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

CLI-03-02

MEMORANDUM AND ORDER

Today, in this license transfer proceeding, we reject on their merits the antitrust-based portions of the petitions to intervene and requests for hearing filed by the Northern California Power Agency ("NCPA") and the following group of entities: the Transmission Agency of Northern California, M-S-R Public Power Agency, Modesto Irrigation District, the California Cities of Santa Clara, Redding, and Palo Alto, and the Trinity Public Utility District (collectively, "TANC"). We find that legal and policy considerations preclude transfer of antitrust conditions originally imposed in 1978 on the licenses for Diablo Canyon Nuclear Power Plant, Units 1 and 2 (collectively, "DCPP"). Further, we find inadmissible TANC's challenges to the transferees' technical and financial qualifications to operate DCPP. Our decision on the TANC and NCPA

petitions completes our consideration of adjudicatory issues in this case.[1] We accordingly terminate the proceeding.

## I. BACKGROUND

This proceeding involves an application seeking the Commission's authorization for Pacific Gas and Electric Co. ("PG&E") to transfer its licenses for DCPP[2] in connection with a comprehensive Plan of Reorganization which PG&E filed under Chapter 11 of the United States Bankruptcy Code. Under the restructuring plan that PG&E submitted to the Bankruptcy Court, the licenses would be transferred to a new generating company named Electric Generation LLC ("Gen"), which would operate DCPP, and to a new wholly-owned subsidiary of Gen named Diablo Canyon LLC ("Diablo Nuclear"), which would hold title to DCPP and lease it to Gen. Other components of the restructuring include the transfer of both the majority of PG&E's electric transmission business to ETrans LLC ("ETrans") and the majority of its gas transmission assets and liabilities to GTrans LLC ("GTrans")[3] – both newly created companies.

The application proposes that, solely for antitrust purposes, the NRC licensees would be Gen, ETrans, PG&E, and Diablo Nuclear. The first three of these would be jointly and severally responsible for compliance with certain antitrust conditions (described in section III.C, *infra*) in

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[1] We previously denied all other petitions to intervene. *See Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317 (2002), *petition for judicial review pending*, No. 02-72735 (9th Cir.).

[2] *See* 42 U.S.C. § 2234; 10 C.F.R. § 50.80.

[3] Both ETrans and GTrans would also become indirect wholly-owned subsidiaries of PG&E Corporation (the current parent of, and not to be confused with, PG&E), which will change its name. PG&E would retain most of the remaining assets and liabilities and would continue to conduct local electric and gas distribution operations and related customer services. After disaggregation of the businesses, PG&E Corporation would declare a dividend and distribute the common stock of PG&E to its public shareholders, thus separating PG&E from PG&E Corporation. PG&E expects that the value realized will provide cash and increased debt capacity to enable it to repay creditors, restructure existing debt, and emerge from the bankruptcy. *See Diablo Canyon*, CLI-02-16, 55 NRC at 332 n.2.

the current DCPP licenses.[4] The NRC staff, however, in its *Federal Register* notice of the DCPP application,[5] indicated that it might transfer the antitrust conditions to only Diablo Nuclear and Gen because they would be the only entities with authority to possess or operate DCPP.[6]

In response to the published notice of the DCPP application, the Commission received five petitions to intervene and requests for hearing. The petitioners were the Official Committee of Unsecured Creditors of PG&E ("Committee"), the California Public Utilities Commission ("CPUC"), the County of San Luis Obispo ("County"), NCPA, and TANC. The Committee expressed interest in the financial qualifications of the future licensees but supported PG&E's proposed reorganization plan. CPUC opposed the transfer of the two licenses to the extent that the transfer would proceed according to PG&E's proposed plan. The County was concerned about the technical and financial qualifications of the transferees and ETrans. Neither CPUC, the Committee nor the County raised any antitrust issues. TANC and NCPA, however, expressed concerns primarily about the NRC staff's proposal to grant licensee status to only Gen and Diablo Nuclear. TANC and NCPA believe that this proposed approach would have the effect of eliminating the antitrust conditions in the current licenses. TANC also raised issues involving the transferees' financial and technical qualifications. Pursuant to 10 C.F.R. § 2.1316, the NRC Staff is not a party to this proceeding.

