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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

**APPLICATION BY SAN LUIS OBISPO COUNTY AND THE CALIFORNIA
PUBLIC UTILITIES COMMISSION FOR A STAY OF THE NRC STAFF'S
ORDER AUTHORIZING TRANSFER OF THE OPERATING LICENSES FOR
THE DIABLO CANYON NUCLEAR POWER PLANT AND
APPROVING CONFORMING LICENSE AMENDMENTS**

This is an application, pursuant to 10 C.F.R. § 2.1327, for a stay of the effectiveness of the Nuclear Regulatory Commission ("NRC") staff's Order Approving Transfer of Licenses and Conforming Amendments ("Order"), dated May 27, 2003, which approved: (1) transfer of the operating licenses for the Diablo Canyon Nuclear Power Plant ("DCPP") from the current licensee, Pacific Gas & Electric Company ("PG&E"), to two new entities, Electric Generation LLC ("Gen") and Diablo Canyon LLC ("Diablo"); and (2) conforming amendments to those operating licenses.¹ The stay applicants are San Luis Obispo County ("SLOC") and the California Public Utilities Commission ("CPUC") (collectively "Governmental Entities" or "applicants"). For the following reasons, applicants have satisfied each and every of the NRC's stay criteria in 10 C.F.R. § 2.1327(d), and therefore the Commission should grant this request for a stay.

¹ This Order was transmitted by e-mail to SLOC and the CPUC, on May 30, 2003, at 8:08 a.m. Notwithstanding the NRC staff's delay in transmitting the Order, this request is filed in accordance with the time limits established by 10 C.F.R. § 1327(a) and 10 C.F.R § 2.710.

I. Background

This case involves PG&E's proposed transfer of the operating licenses for DCPD to Gen (which would operate and be financially responsible for DCPD operating costs) and to Diablo (which would own DCPD, lease it to Gen, and be responsible for all decommissioning costs). PG&E's proposed license transfer is a necessary element of its proposed reorganization to exit from bankruptcy. Accordingly, PG&E applied to the NRC pursuant to 10 C.F.R. § 50.80 for its approval of these proposed license transfers.

In response, the NRC noticed PG&E's application and an opportunity to request a hearing.² The Governmental Entities were among the petitioners who sought to intervene and requested a hearing, pursuant to the Commission's rules of Practice in Subpart M. They raised issues regarding the adequacy of PG&E's showing of financial qualification, as required by the NRC's rules in 10 C.F.R. §§ 50.33(f) and 50.75(e). Specifically, CPUC and SLOC called into question the ability of PG&E to demonstrate reasonable assurance that its successor licensees would obtain the necessary operating funds from the proposed Power Sale Agreement ("PSA") or have access to the Decommissioning Trust Fund for DCPD.

The Commission denied SLOC's and CPUC's petitions to intervene.³ The Commission: (1) found that its issues would be resolved in other fora and, thus, were not relevant to its finding of reasonable assurance;⁴ (2) stated that any uncertainty associated with these issues

² 67 Fed. Reg. 2455 (January 17, 2002).

³ Memorandum and Order, dated June 25, 2002 (CLI-02-16).

⁴ The Governmental Entities petitioned for review of this decision in the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit"). *California Public Utilities Commission and San Luis Obispo County v. United States Nuclear Regulatory Commission*, No. 02-72735 (Aug. 23, 2002). This petition is pending.

could be dealt with by the NRC staff through their imposition of license conditions; and (3) directed the NRC staff to consider the Governmental Entities' issues as comments and to respond to them.

Following the denial of the remaining petitioners' petitions to intervene,⁵ an NRC decision on whether to authorize transfer of the licenses was solely up to the NRC staff. 10 C.F.R. § 2.1316(a). The NRC staff authorized the license transfer, with conditions, through the Order issued on May 27, 2003. Those conditions authorize the NRC staff to decide material issues of fact that should have been determined in a hearing, or at a minimum determined with certainty, in advance of approving the license transfer application. Accordingly, this stay motion by the Governmental Entities followed.

