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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)
)
Pacific Gas and Electric Co.)
)
(Diablo Canyon Power Plant,)
Units 1 and 2))

Docket Nos. 50-275
50-323

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO CALIFORNIA PUBLIC
UTILITIES COMMISSION PETITION FOR LEAVE TO INTERVENE, MOTION TO
DISMISS APPLICATION OR, IN THE ALTERNATIVE, REQUEST FOR STAY OF
PROCEEDINGS, AND REQUEST FOR SUBPART G HEARING

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.1307(a), Pacific Gas and Electric Company (“PG&E”) herein answers the Petition for Leave to Intervene, Motion to Dismiss Application or, in the Alternative, Request for Stay of Proceedings, and Request for Subpart G Hearing Due to Special Circumstances (“Petition”) filed on February 5, 2002, by the California Public Utilities Commission (“CPUC”).¹ The CPUC’s Petition relates to PG&E’s application, pursuant to Section 184 of the Atomic Energy Act and 10 C.F.R. § 50.80, for Nuclear Regulatory Commission (“NRC” or “Commission”) approval of a proposed transfer of the operating licenses for the Diablo Canyon Power Plant, Units 1 and 2 (“DCPP”).

As discussed below, the CPUC’s filing is — fundamentally — a challenge to the proposed disaggregation and restructuring of PG&E’s businesses that would necessitate the

¹ In addition, this Answer substantively responds to the CPUC’s Renewed Motion to Dismiss Application, or in the Alternative to Hold Applications in Abeyance, and notice

proposed NRC license transfers. The Petition, in challenging that reorganization plan, raises an issue not before the NRC and not within the NRC's jurisdiction to resolve. Accordingly, the CPUC's motion to dismiss or stay this proceeding should be denied. Its request for a hearing and petition for leave to intervene also should be denied.

II. BACKGROUND

A. The License Transfer Application

In an application dated November 30, 2001, PG&E requested the NRC's approval of the direct transfer of the DCPD operating licenses currently held by PG&E. This request was made in support of the pending reorganization and restructuring of the businesses and operations of PG&E. The reorganization and restructuring will allow PG&E to emerge from bankruptcy.

On April 6, 2001, PG&E had filed a petition for relief under Chapter 11 of the United States Bankruptcy Code. PG&E's goal was to halt the deterioration of its financial position, restore the company to financial health, and continue supplying electricity and gas in the normal course of business. PG&E and its parent corporation, PG&E Corporation, subsequently filed with the Bankruptcy Court a comprehensive Plan of Reorganization ("Plan") for PG&E.² The Plan must be confirmed by the Bankruptcy Court under Section 1129 of the Bankruptcy Code, 11 U.S.C. § 1129, and is currently being aggressively opposed by the CPUC in that forum.

Under the Plan, the current businesses of PG&E will be disaggregated and restructured. PG&E will divide its operations and the assets of its business lines among four

of Bankruptcy Court Ruling, filed by mail on February 11, 2002 ("Renewed Motion"). See Section III.B of this PG&E Answer.

² The Plan (and the associated Disclosure Statement) was originally filed with the Bankruptcy Court on September 20, 2001. Various amendments to the plan have been subsequently filed.

separate operating companies. The majority of the assets and liabilities associated with the PG&E's electric transmission business will be contributed to ETrans LLC ("ETrans"); the majority of PG&E's gas transmission assets and liabilities will be contributed to GTrans LLC ("GTrans"); and the majority of the assets and liabilities associated with PG&E's generation business, including DCP, will be contributed to Electric Generation LLC ("Gen") or to its subsidiaries. Ownership of DCP will be assigned to a wholly-owned subsidiary of Gen, Diablo Canyon LLC ("Nuclear").

After some intermediate steps described in the license transfer application, ETrans, GTrans and Gen will, under the Plan, become indirect wholly-owned subsidiaries of PG&E Corporation (which will change its name). PG&E will retain most of the remaining assets and liabilities, and will continue to conduct local electric and gas distribution operations and associated customer services. Once PG&E's businesses have been disaggregated, PG&E Corporation will declare a dividend and distribute the common stock of PG&E to its public shareholders, separating PG&E from PG&E Corporation. Through the proposed restructuring, PG&E anticipates that value realized will provide necessary cash and increased debt capacity to enable it to repay creditors, restructure existing debt, and emerge from the bankruptcy with new businesses, including Gen, that will be financially sound going forward.

Because the Plan involves the transfer of ownership and operating authority for DCP from PG&E to Nuclear and Gen respectively, NRC approval under 10 C.F.R. § 50.80 is required in order to implement the Plan. In accordance with 10 C.F.R. § 50.90, PG&E is also requesting approval of certain administrative amendments to conform the operating licenses. In addition, with respect to the existing DCP antitrust license conditions, no substantive changes

are proposed, but Gen, ETrans, and PG&E are proposed to be named as the responsible licensees.

PG&E's license transfer application addresses the matters relevant to NRC review and consent to the proposed license transfer. The application demonstrates the continued technical and financial qualifications of Gen to be the operator of DCP. In addition, the application addresses the continued nuclear decommissioning funding assurance provided for DCP based upon the prepayment funding alternative authorized by NRC regulations.

In addition to Bankruptcy Court confirmation, other regulatory approvals will be required in order for PG&E to implement certain aspects of the Plan, including several approvals from the Federal Energy Regulatory Commission ("FERC"). The CPUC is contesting the FERC approvals in that forum as well. PG&E is pursuing all of the required approvals in parallel and therefore recognizes that NRC approval may be conditioned upon receipt of these approvals.

From its Petition filed with the NRC, and from its active opposition at the Bankruptcy Court and FERC, it is plain that the CPUC opposes the Plan — chiefly because it would involve a transfer of the economic oversight over Gen, ETrans, and GTrans from the CPUC to FERC. As is further discussed below, however, the CPUC is improperly seeking to use the NRC as an additional forum to litigate this opposition to the Plan. These are matters already and more appropriately before the Bankruptcy Court and FERC. These are, quite simply, matters beyond the jurisdiction of the NRC and outside the scope of the NRC's license transfer review.

B. The Limited Scope of Subpart M Proceedings

Pursuant to 10 C.F.R. § 2.1301(b), on January 17, 2002, the NRC published a notice of consideration of approval of the license transfers and opportunity to request a hearing.³ The CPUC timely filed its petition on February 5, 2002, for overnight delivery on February 6, 2002.

The NRC amended its regulations in 1998 to provide streamlined hearing procedures for all NRC license transfer reviews. These procedures, located at 10 C.F.R. Part 2, Subpart M, were intended to provide a fair process to consider issues raised in connection with a license transfer and properly within the scope of an NRC license transfer review. The procedures also were expressly adopted to assure that license transfer proceedings are resolved in an expedited manner, recognizing the time-sensitivity that accompanies license transfer cases. *See* Final Rule, Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998). These purposes directly apply to the present case, where there can be no dispute that there is a strong public and NRC interest in PG&E's timely exit from bankruptcy.