On June 25, 2002, we issued an order (CLI-02-16, *supra* note 1) denying the intervention petitions of CPUC, the Committee and the County, but granting CPUC and the

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[4] PG&E's Brief in Response to Commission Memorandum and Order CLI-02-12, dated May 10, 2002, at 3-4, 15. The antitrust conditions themselves are appended to that Brief as Attachment B at 1 ("Antitrust Conditions: Facility Operating License No. DPR-80").

[5] We refer throughout this Memorandum and Order to "[t]he NRC staff['s] . . . *Federal Register* notice" or "the NRC staff's proposal" because it was drafted and signed by a member of the agency's staff, albeit "[f]or the Nuclear Regulatory Commission." *See* 67 Fed. Reg. 2455, 2456 (Jan. 17, 2002).

[6] *See id.*

County "governmental participant" status (entitling them to participate in the proceeding if, but only if, we were subsequently to grant a hearing to another petitioner).[7] But we deferred ruling on the intervention petitions of NCPA and TANC. Today we address their petitions.

To intervene as of right in a license transfer proceeding, a petitioner must demonstrate standing; *i.e.*, that its "interest may be affected by the proceeding,"[8] and must raise at least one admissible issue.[9] We conclude that NCPA and TANC have each demonstrated standing and raised an admissible antitrust issue. We therefore grant their petitions to intervene. We find, however, that as their antitrust issues are ones of law rather than fact, we can resolve them on the basis of the current record. We therefore deny NCPA's and TANC's requests for hearing.

## II. STANDING

To demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

(1) identify an interest in the proceeding by

> (a) alleging a concrete and particularized injury (actual or threatened) that
> (b) is fairly traceable to, and may be affected by, the challenged action (here, the grant of a license transfer application), and
> (c) is likely to be redressed by a favorable decision, and
> (d) lies arguably within the "zone of interests" protected by the governing statute(s) (here, the AEA).

(2) specify the facts pertaining to that interest.[10]

NCPA rests its claim of standing on its status as a third-party beneficiary of the Stanislaus Commitments (a 1976 antitrust agreement between PG&E and the United States

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[7] CLI-02-16, 55 NRC at 345, 349 (permitting participation analogous to that authorized under 10 C.F.R. § 2.715(c)).

[8] AEA 189a, 42 U.S.C. 2239(a); *Diablo Canyon*, CLI-02-16, 55 NRC at 335 & n.17.

[9] 10 C.F.R. § 2.1306; *Diablo Canyon*, CLI-02-16, 55 NRC at 335 & n.18.

[10] *See* 10 C.F.R. §§ 2.1306, 2.1308; *Diablo Canyon*, CLI-02-16, 55 NRC at 336; *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000) and references cited therein.

Department of Justice which the Commission incorporated into DCPP's license conditions 2½ years later) which protect the economic interests of NCPA's members.[11] PG&E acknowledges that NCPA has an interest in raising antitrust issues in this proceeding[12] and no other party opposes NCPA's claim of standing. We likewise conclude that NCPA has standing as a beneficiary of antitrust license conditions at issue in this proceeding.

TANC uses PG&E's scheduling, generation and transmission services[13] and claims standing based on, *inter alia*, antitrust interests quite similar to those of NCPA.[14] PG&E acknowledges that TANC, like NCPA, has an interest in raising antitrust issues[15] and no other party challenges TANC's claim of standing. We agree that TANC has standing.

## III. SUBSTANTIVE ISSUES

### A. Standards for Admission of Substantive Issues

Our rules specify that, to demonstrate that issues are admissible in a Subpart M proceeding, a petitioner must

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[11] NCPA's Petition to Intervene, dated Feb. 6, 2002, at 3-5. The Stanislaus Commitments and their incorporation into the DCPP licenses are described in greater detail both at pages 10 *et seq.*, *infra* and in *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Plant, Units 1 and 2), DD-90-3, 31 NRC 595, 597 (1990), and were published in "Receipt of Attorney General's Advice and Time for Filing of Petitions to Intervene on Antitrust Matters," 41 Fed. Reg. 20,225, 20,226-28 (May 17, 1976). The Commitments were supplemented by a 1991 settlement agreement between PG&E and NCPA in an NRC proceeding. The settlement extended the contract's term until at least January 1, 2050. *See* TANC's Additional Comments, dated Sept. 23, 2002, at 4 n.2, 5, 7. TANC's Sept. 23rd pleading, despite being unauthorized under our procedural rules, contains information that assists us in our determination of the antitrust issues in this proceeding, and we therefore grant TANC's request for permission to file that pleading, *id.* at 1-2.

