

SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION

PORTLAND GENERAL ELECTRIC COMPANY AND OREGON ELECTRIC UTILITY

COMPANY, LLC

TROJAN NUCLEAR PLANT AND THE TROJAN INDEPENDENT SPENT FUEL STORAGE

INSTALLATION

DOCKET NOS. 50-344 AND 72-17

1.0 INTRODUCTION

By application dated June 14, 2004, and supplemented by letters dated September 29, 2004, and December 9, 2004, for an order approving the indirect transfer of control of licenses Portland General Electric Company (PGE), acting on its own behalf and that of Oregon Electric Utility Company, LLC (OEUC), (collectively the applicants), requested that the United States Nuclear Regulatory Commission (NRC) approve the indirect transfer of Facility Operating (Possession Only) License No. NPF-1 for the Trojan Nuclear Plant (Trojan), to the extent held by PGE in regard to PGE's 67.5 percent ownership interest in Trojan, and the indirect transfer of Materials License No. SNM-2509 for the Trojan Independent Spent Fuel Storage Installation (Trojan ISFSI), to the extent held by PGE in regard to PGE's 67.5 percent ownership interest in the Trojan ISFSI, to OEUC. This request is in connection with the proposed sale of PGE to OEUC. The supplemental letters cited above did not expand the scope of the application beyond that noticed in the *Federal Register*.

The original application states that, if the proposed sale cannot be completed before December 31, 2004, Enron Corp. (Enron), the current owner of PGE, may initially transfer PGE's stock to a trust. That document seeks authority from the NRC for the stock transfer to OEUC either by Enron or by the trust, either of which then could be the transferor of the stock of PGE to OEUC depending upon the date of closure of the sale. However, the supplement dated December 9, 2004, from the applicants indicates that there is no longer any intent to use a trust.

2.0 BACKGROUND

Trojan is a nuclear power plant, located on the Columbia River in Columbia County, Oregon, which is also the location of the Trojan ISFSI. In May 1993, the Trojan license was amended to a possession-only license, and in April 1996, the NRC authorized the decommissioning of Trojan. In September 2003, the transfer of spent nuclear fuel from the Trojan spent fuel pool to the Trojan ISFSI was completed. Radiological decommissioning of Trojan is in the later stages of completion.

The PGE is a subsidiary of Enron, which owns 100 percent of PGE's voting stock, and PGE is a registered public utility holding company under the Public Utility Holding Company Act of 1935 (PUHCA). The PGE is an Oregon corporation engaged principally in the generation, transmission, and distribution of electric energy in Oregon, with approximately 750,000 retail customers. The PGE also sells energy to wholesale customers and transmits electric energy in interstate commerce for other electric utilities under jurisdiction of the Federal Energy Regulatory Commission (FERC). The PGE is an "electric utility" as defined by the NRC in 10 CFR 50.2, in regard to its regulation by the Oregon Public Utilities Commission (OPUC).

On December 2, 2001, Enron filed to initiate bankruptcy proceedings under Chapter 11 of the Bankruptcy Code. The PGE is not a debtor in the bankruptcy case and its physical assets are not included in the case, but PGE's common stock held by Enron is an asset in the bankruptcy estate.

On November 18, 2003, Enron entered into a definitive agreement (the "Transaction") with OEUC under which OEUC will acquire all issued and outstanding common stock of PGE and will become the sole owner of PGE. The PGE will continue to be a licensee of Trojan and the Trojan ISFSI. The proposed transfer of PGE stock involves no change to any of the other ownership interests in Trojan and the Trojan ISFSI by PacifiCorp (2.5 percent) and the Eugene Water and Electric Board (30 percent).

The transaction is valued at approximately \$2.35 billion. This amount includes the assumption of debt projected to total approximately \$1.1 billion at closing, plus the base purchase price of \$1.25 billion. The base purchase price is subject to adjustments. The United States Bankruptcy Court for the Southern District of New York, in charge of the Enron bankruptcy proceeding, issued an Order approving the Transaction dated February 5, 2004.

After completion of the Transaction, PGE will continue to exist as an electric utility regulated by the OPUC and FERC, with its headquarters remaining in Portland, Oregon. The current PGE executive officer team is expected to continue to operate the utility on a daily basis, including the current President and Chief Executive Officer of PGE, as well as the current Vice President, Generation, who has been the officer directly responsible for NRC licensed activities at Trojan since 1994. The application states that there will be no changes to Trojan's management group or operation following the Transaction and that PGE will continue to have sole authority to make all decisions to protect public health and safety, as required by the licenses and applicable laws and regulations.