To intervene as of right in a Subpart M proceeding, a petitioner must first demonstrate that it has standing. To do so, a petitioner must:

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (*e.g.*, the grant of an application), and

³ Pacific Gas and Electric Company, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2, Notice of Consideration of Approval of Transfer of Facility Operating Licenses and Conforming Amendments and Opportunity for a Hearing, 67 Fed. Reg. 2455 (Jan. 17, 2002).

- (c) is likely to be redressed by a favorable decision, and
- (d) lies arguably within the “zone of interests” protected by the governing statute(s).

(2) specify the facts pertaining to that interest.

10 C.F.R. §§ 2.1306, 2.1308. *Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000) (“Indian Point 3”); *see also GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 202 (2000) (“Oyster Creek”).

In addition, Subpart M establishes clear requirements for admissible issues.

Under 10 C.F.R. § 2.1306(b)(2), a petitioner must:

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner’s position on such issues, together with references to the sources and documents on which petitioner intends to rely.

Consol. Edison Co. of N.Y. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 133-34 (2001) (“Indian Point 2”); *see also Indian Point 3*, CLI-00-22, 52 NRC at 295; *Oyster Creek*, CLI-00-06, 51 NRC at 203.

Moreover, an issue sought to be admitted for consideration in a Subpart M proceeding must deal with subjects delineated by the NRC’s hearing notice. Issues concerning matters that are not within that defined scope cannot be admitted. *Portland Gen. Elec. Co.*

(Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); *see also Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-28, 48 NRC 279, 283 (1998).

When addressing the admissibility of issues in a Subpart M proceeding, the Commission therefore must specifically consider whether the issues sought to be litigated are:

- (i) Within the scope of the proceeding;
- (ii) Relevant to the findings the Commission must make to act on the application for license transfer;
- (iii) Appropriate for litigation in the proceeding; and
- (iv) Adequately supported by the statements, allegations, and documentation required by 10 C.F.R. § 2.1306(b)(2)(iii) and (iv).

10 C.F.R. § 2.1308(a)(4). The scope of a license transfer proceeding is properly limited to issues the NRC considers when reviewing a transfer of an operating license. The NRC has stated:

Although other requirements of the Commission's licensing provisions may also be addressed to the extent relevant to the particular transfer action, typical NRC staff review of such applications consists largely of assuring that the ultimately licensed entity has the capability to meet financial qualification and decommissioning funding aspects of NRC regulations.

Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. at 66,722.

As discussed below, the CPUC has failed to identify issues within the "zone of interests" protected by the NRC; within the scope of the proceeding; relevant to the findings the NRC must make on the license transfer application; otherwise appropriate for litigation in this forum; or even adequately supported by facts.

III. CPUC'S PETITION

A. CPUC's Standing is Limited to Matters Within the Zone of Interests Protected by the NRC

The CPUC, a California state agency established by the California constitution, states that it is charged with “the responsibility for regulating electric corporations within the State of California.” (Pet. at 4.) The CPUC currently exercises economic regulatory authority over DCPD. The CPUC also states that it has “a statutory mandate to represent the interests of electric consumers throughout California” in the proceeding before the NRC. *Id.*

The Commission has held that state agencies may participate in an NRC proceeding, either as a party or as an interested state pursuant to 10 C.F.R. § 2.715(c). To participate as a party, a state agency must satisfy the same standards as an individual petitioner. *N. States Power* (Indep. Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996); *see also Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987). In the license transfer context, the Commission has stated, “[T]he Commission has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc.” *Indian Point 3*, CLI-00-22, 52 NRC at 295 (citing *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-99-30, 50 NRC 333, 344-45 (1999) (“Nine Mile Point”)).

Given that it is a state agency, PG&E does not contest CPUC's interests in this proceeding to the extent those interests might somehow relate to public health and safety or the protection of the environment. However, the CPUC's interests with respect to DCPD — by virtue of its statutory mandate and as evidenced throughout the Petition — actually appear to be limited to economic oversight and ratepayer interests. The NRC has consistently held that such interests are outside the “zones of interests” protected by the NRC's enabling statutes (*i.e.*, the

Atomic Energy Act and the National Environmental Policy Act). *See, e.g., Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 n.7 (1977); *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977). Accordingly, the CPUC has no standing to raise ratepayer matters here, or any other matters related to the economic oversight of Gen or DCP. Moreover, the CPUC's intervention petition and request for hearing should be denied as discussed further below, because the CPUC fails to set forth at least one issue within the scope of the NRC's review and appropriate for litigation in this forum.

B. CPUC's Motion to Dismiss the Application or, in the Alternative, to Stay the Proceeding, Should be Denied

1. *A Deferral Would Be Inconsistent with Commission Policy*

The CPUC claims that the license transfer application is premature and therefore should be dismissed. Specifically, the CPUC states that the November 30, 2001 NRC application "assumes the legal validity of the Plan" which has not yet been approved by the Bankruptcy Court. (Pet. at 6.) In addition, the CPUC states that the Bankruptcy Court will shortly rule on the issue of whether the CPUC may file an alternative plan of reorganization which would differ significantly from the Plan currently before the Bankruptcy Court. (Pet. at 7-9.) The CPUC asserts that the Bankruptcy Court will also rule in the near future on certain preemption issues which could also necessitate the submittal of a new plan of reorganization and will, regardless of the outcome, likely result in additional litigation that would require a significant time period for final resolution of the issues. (Pet. at 10-11.) The CPUC argues that the pendency of the bankruptcy proceeding necessitates dismissal of the NRC license transfer application until these issues are resolved or, in the alternative, necessitates deferring the

proceeding until the Bankruptcy Court's rulings on the preemption issue and the filing of the alternative plan. (Pet. at 11-12.)⁴

The CPUC's arguments do not provide a basis for dismissal of PG&E's license transfer application or for a stay of any NRC proceeding on the license transfer application. PG&E acknowledges the ongoing proceeding in the Bankruptcy Court, the significant issues raised in that proceeding, and the pending proceedings on other required regulatory approvals, particularly those at FERC. PG&E recognizes that the CPUC is actively opposing the Plan and the related regulatory approvals in those forums. However, for reasons of efficiency, and in order to expedite PG&E's implementation of the Plan and exit from bankruptcy upon confirmation of the Plan, PG&E is seeking parallel reviews of the Plan at the Bankruptcy Court and the regulatory approvals at the relevant federal agencies.

PG&E's NRC license transfer application is premised on the Plan as it is currently proposed, and requests that the NRC review the DCPD license transfers as would be required to implement the Plan. Mindful of the possibility that the substance of the Plan may change in some respects prior to its approval, the NRC has the authority to condition its consent to the transfers, as it considers appropriate, on (a) PG&E obtaining the other required approvals, and/or (b) confirmation of specific elements of the Plan as may be relevant to the issues under review by the NRC. Consequently, the NRC transfer application need not — and should not — be dismissed pending approval of the Plan.

