

July 2, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

July 11, 2002 (1:36PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)
)
Pacific Gas and Electric Co.)
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))

Docket No. 72-26-ISFSI

OPPOSITION OF PACIFIC GAS AND ELECTRIC COMPANY TO
REQUESTS FOR STAY OF PROCEEDING

I. INTRODUCTION

Pursuant to the Licensing Board's Orders dated June 20 and June 25, 2002, Pacific Gas and Electric Company ("PG&E"), applicant in the above-captioned matter, hereby files its unified answer to the three requests for stay of this proceeding submitted by Klaus Schumann and Mary Jane Adams, petitioner Lorraine Kitman, and petitioners San Luis Obispo Mothers for Peace *et al.* ("SLOMFP").¹ As discussed below, Commission precedent and public policy dictate that the NRC continue and promptly complete its review of the proposed Application. Therefore, the motions to stay the proceeding should be denied.

¹ SLOMFP filed its motion to stay in conjunction with petitioners Avila Valley Advisory Council, San Luis Obispo County Supervisor Peg Pinard, Central Coast Peace and Environmental Council, Environmental Center of San Luis Obispo, Nuclear Age Peace Foundation, San Luis Obispo Chapter of Grandmothers for Peace International, San Luis Obispo Cancer Action Now, Santa Lucia Chapter of the Sierra Club, Santa Margarita Area Residents Together, Cambria Legal Foundation, and Ventura County Chapter of the Surfrider Foundation.

II. BACKGROUND

A. The Approval at Issue

On December 21, 2001, PG&E submitted to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") an Application for a site-specific license under 10 C.F.R. Part 72 to possess spent fuel, and other radioactive materials associated with spent fuel, in an independent spent fuel storage installation ("ISFSI"). If granted, the license would authorize PG&E to store spent fuel and associated materials generated at the Diablo Canyon Power Plant ("DCPP") in a dry cask storage system at the DCPP site in San Luis Obispo County.

The projected spent fuel storage requirements for DCPP necessitate operation of the ISFSI beginning in 2006. To meet this schedule and preserve the capability for a full core off-load, PG&E has requested that the 10 C.F.R. Part 72 license be issued by the end of 2003. PG&E plans to begin ISFSI construction soon thereafter, to support operation by 2006. The NRC Staff review is currently on schedule to meet that goal; issuance of the license, including the NRC Staff's Safety Evaluation Report and Final Environmental Statement, is expected by February 22, 2003.²

B. PG&E Plan of Reorganization

On April 6, 2001, PG&E filed a petition for relief under Chapter 11 of the United States Bankruptcy Code. Subsequently, on September 20, 2001, PG&E filed with the United States Bankruptcy Court for the Northern District of California ("Bankruptcy Court") a comprehensive plan of reorganization ("Plan") for PG&E. The Plan involves a restructuring of PG&E's businesses and operations. Under the Plan, if confirmed by the Bankruptcy Court,

² See Letter, S. Baggett, NRC, to L. Womack, DCPP, "Schedule for Review of the Diablo Canyon Independent Spent Fuel Storage Installation," dated May 9, 2002.

PG&E's generating assets, including DCPD and the proposed ISFSI, would be transferred to a new generating company named Electric Generation LLC ("Gen"). Gen would be a subsidiary of PG&E Corporation (PG&E's parent corporation), and PG&E would be separated from PG&E Corporation. Accordingly, on November 30, 2001, to facilitate prompt implementation of the Plan if and when the Plan is confirmed and all regulatory approvals are obtained, PG&E filed with the NRC a request for NRC consent to a transfer of the 10 C.F.R. Part 50 operating license for DCPD to Gen. (In addition, the license transfer application requests approval of a transfer of ownership of the asset to a subsidiary of Gen, Diablo Canyon LLC ("Nuclear")). That Part 50 license transfer application is currently pending before the NRC Staff, and is subject to a proceeding pending before the Commission. In addition to the approvals of the Bankruptcy Court and the NRC, approvals are required from the Federal Energy Regulatory Commission ("FERC") and the Securities and Exchange Commission in order to implement the Plan.

