

NO. 02-72735

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.,  
Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,  
Respondent

and

PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,  
Intervenors

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PETITION FOR REVIEW OF MEMORANDUM AND ORDER CLI-02-16 OF  
THE U.S. NUCLEAR REGULATORY COMMISSION

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ANSWERING BRIEF OF RESPONDENT-INTERVENOR  
PACIFIC GAS AND ELECTRIC COMPANY

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CALIFORNIA PUBLIC UTILITIES COMMISSION)  
AND COUNTY OF SAN LUIS OBISPO, )  
PETITIONERS, )

v. )

U.S. NUCLEAR REGULATORY COMMISSION, )  
RESPONDENT, )

AND )

PACIFIC GAS AND ELECTRIC COMPANY, )  
ET AL., )  
INTERVENORS. )

No. 02-72735

CORPORATE DISCLOSURE STATEMENT


Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor Pacific Gas and Electric Company ("PG&E") hereby files this Disclosure Statement.

PG&E is a corporation organized under the laws of the State of California. PG&E is an operating public utility engaged principally in the business of providing electricity and natural gas distribution and transmission services throughout most of Northern and Central California. Effective January 1, 1997,

PG&E and its subsidiaries became subsidiaries of Pacific Gas and Electric Corporation, an energy-based holding company organized under the laws of the State of California. On April 6, 2001, PG&E filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of California. On September 20, 2001, PG&E and its parent corporation jointly filed a Plan of Reorganization with the Bankruptcy Court. PG&E continues to operate its business as a debtor-in-possession subject to the jurisdiction of the Bankruptcy Court.

Pacific Gas and Electric corporation, PG&E's parent corporation, is the only publicly held corporation owning ten percent or more of PG&E's stock.

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Dated in Washington, District of Columbia  
This 10th day of February 2003

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ANSWERING BRIEF OF RESPONDENT-INTERVENOR  
PACIFIC GAS AND ELECTRIC COMPANY

I. JURISDICTIONAL STATEMENT

Respondent-intervenor Pacific Gas and Electric Company ("PG&E")  
agrees with the Statement of Jurisdiction in the Brief of Respondent U.S. Nuclear  
Regulatory Commission ("NRC" or "Commission").

## **II. STATEMENT OF ISSUES FOR REVIEW**

PG&E agrees with the Statement of Issues for Review as articulated by Respondent NRC.

## **III. STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This case concerns a request for an NRC licensing action — the consent to the transfer of two NRC nuclear power reactor licenses for PG&E's two-unit Diablo Canyon Power Plant ("DCPP"). Following a notice of opportunity for hearing on the request, petitioner California Public Utilities Commission ("CPUC") filed a timely petition to intervene and request for hearing. Approximately three months later, petitioner County of San Luis Obispo ("County") filed an untimely petition to intervene and request for hearing. The Commission properly rejected both petitions, each on two separate grounds. First, the Commission found that both the CPUC and County failed to identify or support any admissible issue material to the NRC's review, under the Atomic Energy Act of 1954, as amended ("AEA"), of a license transfer application. Second, the Commission properly found that the CPUC failed to demonstrate injury or standing to intervene in the proceeding, and that the County's petition failed to satisfy the Commission's criteria for late filing. This appeal does no more than request review

of a reasonable agency decision disposing of petitions to intervene in an administrative proceeding.

#### **B. PROCEDURAL BACKGROUND**

On November 30, 2001, PG&E filed an application with the NRC requesting approval of the transfer of the NRC operating licenses for DCPD to Electric Generation, LLC ("Gen") and Diablo Canyon LLC ("Nuclear"). The requested transfer is associated with PG&E's proposed Plan of Reorganization ("Plan") to restructure its business operations to allow PG&E to emerge from Chapter 11 bankruptcy. Pursuant to the NRC's regulations, 10 C.F.R. § 2.1301(b), on January 17, 2002, the NRC published its *Federal Register* notice of consideration of approval of the proposed DCPD license transfer and of an opportunity to request a hearing, establishing a twenty-day period for interested persons to file such petitions ("NRC Notice"). (ER 0005-0006.)

On February 5, 2002, the CPUC timely filed a petition for leave to intervene, as well as a motion to dismiss or stay the NRC proceeding pending a bankruptcy court decision on the PG&E Plan. The CPUC based its standing on its statutory responsibility to regulate California's public utilities and to represent the interests of electric consumers. The CPUC proffered four proposed contentions for hearing: (1) Gen will not meet NRC financial qualifications requirements because a power sales agreement ("PSA") which will provide the vast majority of Gen's

revenues contains, according to the CPUC, above-market rates which will not be approved by the responsible regulator, the Federal Energy Regulatory Commission ("FERC"); (2) the CPUC opposed the proposed transfer to Nuclear of the beneficial interest in the Nuclear Decommissioning Trusts ("Trusts") associated with DCPD and the NRC cannot approve that transfer; (3) the proposed transfer would violate California law and reduce the CPUC's alleged regulatory responsibilities; and (4) the proposed license transfer would, according to the CPUC, threaten the public safety and welfare.

PG&E opposed the petition on the ground that the CPUC in its proposed issues for hearing was fundamentally challenging the Plan itself, rather than the license transfer application, and that the CPUC was raising issues not properly within the scope of the NRC's transfer review, not within the NRC's jurisdiction to resolve, irrelevant to the NRC's transfer review criteria, or otherwise unsupported by fact. PG&E also opposed the motion to dismiss or stay the proceeding, on the basis that a deferral would be inconsistent with Commission policy. The CPUC filed a renewed motion to dismiss the proceeding on February 11, 2002, reiterating arguments made in its petition for leave to intervene, which PG&E again opposed.<sup>1</sup>

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<sup>1</sup> In a Memorandum and Order dated April 12, 2002, the Commission requested from PG&E and the petitioners, among other things, information regarding developments in the bankruptcy proceeding. PG&E and the

On May 10, 2002 — more than three months after timely petitions were due to be filed and over 110 days after the NRC Notice was issued — the County filed a petition for leave to intervene and request for hearing. The County claimed its late filing was justified because of “new” developments in the PG&E bankruptcy proceeding. In its petition, the County proposed two general issues for hearing: (1) that, in light of the pending bankruptcy case, Gen and Nuclear failed to demonstrate the requisite financial qualifications; and (2) the license transfer application did not provide sufficient information to demonstrate compliance with NRC requirements for ensuring an available source of off-site power to the facility. The County also requested that the NRC proceeding be suspended pending the outcome of the bankruptcy proceeding.

PG&E opposed the County’s intervention petition on the grounds that the County had not demonstrated that its late-filed request should be considered based on the NRC’s regulatory criteria for evaluating late-filed petitions, and that the County failed to specify, with adequate basis as required by NRC rules, an issue justifying a hearing and within the scope of an NRC license transfer proceeding. PG&E also opposed the County’s stay request.

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CPUC, as well as other participants in the proceeding, provided responses on May 10, 2002.

