

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**RAS 8078**

**DOCKETED 07/07/04**

COMMISSIONERS

**SERVED 07/07/04**

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

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In the Matter of )

PACIFIC GAS AND ELECTRIC COMPANY )

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

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

**CLI-04-18**

**MEMORANDUM AND ORDER**

This proceeding involves Pacific Gas and Electric Company's application for authorization to transfer its licenses for the Diablo Canyon power plants in connection with PG&E's Chapter 11 bankruptcy Plan of Reorganization. We terminated this adjudication on February 14, 2003,<sup>1</sup> and the NRC Staff subsequently issued an order approving the license transfer.<sup>2</sup> Thereafter, we granted the unusual request of PG&E and the chief bankruptcy contestant, the California Public Utilities Commission, that we take no further action (in the already closed NRC proceeding) during the pendency of a tentative settlement they had

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<sup>1</sup>See *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, CLI-03-02, 57 NRC 19 (2003).

<sup>2</sup>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.

reached.<sup>3</sup> We held in abeyance a later request by San Luis Obispo County to stay the NRC Staff's transfer order.<sup>4</sup>

In a recent motion to terminate this proceeding, PG&E notified the Commission that it had emerged from bankruptcy on April 12, 2004, obviating the need to transfer the licenses for the two Diablo Canyon nuclear plants and rendering this proceeding moot. PG&E represented that counsel for the CPUC and San Luis Obispo County did not object to termination of the proceeding.

The City of Santa Clara filed the only response to PG&E's motion.<sup>5</sup> Santa Clara, although it did not oppose PG&E's request to terminate the proceeding, urged us to take the additional action of vacating orders previously issued in this proceeding. Specifically, Santa Clara said that it was "aggrieved by certain aspects of [] CLI-03-02" through that order's treatment of antitrust conditions.<sup>6</sup> Santa Clara also requested that the Commission issue an order canceling approval of the transfer of the PG&E licenses.

PG&E opposed both of Santa Clara's requests. As to vacatur, PG&E says that the Commission's legal and policy decision regarding the status of the antitrust conditions in the Diablo Canyon licenses provides important guidance for PG&E and other licensees in the future. According to PG&E, Santa Clara can suffer no harm from the order, as the decision in

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<sup>3</sup>Pending settlement, two courts of appeals that were considering challenges to earlier Commission decisions in this proceeding issued orders holding the judicial proceedings in abeyance.

<sup>4</sup>See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-10, 58 NRC 127 (2003). The NRC Staff is not a party to this adjudicatory proceeding.

<sup>5</sup>The City of Santa Clara was one member of a group of seven intervenors we collectively called TANC (for the Transmission Agency of Northern California, the entity named first in the group's intervention petition). See CLI-02-16, 55 NRC 317, 332 (2002).

<sup>6</sup>"City of Santa Clara, California's Response to Pacific Gas and Electric Company's Motion to Terminate Proceeding" at 2 (Apr. 23, 2004).

question applied to a specific license transfer that will not be consummated and Santa Clara can challenge any future application to transfer the Diablo Canyon licenses. As to cancellation of the license transfer order, PG&E notes no need to do so, as the order was due to become null and void by its own terms on May 31, 2004.

The Commission denies Santa Clara's request for cancellation of the Staff's license transfer order, for that order has become void without Commission action by passage of time. The Commission agrees to terminate this proceeding, but denies Santa Clara's request to vacate CLI-03-02 or any other orders in this proceeding. The earlier orders were Commission orders, not unreviewed Licensing Board orders.<sup>7</sup> Indeed, we devoted substantial analysis to the significant question of antitrust law and policy we decided in CLI-03-02, and we intended it to be the final order in this adjudicatory proceeding. The precedential value of a final determination "on a generic legal issue litigated in a particular proceeding should not hinge upon the presence or absence of wholly extraneous subsequent developments in that proceeding."<sup>8</sup>

As final agency action, CLI-03-02 was appealable only to the federal courts. The Northern California Power Agency, an intervenor in the NRC proceeding, did, in fact, appeal the decision to the U.S. Court of Appeals for the District of Columbia Circuit, and the City of Santa

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<sup>7</sup>See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-05, 47 NRC 113 (1998). In *Claiborne*, the applicant moved to withdraw its license and terminate the proceeding, rendering moot all remaining issues in the case. The Commission dismissed pending petitions for review and vacated the disputed unreviewed orders, but refused to vacate other orders entered in the proceeding. *Id.* at 114. See also *Rochester Gas and Electric Corp.* (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980).

<sup>8</sup>*Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-723, 17 NRC 555, 557-58 (1983). Cf. *Puget Sound Power and Light Co.* (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407 (1980). In *Skagit*, unlike here and in *Black Fox*, termination of a construction permit proceeding occurred while the Commission had before it a lower Board decision on a non-final matter. That decision might have been overturned or modified on Commission review.

Clara intervened in the appeal.<sup>9</sup> In that action, the Northern California Power Agency, after dismissal of the appeal due to mootness, requested the court to vacate CLI-03-02 on the ground that it was deprived of its right to judicial review of an agency order because of mootness brought about by the actions of another.<sup>10</sup> The court of appeals has not acted on the Northern California Power Agency's motion. But, given that no further review is available at the Commission, we see no basis for vacating our earlier orders ourselves.

IT IS SO ORDERED.

For the Commission

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 7<sup>th</sup> day of July 2004

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<sup>9</sup>See *Northern California Power Agency V. NRC*, Case No. 03-1038.

<sup>10</sup>See generally *U. S. v. Munsingwear*, 340 U.S. 36 (1950); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership* (513 U.S. 18 (1994); *A. L. Mechling Barge Lines, Inc. v. U.S.*, 368 U.S. 324 (1961).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-04-18) 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 Adria T. Byrdsong]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 7<sup>th</sup> day of July 2004