

THE UNITED STATES COURT OF FEDERAL CLAIMS

PACIFIC GAS & ELECTRIC COMPANY,)
)
 Plaintiff,)
) No. 04-0074C, into which has been
 v.) consolidated No. 04-0075C
) (Chief Judge Hewitt)
 THE UNITED STATES,)
)
 Defendant.)

DEFENDANT'S SUPPLEMENTAL RESPONSES TO PLAINTIFF PACIFIC GAS AND ELECTRIC COMPANY'S FIRST SET OF INTERROGATORIES ON REMAND

Pursuant to Rules 26 and 33 of the Rules of the United States Court of Federal Claims ("RCFC") and the Court's order dated June 18, 2009, defendant, the United States, provides the following supplemental responses to Interrogatory Nos. 1-4, 7, 9, 14-17, and 21-29 of "PG&E's First Set of Interrogatories on Remand," which plaintiff, Pacific Gas and Electric Company ("plaintiff" or "PG&E"), served upon defendant by electronic mail on April 17, 2009.

GENERAL OBJECTIONS

1. Disclosure of privileged or protected information: Defendant objects to each interrogatory to the extent that it is deemed to require disclosure of classified, confidential, or proprietary information or matters subject to the attorney-client privilege, the attorney work product doctrine, other applicable privileges, or any statutory or regulatory restriction upon disclosure, including the Privacy Act, 5 U.S.C. § 552a. Defendant will not produce privileged or protected documents, materials, or information in response to the interrogatories.

2. Exceeding obligations imposed by the Court's rules and orders: Defendant objects to the instructions and definitions accompanying plaintiff's interrogatories to the extent

that such instructions and definitions attempt to impose obligations on defendant other than those imposed by RCFC 26 and 33 and the Court's prior orders.

3. Conclusions regarding legal significance of documents: Defendant objects to plaintiff's interrogatories upon the grounds and to the extent that, by them, plaintiff seeks to have defendant make certain legal conclusions and/or conclusions as to the legal significance of certain documents and/or events which it is not required to make.

4. Work product information: Defendant objects to plaintiff's interrogatories upon the grounds and to the extent that, by them, plaintiff seeks information prepared and/or developed in anticipation of litigation and/or for trial when plaintiff has not shown that it has substantial need for such materials in the preparation of its case in that plaintiff is unable, without undue hardship, to obtain the substantial equivalent of such information by other means.

5. Irrelevant material: Defendant objects to plaintiff's interrogatories upon the grounds and to the extent that, by them, plaintiff seeks the discovery of information which is irrelevant and immaterial and not reasonably calculated to lead to the discovery of admissible evidence.

6. Vague, overly broad, and unduly burdensome: Defendant objects to plaintiff's interrogatories upon the grounds that the manner in which they are worded, when read with their definitions and general instructions, are so vague, broad, general, and all inclusive that they do not permit a proper or reasonable response and are, therefore, unduly burdensome and oppressive. Defendant further objects to these interrogatories to the extent that, to respond to them, defendant would be required to make an extensive investigation, research, compilation,

and evaluation of data and records in its possession, which would constitute annoyance, harassment, oppression, undue burden, and undue expense to defendant.

7. Inferences from interrogatories: Defendant objects to any inference that can be drawn from any portion of plaintiff's interrogatories or the responses to them that the documents requested or events referenced in the requests actually exist or occurred. The failure to object to each such inference in no way constitutes an admission by defendant that such information exists or that such events actually occurred.

8. Publicly available documents and previously produced documents: Defendant objects to plaintiff's interrogatories to the extent that they require defendant to produce documents that are publicly available. Publicly available documents include documents available through web sites maintained by either the Department of Energy ("DOE") or the Nuclear Regulatory Commission ("NRC") or available from the public document room maintained by the NRC. To the extent that documents are available from these sources, defendant will not undertake the effort to produce them. Similarly, defendant objects to plaintiff's interrogatories to the extent that they require defendant to produce documents already produced to plaintiff. To the extent that documents have previously been produced to plaintiff, defendant will not undertake the effort to produce them again.

9. Premature contention interrogatories: Defendant objects to plaintiff's interrogatories because all 32 interrogatories are premature contention interrogatories, to which defendant cannot fully respond until the close of discovery, July 20, 2009. See, e.g., O2 Micro Intern. Ltd. v. Monolithic Power Systems, Inc., 467 F.3d 1355, 1365 (Fed. Cir. 2006) ("[a]nswers to [contention] interrogatories are often postponed until the close of discovery, [citation omitted],

or are amended as a matter of course during the discovery period”) (citing 8A A. Wright and C. Miller, Federal Practice and Procedure § 2181)). Thus, defendant reserves the right to supplement defendant’s answers to plaintiffs’ interrogatories, to the extent new information becomes available throughout the discovery period.

10. Interrogatories in excess of 25-interrogatory limit: Defendant objects to plaintiff’s interrogatories to the extent that they exceed the 25-interrogatory limit. See RCFC 33.