[12] PG&E's Answer to NCPA's Conditional Request for Hearing, dated Feb. 15, 2002, at 9.

[13] TANC's Petition to Intervene, dated Feb. 6, 2002, at 6-10, 12.

[14] *Id.* at 12, 13.

[15] PG&E's Answer to TANC's Petition to Intervene, dated Feb. 15, 2002, at 7.

(1) set forth the issues (factual and/or legal) that petitioner seeks to raise,

(2) demonstrate that those issues fall within the scope of the proceeding,

(3) demonstrate that those issues are relevant to the findings necessary to a grant of the license transfer application,

(4) show that a genuine dispute exists with the applicant regarding the issues, and

(5) provide a concise statement of the alleged facts or expert opinions supporting the petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.[16]

Our procedural rules require petitioners to articulate at least one detailed threshold issue in order to qualify for an agency hearing.[17] We will not consider vague, unparticularized issues.[18] Applying these standards, we now turn to the two categories of issues raised by TANC and/or NCPA.

**B. Financial and Technical Qualifications Issues**

TANC expresses concern that Gen may be unable to meet its decommissioning obligations or its operating expenses, particularly as the prices it charges for electricity are set by contract for 12 years and are therefore not subject to rate increases which would enable Gen to pass along excess costs to its customers.[19] In a related concern, TANC also worries that

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[16] *See* 10 C.F.R. 2.1306; *Diablo Canyon*, CLI-02-16, 55 NRC at 338 & n.32, citing *Consolidated Edison Co. of NY* (Indian Point, Units 1 & 2), CLI-01-19, 54 NRC 109, 133-34 (2001).

[17] *Diablo Canyon*, CLI-02-16, 55 NRC at 338 & n.34, citing *Power Auth. of the State of NY* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 295 (2000), and *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 164 (2000).

[18] *Diablo Canyon*, CLI-02-16, 55 NRC at 338 & n.34, citing *FitzPatrick*, CLI-00-22, 52 NRC at 295.

[19] TANC's Petition to Intervene at 13-14, 21.

Gen may make no contributions to the decommissioning trust fund.[20] Further, TANC asserts that PG&E may not assign to Gen sufficient personnel with the required technical qualifications to operate the plant in accordance with the licenses' requirements.[21] Finally, TANC asserts that the review of the Reorganization Plan by multiple forums[22] "create[s] a shifting sand foundation on which to make any decision regarding the license [transfer] application."[23]

In our view, none of TANC's issues is admissible. All are overly general and therefore do not satisfy our requirement that petitioners not submit vague, unparticularized issues.[24] As we have stated repeatedly, NRC practice demands detailed explanation and support for initial issues or contentions; "notice pleading" does not suffice.[25] TANC's issues do not meet this standard.

We reject as unsupported the "financial qualifications" portion of TANC's first issue (the possible insufficiency of Gen's rates to cover its operating and decommissioning costs). TANC's arguments are footed in neither facts nor expert opinion, and do not address the relevant portions of PG&E's Application.[26] Moreover, this portion of TANC's first issue appears merely to be an abbreviated version of the previously resolved "financial qualifications" issue raised by CPUC, *i.e.*, that "Gen's finances are 'highly questionable' and it is 'uncertain that Gen

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[20] *Id.* at 21.

[21] *Id.*

[22] Specifically, the Bankruptcy Court, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, the CPUC, the Internal Revenue Service, and the NRC.

[23] TANC's Petition to Intervene at 21.

[24] *See* note 18, supra and accompanying text.

[25] *See Dominion Nuclear Conn.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 363 (2001); *Consolidated Edison Co. of NY* (Indian Point, Units 1 and 2)), CLI-01-19, 54 NRC 109, 134 (2001).

