RAS 4416

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of	
PACIFIC GAS AND ELECTRIC CO.	Docket Nos. 50-275-LT, 50-323-LT
(Diablo Canyon Power Plant, Units 1 and 2)	

BRIEF OF THE NORTHERN CALIFORNIA POWER AGENCY ON SPECIFIC QUESTIONS

By Memorandum and Order of April 12, 2002 (CLI-01-12) in this Docket, this Commission has asked for briefs on two questions. The Northern California Power Agency ("NCPA"), which has timely sought intervention in this license transfer docket, responds to those questions herewith. We address them in the sequence set forth in the Order of April 12.

I. WHAT IS THE COMMISSION'S AUTHORITY UNDER THE ATOMIC ENERGY ACT TO APPROVE THE PROPOSED LICENSE TRANSFERS 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?

The pending application is a part of a Plan of Reorganization ("PoR") filed by PG&E, the current licensee and Debtor in Possession ("DIP") under the terms of Chapter 11 of the Bankruptcy Code. As here relevant, the PoR proposes to divide PG&E into a myriad of entities, all but one of which would become a direct or indirect subsidiary of the Pacific Gas and Electric Corporation ("Corp."), the current parent of

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licensee Pacific Gas and Electric Company ("PG&E"). Thus the PoR (and the application here) provide for the transfer of ownership of the Diablo Canyon Plant to Diablo Canyon LLC ("Nuclear"), a wholly-owned subsidiary of Electric Generation LLC ("Gen"), which in turn is an indirect subsidiary of Corp. Gen would operate the units, and thus be included on the operating licenses. The questions posed by the Commission relate to PG&E's proposal to include on the licenses ETrans LLC, a corporate sibling of Gen that would inherit PG&E's transmission facilities, and the reorganized utility ("PG&ER"), which would be spun off to shareholders and retain PG&E's distribution plant and its retail franchise. PG&E proposes that ETrans and PG&ER stay on the license for the purpose of preserving the so-called Stanislaus Commitments, which are antitrust license conditions attached to both Diablo Canyon licenses.

There are prudential, regulatory and statutory issues that are inherent in the answers to the questions posed by the Commission. To be clear, the question posed appears to us to suggest that the alternative being considered by the Commission would be one in which the only licensees would be Diablo Canyon LLC and Gen. This would leave licensees incapable of performance of certain of the license conditions, and in particular several of the antitrust license conditions. But the basic legal point is that some of the license conditions could not be performed by the proposed new entities which this Commission appears to regard as the potentially the sole licensees. Unless the Commission is to take the position that it will not permit licensees to restructure themselves in ways that are more efficient for operation in a restructured industry, NCPA suggests that the Commission cannot pick and choose among the license obligations in a simple license transfer to decide arbitrarily which obligations it deems important and

which it will permit the licensee to simply ignore and render itself incapable of performing.

As the Commission is aware, the Stanislaus Commitments are more than mere license conditions. They are also a contract between PG&E and the United States under which NCPA members and other Neighboring Entities and Neighboring Distribution Systems enjoy rights as intended third-party beneficiaries.[1] NCPA and PG&E have agreed in the Bankruptcy court that the Stanislaus Commitments, in their contractual aspect, will survive the PG&E restructuring irrespective of what happens to the Diablo Canyon licenses. Indeed, the 1991 settlement of this Commission's Notice of Violation[2] and other proceedings make it clear that the license conditions may be enforced through at least December 31, 2049.[3] However, this does not render the licenses insignificant, because the contract and the license conditions do not serve the same purpose.

Subsections (a) and (b) of Section 105 of the Atomic Energy Act,[4] 42 U.S.C. § 2135, reflect Congress's strong beliefs (1) that nuclear power, which is largely the product of Federal research and development, should not be used in an anticompetitive manner, and (2) that the NRC, which oversees the conduct of its licensees, has an important role in assuring that the public interest is protected. Antitrust conditions in nuclear plant licenses, which typically derive from Section 105(c)(6) of the Act (although

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[1] *United States v. Pacific Gas and Elec. Co.*, 714 F. Supp. 1039 (N.D. Cal. 1989), *appeals dismissed per stipulation*, No. 91-16011 (9th Cir. Mar. 20, 1992).