III. DISCUSSION

Three requests to stay this proceeding have been filed based on the proceeding in the Bankruptcy Court:³ on June 11, 2002, petitioner Lorraine Kitman submitted a stay request to the NRC Staff via e-mail ("Kitman Stay Request"); on June 12, 2002, Klaus Schumann and Mary Jane Adams submitted a substantively identical stay request to the NRC Commissioners via e-mail;⁴ and on June 25, 2002, SLOMFP *et al.* filed a motion for stay of the proceeding

³ The SLOMFP motion also cites to other claims filed against PG&E Corporation in the Bankruptcy Court, and the NRC license transfer proceeding mentioned above. (SLOMFP Motion at 4-5, 6-7.)

⁴ As an initial matter, Mr. Schumann and Ms. Adams have not formally intervened in this matter pursuant to 10 C.F.R. § 2.714(a)(1), and the period for timely intervention in this proceeding expired on May 22, 2002. Moreover, Mr. Schumann and Ms. Adams have not attempted to satisfy the criteria for late intervention under 10 C.F.R. § 2.714(a)(1)(i)-(v). Consequently, they do not have the right to file motions or other pleadings in this proceeding, and their request for stay should be denied on that basis. (Because this

("SLOMFP Motion"). At bottom, the stay requests all allege that matters pending in the Bankruptcy Court should be resolved prior to any hearing on PG&E's ISFSI Application. As discussed below, a stay is not appropriate in this proceeding, and the requests for stay should be denied.

A. A Stay is Not Appropriate in This Proceeding

The various petitioners list several issues which they contend must be resolved in the bankruptcy proceeding in order to ensure "meaningful participation in the NRC intervention process" (Kitman Stay Request), as follows:

- Identity of the agency responsible for oversight of decommissioning funds "collected from California ratepayers which will be used to plan, construct, maintain and secure this nuclear waste site" (Kitman Stay Request);
- Whether financial assurance will be adequate (SLOMFP Motion at 2; Kitman Stay Request) and transport methods will be available (Kitman Stay Request);
- Identity of the company that will own DCPD (Kitman Stay Request), and the company that will hold the NRC ISFSI license (SLOMFP Motion at 1)
- Whether the new owner of DCPD will be subject to regulation by the California Public Utilities Commission ("CPUC") or by FERC (Kitman Stay Request),⁵

request is substantively identical to the Kitman Stay Request, however, the arguments set forth in this Opposition with respect to the Kitman Stay Request would apply equally to this request.) Mr. Schumann and Ms. Adams may participate in the proceeding by making a limited appearance on the issues at the discretion of, and subject to conditions fixed by, the Licensing Board pursuant to 10 C.F.R. § 2.715(a). *Cf. Exxon Nuclear Co. (Nuclear Fuel Recovery & Recycling Center)*, LBP-77-59, 6 NRC 518, 519 n.1 (1977).

⁵ The CPUC has raised the issue of the relative merits of CPUC versus FERC jurisdiction over DCPD in the Part 50 license transfer proceeding currently before the NRC, discussed above. The Commission declined to admit this issue in that proceeding, because (1) NRC approval of the license transfer would not alter the regulatory role of the CPUC; and (2) there is no basis for the argument that CPUC oversight is necessary for the protection of public health and safety with respect to radiological risks, as that role is reserved to the NRC. *Pacific Gas & Elec. Co. (Diablo Canyon Power Plant, Units 1 & 2)*, CLI-02-16, 55 NRC __ (June 25, 2002), slip op. at 16-17. For the same reasons, this issue is not appropriate for consideration in an NRC licensing proceeding on the ISFSI Application, and it cannot provide the basis for a stay of the proceeding.

- Whether DCPD will be a viable enterprise (SLOMFP Motion at 1); and
- The technical competence of the licensee (SLOMFP Motion at 2).

None of these issues necessitates a stay of this proceeding.⁶ Moreover, these issues represent only a small part of the issues that might be raised and addressed in this Part 72 proceeding. There is no reason to delay consideration of relevant matters. Prompt resolution is essential to timely complete the review of the Application.

1. *Financial Qualifications*

Currently, PG&E is the applicant for the Part 72 license. PG&E is an electric utility subject to economic regulation by the CPUC. As long as PG&E remains the licensee, as indicated in the Application, both capital expenditures and operation and maintenance costs related to the ISFSI will be covered by revenues derived from electric rates. To the extent that financial qualifications (including the adequacy of decommissioning funding) is an issue with respect to the ISFSI, that matter can be raised now based on the Application as filed. Information required to meet 10 C.F.R. § 72.22(e) is provided in the Application. There is no basis for a stay of consideration of these issues. PG&E is entitled to move forward with respect to the review of the Application.

