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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

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

INTRODUCTION

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"). On February 25, 2002, Pacific Gas and Electric Company ("PG&E") filed an Answer to the Renewed Motion, stating that nothing in the Nuclear Regulatory Commission's ("NRC") procedures appears to contemplate such a motion, and that the Renewed Motion fails to provide any basis in law or fact for the requested relief. Disregarding NRC procedural rules governing motions, the CPUC filed, on March 1, 2002, a Reply to the Answer of Pacific Gas & Electric Company to the CPUC's Renewed Motion to Dismiss Application ("Reply").<sup>1</sup> For the reasons set forth below, PG&E herein moves to strike

<sup>1</sup> The CPUC filed the Reply by first class mail and it was not received by counsel for PG&E in Washington, D.C. until March 11, 2002. Although Subpart M generally

the CPUC's Reply. PG&E also corrects certain misleading characterizations by the CPUC of developments in the proceeding at the Bankruptcy Court on PG&E's Plan of Reorganization ("Plan").

### DISCUSSION

NRC regulations at 10 C.F.R. Part 2, Subpart M, do not provide for replies to responses to motions. *See* 10 C.F.R. § 2.1325. Indeed, throughout Part 2, replies are generally not permitted without leave of the Secretary or presiding officer, as appropriate. *See* 10 C.F.R. §§ 2.730(c), 2.786(b)(3), 2.1016(c), 2.1237. This rule "puts a party on notice that its original motion should be exhaustive in support of and/or in explanation of the subject matter." *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), 1987 WL 383710, \*1 (Jan. 13, 1987). The CPUC has not requested leave to file a reply to PG&E's Answer.

Moreover, when filing for leave to file a reply, a party must demonstrate with specificity how it can contribute to the record. *See Curators of the Univ. of Mo.* (Byproduct License No. 24-00513-32; Special Nuclear Materials License No. SNM-247), LBP-91-14, 33 NRC 265 (1991). Not only is the CPUC's Reply in this case deficient as to format, it has, more importantly, failed to meet NRC requirements in substance. The Reply does not set forth any new or even different information that would contribute to the development of the record in this proceeding. Rather, the CPUC merely recycles the arguments already amply set forth in both its original and renewed motions to dismiss, and attempts to characterize the status of the

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contemplates electronic or same-day service, the CPUC apparently did not make any e-mail or expedited service.

Bankruptcy Court case.<sup>2</sup> For these reasons, this superfluous filing should be stricken from the record in this proceeding.

In any event, because the CPUC persists in mischaracterizing the nature of the proceedings currently before the Bankruptcy Court, PG&E is also compelled to clarify the record. Stated simply, nothing in the recent proceedings before the Bankruptcy Court warrants dismissal or delay of the proceedings before the NRC on the pending Diablo Canyon license transfer application. PG&E's Plan before the Bankruptcy Court is in fact proceeding apace.

As discussed in PG&E's answers filed in this proceeding on February 15 and 25, on February 7, 2002, the Bankruptcy Court held that PG&E's Plan could be confirmed if PG&E could make certain evidentiary showings justifying implied preemption of state law. *See In re Pac. Gas & Elec. Co.*, No. 01-30923DM, slip op. at 3 (Bankr. N.D. Cal. Feb. 7, 2002) (the "February 7 Order"). In addition, the Bankruptcy Court ordered the filing of a revised Disclosure Statement to set forth in greater detail the bases for implied preemption. February 7 Order, slip op. at 40-41. In accordance with that order, PG&E filed its amended Plan and Disclosure Statement on March 7, 2002.<sup>3</sup>

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<sup>2</sup> It appears to PG&E that the NRC is on the service list for the pertinent filings in the Bankruptcy Court proceeding. Consequently, the Commission is equipped to reach its own conclusions with respect to developments in that proceeding, and doubtless will determine whether it requires further information from the parties to the instant license transfer proceeding.

<sup>3</sup> In the February 7 Order, the Court stated that "the court believes that the [PG&E] 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 with this Memorandum Decision, the court will approve it and let the Proponents test preemption at confirmation.*" February 7 Order, slip op. at 3 (emphasis added).

As of February 27, the date of the hearing that is the focus of the CPUC Reply, the amended Plan and Disclosure Statement had not yet been filed; the filing date for those documents was established during that hearing. Nonetheless, in its Reply, in an apparent attempt to portray PG&E's Plan as "dead," the CPUC omits key facts about the current status of the bankruptcy proceeding. Specifically, the CPUC quotes from an article that appeared in the *Sacramento Bee* (rather than the official transcript of the hearing), in which Judge Montali is claimed to have stated that: "At the moment . . . there is no Plan." Reply at 3. This selective quotation is, at best, incomplete. It is an apparent reference to a comment made by Judge Montali during a discussion as to when PG&E's amended Plan and Disclosure Statement would be filed. As set forth in the official transcript of the hearing, Judge Montali's actual statement was as follows: "at the moment, there's no viable plan on the table in the court file. That being said, *don't worry about [it], that's just timing.*" Transcript at 110-11, *In re Pac. Gas & Elec. Co.*, Case No. 01-30923DM (Bankr. N.D. Cal.) (Feb. 27, 2002) ("February 27 Transcript") (emphasis added). The CPUC's truncated quotation and its assertion that "the bankruptcy court emphasized the fatal effect of its February 7 ruling on PG&E's plan of reorganization" (Reply at 3) is flatly inconsistent with the facts. *See* February 27 Transcript at 110-11. The "timing" lag referred to by Judge Montali at the February 27 hearing ended on March 7, 2002 with the filing of PG&E's amended Plan and Disclosure Statement.

