

RAS 4417

DOCKETED
USNRC

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

May 10, 2002 (4:19PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	
)	
Pacific Gas & Electric Company,)	Docket Nos. 50-275
Diablo Canyon Nuclear Power Plant)	and 50-323
Unit Nos. 1 and 2)	

**BRIEF OF PETITIONERS
TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,
M-S-R PUBLIC POWER AGENCY, MODESTO IRRIGATION DISTRICT,
AND THE CALIFORNIA CITIES OF
SANTA CLARA, REDDING, AND PALO ALTO**

Wallace L. Duncan
James D. Pembroke
Michael R. Postar
Lisa S. Gast
Sean M. Neal
Peter J. Scanlon
Derek A. Dyson
Duncan, Weinberg, Genzer
& Pembroke, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 467-6370

Special Counsel for
Transmission Agency of
Northern California

Attorneys for the M-S-R Public Power Agency, the
Modesto Irrigation District, and the Cities of
Santa Clara, Redding and Palo Alto,
California

May 10, 2002

Template = SECY-021

SECY-02

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND BACKGROUND	1
II. ISSUES	5
III. DISCUSSION	5
A. The Commission Has Authority Under the Atomic Energy Act to Include PG&E and ETrans as Licensees	5
1. Applicable Principles of Statutory Construction	6
2. The Commission's Antitrust Authority	7
3. Chapter 23 License Provisions	13
4. Conclusion	15
B. The Competing Plan Developments in the PG&E Bankruptcy Support a Grant of the Request for Holding this License Application in Abeyance	15
IV. CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>Alabama Power Co. v. United States</i> , 692 F.2d 1362 (11 th Cir. 1982)	7
<i>County of Riverside v. Loma Linda Univ.</i> , 118 Cal. App. 3d 300 (Cal. Ct. App. 1981)	13
<i>Hobbs v United States</i> , 376 F.2d 488 (5 th Cir. 1967)	6
<i>Jackson v. East Bay Hospital</i> , 246 F.3d 1248, 1261 (9 th Cir. 2001)	13
<i>Kansas Gas and Elec. Co. (Wolf Creek Generating Station, Unit 1)</i> , 49 N.R.C. 441 1999 NRC LEXIS 85	6
<i>N.L.R.B. v. Sheet Metal Workers' Intern. Ass'n, Local Union No. 19</i> , 154 F.3d 137 (3 rd Cir. 1998)	13
<i>Niagara Mohawk Power Corp. (Nine Mile Point, Units 1 & 2)</i> , 50 N.R.C. 333 (1999), 1999 NRC LEXIS 115	16
<i>Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2)</i> , 31 N.R.C. 595 (1990), 1990 NRC LEXIS 53	3
<i>Resolution Trust Corp. v. BVS Development, Inc.</i> , 42 F.3d 1206, 1214 (9 th Cir. 1994)	13

Statutes and Regulations

15 U.S.C. § 79(b).	10
42 U.S.C. § 2011-2297h.	5
42 U.S.C. § 2014(s)	13
42 U.S.C. § 2133(a).	13
42 U.S.C. § 2135	13

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of:)	
)	
Pacific Gas & Electric Company,)	Docket Nos. 50-275
Diablo Canyon Nuclear Power Plant)	and 50-323
Unit Nos. 1 and 2)	

**BRIEF OF PETITIONERS
TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,
M-S-R PUBLIC POWER AGENCY, MODESTO IRRIGATION DISTRICT,
AND THE CALIFORNIA CITIES OF
SANTA CLARA, REDDING, AND PALO ALTO**

The Transmission Agency of Northern California (“TANC”), the M-S-R Public Power Agency (“M-S-R”), the Modesto Irrigation District (“MID”), and the California Cities of Santa Clara (“Santa Clara” or “SVP”), Redding (“Redding”), and Palo Alto (“Palo Alto”) (collectively “Petitioners”), by and through counsel, Wallace L. Duncan, James D. Pembroke, Michael Postar, Lisa S. Gast, Sean M. Neal, Peter J. Scanlon and Derek A. Dyson, Duncan, Weinberg, Genzer & Pembroke, P.C., 1615 M Street, NW, Suite 800, Washington, DC 20036, respectfully tender this Brief in accordance with the Memorandum and Order issued by the Nuclear Regulatory Commission (“Commission”) on April 12, 2002 (“the Order”).

