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USNRC

February 15, 2002
2002 FEB 21 PM 12: 08

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

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 PETITION FOR LEAVE TO
INTERVENE, COMMENTS, REQUEST FOR DEFERRAL, AND
ALTERNATIVE REQUEST FOR HEARING OF
TRANSMISSION AGENCY OF NORTHERN CALIFORNIA ET AL.

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, Comments, Request for Deferral or, in the Alternative, Request for Hearing (“Petition”) filed on February 6, 2002, by the Transmission Agency of Northern California (“TANC”), the M-S-R Public Power Agency (“M-S-R”), the Modesto Irrigation District (“MID”), the cities of Santa Clara (“Santa Clara”), Redding (“Redding”), Palo Alto (“Palo Alto”), and the Trinity Public Utility District (“Trinity”) (collectively, “Petitioners”). The 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”) consent to a proposed transfer of the operating licenses for the Diablo Canyon Power Plant, Units 1 and 2 (“DCPP”).

As discussed below, the Petitioners’ request to defer this proceeding — like other similar requests made in connection with this matter — should be denied. In addition, the

Petitioners' "comments" and "concerns" related to PG&E's license transfer application do not raise an issue sufficient for a hearing. While specific comments may be addressed as part of the NRC Staff review, the Petitioners' alternative request for a hearing and petition for leave to intervene should be denied.

II. BACKGROUND

A. The License Transfer Application

PG&E's November 30, 2001, NRC license transfer application is discussed in detail in response to the petitions filed on this docket by the California Public Utilities Commission ("CPUC") and the Northern California Power Agency ("NCPA"). In brief, PG&E requested the NRC's approval of the direct transfer of the DCPD operating licenses to support the pending reorganization and restructuring of the businesses and operations of PG&E. The reorganization and restructuring are based on a comprehensive Plan of Reorganization ("Plan") filed with the United States Bankruptcy Court. Implementation of the Plan will allow PG&E to emerge from bankruptcy. The Plan and the associated Disclosure Statement are currently before the Bankruptcy Court and require confirmation under Section 1129 of the Bankruptcy Code, 11 U.S.C. § 1129.

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 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 DCPD, will be contributed to Electric Generation LLC ("Gen") or to its

subsidiaries. Under the Plan, operating authority for DCPD will be transferred to Gen and ownership of DCPD will be assigned to a wholly-owned subsidiary of Gen, Diablo Canyon LLC ("Nuclear"). ETrans, GTrans and Gen will become indirect wholly-owned subsidiaries of PG&E Corporation. 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.

Because the restructuring involves the transfer of ownership and operating authority for DCPD from PG&E to Nuclear and Gen respectively, NRC approval under 10 C.F.R. § 50.80 is required. In accordance with 10 C.F.R. § 50.90, PG&E is also requesting approval of certain administrative amendments to conform the operating licenses to the transfers. In addition, with respect to the existing DCPD antitrust license conditions, no substantive changes are proposed, but Gen, ETrans, and PG&E will be named as the responsible licensees, in effect jointly and severally responsible for compliance with those conditions.

The license transfer application also specifically 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 DCPD. In addition, the application addresses the continued nuclear decommissioning funding assurance provided for DCPD based upon the prepayment funding alternative allowed by NRC rules.

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, allowing a 20-day opportunity for

interested persons to request a hearing. The notice also allowed 30 days for comments on the proposal. *See 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).* The Petitioners filed their Petition by first-class mail on February 6, 2002. It was received by PG&E on February 8, 2002.¹

Any hearing in connection with this proposed license transfer would be conducted in accordance with the NRC's hearing procedures at 10 C.F.R. Part 2, Subpart M, adopted in 1998 to expedite all NRC license transfer reviews. *See Final Rule, Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998).* 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
 - (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.

¹ Given that 10 C.F.R. § 2.1313(a) required that service be completed on PG&E by February 6, 2002, the Petitioners' filing was untimely. No good cause was stated. PG&E, however, is responding as if the Petition were properly filed on February 6.

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.

Consolidated 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. The Commission will not accept mere “notice pleading,” or the filing of “vague, unparticularized” issues, unsupported by alleged fact or expert opinion and documentary support. *Indian Point 3*, CLI-00-22, 52 NRC at 295; *see also N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-06, 49 NRC 201, 219 (1999) (“Seabrook”).