Importantly, counsel for defendant initially agreed to allow plaintiff to exceed the interrogatory limit based upon counsel for plaintiff’s representation that, should defendant not agree to review or answer any interrogatories beyond the 25-interrogatory limit that plaintiff sought to issue to defendant, plaintiff would simply issue a RCFC 30(b)(6) notice of deposition regarding the topics addressed in those interrogatories. In making this representation, counsel for plaintiff stated that, by answering these additional interrogatories in writing, counsel for defendant would avoid having to prepare a witness to testify about these matters in a RCFC 30(b)(6) deposition, which would “help [the Government] out.” Unfortunately, plaintiff recently expressed its intention to go back on its earlier representation and issue to defendant a RCFC 30(b)(6) deposition notice, apparently regardless of defendant’s responses to these interrogatories. Accordingly, to the extent that plaintiff ultimately issues a RCFC 30(b)(6) deposition notice, and that deposition is allowed to proceed, defendant objects to plaintiff’s interrogatories to the extent that they exceed the 25-interrogatory limit set forth in RCFC 33.

11. Interrogatories requesting identification of evidence: Defendant objects to plaintiff’s interrogatories to the extent that they require defendant to identify each document or testimony in the record upon which defendant may rely at trial. RCFC 26 and 33 do not require

defendant to identify, during discovery upon remand, each document or testimony in the record upon which defendant may rely at trial.

12. The objections set forth above apply to each of the numbered paragraphs of plaintiff's interrogatories.

DEFENDANT'S SUPPLEMENTAL RESPONSE

INTERROGATORY NO. 1

Identify by category and amount which damages that the CFC previously awarded PG&E you contend PG&E is entitled to recover after remand.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

In accordance with the expert reports of R. Larry Johnson, Gregory Maret, and William Jones, dated June 12, 2009, defendant contends that PG&E is not entitled to recover the following costs from its previously filed claim: (1) Humboldt Bay SAFSTOR costs from 1999-2000 in the amount of \$5,015,000; (2) Humboldt Bay SAFSTOR Security Costs from 2001-2004 in the amount of \$7,037,118; (3) the costs that PG&E would have incurred to store its GTCC waste on the ISFSI at Humboldt Bay during the claim period, in the amount of \$1,589,000; (4) the costs that PG&E would have incurred during the claim period to perform the Humboldt Bay stack removal, in the amount of \$919,420; and (5) the costs that PG&E incurred associated with Private Fuel Storage, in the amount of \$899,517.

Consistent with the information provided on page 4 of Mr. Johnson's expert report, defendant contends that, assuming that the rates contained in the 1987 Annual Capacity Report

("ACR") constitute DOE's acceptance obligation, PG&E is entitled to recover on remand the following costs: (1) Humboldt Bay SAFSTOR costs in the amount of \$31,369,882; (2) Humboldt Bay ISFSI costs in the amount of \$7,945,000; (3) Diablo Canyon ISFSI costs in the amount of \$31,734,000; (4) Diablo Canyon temporary rack costs in the amount of \$2,663,807; and (5) Diablo Canyon Storage Options study costs in the amount of \$1,451,091.

INTERROGATORY NO. 2

State whether you contend that, under the PG&E Contract, DOE's rate of acceptance beginning in 2008 is not 3,000 MTU. State all factual and legal grounds upon which you based this contention, and IDENTIFY all evidence including DOCUMENTS that supports this contention[.]

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

As we indicated in our previous response, the Federal Circuit has ruled that the 1987 ACR provides the acceptance rates to be applied in calculating damages in the SNF cases pending before this Court. Pacific Gas & Electric Co. v. United States, 536 F.3d 1282, 1292 (Fed. Cir. 2008). As plaintiff is aware, the 1987 ACR provides acceptance rates through 2007 only. Moreover, the Federal Circuit has not directly addressed the issue of what rates constitute DOE's acceptance obligations after 2007. The 1987 ACR notes that the rates contained in the 1987 ACR were derived from the rates contained in the 1987 Mission Plan Amendment ("MPA"). In the MPA, the rate of acceptance ramps up to 3,000 MTUs in 2008.

We respectfully disagree with the Federal Circuit's determination that the rates contained in the 1987 ACR constitute DOE's obligations with respect to the quantities of SNF/HLW that must be accepted pursuant to the Standard Contract. Moreover, the acceptance rates depicted in the 1987 MPA assume (1) the operation of a Federal repository for the storage and disposal of spent nuclear fuel, beginning in 2003, despite the fact that no such obligation exists anywhere in the Standard Contract and (2) that the 1987 Amendments to the Nuclear Waste Policy Act ("NWPA") would be passed in the form proposed by DOE. However, assuming the Federal Circuit's determination that the rates contained in the 1987 ACR constitute DOE's acceptance obligations, Defendant will not contest - solely for the purposes of this particular case and without constituting a binding admission in any other case - that the rates after 2007 would presumably be consistent with those rates contained in the 1987 draft MPA.