II. Applicants Have the Requisite Interests to Apply for a Stay

An application for a stay of effectiveness of an NRC staff order on a license transfer application is governed by 10 C.F.R. § 2.1327. That provision establishes deadlines for filings and criteria for determining whether to grant a stay, but does not specify who may apply for a stay.

Under ordinary NRC precedent, individuals affected by a Commission action may apply for a stay.⁶ In this instance, applicants can demonstrate that its interests are clearly affected by this Order because the NRC staff, as directed by the Commission, addressed

⁵ *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-02, 57 NRC 19 (Feb. 14, 2003).

⁶ See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000) ("*Vermont Yankee*") (distinguishing between the NRC staff's activities in authorizing a license transfer and any adjudication of specific license transfer issues by the Commission, suggesting that stay applicants need not be participants in an adjudicatory hearing to apply for a stay based on a showing that their interests would be affected by the order).

applicants' concerns as part of issuing this Order.⁷ Moreover, applicants' interests are affected by this Order because the Order, if not stayed, could moot applicants' petition for review of the Commission's decision in CLI-02-16 ("Decision"), which denied applicants' petitions to intervene in the proceedings related to this license transfer. For these reasons, applicants have the requisite interests to file an application for a stay.

II. The Criteria to Obtain a Stay

The Commission applies the stay criteria applicable in the Federal courts under *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F. 2d921, 925 (D.C. Cir. 1958). *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000) ("*Vermont Yankee*"). See, also, NRC Practice and Procedure Digest at 5.7.1.1. Consistent with that practice, 10 C.F.R. § 2.1327(d) provides that:

- (d) In determining whether to grant or deny an application for a stay, the Commission will consider:
- (1) Whether the requestor will be irreparably injured unless a stay is granted;
 - (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
 - (3) Whether the granting of a stay would harm other participants; and
 - (4) Where the public interest lies.

In ruling on stay requests, the Commission has held that irreparable injury is the most crucial factor. *Vermont Yankee*. A party who fails to show irreparable harm must make a strong showing on the other stay factors in order to obtain the grant of a stay. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 260 (1990). As

⁷ Section 9.0 of the Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Transfer of Facility Operating Licenses Nos. DPR-80 and DPR-82 From Pacific Gas and Electric company to Electric Generation LLC and Diablo Canyon LLC for Diablo Canyon Nuclear Power Plant, Units 1 and 2, Docket Nos. 50-275 and 50-323 (May 27, 2003) ("Safety Evaluation").

demonstrated below, applicants have shown irreparable harm if a stay is not granted and shown that all of the other stay criteria have been met.

III. This Application Satisfies the Stay Criteria and Demonstrates that a Stay Must Be Granted

An evaluation of the four stay criteria shows that they are all met without question and that a stay must be granted. Moreover, the Commission may stay the effectiveness of an order if it has ruled on difficult legal questions and the equities of the case suggest that the *status quo* should be maintained during an anticipated judicial review of the decision addressing those legal questions. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1) CLI-92-4, 35 NRC 69, 80 (1992), *citing*, *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C.Cir. 1977). That is the case here, as is described in detail below. The Commission has ruled on difficult legal questions, including the basis for the CPUC's standing and the admissibility of contentions raised by both CPUC and SLOC in this proceeding, and the equities of the case clearly show that the *status quo* should be maintained until the Ninth Circuit rules on the applicants' challenges to the Commission's Decision, which dismissed their petitions to intervene.

A. Irreparable Injury is Immediate Because Applicants Will Otherwise Be Denied Their Legal Rights to Hearing

A party must reasonably demonstrate, and not merely allege, irreparable harm. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985). This Order results in immediate, irreparable injury to the Governmental Entities in two ways. First, the NRC staff has authorized itself to decide material issues of fact that should have been the subject of a hearing or at least determined with certainty before

approving the license transfer application. Second, this Order could establish a basis for mooting out the applicants' appeal of the Commission's Decision, which is pending in the Ninth Circuit.