As discussed below, the Petitioners have demonstrated standing only with respect to issues related to the proposed treatment of the existing DCPD antitrust license conditions. Moreover, the specific “comments” and “concerns” identified by Petitioners related to these conditions do not involve any genuine dispute and do not rise to a level that would justify a

hearing. Those issues should be treated as comments in the ordinary course of the NRC Staff's review of the pending transfer application.

III. THE PETITION

A. Petitioners' Standing

In the Petition, Petitioners state that each is a market participant in the California energy and transmission markets and each depends, "to varying extent," on the use of PG&E's transmission systems and generation assets.² (Pet. at ¶ 19.) Petitioners group their stated

² TANC is a joint exercise of powers agency under the laws of the State of California, and is a "municipality" under the Federal Power Act. TANC states, among other things, that it has 300 megawatts ("MW") of firm bi-directional service over PG&E's transmission system. (Pet. at ¶ 3.) The Petition states that TANC has a "compelling interest in PG&E's rates, operations long-term planning procedures, protocols and agreements." (Pet. at ¶ 20.) M-S-R is also a joint powers agency under California law and is authorized, among other things, to "acquire, construct, maintain and operate facilities for the generation and transmission of electric power and to enter into contractual agreements for the benefit of any of its Members," (Pet. at ¶ 4) and states an interest in an allocation of TANC's transmission service rights which may be affected by this proceeding. (Pet. at ¶ 24.) Redding is a city which owns and operates a municipal electric utility system engaged in the generation, transmission, distribution, purchase and sale of electric power. Redding is a member of both M-S-R and TANC, and has a percentage share of TANC's entitlement to transmission service on the PG&E electric system. (Pet. at ¶ 5.) Its stated concern is chiefly rates for power under Contract 2948A (discussed below). (Pet. at ¶ 22.) Santa Clara is a city which owns and operates a municipal electric utility system, through which it is engaged in the generation, transmission, distribution, purchase and sale of electric power and energy. Santa Clara states, among other things, that it purchases a portion of its power and energy requirements, and certain power, transmission and coordination services from PG&E pursuant to certain contracts. (Pet. at ¶ 6.) Its stated interest is several contracts with PG&E that will be "impacted" by the "disaggregation of assets" contemplated in the reorganization. (Pet. at ¶ 21.) Palo Alto is a city, as well as a municipality under the Federal Power Act, which owns and operates a municipal electric utility system and engages in the generation, transmission, distribution, purchase and sale of electric power and energy at wholesale and retail. Palo Alto is a member of NCPA and TANC. (Pet. at ¶ 7.) Its stated interest is, among other things, access and use of certain of PG&E's transmission facilities and power purchases pursuant to Contract 2948A. (Pet. at ¶ 23.) MID is an irrigation district which undertakes both electric and water supply operations. MID owns and operates facilities for the generation, distribution, purchase and sale of electric power and energy, and is interconnected with PG&E's transmission system under an interconnection agreement

“interests” in eight general categories: (1) Ensuring compliance with the Stanislaus Commitments;³ (2) preservation of contractual rights to transmission services and (3) generation capacity; (4) ensuring the financial viability of all entities in the reorganized PG&E; (5) ensuring that the long term obligations of Gen are not “ignored and deferred until after the [Master Power Purchase and Sale Agreement Between Gen and PG&E (“PSA”)] expires;” (6) determining whether Gen’s obligations under the DCPD license will impair its financial ability to meet its obligations at other facilities; (7) determining whether sufficient decommissioning funding assurance is maintained; and (8) the viability of rates under the PSA. (Pet. at ¶ 19.)

PG&E does not contest Petitioners’ interest in this proceeding with respect to the license transfer application as it relates to the DCPD antitrust license conditions. However, with respect to antitrust issues, this NRC proceeding remains limited in scope. Specifically, the NRC’s antitrust review in this proceeding is limited to the *disposition* of the existing antitrust license conditions in connection with the proposed transfers. *See Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 466 (1999) (“Wolf Creek”). The NRC determined in *Wolf Creek* that, under the Atomic Energy Act, it is not required to conduct

(“IA”) on file with FERC as PG&E Rate Schedule No. 116. In addition, MID is a member of both M-S-R and TANC, and has an interest in a percentage share of TANC’s entitlement to capacity, and an allocation of TANC’s entitlement to transmission service on the PG&E transmission system. (Pet. at ¶¶ 8, 25.) Trinity is a public utility district, as well as a municipality under the Federal Power Act, that is authorized, among other things, to purchase and sell electric energy. Power is delivered to Trinity over certain PG&E transmission facilities in accordance with the terms of an integration/wheeling agreement known as Contract 2948A which, as noted, Petitioners contend could be affected by the reorganization. (Pet. at ¶¶ 9, 26.)