[2] *Pacific Gas & Elec. Co.*, DD-90-3, 31 N.R.C. 595 (1990), *petition for review dismissed*, No. 90-1463 (D.C. Cir. Mar. 5, 1992).

[3] The settlement was submitted to this Commission as an offer of settlement, and accepted as a settlement by a Director's letter dated January 13, 1992.

[4] The Atomic Energy Act is sometimes referred to hereafter as "the AEA" or "the Act."

the Diablo Canyon licenses are not themselves subject to Section 105(c)[5]), are very much a part of this structure. Thus, the maintenance of antitrust conditions in nuclear plant licenses plays an important part in ensuring that the use of atomic energy will, in the words of AEA § 3, 42 U.S.C. § 2013(c), "make the maximum contribution to ... the national welfare."

While Section 234 of the AEA, 42 U.S.C. § 2282, authorizes the Commission to impose a civil penalty on "any person" who violates any term or condition of an NRC license, this is not an adequate solution. If read literally, this provision would seem to allow the NRC to enforce the Stanislaus Commitments against ETrans or PG&ER even if those entities were not made co-licensees of the Diablo Canyon units as PG&E proposes, or for that matter, against the CAISO, the Governor of California or the like. We do not understand this Commission to have asserted that its jurisdictional reach is that broad. Even if it did, however, this would be a roundabout and unsatisfactory solution to the problem of preserving the Stanislaus Commitments in the PG&E restructuring. The NRC oversees its licensees, and licensees obligate themselves to submit to the NRC's oversight. Therefore, if the Stanislaus Commitments are to be retained in the Diablo Canyon licenses—and NCPA believes that they must be retained—and if ETrans and PG&ER are to be subject to the Commitments—and NCPA believes that they must be—then the most straightforward means of achieving that result is the means proposed by

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[5] The Stanislaus Commitments were added to the Diablo Canyon construction permits in 1978 with PG&E's consent when the NRC failed to issue a construction permit to PG&E for the Stanislaus Nuclear Project, as PG&E had agreed in an earlier resolution of the *Stanislaus* proceeding. *See, Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), DD-90-3, 30 N.R.C. 595, 597 (1990).

PG&E, and supported by all affected intervenors: inclusion of PG&ER and ETrans as co-licensees of the Diablo Canyon units.

A. The Question Assumes A Simple License Transfer; But The Proposal As It Would Have To Be Modified Would Require A Substantive Modification Of The License Conditions

The Memorandum and Order cites 10 C.F.R. §§ 2.1306, 2.1308 as the framework for the Commission's consideration of PG&E's license transfer application, and characterizes PG&E's proposal in its application as seeking "to amend the antitrust license conditions to include entities who would not be engaged in activities requiring an NRC license." With all due respect, NCPA submits that it is the Commission staff, not PG&E, that is proposing to amend the antitrust license conditions in the Diablo Canyon license, and that 10 C.F.R. §§ 2.1306, 2.1308 do not provide an appropriate procedural avenue for such a modification.

The two provisions of the Atomic Energy Act which most directly apply to license transfers are Sections 184 and 189, 42 U.S.C. §§ 2234, 2239 (1994 & Supp. V 2000). Section 184 provides that a license may not be transferred "unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this chapter, and shall give its consent in writing." Section 189(a)(1)(A) provides that, when an application is filed to transfer control of a licensed facility, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." The Commission recently promulgated regulations in Subpart M of 10 C.F.R. Part 2 which govern such hearings in the absence of special circumstances warranting a more substantial hearing process.