INTERROGATORY NO. 3

For each year from 1998 through 2010 [2014], set forth the amount of spent fuel and, if different, the amount of SNF/HLW that you contend DOE was obligated to accept from PG&E. State all factual and legal grounds that support your response, and IDENTIFY all evidence including DOCUMENTS that support your response.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

As we indicated in our previous response, based upon the Federal Circuit's decisions in PG&E and Yankee Atomic, defendant was obligated to accept SNF/HLW in accordance with the 1987 ACR acceptance rate, with GTCC waste to be added to the SNF/HLW acceptance queue

under an oldest fuel/waste first, method. Using the rates contained in the 1987 ACR, and the discharges reflected in Table B of the 1987 ACR, titled "Listing Of Spent Nuclear Fuel By date Of Discharge" ("1987 draft APR"), the amount of SNF/HLW that DOE was obligated to accept from PG&E in the first ten years of the acceptance program is as follows:

1987 APR				
Year	HB	DC 1	DC 2	Total MTU
	MTU	MTU	MTU	
1998	15.92	-	-	15.92
1999	13.02	-	-	13.02
2000	-	-	-	-
2001	-	-	-	-
2002	-	-	-	-
2003	-	-	-	-
2004	-	-	-	-
2005	-	-	-	-
2006	-	31.35	31.29	62.64
2007	-	36.81	36.79	73.60

The 1987 draft APR only contains enough utility SNF discharge information to determine PG&E's SNF/HLW allocations through the first ten years of the DOE program. Therefore, to determine DOE's acceptance obligations through 2014, we must apply the discharge information in the 2004 APR to the rates contained in the 1987 ACR, as extended by (pursuant to our concession limited to this case as described in response to Interrogatory No.2) the 1987 MPA. This application results in the following amounts of SNF/HLW being accepted from PG&E by DOE from 1998 through 2014:

2004 APR				
Year	HB	DC 1	DC 2	Total MTU
	MTU	MTU	MTU	
1998	13.18	-	-	13.18
1999	15.76	-	-	15.76
2000	-	-	-	-
2001	-	-	-	-
2002	-	-	-	-
2003	-	-	-	-
2004	-	-	-	-
2005	-	-	-	-
2006	-	30.43	17.02	47.46
2007	-	31.29	34.02	65.31
2008	-	30.05	38.85	68.90
2009	-	41.29	52.35	93.64
2010	-	39.29	38.41	77.69
2011	-	37.42	37.38	74.80
2012	-	33.60	34.39	67.99
2013	-	37.46	29.35	66.81
2014	-	34.06	-	34.06

In its decision in PG&E, the Federal Circuit determined that the 1987 “ACS process,” which included the issuance of an ACR and an APR, constitutes DOE’s acceptance obligations. 536 F.3d 1282, 1289-90 (2008). However, the practical application of the Federal Circuit’s directive to this Court’s Order that we identify DOE’s acceptance obligations to PG&E through 2014 proves to be difficult for two reasons. First, as already stated, the 1987 draft APR only

includes actual SNF discharge information through 1985 and projected SNF discharge information for 1986 through 1989. PX96 at 9. The spent fuel allocations for 2005, 2006 and 2007 are derived from the spent fuel discharge information from 1986 through 1989. As a result, PG&E's allocations for 2006 and 2007 that are included in the 1987 draft APR are based upon projected discharges, rather than actual discharges. Further, the projected discharge information in the 1987 draft APR differs from the actual discharge information eventually obtained by DOE and published in the 1991 APR. As a result, if the court were to apply the 1987 draft APR discharges to the 1987 ACR rates through 2007, and then apply the 2004 APR discharges to the 1987 Mission Plan Amendment ("MPA") rates after 2007, the total amount of MTUs that DOE was obligated to accept from PG&E would be inconsistent in the years 2006 and 2007.

Second, the discharge information included in the 1987 draft APR was not verified by DOE until 1991, when DOE issued the first official APR, pursuant to its obligations in the Standard Contract. DX 189 at 3. For example, PG&E adjusted its place in the acceptance queue as a result of this process, as the Court recognized in Pacific Gas & Electric Co. V. United States, 73 Fed. Cl. 333, 368 (2006). In addition, certain materials were added to the acceptance queue between the publishing of the 1987 draft APR and the 1991 APR.

In short, the 1987 APR discharge information is not sufficiently accurate to determine DOE's acceptance obligations. Although minor differences exist between the discharge information published in the 1991 APR and the 2004 APR, for practical purposes, the 2004 APR simply extends the information provided in the 1991 APR, to provide more recent SNF discharge information. This additional discharge data is necessary to project PG&E's SNF/HLW allocations through 2014, despite the fact that this information was not available until 2004.

Therefore, if the Court desires to determine the amount of SNF/HLW that DOE was obligated to accept from PG&E pursuant to the 1987 ACR (as extended by the 1987 MPA) through 2014, we believe that the Court should apply the 2004 APR discharge data and not the 1987 APR discharge data.