Section 189.a of the Atomic Energy Act of 1954, as amended ("AEA"), requires the NRC to provide an opportunity for a hearing on all issues that are material to an NRC decision. *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443-44 (D. C. Cir. 1984) ("*UCS I*"). This Order is inconsistent with that holding because it permits the NRC staff to decide material issues without providing an opportunity for a hearing. Where the wording of contracts relied on to establish financial qualification is crucial (in this case the PSA), a license condition related to those contracts may be relied on only where it is precisely drawn so that verification of compliance is a ministerial act. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000). As shown by the following analysis of the license conditions, the decisions left to the NRC staff in this Order would not be ministerial.

- Section III(2) of the Order authorized the NRC staff to determine whether the bilateral PSA relied on by PG&E has been approved "without any material changes to the PSA that would adversely impact the five-year financial projections proffered in the application such that the indicated source of funds would not be sufficient to cover projected costs of operation of the facility."
- Section III(3) of the Order authorized the NRC to determine whether the decommissioning trust agreements to be entered into by Diablo Canyon LLC are acceptable to the NRC.

These two provisions authorize the NRC staff to make decisions that are not ministerial because such decisions require exercises of expert judgment regarding the materiality of PSA changes and the acceptability of decommissioning trust provisions that will affect the

final determination of whether the licenses may be transferred. These provisions immediately and irreparably harm the Governmental Entities by denying them of their hearing rights because (1) the NRC staff's determinations of these factual issues are not subject to further review or hearing opportunity, and (2) these provisions may be exercised at any time, irrespective of the timing or outcome of the bankruptcy proceeding.

Regarding the impact of this Order on the appeal pending in the Ninth Circuit, the Commission has held that a motion for a stay must establish that the activity that will take place in the absence of a stay will bring about concrete harm. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB 810, 21 NRC 1616, 1620 (1985). In this case, applicants' pending appeal could be mooted out if this Order is not stayed, such that the applicants would be deprived of any reasonable opportunity to vindicate the Commission's illegal denial of their hearing rights.

B. Applicants Have a High Probability of Success on the Merits of Their Claims

The "level or degree of possibility of success" on the merits necessary to justify a stay varies according to the tribunal's assessment of the other stay factors.⁸ Because applicants have clearly demonstrated irreparable injury, they need not show an overwhelming likelihood of success on the merits. *Cf. Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 (1977). Nevertheless, applicants can demonstrate an overwhelming likelihood of success on the merits. Controlling precedent will cause a reviewing court to find that the NRC Decision has denied applicants of their hearing rights, is based on

⁸ *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977), citing, *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C.Cir. 1977).

fatally incorrect assumptions about the transfer of the decommissioning trust fund, and does not protect Gen's financial qualifications as required by the NRC's rules.

To make a strong showing of likelihood of success on the merits, the applicants must do more than list the possible grounds for reversal. *Toledo Edison Co. (Davis-Bessie Nuclear Power Station, Units 1, 2 &3), ALAB-385, 5 NRC 621 (1977) ("Davis-Bessie")*. Applicants can easily show that this Order is legally deficient on its face because it enables the NRC staff, as discussed above, to decide the specific material issues on which the Commission improperly denied applicants' request for a hearing. It also makes erroneous assumptions about the transfer of the Decommissioning Trust for DCP. Section III(4) requires Diablo Canyon LLC to maintain the decommissioning trusts consistent with the Safety Evaluation, which assumes that, "The transfer to Nuclear of PG&E's interest in the Decommissioning Trust is subject to the approval of the Bankruptcy Court as part of the confirmation of the Plan." Section 4.0 of the Safety Evaluation. SLOC has explained in a Summary Judgment Motion filed in the Bankruptcy Court that the Decommissioning Trust is not part of the bankrupt's estate and, thus, is not subject to the jurisdiction of the Bankruptcy Court. Also, under California law, CPUC has exclusive jurisdiction to authorize transfer of the Decommissioning Trust and PG&E has not, to date, applied to the CPUC to approve the transfer of the Decommissioning Trust to Gen or Diablo. These circumstances cause the NRC's license transfer Order to be fatally defective because the DCP operating licenses cannot be transferred unless the Decommissioning Trust is transferred to the new licensee.