The Commission issued, on June 25, 2002, the Memorandum and Order that is the subject of this appeal. The Commission denied the intervention petitions of both the CPUC and the County, as well as the motions to dismiss or suspend the proceeding. (ER 1148-1177.) The Commission denied the CPUC's intervention petition for two independent reasons. The Commission appropriately determined that the CPUC had failed to demonstrate standing to intervene in a radiological safety proceeding based on economic interests and that, more importantly, it had failed to articulate and support a material, admissible issue for an NRC hearing. The Commission also denied the County's petition for two reasons. The Commission first cited the County's failure to proffer a legitimate reason for late filing. The Commission also found that the County, like the CPUC, had failed to submit an admissible issue. The Commission also declined to dismiss or suspend the proceeding purely on the basis of the pending related proceedings in other forums, citing its policy of expediting adjudicatory proceedings, particularly in the license transfer area.

Thereafter, on August 23, 2002, the CPUC and the County filed the instant appeal. The Petitioners allege on appeal that the NRC erroneously rejected: (1) the CPUC's arguments in favor of its standing; (2) the CPUC's and the County's proposed contentions, (3) the County's basis for late intervention, and (4)

the County's stay request. On January 27, 2003, Respondent NRC filed its answering brief.

#### **IV. STATEMENT OF FACTS**

On April 6, 2001, PG&E filed a petition for relief under Chapter 11 of the United States Bankruptcy Code. PG&E's goal was to halt the deterioration of its financial position, restructure outstanding debt, restore the company to financial health, and continue supplying electricity and gas in the normal course of business. PG&E and its parent corporation, PG&E Corporation, subsequently filed with the bankruptcy court the comprehensive Plan of Reorganization for PG&E. The PG&E Plan calls for PG&E to divide the operations and assets of its business lines among four separate operating companies. The majority of the assets associated with PG&E's electric transmission business will be contributed to ETrans LLC ("ETrans"); the majority of PG&E's gas transmission assets will be contributed to GTrans LLC ("GTrans"); and the majority of the assets associated with PG&E's electric generation business, including DCP, will be contributed to Electric Generation LLC ("Gen") or to its subsidiaries. Ownership of DCP will be assigned to a wholly-owned subsidiary of Gen, Diablo Canyon LLC ("Nuclear").

ETrans, GTrans, and Gen will become indirect, wholly-owned subsidiaries of PG&E Corporation (which will change its name). Reorganized PG&E will retain most of the remaining assets and will continue to conduct local

electric and gas distribution operations and associated customer services. Reorganized PG&E will be separated from re-named PG&E Corporation. In addition, Gen and Reorganized PG&E will establish the long-term bilateral PSA, by which PG&E will purchase substantially all of Gen's output at a rate to be approved by FERC. The PSA specifically includes the output from DCP. As a result of this restructuring, the electric transmission, interstate gas transmission and electric generation businesses will be under the exclusive ratemaking jurisdiction of FERC. The gas and electric distribution businesses will remain under CPUC jurisdiction. As a consequence, the CPUC has vigorously opposed the PG&E Plan.

To be implemented, the PG&E Plan must be confirmed by the bankruptcy court and approved by various federal agencies. In both the bankruptcy court and before each federal regulatory agency from which PG&E has sought approval, the CPUC has advanced essentially the same arguments against the PSA and regarding alleged regulatory impacts which it advanced before the NRC. The bankruptcy court is considering the PG&E Plan, but in February 2002 also authorized the CPUC to file an alternative competing plan of reorganization ("CPUC Plan"). The CPUC Plan was filed on April 15, 2002. Hearings with

respect to the CPUC Plan have been concluded and hearings on the PG&E Plan are ongoing.<sup>2</sup>

To assure prompt implementation of PG&E's Plan upon confirmation, PG&E has applied for all of the necessary federal regulatory approvals that will be needed to implement the Plan. In the application dated November 30, 2001, PG&E requested one such approval from the NRC.<sup>3</sup> PG&E's application requests NRC consent to the direct transfer of the DCPD operating licenses currently held by PG&E to Gen and Nuclear. NRC approval is required under AEA Section 184,

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<sup>2</sup> Currently pending before this Court is an appeal arising from the district court's reversal of a ruling by the bankruptcy court concerning the confirmability of the PG&E Plan. At issue is whether state and local laws that purport to restrict implementation transactions of a plan of reorganization are preempted by Section 1123 of the Bankruptcy Code, a statute that confers authority for basic types of reorganization tools that are common in any complex reorganization. Contrary to the NRC's characterization (NRC Br. at 3 n.2), that appeal presents no issue of whether federal law may be overridden in bankruptcy, nor are any of the state and local laws at issue in that appeal "health and safety laws."

<sup>3</sup> PG&E has also sought the approval of the Securities and Exchange Commission under Section 9(a)(2) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79i(a)(2). PG&E has also made notifications to, and filed requests for approval from, FERC, including a Federal Power Act ("FPA") Section 203 application related to transfers of FERC jurisdictional transmission assets, an FPA Section 205 application for approval of the PSA, a filing under FPA Section 205 of generation interconnection agreements and other agreements, applications under FPA Sections 204 and 305(a) relating to issuance of securities for several of the businesses, filings under FPA Section 8 seeking transfer of hydro-power licenses and an application under Section 7 of the Natural Gas Act relating to the gas transmission business.

42 U.S.C. § 2234, and 10 C.F.R. § 50.80, because PG&E's Plan involves the transfer of ownership and operating authority for DCPD to new corporate entities. The proposed DCPD license transfer application is specifically based upon the reorganization contemplated by PG&E's Plan. *The existence of the alternative CPUC Plan does not alter in any way PG&E's Plan or the NRC license transfer application.* Moreover, the CPUC Plan does not appear to involve any reorganization that would affect the NRC operating licenses for DCPD or require an NRC license transfer.

In the mid-1990s, the NRC recognized that the electric utility industry was entering a time of increased competition and deregulation. States began to pass deregulation legislation that significantly altered the traditional monopoly status of electric utilities. Some states required "restructuring" by which generation, transmission and distribution functions were divided into separate entities. In addition, some states were eliminating traditional cost-of-service rate regulation. The NRC therefore began to develop regulatory standards to address the specific requirements of nuclear power plants that were not operated by "electric utilities" as that term was defined in NRC regulations. The NRC ultimately promulgated an update to its decommissioning financial assurance requirements to specify acceptable funding mechanisms that may be used by

reactor licensees who are no longer electric utilities.<sup>4</sup> In addition, in recognition that restructuring would involve license transfers for nuclear generating assets, the NRC published a "Standard Review Plan on Power Reactor Financial Qualifications and Decommissioning Funding Assurance," NUREG 1577, Rev. 1, (March 1, 1999) ("SRP"), to establish NRC Staff review criteria for license transfer applications under 10 C.F.R. § 50.80.<sup>5</sup>

In particular, the NRC evaluates a discrete set of issues that are defined by the NRC regulations and regulatory guidance documents, including the

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<sup>4</sup> See Final Rule, Financial Assurance Requirements for Decommissioning Nuclear Power Reactors, 63 Fed. Reg. 50,465 (Sept. 22, 1998).