Finally, as we explained in our prior response, the Federal Circuit in Yankee Atomic, 536 F.3d at 1274, held that GTCC constitutes HLW under the Standard Contract. We disagree with that decision, but, to the extent that the decision remains in effect and is not vacated or overruled in the future, that decision requires GTCC waste be added to the SNF/HLW acceptance queue pursuant to the terms of the Standard Contract, Art. VI.B.1(a). As William Jones opined in his expert report, dated June 12, 2009, the segmentation date of the reactor internals is a date that is equivalent to the SNF discharge date. Therefore, the segmentation date of the reactor internals is the date that DOE could have used to determine the age of GTCC waste for its insertion into the acceptance queue.

Consistent with PG&E's own spent fuel storage plans, Mr. Jones opines that PG&E would not have begun segmenting its GTCC waste until all spent fuel had been removed from the Humboldt Bay spent fuel pool. Moreover, Mr. Jones estimates that segmentation would be complete in 2000. As of 2014, the most recently discharged SNF listed in the 2004 APR was discharged in 1999. Therefore, if the rates contained in the 1987 ACR, as extended by the 1987 MPA, constitute DOE's acceptance obligations, DOE was not obligated to accept any GTCC waste from PG&E until after 2014. Therefore, DOE was not obligated to accept any GTCC waste from PG&E until long after the close of this claim period, and PG&E would have been

responsible for any costs that it would have incurred to store its GTCC waste onsite, pending acceptance of that waste by DOE.

INTERROGATORY NO. 4

Identify each document or documents that you contend sets forth, alone or together, the chronological listing of SPENT FUEL that should be used in determining the oldest fuel first ("OFF") sequence mentioned in the standard contracts.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

In its decision in PG&E, the Federal Circuit determined that the 1987 "ACS process," which included the issuance of an ACR and an APR, constitutes DOE's acceptance obligations. 536 F.3d 1282, 1289-90 (2008). However, the practical application of the Federal Circuit's directive to this Court's order that we identify DOE's acceptance obligations to PG&E through 2014 proves to be difficult for two reasons. First, as already stated, the 1987 draft APR only includes actual SNF discharge information through 1985 and projected SNF discharge information for 1986 through 1989. As a result, PG&E's allocations for 2006 and 2007 that are included in the 1987 draft APR are based upon projected discharges, rather than actual discharges. Further, the projected discharge information in the 1987 draft APR differs from the actual discharge information eventually obtained by DOE and published in the 1991 APR. As a result, if the court were to apply the 1987 draft APR discharges to the 1987 ACR rates through 2007, and then apply the 2004 APR discharges to the 1987 Mission Plan Amendment ("MPA")

rates after 2007, the total amount of MTUs that DOE was obligated to accept from PG&E would be inconsistent in the years 2006 and 2007.

Second, the discharge information included in the 1987 draft APR was not verified by DOE until 1991, when DOE issued the first official APR, pursuant to its obligations in the Standard Contract. For example, PG&E adjusted its place in the acceptance queue as a result of this process, as the Court recognized in PG&E, 73 Fed. Cl. at 368. In addition, certain materials were added to the acceptance queue between the publishing of the 1987 draft APR and the 1991 APR. In short, the 1987 APR discharge information is not sufficiently accurate to determine DOE's acceptance obligations.

Although minor differences exist between the discharge information published in the 1991 APR and the 2004 APR, for practical purposes, the 2004 APR simply extends the information provided in the 1991 APR, to provide more recent SNF discharge information. This additional discharge data is necessary to project PG&E's SNF/HLW allocations through 2014. Therefore, if the Court desires to determine the amount of SNF/HLW that DOE was obligated to accept from PG&E pursuant to the 1987 ACR (as extended by the 1987 MPA) through 2014, we believe that the Court should apply the 2004 APR discharge data and not the 1987 APR discharge data.

INTERROGATORY NO. 7

Identify all circumstances, if any, in which you contend that, ABSENT DOE's BREACH, DOE would have employed the "emergency delivery" provision of the STANDARD CONTRACT, Art. V.D. State all legal and factual grounds upon which you based this contention, and IDENTIFY all evidence including documents that supports this contention.

SUPPLEMENTAL RESPONSE:

Paragraph 3 of the Court's June 18, 2009 Order, requires the Government to supplement Interrogatory No. 7, "[in accordance to the colloquies at the TSC.]" This interrogatory was not part of the colloquy during the telephone status conference held on Wednesday, June 17, 2009. During that call, plaintiff did not identify this interrogatory response as one requiring supplementation. Moreover, the Government did not indicate that this interrogatory required supplementation in its response to Plaintiff's motion to compel. The Government has no further information to supplement its response to this interrogatory.

