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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 09/08/03

COMMISSIONERS

SERVED 09/08/03

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
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)
PACIFIC GAS AND ELECTRIC CO.)
)
(Diablo Canyon Nuclear Power Plant, Units 1)
and 2))
_____)

Docket Nos. 50-275-LT, 50-323-LT

CLI-03-10

MEMORANDUM AND ORDER

On June 2, 2003, the California Public Utilities Commission (CPUC) and San Luis Obispo County asked the Commission to stay the effect of an NRC Staff order issued on May 27, 2003. The Staff order approved the transfer of licenses for the two-unit Diablo Canyon Nuclear Power Plant. Pacific Gas and Electric Co. (PG&E), the licensee for the Diablo Canyon facilities, opposes the stay application, but requests that we hold the proceeding in abeyance in light of a tentative settlement of a related bankruptcy proceeding. CPUC supports the abeyance request. The County opposes it and continues to demand a stay of the license transfer order. In view of the tentative bankruptcy settlement, we have decided to hold the stay application in abeyance, as requested by PG&E.

This proceeding involves PG&E's application for authorization to transfer its licenses for Diablo Canyon in connection with a comprehensive Plan of Reorganization which PG&E filed under Chapter 11 of the United States Bankruptcy Code. In response to the *Federal Register*

notice of PG&E's license transfer application,¹ we received five petitions to intervene and requests for hearing. The petitioners included CPUC and the County. On June 25, 2002, we issued an order denying the intervention petitions of CPUC and the County (and a third petitioner) but granting them "governmental participant" status (entitling them to participate in the proceeding if, but only if, we were subsequently to grant a hearing to another petitioner).² On February 14, 2003, we issued a second decision denying the remaining petitions to intervene and terminating the proceeding.³ A few months later the NRC Staff issued an order approving the license transfer application, albeit with conditions.⁴ As noted above, CPUC and the County sought to stay the effectiveness of the Staff order.

Subsequently, CPUC and PG&E announced a tentative settlement agreement between them on bankruptcy-related matters. The proposed bankruptcy settlement requires satisfaction of a number of conditions, but if consummated, the settlement would eliminate the need for the Diablo Canyon license transfer. PG&E, with CPUC's support, requests the Commission to hold the remaining aspects of this license transfer proceeding in abeyance.⁵ The County, however, opposes abeyance and renews its application for a stay of the Staff's transfer order.

¹ See 67 Fed. Reg. 2455 (Jan. 17, 2002).

² CLI-02-16, 55 NRC 317, 345, 349 (2002), *petition for judicial review pending*, No. 02-72735 (9th Cir.).

³ CLI-03-2, 57 NRC 19 (2003), *petition for judicial review pending*, No. 03-1038 (D.C. Cir.).

⁴ See "Pacific Gas and Electric Co. (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), announcing Staff order dated May 27, 2003.

⁵ Only the stay application and the motion to hold it in abeyance are on our docket at this time. As recounted in the text, earlier this year the Commission terminated the adjudication, and the NRC Staff issued an order approving the license transfer.

The County's continued demand for a stay notwithstanding, we see no reason not to grant the request of the chief bankruptcy contestants, PG&E and CPUC, that we take no further action during the pendency of their tentative settlement. Notably, both courts of appeals currently considering challenges to NRC decisions on the Diablo Canyon license transfer have issued orders holding judicial proceedings in abeyance to await further action on the potential settlement.⁶ Neither those judicial abeyance orders nor our decision today to issue our own abeyance order will cause any conceivable harm to the County. The fact is that the NRC Staff's approval of the Diablo Canyon license transfer has no immediate effect on anyone, including the County, because the Staff approval cannot be implemented absent (among other things) bankruptcy court approval of the transfer.

The law favors settlements. Where, as here, we are asked to postpone a decision in order to accommodate a possible settlement, we ordinarily will grant the request, absent harm to third parties or to the public interest. As noted above, neither the County nor anyone else requires an immediate Commission decision on whether to stay the NRC Staff's license transfer order because, in practical terms, that order has no current effect. Indeed, if the currently contemplated settlement is consummated, the license transfer controversy will be rendered moot, and neither the Commission nor the reviewing courts will have to consider the matter further.

For the foregoing reasons, we *grant* PG&E's motion to hold the proceeding (*i.e.*, the stay application) in abeyance. We also *direct* PG&E to notify us immediately upon final approval or rejection of the tentative settlement agreement. If appropriate, we will reactivate consideration of the stay application at that time.

⁶ *California Public Utility Commission v. NRC*, No. 02-72735 (9th Cir., abeyance order entered July 28, 2003); *Northern California Power Agency v. NRC* (D.C. Cir., abeyance order entered Aug. 1, 2003).

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of September, 2003.

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NUCLEAR REGULATORY COMMISSION

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)
(Diablo Canyon Power Plant, Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-03-10) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of September 2003