The application states that the two primary NRC-approved documents related to Trojan and the Trojan ISFSI, the TNP Decommissioning Plan and the Trojan ISFSI Safety Analysis Report, will not change because of the purchase of PGE's stock by OEUC. Also, the purchase does not involve any plan to change any of the persons assigned to key management or technical and administrative positions at Trojan or the Trojan ISFSI. The application states that the 1996 NRC Order approving the TNP Decommissioning Plan and subsequent revisions to that plan have authorized that each co-owner of Trojan and the Trojan ISFSI will separately collect and assure the availability of funds for decommissioning Trojan and for the operation and eventual decommissioning of the Trojan ISFSI. PGE's funds for these purposes are collected through rates and deposited to an external trust fund, and this process will not change because of the purchase of PGE by OEUC. The OPUC currently allows PGE to collect its decommissioning costs from electric rates charges to customers, and this process will continue after the purchase.

The registered office address of OEUC as the indirect transferee is:

Oregon Electric Utility Company, LLC
c/o SW&W Legal Services, Inc.
1211 SW Fifth Avenue, Suites 1600-1800
Portland, Oregon 97204

The OEUC is an Oregon Limited Liability Company formed in 2003 solely for the purpose of holding the common stock of PGE, and will be principally engaged in managing the business interests of PGE. At the closing of the acquisition of PGE by OEUC, Managing Member, LLC, a newly formed Oregon limited liability company ("Managing Member"), will hold 95 percent of the voting interests in OEUC. The Managing Member will consist of five members, Dr. Peter O. Kohler, Gerald Grinstein, Thomas J. Walsh, Robert Miller, and Duane C. McDougall. At closing, three classes of parties, all of which are U.S. entities, will hold ownership and/or control interests in OEUC, as follows:

1. The Managing Member, a limited liability company that holds an approximately 0.67 percent ownership interest and 95 percent of the voting rights in OEUC;
2. Two limited partnerships, TPG Partners III, L.P. (TPG Partners III) and TPG Partner IV, L.P. (TPG Partners IV), (collectively the TPG Partners), which will hold a 79.90 percent ownership interest and 5 percent of the voting rights in OEUC; and
3. Two passive investors, the Bill & Melinda Gates Foundation (the Gates Foundation) and OCM Principal Opportunities Fund III, L.P. (OCM), a limited partnership. The passive investors collectively hold a 19.43 percent ownership interest in OEUC (about 9.715 percent each) and have no voting rights.

The TPG Partners are limited partnerships, each of which is managed by its General Partner. The General Partners for TPG Partners III and TPG Partners IV are, respectively, TPG Advisors III, Inc. and TPG Advisors IV, Inc., each being a Delaware closely-held corporation. Both of these General Partners are affiliated with the Texas Pacific Group (TPG), which comprises a series of funds that manage investments on behalf of many of the nation's largest public and private pension funds, university endowments, and other investors. The application states that TPG "has significant experience in investing in companies across a variety of industries, including airlines, financial services, technology, and healthcare. Its current portfolio consists of approximately 30 companies, which collectively employ 250,000 employees and generate combined revenues of \$36 billion in 2003."

Although the Managing Member will initially hold 95 percent of the voting control, such control will be subject to certain consent rights to be held by the TPG Partners which are listed in the application. Additionally, if Congress were to repeal the PUHCA (or to amend or reinterpret PUHCA as more fully described in the application), the voting interests in OEUC to be held by the Managing Member and the TPG Partners would be adjusted to reflect their respective equity holdings (not taking into account the equity held by the passive investors), such that the Managing Member's voting rights would be reduced to approximately 0.6 percent and the combined voting rights of TPG Partners would be increased to approximately 99.4 percent.

The application states that such a realignment of voting rights with a repeal of the PUHCA would have no effect on PGE's operations or the qualifications of OEUC as PGE's corporate parent.

In conducting its evaluation of the application, the staff will consider the relationships of control and ownership of PGE currently proposed among OEUC, the Managing Member, the TPG Partnerships, and the two passive investors, as well as the potential relationships that might exist if PUHCA were to be repealed or significantly amended or reinterpreted such that voting rights and corporate control could be affected.

3.0 REGULATORY EVALUATION

The applicants request the approval of the indirect transfer of the Trojan and the Trojan ISFSI licenses to OEUC, pursuant to 10 CFR 50.80. 10 CFR 50.80(a) states "No license for a production or utilization facility, or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall give its consent in writing."