As the Commission observed in its recent orders promulgating Subpart M, sometimes license transfers will necessitate administrative amendments to an operating license, typically including a substitution of names. Section 187 of the Act, 42 U.S.C. § 2237 (1994), provides: "The terms and conditions of all licenses shall be subject to amendment, revision, or modification, by reason of amendments of this chapter or by reason of rules and regulations issued in accordance with the terms of this chapter." The only type of license amendment permitted by NRC regulations is an amendment made pursuant to a licensee's application (10 C.F.R. §§ 50.90–50.92). The Commission may *modify* a license "for cause" in the event that a licensee is found to have made misrepresentations to the Commission to secure its license, or violates its license, the AEA, or a Commission regulation or order (10 C.F.R. § 50.100). Since the licensee's application proposes to include all of the relevant successors in interest (assuming that the PG&E PoR is approved and confirmed in the bankruptcy proceeding), it is not clear to us what the Commission's legal basis would be for *sua sponte* modifying the application as filed.

This Commission has held that a licensee is permitted to seek an amendment to its license to eliminate antitrust license conditions. *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI–92–11, 36 N.R.C. 47 (1992). Antitrust conditions may be eliminated directly, by striking them from a license, or they may be eliminated indirectly, by a licensee undertaking a "restructuring" and then seeking to drop transmission-, distribution-, and/or load-related entities from the operating license. There is no meaningful distinction between these two methods of eliminating antitrust conditions from a nuclear plant license, and the Commission should not treat them differently.

Here, PG&E has not sought to drop any of the antitrust conditions from its Diablo Canyon licenses. Rather, PG&E has filed an application for license transfer which would maintain the antitrust conditions in the Diablo Canyon licenses in full force. Accordingly, because the Commission has no cause to reopen the Diablo Canyon licenses under 10 C.F.R. § 50.100, *there is no statutory basis for the Commission to modify the Diablo Canyon licenses by eliminating a number of the antitrust conditions*, which is what would be accomplished were Commission staff to drop ETrans and PG&ER from the Diablo Canyon licenses.

We believe the above points to be dispositive. If, however, this Commission believes that there is a fundamental statutory problem (so far undisclosed) that would prevent retention of ETrans and PG&ER on the Diablo Canyon licenses unless each will have an ownership interest in the facility, NCPA believes that the Commission should afford PG&E an opportunity to overcome this difficulty by revising its Plan of Reorganization to specify that ETrans and PG&ER shall each retain a small, fractional ownership interest in each of the Diablo Canyon units sufficient to support licensee status.[6]

B. The Proposal As Modified Would Substantially Change The Plan Of Reorganization In A Manner That Might Require Starting All Over Again In The Bankruptcy Court

The Bankruptcy Court has approved the Disclosure Statement for PG&E's Plan of Reorganization, but that disclosure approval does not yet constitute or even imply any

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[6] Because the proposed ETrans would own transmission facilities necessary for the operation of the Diablo Canyon plants in any event, it would appear that ETrans should properly be on the license under any circumstances.

court approval of the PG&E PoR.[7] At this point, any change to the Plan of Reorganization could prove disruptive, and potentially delay PG&E's emergence from bankruptcy. PG&E has contended in Bankruptcy Court, before the Federal Energy Regulatory Commission (FERC), and before this Commission, that its restructuring will not affect its compliance with license obligations or its contractual commitments to its customers. As here relevant, this is clearly reflected in PG&E's PoR and Disclosure Statement[8]

The Stanislaus Commitments begin by defining "The Applicant" as "Pacific Gas and Electric Company, any successor corporation, or any assignee of this license." The Commitments were intended to apply not only to the then proposed licensee, but to preclude evasion of the obligations by corporate gerrymandering. The pieces into which PG&E proposes to divide itself are all successor corporations to the present PG&E. Accordingly, all such corporations will be included in the term "Applicant" following restructuring.

