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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE 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)	)	

PACIFIC GAS AND ELECTRIC COMPANY'S ANSWER TO STAY APPLICATION

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.1327(c), Pacific Gas and Electric Company ("PG&E") herein answers the application for stay filed on June 2, 2003, by San Luis Obispo County ("County") and the California Public Utilities Commission ("CPUC") (collectively, "Governmental Entities").[1] As discussed below, the Governmental Entities have not shown that Section 2.1327 applies to the current circumstances, and, moreover, wholly fail to demonstrate a basis for the requested stay. Accordingly, the Application should be denied.

II. BACKGROUND

On November 30, 2001, PG&E filed an application with the Nuclear Regulatory Commission ("NRC or Commission") requesting approval of the transfer of the NRC operating licenses for Diablo Canyon Power Plant ("DCPP") to Electric Generation, LLC ("Gen") and

[1] *See* "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," dated June 2, 2003 ("Application").

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Diablo Canyon LLC ("Nuclear"). The transfer is associated with PG&E's proposed Plan of Reorganization ("Plan") to emerge from bankruptcy.

Following the requisite notice of the proposed transfer, five entities, including the County and the CPUC, requested a hearing on the application. On June 25, 2002, the Commission issued an Order, CLI-02-16, in which it denied the petitions of the CPUC and the County, and one other petitioner.[2] The Commission's decision was based on standing and timeliness grounds, as well as the lack of an admissible contention. On August 23, 2002, the CPUC and the County filed a Petition for Review of CLI-02-16 in the U.S. Court of Appeals for the Ninth Circuit. Briefing in that case was completed in March 2003; no oral argument has been scheduled to date. In a second Order, dated February 14, 2003, the Commission rejected on their merits the antitrust contentions raised by the remaining petitioners and dismissed those petitions.[3] That decision terminated the NRC adjudicatory proceeding.

Thereafter, in an Order dated May 27, 2003, the NRC Staff approved the transfer of DCPP's operating licenses to Gen and Nuclear.[4] Although the Order is "effective upon issuance," it also conditions transfer of the DCPP operating licenses on satisfaction of seven separate conditions. 68 Fed. Reg. at 33,209. Among other things, those conditions preclude transfer of DCPP until (1) the accumulated decommissioning trust funds associated with DCPP ("Decommissioning Funds") can be transferred to Nuclear, *id.* Condition (3); and (2) the Federal

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2 *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317 (2002), *appeal docketed*, No. 02-72735 (9th Cir. Aug. 23, 2002).

3 *See Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 & 2), CLI-03-2, 57 NRC 19 (2003), *appeal docketed*, No. 03-1038 (D.C. Cir. Feb. 25, 2003).

4 *See* Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2); Order Approving Transfer of Licenses and Conforming Amendments, 68 Fed. Reg. 33,208 (June 3, 2003).

Energy Regulatory Commission ("FERC") approves a bilateral power sales agreement ("PSA") between Gen and PG&E, *id.* Condition (2). Furthermore, the Order requires PG&E to provide prompt written notice to the Director of the Office of Nuclear Reactor Regulation (1) of the receipt of all regulatory and judicial approvals required for the transfer of the DCPP (within 5 days), and (2) of the closing date of the transfer of DCPP no later than 7 business days prior to the closing. *Id.* Condition (7). Thus, although the Order is final and immediately effective, several conditions must be met before PG&E can transfer DCPP.

III. DISCUSSION

The transfer Order and supporting Safety Evaluation Report ("SER") document the final findings and conclusions of the agency. The Governmental Entities seek a stay of the effectiveness of the NRC's Order, until either the ongoing bankruptcy case is concluded or the Ninth Circuit rules on the pending Petition for Review. As discussed below, the Application should be denied.

A. A Stay Would Be Inconsistent With NRC Regulations

Section 2.1327 allows parties to an ongoing transfer proceeding to apply for a stay of the effectiveness of an NRC Staff action taken pursuant to 10 C.F.R. § 2.1316(a).[5] The Governmental Entities cite as precedent *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000) ("Vermont Yankee"). However, in that case, the Staff SER and transfer approval were issued at a time when the adjudicatory portion of the license transfer proceeding was "still very much alive." *Id.* at 83 (the Commission was still considering the admissibility of the issues proffered by the petitioners). In the present

[5] The latter provision specifically mandates that the Staff is to issue its SER and its approval or denial of a license transfer "[d]uring the pendency of any hearing under this subpart."

case, the adjudicatory portion of the proceeding is decidedly *not* alive — given the Commission decisions in CLI-02-16 and CLI-03-2, there is no pending hearing or hearing request. Therefore, *Vermont Yankee* does not establish that a stay pursuant to Section 2.1327 would be appropriate under the present procedural circumstances.