INTERROGATORY NO. 9

State whether you contend that, ABSENT DOE's BREACH, PG&E would have incurred any SAFSTOR costs in and after 1999. If so, IDENTIFY the SAFSTOR costs PG&E would have incurred in each year and s[t]ate all factual and legal grounds upon which you based this contention, and IDENTIFY all evidence including DOCUMENTS that supports this contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

Had DOE begun accepting SNF/HLW from utility plaintiffs beginning in 1998 in accordance with the rates contained in the 1987 ACR, DOE would not have been obligated to accept all of PG&E's SNF at Humboldt Bay until 1999. This date is determined by assigning the spent fuel allocations from either the 1987 APR or the 2004 APR to the rates contained in the 1987 ACR, as reflected in our supplemental response to Interrogatory/No. 3. In addition, as Mr. Jones has opined and as is consistent with PG&E's own spent fuel planning, PG&E would have

segmented its Humboldt Bay reactor core in its spent fuel pool, after all of the spent fuel had been removed. That segmentation process would not have been complete until 2000. As Gregory Maret opined in his expert report, dated June 12, 2009, PG&E would have been required to maintain its Humboldt Bay spent fuel pool in SAFSTOR condition while segmenting its reactor in the pool. Therefore, PG&E would have incurred SAFSTOR costs in the amount of \$5,015,000 in 1999 and 2000. In addition, as Mr. Maret has opined, PG&E would have incurred certain SAFSTOR security costs through the end of the claim period in association with the on-site storage of GTCC waste, which Mr. Johnson calculates would have been in the amount of \$7,037,118.

INTERROGATORY NO. 14

State whether you contend that, ABSENT DOE's BREACH either or both of the DCPD spent fuel pools would have filled with SPENT FUEL and/or other material to the point that full core reserve capacity was lost, and if so, state by month and year when you contend that would have occurred. State all factual and legal grounds upon which you base this contention, and IDENTIFY all evidence including DOCUMENTS that supports this contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

Based upon information provided by PG&E, had DOE begun accepting SNF/HLW from utility plaintiffs beginning in 1998 pursuant to the rates contained in the 1987 ACR, PG&E would have had sufficient SNF allocations to avoid losing FCR in its DCPD spent fuel pools, without constructing a independent spent fuel storage installation ("ISFSI") or otherwise

increasing the spent fuel storage capacity in either of the DCPD spent fuel pools. PG&E's ability to maintain FCR in its DCPD spent fuel pools is due in large part to spent fuel management decisions made by PG&E in 1999 and 2000. See e.g., Deposition of Larry Womack, dated May 20, 2009, at 255-269; PX 365 at PPGE0070251-259.

INTERROGATORY NO. 15

State whether you contend that, ABSENT DOE's BREACH and assuming DOE followed an OFF pickup schedule, PG&E could not have eliminated any need it may have had for additional SPENT FUEL storage at Diablo Canyon beyond that available in the spent fuel pools, so as to avoid the costs of constructing an ISFSI at DCPD, by one or more of the following alternatives: 1) transshipping fuel between DCPD's spent fuel pools, 2) reducing the amount of fuel discharged, 3) impinging upon its full core reserve in one or both pools, or 4) using a temporary rack. If you do make that contention, state all factual and legal grounds upon which you base this contention, and IDENTIFY all evidence including DOCUMENTS that supports this contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

Based upon information provided by PG&E, had DOE begun accepting SNF/HLW from utility plaintiffs beginning in 1998 pursuant to the rates contained in the 1987 ACR, PG&E would have had sufficient SNF allocations to avoid losing FCR in its DCPD spent fuel pools, without constructing a independent spent fuel storage installation ("ISFSI") or otherwise increasing the spent fuel storage capacity in either of the DCPD spent fuel pools. PG&E's ability

to maintain FCR in its DCPD spent fuel pools is due in large part to spent fuel management decisions made by PG&E in 1999 and 2000. See e.g., Deposition of Larry Womack, dated May 20, 2009, at 255-269; PX 365 at PPGE0070251-259.

INTERROGATORY NO. 16

State whether you contend that, ABSENT DOE'S BREACH and assuming DOE followed an OFF pickup schedule, PG&E would have developed and constructed an ISFSI at DCPD. If you do make that contention, state all factual and legal grounds upon which you base this contention and IDENTIFY all evidence including DOCUMENTS that supports this contention.

RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

Based upon information provided by PG&E, had DOE begun accepting SNF/HLW from utility plaintiffs beginning in 1998 pursuant to the rates contained in the 1987 ACR, PG&E would have had sufficient SNF allocations to avoid losing FCR in its DCPD spent fuel pools, without constructing a independent spent fuel storage installation ("ISFSI") or otherwise increasing the spent fuel storage capacity in either of the DCPD spent fuel pools. PG&E's ability to maintain FCR in its DCPD spent fuel pools is due in large part to spent fuel management decisions made by PG&E in 1999 and 2000. See e.g., Deposition of Larry Womack, dated May 20, 2009, at 255-269; PX 365 at PPGE0070251-259.

INTERROGATORY NO. 17

Do you contend there is any reason PG&E is not entitled to recover on remand the costs it claims through 2004 for the temporary cask pit rack at DCCP, and, if so, IDENTIFY any such reason(s), state all factual and legal grounds upon which you base this contention, and identify all evidence including DOCUMENTS that supports this contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

Based upon information provided by PG&E, had DOE begun accepting SNF/HLW from utility plaintiffs beginning in 1998 pursuant to the rates contained in the 1987 ACR, PG&E would have had sufficient SNF allocations to avoid incurring the costs that it claims through 2004 for the temporary cask pit rack at DCCP. PG&E's ability to maintain FCR in its DCCP spent fuel pools is due in large part to spent fuel management decisions made by PG&E in 1999 and 2000. See e.g., Deposition of Larry Womack, dated May 20, 2009, at 255-269; PX 365 at PPGE0070251-259.