The NRC, in promulgating the Subpart M procedures, emphasized the importance of its timely review of license transfer applications: "Because of the need for expeditious

⁴ This argument is factually updated in the CPUC's Renewed Motion, but is not substantively changed. The CPUC wants a stay pending a "viable" plan being submitted to the Bankruptcy Court.

decisionmaking from all agencies, including the Commission, for these kinds of transactions, timely and effective resolution of requests for transfers on the part of the Commission is essential.” Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. at 66,721. Moreover, it is well settled that the pendency of parallel proceedings before other forums is not adequate grounds to stay an NRC license transfer adjudication. *Indian Point 3*, CLI-00-22, 52 NRC at 289; *Nine Mile Point*, CLI-99-30, 50 NRC at 343-44; *Consol. Edison Co. of N.Y.* (*Indian Point*, Units 1 & 2), CLI-01-08, 53 NRC 225, 228-30 (2001). Rather than deferral, the license transfer rules allow petitioners to submit late-filed issues, where appropriate. See 10 C.F.R. § 2.1308(b). Indeed, the Commission has held that this rule, rather than a stay, is “the best means for handling newly arising issues” from collateral proceedings. *Indian Point 2*, CLI-01-08, 53 NRC at 229. The Commission in the past has also reviewed and approved transfers that subsequently were not completed. See *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999); *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit No. 1); Order Approving Transfer of License and Conforming Amendment, 64 Fed. Reg. 60,241 (Nuclear Regulatory Comm’n Nov. 4, 1999).

In sum, the motion to dismiss and the alternative request for a stay should be denied. Commission precedent as well as public policy dictate that the NRC continue its review of the proposed license transfer application. The NRC is well-equipped to condition any transfer consent on PG&E obtaining the necessary court and regulatory approvals for the Plan.

2. *PG&E’s Plan Continues To Be Viable Before the Bankruptcy Court*

Notwithstanding the assertions of the CPUC regarding the prospects for confirmation of the Plan by the Bankruptcy Court, PG&E’s Plan remains viable and PG&E is continuing to aggressively pursue confirmation. The Plan has widespread support and, in the

five months since it was filed, has made substantial progress toward confirmation. Among other things, it has garnered the support of the Official Creditors Committee, the Senior Debtholders and numerous other creditors. The two major credit rating agencies, Moody's and Standard & Poor's, have reviewed the Plan and determined that, if implemented as proposed, and within the time frame proposed, the Plan would produce companies capable of issuing senior debt with investment-grade ratings.

On February 7, 2002, the Bankruptcy Court issued a ruling in which it rejected arguments of the CPUC and the State of California that the Plan is invalid on its face and cannot be confirmed because it relies on the preemption of state law. *In re Pacific Gas & Elec. Co.*, No. 01-30923DM (Bankr. N.D. Cal. Feb. 7, 2002). It held that, while the Bankruptcy Code does not provide "a wholesale unconditional preemption of numerous laws," "the Plan *could be confirmed* if [PG&E and PG&E Corporation] are able to establish with particularity the requisite elements of implied preemption" and the Plan is amended to eliminate elements that conflict with state sovereign immunity. *Id.*, slip op. at 3 (emphasis added). The Bankruptcy Court also concluded that the Bankruptcy Code did not give "absolute veto power to the State and the [CPUC]." *Id.*, slip op. at 27 n.17. Significantly, the court also expressly rejected CPUC and State arguments that PG&E and its parent are "abusing the bankruptcy process to escape the [CPUC's] jurisdiction," holding that "[u]sing bankruptcy reorganization to move from state regulation to federal regulation is not necessarily improper." *Id.*, slip op. at 31-32.

Accordingly, PG&E and PG&E Corporation may now file a revised Disclosure Statement for purposes of disclosing to creditors how enforcement of state laws barring the disaggregation contemplated by the Plan "would be an 'obstacle to the accomplishment and execution of the full purposes of the bankruptcy laws.'" *Id.*, slip op. at 32. (citation omitted).

The Bankruptcy Court also established an expeditious schedule for the CPUC to file a term sheet to support its request that the Bankruptcy Court consider letting it file an alternate plan, and for PG&E to respond.⁵

In conclusion, the February 7, 2002 Bankruptcy Court decision allows PG&E to continue pursuing confirmation of its Plan on an expeditious basis. While PG&E is revising the Plan and Disclosure Statement in accordance with the decision, PG&E does not expect that the revisions to the Plan or Disclosure Statement will affect issues before the NRC. The Commission's continued consideration of the license transfer application is necessary to assure timely implementation of the Plan, and the request for dismissal or deferral should be rejected.⁶

C. CPUC's Request for a Subpart G Hearing Should Be Denied

The CPUC also requests that the Commission hold a formal hearing on any admissible issue (there are none, as discussed below) under Subpart G hearing procedures rather than Subpart M. However, a motion for a Subpart G proceeding is expressly prohibited under 10 C.F.R. § 2.1322(d). *Indian Point 3*, CLI-00-22, 52 NRC at 290; *Vt. Yankee Nuclear Power Corp.*

⁵ The CPUC filed a term sheet for its alternative plan on February 13, 2002. PG&E will be responding to that term sheet on February 21, 2002.

⁶ The Renewed Motion should also be denied.

(Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162 (2000) (“Vermont Yankee”).⁷

In an attempt to circumvent this clear prohibition, the CPUC requests a waiver of the Subpart M regulations pursuant to 10 C.F.R. § 2.1329, due to alleged “special circumstances concerning the subject of the hearing.” (Pet. at 58-59.) However, because the CPUC’s request for waiver of the Subpart M regulations fails to meet the requirements of Section 2.1329 in either form or substance, that request too should be denied.

Section 2.1329 provides, in pertinent part:

- (a) A participant may petition that a Commission rule or regulation be waived with respect to the license transfer application under consideration.
- (b) The sole ground for a waiver shall be that, because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted.
- (c) Waiver petitions shall specify why application of the rule or regulation would not serve the purposes for which it was adopted and shall be supported by affidavits to the extent applicable.

The CPUC’s request does not comply with the procedural requirements of Section 2.1329. The CPUC does not explain with any specificity, in an affidavit or otherwise, why the “special

⁷ 10 C.F.R. 2.1322(d) provides (emphasis added):

The Commission, on its own motion, or in response to a request from a Presiding Officer other than the Commission, may use additional procedures, such as direct and cross-examination, or may convene a formal hearing under subpart G of this part on specific and substantial disputes of fact, necessary for the Commission’s decision, that cannot be resolved with sufficient accuracy except in a formal hearing. The staff will be a party in any such formal hearing. *Neither the Commission nor the Presiding Officer will entertain motions from the parties that request such special procedures or formal hearings.*

circumstances” of this case would be more appropriately addressed using Subpart G procedures, particularly given that Subpart M procedures were expressly adopted for transfer cases.

The Commission and its administrative boards have in the past applied similar criteria related to the showing a petitioner must make to establish a prima facie case of “special circumstance.” First, “the circumstances alleged must be unique to the particular facility at issue.” *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Facility), LBP-98-7, 47 NRC 142, 238 (1998) (“PFS”); see *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-653, 16 NRC 55, 72-74 (1981). Second, as reflected in the regulation, the petitioner must show that application of the rule will not serve the purposes for which it was adopted. *PFS*, LBP-98-7, 47 NRC at 239; see *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 235 (1989); *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-06, 49 NRC 201, 217 n.8 (1999) (“Seabrook”). Third, the petitioner must show that the circumstances involved are “unusual and compelling” such that it is evident from the petition and other allowed papers that a waiver is necessary to address the merits of a ‘significant safety problem’ relative to the rule at issue.” *PFS*, LBP-98-7, 47 NRC at 239. Stated another way, the petitioner must establish that the issue raised is a significant safety problem. The CPUC has not made any such showing.