I. INTRODUCTION AND BACKGROUND

On November 30, 2001, Pacific Gas and Electric Company (“PG&E”) filed its Application for License Transfers and Conforming Administrative License Amendments (“PG&E Application”) with the Commission, in which PG&E seeks the Commission’s consent to transfer the operating licenses for Diablo Canyon Power Plant

Units 1 and 2 (“Diablo”). If the transfer is approved, there would be four licensees with varying degrees of authority and responsibility, ranging from the right to use, possess and operate the plant, to the obligation to comply jointly with the antitrust license conditions.

Reorganization. The transfer is part of PG&E’s proposed bankruptcy Plan of Reorganization (“POR”). PG&E’s POR proposes to sever PG&E, an investor owned gas and electric utility, into four primary entities. Most of the generating assets, including Diablo, would be transferred to Electric Generation LLC (“Gen”), or its subsidiaries (*e.g.*, Diablo Canyon LLC). The electric and gas backbone transmission assets would be transferred to ETrans LLC (“ETrans”) and Gas Trans LLC, respectively. PG&E would be limited to owning and operating the residual assets, including the local distribution systems for gas and electricity.

Gen and ETrans will become direct subsidiaries of PG&E Corporation (“Corp”), the current parent company of PG&E. Corp will distribute the common stock of PG&E through a dividend to Corp’s shareholders. Although it will not remain under the same corporate parent, PG&E will retain substantial affiliations with Gen and ETrans through long-term agreements for the purchase and transmission of PG&E’s electric energy requirements.

PG&E’s application before this Commission seeks consent to transfer the Diablo operating license to Gen and its wholly owned subsidiary, Diablo Canyon LLC. Gen’s license would authorize it to possess, use and operate Diablo, while Diablo Canyon LLC would be authorized only to possess Diablo. Recognizing the need to preserve the antitrust conditions, PG&E’s application requests the Commission to retain PG&E as a

licensee, and to add ETrans as a licensee, each for the “purpose of retaining responsibility of the existing antitrust license conditions.” PG&E Application, p. 4, n.4.

Antitrust Conditions/Stanslaus Commitments. A significant issue for determination in this proceeding is the appropriate treatment of the existing antitrust license conditions. The antitrust conditions incorporated into the Diablo license are commonly referred to as the “Stanislaus Commitments.” In 1976, PG&E, as part of its efforts to secure licensing for two nuclear power projects (Stanislaus Nuclear Project and Diablo Canyon Nuclear Project), agreed, in the so-called “Stanislaus Commitments,” to certain licensing conditions to resolve an ongoing dispute over providing transmission services, power sales, interconnection arrangements and other services to “Neighboring Distribution Systems” and “Neighboring Entities.”^{1/} MID, SVP, Redding, and Palo Alto are “Neighboring Distribution Systems” and/or “Neighboring Entities.”

Initially, the Stanislaus Commitments were set forth in an April 30, 1976 letter and related attachments from John F. Bonner (then President of PG&E) to the Assistant Attorney General, Antitrust Division, United States Department of Justice. PG&E’s letter to the Department of Justice made clear PG&E’s obligation to provide transmission service, power sales services and related services to Neighboring Distribution Systems and Neighboring Entities.

While the Stanislaus Project was never constructed, the Stanislaus Commitments were included as part of the NRC license for PG&E’s Diablo Canyon

^{1/} See generally, Pacific Gas & Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), 31 N.R.C. 595 (1990), 1990 NRC LEXIS 53, at *4-5 (discussing the history of the conditions in the context of an enforcement action order).