Moreover, at the February 27 hearing, Judge Montali set the next steps for advancement of PG&E's Plan. He directed that objections to the amended Disclosure Statement would be due on March 19, and scheduled a hearing to be held on March 26, consistent with the expedited schedule urged by PG&E. February 27 Transcript at 163. The March 26 hearing is to be held for the purpose of considering any objections to the refiled Disclosure Statement. The

Disclosure Statement could be approved during that hearing.<sup>4</sup> Each of these procedural steps — hearing objections to a disclosure statement, amending it, refiling an amended disclosure statement, hearing objections again and eventually approving the amended disclosure statement — is a routine part of the ordinary course of events necessary to confirm a plan of reorganization. The CPUC’s efforts to seize on normal transitory events and selective quotations as a cause for the NRC to delay or dismiss the pending license transfer application should be disregarded.

At the February 27 hearing, Judge Montali also determined that the CPUC would be permitted to file an alternative plan if it did so by April 15. Recognizing that the CPUC’s previously filed term sheet presented significant unresolved issues (*e.g.*, an apparent revenue shortfall, a failure to explain how the CPUC’s approach would restore PG&E to investment grade credit ratings, and questions of whether the CPUC would be bound to carry out a plan that relied on specified future regulatory treatment),<sup>5</sup> Judge Montali determined that he would not preclude the CPUC from seeking to address these and other outstanding issues and filing an alternative plan “not inconsistent with its terms sheet and the comment on the record today.” February 27 Transcript at 159. According to Judge Montali, he will then assess such alternative

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<sup>4</sup> At the March 26 hearing, the Bankruptcy Court will consider further scheduling of events necessary for confirmation of PG&E’s Plan (such as, soliciting votes and holding a confirmation hearing). February 27 Transcript at 165 (“On March 26th, we’ll take some time and talk about the timing of events that should follow. That’s the best I can offer. There may be major revisions to the debtor’s plan. There may be no revisions. I may approve the disclosure statement, I don’t know”).

<sup>5</sup> *See, e.g.*, February 27 Transcript at 141 (The Court: . . . “I’ve heard today . . . we’ve got some huge discrepancies in the dollars, but we can reconcile them. I’ve heard the other side say those are so huge that they’re not reconcilable, and you know, again, I’m struggling with that, but the \$1.2 billion taking, the question of whether the [California Public Utilities] Commission can even make these kinds of commitments, those get to be much more fundamental, I mean fundamental, I should say, potential fatal flaws in the [CPUC] plan, but maybe not, maybe it’s solvable ones”). *See also id.*, at 56-58.

plan after filing to determine whether the CPUC's alternative plan can move forward (or "will die a stillbirth") and the time frame for any further action. February 27 Transcript at 157, 159.

The possibility that the CPUC may file an acceptable alternative plan with the Bankruptcy Court on April 15<sup>6</sup> does not diminish the need for continued evaluation of PG&E's NRC license transfer application for Diablo Canyon. Even if the CPUC succeeds in putting together an alternative plan that is feasible on its face and gaining the right to present that alternative plan to creditors, creditors will still have the opportunity to vote on and accept the PG&E Plan. PG&E continues to believe that creditors, given this opportunity, will vote to accept the PG&E Plan over an alternative plan having the principal features of the CPUC term sheet. Accordingly, PG&E continues to seek the regulatory approvals needed — including from the NRC — to implement its Plan once that Plan is confirmed.

In sum, the CPUC's Reply amounts to a frivolous and repetitive attempt to inaccurately portray recent events in the Bankruptcy Court. *Cf. Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-4, 47 NRC 17, 19 (1998) ("Frivolous, disruptive, and contemptuous pleadings cannot and will not be entertained by the Commission"). The Reply should be stricken and/or disregarded. The CPUC's various motions should be rejected.

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<sup>6</sup> Judge Montali directed the CPUC to inform the Bankruptcy Court if it determines not to go forward. February 27 Transcript at 165.

CONCLUSION

For the reasons set forth above, the Reply to PG&E's Answer should be stricken from the record in this proceeding.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style and is positioned above the typed name and address.

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

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of: )  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "MOTION OF PACIFIC GAS AND ELECTRIC COMPANY TO STRIKE CALIFORNIA PUBLIC UTILITIES COMMISSION REPLY TO THE ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO THE CPUC'S RENEWED MOTION TO DISMISS APPLICATIONS OR, IN THE ALTERNATIVE, TO HOLD APPLICATIONS IN ABEYANCE" in the above captioned proceeding have been served by electronic mail on those persons indicated by an asterisk (\*) below, this 15th day of March 2002. Additional service by deposit in the United States mail, first class, has also been made this same day on all persons listed below.

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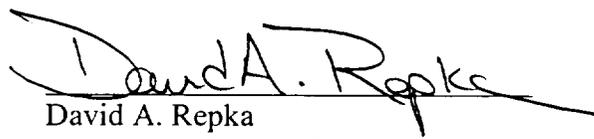
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