Following the definition of "Applicant" are definitions of three terms that are critical to the Commitments—Service Area, Neighboring Entity, and Neighboring

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[7] The PoR, to be approved, must overcome objections of the CPUC and creditors in "confirmation hearings" in the bankruptcy court, and even the most optimistic observers do not anticipate those hearings to be scheduled earlier than the Fall of this year. Any PoR, whether that of the DIP or of another proponent, must be tested against the requirements of 11 U.S.C. 1129 and against the contentions of the State of California that a Plan which accepts the assumptions of the PoR proposed by the DIP is directly contrary to certain State of California laws. The contention of the DIP is that those State laws are preempted by the Bankruptcy Code and by Federal law, a contention which has been rejected by the Bankruptcy Court in the form originally proposed by the DIP, and the DIP has not yet begun the task of showing why preemption is necessary in conformance with the law determined thus far by the Bankruptcy Court.

[8] Section 6.9, pp. 68-69 of the Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company, dated April 19, 2002; Section V.B.22, pp. 93-94 of the Disclosure Statement for Plan of Reorganization . . . dated April 19, 2002.

Distribution System. None of these definitions is comprehensible in a post-restructuring context if the term "Applicant" is understood to exclude ETrans and PG&ER. Likewise, neither Gen nor Nuclear LLC will be capable of complying with the interconnection and transmission obligations undertaken by PG&E in the Stanislaus Commitments.

Suppose PG&E's restructuring goes through, this Commission does not retain ETrans as a Diablo Canyon licensee, and this Commission becomes aware that ETrans is engaging in anticompetitive conduct contrary to the Stanislaus Commitments. Since ETrans would not be a licensee, this Commission would have no basis to make a report to the Attorney General under Section 105(b) of the Act. Suppose ETrans were to be found by a court to have engaged in such conduct. If ETrans is no longer a licensee, the Commission could not take action to safeguard the national welfare under Section 105(a) of the Act or to enforce its own license conditions. If all of these things are necessary consequences of PG&E's restructuring proposal, then PG&E's disclosure statement rather severely understates the impact of the restructuring, and serious objections to the DIP's PoR arise under 11 U.S.C. 1129, all of which could result in an undesirable delay in PG&E's emergence from bankruptcy.[9]

If the Commission intends to consider gutting the Diablo Canyon antitrust license conditions in these license transfer proceedings, it should schedule full hearings under Subpart L of 10 C.F.R. Part 2, rather than streamlined hearings under Subpart M, to resolve this issue. There was nothing in the rulemaking process that gave rise to Subpart M that suggests that these regulations were intended to apply to litigation of

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[9] This would be so at least under the PoR proposed by PG&E. As noted below, the competing PoR (that of the CPUC) does not envision disaggregation into disparate entities, as does that of PG&E, nor would it require amendment to the Diablo Canyon licenses.

substantive license amendments. More specifically, there is no mention of antitrust conditions in the Notice of Proposed Rulemaking[10] or the order promulgating the Subpart M regulations.[11] To the extent that the Commission believes that license transfers which substantively impact antitrust license conditions fall under Subpart M, despite the failure to consider this issue at any point in the rulemaking giving rise to this subpart, NCPA believes that the Commission plainly ought to waive the Subpart M regulations pursuant to 10 C.F.R. § 2.1329(b), as the criterion for waiver is plainly met.[12]

C. The Commission In Any Event Must Deal With Changes In The Restructured Electric Industry In A Manner Which Preserves The Obligations To The Public Embodied In Its Licenses As Far As Reasonably Possible

NCPA has explained its views on the Commission's decisions in the *Wolf Creek*[13] line in its Petition Of The Northern California Power Agency For Leave to Intervene, Conditional Request For Hearing And Suggestion That Proceeding Be Held In Abeyance, filed in these dockets on February 6, 2002. In the interests of staying within the page limitation suggested for this response we do not repeat that argument in this filing, since we assume that the Commission was cognizant of the argument set out therein in posing the questions to which this filing responds, and desired only supplemental briefing. We do stress, however, one important part of that decisional line which we believe dispositive here; the acceptance by this Commission of the concept that where all parties

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[10] *Streamlined Hearing Process for NRC Approval of License Transfers*, 63 Fed. Reg. 48,644 (1998).

