

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

California Public Utilities Commission and)
County of San Luis Obispo,)
Petitioners)
v.)
U.S. Nuclear Regulatory Commission,)
Respondent)

No. 02-72735

NRC No. NRC-50-275-LT

REPLY TO OPPOSITION BY PACIFIC GAS AND ELECTRIC COMPANY TO
MOTION OF CALIFORNIA PUBLIC UTILITIES COMMISSION AND
COUNTY OF SAN LUIS OBISPO FOR EXTENSION OF TIME FOR BRIEFING

INTRODUCTION

On November 8, 2002, Pacific Gas and Electric Company ("PG&E") — an Intervenor — objected to requests by the County of San Luis Obispo ("County") and the California Public Utilities Commission ("CPUC") — the Petitioners in this matter — for an extension of the briefing schedule previously established, as provided for in Ninth Circuit Rule 28-4 ("Rule 28-4").

PG&E's statement of objection is based on its prejudgment of the merits of this appeal and clearly shows that it will suffer no prejudice if the requested extension of time is granted. Contrary to PG&E's allegations, this appeal will affect the Nuclear Regulatory Commission's proceeding on PG&E's proposed license transfer only if the Court eventually decides that the Petitioners have been

denied their hearing rights under Section 189.a. of the Atomic Energy Act of 1954, as amended (“AEA”). Until this Court so decides, the NRC’s proceeding will continue independent of the briefing schedule in this case.

Finally, PG&E also makes light of the Petitioners’ good-faith reliance on Rule 28-4 by speculating on how the Petitioners intended to coordinate their appeals. Contrary to PG&E’s speculations, it in fact did take some time to get the approvals necessary for these governmental parties to coordinate their briefs. Now that such coordination has been approved, this requested extension will further the judicial economy purposes of Rule 28-4.

ARGUMENT

PG&E presents a parade of horrible results that it claims could stem from extending this briefing schedule by 21 days – the time provided in Ninth Circuit Rule 28-4. At bottom, all of these supposed consequences would flow from PG&E’s observation that “a reversal and remand by this Court of the NRC order denying the hearing request could nonetheless significantly affect the timing of an NRC final decision related to PG&E’s pending license transfer application.” Opposition at 3 (footnote omitted).

The fatal flaw in this argument is that if the Court were to reverse and remand an NRC Order, as assumed by PG&E, the Court would have taken such action because the NRC has denied the Petitioners their hearing rights under

Section 189.a of the AEA, the very matter at issue in this appeal. Thus, if the Court does find that the NRC has denied Petitioners its hearing rights, the timing of the NRC's final decision should properly be delayed in order to provide the Petitioners with their rightful opportunity to the hearing they are seeking.

Moreover, in footnote 1 (Opposition at 3), PG&E acknowledges that even if this Court were to require the NRC to hold a hearing as requested by the Petitioners, the NRC could still issue the license transfer without delay. Therefore, even if the Court were eventually to agree with Petitioners, the NRC could still act to transfer the license in a manner that will avoid PG&E's concerns.

Furthermore, PG&E has not shown how a 21-day extension of the briefing period would inexorably cause this Court to find for Petitioners and, thus, create the necessary predicate for delay postulated by PG&E.

Finally, PG&E's position is based on five fundamental assumptions that are either clearly false or by no means certain.

First, PG&E assumes that the NRC's decision will determine the timing of PG&E's emergence from bankruptcy. In view of the hotly contested proceeding in the United States Bankruptcy Court for the Northern District of California ("Bankruptcy Court") and PG&E's need to obtain other regulatory approvals, this assumption is simply untrue.

Second, PG&E assumes that the NRC will approve its license transfer request. The NRC may ultimately issue this license transfer request, but it is not a foregone conclusion that this will occur in the timeframe anticipated by PG&E, especially if the Court compels the NRC to grant to Petitioners the hearing rights that the NRC improperly denied them.