Nuclear Project. In the Stanislaus Commitments, PG&E agreed to provide the following services, among others:

- A. The requirement that interconnection agreements provide for reserve coordination in which each of the parties maintains adequate reserves for its estimated peak firm load, and specifying that (except in specified circumstances which are not relevant) a Neighboring Entity shall not be required to carry reserves higher than those of PG&E, and PG&E is obligated to sell capacity to a Neighboring Entity for use as reserves if the capacity is available. See Stanislaus Commitments, §§ III (A), (B) and (C).
- B. The requirement that PG&E offer to coordinate maintenance schedules with a Neighboring Entity, and to exchange or sell maintenance capacity and energy when available. See id., § III (E).
- C. The requirement that PG&E sell emergency power to a Neighboring Entity if that Neighboring Entity maintains the level of minimum reserves agreed to (and vice-versa). See id., § IV.
- D. The requirement that (when it has adequate generation available) PG&E offer to sell firm, full or partial requirements power to Neighboring Distribution Systems or Neighboring Entities. See id., § VI.
- E. The requirement that PG&E transmit power pursuant to interconnection agreements for a Neighboring Entity and/or a Neighboring Distribution System, and/or others dealing in bulk power supply. See id., § VII(A).
- F. The requirement that PG&E shall include in its planning and construction programs such increases in its transmission capacity or such additional transmission capacity as may be required by a Neighboring Entity. See id. § VII(B).
- G. The requirement that all rates, charges, terms and practices are and shall be subject to the acceptance and approval of any regulatory agencies or courts having jurisdiction over them. See id., § IX(A).

The Stanislaus Commitments are in effect through at least January 1, 2050, and PG&E, in its current aggregated structure, retains the obligations briefly described above.

II. ISSUES

To assist the process of determining the appropriate transfer of the above described antitrust conditions, and to address the various petitioners' requests for deferral, the Commission directed the petitioners and the applicant to submit briefs on the following issues:

1. What is the Commission's authority under the Atomic Energy Act to approve the proposed license transfer and related license amendments where the current licensee (PG&E) as well as a company engaged solely in transmission activities would not, after the transfer, be engaged in activities at Diablo Canyon requiring a license, yet would remain or become named licensees on the Diablo Canyon licenses?
2. Have recent filings and developments in PG&E's bankruptcy proceeding had any effect on the pending motions to hold this license transfer proceeding in abeyance?

III. DISCUSSION

A. The Commission Has Authority Under the Atomic Energy Act to Include PG&E and ETrans as Licensees

The first issue identified by the Commission centers around the Commission's authority under Chapter 23 of the Atomic Energy Act ("AEA").^{2/} Discussion begins with a general statement of applicable principles of statutory construction. Since the question of authority arises due to the Diablo antitrust conditions, the substantive discussion begins with the Commission's interpretation and application of its statutory antitrust responsibilities. Since the Commission's analysis of antitrust

^{2/} 42 U.S.C. § 2011-2297h.

conditions in license transfer proceedings depends on the facts of each case,^{3/} the PG&E conditions and proposed transfer are next analyzed under the *Wolf Creek* criteria, concluding that the conditions must be transferred to the four PG&E entities to maintain necessary antitrust protections. This section concludes with an analysis of the licensing provisions of Chapter 23, concluding that the Commission has authority to include PG&E and ETrans on the license since they are agents of Gen and Diablo Nuclear LLC for purposes of compliance with the license conditions.

1. **Applicable Principles of Statutory Construction.**

Chapter 23 must be interpreted by reviewing its provisions as a whole.^{4/} Accordingly, it would be inappropriate to attempt to answer the question of the Commission's authority by focusing on one section of the Chapter, or any single phrase included therein. The licensing provisions must be viewed in light of the antitrust provisions in the Chapter, the purposes to be met thereby, and the responsibilities created thereunder. Such analysis can lead to but one conclusion, *i.e.*, that the purposes of Chapter 23 cannot be met by transferring PG&E's Diablo license without including, as licensees, all the PG&E entities required for it to be capable of jointly performing the Diablo license conditions.

^{3/} See *Kansas Gas and Elec. Co. (Wolf Creek Generating Station, Unit 1)*, 49 N.R.C. 441 1999 NRC LEXIS 85, at *58 ("Wolf Creek").

^{4/} See *Hobbs v United States*, 376 F.2d 488 (5th Cir. 1967) (overturing Commission action that denied an application for compensation under one section of the AEA, the court states that the AEA "must be viewed as a whole").

2. The Commission's Antitrust Authority.

The Commission's antitrust duties are set forth in AEA Section 105, 42 U.S.C. § 2135. The Commission's antitrust authority is sufficiently broad to allow the Commission to include ETrans and PG&E as licensees on the transferred license for purposes of preserving antitrust protections.