In any event, “special circumstances” do not exist in this case. The Subpart M procedures were established for precisely the present type of application. Given the strong public interest in PG&E’s timely implementation of the Plan and emergence from bankruptcy, the expedited Subpart M procedures should be applied in this case, just as in any other license transfer case. Compare *Indian Point 3*, CLI-00-22, 52 NRC at 290-91; *Indian Point 2*, CLI-01-19, 54 NRC at 130 (observing that the Subpart M rules cover *all* license transfer issues).

Furthermore, as discussed below, the CPUC is in reality attempting to engage the NRC in matters that are already, and more appropriately, before the Bankruptcy Court and FERC. The gravity that the CPUC assigns to these matters does not present special circumstances for the NRC. These matters remain, regardless of their perceived importance, inappropriate for a Subpart G hearing at the NRC, and in fact should be expeditiously dismissed in accordance with Subpart M. The CPUC's request for a Subpart G hearing should be denied.

D. CPUC's Proposed Issues

A review of the issues proposed by the CPUC for hearing compels a conclusion that the CPUC has failed to set forth a material issue of law or fact within the scope of the proposed license transfer or within the scope of the NRC's jurisdiction. None of the proposed issues presented by the CPUC are appropriate for litigation at the NRC. *See* 10 C.F.R. §§ 2.1306(b)(2) and 2.1308(a)(4).

1. *Transfer of Nuclear Decommissioning Trusts*

a. NRC Jurisdiction to Authorize the Assignment

The CPUC asserts that the license transfer should not be approved by the NRC because PG&E's plan, as part of the Plan before the Bankruptcy Court, is to transfer to Nuclear the beneficial interest in those portions of PG&E's Nuclear Decommissioning Trust ("Trust") associated with DCP. The CPUC asserts, as it has in other proceedings, that the Trust includes CPUC jurisdictional trusts, and that the proposed transfer of the beneficial interest may not be lawfully approved. (Pet. at 12-14.) In support of this proposition, the CPUC offers the following bases: (1) the NRC does not have direct jurisdiction over the Trust, and accordingly, cannot authorize the assignment; (2) CPUC approval is required to transfer the beneficial interests in the Trust; (3) the assignment of the beneficial interest would not be in the interest of the ratepayers;

and (4) the proposed assignment will create “serious difficulties and potential inequities” because of impracticalities in segregating the Trust assets as between DCPD and Humboldt Bay. (Pet. at 13.)

PG&E’s license transfer application addresses the aspects of the Plan related to the assignment to Nuclear of the beneficial interest in the Trust associated with DCPD. As it pertains to DCPD, the Trust includes a CPUC jurisdictional qualified trust and a FERC jurisdictional qualified trust. In connection with confirmation of the Plan, PG&E is seeking an order from the Bankruptcy Court, pursuant to Section 1142(b) of the Bankruptcy Code (11 U.S.C. § 1142(b)), compelling the CPUC to approve the transfer of the beneficial interest in the CPUC jurisdictional trust associated with DCPD to Nuclear or, in the alternative, deeming such approval to have been granted by the CPUC. *See* Application at 11, and Application, Enclosure 1 (Plan) at 56.⁸ In addition, to the extent FERC deems the transfer of the beneficial interest in the FERC jurisdictional qualified trust to be within its jurisdiction, PG&E is seeking FERC approval of the assignment under Section 203 of the Federal Power Act, 16 U.S.C. § 824b.

In general, the merits of the CPUC’s argument related to PG&E’s authority to assign the Trust are before the Bankruptcy Court and FERC. The CPUC contends here that the NRC lacks jurisdiction to authorize assignment of the beneficial interest in the Trust. However, PG&E is not seeking NRC authorization to assign the beneficial interest in the Trust. That authorization is being requested of the Bankruptcy Court and, to the extent necessary, FERC.

⁸ With respect to the CPUC jurisdictional trust, the assignment of the beneficial interest to Nuclear will not supplant the lawful authority of the CPUC or any other agency with respect to oversight of the trust. PG&E is seeking an order from the Bankruptcy Court to compel the CPUC approval of the transfer of the interest, but will not be asking the Bankruptcy Court to remove the CPUC from the CPUC jurisdictional trust.

The CPUC is contesting the proposed assignment in those forums. This is not a matter, therefore, that the NRC needs to decide.

PG&E's license transfer application at the NRC *assumes* the assignment of the beneficial interest to Gen or Nuclear will be authorized, and demonstrates that the prepaid funds that would be transferred will meet NRC requirements for decommissioning as established by 10 C.F.R. § 50.75(c). *See* Application at 11; *see also* Application, Enclosure 9. The CPUC does not meaningfully challenge the sufficiency of the showing in the transfer application with respect to the adequacy of funding to meet NRC requirements. The NRC can, as it has in the past, condition its transfer approval on the transfer of the requisite decommissioning funding amount. *See, e.g.,* GPU Nuclear, Inc. (Three Mile Island, Unit No. 1), Order Approving Transfer of License and Conforming Amendment, 64 Fed. Reg. 19,202, 19,203-04 (Nuclear Regulatory Comm'n Apr. 19, 1999). The CPUC does not raise a valid issue for an NRC hearing.

b. CPUC Approval to Transfer the Beneficial Interest

The CPUC next cites the Master Trust Agreement related to the requirement for CPUC approval of a transfer of CPUC jurisdictional funds, and therefore argues yet again that the beneficial interest in the CPUC qualified decommissioning trust cannot be transferred without the authorization of the CPUC. (Pet. at 15-16.) However, as discussed above, this issue is squarely before the Bankruptcy Court given PG&E's request for a ruling from the Bankruptcy Court that the CPUC's consent to the transfer shall not be required. The NRC cannot authorize the transfer of the interest and is not being asked to do so. Likewise, the NRC cannot review any eventual ruling of the Bankruptcy Court. The NRC may simply condition its transfer consent on receipt of the necessary approvals and should not accept this as an issue appropriate for litigation at the NRC.

c. Assignment of Interests in the Trusts and the Public Interest

The CPUC next alleges that the transfer of the beneficial interest in the Trust would not be in the public interest. (Pet. at 17-19.) Here again, the CPUC is raising an issue it has raised in another forum (FERC) regarding the proposed transfer of the interest in the Trust. Notwithstanding that this is not an issue for NRC review, the arguments offered by the CPUC are baseless.