The Commission has provided in Section 2.1327 an opportunity for petitioners or parties in specific cases, with arguably special circumstances or unique hearing issues, to seek a stay of effectiveness of a transfer issued under Section 2.1316(a) pending the outcome of a hearing. However, in the present case there is no hearing ongoing, much less one with special circumstances. The mere prospect of a judicial appeal, or even the fact of a pending judicial appeal, alone would not be a basis for the NRC to defer effectiveness of its action. Indeed, if it were, Section 2.1316(a) would be eviscerated. Accordingly, a stay of the Order pending judicial review is relief that would be better obtained from the judicial forum if such a stay could be justified.[6]

B. The Application Fails to Establish Grounds for a Stay

Even if considered under Section 2.1327, the Application fails to demonstrate a basis for the requested stay. In ruling on stay requests in license transfer proceedings, the Commission applies the following factors, set forth in 10 C.F.R. § 2.1327(d):

> (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;

[6] Agency practice in the licensing context (but not necessarily the license transfer context) suggests that the NRC in its discretion could issue a brief "administrative stay" to allow parties to seek a stay in a judicial forum. Such temporary relief is not what the Governmental Entities are now seeking. Moreover, given that implementation of the transfer is not imminent, there is no basis for the NRC to take such action.

(3) Whether the granting of a stay would harm other participants; and

(4) Where the public interest lies.

The Commission has held irreparable injury to be the most heavily weighted factor. *See Vermont Yankee*, CLI-00-17, 52 NRC at 83, citing *Ala. Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795, 797 (1981).

1. No Showing of Irreparable Harm

Regarding the first factor, a motion for a stay must be bolstered by more than a mere allegation of irreparable harm. An irreparable injury must be "reasonably demonstrated" by the movant. *See Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-814, 22 NRC 191, 196 (1985). The Governmental Entities fall far short of demonstrating such injury in this case because the conditions precedent to the actual transfer of DCPP and the operating licenses have not been met and will not be met until certain regulatory and judicial approvals are obtained. At this stage, the Governmental Entities present an entirely speculative, rather than irreparable injury.

There can be no irreparable harm from the present effectiveness of the Order. The license transfer approval includes specific conditions precedent to implementation of the transfer, including Condition (3) requiring that the DCPP Decommissioning Funds be transferred from PG&E to a trust established by Nuclear for DCPP. The transfer of Decommissioning Funds, however, is contingent upon bankruptcy court approval. As a result, the transfer cannot be implemented until the bankruptcy proceeding is complete and the PG&E Plan of Reorganization confirmed. Although the bankruptcy court has conducted a portion of the hearing on PG&E's Plan, the Plan has not been confirmed. In addition, Condition (2) requires FERC approval of the PSA prior to transfer of DCPP. Again, although that application is fully

submitted and ready for determination, FERC has not yet provided this approval. Therefore, based on the very terms of the transfer Order, a stay pending resolution of the bankruptcy proceeding is unnecessary at this time, as the conditions necessary for transfer have not been met and will not be met until both the bankruptcy court and FERC rule on issues before them. Thus, at best, the Governmental Entities present merely the specter of future injury.

For the same reason, there is also no irreparable harm from the effectiveness of the NRC's transfer Order pending resolution of the Petition for Review in the Court of Appeals. The Ninth Circuit case has been fully briefed. It may be resolved before the bankruptcy process and other conditions precedent to the transfer are satisfied. Certainly, prior to confirmation of the Plan of Reorganization and receipt of the regulatory approvals, that judicial appeal is not "mooted." Thus, under the present circumstances, the Governmental Entities have shown no present danger of injury, irreparable or otherwise.[7]

Finally, rather than making any showing of "irreparable harm" under the stay criterion, the Governmental Entities (Application at 5-7) merely make arguments related to the "merits" of their position. These arguments — while articulating a disagreement with the NRC's conclusions — obviously do not support a showing of harm from the present effectiveness of the NRC's Order. These are arguments for judicial appeal.

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[7] Following confirmation and receipt of regulatory approvals, many, if not all of, the issues raised at the NRC by the Governmental Entities that are the subject of the judicial appeal, may in fact be mooted — but not by the NRC's Order or the effectiveness of that Order. For example, the Governmental Entities are seeking a hearing on whether the Plan will be confirmed, whether the Decommissioning Funds can be transferred, and whether the PSA will be approved. Those issues would be mooted by the bankruptcy court and FERC actions. Moreover, the NRC's Order includes conditions that call for the NRC to confirm that the judicial and regulatory approvals encompass all elements required by the NRC.

2. *No Likelihood of Success on the Merits*

Where, as here, a movant fails to show irreparable harm, it then must make an "overwhelming" showing that it is likely to succeed on the merits.[8] The arguments of the Governmental Entities regarding the merits of their disagreement with the NRC's Order focus on specific conditions imposed in the transfer Order. Given that the transfer Order is final agency action, PG&E sees no basis on which to conclude that the Commission will now reverse course and agree with the Governmental Entities. Likewise, given that the Commission has already opposed the Petition for Review in the Court of Appeals, the Commission should not now conclude that the Governmental Entities are likely to succeed on appeal.