³ The Stanislaus Commitments, which resulted from a statement of commitments by PG&E to the United States Department of Justice in 1976, were included in the DCPD operating license. References to the Stanislaus Commitments and the DCPD antitrust license conditions are substantively interchangeable.

new antitrust reviews in post-operating license transfer cases. *Id.* at 459. The NRC subsequently amended its rules to clarify its practice in this area. *See* Final Rule, Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649 (July 19, 2000) (amending 10 C.F.R. §§ 2.101(e), 50.42(b), and 50.80(b), such that antitrust information need be submitted only with an application for a construction permit or an initial operating license, and not for license transfer after an initial operating license has been issued).

To the extent Petitioners set forth issues styled as “health and safety issues,” such as financial qualifications or decommissioning funding assurance, the Petitioners do not have standing to intervene in this proceeding. Petitioners fail to allege any radiological or environmental harm to their interests; rather, their concerns center around the economic ramifications of the proposed reorganization. It has long been Commission practice to reject standing for petitioners asserting a pure economic injury, unlinked to any radiological or environmental harm. *See Int’l Uranium (USA) Corp.* (Receipt of Material from Tonawanda, N.Y.), CLI-98-23, 48 NRC 259, 265 (1998); *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm’n*, 194 F.3d 72 (D.C. Cir. 1999) (denying Envirocare’s petition for review because the NRC’s interpretation that competitors asserting economic injury do not demonstrate the necessary interest under the Atomic Energy Act is a permissible one). Moreover, economic interest as a ratepayer does not confer standing in NRC licensing proceedings. *See Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 n.4 (1983). Because Petitioners have not alleged any radiological or environmental harm to their personal or property interests, they do not have standing to address their concerns regarding issues other than the antitrust license conditions. Nevertheless, the “concerns” related to issues

other than antitrust fail to raise issues appropriate for a hearing in an NRC license transfer proceeding, as discussed further below.

B. Petitioners' Request for Deferral of the Proceeding Should be Denied

Like the CPUC and NCPA in separate filings, the Petitioners contend that PG&E's license transfer application is "demonstrably premature." The Petitioners request that the license transfer application be held in abeyance for the following reasons: (1) the Bankruptcy Court has not yet approved the Plan;⁴ (2) PG&E has not yet "secured (or sought) necessary state approvals;" (3) PSA requires approval from FERC, and could be rejected or substantially modified, in which case the financial projections on which the license transfer application is based will be "inaccurate at best;" and (4) certain service agreements have not yet been "solidified;" without those, it cannot be determined whether Gen will have the technical qualifications to operate the Plant, or, "if it does, how much it will cost [Gen] to do so."⁵ (Pet. at ¶¶ 41-44.) As is discussed further below, none of these reasons is sufficient to justify a deferral of the transfer application review or this proceeding.

As discussed in PG&E's answers to the CPUC and NCPA requests for deferral, the NRC license transfer application is premised on the Plan as it is currently proposed. PG&E has requested that the NRC review the transfers that would be required to implement the specific

⁴ Petitioners raise this issue again as a component of their list of "concerns." (Pet. at ¶ 38C ("the pending review of the [Plan], or components thereof, by the Bankruptcy Court, [the Federal Energy Regulatory Commission ("FERC")], CPUC, [the Securities and Exchange Commission] and [the Internal Revenue Service] create a shifting sand foundation on which to make any decision regarding the license application.")) PG&E is treating this ripeness "concern" as part and parcel of the request for deferral, rather than as a potential hearing issue or comment.

⁵ The issue of Gen's technical qualifications is also discussed further below in connection with the Petitioners' "concerns."

currently pending 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 approval of the transfers, as it considers appropriate, on (a) PG&E obtaining the other required approvals (including the Bankruptcy Court and FERC approvals), and/or (b) confirmation of specific elements of the Plan as may be relevant to the issues under review by the NRC (such as the PSA). Consequently, the NRC transfer application review need not — and should not — be deferred.