[26] *See* Application at 8-10 (operating costs), 10-12 (decommissioning funding).

will have the resources to carry out the critical plant maintenance and public safety-related functions that will enable [DCPP] to meet the Commission's rigorous regulatory requirements."[27] We therefore also reject this portion of TANC's first issue on the same grounds as we rejected the CPUC's similar but far more detailed position.[28]

We similarly decline to admit the "decommissioning funding" portion of TANC's first issue, as it lacks sufficient factual or expert support. We also rely on the grounds we previously expressed in rejecting CPUC's similar issue -- that because "PG&E does not have the legal authority to make this transfer, the proposed licensee will have no decommissioning funding assurance, and, therefore, the Commission cannot approve the requested license transfer."[29]

Regarding TANC's second issue (that Gen intends not to contribute to the decommissioning trust fund), TANC has not demonstrated that the anticipated level of the decommissioning fund would be insufficient to satisfy the regulatory requirements of 10 C.F.R. § 50.75.[30] Nor has TANC provided us any reason (via submission of facts or expert opinion) to believe that Gen, if it becomes a licensee, would fail to meet its decommissioning funding obligations to supplement the current fund to the extent necessary to comply with section 50.75.

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[27] 55 NRC at 338.

[28] *See id.* at 338-40.

[29] *See id.* at 340, 341-42.

[30] We previously observed that "PG&E proposes to meet [the decommissioning funding obligations imposed by] section 50.75 by prepaying, by means of existing trust funds, an amount sufficient to cover the decommissioning costs at the expected time of termination of operation .... Prepayment is the strongest and most reliable of the funding devices described in 10 C.F.R. § 50.75(e)(1)." *Id.* at 342 n.50 (citations omitted). *See also* PG&E's Answer to TANC's Petition to Intervene, dated Feb. 15, 2002, at 18 ("assuming the present value of the [decommissioning] funds, plus credit for a contribution to the funds in 2002 as already approved through the CPUC ratemaking process, as well as a modest return over the operating license term as allowed by the regulations, the decommissioning trusts are adequately funded to meet the NRC-mandated decommissioning obligations *without further contributions*" (emphasis in original)); Application at 11 and Enclosure 9.

We have long declined to assume that licensees will refuse to meet their obligations under their licenses or our regulations.[31]

. . . TANC also has provided no factual or expert support for its third argument, that PG&E may not assign to Gen sufficient personnel with the required technical qualifications to operate the plant in accordance with the license requirements.[32] Our jurisprudence makes it clear that parties may not submit summary conclusions, but must instead support their arguments with facts, policy discussion or legal authority.[33] Further, as noted above, we assume that our licensees will comply with this agency's safety regulations – including those involving technical qualifications.[34] If the Commission finds that "a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then . . . the agency can and will take the necessary enforcement action to ensure the public health and safety."[35]

TANC's fourth ("shifting sand foundation") argument is in essence nothing more than a challenge to our policy of not delaying license transfer proceedings merely because another

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[31] *See, e.g., GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000); *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 400 (1995); *Northern Ind. Pub. Serv. Co.* (Bailly Generating Station Nuclear-1) ALAB-207, 7 AEC 957, 958 (1974).

[32] By contrast, PG&E has provided significant information indicating that TANC's concerns regarding technical qualifications are unfounded. *See* Application at 2, 4, 7-8; PG&E's Answer to TANC's Petition to Intervene, dated Feb. 15, 2002, at 19-20, citing Application at 7.

[33] *See, e.g., GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 208 (2000) (petitioner "has offered no tangible information, no experts, no substantive affidavits. Instead, it has provided bare assertions and speculation. This is not enough to trigger an adversary hearing on [transferee's] financial qualifications"). *See also* note 25, *supra*, and accompanying text.

[34] *See* 10 C.F.R. § 50.54(m).

[35] *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 209 (2000).

judicial or administrative forum simultaneously happens to be adjudicating a related matter.[36] As we recently reiterated in this very proceeding, "it 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."[37] Also, such a delay would contravene our more general policy of expediting license transfer proceedings.[38] TANC's cursory argument lacks any factual, legal or policy support that would convince us to suspend these policies here.

**C. Antitrust Issues**

***1. Background***

The antitrust arguments in NCPA's and TANC's petitions are unusual in that they do not challenge PG&E's license transfer application but instead dispute the NRC Staff's suggestion in the *Federal Register* notice that the NRC might reject PG&E's proposed treatment of the antitrust conditions, known as the Stanislaus Commitments, that are currently included in PG&E's DCPP licenses. The Stanislaus Commitments arose out of a 1976 settlement between the United States Department of Justice and PG&E regarding antitrust issues related to PG&E's then-proposed Stanislaus nuclear power plant.[39] PG&E had agreed at the time to

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[36] *See* CLI-02-16, 55 NRC at 334; *Consolidated Edison Co. of NY* (Indian Point Nuclear Generating Units Nos. 1 & 2), CLI-01-08, 53 NRC 225, 229-30 (2001); *FitzPatrick*, CLI-00-22, 52 NRC at 289; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 343-44 (1999).