<sup>5</sup> PG&E's license transfer application is not, by any means unprecedented. Since the establishment of its regulations and guidance, the NRC has had extensive experience in the license transfer arena, including transfers of licenses to entities, such as Gen, that were no longer selling power at traditional cost-based rates. For example, restructuring legislation in New Jersey led Public Service Electric and Gas Company to disaggregate its fossil and nuclear generation from its transmission and utility functions. The Salem and Hope Creek nuclear plants were transferred to a limited liability company created under a generation holding company. A power sales contract was created between the generation company and the utility, and remaining output would be sold on the market. The NRC reviewed the financial qualifications data submitted in the license transfer application and found, in a consent decree dated February 16, 2000, the showing to be adequate. (The consent decree is available through the NRC web site, [www.nrc.gov](http://www.nrc.gov), via the NRC Agencywide Documents Access and Management System ("ADAMS"), accession number ML003884541.) Within the last five years, the NRC has also approved license transfers involving sales of Three Mile Island, Unit 1, Indian Point, Units 2 and 3, Pilgrim Nuclear Station, Nine Mile Point Station, and Clinton Nuclear Station, among others.

SRP. Principally, these involve the technical qualifications of the prospective licensee (*i.e.*, the character and technical competence of the transferee), the financial qualifications of the transferee (*i.e.*, the financial means of the entity to pay ongoing operating costs associated with the licensed facility), and the licensee's continued financial assurance related to the anticipated, end-of-life decommissioning of the power reactors.<sup>6</sup> All of these criteria are evaluated with a view to assuring that no radiological health and safety risk is posed by the proposed transferee.

PG&E's license transfer application fully addresses all of the matters relevant to NRC review and consent to a proposed license transfer. First, the license transfer application demonstrates the continued technical qualifications of Gen to be the licensed operator of DCP. Essentially, the existing management and operating organization for DCP will be transferred to Gen and will continue to operate the plant. Neither petitioner contends that Gen will not be technically qualified to operate DCP. Second, the application addresses the financial qualifications of Gen, by including NRC-required projections of DCP operating costs and Gen's revenues over a five-year period, as well as a projected opening balance sheet demonstrating Gen's assets and liabilities. Finally, the application addresses the continued nuclear decommissioning funding assurance provided for

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<sup>6</sup> See, *e.g.*, 10 C.F.R. § 50.80; SRP, NUREG-1577, Rev. 1.

DCPP based upon a transfer of the beneficial interest in the existing DCPP Trusts associated with DCPP and the prepayment funding alternative authorized by NRC regulations.<sup>7</sup> There is nothing about the license transfers at issue that poses any enhanced radiological health and safety risk.

The NRC, in issuing its notice of an opportunity for a hearing on the proposed DCPP license transfer, limited the opportunity to matters relevant to the NRC license transfer review. (ER 0005-0006.)

#### V. STANDARD OF REVIEW

Under section 706 of the Administrative Procedure Act, a court must uphold a final agency action unless that action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001). An agency’s action is arbitrary and capricious only if the agency has:

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Id.* (citation omitted). Accordingly, the reviewing court must determine whether the decision was “based on a consideration of the relevant factors and whether

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<sup>7</sup> See 10 C.F.R. § 50.75.

there has been a clear error of judgment.” *Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1177 (9th Cir. 2000) (citation omitted).

Agencies have broad discretion to develop and interpret the procedures necessary for them to perform their statutory obligations. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Supreme Court stated that it “has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.” 435 U.S. 519, 524 (1978). This discretion extends to developing procedures for participation in agency proceedings, as an agency “should be accorded broad discretion in establishing and applying rules for . . . public participation, including . . . how many are reasonably required to give the [agency] the assistance it needs in vindicating the public interest.” *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1005-06 (D.C. Cir. 1966).

This Court also has consistently held that an agency should be granted a high degree of deference when interpreting its own rules. *U.S. West Comm., Inc. v. Wash. Util. & Transp. Comm’n*, 255 F.3d 990, 997 (9th Cir. 2001) (“It is well established that we give substantial deference to an agency’s interpretation of its own regulations because its expertise makes it well-suited to interpret statutory language”). *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S.

837 (1984) emphasizes that even where a statute is ambiguous, the reviewing court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the agency. *Id.* at 844; *accord*, *Royal Foods Co. Inc. v. RJR Holdings Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001).

## VI. SUMMARY OF ARGUMENT

The AEA does not require automatic intervention by any person wishing to participate in an NRC licensing proceeding. Rather, a hearing petitioner must (1) establish standing in the form of a concrete and particularized injury to a radiological health or safety interest traceable to the challenged action and redressable by a favorable decision, *and* (2) submit at least one admissible issue. In order to evaluate whether hearing petitioners meet these requirements, the Commission has established threshold standards with which petitioners must comply, including standards for timeliness, standing, pleading of contentions, and the scope of material issues. (*See* Argument Section A.) It is axiomatic that administrative agencies should be accorded broad deference in applying procedural regulations such as these, as the NRC did in this case.

The Commission properly rejected both petitions, specifically determining that the contentions submitted by the CPUC (*see* Argument Section B) and County (*see* Argument Section C) were either beyond the scope of an NRC

license transfer review, or failed to articulate a genuine dispute on an issue material to that review.

### *The CPUC's Inadequate Contentions*

With respect to financial qualifications (Argument Section B.1.), the CPUC essentially claimed that the proposed PSA is unfairly priced and will not be approved by FERC, and therefore Gen would be unqualified to hold the DCPD licenses. However, the CPUC did not show, or even assert, that the NRC is charged with any authority regarding the provisions of the PSA. In fact, the NRC lacks any such responsibility, and exclusive jurisdiction over the PSA pricing resides with FERC under the FPA. In any event, the CPUC's PSA issue is irrelevant because the NRC can — as it has done in other license transfers — condition its approval of the proposed license transfer on action by other decision-makers (in this case, FERC).

The Commission properly rejected the CPUC's proposed decommissioning funding contention for similar reasons. (Argument Section B.2.) The CPUC fundamentally argues that the transfer of the beneficial interest in the Nuclear Decommissioning Trusts requires CPUC approval and that the NRC cannot authorize such a transfer. However, the NRC specifically found that it had no authority to transfer the Trusts. Therefore, the extent of NRC authority is not an admissible issue requiring further inquiry. The issue of CPUC approval of the

transfer of the Trusts, moreover, is an issue that will be determined by the bankruptcy court. The Commission, therefore, acted properly in excluding the issue.

In its third proposed contention (Argument Section B.3.), the CPUC argued that the NRC approval of the license transfer would change the regulatory role of the CPUC. The Commission properly rejected this issue. The NRC license transfer approval at issue would not, in itself, change the regulatory role of the CPUC. Issues regarding economic oversight of the electric industry in California are unaffected by any NRC action, and the preemption of applicable California law must be resolved in other forums. There is also no basis for the CPUC's argument that CPUC oversight is necessary for protection of the public health and safety with respect to radiological risks. The NRC has extensive experience licensing all manner of entities that operate nuclear power plants, does not favor one economic regulatory form over another, and has promulgated regulations to address the diverse regulatory situations.