In one argument, the Governmental Entities contend that the conditions imposed on the transfer confer too much discretion to the NRC Staff and circumvent their rights to a hearing under the Atomic Energy Act. In the case cited by the Governmental Entities, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000) ("*PFS*"), the Commission specifically held that license conditions can be an acceptable method for providing reasonable assurance of financial qualifications of an NRC license applicant. *Id.* at 29. This is the same approach taken in the present case. Moreover, the *PFS* case addressed the acceptability of using license conditions to delegate certain matters for NRC Staff post-hearing resolution — where the conditions specifically involved matters subject to an ongoing hearing. *Id.* at 33-34. Any limitations on license conditions utilized to resolve ongoing hearing matters do not apply in the present context — *where there is no hearing ongoing.*

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8 *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994).

Even under the standards articulated in *PFS* (and the "longstanding agency practice" cited therein), the conditions in the present transfer Order are essentially "ministerial" — involving routine post-licensing verification by the NRC Staff:

- Under Condition (2), verifying whether the proposed Power Sales Agreement ("PSA") has been approved "without any material changes that would adversely impact the five-year financial projections proffered in the application" is not a complex requirement or one involving substantial judgment.

- Under Condition (3), the NRC Staff can easily confirm whether the decommissioning trust agreements include the terms required by the specific provisions articulated in 10 C.F.R. § 50.75(h)(1) (published December 24, 2002). Given the clear requirements, this is not a complex requirement or one involving substantial judgment. This is a "ministerial-type compliance check" as contemplated in *PFS*. *See* CLI-00-13, 52 NRC at 33 n.3.

The Governmental Entities also argue that Condition (4) is inappropriate, and that they will prevail on the merits, because PG&E will — in their view — not be able to obtain authorization of the bankruptcy court to transfer the beneficial interest in the decommissioning trust. However, this is an argument in which the Commission has previously declined to engage. *See Diablo Canyon*, CLI-02-16, 55 NRC at 340-42. The fact is, if the Governmental Entities are correct, then a stay of effectiveness of the transfer Order is not necessary.

Finally, the Governmental Entities make an argument regarding the inadequacy of Condition (6) and the 12-year term of the PSA. This argument lacks any support in the regulations. As discussed in the NRC's SER, PG&E has provided 5-year financial projections sufficient to meet 10 C.F.R. § 50.33(f)(2). There is no regulatory basis on which to argue that further projections are required or that power sales contracts must exist for the entire licensed

term of the facility.[9] This is not an issue in which the Governmental Entities are likely to succeed on the merits.

3. PG&E Will Be Harmed By A Stay

Given that the Governmental Entities have utterly failed to meet their burden on the two primary factors discussed above, a detailed discussion of the other two factors is not required. *Sequoyah Fuels*, CLI-94-9, 40 NRC at 8. Nevertheless, these factors weigh against the Governmental Entities. Contrary to the position of the Governmental Entities, PG&E would be harmed by a stay of effectiveness of the NRC's transfer order pending judicial appeal. The issuance of the NRC's Order, as well as the effectiveness of the Order, may facilitate PG&E's pursuit of other required approvals and financing related to the plan of reorganization. A stay of effectiveness could mitigate this effect.

4. A Stay is Not in the Public Interest

The public interest — including the interests of PG&E, and its customers, ratepayers and creditors — lies squarely with the prompt resolution of the bankruptcy case, implementation of a viable Plan, and PG&E's emergence from Chapter 11. For example, thousands of pre-petition creditors must await plan consummation for payment on their claims. Any stay that might delay resolution of PG&E's bankruptcy case is not in the public interest.

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[9] *Cf.* Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44,071, 44,073 (Aug. 19, 1997) ("[T]he NRC continues to believe that its primary tool for evaluating and ensuring safe operations at its licensed facilities is through its inspection and enforcement programs. . . . Although enhanced financial qualifications reviews may provide the NRC with valuable additional insights on a licensee's general qualifications to operate its facilities safely, it is not clear that enhanced financial qualifications programs by themselves would prove to be a sufficient indicator of general ability to operate a facility safely.").

IV. CONCLUSION

For the reasons set forth above, the Governmental Entities' Application for stay should be denied.

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Dated in Washington, District of Columbia
This 12th day of June 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of "PACIFIC GAS AND ELECTRIC COMPANY'S ANSWER TO STAY APPLICATION" in the above captioned proceeding have been served as shown below by electronic mail, this 12th day of June 2003. Additional service by deposit in the United States mail, first class, has also been made this same day as shown below.

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