[11] *Streamlined Hearing Process for NRC Approval of License Transfers*, 63 Fed. Reg. 66,721 (1998).

[12] This regulation provides that "[t]he sole ground for a waiver shall be that, because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted."

[13] *In the Matter of Kansas Gas & Elec. Co. (Wolf Creek Generating Station, Unit 1): Memorandum and Order,* CLI-99-19, 49 N.R.C. 441, 64 Fed. Reg. 33,916 ("Wolf Creek").

agree as to the disposition of the existing antitrust conditions this Commission ought not seek to override that agreement:

> The Commission stated that it would entertain proposals by the parties as to the proper treatment of existing license conditions. Wolf Creek at 466. In fact, that is precisely what the Commission did in the Wolf Creek transfer case itself, although, because the parties reached a settlement, no decision was required by the Commission. The Commission continues to believe that this approach is workable and that retention of the reporting rule for all post-operating license transfer cases where there are existing antitrust conditions is unnecessary. For example, the proper disposition of existing antitrust conditions may be obvious and agreeable to all involved in some cases, . . .
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> Indeed, in the only case of that nature that has occurred recently—the Wolf Creek case itself—the reporting requirement proved entirely unnecessary when the applicants agreed that the existing antitrust conditions should apply to the entire, post-transfer organization, as APPA has acknowledged . . . .

Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649, 44,656 (2000). Of course, all parties, licensee and intervenors, do agree here as to the disposition of the license conditions among the entire, post-transfer organization.

Beyond the technical arguments, however, there are clear basic policy issues which this Commission cannot and should not ignore. These issues arise from a recognition of the role which this Commission was granted over the basic infrastructure of the electric industry, and of the impact which its exit from that role would have on the industry as a whole.

The Commission was given its current antitrust authority in the Atomic Energy Act Amendments of 1970, in some ways over its objection; the Commission had gone to considerable lengths to avoid dealing with its pre-existing antitrust powers. *Cities of*

Statesville v. Atomic Energy Commission, 441 F.2d 962 (D.C. Cir. 1969), *superseded by statute as explained in Ft. Pierce Utils. v. United States*, 606 F.2d 986 (D.C. Cir.), *cert. denied*, 444 U.S. 842 (1979). With the greatest of respect, NCPA suggests that Congress granted this authority to this Commission and directed it to use it precisely because it expected and needed a mechanism to assure that the multibillion dollar resources, to whose development the federal government had contributed so handsomely, not be used to further monopolize the market for electricity, a commodity essential to the economy of the nation.

The Commission did its part to comply with the 1970 amendments, and the actions of the Commission in attaching antitrust license conditions did indeed go far toward ending many of the worst examples of anticompetitive activities in the industry. But basic conditions such as those are incorporated into the plans and thinking of economic actors whose plans and investment for the future need be based on statutes and regulations which can safely be relied upon.

The Stanislaus Conditions embodied in the Diablo Canyon license were and are important to NCPA and to other neighboring entities and neighboring distribution systems. In NCPA's case, we have invested well over a billion dollars in generating resources in reliance on what one of PG&E's officers has described as "no bullshit firm transmission" rights embodied in those conditions and on the obligation of PG&E to build transmission adequate to protect those rights. Others have invested even more in reliance. Like the most basic pacts, these license conditions have kept the peace, or a semblance of the peace, providing a mechanism with some teeth for the resolution of disputes within a basic structural framework that otherwise might not exist.

