motion 1, at 11-12; Motion 2, at 8-9 (on page 9, PG&E introduces evidence not yet before this Commission).) In raising substantive legal and factual arguments regarding the merits of the Testimony, PG&E is trying this case in a Motion to Strike. Challenges to the accuracy of selected facts are not a basis for a Motion to Strike. The appropriate procedure is for PG&E to raise its points during cross-examination or through its own rebuttal testimony, thereby allowing development of a sufficient record for the Commission to make a credibility determination.

PG&E's litigation tactic is troubling in another respect. From PG&E's perspective this is a no-lose situation. Even if the Motions fail, PG&E will have had an additional opportunity to present its factual arguments which Joint Parties cannot respond to on the record. And, because PG&E's Rebuttal Testimony has been submitted before the Commission issues a decision on these Motions, PG&E also has an opportunity to

present sworn testimony to support its position in these Motions, without any further testimony by intervenors permitted under the current schedule.

PG&E should not be allowed to pre-empt the Commission's review of the Testimony of Doctors Namson and Thompson. This Testimony presents valuable and important information to the Commission that is highly relevant to its decision on the Application. As we expected, PG&E's rebuttal testimony, filed earlier this week, addresses the Testimony PG&E seeks to exclude from the record. PG&E's Motion to Strike should be denied and the hearing record developed in full.

Respectfully submitted:

By: Dian M. Grueneich/mle

Dian M. Grueneich†
Theresa Cho, Of Counsel
Clyde Murley, M.A.
GRUENEICH RESOURCE ADVOCATES
582 Market Street
San Francisco, CA 94104
(415) 834-2300 telephone
(415) 834-2310 facsimile
dgrueneich@gralegal.com
cmurley@gralegal.com

For:
SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, PUBLIC CITIZEN, ENVIRONMENT CALIFORNIA, GREENPEACE, THE UTILITY REFORM NETWORK, AGLET CONSUMER ALLIANCE AND THE OFFICE OF RATEPAYER ADVOCATES

†Matt Freedman, Attorney for The Utility Reform Network; James Weil, Director for Aglet Consumer Alliance; and Paul Angelopulo, The Office of Ratepayer Advocates, have authorized me to sign this pleading on their behalf.

August 25, 2004

CERTIFICATE OF SERVICE

I, Jack McGowan, certify that I have, on this date, caused this CONSOLIDATED RESPONSE OF SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, PUBLIC CITIZEN, ENVIRONMENT CALIFORNIA, GREENPEACE, THE UTILITY REFORM NETWORK, AGLET CONSUMER NETWORK AND THE OFFICE OF RATEPAYER ADVOCATES TO PG&E'S MOTIONS TO STRIKE THE TESTIMONY OF GORDON THOMPSON AND JAY NAMSON to be served by electronic mail on the parties listed on the Service List, and by U.S. Mail for those who have not provided an electronic address, for the proceeding in California Public Utilities Commission Docket No. A.04-01-009.

I declare under penalty of perjury, pursuant to the laws of the State of California, that the foregoing is true and correct.

Executed on August 25, 2004 in San Francisco, California.

Jack McGowan