

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 08/01/02

COMMISSIONERS

SERVED 08/01/02

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of)
)
)
PACIFIC GAS AND ELECTRIC CO.) Docket Nos. 50-275-LT, 50-323-LT
)
(Diablo Canyon Power Plant, Units 1 and 2))

)

CLI-02-18

MEMORANDUM AND ORDER

This proceeding arises from an application seeking the Commission's authorization for Pacific Gas and Electric Co. ("PG&E") to transfer its licenses for the Diablo Canyon Power Plant, Units 1 and 2, to a newly established generating company. The license transfer application resulted from a comprehensive Plan of Reorganization which PG&E filed under Chapter 11 of the United States Bankruptcy Code. In a recent order, we described the reorganized corporate structure PG&E proposed and the nature of the five intervention petitions we received.¹ We denied the petitions of the California Public Utilities Commission, the County of San Luis Obispo, and the Official Committee of Unsecured Creditors of PG&E, and we reserved ruling on the petitions of the Northern California Power Agency ("NCPA") and the following group: the Transmission Agency of Northern California, M-S-R Public Power Agency, Modesto Irrigation

¹See *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC ___, slip op. at 1-3 (June 25, 2002).

District, the California Cities of Santa Clara, Redding, and Palo Alto, and the Trinity Public Utility District (collectively, "TANC").²

The NCPA and TANC petitions raise antitrust concerns. The petitions are unusual because they do not challenge PG&E's license transfer application as such. Rather, they dispute the NRC Staff's notice that it may reject PG&E's suggested treatment of the antitrust conditions in its current licenses.³ The PG&E application proposes to continue these conditions in effect for PG&E itself and for a newly created transmission company, even though after the transfer these companies no longer would own or operate the Diablo Canyon plants or otherwise engage in activities requiring an NRC license. Consequently, we recently invited the petitioners and the applicant to submit briefs on the following question:

What is the Commission's authority under the Atomic Energy Act to approve the proposed license transfers and related license amendments where the current licensee (PG&E) as well as a company engaged solely in transmission activities would not, after the transfer, be engaged in activities at Diablo Canyon requiring a license, yet would remain or become named licensees on the Diablo Canyon licenses?⁴

During our review of the briefs the parties submitted, a fundamental issue of NRC authority has come to the Commission's attention. Specifically, the Diablo Canyon units were licensed under Section 104.b of the Atomic Energy Act ("AEA"),⁵ a licensing statute used in the early days of commercial power reactor development but containing no antitrust provisions. Section 105 of the AEA,⁶ enacted in 1970, granted the Commission certain antitrust powers and responsibilities

²See *id.*, 55 NRC at ___, slip op. at 3.

³See 67 Fed. Reg. 2455, 2456 (Jan. 17, 2002).

⁴CLI-02-12, 55 NRC 267, 268 (2002).

⁵42 U.S.C. § 2134.

⁶42 U.S.C. § 2135.

for facilities licensed under Section 103 of the Act.⁷ But PG&E holds no Section 103 license for Diablo Canyon.

The petitioners and the applicant did not, in their earlier submissions, address the question whether the Commission has statutory authority to retain or impose antitrust conditions for commercial nuclear power plants licensed under Section 104.b. Accordingly, we now seek briefs from the petitioners and the applicant on this question.⁸ The briefs should not exceed 25 pages and should be filed by August 22, 2002.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of August, 2002

⁷42 U.S.C. § 2133.

⁸The California Public Utilities Commission and the County of San Luis Obispo may also file briefs. Earlier, we gave these entities participant status if we subsequently grant a hearing to another petitioner. See CLI-02-16, 55 NRC at ___, slip op. at 22, 27. In addition, we invite the Department of Justice to submit its views if it so chooses.