

October 2, 2006

Mr. John S. Keenan
Senior Vice President and Chief Nuclear Officer
Pacific Gas and Electric Company
Diablo Canyon Power Plant
P.O. Box 770000
San Francisco, CA 94177-0001

SUBJECT: DIABLO CANYON POWER PLANT, UNIT NOS. 1 AND 2 - ISSUANCE OF
AMENDMENTS RE: DELETION OF ANTITRUST LICENSE CONDITIONS
(TAC NOS. MC9673 AND MC9674)

Dear Mr. Keenan:

The U.S. Nuclear Regulatory Commission (the Commission) has issued the enclosed Amendment No. 189 to Facility Operating License No. DPR-80 and Amendment No. 191 to Facility Operating License No. DPR-82 for the Diablo Canyon Power Plant, Unit Nos. 1 and 2, respectively. The amendments consist of changes to the facility operating licenses in response to your application dated January 19, 2006, as supplemented on June 20, 2006.

The amendments delete the antitrust conditions from the facility operating licenses.

A copy of the related Safety Evaluation is enclosed. The Notice of Issuance will be included in the Commission's next regular biweekly *Federal Register* notice.

Sincerely,

/RA/

Alan Wang, Project Manager
Plant Licensing Branch IV
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation

Docket Nos. 50-275
and 50-323

Enclosures: 1. Amendment No. 189 to DPR-80
2. Amendment No. 191 to DPR-82
3. Safety Evaluation

cc w/encls: See next page

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cc w/encls: See next page

Accession No.: ML062280659

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DATE	8/29/06	8/29/06	9/8/06	9/21/06	10/2/06

OFFICIAL RECORD COPY

Diablo Canyon Power Plant, Units 1 and 2

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Field Representative
United States Senator Barbara Boxer
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San Francisco, CA 94111

March 2006

PACIFIC GAS AND ELECTRIC COMPANY

DOCKET NO. 50-275

DIABLO CANYON NUCLEAR POWER PLANT, UNIT NO. 1

AMENDMENT TO FACILITY OPERATING LICENSE

Amendment No. 189
License No. DPR-80

1. The Nuclear Regulatory Commission (the Commission) has found that:
 - A. The application for amendment by Pacific Gas and Electric Company (the licensee), dated January 19, 2006, as supplemented on June 20, 2006, complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations set forth in 10 CFR Chapter I;
 - B. The facility will operate in conformity with the application, the provisions of the Act, and the rules and regulations of the Commission;
 - C. There is reasonable assurance (i) that the activities authorized by this amendment can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations;
 - D. The issuance of this amendment will not be inimical to the common defense and security or to the health and safety of the public; and
 - E. The issuance of this amendment is in accordance with 10 CFR Part 51 of the Commission's regulations and all applicable requirements have been satisfied.
2. Accordingly, the license is amended by changes to the Facility Operating License No. DPR-80 as indicated in the attachment to this license amendment.

3. This license amendment is effective as of its date of issuance and shall be implemented within 90 days of issuance.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

David Terao, Chief
Plant Licensing Branch IV
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation

Attachment: Changes to the Facility
Operating License No. DPR-80

Date of Issuance: October 2, 2006

PACIFIC GAS AND ELECTRIC COMPANY

DOCKET NO. 50-323

DIABLO CANYON NUCLEAR POWER PLANT, UNIT NO. 2

AMENDMENT TO FACILITY OPERATING LICENSE

Amendment No. 191
License No. DPR-82

1. The Nuclear Regulatory Commission (the Commission) has found that:
 - A. The application for amendment by Pacific Gas and Electric Company (the licensee), dated January 19, 2006, as supplemented on June 20, 2006, complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations set forth in 10 CFR Chapter I;
 - B. The facility will operate in conformity with the application, the provisions of the Act, and the rules and regulations of the Commission;
 - C. There is reasonable assurance (i) that the activities authorized by this amendment can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations;
 - D. The issuance of this amendment will not be inimical to the common defense and security or to the health and safety of the public; and
 - E. The issuance of this amendment is in accordance with 10 CFR Part 51 of the Commission's regulations and all applicable requirements have been satisfied.
2. Accordingly, the license is amended by changes to the Facility Operating License No. DPR-82 as indicated in the attachment to this license amendment.

3. This license amendment is effective as of its date of issuance and shall be implemented within 90 days of issuance.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

David Terao, Chief
Plant Licensing Branch IV
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation

Attachment: Changes to Facility
Operating License No. DPR-82

Date of Issuance: October 2, 2006

ATTACHMENT TO LICENSE AMENDMENT NO. 189
TO FACILITY OPERATING LICENSE NO. DPR-80
AND AMENDMENT NO. 191 TO FACILITY OPERATING LICENSE NO. DPR-82
DOCKET NOS. 50-275 AND 50-323

Remove Appendix C of the Facility Operating Licenses.