In addressing this matter at FERC, PG&E has demonstrated that assignment of PG&E's current beneficial interest in the portions of the FERC jurisdictional trust associated with DCPD is an essential element of the Plan because it is necessary to permit Gen and Nuclear to become the licensees for the plant under NRC regulations, and that an assignment is consistent with the public interest and, in fact, is in the public interest. *See Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,124, 61,347-48 (1999); *see also Baltimore Gas & Elec. Co.*, 90 FERC ¶ 62,222, *reh'g denied*, 92 FERC ¶ 61,043 (2000) (holding that the entirety of a proposed intra-corporate asset transfer, including the transfer of a decommissioning trust fund, was consistent with the public interest and authorizing the proposed transaction under Section 203).⁹ As addressed at FERC, there has been no showing that the assignment will create a post-reorganization regulatory gap or that there will be any loss of effective regulation.

The CPUC speculates in its current NRC Petition that a non-utility licensee such as Gen and/or Nuclear will be "less reliable and less trustworthy" in maintaining the decommissioning fund, particularly because that entity will not be subject to CPUC oversight. (Pet. at 19.) No facts, however, are offered to support the conclusory and speculative statement

⁹ In this regard, PG&E has clearly stated that Nuclear will be obligated to return to PG&E for refund to its customers any decommissioning funds unexpended when the decommissioning of DCPD is complete.

that Gen and/or Nuclear would not be trustworthy or reliable. No meaningful challenge to Gen's financial qualifications is made, or to the adequacy of the showing in the application with respect to the level of prepaid decommissioning funding to be provided to meet NRC requirements. Use of the decommissioning funds in the Trust will continue to be limited to decommissioning by the terms of the Trust itself. *See* Application at 11. The use of the Trust funds will also remain subject to NRC requirements regarding use and NRC oversight. *See generally* 10 C.F.R. §§ 50.75, 50.82(a).¹⁰

In sum, the CPUC has failed to provide any basis for its conclusory allegation that the transfer of the beneficial interest in the Trust would not be in the public interest. This issue should be rejected as a basis for an NRC hearing.

d. Alleged Impracticalities of Segregating the Trust Assets

PG&E's decommissioning Trust (including both CPUC jurisdictional trusts and FERC jurisdictional trusts) encompasses funds to cover decommissioning costs for both DCPD and the shutdown Humboldt Bay Power Plant, Unit 3 ("Humboldt Bay"). In the DCPD license transfer application, PG&E explained that PG&E would continue to be the owner and the licensee for Humboldt Bay, and would retain its interest in the Trust with respect to funds collected for the purpose of decommissioning Humboldt Bay. All of the funds in the Trust associated with Humboldt Bay will be segregated from the DCPD funds. CPUC alleges, however, without basis, that it would be "unreasonable and impractical" to allocate the Trust into

¹⁰ In license transfer cases, the NRC has also routinely imposed license conditions to ensure the proper use and maintenance of decommissioning funding. *See, e.g.*, Power Auth. of N.Y. (Indian Point Nuclear Generating Unit No. 3); Order Approving Transfer of License and Conforming Amendment, 65 Fed. Reg. 70,843, 70,844 (Nuclear Regulatory Comm'n Nov. 28, 2000). Similar conditions would be included in PG&E's proposed amendment of the Master Trust Agreement.

separate components for DCPD and Humboldt Bay. (Pet. at 19-21.) This argument is patently baseless.

The CPUC has historically authorized decommissioning trust contributions by facility; *i.e.*, DCPD Unit 1, DCPD Unit 2, and Humboldt Bay. When contributions have been collected by PG&E from the ratepayers, those contributions have been accounted for by facility and unit and investments are made on a unit-specific basis. The DCPD license transfer application specifically includes the “segregated” values of the funds associated with each unit. *See* Application at 11, and Application, Enclosure 9. The CPUC has not identified any practical difficulties with this segregation and consequently has not shown that a genuine dispute exists with respect to the issue.

In addition, the CPUC seeks a “detailed study” of the scope of the decommissioning effort required for each facility. (Pet. at 20.) However, with respect to DCPD, this assertion requests action by PG&E that would exceed NRC decommissioning funding requirements. The NRC has established a comprehensive regulatory scheme governing decommissioning funding. Those regulations permit, in the first instance, the use by licensees of a generic algorithm to establish reasonable decommissioning funding levels during plant life. *See* 10 C.F.R. §§ 50.75 (b)-(c).¹¹ The regulations do *not* require site-specific cost estimates, such as are demanded by the CPUC, until two years following plant shutdown. *See* 10 C.F.R.

¹¹ To demonstrate the continued satisfaction of the generic formula funding levels, PG&E submitted decommissioning funding status reports to the NRC on March 31, 1999, and March 30, 2001. These reports, filed in accordance with 10 C.F.R. § 50.75(f)(1), address the status of decommissioning funding for both DCPD and Humboldt Bay. DCPD funding status is addressed by comparison to the generic formula amount. Site-specific cost estimates are also referenced for comparison purposes with respect to DCPD, although not required under NRC regulations.

§ 50.82(a)(8)(iii).¹² Significantly, the NRC has found that these mechanisms provide reasonable assurance that decommissioning funds will be available when needed and thereby provide adequate protection of the public health and safety. *See* Final Rule, General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,030-31 (June 27, 1988); *see also* Final Rule, Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278 (July 29, 1996) (clarifying and updating the 1988 decommissioning funding rule).

In sum, the CPUC assertions are no more than a frontal assault on NRC regulations, and it is well settled that a petitioner in an individual adjudication may not challenge generic regulations. *Indian Point 3*, CLI-00-22, 52 NRC at 303; *Vermont Yankee*, CLI-00-20, 52 NRC at 165-66; *Seabrook*, CLI-99-06, 49 NRC at 217 n.8. Consequently, the CPUC has not presented a litigable issue within the scope of a license transfer proceeding.

2. *Financial Qualifications*

The CPUC next claims that, under the proposed Master Power Purchase and Sale Agreement Between Gen and Reorganized PG&E (the “PSA”), Gen will be unable to satisfy the Commission’s financial assurance requirements at 10 C.F.R. § 50.33(f). The CPUC bases this assertion on “serious flaws” that it perceives in the PSA. (Pet. at 21.) This proposed issue, however, is completely lacking in any basis and, in any event, is in reality merely a front for the CPUC’s attempt to raise issues beyond the scope of NRC jurisdiction. PG&E has submitted the PSA to FERC for acceptance as a market-based rate schedule under Federal Power Act Section

¹² Prior to the submittal of a site-specific cost estimate under 10 C.F.R. § 50.82(a)(8)(iii), a licensee is required to provide additional information concerning costs in only two contexts, neither of which are required at this point in the operating life of DCP, nor entail a detailed study as sought by the CPUC. The first does not occur until at or about five years prior to shutdown when a “preliminary” cost estimate is required. 10 C.F.R. § 50.75(f)(2). The second is not required until two years following plant shutdown, and

205, 16 U.S.C. § 824d. The CPUC’s arguments go to the acceptability of the economic terms of the PSA — which will be determined by FERC, not by the NRC. As discussed in PG&E’s FERC filing under Section 205, the use of market-based rates and a long-term bilateral contract, such as the PSA, advances FERC’s policies for stabilizing prices and increasing supply, and is consistent with FERC policies for creating viable markets.