[37] CLI-02-16, 55 NRC at 334 (footnote and internal quotation marks omitted).

[38] *Id.* at 343; Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721 (Dec. 3, 1998); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 24 (1998).

[39] A United States District Court ruled that certain members of the NCPA are third-party beneficiaries to that 1976 settlement. *See United States v. Pacific Gas & Elec. Co.*, 714 F. Supp. 1039, 1051 (N.D. Cal. 1989), *appeals dismissed per stipulation*, No. 91-16011 (9th Cir. Mar. 20, 1992).

attach those commitments as license conditions for DCPP if the Stanislaus facility were not licensed and constructed in accordance with PG&E's original plans.[40] Accordingly, the Stanislaus Commitments became amendments to the DCPP construction permits in 1978.[41] These amendments were ultimately incorporated as conditions into the two DCPP operating licenses in 1984 and 1985.[42]

The current PG&E license transfer application proposes to continue these conditions in effect for Gen, PG&E itself and ETrans even though the latter two companies would, after the transfer, not own or operate the Diablo Canyon plants or otherwise engage in any activities requiring an NRC license for DCPP. The NRC staff described in its *Federal Register* notice how PG&E's license transfer application proposed to address these conditions:

> With specific regard to the antitrust conditions in the licenses, the application proposes changes such that Gen will be inserted in the conditions and thus become subject to complying with them, and ETrans . . ., a new company that will be affiliated with Gen upon implementation of the [Reorganization P]lan and that will acquire the electric transmission assets of PG&E but not have any interest in Diablo Canyon, will also be inserted in the conditions and thus become subject to complying with them. In addition, the application proposes that PG&E will remain designated in the conditions for the limited purpose of compliance with the conditions, notwithstanding the divesting of its interest in Diablo Canyon, while [Diablo] Nuclear will not be named in the conditions.[43]

In the next paragraph of the notice, the staff made the comment to which NCPA and TANC object:

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[40] *See Pacific Gas & Elec. Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 47 (1983).

[41] *See* Issuance of Amendment to Construction Permit, Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 43 Fed. Reg. 59,934 (Dec. 22, 1978).

[42] *See* PG&E's License Transfer Application, Enclosure 4 (which includes Appendix C to Operating License for Unit 1) and Enclosure 5 (which includes Appendix C to Operating License for Unit 2).

[43] 67 Fed. Reg. at 2455-56.

> Notwithstanding the proposed changes to the antitrust conditions offered as part of the amendments to conform the licenses to reflect their transfer from PG&E to Gen and [Diablo] Nuclear, the Commission is considering whether to approve either all of the proposed changes to the conditions, or only some, but not all, of the proposed changes as may be appropriate and consistent with the Commission's decision in *Kansas Gas and Electric Co., et al.*, CLI-99-19, 49 NRC 441, 466 (1999). *In particular, the Commission is considering approving only those changes that would accurately reflect Gen and [Diablo] Nuclear as the only proposed entities to operate and own Diablo Canyon.*[44]

Stated differently, the NRC staff proposed both removing PG&E from the license conditions that had incorporated the Stanislaus Commitments and declining to impose those conditions upon ETrans.

In this adjudication, PG&E does not oppose outright the NRC staff's alternative but instead describes it as "unnecessary."[45] PG&E points to our ruling in *Wolf Creek* that the Commission "plainly has continuing authority to modify or revoke its own validly imposed conditions"[46] in a way that would permit inclusion of PG&E and ETrans in the licenses' antitrust conditions.

TANC, in its hearing request, expresses support for the Stanislaus Commitments. TANC explains that many of its co-petitioners benefit from those commitments because they obligate PG&E to provide essential transmission, scheduling, interconnection, generation and

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[44] *Id.* at 2456 (emphasis added).

[45] PG&E's Answer to NCPA's Conditional Request for Hearing, dated Feb. 15, 2002, at 12. *See also* PG&E's Brief in Response to Commission Memorandum and Order CLI-02-12 at 6.