Finally, the Commission correctly held that the CPUC failed to raise any issue material to the NRC decision on the license transfer application in its proposed "public safety and welfare" contention. (Argument Section B.4.) In this contention the CPUC raised an issue regarding plant security that is clearly outside the scope of a license transfer review and proceeding; plant security is the subject

of ongoing NRC regulation of all facilities within its jurisdiction, and the proposed transfer does nothing to alter that regulatory oversight. The CPUC raised a completely unsupported issue regarding operating expenses and corporate relationships that utterly fails to take account of, much less rebut, the detailed financial evidence in the application establishing financial qualifications. And, the CPUC raised an issue related to the Diablo Canyon Independent Safety Committee completely lacking in any NRC regulatory basis. The CPUC, therefore, failed to define and provide support for any material issue for a hearing.

### ***The County's Inadequate Contentions***

The Commission also correctly held that the County's first contention, concerning financial qualifications, failed to identify and support an admissible issue. (Argument Section C.1.) The County's position regarding financial qualifications rests on conclusory and unsupported allegations that take no heed of the application's extensive and detailed financial information. Accordingly, the Commission correctly held that the County did not raise a litigable issue.

Similarly, the Commission correctly found that the County's second proposed contention regarding off-site power failed to identify and support a genuine issue. (Argument Section C.2.) The County made only a conclusory statement that the license application did not contain sufficient detail on the financial strength of ETrans and its ability to supply off-site power to DCPD,

completely disregarding the extensive information on ETrans included in the NRC license transfer application. The Commission did not abuse its discretion in rejecting this issue.

### ***The CPUC's Lack Of Standing***

Apart from its determinations regarding petitioners' failure to identify an admissible issue, the Commission properly rejected the CPUC's argument that it should have standing based upon its purely economic interest and responsibilities. The Commission correctly found that the CPUC failed to articulate an injury traceable to the proposed action and within the NRC's zone of interests concerning protection of the public health and safety and the environment from radiological injury. (Argument Section D.) Substantial deference is owed the NRC in its interpretation of the "interest" requirement for a hearing under the AEA, and in its holding that economic harm is not within the AEA's zone of interests.

### ***The County's Unjustified Late Filing***

With respect to the County's late-filed petition, the Commission, again, in addition to finding no admissible issue, properly held that the County failed to demonstrate good cause for late filing. (Argument Section E.) The County filed almost 3 months late and based its justification for late filing on "new" developments in the bankruptcy proceeding. However, these developments

involved no more than the CPUC's decision to submit an alternative plan of reorganization. The CPUC Plan did not (and does not) affect the substance of PG&E's license transfer application and is irrelevant to the NRC's determination of whether that application meets the standards for approval under applicable law. Moreover, these developments were not "new" at the time of the County's petition. The County, as a participant in PG&E's bankruptcy proceeding, knew of the CPUC's intent and desire to file an alternative plan – with no DCPD license transfer – during the NRC's prescribed notice period. (Indeed, the CPUC noted this in its timely petition.) Accordingly, the County did not establish any cause, let alone good cause, for its failure to timely file.

### *Proper Refusal To Stay Proceedings*

Finally, the NRC properly denied the County's request to stay the proceeding pending the outcome of the bankruptcy court's consideration of the PG&E Plan. (Argument Section F.) It is well established that administrative agencies are entitled to considerable deference in managing their cases. Here, the Commission reasonably relied on its longstanding policy that the pendency of parallel proceedings in other forums — such as FERC or the bankruptcy court — is not grounds to stay an NRC license transfer proceeding. Significantly, neither petitioner attempted to articulate any legally cognizable harm to it flowing from such parallel consideration.

## **VII. ARGUMENT**

### **A. THE NRC IN THIS CASE APPLIED ESTABLISHED THRESHOLD STANDARDS FOR HEARING REQUESTS**

The NRC has established reasonable procedural requirements governing the conduct of its licensing proceedings. The Commission acted well within its discretion in applying these standards in this case. Notwithstanding the arguments of the petitioners, the NRC did not act contrary to any law or precedent.

#### **1. *HEARING PETITIONS MUST MEET STANDING, PLEADING AND TIMELINESS REQUIREMENTS***

##### **A. *STANDING***

The NRC's hearing requirement derives from AEA Section 189.a(1)(A), 42 U.S.C. § 2239(a)(1)(A), which requires the Commission to offer a hearing on certain licensing actions to "interested" persons. Consistent with this statute, the NRC offers a hearing on power plant operating license transfers. However, Section 189.a "does not confer the automatic right of intervention on anyone." *BPI v. Atomic Energy Comm'n*, 502 F.2d 424, 428 (D.C. Cir. 1974). To intervene as of right in an NRC license transfer proceeding, a petitioner must first demonstrate that it has a sufficient "interest," or standing. To do so, under NRC regulations, a petitioner must:

- (1) identify an interest in the proceeding by
  - (a) alleging a concrete and particularized injury (actual or threatened) that

- (b) is fairly traceable to, and may be affected by, the challenged action (*e.g.*, the grant of an application),
- (c) is likely to be redressed by a favorable decision, and
- (d) lies arguably within the “zone of interests” protected by the governing statute(s).

(2) specify the facts pertaining to that interest.

10 C.F.R. §§ 2.1306, 2.1308. *Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 N.R.C. 266, 293 (2000) (“Indian Point 3”); *see also GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 N.R.C. 193, 202 (2000) (“Oyster Creek”).

The NRC is not an Article III court and is not bound to follow the law of standing derived from the “case or controversy” requirement. *Envirocare of Utah Inc. v. Nuclear Regulatory Comm’n*, 194 F.3d 72, 75 (D.C. Cir. 1999). The court in *Envirocare* therefore found that whether the Commission had properly excluded a petitioner turned not on judicial decisions dealing with standing to sue, “but on familiar principles of administrative law regarding an agency’s interpretation of the statutes that it alone administers.” *Id.* at 75-76. The court cited *Chevron* as the appropriate standard of review. *Chevron* emphasizes that where a statute is ambiguous — as is the AEA provision related to persons “whose interest may be affected by the proceeding” — the reviewing court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the agency. 467 U.S. at 844. If Congress has been silent or

ambiguous about the meaning of the provision at issue, the court will defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id.* at 841. See *City of Los Angeles v. United States Dep't of Commerce*, 307 F.3d 860, 873 (9th Cir. 2002); *Irvine Medical Center v. Thompson*, 275 F.3d 823, 828 (9th Cir. 2002).

#### B. PLEADING

In addition to requiring a petitioner to establish a sufficient "interest," the NRC's rules also require a party to set forth at least one admissible hearing issue, or "contention," in order to be admitted as a party. For proceedings on license transfer applications, under 10 C.F.R. § 2.1306(b)(2), a petitioner must:

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

When addressing the admissibility of issues in a license transfer proceeding, the Commission, under the agency's regulations, will consider whether the issues sought to be litigated are:

- (i) within the scope of the proceeding;
- (ii) relevant to the findings the Commission must make to act on the application for license transfer;
- (iii) appropriate for litigation in the proceeding; and
- (iv) adequately supported by the statements, allegations, and documentation required by 10 C.F.R. § 2.1306(b)(2)(iii) and (iv).