As discussed above, PG&E's plan of reorganization is indeed pending before the Bankruptcy Court. However, as also discussed above, to be implemented, PG&E's Plan must be

⁶ The Kitman Stay Request also states, as a basis for staying this proceeding, that "San Luis Obispo County has not yet begun the Environmental Impact Report process which is not expected to be complete until late 2002 or early 2003." San Luis Obispo County will be preparing an environmental impact report in connection with PG&E's application for a Coastal Development Permit for the ISFSI. That environmental review is limited to those matters within the purview of state and local governments. *See generally Maine Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47 (D. Me 2000). Such a review is not an element of the NRC licensing process, and any issues related to that review are beyond the scope of this proceeding. Therefore, this does not provide a basis for a stay.

confirmed under Section 1129 of the Bankruptcy Code, 11 U.S.C. § 1129, and several other regulatory approvals are required. While PG&E is confident that its Plan will ultimately be confirmed, the fact is that the Bankruptcy Court did authorize the CPUC to file an alternative competing plan of reorganization, which was filed on April 15, 2002. The CPUC's proposed plan of reorganization would not involve transfer of the NRC operating license for DCP. PG&E would remain both the Part 50 licensee for the power plant and the Part 72 ISFSI applicant.⁷ Given the uncertainty inherent in this process, PG&E is proceeding with its ISFSI Application based on the current power plant licensee (PG&E) becoming the Part 72 licensee.

As stated in a supplement to the Part 72 ISFSI Application dated June 7, 2002,⁸ if and when the Plan is confirmed, and if the license transfer is approved by the NRC, and if the Plan is implemented, then PG&E will amend the Part 72 Application such that Gen will become the applicant. Accordingly, the basis for financial qualifications would change. Capital and operating costs related to DCP and the ISFSI would be covered by revenues from merchant sales of electricity. The financial qualifications issues germane to the Plan are already being addressed by the NRC in its review of the DCP license transfer. That information is cross-referenced in the ISFSI Application at § 1.5 (pages 4-6). Funding for the ISFSI, which constitutes only a small portion of the funding for DCP, is included in the financial data submitted in conjunction with the license transfer application. To the extent that this information

⁷ On May 15, 2002, the Bankruptcy Court confirmed that the creditor vote solicitation process for both plans of reorganization would begin in June and established August 12, 2002, as the date on which voting ballots are due. Following the completion of voting and confirmation hearings, it is anticipated that a Confirmation Order will be issued by the Bankruptcy Court, and a plan of reorganization consummated, by December 31, 2002.

⁸ PG&E Letter DIL-02-008 from L. Womack, PG&E, to the NRC Document Control Desk, "Supplemental General and Financial Information — 10 CFR 72.22," dated June 7, 2002.

is even presently relevant, it is available and it is subject to review in the Part 50 license transfer proceeding.

In sum, any challenge to PG&E's financial qualifications can be raised now based upon the Application. To the extent that petitioners would challenge the financial qualifications of Gen, that issue currently is being dispositioned in the NRC Part 50 license transfer proceeding. There is no reason to stay this proceeding on either the financial issues or any other relevant issues.

2. *Technical Qualifications*

The Application, at § 2.0 (page 7) and Chapter 9 of the Diablo Canyon ISFSI Safety Analysis Report set forth the technical qualifications of the PG&E staff for managing the design, construction, and operation of the ISFSI in accordance with NRC requirements. As is the case with questions regarding PG&E's financial qualifications, any challenge with respect to those technical qualifications can and should be set forth without further delay. Meanwhile, the technical qualifications of Gen to operate DCPD — which are essentially identical to those of PG&E given that the nuclear organization would simply be transferred from PG&E to Gen — are being addressed in the Part 50 license transfer. There is no basis to assume that Gen would be any less qualified than PG&E. The open question of whether the nuclear organization is part of PG&E or part of Gen does not justify a stay of the present proceeding.