[46] *Id.* at 13 n.9, citing *Kansas Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 466 n.23 (1999) ("*Wolf Creek*") (which in turn cited *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 NRC 47, 54-59 (1992) ("*Perry*"), *petition for review dismissed sub nom. City of Cleveland v. Nuclear Regulatory Comm'n*, 68 F.3d 1361, 1370 (D.C. Cir. 1995)). *See also* PG&E's Brief in Response to Commission Memorandum and Order CLI-02-12 at 9 n.10 (same); NCPA's Brief on Specific Questions, dated May 10, 2002, at 6 ("The Commission may modify a license for cause . . . ." (emphasis omitted)).

related services.[47] TANC is concerned that, "in a post-reorganization world, reorganized PG&E will have neither the generation nor the transmission capabilities to satisfy the Stanislaus Commitments."[48] TANC therefore supports (though it would prefer to strengthen[49]) PG&E's proposal to retain its obligations under these commitments and to add Gen, Diablo Nuclear and ETrans as successor licensees who would likewise be bound by those commitments.[50] Thus, TANC implicitly opposes the NRC staff's proposed elimination of PG&E and ETrans from the license conditions that incorporate the Stanislaus Commitments.

NCPA takes a similar position, but explicitly opposes the staff's proposal.[51] Indeed, NCPA questions whether the Commission even has the authority to alter the DCPP antitrust license conditions in the fashion proposed by the NRC staff.[52] In addition, in a background discussion of the Commission's antitrust jurisprudence, NCPA addresses the relevance of both

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[47] *See* TANC's Petition to Intervene, dated Feb. 6, 2002, at 12.

[48] *Id.* at 19.

[49] *Id.* at 19-21. TANC wishes to strengthen the proposal in the following respects: the need for the licenses to specify the existence of joint and several liability amongst Gen, PG&E and ETrans; certain implied changes to the antitrust obligations; the continued availability of "firm transmission" of electricity after reorganization; and the duration of the antitrust conditions.

[50] *Id.* at 19-21. *See also id.* at 25 (asking the Commission to "[e]nsure that PG&E's obligations under the Stanislaus Commitments remain fully in force, whether performed by reorganized PG&E and/or PG&E affiliates, and remain unaffected by the proposed reorganization").

[51] NCPA's Petition to Intervene, Conditional Request for Hearing and Suggestion that Proceeding be Held in Abeyance, dated Feb. 6, 2002. *See particularly id.* at 28 ("request[ing] that the NRC grant [PG&E's] application for transfer of its license[s] in the manner proposed by [PG&E], which is intended to preserve the Stanislaus Commitments as presently in effect").

[52] *Id.* at 26. NCPA also raises a number of equitable arguments against changing the conditions. *Id.* at 26-29.

sections 103 and 105 of the AEA,[53] suggesting that its challenge to the Commission's authority to change the conditions rests, at least in part, on those statutory sections.

We sought comments from PG&E, petitioners, governmental participants, and the United States Department of Justice on our statutory authority to retain or impose the antitrust conditions at issue in this proceeding.[54] TANC, NCPA and PG&E filed briefs responding to this issue (with TANC also filing "additional comments"), all arguing that the Commission has the necessary authority to retain the antitrust conditions in the Diablo Canyon licenses.

We conclude that TANC's and NCPA's antitrust issues are admissible (a conclusion no party or participant contests) but, for the reasons set forth below, that they are without merit.

***2. Analysis***

A careful reading of AEA Sections 105c(5) and 105c(6) shows that Congress linked NRC's antitrust authority to the specific license under antitrust review -- and to *that license only.* The first of these sections provides that the Commission "shall make a finding as to whether *the activities under the license* would create or maintain a situation inconsistent with the antitrust laws . . . ."[55] Once we have made the finding required under Section 105(c)(5), we have the authority under Section 105(c)(6) to take certain specified licensing actions -- *i.e.*, "to issue or continue *a license as applied for*, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as [the NRC] deems appropriate."[56]

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[53] *Id.* at 19-25, citing 42 U.S.C. §§ 2133, 2135.

[54] *See Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-18, 56 NRC __, ___, slip op. at 3. *See also Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-12, 55 NRC 267, 268 (2002).

[55] 42 U.S.C. § 2135(c)(5) (emphasis added).

[56] 42 U.S.C. § 2135(c)(6) (emphasis added).