Third, PG&E assumes that the Bankruptcy Court will approve PG&E's reorganization plan instead of the competing plan presented by the CPUC or some third plan. It is not the purpose of this brief reply filing to argue the merits of the competing reorganization plans. Suffice it to say that the Bankruptcy Court will approve one reorganization plan to bring PG&E out of bankruptcy.

Fourth, PG&E assumes that the Court will find for Petitioners. This assumption is inappropriate since the Court has yet to consider the briefs of the parties, hear oral argument and actually decide the matter.

Fifth, PG&E assumes that a 21-day extension in the briefing schedule will translate to a 21-day extension of this Court's decision. Even if this were true, it is irrelevant, because if the Court rules in favor of Petitioners herein, the NRC's process for considering PG&E's license transfer request must necessarily be extended for a period of time well in excess of 21 days to enable Petitioners to be able to exercise the hearing rights that the NRC illegally denied to them.

For all these reasons, PG&E's claim that Petitioners' invocation of Rule 28-4 is prejudicial and unfair lacks merit and foundation.

PG&E is rightly concerned about the financial interests of its customers, ratepayers and its creditors. Indeed, Petitioners share these concerns, as evidenced by the filing of the CPUC of its alternate plan of reorganization with the Bankruptcy Court. However, these financial concerns in no way support PG&E's opposition to petitioners' request for a 21-day briefing period extension.

Moreover, these financial interests are not the only ones at stake here. In the exercise of their governmental responsibilities, Petitioners are also concerned about the health, safety and welfare of the citizens of San Luis Obispo County and in all of California who could be adversely affected by an accident at the Diablo Canyon Nuclear Power Plant. The opportunity to fully address these health and safety concerns is in the public interest.

Despite the seriousness of the health and safety issues raised in this appeal, PG&E asserts that Petitioners have "merely" invoked Rule 28-4 as an eleventh-hour gambit for delay. Such assertion is wholly without merit. Petitioners are coordinating necessary governmental approvals in order to file a joint brief. Moreover, the filing of a joint brief will clearly serve the purpose of Rule 28-4 to increase judicial efficiency. In recognition of the value of such efficiency, Rule 28-4 provides for the mandatory grant of a 21-day extension of time, "[I]f no

previous extension of the filing deadline or enlargement of brief size has been obtained and the case has not been expedited.”¹ That is the case here.

CONCLUSION

Since Appellants timely filed a motion, supported by Ninth Circuit Form 7, as provided for in Rule 28-4, Appellants’ Motion for an Extension of Time and Enlargement of Brief should be granted.

Dated: November 12, 2002

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¹ Petitioners’ request meets both the spirit and the letter of the purpose for which this Rule was established. The Circuit Advisory Committee Note to Rule 28-4 states (*emphasis added*), in part:

Rule 28-4 encourages separately represented parties to file a joint brief to avoid burdening the court with repetitive presentations of common facts and issues. Such joint briefing may require additional time and size. Accordingly, upon written notice, the court will grant a 21-day extension of time for filing a joint brief or a brief responding to multiple briefs.

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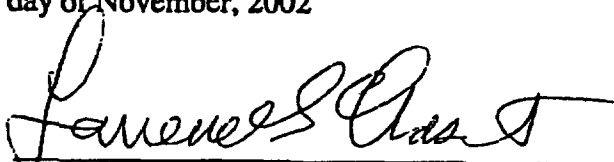
NRC No. NRC-50-275-LT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing REPLY TO OPPOSITION BY PACIFIC GAS AND ELECTRIC COMPANY TO MOTION OF CALIFORNIA PUBLIC UTILITIES COMMISSION AND COUNTY OF SAN LUIS OBISPO FOR EXTENSION OF TIME FOR BRIEFING have been served upon the following persons by U.S. mail, first class.

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Dated at San Francisco, California, this 12th day of November, 2002


 Laurence G. Chaset, Esq.