The NRC is established by Congress as a specialized agency with essential jurisdiction to create and enforce rules that are necessary for the functioning of essential institutions for a democratic society. Since 1970 (at least), that jurisdiction has indisputably included antitrust as well as public health and safety.[14] While NCPA and PG&E have not by any means reached a point in which swords have been beaten into plowshares, this mechanism has at least reduced the level of warfare to a minimum that could be handled within the mechanisms established by the polity.[15]

But agreements without a framework for resolution are like agreements among nations who do not trust one another. The Stanislaus Commitments without all of the NRC mechanisms needed for assuring compliance would be akin to the Molotov-Ribbentrop Pact,[16] which Nazi Germany could and did breach without a moment's hesitation when it believed it desirable to do so in its own interest.[17] NCPA already finds that PG&E is contending in the FERC that it is entitled to abandon its obligation under the Stanislaus Commitments to provide firm transmission from NCPA resources to NCPA loads. While NCPA is seeking to deal first with that contention at FERC within the framework set out in that agency, where the proposal was filed, it may still be necessary to seek relief at this Commission. So PG&E is, we believe, already (and again) in violation of the license conditions which it seeks to split among disaggregated

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[14] These issues are not entirely unrelated; monopolists do have a tendency to abuse their monopoly power, observed as long ago as Adam Smith. The abuse frequently will be observed in areas which are not wholly economic, an observation made in 1890, when the Sherman Act was passed, and since. *E.g., Northern Pac. Ry. v. United States*, 356 U.S. 1, 4-5 (1958).

[15] *See, e.g.,* cases cited in footnotes 1 and 2, *supra.*

[16] The August 23, 1939 non-aggression pact between the Soviet Union and Nazi Germany which (among other things) allocated the Baltic states between the two in its secret protocols.

[17] Nazi Germany invaded the Soviet Union without warning on June 22, 1941.

successor corporations, and if the result this Commission hints at were to be permitted, PG&E successor entities would be positioned to seek to escape significant portions of the license conditions of which it is now in violation.

If the current restructured electricity markets were in fact the panacea that some economic theorists predicted they would be, these issues would no longer be important, and the Commission could rationally consider whether its antitrust jurisdiction were still needed. Bitter experience, however, much of it in California itself, makes clear that a panacea is not yet at hand. Isaiah's prophesy has not yet come to pass in this industry, the lion is not yet eating straw, nor the wolf feeding with the lamb.[18] Fundamental policy disputes are not yet resolved and while that is the case the chaos that always follows the failure of basic resolution can be expected to continue to offer opportunities for the wolf and the lion to wreak anticompetitive havoc.[19]

In the absence of some supervening miracle, it is clear to most observers that the basic need for antitrust enforcement is not yet over in the electric industry. Events as recent as this week make that clear, but these events have been occurring on a fairly regular basis for the past several years. Thus, we suggest, it would be without legal basis and certainly without factual basis for this Commission to decide to abandon its jurisdiction to enforce license conditions against successors in interest to the current licensee, especially when the current licensee proposes their inclusion and has submitted them voluntarily as co-licensees subject to the jurisdiction of this Commission. Indeed,

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[18] "The wolf and the lamb shall feed together, and the lion shall eat straw like the bullock" Isaiah 65: 25.

[19] Indeed, it is not at all impossible that the current competition between the PoRs proposed by the DIP and by the CPUC, and the different fundamental policy values embodied therein, may yet create deadlock in the bankruptcy proceedings.

in the case of ETrans, the proposed corporation would be a corporate sibling under the control of the same holding company.[20] In the case of PG&ER, the successor would be under effectively common ownership with Gen and with Diablo Canyon LLC, at least for many years.

Unless the NRC is to decide which license conditions are important and which are not of its own accord, without factual or record basis for so doing, there is thus no ground for rejecting the proposal of the current licensee to include all of the successors in interest needed to carry out its obligations under the license. NCPA respectfully suggests that Congress would need to speak on this issue before this Commission can obtain authority to ignore the antitrust conditions. The only alternative would be to preclude PG&E from splitting itself up, a proposal envisioned in the Plan of Reorganization proposed by the California Public Utilities Commission (the CPUC) in the Bankruptcy Court, as discussed below.

