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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

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO CALIFORNIA PUBLIC UTILITIES COMMISSION RENEWED MOTION TO DISMISS APPLICATIONS OR, IN THE ALTERNATIVE, TO HOLD APPLICATIONS IN ABEYANCE

On February 11, 2002, the California Public Utilities Commission ("CPUC"), a petitioner to intervene in connection with this license transfer matter, filed a Renewed Motion to Dismiss Applications, or in the Alternative, Hold Applications in Abeyance, and Notice of Bankruptcy Court Ruling ("Renewed Motion"). Nothing in the NRC's procedures at 10 C.F.R. Part 2, Subpart M, appears to contemplate such a motion. Nonetheless, the CPUC takes the opportunity to reiterate and "renew" a Motion to Dismiss (or, in the alternative, to suspend) that it previously made in its February 5, 2002 petition to intervene with respect to this matter.

The CPUC's intervention petition, original Motion to Dismiss, and the Renewed Motion all relate to the application of Pacific Gas and Electric Company ("PG&E") for NRC consent to the transfer of the operating licenses for the Diablo Canyon Power Plant, Units 1 and 2 ("DCPP"). On February 15, 2002, PG&E answered the intervention petition and responded to the Motion to Dismiss (Answer of PG&E to CPUC Petition for Leave to Intervene, Motion to Dismiss Application or, in the Alternative, Request for Stay of Proceedings and Request for Subpart G Hearing ("Answer")). At that time, PG&E opposed the Motion to Dismiss and the

alternative request to hold the application in abeyance pending proceedings at the Bankruptcy Court.

In accordance with 10 C.F.R. § 2.1307(a),¹ PG&E herein responds to the Renewed Motion. In its Answer, PG&E previously demonstrated that nothing in the ongoing Bankruptcy Court proceedings warrants delay in the NRC's consideration of the DCPD license transfer application. The Renewed Motion fails, as did the prior Motion to Dismiss, to provide a basis in law or fact for the requested relief.

The Renewed Motion contends that the Bankruptcy Court decision issued on February 7, 2002, *In re Pacific Gas & Electric Co.*, No. 01-30923DM (Bankr. N.D. Cal. Feb. 7, 2002) ("February 7 Order"), renders PG&E's Plan of Reorganization ("Plan") "unconfirmable" and thereby "moot[s]" the November 30, 2001 Applications because they "flow" from the Plan. (Renewed Motion at 2-3.) However, the Bankruptcy Court's February 7 Order did *not* disapprove the Disclosure Statement or the Plan and does not require PG&E (and its Parent) to amend the Plan in any respect relevant to this proceeding. The Bankruptcy Court in the February 7 Order rejected the argument that express preemption is available, but invited PG&E and its Parent to amend the Disclosure Statement to "state in summary fashion the reasons why they believe it necessary for each of [specified laws and orders as discussed in the February 7 Order] to be preempted." February 7 Order at 40. Indeed, rather than finding the Plan "unconfirmable" (Renewed Motion at 3), the Bankruptcy Court stated that: "the court believes that the Plan could be confirmed if Proponents are able to establish with particularity the requisite elements of implied preemption. If the Disclosure Statement is amended consistent

¹ The CPUC filed the Renewed Motion by first class mail. There was no e-mail service. Accordingly, PG&E is filing this response on a schedule consistent with 10 C.F.R. §§ 2.1307(a) and 2.1314(c).

with this Memorandum Decision, the court will approve it and let the Proponents test preemption at confirmation.” February 7 Order at 3. Accordingly, PG&E and its Parent intend to amend their Plan and Disclosure Statement pursuant to the February 7 Order and proceed toward approval of the Disclosure Statement and confirmation of the Plan.²

Of particular importance to the NRC, the amendments required by the Bankruptcy Court do not — contrary to all the implications of the CPUC — affect the Plan as described in the DCPD license transfer application or the transfer consent PG&E is seeking from the NRC. The same consent under 10 C.F.R. § 50.80 will be required to effectuate the Plan, regardless of which specific state laws will be preempted and whether preemption is granted based on the doctrine of express or implied preemption. Nothing in the February 7 Order requires the NRC to delay, defer, or otherwise alter its schedule for considering the merits of PG&E’s application.³ The CPUC’s Renewed Motion alleging the existence of a procedural roadblock where none

² On February 21, 2002, PG&E submitted to the Bankruptcy Court its “Statement of Plan Proponents’ Intentions.” It advised the Court that PG&E and its Parent intend to seek an expedited interlocutory appeal of the order denying approval of their Disclosure Statement on the grounds that the Court erred in its determination that express preemption is not applicable to their Plan. However, PG&E also advised the Court that PG&E and its Parent will amend the Plan and Disclosure Statement and proceed with the solicitation of consents and confirmation of the amended Plan during the pendency of the interlocutory appeal.

³ The CPUC has also argued that delay is warranted because it had been granted the opportunity to present to the Bankruptcy Court a term sheet for an alternative plan, which it did on February 13, 2002. However, as illustrated by PG&E and Parent’s response to that term sheet, which was filed on February 20 with the Bankruptcy Court, the CPUC’s term sheet does not set forth the parameters of a feasible plan because there is at least a \$4.5 billion shortfall between its sources and uses of funds. In accordance with the February 7 Order, the Bankruptcy Court will hold a hearing on February 27, 2002, to consider these filings and to consider whether to permit the CPUC to file a competing plan. February 7 Order at 48-49.

exists is merely an effort to prevent a full and timely consideration of the NRC license transfer application.⁴

In particular, the CPUC argues again that the Bankruptcy Court's February 7 Order is "fatal" to the request for transfer of the beneficial interest in the CPUC jurisdictional Nuclear Decommissioning Trust associated with DCP. PG&E responded to this argument in its prior Answer. The February 7 Order is not in any way "fatal" to this aspect of the Plan. Entirely consistent with that order, PG&E will seek an order from the Bankruptcy Court compelling the CPUC to approve the transfer of the beneficial interest or, in the alternative, deeming such approval to have been granted. This element of the Plan is still very much alive at the Bankruptcy Court. The CPUC's opposition to the transfer of the beneficial interest is duly noted, but it should take that opposition to the forum in which it can be addressed. Meanwhile, the NRC can continue to review the DCP license transfer application and place conditions on any transfer consent as it considers necessary relative to the decommissioning trust.

⁴ Moreover, as noted in PG&E's Answer, it is well settled that the pendency of parallel proceedings before other forums is not adequate grounds to stay an NRC license transfer adjudication. *Power Auth. Of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point Unit 3), CLI-00-22, 52 NRC 266, 289 (2000); *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-99-30, 50 NRC 333, 343-44 (1999); *Consol. Edison Co. of N.Y.* (Indian Point, Units 1 & 2), CLI-01-08, 53 NRC 225, 228-30 (2001).

For the reasons set forth above, the Renewed Motion to dismiss the license transfer application or to stay this proceeding should also be denied.

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Dated in Washington, District of Columbia
This 25th day of February 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 RENEWED MOTION TO DISMISS APPLICATIONS OR, IN THE ALTERNATIVE, TO HOLD APPLICATIONS IN ABEYANCE" in the above captioned proceeding have been served as shown below by electronic mail, this 25th 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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