REMOVE

INSERT

Appendix C

- - -

SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION
RELATED TO APPLICATION FOR LICENSE AMENDMENTS
TO DELETE ANTITRUST LICENSE CONDITIONS
DIABLO CANYON NUCLEAR POWER PLANT, UNITS 1 AND 2
FACILITY OPERATING LICENSES DPR-80 AND DPR-82
DOCKET NOS. 50-275 AND 50-323

1.0 INTRODUCTION

By application dated January 19, 2006 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML060300299), as supplemented by letter dated June 20, 2006 (ADAMS Accession No. ML061780306), Pacific Gas and Electric Company (PG&E or the licensee) requested that the U.S. Nuclear Regulatory Commission (NRC/the Commission), pursuant to Section 50.90 of Title 10 of the *Code of Federal Regulations* (10 CFR), amend the Facility Operating Licenses, Nos. DPR-80 and DPR-82, for the Diablo Canyon Nuclear Power Plant, Units 1 and 2 (DCPP or facility). The proposed amendments would delete the antitrust conditions from the facility operating licenses.

A "Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing" was published in the *Federal Register* on April 14, 2006 (71 FR 19551). No requests for a hearing were received. The Northern California Power Agency (NCPA) filed comments by letter dated May 12, 2006, from its counsel, Spiegel & McDiarmid. In addition, the Antitrust Division of the U.S. Department of Justice (DOJ) in a letter dated June 1, 2006, stated that it had no comments concerning the proposed amendments.

The supplemental letter dated June 20, 2006, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

2.0 BACKGROUND

The operating licenses for DCPP have contained antitrust conditions since the mid-1980s. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 31 (2003). In general, the conditions contain requirements concerning transmission services, interconnections, coordination, and the sale of certain power to interconnected and neighboring entities. The conditions also provide that certain entities could have sought an ownership interest in another nuclear unit built by PG&E within a specified time frame, which has since expired.

The DCPD licenses were issued under Section 104.b of the Atomic Energy Act of 1954, as amended (AEA). The antitrust conditions, known as the Stanislaus Commitments, were originally developed in the context of a Section 105.c antitrust review involving the never-built Stanislaus Nuclear Project, which would have been licensed to PG&E under Section 103 of the AEA had it gone forward. The Stanislaus Commitments were added to the DCPD construction permits in 1978 with the consent of PG&E at that time, and later carried forward in the DCPD operating licenses when they were issued. PG&E originally agreed to the Stanislaus Commitments in connection with the DOJ's antitrust review of the Stanislaus Nuclear Project. Such agreement was the basis for the DOJ to recommend to the NRC that no antitrust hearing would be necessary in connection with Stanislaus construction permit.

3.0 REGULATORY FRAMEWORK

The licensee is requesting the amendment of the licenses to remove the antitrust conditions pursuant to 10 CFR 50.90, "Application for amendment of license or construction permit." The NRC has determined that it has the authority to amend a license at the request of a licensee seeking to modify, suspend, or revoke its antitrust license conditions. See *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 NRC 47, 59 (1992); *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), 49 NRC 441, 466 n.23 (1999).

4.0 EVALUATION

4.1 Changed Circumstances

As PG&E points out in its application, significant legal and factual developments have occurred since the antitrust conditions were first imposed in 1978 against PG&E in the DCPD construction permits. The Federal Energy Regulatory Commission (FERC) in the last decade has issued several orders providing for non-discriminatory open access to transmission service. See, e.g., FERC Orders 888, 889, and 2003. In addition, the California legislature in 1995 established the California Independent System Operator (CAISO) to, among other things, provide open access to non-discriminatory transmission service and operate energy and ancillary services markets, according to the application. The CAISO is subject to FERC jurisdiction, and now has operational control over PG&E's transmission facilities.

The application states that FERC's implementation of its open access policies ensures a competitive power market, and thus the concerns underlying the Stanislaus Commitments no longer exist. According to PG&E, "in 2004 FERC specifically found that the services available under the CAISO tariff meet PG&E's obligations under the Stanislaus Commitments." See "Opinion and Order Affirming Initial Decision," 107 FERC P61,154 (May 10, 2004).

Dating back to the DCPD construction permits, the antitrust conditions are now 28 years old. Their age, particularly given the above changed circumstances of law and fact, weighs against retaining the conditions in the licenses. See *Diablo Canyon*, CLI-03-2, 57 NRC at 35 n.62.

4.2 Private Contractual Rights

According to the application, the Stanislaus Commitments are the subject of agreements between PG&E and others, such as a November 1991 agreement with NCPA regarding interconnection issues and transmission service rates. PG&E asserts that it will continue to

meet these contractual obligations, regardless of whether the antitrust conditions are deleted from the DCPD operating licenses. It also points out that the Commission in CLI-03-2 noted that parties to the Stanislaus-related contracts can enforce those contracts “quite apart from any NRC license conditions.” NCPA, in its comments filed, informed the NRC that it has negotiated a new settlement agreement with PG&E under which the November 1991 agreement as well as the new settlement agreement may be enforced at the FERC or in court; NCPA agreed that it will not oppose or attempt to condition in any way PG&E’s license amendment request.