Also, 10 CFR 50.80c states that "the Commission will approve an application for the transfer of a license, if the Commission determines: (1) that the proposed transferee is qualified to be the holder of the license; and (2) that transfer of the licensee is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto." For indirect transfers, the Commission, in addressing (1), must make a finding whether the transaction at issue will affect the qualifications of the holder of the license.

4.0 EVALUATIONS

4.1 Financial Qualifications and Decommissioning Funding Assurance

With respect to the Part 50 license for Trojan, Section 50.33(f) of 10 CFR requires that except for an electric utility applicant for a license to operate a utilization facility of the type described in 10 CFR 50.21(b) or 10 CFR 50.22, each application shall state "information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with regulations of this chapter, the activities for which the permit or license is sought."

Section 50.2 of 10 CFR states that an electric utility is "any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority."

As noted earlier, PGE is an electric utility. The Transaction will not change PGE's status as an electric utility and will not alter recovery by PGE of its operational costs, or alter its licensed activities or funding of decommissioning which are associated with Trojan through rates established by the OPUC. Both the NRC and the OPUC have approved PGE's decommissioning plans and decommissioning funding plans which provide financial assurance for decommissioning Trojan. The planned acquisition of PGE's common stock does not change the basis for this assurance. Therefore, pursuant to 10 CFR 50.33(f), PGE as an electric utility is exempt from further NRC financial qualifications review with respect to the Part 50 license for Trojan.

The application states that, notwithstanding the Transaction, the required funding assurance for operating and decommissioning the Trojan ISFSI will continue to be provided in conjunction with the NRC's approval of the Trojan ISFSI license in March 1999 and will remain unchanged. The implementation of PGE's financial assurance mechanisms as described in the Trojan plant decommissioning plan and the Trojan ISFSI Safety Analysis Report has not changed since the NRC approved the ISFSI.

In view of the NRC's concern that corporate restructuring (involving either a direct or an indirect transfer of control) can lead to a diminution of assets necessary for the safe operation and decommissioning of a licensee's nuclear power plant or related facilities such as an ISFSI, the NRC's practice has been to condition corresponding license transfer approvals upon a requirement that the licensee not transfer significant assets from the licensee to an affiliate without first notifying the NRC. This requirement assists the NRC in assuring that a licensee will continue to maintain adequate resources to contribute to the safe operation and decommissioning of its facilities. Thus, the following should be made a condition of the order approving the application regarding the proposed Transaction:

The PGE shall provide the Director of the Office of Nuclear Material Safety and Safeguards a copy of any application, at the time it is filed, to transfer (excluding grants of security interests or liens) from PGE to its direct or indirect parent, or to any other affiliated company, facilities for the production, transmission, or distribution of electric energy having a depreciated book value exceeding ten percent (10%) of PGE's net utility plant, as recorded on its books of account.

In consideration of the foregoing, the staff finds that OEUC's acquisition of PGE common stock will not adversely affect PGE's financial qualifications to hold the licenses for Trojan and the Trojan ISFSI.

4.2 Antitrust Review

The Atomic Energy Act of 1954 as amended (AEA) does not require or authorize antitrust reviews of post-operating license transfer applications. *Kansas Gas and Electric Co., et al.* (Wolf Creek Generating Station, Unit 1) CLI-99-19, 49 NRC 441 (1999). The application postdates the issuance of the Trojan operating license, and therefore no antitrust review is required or authorized.

4.3 Foreign Ownership, Control, or Domination

Section 103d of the AEA prohibits the NRC from issuing a license for a nuclear power plant to "any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." The NRC's regulation, 10 CFR 50.38, contains language to implement this prohibition.

The applicants have stated that following the proposed indirect license transfers as described in this application, PGE will continue to be the licensed 67.5 percent owner of Trojan and the Trojan ISFSI. The application states that, upon closing of the Transaction, OEUC will appoint a new Board of Directors of PGE, a majority of whose members at all times will be U.S. citizens. According to the application, OEUC is a U.S. company with its management and control entirely held and exercised by U.S. citizens.

The three separate groups of investors that will directly or indirectly hold ownership and control interests in OEUC—the Managing Member, the limited partnerships TPG Partners III and TPG IV (and the General Partners managing both of these limited partnerships), and the two passive investors (the Gates Foundation and OCM)—are all totally or predominantly held and controlled by U.S. citizens.