The Order also does not adequately protect the financial qualification of the proposed licensee Gen. Section III(6) of the Order seeks to protect the financial qualification of Gen against erosion by requiring it to provide the NRC a copy of any application to transfer

electrical generating production facilities to a direct or indirect parent or to any other affiliated company. This license condition, on its face, is totally ineffectual and, therefore, prevents the NRC from supporting a finding of financial qualification over the licensed life of the facility, as required by 10 C.F.R. 50.33(f)(2). That regulation requires PG&E to demonstrate reasonable assurance of obtaining the necessary funds to operate DCPD over its remaining licensed life. Because this licensed life is more than the 12-year period of the PSA, Gen could not rely solely on the PSA. If the NRC Staff relied on Gen's access to funds from other hydroelectric generating facilities operated by Gen, the license conditions fail to ensure access to those funds for the life of the plant. Rather, the license condition only requires prior notice to the NRC of proposed transfer of assets. It does not require the NRC to approve the transfer of Gen's assets. Moreover, notice to the NRC is not even required if Gen decides to sell some of its generating assets to an entity other than a direct or indirect parent or other affiliated company. For these specific reasons, a reviewing court is sure to find these conditions fatally flawed, so that applicants have demonstrated an overwhelming likelihood of success on the merits of a challenge to this Order.

C. No Other Parties Are Harmed By the Grant of a Stay

Neither PG&E nor the NRC will be harmed by a stay of this Order until the PG&E bankruptcy proceeding is concluded either by judicial decision or by negotiated settlement. A stay will not delay the license transfer because the license conditions cannot be satisfied until the conclusion of the bankruptcy proceeding.

D. Public Interest Lies in Favor of the Orderly Resolution of the Highly Uncertain Situation Created by PG&E's Bankruptcy

This factor is unusually important here because the public's interest is represented by the active participation of the public's elected and appointed representatives. The elected Supervisors of the County of San Luis Obispo and the members of the California's Public Utilities Commission reflect local and statewide concerns about the health and safety issues associated with the NRC's authorization of this license transfer. Only by staying this Order, at least until the Ninth Circuit has had an opportunity to render an objective, independent decision on the need for a hearing on the concerns raised by the Governmental Entities, and until uncertainties are resolved through the bankruptcy process, instead of illegally by license conditions that permit the staff to address material issues, can the Commission properly serve the public interest.

IV. Conclusion

For all these reasons, the Commission should stay the effectiveness of this Order until either PG&E's bankruptcy proceeding is concluded or the Ninth Circuit rules on the pending petition for review by the Governmental Entities.

Respectfully submitted,



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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing "Application by San Luis Obispo County and the California Public Utilities Commission for a Stay of the NRC Staff's Order Authorizing Transfer of the Operating Licenses for the Diablo Canyon Nuclear Power Plant and Approving Conforming License Amendments," were served upon the following persons by e-mail delivery, if an e-mail address is available, with a follow-on copy by regular mail posted on the 2nd of June, 2003, in accordance with the requirements of 10 C.F.R. § 2.1313:

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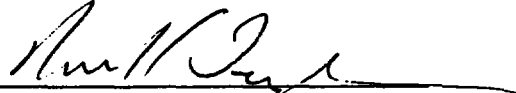
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Dated at Chicago, Illinois, this 2nd day of June, 2003


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