

RAS 6616

July 7, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

July 14, 2003 (10:52AM)

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

PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE TO
SAN LUIS OBISPO COUNTY'S RENEWED STAY APPLICATION

I. INTRODUCTION

Pacific Gas and Electric Company ("PG&E") herein responds to the San Luis Obispo County ("County") renewed application of June 30, 2003, seeking a stay of the license transfers that are the subject of this proceeding.¹ PG&E opposes the Renewed Application, but continues to request that this proceeding be held in abeyance. The County in its filing is seeking relief that would be in a form that is inconsistent with the Commission's regulations, that it does not need, and to which it is not entitled under the regulations. In contrast, PG&E's proposal to hold this proceeding in abeyance would seemingly accomplish precisely what the County seeks in a way that would be consistent with the regulations and that would not establish any unwarranted procedural precedent.

¹ See "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," dated June 30, 2003 ("Renewed Application").

On November 30, 2001, PG&E filed an application with the Nuclear Regulatory Commission (“NRC”) requesting approval of the transfer of the operating licenses for Diablo Canyon Power Plant (“DCPP”). The proposed transfers are associated with PG&E’s proposed Plan of Reorganization to emerge from bankruptcy. Following completion of a contested proceeding on the application,² the NRC Staff approved the transfer by Order dated May 27, 2003.³

Thereafter, on June 2, 2003, San Luis Obispo County (“County”) and the California Public Utilities Commission (“CPUC”) sought a stay of the effectiveness of the Order pursuant to 10 C.F.R. § 2.1237, until either the ongoing bankruptcy case is concluded or the court of appeals rules on the pending Petition for Review of CLI-02-16 (the Commission decision denying the petitions of the CPUC, the County, and one other petitioner).⁴ PG&E opposed the Stay Application in an Answer dated June 12, 2003, on the basis that the CPUC and the County failed to demonstrate that 10 C.F.R. § 2.1237 applies in the current procedural posture of the case, and, moreover, wholly failed to demonstrate a basis for the requested stay.⁵

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); *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).

³ 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) (“Order”). Although the Order was “effective upon issuance,” it also conditions the DCPD license transfers on satisfaction of seven separate conditions.

⁴ 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 (“Stay Application”).

⁵ See “Pacific Gas and Electric Company’s Answer to Stay Application,” dated June 12, 2003 (“PG&E Answer”).

On June 24, 2003, in view of a proposed settlement of the PG&E bankruptcy case, PG&E filed a motion requesting that the NRC hold any remaining aspects of this proceeding (*i.e.*, principally the Stay Application) in abeyance until further notice, to allow time for the receipt of certain approvals and satisfaction of certain other conditions precedent necessary for settlement of PG&E's Chapter 11 bankruptcy proceeding.⁶ PG&E pointed out that it still could not implement the license transfers until the conditions specified in the Order are satisfied. On June 30, 2003, the County filed its Renewed Application, purportedly "to stay the transfer of the [DCPP] license" consistent with Section 2.1327. In the Renewed Application, the County also "opposes" the PG&E Motion for an abeyance. (Renewed Application at 1.) For the reasons discussed below, any application for a stay of effectiveness of the license transfer Order should be deferred or denied. Moreover, for many of the reasons urged by the County, PG&E's Motion to hold this proceeding in abeyance should be granted.

II. DISCUSSION

The County's Renewed Application is fundamentally confused. The County mischaracterizes PG&E's position, fails to properly distinguish between a stay of the license transfer or a stay of effectiveness of the previously issued transfer Order on the one hand and a stay of this proceeding (the remaining aspects of it, at least) on the other, and reaches an incongruous conclusion in which it is arguing against itself. The County certainly establishes no irreparable harm from the effectiveness of the transfer Order that would support a stay of effectiveness of that Order pursuant to 10 C.F.R. § 2.1327. Accordingly, as PG&E has explained in response to the Stay Application, that relief could not be granted if the Commission were to rule on the Stay Application. However, in the end the County agrees that the Commission

⁶ See "Pacific Gas and Electric Company's Motion to Hold in Abeyance," dated June 24,

should stay the proceeding on the license transfer (Renewed Motion at 4), which is precisely the relief requested in the PG&E Motion. Therefore, the County's "opposition" to the PG&E Motion (Renewed Motion at 1) makes no sense.