Moreover, as discussed in PG&E's response to the petitions and deferral requests of the CPUC and NCPA, notwithstanding any suggestions of the Petition the PG&E Plan continues to be viable before the Bankruptcy Court and PG&E is continuing to aggressively pursue confirmation. In response to the recent decision of the Bankruptcy Court,⁶ PG&E will amend the Plan and Disclosure Statement consistent with the Court's decision to disclose to creditors how enforcement of state laws and regulations to bar the disaggregation contemplated by the Plan would be an obstacle to the full purposes of the bankruptcy laws. This will allow the court to approve the Plan and Disclosure Statement and will allow PG&E to test preemption issues before the court at confirmation. The Plan has already achieved the confidence of creditors and investors necessary to its success, and is advancing through the judicial and administrative proceedings that are required for its confirmation.

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 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

⁶ *In re Pacific Gas & Elec. Co.*, No. 01-30923DM (Bankr. N.D. Cal. Feb. 7, 2002).

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; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-99-30, 50 NRC 333, 343-44 (“Nine Mile Point”); *Consol. Edison Co. of N.Y.* (Indian Point, Units 1 & 2), CLI-01-08, 53 NRC 225, 228-30 (2001). Indeed, the Commission in the past has reviewed and approved transfers that subsequently were not completed. *Wolf Creek*, CLI-99-19, 49 NRC at 441; 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 NRC’s continued consideration of the DCPD license transfer application is necessary to arrive at timely confirmation of the Plan. The request for deferral of the review should be denied. Commission precedent as well as public policy dictate that the NRC continue its review of the license transfer application. The NRC is well-equipped to condition its transfer consent on PG&E obtaining the necessary court and regulatory approvals in order to implement the Plan and proposed transfers.

C. Petitioners’ Comments and Proposed “Concerns”

The Petitioners style the bulk of their petition as “comments” and “concerns” and their proposals should be treated as comments under the Subpart M regulations. *See* 10 C.F.R. § 2.1305.⁷ In any event, PG&E substantively responds to each “comment” and “concern” that

⁷ Section 2.1305 provides, in pertinent part:

- (a) As an alternative to requests for hearings and petitions to intervene, persons may submit written comments regarding license transfer applications. The Commission will

has been raised as discussed further below. None of these matters raises a genuine dispute that would merit a hearing.

1. *Antitrust Comments*

a. Joint and Several Liability

The Petitioners are concerned because the proposed mark-ups of the DCPD licenses do not clearly state that PG&E, Gen, and ETrans would be “jointly and severally” responsible for compliance with the antitrust license conditions. (Pet. at ¶ 33.) To remedy this perceived problem, the Petitioners propose that the “joint and several” language that is in the Application (at 3) be added to the license itself to “clarify the status” of each party’s responsibility. This “concern” does not present a genuine dispute of material fact or law.

The NRC clearly has jurisdiction to enforce the antitrust license conditions against all entities listed on the license as entities responsible for those conditions, by virtue of their presence on the license. It is simply not necessary to have the “joint and several” language included in the license for the Commission to exercise this authority.⁸ In addition, PG&E’s

consider and, if appropriate, respond to these comments, but these comments do not otherwise constitute part of the decisional record.

⁸ The Commission has addressed a similar issue in an analogous context related to co-licensees’ obligations related to decommissioning funding. In its policy statement on deregulation, the Commission made the following statement with respect to co-owners of a facility, all of whom would be licensees listed on the NRC operating license:

The NRC recognizes that co-owners and co-licensees generally divide costs and output from their facilities by using a contractually-defined, pro rata share standard. The NRC has implicitly accepted this practice in the past and believes that it should continue to be the operative practice, but *reserves the right*, in highly unusual situations where adequate protection of public health and safety would be compromised if such action were not taken, *to consider imposing joint and several liability on co-*

proposed approach to the antitrust conditions in the license transfer application is consistent with a Stipulation that PG&E, NCPA, and Palo Alto have agreed to submit to the Bankruptcy Court as a settlement. The Stipulation includes the language regarding “joint and several” responsibility.⁹ In sum, the Petitioners have not submitted an issue in genuine dispute, and this proposed “concern” should be rejected as a basis for a hearing.

b. Possible Changes in Antitrust Obligations

The Application states, at page 13, “*In order to preserve as nearly as possible the current antitrust obligations, PG&E proposes to retain reorganized PG&E on the license with respect to antitrust conditions and to add ETrans as a licensee for those conditions, as PG&E’s successor with respect to the transmission system.*” (Emphasis added.) The Petitioners claim that the emphasized language “intimates” that PG&E’s antitrust obligations post-reorganization could differ from current obligations, and request that PG&E specify “in what fashions its obligations may change as a result of the reorganization.” (Pet. at ¶ 34.)

owners of more than de minimis shares when one or more co-owners have defaulted.

Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44,071, 44,074 (Aug. 19, 1997) (emphasis added). In these situations no “joint and several” language would be explicitly stated in the license in order to achieve the “joint and several” responsibility.

⁹ In the Stipulation, PG&E agreed that — quite apart from the NRC antitrust license conditions — the rights of NCPA and Palo Alto under the Stanislaus Commitments will be unimpaired and pass through the bankruptcy unaffected. The Stipulation provides that PG&E will assign to Reorganized PG&E, ETrans, and Gen a 1991 Settlement Agreement between it and NCPA, and that those entities will be jointly and severally responsible for the obligations under that agreement, including certain procedures for implementing the Stanislaus Commitments until January 1, 2050. The Stipulation also identifies which of the three businesses will have primary responsibility for arranging to provide each of the various services referred to in the Stanislaus Commitments. Therefore, although each entity will have joint and several responsibility, the eligible customers will know which entity is expected to arrange for each service.

Quite simply, PG&E does not propose that its antitrust obligations change in any way. The license transfer application does not propose any change in the substantive conditions. Rather, the proposed substitution of entities in the license transfer application is intended to retain the obligations under the antitrust license conditions exactly as they exist pre-reorganization.¹⁰ The arrangement proposed in the license transfer application will accomplish this without any diminution of PG&E's obligations, or of its ability to perform them. Consequently, the Petitioners have not presented a genuine dispute with regard to this proposed "comment."

c. "Firm Transmission" After Reorganization

Petitioners next comment that it is not clear that Reorganized PG&E can provide "firm transmission" after its reorganization, pursuant to its interconnection agreements. Petitioners request that PG&E be required to establish how it will provide "truly firm transmission" post-reorganization, either itself, or through Gen and/or ETrans. (Pet. at ¶ 35.)

This comment relates to an issue beyond the scope of the current NRC review. PG&E is not proposing to amend the license conditions and any dispute or lack of clarity that exists today with respect to the scope of an obligation will remain after the license transfer. The NRC in its *Wolf Creek* decision as discussed above specifically limited an antitrust review in the present context to dispositioning the existing antitrust license conditions; the NRC had no intent to conduct new antitrust reviews based on current conditions. *Wolf Creek*, CLI-99-19, 49 NRC at 459. Moreover, FERC remains the forum for the Petitioners to address the content of PG&E's interconnection agreements or the effect of a reorganization, as well as FERC open access

¹⁰ As also reflected in the Stipulation discussed above, the Stanislaus Commitments are unimpaired by the reorganization.

requirements, on PG&E's ability to provide "truly firm transmission." This is not an issue for the NRC license transfer review or for a Subpart M hearing.

d. Length of Time to Retain Antitrust Conditions

The Petitioners comment that, in the license transfer application, PG&E states that it will retain the DCPD antitrust license conditions "at this time." Petitioners believe PG&E should be required to state how long it intends to retain responsibility for the license conditions and describe the circumstances under which its responsibility may change. (Pet. at ¶ 36.) This "comment" does not present a genuine dispute that would merit a hearing.

PG&E has no plans to request that the NRC remove the antitrust conditions at this time. In any event, if and when PG&E or Gen should seek to modify or delete the antitrust conditions, the request would constitute a separate NRC licensing action. A license amendment application would be required. The Petitioners (and any other interested parties) would have an opportunity to comment and to seek a hearing at that time. *See* 10 C.F.R. §§ 50.90, 50.91. A genuine dispute does not exist with respect to this "concern;" consequently, it should be rejected as an issue for a Subpart M hearing.

