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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

April 23, 2004 (2:43PM)

BEFORE THE COMMISSION

OFFICE OF THE 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

**CITY OF SANTA CLARA, CALIFORNIA'S RESPONSE TO
PACIFIC GAS AND ELECTRIC COMPANY'S
MOTION TO TERMINATE PROCEEDING**

The City of Santa Clara, California ("Santa Clara"), an intervenor herein, by and through its attorneys, James D. Pembroke and Derek A. Dyson, Duncan, Weinberg, Genzer & Pembroke, P.C., 1615 M Street, N.W., Suite 800, Washington D.C. 20036, hereby submits its Response to Pacific Gas and Electric Company's ("PG&E") Motion to Terminate Proceeding ("Motion") filed in the above-captioned case and states as follows:

This proceeding commenced on November 30, 2001, through the filing by PG&E with the Nuclear Regulatory Commission ("NRC") of an application for approval of the transfer of the operating licenses for its Diablo Canyon Power Plant ("DCPP") as part of PG&E's then-proposed Plan of Reorganization to emerge from bankruptcy. As more fully described in PG&E's Motion, PG&E has abandoned its initial Plan of Reorganization and has adopted an alternate Plan of Reorganization which was implemented on April 12, 2004. Since the alternate Plan of Reorganization does not call for the transfer of the DCPP operating licenses, PG&E filed its Motion on April 12, 2004, requesting the NRC to terminate these license transfer proceedings.

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SECY-02

Santa Clara does not oppose the grant of PG&E's Motion, however, Santa Clara urges the NRC, in its order terminating the license transfer proceedings, to vacate, and otherwise declare null and void, its orders previously issued in these license transfer proceedings.

Without unnecessarily re-plowing old ground, Santa Clara notes that it was aggrieved by certain aspects of the orders issued herein, including the Memorandum and Order, CLI-03-02 issued on February 14, 2003, through, *inter alia*, that order's treatment of the DCPD antitrust conditions, commonly known as the Stanislaus Commitments.¹

Once the NRC dismisses the license transfer proceedings, as requested by PG&E in its Motion, the orders previously issued in this proceeding will establish no rights or obligations among the NRC and parties to this proceeding. Thus, Santa Clara requests, as part of the NRC's order terminating this licensing proceeding, that the orders previously issued in this proceeding be declared null and void.

As noted, on April 13, 2004, PG&E filed its Motion wherein it states that as of April 12, 2004, an approved alternate Plan of Reorganization had been implemented in its bankruptcy proceedings, that PG&E had emerged from bankruptcy, and that implementation of the alternate Plan of Reorganization had eliminated the need for the DCPD license transfers at issue in these proceedings. According to PG&E, it no longer intends to implement the transfers approved by the NRC in its May 27, 2003 order, and will allow the May 27, 2003 order to expire.

PG&E recognizes in its letter accompanying the Motion, as well as in the Motion, that the orders would become null and void absent a transfer by May 31, 2004. Santa Clara

¹ That Memorandum and Order were appealed to the United States Court of Appeals for the District of Columbia Circuit in Northern California Power Agency v. Nuclear Regulatory Commission and the United States of America, Case No. 03-1038. Santa Clara and PG&E intervened in that case. This case was dismissed as moot on April 16, 2004.

requests that the NRC issue an order canceling the approval of the transfer of the licenses in these proceedings. In light of the implementation of the alternate Plan of Reorganization by PG&E, such cancellation is appropriate and the orders issued in the case should be declared null and void.

Cancellation of the approval of the transfer of licenses by the NRC and declaration of the orders as null and void are consistent with the steps taken by the NRC on May 12, 1998, in the Baltimore Gas & Electric Company ("BGE")/Calvert Cliffs Nuclear Power Plant proceedings.² In those proceedings, the NRC approved the proposed transfer of operating licenses by Order dated October 18, 1996, from BGE to Constellation Energy Corporation. The approved transfers were obtained to permit the consummation of the merger between BGE and Potomac Electric Power Company ("PEPCO"), resulting in the formation of Constellation Energy Corporation. However, by letter dated January 30, 1998, BGE informed the NRC that on December 18, 1997, BGE and PEPCO mutually agreed to terminate the proposed merger, and requested that the NRC's approval of the transfer of licenses be canceled. The NRC determined that its approval of the transfer of the licenses for Calvert Cliffs Nuclear Power Plant should be withdrawn, and issued an order dated May 12, 1998, ordering "that the approval of the transfer of licenses described herein is immediately withdrawn, and the orders . . . are null and void."³

The BGE situation is very similar to the one faced by the NRC in the instant PG&E proceeding. When the NRC granted PG&E's request for approval of the transfer of the operating licenses for DCCP, that approval was based upon PG&E's then-pending Plan of

² 63 Fed. Reg. 26,213 (May 12, 1998).

³ *Id.* Such action is consonant with the federal appellate practice of vacating agency orders where such orders have been appealed but have been rendered moot by the actions of others. See, e.g. Columbia Rope Company v. West, 142 F.3d 1313, 1317-18 (D.C. Cir. 1998); Atlantic Gas Light Co. v. FERC, 140 F.3d 1392, 1401-03 (D.C. Cir 1998); AFLAC v. FCC, 129 F.3d 625, 630-31 (D.C. Cir. 1997).

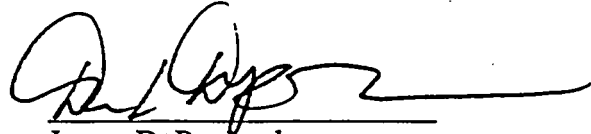
Reorganization to emerge from bankruptcy. As of April 12, 2004, the alternate Plan of Reorganization for PG&E has been implemented. Under the alternate Plan of Reorganization, the NRC license transfers at issue are no longer needed, just as the license transfers were no longer necessary when the BGE/PEPCO merger was called off. Accordingly, Santa Clara requests that the NRC issue an order canceling the approval of the transfer of the DCPP operating licenses, and declaring the earlier orders in the proceeding to be null and void.

WHEREFORE, for the foregoing reasons, Santa Clara respectfully requests that the NRC:

1. Grant PG&E's Motion to Terminate Proceeding;
2. Declare all orders previously issued in this license transfer proceeding to be null and void; and
3. Grant such other relief as may be necessary or appropriate.

Dated: April 23, 2004

Respectfully submitted,

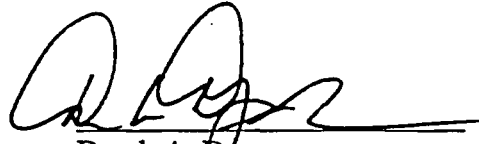


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the U.S. Nuclear Regulatory Commission in this proceeding by U.S. Mail. Dated at Washington, D.C., this 23rd day of April, 2004.



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