a. Financial Viability of Gen

In the license transfer application, PG&E supplied financial information as required for a non-utility applicant, pursuant to 10 C.F.R. § 50.33(f). *See also* NUREG-1577, Rev. 1, “Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance” (2001). This includes a projection for Gen of total annual costs and revenues for each of the first five years of facility operation. *See* 10 C.F.R. § 50.33(f)(2). The financial qualifications showing demonstrates Gen’s viability and meets all applicable NRC requirements. PG&E recognizes that the showing of Gen’s financial projections is premised on the terms of the PSA. Indeed, the PSA is an essential component of the Plan before the Bankruptcy Court and is a linchpin of the Plan. This does not, however, make Gen unqualified, as the CPUC seems to argue. The NRC has plenary authority to condition the license transfer approval on any aspect of the PSA that it deems relevant to the transfer, or on any aspect of the financial qualifications showing made by PG&E in the transfer application.¹³

that involves an “estimate of expected costs” with the filing of a post-shutdown decommissioning activities report. 10 C.F.R. § 50.82(a)(4)(i).

¹³ To the extent the CPUC would require further financial assurance, its argument must be rejected, as NRC rules do not mandate supplemental funding. *Indian Point 3*, CLI-00-22, 52 NRC at 299-300; *see Vermont Yankee*, CLI-00-20, 52 NRC at 175, (citing *Oyster Creek*, CLI-00-06, 51 NRC at 205). Because the adequacy of supplemental funding is not an issue in an NRC license transfer review, this issue cannot constitute a basis for granting a hearing. *See* 10 C.F.R. § 2.1306(b)(2).

Fundamentally, the CPUC is challenging the validity of the PSA. As mentioned above, the PSA is subject to the approval of FERC under Section 205 of the Federal Power Act. The merits of the CPUC's challenge to the PSA are currently being addressed in that forum — as the CPUC openly acknowledges in its Petition. (Pet. at 22 (“The CPUC is currently attempting to thwart this scheme in a motion contesting PG&E’s Federal Power Act Section 203, 204, and 205 filings with FERC, as well as before the Bankruptcy Court”).) As discussed above, the CPUC argues that “the pricing, terms and conditions of the PSA are not just and reasonable, and thus, may not be approved by FERC.” (Pet. at 24.) That issue, however, is clearly beyond the scope of the NRC’s jurisdiction and thus cannot constitute the basis for a Subpart M hearing. *See Gulf States Utils. Co.* (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, 43-44 (1994).

b. The Proposed PSA Rates

The CPUC next asserts, more specifically, that the rates in the proposed PSA are “unjust and unreasonable to reorganized PG&E and its retail customers who will foot the bill.” (Pet. at 24.) The CPUC goes on to outline its position on: comparison of the proposed PSA rates to other retail rates (Pet. at 25-28); the validity of PG&E’s benchmark analysis (Pet. at 29-38); and PG&E’s market power analysis (Pet. at 38-40). These arguments are, of course, outside the scope of the NRC license transfer review and beyond the scope of the NRC’s jurisdiction. They are quite plainly a rehash of the arguments being made by the CPUC before FERC and must be addressed in that forum. *See* Exhibits D-F to the Petition. FERC is the federal agency entrusted with the authority to determine the reasonableness of wholesale rates.

In any event, PG&E has responded to the CPUC’s challenge to the PSA in filings made at FERC. The CPUC has failed at FERC to present any evidence demonstrating that the PSA is unjust or unreasonable or that it is not in the public interest. As in the current NRC filing,

most of the CPUC's attacks on the PSA are, in essence, protests against the very nature of the proposed disaggregation transactions in general (to which PG&E has also responded at FERC in connection with the related Federal Power Act Section 203 approval). PG&E has supported its proposed PSA rate with a thorough and conservative benchmark analysis that is consistent with FERC precedent. That analysis amply justifies the price of the PSA.¹⁴ Accordingly, PG&E has requested FERC acceptance of the PSA as just and reasonable under Section 205.¹⁵

In sum, the CPUC's arguments related to the validity of the proposed PSA are simply attempts to draw the NRC into ongoing disputes currently before FERC. Not only are these issues beyond the scope of the NRC's license transfer review, the NRC is patently unable to fashion a remedy because the issues are beyond the scope of the agency's authority. Consequently, these issues may not serve as basis for a license transfer hearing.

3. The State of California's Regulatory Responsibilities

This proposed issue, inaccurately styled as a health and safety matter, asserts that the transfer of the DCPD licenses from PG&E to Gen and Nuclear would reduce California's regulatory responsibilities over nuclear power, to the detriment of the California citizenry. The CPUC claims that PG&E is "using the Bankruptcy Court, the NRC and FERC to dodge its responsibilities" under the California Public Utilities Code ("Code"), in a "direct attack on the

¹⁴ PG&E could append its responses to these FERC filings to this pleading. However, given the NRC's role, PG&E will not burden the Commission with that huge volume of paper.

¹⁵ The CPUC concludes in its argument to the NRC that only cost-of-service rates can be "just and reasonable." (Pet. at 40-41.) The generic argument for cost-of-service rates is also an issue for FERC. However, as is also discussed below, it has no factual basis as it relates to DCPD. Since a ratemaking settlement in 1988, and to the present time, DCPD has *not* been operating on cost-of-service rates. Rather, it has been operating safely and earning under a performance-based approach, with revenues based on a rate per kilowatt hour ("kwh").

authority of the State of California” to “regulate electrical utilities in the interest of the health and safety” of Californians. (Pet. at 44.) In addition, the CPUC cites to several Code sections for the proposition that the following California interests would be injured if the reorganization takes place as envisioned in the Plan: (1) “ensuring universal service and fair and just utility rates” (Pet. at 45); (2) “protecting financial integrity and dedication to service” (Pet. at 45-47); (3) “preventing the loss of in-state generation facilities” (Pet. at 47-48); (4) “preventing improper inter-company transactions” (Pet. at 48-49); (5) “preventing the misuse of the holding company structure” (Pet. at 49-50); and (6) “requiring utilities to share gains on sales with ratepayers” (Pet. at 50). The CPUC goes on to extol the praises of state regulation versus federal regulation in these areas. (Pet. at 51-52.) None of these issues, however, are properly raised before the NRC.

The NRC license transfer approval — only one of several regulatory approvals that will be required to fully implement the Plan — would not, in itself, change the regulatory role of the CPUC. The NRC license transfers are merely one step to implement the Plan. Any change in the role of the CPUC as a result of the approval of the Plan *by the Bankruptcy Court* would be an issue to be addressed to the Bankruptcy Court. Any issue related to a change in the CPUC role as a result of FERC’s approval of the transfer of FERC-jurisdictional assets must be raised at FERC. Indeed, the CPUC is making identical arguments in both of those forums and has merely appended the pertinent pleadings to its NRC Petition. *See* Exhibits A-F to the Petition.¹⁶

Furthermore, there is no basis for the argument that CPUC oversight is necessary for protection of the public health and safety with respect to radiological risks. That safety

¹⁶ Again, to save paper, PG&E is not submitting its own FERC filings to the NRC.

oversight role is reserved to the NRC. *See Pacific Gas & Elec. v. Energy Res. Comm'n*, 461 U.S. 190, 205-13 (“But as we view the issue, Congress, in passing the [Atomic Energy Act of 1954] . . . intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related concerns.”) (emphasis added). The NRC’s role extends to assuring the continuing financial qualifications of NRC licensees as that may relate to operational safety.¹⁷ As discussed above, premised on the Plan as proposed, including the PSA, Gen will meet NRC financial qualifications regulations. Gen will remain subject to NRC oversight with respect to continuing financial qualifications and the safe operation of DCP. In sum, the CPUC does not present an issue that is litigable in an NRC proceeding.