10 C.F.R. § 2.1308(a)(4).<sup>8</sup>

The scope of an NRC license transfer proceeding is properly limited to issues that the NRC actually considers when reviewing an application for a transfer of an operating license. The NRC has stated:

Although other requirements of the Commission's licensing provisions may also be addressed to the extent relevant to the

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<sup>8</sup> See *Vermont Yankee*, 435 U.S. at 553-54 ("Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more than bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'"); cf. *Conn. Bankers Ass'n v. Bd. of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980) ("a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate.")

particular transfer action, typical NRC staff review of such applications consists largely of assuring that the ultimately licensed entity has the capability to meet financial qualification and decommissioning funding aspects of NRC regulations.

See Final Rule, Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998). It follows that matters outside the scope of NRC's review, or outside the NRC's jurisdiction, cannot be the bases for valid hearing issues.

### C. TIMELINESS

The Commission has also established reasonable procedural requirements to assure an efficient hearing process. Pursuant to 10 C.F.R. § 2.1308(b), untimely intervention petitions or hearing requests "may be denied unless good cause for failure to file on time is established." In reviewing such untimely petitions, the Commission will also consider:

- (1) The availability of other means by which the requestor's or petitioner's interest will be protected or represented by other participants in a hearing; and
- (2) The extent to which the issues will be broadened or final action on the application delayed.

10 C.F.R. § 2.1308(b)(1)-(2). At least one court of appeals has recognized, in support of the NRC's late-filing standards, that the NRC has "wide discretion to structure its licensing hearings in the interests of speed and efficiency."

*Massachusetts v. United States Nuclear Regulatory Comm'n*, 924 F.2d 311, 333 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991) (citation omitted).<sup>9</sup>

2. *The NRC Provided An Opportunity For Hearing As Required by UCS I*

Petitioners throughout their brief principally rely on *Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n*, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied sub nom Ark. Power & Light Co. v. Union of Concerned Scientists*, 469 U.S. 1132 (1985) ("UCS I"), for the proposition that a hearing "must be granted on any issue that the NRC has made material to its decision by conditioning the issuance of a license on the resolution of that issue." (CPUC/County Br. at 22.) However, Petitioners misunderstand the holding of that case, and their reliance on *UCS I* is misplaced. Petitioners were afforded the

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<sup>9</sup> The procedures utilized by the NRC with respect to its hearing are not unique. They are consistent with the requirements of the Administrative Procedure Act and the practices of other federal agencies. *See, e.g.*, 10 C.F.R. § 590.303(c) (requiring motions to intervene in Department of Energy proceedings for authorization to import or export natural gas to "state, to the extent known, the position taken by the movant and the factual and legal basis for such positions in order to advise the parties and the Assistant Secretary as to the specific issues of policy, fact, or law to be raised or controverted"); 17 C.F.R. § 10.33(a) (requiring petitions for leave to intervene before the Commodity Futures Trading Commission under the Commodity Exchange Act to "set forth with specificity the nature of the petitioner's interest in the proceeding and the manner in which his interests may be affected substantially").

opportunity to demonstrate standing and timely propose material issues regarding the license transfer application. They simply failed to do so.

In *UCS I*, the court overturned a generic NRC rule providing that an Atomic Safety and Licensing Board need not consider, in a licensing hearing related to a full power license to operate a nuclear power plant, the results of mandatory pre-licensing emergency preparedness exercises. The court made this finding because the rule eliminated from *all* licensing proceedings consideration of a factor the NRC itself had made material to its full power licensing decision. *UCS I* does not repeal the "*interested*" *person* language of AEA Section 189.a(1)(A). Moreover, *UCS I* does not hold that *any* proposed issue arguably related to a material topic must be admitted for hearing. Finally, *UCS I* does not in any way compel the NRC to accept *untimely* petitions. Accordingly, the NRC's application of threshold procedural standards in the present case was not in any way inconsistent with *UCS I*.

It is well established that, "[a]bsent constitutional constraints or extremely compelling circumstances" (neither of which is present here), administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee*, 435 U.S. at 543 (citation omitted). *E.g.*, *Adkins v. Trans-Alaska Pipeline Liability Fund*, 101 F.3d 86, 89 (9th Cir. 1996);

*Wilderness Soc'y v. Tyrrel*, 918 F.2d 813, 816 (9th Cir. 1990). Moreover, the court should defer to the operating procedures employed by an agency such as the NRC when its organic statute, here the AEA, "requires only that a 'hearing' be held." *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 920 F.2d 50, 54 (D.C. Cir. 1990) ("UCS II"), citing *American Trucking Ass'ns v. United States*, 627 F.2d 1313, 1319 n.20 (D.C. Cir. 1980) (noting that such "operating procedures" fall "uniquely within the expertise of the agency"). Indeed, increased deference is due to the NRC with respect to the application of the agency's procedural rules because of the "unique degree 'to which broad responsibility is reposed in the [Commission], free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.'" *UCS II*, 920 F.2d at 54, quoting *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778, 783 (D.C. Cir. 1968). In addition, the NRC "should be accorded broad discretion in establishing and applying rules for . . . public participation." *BPI*, 502 F.2d at 426-27 (affirming denial of petition to intervene in licensing proceeding, and concluding that "it is not unreasonable for the Commission to require that the prospective intervenor first specify the basis for his request for a hearing").

As is discussed further below, the NRC was neither arbitrary nor capricious in applying its existing, well-established procedural requirements to the

petitions to intervene in this case, and did not, in doing so, improperly exclude either petitioners or issues under *UCS I*.

**B. THE COMMISSION CORRECTLY REJECTED THE CPUC'S PROPOSED ISSUES**

In their Brief, Petitioners challenge the NRC's holding that the CPUC did not submit any valid contentions for hearing. As the NRC explained in its Order, the CPUC proffered no admissible contentions. The NRC determined that the contentions raised were "either immaterial to license transfer or too vague to define a genuine dispute with the applicant." (ER 1158.)

Petitioners in an NRC proceeding have an "ironclad obligation' to examine the application and publicly available documents to uncover any information that could serve as a foundation for a contention." *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 N.R.C. 3, 24-25 (2001). It is not enough to merely make vague allegations that disregard information provided in the license application or that exceed the scope of the proceeding. A review of the issues proposed by the CPUC for a hearing at the NRC compels the conclusion that the CPUC failed to set forth, with the requisite basis, a material issue of law or fact within the scope of the license transfer review or within the scope of the NRC's jurisdiction.

1. ***The CPUC's Financial Qualifications Contention Constituted a Challenge to the PSA, Not the NRC License Transfer Application***

In its proposed financial qualifications contention, the CPUC claimed that, under the proposed PSA, Gen will be unable to satisfy the Commission's financial assurance requirements at 10 C.F.R. § 50.33(f). The CPUC based this assertion on perceived flaws in the PSA itself, which led it to the belief that the PSA would not be approved by the responsible economic regulator. The CPUC argues on appeal that the Commission's rejection of this contention as outside NRC jurisdiction and not relevant to the license transfer proceeding was contrary to law because it raised a "material issue" requiring a hearing under *UCS I*. However, the NRC's conclusion was reasonable and prudent, and *UCS I* does not compel a hearing on an issue that falls beyond the scope of the NRC's jurisdiction.

