

June 30, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

July 9, 2003 (3:26PM)

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

RENEWED APPLICATION BY SAN LUIS OBISPO COUNTY 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 AND OPPOSITION TO PG&E'S MOTION TO HOLD THE
LICENSE TRANSFER PROCEEDINGS IN ABEYANCE

San Luis Obispo County ("SLOC") hereby opposes PG&E's motion to hold the license transfer proceeding in abeyance and urges the Commission to stay the transfer of the license, consistent with its stay request filed pursuant to 10 C.F.R. § 2.1327.¹ As discussed below, requesting a stay is the only procedurally correct approach to putting a "hold" on these proceedings. It is a stay of these proceedings that SLOC has consistently sought. Now that PG&E and SLOC are effectively seeking the same type of relief, it should therefore come in the form of the stay.

On June 24, 2003, Pacific Gas & Electric Company ("PG&E") informed the U.S. Nuclear Regulatory Commission ("Commission" or "NRC") that PG&E, PG&E Corporation, and the staff of the California Public Utilities Commission ("CPUC") had entered into a

¹ 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, filed June 2, 2003.

proposed settlement of the PG&E bankruptcy case ("Settlement Agreement"). Upon adoption of the Settlement Agreement by all of those parties, they will request the Bankruptcy Court to approve a plan of reorganization ("Settlement Plan") that differs substantially from the Plan of Reorganization filed by PG&E and its parent, PG&E Corporation. In particular, the Settlement Agreement would leave PG&E as an integrated utility under the regulatory jurisdiction of the CPUC, thereby rendering moot PG&E's request for a transfer of the operating licenses issued by the NRC for the two units of the Diablo Canyon Nuclear Power Plant ("Diablo Canyon").

On previous occasions, SLOC requested the NRC and the NRC staff to stay this license transfer proceeding until the PG&E bankruptcy proceeding was concluded and the eventual licensee for Diablo Canyon could be established definitively. These requests were based on safety concerns regarding the ability of the ultimate licensee to demonstrate the necessary financial qualifications, as required by the NRC's requirements, and to avoid the unnecessary waste of limited resources on a proceeding based on PG&E's view of the likely success of the contested PG&E Plan of Reorganization. More recently SLOC requested the Commission to stay the NRC staff's transfer of the Diablo Canyon licenses until judicial review of the Commission's decision in CLI-02-16 could be completed. Now that PG&E has abandoned the PG&E Plan, contrary to the Commission's earlier views that there was no reason to believe that the PG&E Plan would not be approved, all proceedings based on the transfer of Diablo Canyon's licenses should be *stayed*, consistent with SLOC's repeated requests, to avoid the further waste of resources.

In this regard, it should be noted that the proposed Settlement Agreement requires the parties to seek such stays upon its execution. Paragraph 11 of the Settlement Agreement

(Attachment A to “Pacific Gas and Electric Company’s Motion to Hold in Abeyance”) provides, in pertinent part:

11. Withdrawal of Certain Applications

a. Promptly upon the Effective Date, PG&E shall withdraw all of its applications previously filed with the FERC, the NRC, the SEC and elsewhere in connection with the PG&E Plan. A full and complete list of such applications is set forth in Appendix D, hereto [it includes the license transfer application that is the subject of this correspondence]. Upon execution of this Agreement, PG&E and PG&E Corporation shall move to obtain or otherwise request a stay of all actions before the FERC, NRC, SEC or similar agency initiated by PG&E and/or PG&E Corporation to implement the PG&E Plan. In addition, upon execution of this [Settlement] Agreement by all Parties, PG&E and PG&E Corporation shall suspend all actions to obtain or transfer licenses, permits and franchises to implement the PG&E Plan. On the Effective Date or as soon thereafter as practicable, PG&E and PG&E Corporation shall withdraw or abandon all such applications for licenses, permits and franchises. (emphasis supplied).

PG&E reports that the Settlement Agreement has not yet been executed and, accordingly, has not yet requested a stay. PG&E also continues to oppose SLOC’s request for a stay of the NRC staff’s transfer of the Diablo Canyon licenses but has requested the Commission to hold in abeyance a decision on the stay request and all other actions on the license transfer until implementation of the Settlement Agreement. The NRC’s rules do not provide for a request to hold a license transfer proceeding in abeyance. The NRC’s rules provide only for a request for a stay.² 10 C.F.R. § 2.1327. Where, as here, the NRC’s rules provide a specific, appropriate procedural mechanism for dealing with a particular situation, PG&E may not rewrite the Commission’s rules or rely on the generally available process of filing a motion to obtain the same relief in a manner that supports its negotiating strategy, when another process is specified

² Clearly, the NRC’s criteria for granting a stay, 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*”), have been satisfied in this case.

in the NRC's rules. Moreover, according to PG&E's argument in response to SLOC's request for a stay of the license transfer, there is no longer any ongoing proceeding to hold in abeyance. Finally, implementation of Settlement Agreement would be completed well after its execution, so that a request to hold this proceeding in abeyance until implementation of the Settlement Agreement is contrary to its terms.

SLOC believes that the developments in the bankruptcy proceeding reinforce its request for a stay of the license transfer. The Settlement Agreement clearly would leave PG&E in its current status as an integrated utility regulated by the CPUC. The Commission's basis for rejecting earlier requests for a stay has been demonstrated to be incorrect. The status quo ante is now the parties' desired end state and the Commission should do nothing to upset the parties' ability to obtain that end state. Accordingly, the Commission should stay the NRC staff's grant of the license transfer.

A Commission stay also would have the salutary effect of stopping the waste of resources on this proceeding. PG&E reports that the Bankruptcy Court has, since settlement negotiations began on March 11, 2003, stayed hearings in the bankruptcy case. Surely, the Bankruptcy Court is not more concerned about the parties' waste of resources than is the Commission. Accordingly, the Commission could do no less and stay its proceedings on the license transfer.

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 "Renewed Application by San Luis Obispo County 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 and Opposition to PG&E's Motion to Hold the License Transfer Proceedings in Abeyance," were served upon the following persons by e-mail delivery, if an e-mail address is available on the 30th of June, 2003, with a follow-on copy by regular mail posted on the 1st of July, 2003, in accordance with the requirements of 10 C.F.R. § 2.1313:

Nils J. Diaz, Chairman
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U.S. Nuclear Regulatory Commission
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Jeffrey S. Merrifield, Commissioner
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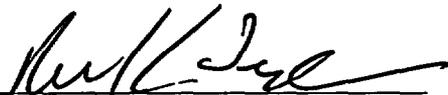
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Dated at Chicago, Illinois, this 30th day of June, 2003


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