Other CPUC interests itemized in the Petition are clearly beyond the scope of an NRC license transfer proceeding, and — again — beyond the scope of NRC’s jurisdiction altogether. The NRC’s authority is limited by the Atomic Energy Act to the protection of the public health and safety and the common defense and security as they relate to the use of nuclear energy. The interests cited by the CPUC generally falls under the aegis of the economic regulators, not the NRC. *See, e.g., Gulf States Utils. Co. (River Bend Station, Unit 1)*, LBP-94-3, 39 NRC 31, 43-44 (1994) (rejecting a proposed contention concerning “interconnection and transmission provisions, rates for electric power and services, cost-sharing agreements, long-term and short-term planning functions, and similar, utility-related, operational agreements” as “utility functions that clearly lie within the jurisdiction of FERC or appropriate state agencies

¹⁷ *See generally* NUREG-1577, Rev. 1 “Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance” (2001).

that regulate electric utilities”). Similarly, CPUC’s arguments on the relative merits of CPUC versus FERC oversight are beyond the scope of NRC jurisdiction. NRC is unable to redress the CPUC’s concerns on these issues. Therefore, they should be rejected as bases for a hearing.

4. Alleged Public Safety and Welfare Concerns Related to the Proposed License Transfer

In a final category in which it attempts to engage the NRC’s interest, the CPUC at last styles its issues in the trappings of contentions that the public safety and welfare are threatened by the proposed license transfer. However, again the issues devolve to the fundamental CPUC complaint regarding the proposed disaggregation of PG&E’s businesses and the decreased CPUC oversight role. The CPUC claims that public health and safety will suffer due to the “deprivation of concurrent state jurisdiction over an NRC-regulated facility.” (Pet. at 53.) This generalized complaint does not equate to any real safety issue with a nexus to the proposed license transfer, nor is it based on any particular CPUC expertise.

More specifically, the CPUC raises concerns related to (1) the threat of terrorist attacks; (2) the transition from a cost-of-service to a market-driven rate base; and (3) the possible dissolution of the Diablo Canyon Independent Safety Committee (“DCISC”). (Pet. at 53-58.) All three of these alleged safety issues are beyond the scope of a license transfer proceeding. These arguments are clearly an attempt to cloak the CPUC’s core opposition to the Plan — the transfer of economic regulatory jurisdiction over DCCP from the CPUC to FERC — in public safety terms. This thinly veiled attempt to engage the NRC in a jurisdictional dispute being aggressively waged in another forum should not be countenanced. However, as discussed below, none of the alleged safety issues has any basis; for each, there is no connection to the proposed transfer actually before the NRC.

a. Terrorism

The CPUC contends that the NRC should not approve the proposed license transfer because “important safeguards to public health and safety will be lost” if CPUC no longer has concurrent jurisdiction over the facility in light of recent terrorist threats. (Pet. at 53.) However, there is no link drawn between hypothetical terrorist attacks on nuclear plants and the proposed license transfers. The CPUC has not presented any basis for an argument that the license transfers would in any way increase the risks associated with potential terrorist attacks on the facility. Moreover, the CPUC has not shown any basis for an argument that CPUC oversight would reduce that risk, that Gen is not financially viable, or that Gen’s financial condition would in any way bear on security issues.

Security is an ongoing operational issue which will remain whether or not the license is transferred, and is therefore beyond the scope of a transfer review. *See Oyster Creek*, CLI-00-06, 51 NRC at 212-13 (“A license transfer proceeding is not a forum for a full review of all aspects of current plant operation”); *see also Indian Point 2*, CLI-01-19, 54 NRC at 146-47 (rejecting a proposed contention regarding the plant’s emergency response plan as an issue relating to daily plant operations). The CPUC’s proposed issue is not relevant to the findings necessary to grant the license transfer application. *See* 10 C.F.R. § 2.1306(b)(2).

CPUC’s security-related concern also raises what is in reality a generic issue currently under review by the Commission. In a letter transmitting his October 16, 2001 response to questions regarding nuclear facility security, posed by Congressman Edward Markey, Chairman Meserve stated: “I, with the full support of the Commission, have directed the NRC Staff to thoroughly reevaluate the NRC’s safeguards and physical security programs. This reevaluation will be a top-to-bottom analysis involving all aspects of the Agency’s safeguards

and physical security programs.” Any new NRC security requirements that might result will be applied to DCPD in the same manner as any other NRC-licensed power plant.¹⁸ The Commission’s ongoing generic review is thus the appropriate vehicle for considering security-related concerns.

In sum, security issues fall outside the scope of an NRC license transfer review and this proposed issue must be rejected. It is well settled that proposed contentions concerning generic issues that are — or are about to become — the subject of rulemaking by the NRC should not be adjudicated in individual licensing proceedings. *See, e.g., Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 345 (1999); *PFS*, LBP-98-7, 47 NRC at 179; *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-93-1, 37 NRC 5, 29-30 (1993).¹⁹

b. Transition to a cost-of-service market

The CPUC again contends broadly that public safety will be negatively impacted by the “transition from a cost-of-service to a market-driven rate base.” In particular, the CPUC identifies two issues: (1) the plant will not be run safely at market-based rates, because DCPD management will attempt to reduce operating expenses; and (2) the “distant” relationship between Nuclear and its ultimate parent, PG&E Corporation, will result in a flow of profits from Nuclear to PG&E Corporation, while isolating the parent from responsibility for plant operations

¹⁸ Indeed, the PSA includes a Special Condition such that if Gen is required to incur material additional costs in connection with increased staffing or physical modifications to DCPD related to security, there will be a reasonable equitable adjustment to the PSA capacity charge for DCPD. *See* Application, Enclosure 7, at original sheet 51.