INTERROGATORY NO. 21

State when you contend that commercial nuclear reactor internals become GTCC. State all factual and legal grounds upon which you base your contention, and IDENTIFY all evidence including DOCUMENTS that supports this contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

As William Jones opined in his expert report, dated June 12, 2009, defendant contends that nuclear reactor internals become GTCC when segmentation of the nuclear reactor is complete and “the actual GTCC waste packing volume [is] known with certainty.” Expert Report of William Jones, dated June 12, 2000, at p. 1; see also Trial Testimony of Christine Gelles, Southern California Edison Co. v. United States, No. 04-109C, dated Apr. 22, 2009, at 707:17-708:23

INTERROGATORY NO. 22

State when you contend that DOE was or is obligated to remove GTCC from HBPP. State all factual and legal grounds upon which you base your contention, and IDENTIFY all evidence including DOCUMENTS that supports this contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

The Federal Circuit held in Yankee Atomic that GTCC constituted HLW, which was covered by the Standard Contract and, consequently, should be accepted by DOE on the same schedule as SNF. 536 F.3d at 1274. In so holding, the Federal Circuit concluded that “the Government planned to (and would have) removed the GTCC with the SNF.” Id. at 1278 (emphasis added). We disagree with the Court’s decision that GTCC is HLW, but, to the extent that the decision remains in effect and is not vacated or overruled in the future, that decision requires GTCC waste be added to the SNF/HLW acceptance queue pursuant to the terms of the Standard Contract, Art. VI.B.1(a). As such, in PG&E, the Federal Circuit directed this Court to

use the 1987 ACR acceptance rate and to account for the acceptance of GTCC on remand.

PG&E, 536 F.3d at 1293.

As the Government's expert William Jones opined in his expert report, dated June 12, 2009, the segmentation date of the reactor internals is a date that is equivalent the SNF discharge date. Therefore, we contend that the segmentation date of the reactor internals is the date that DOE could have used to determine the age of GTCC waste for its insertion into the acceptance queue.

Consistent with PG&E's existing spent fuel storage plans, Mr. Jones opines that PG&E would not have begun segmenting its HBPP GTCC waste until all spent fuel had been removed from the HBPP spent fuel pool. Moreover, Mr. Jones estimates that segmentation would not be complete until 2000. Assuming that DOE's acceptance obligations are set forth in the 1987 ACR, as extended by the 1987 MPA, then according to the 2004 APR, the most recently discharged SNF that would have been eligible for acceptance in 2014 was discharged in 1999. Therefore, DOE was not obligated to accept any GTCC waste from HBPP until after 2014. In fact, DOE was not obligated to accept any GTCC waste from PG&E until long after the close of this claim period, and PG&E would have been responsible for any costs that it would have incurred to store its GTCC waste onsite, pending acceptance of that waste by DOE.

INTERROGATORY NO. 23

State when you contend that DOE was or is obligated to remove GTCC from the reactor site of each of the other contracting utilities (*i.e.*, "Purchasers"). State all factual and legal grounds upon which you base your contention, and IDENTIFY all evidence that supports this contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

The Federal Circuit held in Yankee Atomic that GTCC constituted HLW, which was covered by the Standard Contract and, consequently, should be accepted by DOE on the same schedule as SNF. 536 F.3d at 1274. In so holding, the Federal Circuit concluded that “the Government planned to (and would have) removed the GTCC with the SNF.” Id. at 1278 (emphasis added). We disagree with the Court’s decision that GTCC is HLW, but, to the extent that the decision remains in effect and is not vacated or overruled in the future, that decision requires GTCC waste be added to the SNF/HLW acceptance queue pursuant to the terms of the Standard Contract, Art. VI.B.1(a). As such, in PG&E, the Federal Circuit directed this Court to use the 1987 ACR acceptance rate and to account for the acceptance of GTCC on remand. PG&E, 536 F.3d at 1293.

As the Government’s expert William Jones opined in his expert report, dated June 12, 2009, the segmentation date of the reactor internals is a date that is equivalent the SNF discharge date. Therefore, we contend that the segmentation date of the reactor internals is the date that DOE could have used to determine the age of GTCC waste for its insertion into the acceptance queue. We do not currently have sufficient information from the entire nuclear utility industry to determine the segmentation date of all the GTCC currently onsite at each utility. As a consequence, we are unable to determine exactly when each plaintiff utility’s GTCC waste would be eligible for acceptance by DOE. However, we are not aware of any utility that has segmented

its reactor core early enough in time for that GTCC waste to be inserted into the acceptance queue prior to 2007.