2. *Other Concerns*

The Petitioners list several additional "concerns," ostensibly related to the public health and safety. However, as discussed above, the Petitioners lack standing to raise these health and safety concerns unrelated to their interests with respect to transmission services and the antitrust conditions. Accordingly, the Commission need not address these concerns in this forum. In any event, each "concern" is insufficient to constitute an issue for hearing because the Petitioners have failed to provide a basis demonstrating a genuine dispute. Indeed, Petitioners have not even attempted to meet the specificity and basis requirements of the Subpart M

regulations. Accordingly, the broad-brush concerns should be rejected as hearing issues. At most they should be left for NRC Staff consideration in its review of the pending application.

a. Financial Qualifications

Petitioners first express a concern that the rates for electricity to be locked in by the proposed long-term PSA between Gen and Reorganized PG&E “may be inadequate to meet Gen’s operating expenses and decommissioning expenses.” (Pet. at ¶ 38A.) Petitioners also state that the “lack of publicly available information regarding Gen’s projected expenses casts further doubts on Gen’s financial qualifications.” *Id.* This “concern,” however, fails to satisfy the NRC requirements for admissible issues in a license transfer proceeding. Petitioners fail to assert anything greater than a general challenge to the application without engaging any particular information therein; this is not enough to trigger a hearing. *Dominion Nuclear Conn. Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC ___, 2001 WL 1563173, at *7 (Dec. 5, 2001).

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). This financial qualifications showing meets all applicable requirements. Gen’s financial qualifications are premised on the PSA; indeed, the entire Plan is premised on approval of the PSA.¹¹ The Petitioners do not show in any way how the PSA would be inadequate.

¹¹ To the extent the Petitioners are concerned that there is insufficient financial qualifications data in the public domain, PG&E notes that it has asked that some of the data included in the license transfer application be withheld from public disclosure under

Uncertainty related to the PSA's regulatory status also does not create an issue for hearing. 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 license transfer application.

Moreover, to the extent the Petitioners are questioning the validity of the PSA, they raise an "issue" beyond the scope of NRC's jurisdiction. The PSA is subject to the approval of FERC under Section 205 of the Federal Power Act, 16 U.S.C. § 824d. The merits of the PSA are currently being challenged in that forum. In that forum PG&E has made a showing that the proposed PSA rate is just and reasonable. The NRC has no authority to fashion relief with respect to the terms of the PSA.

b. Contribution to the Decommissioning Trust Funds

Petitioners next state a concern that the application may be deficient because PG&E will change its method for meeting the NRC's decommissioning funding assurance requirements. Petitioners style the concern as follows:

Gen does not intend to contribute to the decommissioning trust funds. The assumption that the current funds in the decommissioning trusts will meet the decommissioning expenses without any additional contributions by Gen raises concerns. The CPUC's approval of contributions of \$24 million as recently as last year, raises concerns as to why contributions are no longer necessary. PG&E's filings with the CPUC and its decommissioning study for the Diablo units may also shed light on the actual expected level of decommissioning expenses, as opposed to the general regulatory minimums PG&E uses for comparison.

(Pet. at ¶ 38B.) As written, this concern does not set forth any facts or expert opinion supporting the intimation that decommissioning funding assurance requirements will not be met following

10 C.F.R. § 2.790. However, PG&E has made this proprietary commercial information available to NCPA and the CPUC under non-disclosure agreements.

the license transfer. Regardless, as discussed below, this issue does not establish a genuine dispute of material fact or law.

Decommissioning funding assurance for DCPD is currently provided by an external Nuclear Decommissioning Trust as authorized by 10 C.F.R. § 50.75(e)(1)(ii). As indicated in Enclosure 9 to the license transfer application, assuming the present value of the DCPD funds, plus credit for a contribution to the funds in 2002 as already approved through the CPUC ratemaking process, as well as a modest rate of return over the operating license term as allowed by the regulations, the decommissioning trusts are adequately funded to meet the NRC-mandated decommissioning obligations *without further contributions*. Put another way, PG&E will have collected, and will transfer to Gen, sufficient funds to demonstrate reasonable assurance of funding in accordance with the generic algorithm codified in NRC regulations. See 10 C.F.R. § 50.75(c); NRC Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" (1990). For purposes of meeting NRC requirements, contributions are no longer necessary after 2002 because the fund will be adequately *prepaid* in accordance with 10 C.F.R. § 50.75(e)(1)(i).¹² Moreover, NRC regulations do *not* require site-specific cost estimates, such as are suggested by Petitioners, from an NRC licensee until two

¹² That section provides, in pertinent part:

Financial assurance is to be provided by the following methods:

Prepayment. Prepayment is the deposit made preceding the start of operation into an account segregated from licensee assets and outside the licensee's administrative control of cash or liquid assets such that the amount of funds would be sufficient to pay decommissioning costs at the time termination of operation is expected.