As for the antitrust conditions at issue in the instant proceeding, the "license as applied for" was the construction permit for PG&E's proposed Stanislaus facility, and the "activities" that triggered the DCPP conditions, via a settlement, were PG&E's potential activities under the Stanislaus license. In the end, however, we never issued a license for the proposed Stanislaus plant – as PG&E eventually abandoned the project.[57] In the absence of a Stanislaus license, either actual or proposed, we now lack the statutorily-referenced license for which the AEA authorizes "such [antitrust] conditions as [we] deem appropriate."

The AEA gives the NRC no separate authority, independent of the Stanislaus proceeding, to impose antitrust license conditions on PG&E with respect to DCPP. This is because DCPP was licensed pursuant to Section 104 of the AEA – a section excluding license applicants for "research and development" plants, such as DCPP, from antitrust review (except under circumstances not present here).[58] The Commission's initial authority to impose antitrust conditions on PG&E came from the now-defunct Stanislaus proceeding (a license review based on an application submitted under Section 103). Now that it is clear that the Section 103 Stanislaus proceeding will not be reopened, we lack an antitrust "hold" on PG&E. We see no legal underpinning for transferring the Stanislaus-triggered DCPP antitrust conditions to new entities to be created under the proposed PG&E reorganization plan. This legal conclusion is particularly compelling in light of our obligation to respect our Congressional grant of authority.[59]

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[57] *See Pacific Gas & Elec. Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45 (1983) (granting PG&E's motion to withdraw the Stanislaus application). PG&E withdrew the Stanislaus application in 1983 "without prejudice." *Id.* at 46. By now, however, it is evident that PG&E has abandoned the Stanislaus project. No filing in this adjudication maintains otherwise.

[58] *See* AEA § 105(c)(3), 42 U.S.C. § 2135(c)(3).

[59] *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990), quoting *Federal Maritime Comm'n v. Seatrain Line, Inc.*, 411 U.S. 726, 745 (1973) ("an agency may not bootstrap itself into an area in which it has no jurisdiction by . . . violating its statutory mandate"). *See also Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57, 62 (2nd Cir. 1983) ("Neither the Secretary by

(continued...)

Moreover, as we indicated at length in *Wolf Creek*, sound policy reasons argue against taking an expansive view of our antitrust authority. Here, were we to transfer DCPP's current antitrust conditions to new independent PG&E spinoffs, we would be placed in the position of enforcing antitrust conditions against at least one company with no connection at all to the nuclear power plant. We simply lack the resources and expertise necessary to handle antitrust matters that do not fall squarely within our jurisdiction. By contrast, FERC and the Federal Trade Commission (as economic regulatory bodies) -- together with the Department of Justice and the Federal courts -- have the resources and mission (the NRC is primarily a safety regulator) to deal with antitrust issues such as those that concern TANC and NCPA.

As we stated in *Wolf Creek*:

> Once a nuclear facility is licensed to operate, traditional antitrust forums -- the federal courts and governmental agencies with longstanding antitrust expertise -- are better equipped than the Commission to resolve and remedy antitrust violations by NRC licensees. [60]
>
> * * * * *
>
> For this Commission to use its scarce resources needed more to fulfill our primary statutory mandate to protect the public health and safety and the common defense and security than to duplicate other antitrust reviews and authorities makes no sense and only impedes nationwide efforts to streamline and make more efficient the federal government.[61]

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[59](...continued)
regulation nor the Commission by decision can extend the scope of OSHA beyond the boundaries defined by Congress"); *Office of Consumers' Counsel v. Federal Energy Regulatory Comm'n*, 655 F.2d 1132, 1142 (D.C. Cir. 1980) (quoting *Seatrain, supra*); *Utz v. Cullinane*, 520 F.2d 467, 490 (D.C. Cir. 1975) (same).

[60] CLI-99-19, 49 NRC at 452.

[61] *Id.* at 465. *See also id.* at 463; *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), CLI-77-13, , 5 NRC 1303, 1316-17 (1977); Final Rule, "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,971 (Dec. 13, 1991).

The age of the DCPP conditions[62] and recent developments in the law (in particular, those providing for nondiscriminatory open access to transmission)[63] are practical factors cutting against the carryover of the original PG&E conditions to the new situation created by the PG&E reorganization plan (presuming that it gains approval). Hence, we decline to re-enact the DCPP antitrust conditions as part of the DCPP license transfer, and we instruct our staff not to include those conditions if it otherwise approves the PG&E transfer application.