II. 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?

There have indeed been developments in the bankruptcy proceeding which may have an effect on the pending motions to hold the transfer proceeding in abeyance. It now appears that both the PG&E PoR and the CPUC proposed PoR may be submitted to a vote of the creditors together. So the PG&E PoR which reflects the proposal made by PG&E (and supported by NCPA before this Commission) to include all of the successor entities as licensees appears likely to go forward in the bankruptcy process for

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[20] An alternative might be to make Corp., the holding company, a licensee for these purposes.

submission to creditors, but only in a context in which it appears that it and the CPUC plan will be jointly submitted to creditors.[21]

But as noted above, the most significant effect on the bankruptcy process would be a conclusion by this Commission that the license transfer as sought would have to be modified to preclude the inclusion of ETrans and PG&ER. The stipulation in bankruptcy[22] which supports the current transfer application was intended by the parties to avoid the potential for substantially increased claims by NCPA, Palo Alto and other Neighboring Entities or Neighboring Distribution Systems. In a carefully balanced scheme for emergence from bankruptcy this ability to reduce the damages that might accrue to innocent bystanders was a key feature. The PG&E PoR is inherently tied to the ability to pay all claims in full, and the Debtor in Possession has structured the PoR in

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[21] Coincidentally, the hearing on the CPUC disclosure statement occurred yesterday. The fact that the PG&E PoR will be allowed to go forward does not mean that any conclusion has been made that it is "confirmable" under 11 U.S.C. 1129. In fact, the PoR is dependent upon a finding that several State laws are preempted by the Bankruptcy Code and the Constitution (among many other issues in vigorous dispute). PG&E's contention that those state laws were automatically preempted has been rejected (and is being appealed), and PG&E will now undertake to show that each of the laws in question is preempted on a case by case basis. That showing has not yet begun, and will involve vigorous litigation with the CPUC and the State of California, whose competing plan is irreconcilable with that of the DIP.

[22] 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&ER, 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. 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.

such a manner as to minimize claims that might otherwise be asserted. Thus the possibility that this Commission would override the carefully worked out plan of the Licensee to minimize its risks as debtor in possession in Chapter 11 may be the single largest risk to the Debtor's success in emerging from bankruptcy.

Equally significant, the Bankruptcy Court has terminated the exclusivity period within which only the Debtor in Possession could propose a plan of reorganization, although as yet only as to the CPUC. The CPUC has proposed its own PoR to the Court, which does not envision the disaggregation of DIP, and it appears that both PoRs are intended to go forward together to the creditors, after which (if one or both plans receive the necessary approvals) the plans approved will be submitted for confirmation hearings. At this point it appears that the confirmation hearings in the Fall or later will be the vehicle in which the serious concerns with both plans will be fought out. So there are now two plans of reorganization pending, and there may be more, if the current exclusivity period (other than for the DIP and the CPUC) is allowed to expire in June, as now seems possible in view of the likely deadlocks and feasibility concerns about both plans.[23]

In short, there are now two plans with quite inconsistent approaches as to the disaggregation proposed in these dockets. It is NCPA's view that the Commission would be better served by awaiting some indication that the DIP PoR is at least more likely of confirmation before it proceeds on the legally perilous path that appears to be envisioned.

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[23] The current exclusivity period expires on June 30, 2002.

CONCLUSION

For the foregoing reasons, NCPA strongly urges the Commission to accept the licensee's proposal to include all relevant successor entities on the license. NCPA suggests, however, that it may be prudent for this Commission to await further developments in the Bankruptcy process before it decides that it need proceed with processing the application, since it is not clear to us that the PoR reflected in the application will in fact prevail.

Respectfully submitted,

Robert C. McDiarmid
Lisa G. Dowden
Daniel I. Davidson
Ben Finkelstein

Attorneys for
the Northern California Power
Agency

Law Offices of:
Spiegel & McDiarmid
1350 New York Avenue, NW
Suite 1100
Washington, DC 20005-4798
(202) 879-4000

May 10, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have on this 10th day of May, 2002, caused the foregoing document to be sent by electronic (where available) or hand delivery (if in Washington without electronic delivery information) and first-class mail to:

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Lawrence J. Chandler, Esq.
Office of the General Counsel
Mail Stop – O-15 D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: ljc@nrc.gov; ogclt@nrc.gov