Section 105 reflects the Congress' desire to fairly distribute the benefits of tax-payer funded atomic research, and includes among its purposes preventing large utility companies from being able to exercise market power in connection with, and as a result of, their ownership of large nuclear power plants. *See Alabama Power Co. v. United States*, 692 F.2d 1362, 1368-1369 (11th Cir. 1982) (discussing the history of Section 105). Before acting on an application for a new license, the AEA requires the Commission to refer such applications to the Attorney General for review of the antitrust implications. *Id.* at 1385. After such review, the Commission may, if necessary, impose appropriate antitrust license conditions. *Id.* In the case of PG&E's Diablo and Stanislaus license applications, the Attorney General advised the Commission that PG&E engaged in activities that were inconsistent with antitrust laws. *See Pacific Gas & Elec. Co.*, *supra*, slip op. at 4-5. The Stanislaus Commitments were incorporated as conditions to the Diablo license to mitigate the market power abuses by PG&E.

The Commission interprets its antitrust duties differently in the case of a license transfer. In transfer cases, the Commission limits its antitrust action to a determination of how the existing license conditions should be treated when the license is transferred. *See Wolf Creek*, Slip op. at *58 (breaking from past practice of performing a complete antitrust review for transfers applications). In *Wolf Creek*, the Commission

indicated the treatment of the conditions would depend on the facts of each case, including the "license conditions on their face, the nature of the license transfer, and perhaps the competitive situation as well. . . ." *Id.* The Commission also indicated that it would entertain suggestions from licensees, applicants, and others. *Id.* at *59.

Applying the factors identified by the Commission in *Wolf Creek* to the facts in this proceeding demonstrates the need to continue the conditions and to include ETrans and PG&E as licensees which would be subject to such conditions. First, with regard to suggestions from licensees, applicants and others, the Applicant suggested that the four disaggregated PG&E entities be included on the license and subject to the Diablo conditions. The Applicant also recognized the need to continue the conditions when it assumed the conditions in its bankruptcy POR,^{5/} and entered into a stipulation regarding the Stanislaus Commitments in the Bankruptcy Court.^{6/} Further, although some

^{5/} See Section 6.9, pp. 71-72 of PG&E POR dated April 19, 2002.

^{6/} Stipulation of City of Palo Alto, Northern California Power Agency and Pacific Gas & Electric Company Regarding the Stanislaus Commitments, executed in final form on February 11, 2002, and recently approved by the Bankruptcy Court. See Document Nos. 5586, 5587, 5588, 5589, 6011 and 6012 on the PG&E Docket of the United States Bankruptcy Court, Northern District of California ("PG&E Docket"). The backbone of the Stipulation, among other provisions, is that PG&E, ETrans LLC and Gen are jointly and severally liable for the full performance, and liable for the nonperformance, of the Stanislaus Commitments. The Stipulation, however, has no effect on any and all claims of NCPA and Palo Alto against PG&E for breaching PG&E's obligations relating to and in connection with the Stanislaus Commitments. See (1) Response of Northern California Power Agency to PG&E's Motion for Order Determining Procedure for Estimating Certain Claims for Plan Feasibility Purposes ("Response of the NCPA") and related declaration, filed March 20, 2002, both Document No. 5359 on the PG&E Docket, and (2) Objection of the City of Palo Alto to PG&E's Motion for Order Determining Procedures for Estimating Certain Claims for Plan Feasibility Purposes ("Objection of Palo Alto"), filed March 20, 2002, Document No.

(continued...)

Petitioners express concerns about the license transfer and related disaggregation, none of the petitioners oppose PG&E's suggested treatment of the conditions, if a license transfer is to occur. So, the *Wolf Creek* criteria considering suggestions from licensees, applicants and others favors continuing the conditions in full by including each of the four PG&E entities as licensees.