INTERROGATORY NO. 24

For each year from 1998 to 2007 [2014], state the extent to which, if any, you contend that, ABSENT DOE'S BREACH, DOE's acceptance of GTCC from Purchasers would have affected the amount of SPENT FUEL that DOE accepted in that year. State all factual and legal grounds upon which you base this contention, and IDENTIFY all evidence including DOCUMENTS that supports this contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

The Federal Circuit held in Yankee Atomic that GTCC constituted HLW, which was covered by the Standard Contract and, consequently, should be accepted by DOE on the same schedule as SNF. 536 F.3d at 1274. In so holding, the Federal Circuit concluded that "the Government planned to (and would have) removed the GTCC with the SNF." Id. at 1278 (emphasis added). We disagree with the Court's decision that GTCC is HLW, but, to the extent that the decision remains in effect and is not vacated or overruled in the future, that decision requires GTCC waste be added to the SNF/HLW acceptance queue pursuant to the terms of the Standard Contract, Art. VI.B.1(a). As such, in PG&E, the Federal Circuit directed this Court to use the 1987 ACR acceptance rate and to account for the acceptance of GTCC on remand. PG&E, 536 F.3d at 1293.

As the Government's expert William Jones opined in his expert report, dated June 12, 2009, the segmentation date of the reactor internals is a date that is equivalent to the SNF discharge date. Therefore, we contend that the segmentation date of the reactor internals is the date that DOE could have used to determine the age of GTCC waste for its insertion into the acceptance queue. We do not currently have sufficient information from the entire nuclear utility industry to determine the segmentation date of all the GTCC currently onsite at each utility. As a consequence, we are unable to determine exactly when each plaintiff utility's GTCC waste would be eligible for acceptance by DOE. However, we are not aware of any utility that has segmented its reactor core early enough in time for that GTCC waste to be inserted into the acceptance queue prior to the 2007.

INTERROGATORY NO. 25

State whether you contend that the Standard Contract's "ACS process," identified by the Federal Circuit in its opinion in this case, *see* 536 F.3d at 1285-86, applies to GTCC. State all factual and legal grounds upon which you base this contention, and IDENTIFY all evidence including DOCUMENTS that supports this contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

At the time of the issuance of the 1987 ACR, the drafters of that document did not believe that GTCC was HLW. Further, the commercial HLW then in existence was not covered by the Standard Contract. The 1987 ACR notes that "the waste acceptance schedule for HLW is not included since the Mission Plan Amendment does not specify acceptance of HLW during the

10-year period covered by this report.” PX96 at 7. The ACR also states that it “does not assign priority to . . . HLW If required, adjustments to priority listings, resulting from the inclusion of these wastes, will be reported in future ACRs.” *Id.* at 10. Accordingly, the 1987 ACR, as published, did not include GTCC waste. However, at the time that DOE published the 1987 ACR, it notified all Standard Contract holders that, to the extent that GTCC waste were to be included as HLW into the acceptance queue, adjustments must be made to the priority listings.

In 2008, the Federal Circuit held in Yankee Atomic that GTCC constituted HLW pursuant to the Standard Contract and, consequently, should be accepted by DOE on the same schedule as SNF. 536 F.3d at 1274. In so holding, the Federal Circuit concluded that “the Government planned to (and would have) removed the GTCC with the SNF.” *Id.* at 1278 (emphasis added). We disagree with the Court’s decision that GTCC is HLW, but, to the extent that the decision remains in effect and is not vacated or overruled in the future, that decision requires GTCC waste be added to the SNF/HLW acceptance queue pursuant to the terms of the Standard Contract, Art. VI.B.1(a). Therefore, if GTCC waste is HLW, pursuant to the Standard Contract, the acceptance of GTCC waste as HLW must be incorporated into the ACS process set forth in the Standard Contract. Art. IV, V, VI (references to “SNF and/or HLW”).

INTERROGATORY NO. 26

If you contend that the OFF provision in the Standard Contract applies to GTCC, explain what date DOE would use for purposes of chronologically ranking activated metal GTCC, and, separately, other GTCC, in an acceptance queue based on an OFF order.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

For the purpose of determining damages, the most appropriate date for placing activated metal GTCC in the OFF queue for purposes of acceptance by DOE is the date upon which segmentation of the reactor internals is complete. For the purposes of determining damages, for other GTCC, the most appropriate date to be used for placing it in the OFF queue for purposes of acceptance by DOE is the date upon which the waste is “fully radiologically characterized and the packaged volume known.” Expert Report of William Jones, dated June 12, 2009, at p. 1-2.

INTERROGATORY NO. 27

If you contend that, under the Federal Circuit’s decision in *Yankee Atomic*, the acceptance rates in the 1987 ACR apply to GTCC as well as to SPENT FUEL, how do you contend the quantity of GTCC should be characterized for purposes of applying those acceptance rates, which are expressed in MTUs, *i.e.*, whether the quantity of GTCC would be determined based on the volume of the GTCC, the weight of the GTCC, the mass of the GTCC, the number of canisters in which the GTCC may be stored, the radioactivity level of the GTCC, or some other method.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

Defendant contends that, had it performed under the Standard Contract beginning in 1998, before determining how GTCC would be characterized for purposes of acceptance under

the OFF queue, the utilities would have had to identify the amount of GTCC to be accepted, the way in which they were storing/packaging that GTCC on-site, and the characteristics of the GTCC. This information would have enabled DOE to develop appropriate criteria for the acceptance and ultimate disposition of GTCC, which DOE has not yet done. To date, no utility has provided such information to DOE.