At the outset, it is important to separate the distinct concepts raised by the County/CPUC Stay Application and the PG&E Motion. Although the Renewed Application states (at 1) that it seeks a stay of the license transfer, the Stay Application actually appears to be a request in accordance with 10 C.F.R. § 2.1327 to stay the effectiveness of the previously-issued NRC license transfer Order, pending resolution of related adjudicatory proceedings. Putting aside whether such relief is even available at this time (given no pending NRC hearing issues, as discussed in the PG&E Answer opposing the Stay Application), the focus of the Stay Application is on effectiveness of the Order — not on the ongoing, post-effectiveness conduct of NRC administrative proceedings. Indeed, the very purpose of a stay under 10 C.F.R. § 2.1327 is to defer effectiveness of a transfer order *while NRC hearings go forward*. PG&E has responded to the Stay Application and its position on the merits of that matter is unchanged.

As discussed in the PG&E Answer, the County never makes the required showing to support a stay of effectiveness of the transfer Order (or a stay of the license transfer) — either in the Stay Application itself or in the Renewed Application. Most importantly, there must be a showing of irreparable harm from the effectiveness of the transfer Order. *See* 10 C.F.R. § 2.1327(d)(1); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79 (2000). Clearly, this never was the case, given that the license transfer cannot be implemented until the various conditions in the Order itself are satisfied. These conditions include confirmation of the PG&E Plan of Reorganization by the Bankruptcy Court

and receipt of other required regulatory approvals related to *that* plan. Now, given the proposed Settlement Agreement, satisfaction of the license transfer conditions is even less imminent than it might have been previously, and the basis for any stay of the effectiveness of the Order is even more tenuous.⁷ Accordingly, PG&E's position on the Stay Application, as stated in the PG&E Motion, is unchanged. If the Commission were to rule on the Stay Application, that application should be denied. However, no ruling on the Stay Application is presently required.

Consistent with the Settlement Agreement, the PG&E Motion asks the Commission to hold in abeyance any remaining aspects of this proceeding (in actuality only the Stay Application at this point, and any other matters that might somehow arise in the future).⁸ The County argues (Renewed Motion at 3) that the "NRC's rules do not provide for a *request to hold a license transfer proceeding in abeyance*" (emphasis in original). This is a curious position, indeed. Certainly, as discussed above, 10 C.F.R. § 2.1327 (addressed to a stay of effectiveness of a transfer order) is *not* addressed to this particular relief. However, PG&E's motion was not filed pursuant to that regulation. Rather, a stay of a proceeding (a decision to hold it in abeyance, in other words) is relief that is always available in an NRC administrative proceeding, simply as a matter of case management. See 10 C.F.R. § 2.718(m); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 158

⁷ For example, as discussed in the PG&E Motion, the bankruptcy case with respect to the PG&E Plan of Reorganization is already stayed. Moreover, consistent with the terms of the Settlement Agreement, PG&E has filed requests with other regulators (such as the Federal Energy Regulatory Commission) to stay proceedings on approvals required in connection with the PG&E Plan of Reorganization.

⁸ The County states (Renewed Motion at 3) that "PG&E reports" that the Settlement Agreement has not yet been executed and that PG&E has not yet requested a stay. The first half of this is correct. The second half is not. PG&E has indeed, in its Motion to Hold in Abeyance, requested a "stay" of the proceeding (not a stay of effectiveness of the Order).

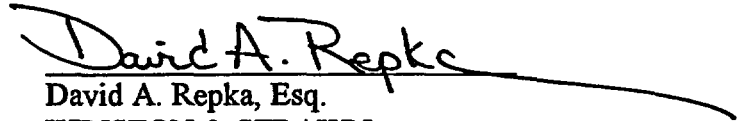
n.14 (1988). *See also* 10 C.F.R. § 2.1325. In fact, this is precisely the relief that the County has requested several times in this proceeding and it is precisely the relief the County seems to request at the conclusion of its Renewed Application (at 4). For the reasons discussed in the PG&E Motion, it is relief that at the present time, given the proposed Settlement Agreement, has become appropriate, at least pending further developments with respect to that agreement.

In the end, the County in its Renewed Application has become unclear and unfocused in what it seeks. To the extent it seeks a stay pursuant to 10 C.F.R. § 2.1327 of the *effectiveness* of the May 27, 2003 license transfer Order, PG&E continues to oppose the request, because such a stay would be inconsistent with NRC regulations and would establish a poor precedent. Nonetheless, PG&E believes resolution of the issue can be deferred since there is no imminent prospect of a license transfer pursuant to that Order. Moreover, to the extent the Renewed Application seeks a stay of the *proceeding* pending further developments in the bankruptcy case with respect to the proposed Settlement Agreement, the County is effectively supporting the PG&E Motion.

III. CONCLUSION

For the reasons stated above, the County's Renewed Application should be construed as support for PG&E's June 24, 2003 motion to hold this proceeding in abeyance. Accordingly, that PG&E Motion should be granted. To the extent the Renewed Application seeks a stay of effectiveness of the NRC's May 27, 2003 license transfer Order, the request should be deferred or denied.