Second, with regard to the competitive situation, the disaggregation will not reduce the market power of PG&E as a whole. The term "affiliate" is used to connote an absence of an arm's-length relationship.^{7/} The PG&E disaggregated entities will not

6/ (...continued)
5364 on the PG&E Docket, to PG&E's (unsuccessful) Motion for Order Determining Procedures for Estimating Certain Claims for Plan Feasibility Purposes, filed March 1, 2002, Document No. 4981 on the PG&E Docket. See also Protest and Motion to Reject of the Northern California Power Agency, F.E.R.C. Document No. 2211721, Docket No. ER01-2998-000. Thus, the Bankruptcy Court can be viewed as an "other party" under *Wolf Creek*, providing a suggestion to this Commission that the antitrust conditions must continue to apply to the disaggregated PG&E entities.

7/ For example, the Public Utility Holding Company Act defines "Affiliate" as follows:

(11) "Affiliate" of a specified company means—

(A) any person that directly or indirectly owns, controls, or holds with power to vote, 5 per centum or more of the outstanding voting securities of such specified company;

(B) any company 5 per centum or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by such specified company;

(C) any individual who is an officer or director of such specific company, or of any company which is an affiliate thereof under clause (A) of this paragraph; and

(continued...)

be in arms-length relationships. Gen and ETrans will remain affiliates by corporate relationship. PG&E will remain an affiliate of Gen and ETrans through the existence of long-term essential contractual relationships, and possibly through Corp's holding stock in, or having common directors with, PG&E.

A lack of an arms-length relationship between PG&E, Gen and ETrans is apparent since under the POR, PG&E will enter into long term power purchase agreements with Gen, and long term transmission agreements with ETrans. Those agreements will constitute a significant portion of the revenues of Gen and ETrans. Likewise, they will meet a significant portion of the operating needs of PG&E. As a result, the three entities will not interact as market sensitive entities. Such contractual relationships, coupled with shared ownership, will not create an arms-length relationship. Rather, an intertwined, affiliate relationship will continue, providing ample opportunity for predatory practices and market power abuse. Regardless of whether or not the relationship meets the technical definition of any securities or antitrust laws, the reasonable probability of market power abuse is sufficient for this Commission's analysis. *See e.g., Alabama Power Co., supra* at 1368.

7/ (...continued)

(D) any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearings, to stand in such relation to such specified company that there is liable to be such an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this chapter upon affiliates of a company.

15 U.S.C. § 79(b).

Not only would a transfer create an opportunity for market power abuse, experience demonstrates that abuse will be forthcoming. On past occasions, enforcement actions have been necessary to force PG&E into compliance with the Stanislaus Commitments. *See, e.g., Diablo Canyon, supra.* Currently, PG&E is acting in patent derogation of PG&E's obligations under the Stanislaus Commitments in its request to terminate certain interconnection agreements. Disputes regarding PG&E's termination of interconnection agreements in violation of the Stanislaus Commitments are now pending before the Federal Energy Regulatory Commission.^{8/}

The post-transfer "competitive situation" will not result in any reduction in market power. Coupled with PG&E's historical practice, the "competitive situation" demonstrates the need (as recognized by PG&E) for transfer of the complete Diablo license conditions to entities that are jointly capable of complying with the conditions.

Analysis of two other criteria identified by the Commission in *Wolf Creek*, (*i.e.*, the license conditions on their face and the nature of the transfer) likewise leads to the conclusion that a complete transfer of the conditions is essential. On their face, the conditions govern transmission, generation, scheduling and interconnection activities. The nature of the license transfer is related to the disaggregation of PG&E's functions, such that none of the resulting entities would individually be capable of performing the conditions. Gen and Diablo Nuclear LLC cannot comply with a number of the conditions because they would lack the appropriate assets to ensure that the transmission, interconnection and scheduling conditions are met. Section VII(A) of the Commitments

^{8/} *See, e.g.,* FERC Docket Nos. ER02-358 (termination of Silicon Valley Power Interconnection Agreement), and ER01-2998 (termination of Northern California Power Agency Interconnection Agreement).

requires PG&E to transmit power pursuant to interconnection agreements “with provisions which are appropriate to the requested transaction. . . .” That is, firm power sales or purchases must be supported by firm transmission. Under the ISO regime, “firm transmission” is not firm in the traditional sense. Rather, it is subject to a series of constraints. Only if all the component parts of a disaggregated PG&E are involved, will PG&E have the assets capable of providing truly “firm transmission” in the post-reorganization world. ETrans and PG&E have the requisite assets to jointly comply with the conditions along with Gen and Diablo Nuclear, LLC. Accordingly, it is necessary for the maintenance of the conditions, which all parties agree is necessary, for the conditions to attach to ETrans and PG&E, as well as to Gen and Diablo Nuclear LLC.