In its license transfer application, PG&E supplied precisely the financial information that is required for a non-utility applicant (*i.e.*, an applicant like Gen which does not rely on cost-of-service based rates), pursuant to 10 C.F.R. § 50.33(f). *See also* SRP, NUREG-1577, Rev. 1. In accordance with 10 C.F.R. § 50.33(f)(2) and the NRC's regulatory guidance, the transfer application includes an opening balance sheet and financial projections for Gen for the first five years of operation following the license transfer. The financial projections show Gen's annual operating costs and operating revenues derived primarily from electricity sales under the PSA. The projections and other information included in the

application demonstrate Gen's viability and meet all applicable NRC requirements. The application includes key assumptions, such as the assumed capacity factor for DCPD and the contract price for power under the PSA. The showing of Gen's financial qualifications is premised on the terms of the PSA and specifically acknowledges in the application that the PSA is subject to approval by the FERC.

The Commission found that the CPUC's proposed financial qualifications contention fundamentally challenged the economic reasonableness and fairness of the PSA — not the NRC-required showing of financial qualifications. Specifically, the CPUC argued that FERC cannot approve the rates in the proposed PSA, because those rates are not "just and reasonable." However, the Commission correctly found that FERC is the federal agency entrusted with the authority to determine whether wholesale rates are "just and reasonable."<sup>10</sup> (ER 1159.) The CPUC essentially outlined its position at FERC on: a comparison of the proposed PSA rates to other retail rates; the validity of PG&E's benchmark rate analysis; and PG&E's market power analysis. However, whether or not FERC should approve the PSA based on evidence of this type is a matter for FERC, not the NRC. These are arguments well outside the scope of the NRC license transfer

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<sup>10</sup> The Supreme Court has stated that Congress' enactment of the FPA vested the Federal Power Commission (FERC's predecessor) with exclusive authority to regulate interstate wholesale utility rates. *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 216 (1964). See also *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951).

review and beyond the scope of the NRC's jurisdiction. The merits of the CPUC challenge to the PSA can be and currently are being addressed at FERC, as acknowledged by the CPUC in its petition below. (ER 0033.)<sup>11</sup>

The CPUC's argument essentially distills to speculation that the PSA will not be approved by FERC and therefore Gen would not be a viable entity, unqualified to hold the DCPD licenses. However, the NRC can condition its approval on PG&E's receipt of the other necessary regulatory approvals associated with the reorganization Plan, including FERC acceptance of the proposed PSA that is the linchpin of the financial qualifications showing submitted to the NRC. NRC license transfer approvals frequently include a condition that the transfer will not

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<sup>11</sup> Gen filed an application under FPA Section 205, 16 U.S.C. § 824d(1994), seeking FERC approval of the PSA and demonstrating the justness and reasonableness of the PSA's rates as required under Section 205. In June 2002, FERC accepted the PSA for filing and set for hearing, on an expedited basis, the benchmark analysis of market transactions Gen offered to justify the PSA's rates and terms and conditions. *Elec. Generation LLC*, 99 F.E.R.C. ¶ 61,307 (2002), *reh'g denied*, 100 F.E.R.C. ¶ 61,149 (2002). After an expedited hearing, in October 2002, a FERC administrative law judge issued an initial decision finding that Gen has demonstrated that those rates are just and reasonable. *Elec. Generation LLC*, 101 F.E.R.C. ¶ 63,005 (2002). Accelerated briefing of the case to the full FERC was completed in November 2002. Thus, FERC – not the NRC – will, pursuant to its exclusive authority, assess the propriety of the PSA's rates.

be implemented unless and until the licensee receives other required approvals.<sup>12</sup>

The NRC is not required to provide a duplicative forum on the other approvals.

In its argument, the CPUC cites *UCS I*. However, because the substantive issue actually raised by the CPUC — the reasonableness of the PSA rate — is outside the scope of the NRC's review, *UCS I* does not compel a hearing on the issue. As discussed above, *UCS I* did not hold that any proposed issue, regardless of its relevance, may be litigated by anyone. It is simply not enough to argue that the PSA is part of PG&E's basis for financial qualifications, and that this somehow brings the PSA — and the associated FERC issues — within the NRC's jurisdiction. The CPUC did not raise an issue material to the NRC's license transfer decision. Courts have consistently recognized that agencies are not required to hold an evidentiary hearing on matters that are not material to the decision-making process. In *United States v. Storer Broadcasting*, the Supreme Court stated that “[w]e do not think that Congress intended the [FCC] to waste time on applications that do not state a valid basis for a hearing.” 351 U.S. 192, 205 (1956). Even in *UCS I*, the court stated that “certainly the Commission can limit that hearing to issues . . . that it considers material. . .” 735 F.2d at 1448. In

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<sup>12</sup> See, e.g., NRC's Order approving the Salem license transfer (discussed above), Section III, Condition 8, at 6.

short, the NRC's decision to exclude the issue was neither arbitrary, capricious, an abuse of discretion, nor otherwise inconsistent with law.

**2. *The CPUC's Decommissioning Funding Contention Was Properly Rejected as Failing to Present a Litigable Issue***

The CPUC asserted below that the license transfer should not be approved by the NRC because: (1) the NRC does not have direct jurisdiction over the Trusts, and accordingly, cannot authorize the assignment; (2) CPUC approval is required to transfer the beneficial interests in the Trusts; (3) the assignment of the beneficial interest would not be in the interest of the ratepayers because the proposed new holder of the beneficial interest, Nuclear, would be "less reliable and trustworthy" (ER 0030.); and (4) the proposed assignment will create difficulties because of impracticalities in segregating the trust assets as between DCP and Humboldt Bay.

NRC regulations at 10 C.F.R. § 50.75 establish requirements for addressing how an NRC licensee must provide reasonable assurance that funds will be available for decommissioning a power plant at the completion of the license term. Decommissioning funding assurance for DCP is currently provided by the Trusts as authorized by 10 C.F.R. § 50.75(e)(1)(iii). As part of the proposed Plan, PG&E would transfer to Nuclear the beneficial interest in the Trusts associated with DCP. The transfer application included detailed information on the current level of decommissioning funding for each of the DCP units, and demonstrates

that — assuming the transfer of the interest to Nuclear — the Trusts would be adequately funded to meet the NRC-mandated funding levels. (See PG&E ER 000001- 000007.) Specifically, the amounts that would be transferred would satisfy NRC requirements for financial assurance for decommissioning in the form of a prepayment in accordance with 10 C.F.R. § 50.75(e)(1)(i).<sup>13</sup> Accordingly, PG&E expects that the NRC license transfer approval will be conditioned on the transfer of the beneficial interest in the Trusts, inherently conditioning the transfer on receipt of the necessary authority from the bankruptcy court.