Finally, we note that our ruling today does not preclude TANC and NCPA from enforcing their antitrust-related rights under the Stanislaus Commitments. As beneficiaries of the Stanislaus settlement contracts,[64] they can enforce those contracts quite apart from any NRC license conditions. No participant in this proceeding has given us any reason to doubt the enforceability of the Stanislaus Commitments either in federal court or before the FERC.[65] Indeed, both a federal district court and the FERC have described the Commitments as a contract, and each considers the Commitments enforceable in its own forum.[66] The

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[62] The Department of Justice normally seeks antitrust remedies of a ten-year duration. *See New York v. Microsoft Corp.*, 224 F. Supp.2d 76, 184 (D.D.C. 2002).

[63] *See New York v. Federal Energy Regulatory Comm'n*, 535 U.S. 1 (2002) (upholding FERC's open access requirements).

[64] *See* note 11, *supra*.

[65] *See, e.g.*, TANC's Additional Comments at 9-10, 12, 15. In fact, in proceedings before both this Commission and the FERC, PG&E "has repeatedly acknowledged its obligation to provide transmission services under [the Stanislaus] Commitments." *United States v. Pacific Gas & Elec. Co.*, 714 F. Supp. at 1049. The enforceability of the Commitments is further supported by PG&E's own statement in the instant proceeding that it "would continue to meet any obligations to other parties with respect to the Stanislaus Commitments so long as those obligations may exist under other agreements." *See* PG&E's Brief in Response to Commission Memorandum and Order CLI-02-18, dated Aug. 22, 2002, at 11.

[66] *See United States v. Pacific Gas & Elec. Co.*, 714 F. Supp. at 1047 n.13, 1050-51, 1054 (rejecting the argument that the court lacks authority to enforce the Stanislaus Commitments); *Pacific Gas & Elec. Co.*, 49 FERC ¶ 61,116, 1989 WL 262814 at text associated with fn. 14 (no WL pagination available) (FERC) (Commission 1989) ("We . . .

(continued...)

commitments' enforceability in other fora undermines the hyperbolic claims of TANC and NCPA that a parade of horribles[67] will ensue if we do not retain the DCPP antitrust license conditions.

## CONCLUSION

For the reasons set forth above, the Commission

(1) *grants* TANC's and NCPA's petitions to intervene,

(2) *finds* TANC's financial and technical qualifications issues inadmissible,

(3) *finds* TANC's and NCPA's antitrust issues lack substantive merit,

(4) *denies* TANC's and NCPA's requests for hearing,

(5) *terminates* this proceeding, and

(6) instructs the NRC staff not to include the antitrust conditions if it otherwise approves the PG&E transfer application.

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[66](...continued)
disagree with PG&E that the Stanislaus Commitments are not subject to the [Federal Energy Regulatory] Commission's review . . . . [T]o the extent that the Commitments affect or relate to . . . a rate schedule subject to our jurisdiction under the Federal Power Act, they are . . . subject to our review" (footnote 14 omitted)).

[67] *E.g.*, TANC's Brief, dated Aug. 22, 2002, at 15 ("anti-competitive and predatory trade practices"); TANC's Additional Comments at 11 ("PG&E's obligations . . . to third party beneficiaries of the Stanislaus Commitments [will] be evaded or negated"); NCPA's Brief on Specific Questions at 9 ("If ETrans is no longer a licensee, the Commission could not take action to safeguard the national welfare under Section 105(a) of the [AEA] or to enforce its own license conditions"); *id.* at 13 ("The Stanislaus Commitments without all of the NRC mechanisms needed for assuring compliance would be akin to the Molotov-Rippentrop [*sic*, Ribbentrop] Pact, which Nazi Germany could and did breach without a moment's hesitation when it believed it desirable to do so in its own interest").

IT IS SO ORDERED.[68]

For the Commission[69]

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of February, 2003.

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[68] PG&E, TANC and NCPA may seek reconsideration of this order. Petitions for reconsideration must be filed in such a manner that they arrive at the Office of the Secretary no later than 4:15 p.m. on February 24, 2003, and replies to such petitions no later than 4:15 p.m. on March 6, 2003.

[69] Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-03-02) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

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Docket Nos. 50-275/323-LT
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of February 2003

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, I hereby certify that I have this day served a copy of the foregoing Petition for Review by first-class mail, postage prepaid, upon each party admitted to the proceeding below, *Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, Docket Nos. 50-275-LT, 50-323-LT, as shown on the attached service list.

Dated at Washington, D.C. this 25th day of February, 2003.

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