All owners, Board members, and management of the Managing Member are U.S. citizens. TPG III and TPG IV are limited partnerships (with certain consent rights over the control of the Managing Member, as noted earlier), both of which are managed and controlled by general partners that are Delaware corporations. The application states that the “current foreign investor percent interests in TPG Partners III and IV are, respectively, less than 15 percent and less than 25 percent” and that, while each of these entities includes various domestic and foreign interests that may change over time, “it is not envisioned that foreign investors will ever hold, in the aggregate, a majority ownership interest in either partnership.” Also, the consent rights over specified actions of OEUC and the right under some circumstances to remove members of the Managing Member that are held by TPG III and IV, are all ultimately and solely under the management and control by their general partners, which are U.S. corporations controlled by three U.S. citizens.

The Gates Foundation is a U.S. entity. The OCM limited partnership is expected to continue to include domestic and foreign investors, some of which may change over time. The application states that the current foreign investor percent interest in OCM is approximately 12.5 percent and that “it is not envisioned that foreign investors will ever hold, in the aggregate, a majority ownership interest in OCM.” Also, OCM and the Gates Foundation are both passive investors and will have no management or voting rights or any rights to seats of the OEUC or PGE Boards of Directors.

As noted earlier herein, if Congress were to repeal or to significantly amend the PUHCA, the voting interests of Managing Member and the TPG Partners would change significantly with the TPG Partners holding more than 99 percent of these rights, but the application states that such a change would “not affect the management and control of the business of OEUC for foreign ownership and control purposes, since in any case the company will be under the control of either (a) the members of the Managing Member or (b) the individuals who control the general partners of the TPG Partners III and IV limited partnerships, all of whom are U.S. citizens.”

In consideration of the foregoing, the staff does not know or have reason to believe that under the proposed Transaction, PGE will be owned, controlled, or dominated by a foreign interest within the meaning of the AEA and concludes that the foreign ownership prohibition of the AEA and of the NRC would not bar the proposed Transaction.

However, the staff notes that, should the percentage ownership interests held by any foreign investors in the TPG limited partnerships begin to rise significantly and approach 50 percent, the staff would view that change as material and would expect that the NRC would be notified immediately. Consideration would have to be given at that time as to whether OEUC (and in turn PGE, indirectly) would be deemed to be owned by foreign interests under Section 103 of the AEA or under 10 CFR 50.38 of the NRC regulations. In addition, staff consideration would have to be given as to whether a negation action plan would be necessary, and whether such a plan could be created and implemented, to allow the ownership and control structure over PGE to continue without contravening the AEA.

4.4 Potential Change in Control of OEUC

At the outset the staff is basing its review of the proposed sale of PGE on an initial OEUC organizational structure which is to be controlled by the Managing Member's 95 percent voting rights (and 0.67 percent ownership interest), which control is subject to consent rights held by the two TPG limited partnerships (as noted earlier, with their combined 5 percent voting rights) which are to be the principal owners of OEUC with their 79.90 percent ownership interest. The limited partnerships are controlled by their General Partners, which are both closely-held Delaware corporations. The two passive investors, OCM and the Gates Foundation, would collectively own a 19.43 percent ownership interest in OEUC and have no voting rights.

As noted earlier, if Congress were to repeal PUHCA, the ownership interests of both the Managing Member and the TPG Partners in OEUC would remain the same, but their voting interests would be revised to reflect their ownership interests (considering there are no voting rights for passive investors), such that the Managing Members would be reduced to holding from 95 percent to only about 0.6 percent of the voting rights and the TPG partners would hold about 99.4 percent of the voting rights, in contrast to their current 5 percent interest. However, the application explains that such a change in voting rights "would no have effect on PGE's operations or the qualifications of OEUC as PGE's corporate parent." While the ownership interests of the various owners would remain the same, majority control over OEUC would transfer from the Managing Member to the TPG Partners. Notwithstanding such transfer of control, PGE would still remain an electric utility subject to its current rate regulatory authorities. The application identified no underlying representations that would be affected by changes in PUHCA. The staff has considered the potential adjustment of voting rights through changes in PUHCA and concluded that the staff's findings herein would not change.

5.0 CONCLUSION

In view of the foregoing, the staff finds that, subject to the condition discussed herein, the acquisition of PGE by OEUC will not affect the qualifications of PGE to hold the Trojan Operating (Possession Only) License and the Trojan ISFSI Materials License to the extent now held by PGE, and that the indirect transfer of the control of the licenses to OEUC is otherwise consistent with the applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

Principal Contributor: A.F. McKeigney

Date: December 10, 2004