The Commission correctly determined that the CPUC concerns did not raise an issue for hearing within the scope of the NRC review. As stated by the Commission, the NRC Staff review is based on the assumption that the transfer of the beneficial interest takes place. (ER 1162.) The issue, therefore, properly before the NRC, based on the application made, is whether Nuclear would be financially qualified *assuming* the decommissioning fund interest is assigned. The

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<sup>13</sup> The NRC regulations set forth a minimum amount, determined by formula, required to demonstrate reasonable assurance of funds for decommissioning by reactor type and power level. See 10 C.F.R. § 50.75(c). The prepayment option for satisfying this regulatory minimum amount calls for the licensee to deposit into the trust an amount sufficient to meet the NRC-mandated formula amount for decommissioning costs. In determining the prepayment amount, the licensee may take credit for projected earnings on the prepaid funds using up to a 2 percent annual real rate of return for the time through the projected decommissioning period. This is the showing made in the transfer application. See 10 C.F.R. § 50.75(e)(1)(i).

CPUC did not in any respect challenge the adequacy of the showing made by PG&E with respect to the decommissioning funding level *assuming* the transfer of the interest. Accordingly, the CPUC failed to raise an issue within the scope of an NRC license transfer review. The issue of the authorization to transfer the Trusts, including the issue of whether federal bankruptcy law preempts the CPUC's opposition to the transfer, must be resolved in the context of the bankruptcy proceeding and any related appeals, including to this Court.

Decommissioning funding assurance is a matter within the scope of the transfer proceeding, but the CPUC raised no material issue as to that matter. The specifics of its proposed issue — focusing on the authority to transfer the Trusts — are not material to the NRC license transfer decision. Therefore, the NRC decision to exclude the CPUC's proposed contention from consideration should be affirmed because it was neither arbitrary nor capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>14</sup>

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<sup>14</sup> PG&E's Nuclear Decommissioning Trusts include money associated with the shutdown Humboldt Bay Power Plant, Unit 3. PG&E will retain its beneficial interest in the Trusts for the purpose of decommissioning Humboldt Bay. The assets associated with Humboldt Bay will be segregated from the DCPD components as part of the reorganization process. In the NRC application, PG&E provided precise quantitative information on the fund levels for DCPD, "segregated" from any funds held in trust for decommissioning of the Humboldt Bay facility. (PG&E ER 000001-000007.) The CPUC's argument regarding segregation of funds related to DCPD from those associated with Humboldt Bay was simply unfounded and therefore there was no basis for a hearing.

**3. *The CPUC Contention Related to Its "Exclusive Regulatory Responsibilities" Was Not Relevant to the Required NRC Findings***

The CPUC next argues that the Commission "wrongfully overlooked" the CPUC's assertion that the transfer of the DCPD licenses from PG&E to Gen and Nuclear would violate California law and reduce the CPUC's regulatory responsibilities over nuclear power, to the detriment of the people of California. On appeal, the CPUC argues that the Commission ignored the fact that the CPUC is "clearly the expert agency to ensure financial qualifications on a day-to-day basis" and that the link between financial qualifications and public health and safety necessitates the CPUC's involvement with the plant. (CPUC/County Br. at 31-32.) This is simply another variation on the CPUC's main complaint; namely, that the NRC approval of the license transfer would in some unexplained way change the regulatory role of the CPUC. However, these arguments confuse a potential material issue (financial qualifications) with an admissible contention. The Commission rejected this proposed contention on the basis that issues regarding economic regulatory oversight of the electric industry in California and the preemption of applicable California law must be resolved elsewhere. Specifically, the Commission correctly held that "[t]hese are not matters for the NRC." (ER 1164.)

First, the NRC license transfer approval at issue before the NRC — again, only one of several regulatory approvals that will be required to fully

implement PG&E's Plan — would not, in itself, change the regulatory role of the CPUC. The NRC license transfers are merely one step to implement the Plan. Any change in the role of the CPUC as a result of the approval of the Plan *by the bankruptcy court* is an issue to be addressed to the bankruptcy court. Similarly, any issue related to a change in the CPUC role as a result of FERC's approval of the transfer of FERC-jurisdictional electric generating or transmission assets must be raised at FERC. Indeed, the CPUC in both of these forums is making many of the same arguments as it made to the NRC. (See ER 0072-0388.) These are clearly matters beyond the scope of the NRC's license transfer review and the NRC's radiological health and safety purview.

Second, there is no basis for the argument that CPUC oversight is necessary for protection of the public health and safety with respect to radiological risks. As discussed above, the radiological safety oversight role is reserved to the NRC. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) ("But as we view the issue, Congress, in passing the [AEA] . . . intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.") (emphasis added). The NRC, not the CPUC, is

responsible for assuring the continuing financial qualifications of NRC licensees as those qualifications may relate to operational safety and decommissioning funding. *See generally* SRP, NUREG-1577, Rev. 1. The NRC will continue its oversight regardless of the identity of the DCPD licensee and regardless of whether the CPUC has any continued economic oversight role over the plant.

As a point of fact, the NRC has extensive experience with entities licensed to operate nuclear power plants that are state-regulated and those that are FERC-regulated with respect to economic matters such as rates. The NRC similarly has extensive experience with entities licensed to operate nuclear power plants that are subject to cost-of-service rate regulation and those that operate nuclear plants as unregulated merchant plants. *See generally* NRC, "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry," 62 Fed. Reg. 44,071 (Aug. 19, 1997). The NRC does not determine the type of economic regulation that will apply in a given situation, nor does it require one form over another. Rather, the NRC, in light of the restructuring of the electric utility industry prevalent beginning in the mid-1990s, has implemented requirements and review criteria for financial qualifications, decommissioning financial assurance, and license transfers, that include particular requirements applicable to those entities that are "electric utilities" and other requirements applicable to those that are not subject to cost-of-service rate regulation. *Id.*

PG&E in its license transfer application addressed the non-electric utility requirements.

In the end, regardless of the type of economic regulation that ultimately applies to DCP, PG&E will be required to address NRC regulations as appropriate to the reorganization as approved. The CPUC did not raise any issue with respect to the showings made in the application related to the transfer to Gen, a non-utility. The CPUC's argument as to the necessity of its own role for public safety is unfounded and its policy argument on the importance of its role in the economic regulatory arena is simply not a question for the NRC to decide. The NRC does not have the authority to make structural decisions regarding regulation of the electricity industry in California. The proposed contention therefore completely failed to raise an issue material to the NRC's license transfer review.

**4. *The NRC Properly Determined that the Alleged Health and Safety Issues Raised by the CPUC Lacked Basis or Fell Beyond the Scope of an NRC License Transfer Proceeding***

The CPUC argued in three sub-issues making up its fourth proposed contention that the public safety and welfare would be threatened by the proposed license transfer. Specifically, the CPUC raised concerns related to (1) the threat of terrorist attacks; (2) the transition from a cost-of-service to a market-driven rate base; and (3) the possible dissolution of the Diablo Canyon Independent Safety Committee ("DCISC"). The Commission properly rejected each of these

contentions, which were simply a thinly veiled attempt to cast the CPUC's core opposition to the PG&E Plan — and, specifically, the transfer of economic regulatory jurisdiction over DCPD from the CPUC to FERC — in public safety terms. The contentions failed to raise any issue material to the NRC's decision on the license transfer application.