Respectfully submitted,


David A. Repka, Esq.
WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005-3502
(202) 371-5700

William V. Manheim, Esq.
Richard F. Locke, Esq.
PACIFIC GAS & ELECTRIC COMPANY
77 Beale Street, B30A
San Francisco, CA 94105

ATTORNEYS FOR
PACIFIC GAS AND ELECTRIC COMPANY

Dated in Washington, District of Columbia
This 7th day of July 2003

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) |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of "PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE TO SAN LUIS OBISPO COUNTY'S RENEWED STAY APPLICATION" in the above captioned proceedings has been served as shown below by electronic mail, this 7th day of July 2003. Additional service by deposit in the United States mail, first class, has also been made this same day as shown below.

Nils J. Diaz, Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Edward McGaffigan, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications
Staff
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Lawrence J. Chandler, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: ogclt@nrc.gov
ljc@nrc.gov

Robert K. Temple, Esq.
2524 N. Maplewood Avenue
Chicago, IL 60647
nuclaw@mindspring.com

James B. Lindholm, Jr.
County Counsel for the County of
San Luis Obispo
County Government Center, Rm 386
San Luis Obispo, CA 93408
jlindholm@co.slo.ca.us

Laurence G. Chaset
Public Utilities Commission of
the State of California
505 Van Ness Avenue, Room 5131
San Francisco, CA 94102
e-mail: lau@cpuc.ca.gov

Gregory Heiden
Public Utilities Commission of
the State of California
505 Van Ness Avenue, Room 5024
San Francisco, CA 94102
e-mail: gxh@cpuc.ca.gov

George A. Fraser, General Manager
Northern California Power Agency
180 Cirby Way
Roseville, CA 95678
e-mail: george@ncpa.com

Steven M. Kramer
Carla J. Urquhart
Milbank, Tweed, Hadley & McCloy LLP
1825 I Street, N.W., Suite 1100
Washington, DC 20006
e-mail: skramer@milbank.com
curquhart@milbank.com

David Effross
Public Utilities Commission of
the State of California
505 Van Ness Avenue, 4th Floor
San Francisco, CA 94102
e-mail: dre@cpuc.ca.gov

Robert C. McDiarmid
Ben Finkelstein
Lisa G. Dowden
Meg Meiser
Tracy E. Connor
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Washington, DC 20005-4798
e-mail: robert.mcdiarmid@spiegelmc.com
ben.finkelstein@spiegelmc.com
lisa.dowden@spiegelmc.com
meg.meiser@spiegelmc.com
tracy.connor@spiegelmc.com

Edwin F. Feo
Milbank, Tweed, Hadley & McCloy LLP
601 South Figueroa Street, 30th Floor
Los Angeles, CA 90017
e-mail: efeo@milbank.com

James H. Pope, Chairman
Maury A. Kruth, Executive Director
Transmission Agency of Northern
California
P.O. Box 15129
Sacramento, CA 95851-0129

Wallace L. Duncan, Esq.
James D. Pembroke, Esq.
Michael R. Postar, Esq.
Lisa S. Gast, Esq.
Sean M. Neal, Esq.
Peter J. Scanlon, Esq.
Derek A. Dyson, Esq.
Duncan, Weinberg, Genzer & Pembroke,
P.C.
1615 M Street, N.W., Suite 800
Washington, DC 20036-3203
e-mail: ndr@dwgp.com

James C. Feider
Director, Electric Department
City of Redding
777 Cypress Avenue
Redding, CA 96049-6071

Grant Kolling
Senior Assistant City Attorney
City of Palo Alto
P.O. Box 10250
Palo Alto, CA 94303

Rick Coleman, General Manager
Trinity Public Utility District
P.O. Box 1216
Weaverville, CA 96093-1216

Harrison Call
Call Company
130 S. Cloverdale Blvd.
P.O. Box 219
Cloverdale, CA 95425

William C. Walbridge, General Manager
M-S-R Public Power Agency
P.O. Box 4060
Modesto, CA 95352

James H. Pope
Director of Electric Utility
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050


Roger VanHoy
Assistant General Manager, Electric
Resources
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352

Roland D. Pfeifer, Esq.
Assistant City Attorney
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Girish Balachandran
Assistant Director of Utilities
City of Palo Alto
P.O. Box 10250
Palo Alto, CA 94303

Scott Steffen, Esq.
Assistant General Counsel
Modesto Irrigation District
P.O. Box 4060
Modesto, CA 95352

Sheldon L. Trubatch, Esq.
Law Offices of Sheldon L. Trubatch
4222 River Road, NW, #1
Washington, DC 20016
e-mail:
lawofficesofsheldontrubatch@starpower.net


David A. Repka, Esq.
Counsel for Pacific Gas
& Electric Company