The provision allows an NRC licensee to take credit for projected earnings on the prepaid funds using up to a 2 percent annual real rate of return through the decommissioning period.

years following plant shutdown.¹³ See 10 C.F.R. § 50.82(a)(8)(iii). In sum, the Petitioners' decommissioning funding "concern" does not equate to a genuine dispute of material fact or law.

c. Technical Qualifications

With respect to Gen's technical qualifications to be the operator of DCP, the Petitioners raise the following "concern:"

The arrangements for service contracts have not been made, and it is unclear if PG&E will transfer sufficient employees to Gen to provide the required technical qualifications to operate in accordance with the licenses.

(Pet. at 38D.) Petitioners, however, have not set forth any facts or expert opinion surrounding this issue, nor referenced any evidence indicating that PG&E, Gen, or Nuclear would take action contrary to NRC safety rules following the license transfer. For this reason, and because the technical qualifications of Gen will be equivalent to the present technical qualifications of PG&E, Petitioners have not presented a genuine dispute of material fact or law, and this concern should not be accepted by the Commission as a basis for a hearing.

The license transfer application reflects the following with respect to Gen's technical qualifications: (1) the management team from PG&E's current nuclear organization

¹³ Prior to the submittal of a 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 Petitioners. 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, as noted above, is not required until two years following plant shutdown, and 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). To the extent Petitioners' "concern" challenges the sufficiency of the NRC rules governing decommissioning funding assurance, the challenge is improper. 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; *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC, 151, 165-66; *Seabrook*, CLI-99-06, 49 NRC at 217 n.8.

will be transferred to Gen; these individuals have substantial nuclear experience and a proven record in nuclear plant operations; (2) the management and technical support functions will continue to conform to plant Technical Specifications (“TS”) and the DCPD Updated Final Safety Analysis Report (“UFSAR”); (3) concurrent with the license transfers, the current on-site organizations at DCPD will be transferred *intact* to Gen; (4) substantially all PG&E nuclear personnel in the existing DCPD nuclear organizations will become employees of Gen and will continue to be assigned to DCPD; and (5) the qualifications of nuclear personnel generally will not change as a result of the restructuring and license transfers because personnel qualification requirements presently defined in the plant TS and UFSAR will not be changed and will continue to be met. *See* Application at 7. Thus, all management and technical support functions necessary for the operator of DCPD to meet NRC technical qualifications, including provisions for qualified personnel, will be transferred from PG&E to Gen.¹⁴ In sum, Petitioners’ vague “concern” in the area of technical qualifications does not present a litigable issue, and should be rejected as basis for a hearing.

¹⁴ For key positions necessary to safely operate a plant, the Commission also has regulations in place requiring specific staffing levels and qualifications. *See* 10 C.F.R. § 50.54(m). As a general matter, plant staffing allegations are generally beyond the scope of a license transfer proceeding. The adequacy of staffing is an ongoing operational issue, which should be addressed via a Section 2.206 petition. *See Oyster Creek*, CLI-00-06, 51 NRC at 209 (“If a licensee’s staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then . . . the agency can and will take the necessary enforcement action to ensure the public health and safety”).

IV. CONCLUSION

For the reasons set forth above, Petitioners' request for deferral of PG&E's license transfer application should be denied. The alternative request for a hearing and petition for leave to intervene also should be denied.

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ATTORNEYS FOR PACIFIC GAS &
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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.)

(Diablo Canyon Power Plant,
Units 1 and 2))

Docket Nos. 50-275
50-323

CERTIFICATE OF SERVICE

I hereby certify that copies of "ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO PETITION FOR LEAVE TO INTERVENE, COMMENTS, REQUEST FOR DEFERRAL, AND ALTERNATIVE REQUEST FOR HEARING OF TRANSMISSION AGENCY OF NORTHERN CALIFORNIA ET AL." 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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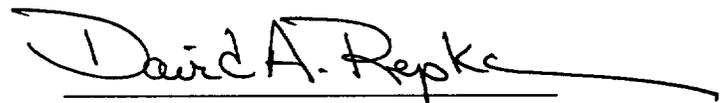
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