Thus, in view of the foregoing, deleting the antitrust license conditions would not have any impact on the antitrust remedies negotiated by PG&E with the parties to the contracts related to the Stanislaus commitments.

4.3 Legal Authority to Continue to Impose Antitrust Conditions in the DCPD Licenses

In CLI-03-2, the Commission was required to address the appropriate disposition of the DCPD antitrust license conditions in the context of a proposed license transfer. The Commission, after analyzing the NRC’s antitrust authority under Section 105 of the AEA and the history of the DCPD antitrust conditions, concluded that the NRC now lacks an “antitrust ‘hold’ on PG&E.” CLI-03-2, 57 NRC at 34. Essentially, the Commission decided that because the basis for the DCPD antitrust conditions was the Section 103 Stanislaus proceeding and not the Section 104 Diablo Canyon proceeding, where an antitrust review under Section 105 was not authorized, and because the Stanislaus proceeding will clearly not be reopened, there is no authority under the AEA to continue to impose antitrust conditions on PG&E with respect to DCPD.

The staff notes that even though CLI-03-2 was later vacated as moot (*see Northern California Power Agency v. NRC*, 393 F.3d 223 (D.C. Cir. 2004)) due to the license transfer not occurring, the analysis in CLI-03-2 of the NRC’s antitrust authority under the AEA is still sound.¹ Accordingly, consideration of the legal basis of the antitrust license conditions weighs in favor of their deletion from the DCPD licenses.

4.4 U.S. Department of Justice and Public Comments

The Antitrust Division of the DOJ played the key role in the original review of the competitive situation in PG&E’s geographic markets and subsequent development of the conditions that were incorporated into the DCPD licenses. By letter dated April 20, 2006, the NRC staff informed the DOJ of the amendment request and provided the DOJ with a copy of the application. The NRC staff requested the DOJ to provide any comments by the close of the

¹In footnote 12 on page 7 of the application, PG&E suggests that if the Commission concluded that it now has authority to continue to impose the antitrust conditions in the current licenses, “PG&E could avoid that jurisdiction by a corporate reorganization that would involve transferring the plant to an affiliated entity.” In light of this statement, it is worth noting that, as a general principle, the staff in license transfer matters involving existing antitrust conditions will take into consideration when deciding whether to continue antitrust conditions in a transferred license whether a proposed transferee will be essentially the transferor superficially reorganized, and whether the license transfer is simply a transaction designed to obtain relief from the conditions.

60-day hearing opportunity period provided in the *Federal Register* notice of the application. As noted in the introduction to this safety evaluation, the DOJ stated in a letter to the NRC dated June 1, 2006, that it had no comments on the request to remove the conditions from the licenses.

In addition, no hearing requests or expressions of opposition to the amendments were filed by members of the public or, more significantly, beneficiaries of the antitrust conditions or competitors of PG&E.² The absence of any such filings or submittals was viewed by the staff as one indication that the conditions are not critical to competitors or are not necessary to maintain a competitive situation, thus weighing in favor of granting the amendment request.

5.0 SUMMARY OF FINDINGS

Circumstances have changed significantly from those that existed when the antitrust license conditions were first imposed 28 years ago. In particular, there have been recent developments in the law at both the federal and state levels to ensure competition in the industry in California and elsewhere. Moreover, agreements binding PG&E related to the Stanislaus Commitments will continue to be in effect whether or not the antitrust conditions actually remain a part of the DCPD licenses, and competitors have voiced no opposition to the removal of the conditions. Finally, under the limited statutory authority granted to the NRC under Section 105 the AEA, it appears that the NRC lacks the authority now to continue to impose the antitrust conditions against PG&E through the DCPD licenses. Accordingly, in consideration of all of the foregoing, the NRC staff finds the proposed amendments acceptable.

6.0 STATE CONSULTATION

In accordance with the Commission's regulations, the California State official was notified of the proposed issuance of the amendments. The State official had no comments.

7.0 ENVIRONMENTAL CONSIDERATION

Pursuant to 10 CFR 51.21, 51.32, and 51.35, an environmental assessment and finding of no significant impact was published in the *Federal Register* on September 20, 2006 (71 FR 55035).

Accordingly, based on the environmental assessment, the Commission has determined that issuance of these amendments will not have a significant effect on the quality of human environment.

8.0 CONCLUSION

The Commission has concluded, based on the considerations discussed above, that: (1) there is reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner, (2) such activities will be conducted in compliance with the

²As discussed in Section 4.2 of this safety evaluation, NCPA did submit a letter to the NRC stating it has agreed with PG&E not to oppose the amendment request or seek conditions.

Commission's regulations, and (3) the issuance of the amendments will not be inimical to the common defense and security or to the health and safety of the public.

Principal Contributor: S. Hom

Date: October 2, 2006