RAS 4771

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

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

BRIEF OF THE NORTHERN CALIFORNIA POWER AGENCY ON SPECIFIC QUESTION

By Memorandum and Order of August 1, 2002 (CLI–02–18) in this Docket, this Commission has requested briefs on the question of whether the Commission has statutory authority to retain or impose antitrust conditions for commercial nuclear power plants licensed under Section 104.b of the Atomic Energy Act. The Northern California Power Agency ("NCPA"), which has timely petitioned for intervention in this license transfer docket, responds to the Commission's question in the affirmative.

The context for the Commission's question is the fact that, although the first unit of PG&E's Diablo Canyon nuclear plant did not enter commercial service until November, 1984, the plant was licensed under Section 104.b of the Atomic Energy Act, not Section 103. Accordingly the applicant, the Pacific Gas & Electric Company ("PG&E"), was not subject to antitrust review under Section 105.c in connection with the licensing of its two Diablo Canyon units. Thus, the so-called Stanislaus Commitments do not have the pedigree of most antitrust license conditions—they were not imposed by the Commission under Subsection 105.c(6) in connection with the issuance of licenses based

upon a Subsection 105.c(5) finding that activities under those licenses would create or maintain a situation inconsistent with the antitrust laws as specified in Section 105.a.

The Stanislaus Commitments became conditions to the construction permits for the Diablo Canyon units by amendment. *See Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, DD–90–3, 31 N.R.C. 595, 597 (1990). PG&E, by letter dated September 19, 1978, confirmed its consent to this amendment, which derived from a 1976 agreement which aimed to avoid an antitrust hearing under Subsection 105.c(5) in connection with PG&E's application under Section 103 for a construction permit for its proposed Stanislaus Nuclear Project, Unit 1. This, of course, is why these provisions are known as the Stanislaus Commitments despite their presence in the Diablo Canyon licenses.

Section 187 of the Atomic Energy Act provides very broad authority for the amendment of licenses and construction permits:

> The terms and conditions of all licenses shall be subject to amendment, revision, or modification, by reason of amendments of this Act, or by reason of rules and regulations issued in accordance with the terms of this Act.

This is in sharp contrast to other federal licensing schemes. For example, licenses issued under the Federal Power Act may not be altered without the licensee's agreement, and are not affected by subsequent legislative enactments. *See* 16 U.S.C. §§ 799, 822 (2000).

There is no basis to question the validity of the license amendment that added the Stanislaus Commitments to the Diablo Canyon construction permits. The amendment was consensual.[1] The agreement which led to the amendment was signed by the

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[1] Thus the situation may be considered as one in which the Applicant agreed in substance to withdraw and resubmit its application, so that it would come under Section 103, rather than 104.b, which would clearly

Department of Justice and presented to the Commission with the Department's endorsement. This Commission also endorsed the propriety of entertaining license amendment applications which concerned antitrust license conditions in *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI–92–11, 36 N.R.C. 47 (1992), *petition for review dismissed sub nom. City of Cleveland v. USNRC*, 68 F.3d 1361 (D.C. Cir. 1995).

When the holder of a construction permit that contains antitrust conditions receives an operating license, the antitrust conditions almost invariably carry forward. Section 105.c(2) sharply limits the circumstances under which a new antitrust review may be conducted in connection with the grant of an operating license. Accordingly, the fact that the Diablo Canyon operating licenses were issued under Section 104.b rather than under Section 103[2] has no bearing on the propriety of maintaining the operating conditions in the license, because no Section 105.c inquiry would have taken place under either licensing regime.

NCPA does not believe that it is accurate to describe the Stanislaus Commitments as having been "imposed" on the Diablo Canyon licenses. However, the Atomic Energy Act clearly allows the imposition of antitrust conditions on Section 104.b licenses. The Commission states in CLI–02–18 that "Section 105 of the AEA, enacted in 1970, granted the Commission certain antitrust powers and responsibilities for facilities licensed under Section 103 of the Act." In fact, however, Section 105 has three subsections, and only the last of them, Section 105.c, is limited to facilities licensed under Section 103.

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have invoked Section 105.c treatment.

[2] *But see* footnote 1 *supra*.

If *any* Atomic Energy Act licensee violates one of several enumerated federal antitrust and fair trade laws in the conduct of its licensed activity, Section 105.a empowers the Commission to "suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act." This provision unquestionably would allow the insertion of antitrust conditions into Section 104.b licenses, or even into Section 104.a licenses. And because of Section 187, Section 105.a applies even to licenses issued prior to 1970. Accordingly, there is no basis for thinking that a Section 104.b license that contains antitrust license conditions is somehow repugnant to the regulatory scheme of the Atomic Energy Act.

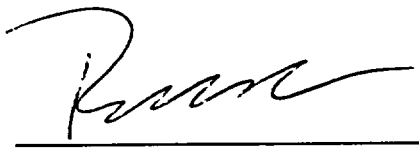
In terms of maintaining the antitrust conditions presently contained in the Diablo Canyon licenses, the Commission's regulations appear to contemplate only two circumstances in which the licenses might be altered: in connection with an application pursuant to 10 C.F.R. §§ 50.90–50.92, or in connection with a finding that a licensee made misrepresentations to the Commission to secure its license, or has violated its license, the AEA, or a Commission regulation or order (10 C.F.R. § 50.100). There is no contention in this proceeding that the Diablo Canyon licenses should be modified for cause under 10 C.F.R. § 50.100, and PG&E has not applied to amend its license by altering the Stanislaus Commitments. Indeed, it is Commission staff that is proposing to alter the Stanislaus Commitments by releasing several intended successors and assigns of PG&E as licensees. It is not clear to us what the legal basis would be under the Commission's regulations for such modification of the Diablo Canyon licenses.

Although NCPA believes that there would be no cognizable legal basis for the distinction the August 1 Memorandum and Order suggests, we note as well that this

Commission itself has issued orders based upon the segments of the license in question and that those segments have generated significant reliance interests by the Applicant, and also by the other parties to this proceeding (other than the Staff). They are, *inter alia*, the basis for the current Plan of Reorganization of PG&E, so that the revision of the license conditions apparently anticipated by those who propounded the inquiry would in and of itself cause a potential failure of the Plan which the Applicants here seek to implement.

For the foregoing reasons, NCPA strongly urges the Commission to accept the licensee's proposal to include all relevant successor entities on the license.

Respectfully submitted,



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August 22, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have on this 22nd day of August, 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:

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