¹⁹ To the extent that CPUC’s security concerns constitute a challenge to 10 C.F.R. § 50.13, such a collateral attack on Commission regulations is also impermissible in a license transfer proceeding. *See, e.g., Vermont Yankee*, CLI-00-20, 52 NRC at 165-66 (citing *Seabrook*, CLI-99-06, 49 NRC at 217 n.8 (“a petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings”)).

and safety. CPUC is concerned that this structure “will allow the holding company to bankrupt [Nuclear] and avoid financial responsibility.” (Pet. at 54-55.)²⁰

The recurring CPUC argument that cost-of-service rates are preferable from a safety standpoint has in fact been previously considered by the NRC as a generic matter. The Commission does not presume that cost-of-service rates are essential to protect the public health and safety. *See generally* Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44,071 (Aug. 19, 1997). In that Policy Statement, the Commission made the determination — pending further experience — that its financial qualifications regulations are sufficient to assure safety for plants with market-based rates. *Id.* at 44,076.²¹

The CPUC’s argument is also baseless because it is not consistent with reality. As of the time the CPUC intervened in this proceeding, DCPD was not subject to cost-of-service ratemaking.²² Since a ratemaking settlement in 1988, and to the present time, DCPD has been operating safely and earning under a performance-based approach, with revenues based on a rate

²⁰ To the extent the CPUC challenges the propriety of transferring the NRC license to Nuclear because it is an LLC, that challenge is improper. The Commission has rejected similar challenges in prior license transfer adjudications. *See N. States Power Co.* (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Indep. Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 57 (2000) (“Monticello”); *Oyster Creek*, CLI-00-06, 51 NRC at 208.

²¹ The CPUC posits that it can “safely presume” that DCPD will “try to downsize its workforce” and will “probably increase its use of overtime.” (Pet. at 55.) CPUC fails to set forth any facts or expert opinion supporting this unfounded assertion. Moreover, for key positions necessary to safely operate a plant, the Commission has regulations in place requiring specific staffing levels and qualifications. *See* 10 C.F.R. § 50.54(m). Where a license transfer application does not suggest “any likelihood of a cost-driven lapse in compliance with NRC safety rules,” this type of proposed issue should be rejected. *See Oyster Creek*, CLI-00-06, 51 NRC at 209.

²² The CPUC has recently attempted to restore DCPD to cost-of-service ratemaking, but to date has not accomplished that goal.

per kwh. Notwithstanding this “lack” of a cost-of-service rate structure, PG&E has consistently maintained strong safety performance, as evidenced by the NRC’s own performance measures — in the past, the Systematic Assessment of Licensee Performance (“SALP”) indicators and now the performance indicator measures under the revised Reactor Oversight Process. DCPD has also consistently earned strong ratings in World Association of Nuclear Operators (“WANO”) peer reviews and Institute of Nuclear Power Operations (“INPO”) evaluations.²³

Finally, the issue raised by the CPUC lacks any basis that specifically challenges the financial qualifications information included in PG&E’s license transfer application. As discussed above, the showing in the application meets in all respects the NRC requirements and guidance documents related to financial qualifications. It simply is not enough for a hearing to assert a generalized challenge to an application without specifically engaging and disputing the information included in the application. *Dominion Nuclear Conn. Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC ___, 2001 WL 1563173, at *7 (December 5, 2001). In sum, CPUC’s “cost-of-service” argument does not present an issue appropriate for litigation in this license transfer proceeding.

c. Diablo Canyon Independent Safety Committee

The CPUC finally contends that the proposed license transfer will “spell the death knell” of the DCISC. The CPUC explains that the DCISC was established “as part of a settlement agreement arising out of the CPUC’s proceedings in connection with its approval of

²³ Moreover, the method of earning proposed under the PSA is actually more safety conservative than the current approach. The PSA decreases any hypothetical incentive for performance contrary to safety that may exist under a performance-based approach such as the one approved by the CPUC and currently utilized at DCPD. The PSA ties most earnings to portfolio availability, by tying the majority of revenues to capacity charges based on unit availability, whereas the approach currently in place ties earnings

DCPP.” It is an independent safety committee that reviews DCP operations with respect to safety, and makes recommendations to improve safety. (Pet. at 57.) However, the DCISC is not required by any NRC regulation or license condition.²⁴

At no point in its NRC license transfer application does PG&E propose to eliminate the DCISC. Rather, any argument regarding disbanding of the DCISC would be a matter between the CPUC and Gen. The DCISC is not a creature of NRC regulation and the NRC has no authority to fashion any relief in the matter. Because this proposed issue is beyond the scope of the present license transfer application, it should be rejected as a basis for hearing.

to kwh generated by DCP alone. *Compare* Final Policy Statement, Possible Safety Impacts of Economic Performance Incentives, 56 Fed. Reg. 33,945 (July 24, 1991).

²⁴ Quite apart from the DCISC, there is a Nuclear Safety Oversight Committee (“NSOC”) for purposes of safety oversight at DCP. As explained in the DCP Final Safety Analysis Report (“FSAR”) Quality Assurance Program, Section 17.2.3, there is a requirement for an independent review and audit function under the direction of the NSOC. NSOC function, composition, meeting frequency, quorum, responsibilities, authority and records are all covered in detail in American National Standards Institute (“ANSI”) N18.7-1976. Since the NSOC requirement is in Chapter 17 of the FSAR Update, any change would be controlled under 10 C.F.R. § 50.54(a).

IV. CONCLUSION

For the reasons set forth above, the CPUC's request for hearing and petition for leave to intervene should be denied. The CPUC's requests to dismiss the license transfer application or to stay this proceeding should also be denied.

Respectfully submitted,



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ELECTRIC COMPANY

Dated in Washington, District of Columbia
This 15th day of February 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
)
Pacific Gas and Electric Co.) Docket Nos. 50-275
) 50-323
(Diablo Canyon Power Plant,)
Units 1 and 2))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Name of Party: Pacific Gas & Electric Company


David A. Repka

Dated at Washington, District of Columbia
this 15th day of February, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Dated at Washington, District of Columbia
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Dated at Washington, District of Columbia
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

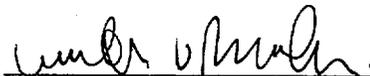
BEFORE THE COMMISSION

In the Matter of:)
)
Pacific Gas and Electric Co.) Docket Nos. 50-275
) 50-323
(Diablo Canyon Power Plant,)
Units 1 and 2))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Admissions: Supreme Court of California
Supreme Judicial Court of Massachusetts
Name of Party: Pacific Gas & Electric Company



William V. Manheim

Dated at Washington, District of Columbia
this 15th day of February, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
)
Pacific Gas and Electric Co.) Docket Nos. 50-275
) 50-323
(Diablo Canyon Power Plant,)
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CERTIFICATE OF SERVICE

I hereby certify that copies of "ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO CALIFORNIA PUBLIC UTILITIES COMMISSION PETITION FOR LEAVE TO INTERVENE, MOTION TO DISMISS APPLICATION, OR, IN THE ALTERNATIVE, REQUEST FOR STAY OF PROCEEDINGS, AND REQUEST FOR SUBPART G HEARING," and NOTICES OF APPEARANCE FOR DAVID A. REPKA, BROOKE D. POOLE, WILLIAM V. MANHEIM AND RICHARD F. LOCKE in the above captioned proceeding have been served as shown below by electronic mail, this 15th day of February 2002. Additional service by deposit in the United States mail, first class, has also been made this same day as shown below.

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Washington, DC 20555-0001

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U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

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U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff
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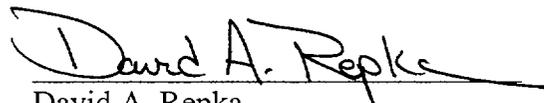
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