B. A Deferral Would Be Inconsistent With Commission Precedent and Policy

As a general matter, the Commission has frequently reiterated its commitment to "the expeditious completion of adjudicatory proceedings." *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998). Moreover, it is well settled that the pendency of parallel proceedings before other forums is not adequate grounds to stay an

NRC adjudication. *See Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 288-90 (2000) (denying motions for stay a license transfer proceeding pending decisions by New York courts, the Internal Revenue Service, FERC, and the New York State Department of Environmental Conservation); *Consol. Edison Co. of N.Y.* (Indian Point, Units 1 & 2), CLI-01-08, 53 NRC 225, 228-30 (2001) (denying request to suspend proceeding until completion of Indian Point 3/FitzPatrick license transfers, and decision on a 10 C.F.R. § 2.206 enforcement petition); *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-99-30, 50 NRC 333, 343-344 (1999) (denying suspension until conclusion of New York Public Service Commission proceeding). Indeed, the Commission has stated, "[I]t would be productive of little more than untoward delay were each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval." *Nine Mile Point*, CLI-99-20, 50 NRC at 344 (quoting *S. Calif. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-171, 7 AEC 37, 39 (1974)).⁹

The Commission recently declined to hold the DCPD license transfer proceeding in abeyance pending resolution of the parallel proceedings in the Bankruptcy Court (also at issue here), and at FERC. Noting that the bankruptcy case "is moving forward in due course," the Commission stated, "We thus see no reason here to deviate from our usual practice of completing our license transfer reviews promptly despite the pendency of related matters elsewhere." *Diablo Canyon*, CLI-02-16, slip op. at 5. The same logic clearly applies to the

⁹ Rather than deferral, the NRC's rules at 10 C.F.R. Part 2, Subpart G allow petitioners to submit late-filed issues, where appropriate. *See* 10 C.F.R. § 2.714(d). Indeed, in the license transfer context, the Commission has held that this rule, rather than a stay, is "the best means for handling newly arising issues" from collateral proceedings. *Indian Point 2*, CLI-01-08, 53 NRC at 229.

instant Subpart G proceeding. Ample information has been provided in the Part 72 Application to address possible issues — including financial and technical qualifications, seismic design, security, environmental, or any other issues within the scope of a Part 72 review. The petitioners have not demonstrated any basis for deviating from well-established precedent and stay the proceeding on the basis of the Bankruptcy Court proceeding, the NRC license transfer, or any other proceedings related to the PG&E reorganization.¹⁰

¹⁰ The petitioners also seem to suggest, but certainly have not shown, that the fact of bankruptcy alone provides a basis for a stay of this proceeding. Contrary to the unfounded suggestion, DCPD continues to operate safely and in accordance with NRC requirements. To the extent that the petitioners make a claim to the contrary, the appropriate vehicle for relief would be a petition for enforcement action pursuant to 10 C.F.R. § 2.206.

IV. CONCLUSION

For the reasons set forth above, the requests for stay of Lorraine Kitman, Klaus Schumann and Mary Jane Adams, and SLOMFP *et al.* should be denied.

Respectfully submitted,



David A. Repka, Esq.
Brooke D. Poole, Esq.
WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005-3502

William V. Manheim, Esq.
Richard F. Locke, Esq.
PACIFIC GAS & ELECTRIC COMPANY
77 Beale Street, B30A
San Francisco, CA 94105

ATTORNEYS FOR PACIFIC GAS &
ELECTRIC COMPANY

Dated in Washington, District of Columbia
This 2nd day of July 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
)
Pacific Gas and Electric Co.) Docket No. 72-26-ISFSI
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of "OPPOSITION OF PACIFIC GAS AND ELECTRIC COMPANY TO REQUESTS FOR STAY OF PROCEEDING" in the above captioned proceeding have been served as shown below by electronic mail, this 2nd day of July 2002. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

Administrative Judge G. Paul Bollwerk, III
Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: gpb@nrc.gov

Administrative Judge Peter S. Lam
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: psl@nrc.gov

Administrative Judge Jerry R. Kline
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: jrk2@nrc.gov
kjerry@erols.com

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
e-mail: dcurran@harmoncurran.com

Lorraine Kitman
P.O. Box 1026
Grover Beach, CA 93483
e-mail: lorraine@bejoseeds.com
l.kitman@bejoseeds.com

Karen D. Cyr, Esq.
Stephen H. Lewis, Esq.
Angela B. Coggins, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
e-mail: OGCMailCenter@nrc.gov
shl@nrc.gov
abc1@nrc.gov

Seamus M. Slattery, Chairman
Avila Valley Advisory Council
P.O. Box 58
Avila Beach, CA 93424
e-mail: Jslat1@aol.com

Peg Pinard
714 Buchanan Street
San Luis Obispo, CA 93401

Klaus Schumann
Mary Jane Adams
26 Hillcrest Drive
Paso Robles, CA 93446
e-mail: jayklaus@email.msn.com



Brooke D. Poole, Esq.
Counsel for Pacific Gas
& Electric Company