As Mr. Jones opined in his expert report, dated June 12, 2009, GTCC can be equated to MTU by converting GTCC to its packaged volume, using site-specific fuel characteristics. This process is set forth in the Expert Report of William Jones, dated June 12, 2009, at pp. 16-19.

INTERROGATORY NO. 28

State whether or not you contend that the footnote in the 1987 ACR stating that the "schedule for HLW is not included since the Mission Plan Amendment does not specify acceptance of HLW during the 10-year period covered by this report," *see* PX 96 at 7, A25, applies to reactor internals GTCC, and separately, to other GTCC. State all factual and legal grounds upon which you base your contention, and IDENTIFY all evidence including DOCUMENTS that supports the contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

At the time of the issuance of the 1987 ACR, the drafters of that document did not believe that GTCC was HLW. Further, the commercial HLW then in existence was not covered by a Standard Contract. The 1987 ACR notes that "the waste acceptance schedule for HLW is not included since the Mission Plan Amendment does not specify acceptance of HLW during the

10-year period covered by this report.” PX96 at 7. The ACR also states that it “does not assign priority to . . . HLW If required, adjustments to priority listings, resulting from the inclusion of these wastes, will be reported in future ACRs.” Id. at 10. Accordingly, the 1987 ACR, as published, did not include GTCC waste. However, at the time that DOE published the 1987 ACR, it notified all Standard Contract holders that, to the extent that GTCC waste were to be included as HLW into the acceptance queue, adjustments must be made to the priority listings. Accordingly, the footnote in question refers to commercial HLW generated in West Valley that was not covered by a Standard Contract.

INTERROGATORY NO. 29

State whether you contend that, ABSENT DOE'S BREACH, PG&E would not have made all GTCC at its Humboldt Bay reactor site available for pickup by DOE in 1998 and/or 1999. If so, state all factual and legal grounds upon which you base this contention, and IDENTIFY all evidence including DOCUMENTS that support[] this contention.

SUPPLEMENTAL RESPONSE:

Without waiving the objections previously posed to this interrogatory, defendant supplements its prior response, dated May 21, 2009, as follows:

As William Jones opined in his expert report, dated June 12, 2009, “had DOE performed starting in 1998, GTCC waste would have been available for shipment off-site one year after all spent fuel was removed from the spent fuel pool.” Expert Report of William Jones, dated June 12, 2009, at p. 1. Because PG&E’s last spent fuel allocation for Humboldt Bay was not until 1999, PG&E’s GTCC waste would not have been made available for pick-up until the year 2000. However, as stated in the supplemental response to Interrogatory No. 3, if the rates contained in

the 1987 ACR, as extended by the 1987 MPA, constitutes DOE's acceptance obligations and the segmentation date is the date used for the insertion of that GTCC waste into the acceptance queue, then DOE was not obligated to accept any GTCC waste from PG&E until after 2014. Therefore, DOE was not obligated to accept any GTCC waste from PG&E until long after the close of this claim period, and PG&E would have been responsible for any costs that it would have incurred to store its GTCC waste onsite, pending acceptance of that waste by DOE.

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

OF COUNSEL:

JANE K. TAYLOR
Office of General Counsel
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585


HAROLD D. LESTER, JR.
Assistant Director

MARIAN E. SULLIVAN
Senior Trial Counsel

JAMES P. CONNOR
LISA L. DONAHUE
JOSEPH KELLER
ANTHONY W. MOSES
SCOTT SLATER
Trial Attorneys
United States Department of Justice
Civil Division
Commercial Litigation Branch
1100 L Street, NW
Washington, DC 20530



SETH W. GREENE
Trial Attorney
United States Department of Justice
Civil Division
Commercial Litigation Branch
Attention: Classification Unit
8th Floor
1100 L Street, NW
Washington, DC 20530
Telephone: (202) 353-4175
Facsimile: (202) 307-2503
E-mail: seth.greene@usdoj.gov

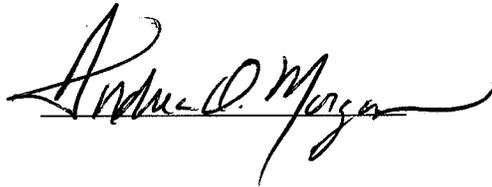
Attorneys for Defendant

Dated: June 29, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2009, I caused to be served by hand delivery
“DEFENDANT’S SUPPLEMENTAL RESPONSES TO PLAINTIFF PACIFIC GAS AND
ELECTRIC COMPANY’S FIRST SET OF INTERROGATORIES ON REMAND” addressed as
follows:

JERRY STOUCK
Greenberg Traurig LLP
2101 L Street, N.W.
Suite 1000
Washington, D.C. 20037

A handwritten signature in black ink, appearing to read "Andrew D. Morgan". The signature is written in a cursive style with a long, sweeping underline that extends to the right.