Laurence G. Chaset, Esq.
Public Utilities Commission
of the State of California
505 Van Ness Avenue
Room 5131
San Francisco, CA 94102
e-mail: lau@cpuc.ca.gov

David Effross
Public Utilities Commission
of the State of California
505 Van Ness Avenue
4th Floor
San Francisco, CA 94102
e-mail: dre@cpuc.ca.gov

Gregory Heiden, Esq.
Public Utilities Commission
of the State of California
505 Van Ness Avenue
Room 5024
San Francisco, CA 94102
e-mail: gxh@cpuc.ca.gov

Robert C. McDiarmid, Esq.
Ben Finkelstein, Esq.
Lisa G. Dowden, Esq.
Daniel I. Davidson, Esq.
Meg Meiser, Esq.
Tracy E. Connor, Esq.
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Washington, D.C. 20005-4798
e-mail: robert.mcdiarmid@spiegelmcd.com
ben.finkelstein@spiegelmcd.com
lisa.dowden@spiegelmcd.com
daniel.davidson@spiegelmcd.com
meg.meiser@spiegelmcd.com
tracy.connor@spiegelmcd.com

George A. Fraser
General Manager
Northern California Power Agency
180 Cirby Way
Roseville, CA 95678
e-mail: george@ncpa.com

Edwin F. Feo, Esq.
Millbank, Tweed, Hadley & McCloy, LLP
601 South Figueroa Street
30th Floor
Los Angeles, CA 90017
e-mail: efeo@milbank.com

Steven M. Kramer, Esq.
Carla J. Urquhart, Esq.
Millbank, Tweed, Hadley &
McCloy, LLP
1825 I Street, N.W.
Suite 1100
Washington, D.C. 20006
e-mail: skramer@milbank.com
curquhart@milbank.com

James H. Pope
Chairman
Maury A. Kruth
Executive Director
Transmission Agency of Northern California
P.O. Box 15129
Sacramento, CA 95851-0129

Wallace L. Duncan, Esq.
James D. Pembroke, Esq.
Duncan, Weinberg, Genzer &
Pembroke, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036-3203
e-mail: ndr@dwgp.com

William C. Walbridge
General Manager
M-S-R Public Power Agency
P.O. Box 4060
Modesto, CA 95352

James C. Feider
Director, Electric Department
City of Redding
777 Cypress Avenue
Redding, CA 96049-6071

James H. Pope
Director of Electric Utility
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Grant Kolling, Esq.
Senior Assistant City Attorney
City of Palo Alto
P.O. Box 10250
Palo Alto, CA 94303
e-mail: grant_kolling@city.palo-alto.ca.us

Roger VanHoy
Assistant General Manager
Electric Resources
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352

Rick Coleman
General Manager
Trinity Public Utility District
P.O. Box 1216
Weaverville, CA 96093-1216

Roland D. Pfeifer, Esq.
Assistant City Attorney
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050
e-mail: rpfeifer@ci.santa-clara.ca.us

Harrison Call
Call Company
130 S. Cloverdale Boulevard
P.O. Box 219
Cloverdale, CA 95425

Girish Balachandran
Assistant Director of Utilities
City of Palo Alto
P.O. Box 10250
Palo Alto, CA 94303
e-mail: girish@cerberus.city.palo-alto.ca.us

Scott Steffen, Esq.
Assistant General Counsel
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352

David A. Repka, Esq.
Brooke D. Poole, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005
e-mail: drepka@winston.com
bpoole@winston.com

Richard F. Locke, Esq.
William V. Manheim, Esq.
Pacific Gas & Electric Company
77 Beale Street
B30A
San Francisco, CA 94105
e-mail: rfl6@pge.com
wvm3@pge.com

Robert C. McDiarmid
Lisa G. Dowden
Daniel I. Davidson
Ben Finkelstein

Law Offices of:
Spiegel & McDiarmid
1350 New York Avenue, NW
Suite 1100
Washington, DC 20005-4798
(202) 879-4000