The nature of the license transfer raises a sound policy reason for attaching the conditions to all of the entities. The transfer does not involve any entities that are not currently associated with the Diablo license. The four proposed disaggregated entities are currently part of the bundle of assets and obligations that constitute PG&E, and therefore all are currently subject to the license conditions. To allow a transfer without attaching the conditions would create a loophole for escaping the impact of conditions on licenses. Significant aspects of the protections included in the license conditions could be avoided by disaggregating assets to affiliates, as PG&E proposes here, thereby dismantling the practical value of the antitrust protections. It would be folly for the Commission to create an opportunity for holders of licenses with antitrust conditions to avoid the impact of those conditions by transferring assets to affiliates. As indicated previously, PG&E recognized the antitrust problem created by its proposal and requested the inclusion of sufficient affiliates, as licensees, to minimize the impact of disaggregation on the

conditions. Making ETrans and PG&E licensees on the transferred license is necessary for the proper administration of the AEA.

3. Chapter 23 License Provisions.

The AEA authorizes the Commission to issue licenses to persons who will be engaged in acts including the transfer, possession, or use (hereinafter “regulated activities”) of certain nuclear facilities. 42 U.S.C. § 2133(a). The term “person” includes a corporation, and its legal successor, representative, or agent. 42 U.S.C. § 2014(s). Any such license is to be issued subject to the conditions established by the Commission “to effectuate the purposes and provisions of” Chapter 23 of the AEA. *See* 42 U.S.C. § 2133(a). ETrans and PG&E are within the Commission’s statutory authority as agents of Gen and Diablo Nuclear LLC.

The PG&E POR creates an agency relationship through a variety of interrelated agreements and commitments in various applications, the intent of which is to have PG&E, ETrans, Gen and Diablo Nuclear LLC comply jointly with the Stanislaus Commitments, which Gen and Diablo Nuclear LLC are incapable of performing. A joint venture results because the proposed disaggregated entities agree to be jointly and severally liable for, and act in concert to ensure, compliance with the license conditions. *Jackson v. East Bay Hospital*, 246 F.3d 1248, 1261 (9th Cir. 2001) (under California law a joint venture “exists where there is an agreement between the parties under which they have a community of interests, that is, a joint interest, in a common business undertaking” quoting *County of Riverside v. Loma Linda Univ.*, 118 Cal. App. 3d 300 (Cal. Ct. App. 1981)). *See also Resolution Trust Corp. v. BVS Development, Inc.*, 42 F.3d 1206, 1214 (9th Cir. 1994). Joint venturers are agents and partners of each other. *N.L.R.B. v. Sheet*

Metal Workers' Intern. Ass'n, Local Union No. 19, 154 F.3d 137 (3rd Cir. 1998)

(recognizing that joint ventures are regarded as both principal and agent of other co-venturers under partnership law). Accordingly, PG&E and ETrans are partners and agents of Gen and Diablo Nuclear LLC, as a result of the reorganization scheme under which they agree to jointly meet the obligations of the Diablo license conditions. Since they are agents, they each are a "person" to whom the Commission can issue a license.^{9/}

Furthermore, it is not unheard of for the Commission to look beyond the regulated activities of applicants to determine antitrust issues. The Commission has looked beyond the proposed regulated activities of a licensee and based its antitrust determination on actions that did not involve the licensee's possession, use or operation of a regulated facility. *See e.g., Alabama Power Co., supra.* In *Alabama Power Co.*, the Commission reviewed the applicant's pre-application exertion of market power with regard to matters including interconnection, coordination services, and retail power markets. *Id.* at 1365. The court upheld the Commission's determination of market power abuse even though the activities in question were not regulated by the licensing provisions of the AEA. So the Commission has interpreted its authority to extend beyond the specific acts over which it has licensing authority in order to address antitrust conditions. In the instant case looking beyond the activities listed in the licensing provision is necessary to protect the "Neighboring Entities" and "Neighboring Utilities" from market power abuse by the PG&E entities. Reading the statute as a whole, the Commission has authority to include PG&E and ETrans as licensees, as agents of Gen and Diablo Nuclear LLC, for purposes of meeting the antitrust license conditions.

^{9/} See 42 U.S.C. § 2014(s).

4. Conclusion

Under a *Wolf Creek* analysis, it is indisputable that there is a need to transfer the entire bundle of conditions along with the license. A proper exercise of the Commission's statutory antitrust duties requires that the license transfer include ETrans and PG&E as licensees, as agents of Gen and Diablo Canyon LLC for purposes of retaining responsibility for the license conditions. Transferring the licenses without maintaining the conditions would ignore the Commission's antitrust duties, exposing the Petitioners to market power abuse by PG&E.

B. The Competing Plan Developments in the PG&E Bankruptcy Support a Grant of the Request for Holding this License Application in Abeyance

Since the Petitions were filed, the Bankruptcy Judge lifted the exclusivity of PG&E's plan for the limited purpose of allowing the California Public Utilities Commission ("CPUC") to file a competing plan. CPUC filed its plan, which does not include a disaggregation of PG&E. If accepted, CPUC's plan would render moot PG&E's application to transfer its license. So, there are now two plans, one which would require Commission action, and a second which would not. The Bankruptcy Court appears to contemplate both of the competing plans of reorganization going forward to confirmation hearings as early as the fall of 2002. Strong opposition to PG&E's POR, especially regarding provisions that have been described as a "regulatory jail break," continues to be asserted by the CPUC, the State, and others.

The addition of a competing POR, which, if approved, would eliminate a need for the application to transfer the license makes suspension of this proceeding necessary for the efficient administration of the AEA. Although this Commission is

reluctant to suspend proceedings, it has recognized a need to suspend proceedings where a proposed transfer may not occur for non-regulatory reasons. See *Niagara Mohawk Power Corp. (Nine Mile Point, Units 1 & 2)*, 50 N.R.C. 333 (1999), 1999 NRC LEXIS 115, slip op. at *42-13. In *Nine Mile Point*, certain owners of a facility sought to transfer their ownership and license to a third party. The remaining co-owners sought deferral on two grounds: (1) a pending New York Public Service proceeding; and (2) the co-owners right of first refusal. *Id.* at *4. The Commission agreed that a suspension was appropriate because the exercise of the first refusal rights by any of the co-owners would render the application moot. *Id.* at *12. The Commission was cognizant of administrative efficiency and resource concerns, stating, "it would not be sensible of us to require the expenditure of both public and co-owner funds on a proceeding, part or all of which may well be rendered moot in the immediate future." *Id.* at *14.

The same holds true for PG&E's application, which will be rendered moot if the bankruptcy proceeding results in confirmation of CPUC's plan. The vote of the creditors on the competing plans is functionally equivalent to the right of first refusal of the co-owners in *Nine Mile Point*. Bankruptcy creditors essentially own part of the bankruptcy estate. If the creditors vote in favor of the CPUC plan, and reject the PG&E plan, the need for this proceeding will be eliminated, independent of the other pending agency proceedings. It would be a waste of resources to move this proceeding forward when there is no indication that the creditors will allow the transfer to occur.

IV. CONCLUSION

For the foregoing reasons, these Petitioners respectfully request (1) the Commission suspend these proceedings pending resolution of the competing bankruptcy

plans; and (2) include ETrans and PG&E as licensees if it ultimately determines a transfer is warranted.

Dated: May 10, 2002

Respectfully submitted,



Wallace L. Duncan
James D. Pembroke
Michael R. Postar
Lisa S. Gast
Sean M. Neal
Peter J. Scanlon
Derek A. Dyson
Duncan, Weinberg, Genzer
& Pembroke, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 467-6370

Special Counsel for
Transmission Agency of
Northern California

Attorneys for the M-S-R Public Power
Agency, the Modesto Irrigation
District, and the Cities of Santa
Clara, Redding and Palo Alto,
California

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding by U.S. Mail. Dated at Washington, D.C., this 10th day of May, 2002.

A handwritten signature in black ink, appearing to read 'P. Scanlon', written over a horizontal line.

Peter J. Scanlon
DUNCAN, WEINBERG, GENZER
& PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370