With respect to the first sub-issue, the disposition of which is not specifically challenged on appeal, the CPUC argued that the NRC should not approve the proposed license transfer because safeguards to the public health and safety would be lost if the CPUC no longer had concurrent jurisdiction over DCPD in light of recent terrorist threats. However, the CPUC presented no basis for its argument that the proposed license transfer would in any way increase the risks associated with potential terrorist attacks on the facility or reduce NRC's existing plant security requirements. On the contrary, security is an ongoing operational issue which will remain whether or not the license is transferred, and is therefore beyond the scope of an NRC license transfer review. *Oyster Creek*, CLI-00-06, 51 N.R.C. at 212 (“[a] license transfer proceeding is not a forum for a full review of all aspects of current plant operation”). Consistent with its precedent, the Commission in this case properly held that plant security is “decidedly outside the scope of a license transfer proceeding.” (ER 1165.) *See* 10 C.F.R. § 2.1306(b).

Second, the CPUC argued broadly that public safety will be negatively impacted by the transition from a cost-of-service to a market-driven rate base. In particular, the CPUC identified two issues: (1) the plant will not be run safely at market-based rates because DCPD management will attempt to reduce operating expenses; and (2) the relationship between Nuclear and its parent, PG&E Corporation, will result in a flow of profits from Nuclear to PG&E Corporation, while isolating the parent from responsibility for plant operations and safety. The Commission properly rejected these unfounded contentions.

As to the operating expenses argument, the Commission correctly rejected the issue as being without basis.<sup>15</sup> As discussed above, the NRC's requirements specifically recognize the potential for license applicants and transferees that would not be rate-regulated. The five-year projections in PG&E's application are directly responsive to NRC requirements for non-electric utilities. The CPUC made no showing, and proffered no factual basis, challenging the adequacy of the projections to meet requirements. (ER 1166.) The CPUC's speculation, which it reiterates on appeal, about future use of profits, future staffing

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<sup>15</sup> At the time the CPUC petitioned to intervene in this proceeding, DCPD was not subject to cost-of-service ratemaking. Since a ratemaking settlement approved by the CPUC in 1988, DCPD had been operating under a performance-based approach, with revenues based on a rate per kilowatt/hour. Subsequent to the intervention petition, PG&E's retained generation was returned to the rate base, at least on an interim basis.

decisions, and future use of overtime, are simply that — speculation. These matters cannot be meaningfully addressed now, nor need they be addressed under NRC regulations as part of the showing required for a license transfer. The NRC makes no presumption that a non-rate-regulated entity cannot be financially qualified and will not operate a plant responsibly. Assuming the license is transferred based on the required showing, however, DCPD will remain subject to ongoing NRC oversight. The issues the CPUC has raised are irrelevant to a license transfer application and, instead, are a matter of ongoing NRC oversight.<sup>16</sup>

As to the corporate relationship issue and the putative flow of profits to the holding company, the Commission correctly held that “[v]ague allegations about the ‘character’ of the transferee and its business relationships are insufficient to support admissibility of this issue.” (ER 1167.) It is well established that the NRC may impose standards for the admission of contentions in a proceeding. *Massachusetts*, 924 F.2d at 333-34 (“we fully recognize that the NRC has ‘wide

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<sup>16</sup> As an example, the NRC has staffing and other requirements that it has determined are necessary for safety. These must be addressed by *any* licensee in ongoing operations. Compliance is subject to routine NRC inspections as well as NRC reporting requirements. *See, e.g.*, 10 C.F.R. § 50.54(m). Furthermore, to the extent cost pressure ever were to manifest itself as a contributor to plant performance or compliance problems, the NRC would remain capable of compelling corrective action. *See, e.g.*, 10 C.F.R. §§ 50.110, 2.201, 2.202, 2.205. Finally, going forward, members of the public are free to seek enforcement action under the petition procedures of 10 C.F.R. § 2.206 based on any evidence that might emerge.

discretion to structure its licensing hearings ‘ . . . [t]his discretion may include, for example, enhanced pleading requirements in support of contentions”); *cf. BPI*, 502 F.2d at 427 (“[u]nder its procedural regulations, it is not unreasonable for the Commission to require that the prospective intervenor first specify the basis for his request for a hearing”). The Commission itself has previously stated that it is not enough for a petitioner to assert generalized challenges to an application without specifically engaging and disputing the information included in the application. *Dominion Nuclear Conn. Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 N.R.C. 349, 358-59 (2001). The CPUC in this contention again did not specifically challenge the financial qualifications information included in PG&E’s license transfer application that is directly responsive to the NRC’s financial qualifications requirements. Therefore, while the CPUC may have invoked matters generally relating to public health and safety, the Commission acted well within its authority and discretion when it concluded that baseless and speculative allegations (allegations that could be made about *any* non-utility applicant) are not enough to merit a hearing.

Finally, the CPUC argued that the proposed license transfer will result in the dissolution of the DCISC. The Commission correctly held this matter to be beyond the scope of NRC’s authority and the scope of the license transfer review. (ER 1167.) The DCISC is an independent committee established pursuant to a rate

review settlement between the CPUC and PG&E. The DCISC reviews DCPD operations with respect to safety, and makes recommendations to PG&E to improve safety. The DCISC is not required by any NRC regulation or license condition. The NRC therefore does not have any role in the DCISC's establishment, operation or dissolution. There was no regulatory basis for the contention and, accordingly, no basis for litigation or relief from the NRC in a license transfer proceeding. Moreover, at no point in its NRC license transfer application does PG&E propose to eliminate the DCISC. Any argument regarding the DCISC's dissolution is, at this time, entirely speculative and beyond the scope of the application. This issue was properly rejected as a matter for hearing.

As discussed above, courts have consistently validated agency procedures that require petitioners to identify and support their issues. The NRC's application of its standards for admission of contentions is not inconsistent with *UCS I*. The Commission's decision to reject the proposed contentions was valid and should be upheld.

**C. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN DISMISSING THE COUNTY'S PROPOSED ISSUES**

The County's petition was also properly rejected by the Commission because the County failed to propose an admissible issue for hearing. The County, like the CPUC, decries the Commission's rejection of its proposed contentions, arguing that the Commission's "conclusory" denial of its contentions does not

“provide the reasoned basis that an agency is required to give to support its decision[.]” (CPUC/County Br. at 45). However, as stated above, it is well established that the NRC may require a basis for each contention sufficient to demonstrate the existence of a genuine dispute on a material issue. *See BPI*, 502 F.2d at 426-27; *Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Comm’n*, 869 F.2d 719, 749 (3d Cir. 1989)(“It is beyond dispute that issues not raised with sufficient particularity may be excluded . . . .”). The Commission properly rejected the County’s contentions for lack of a basis sufficient to demonstrate a genuine issue material to an NRC license transfer review.

**1. *The County’s Financial Qualifications Contention Was Properly Rejected for Lack of Any Litigable Issue***

The County raised four sub-issues in its first contention, which argued that Gen and Nuclear have failed to demonstrate the requisite financial qualifications to own and operate DCCP. Each failed to meet the Commission’s threshold requirement for admissibility.

First, the County vaguely contended that Gen and Nuclear had no basis for providing a cost and revenue projection for the five-year period following the license transfer because the bankruptcy court has not approved a plan of reorganization; consequently, it argued, there are no rate-setting directions from either FERC or the CPUC to make projections possible. However, in advancing this proposed contention the County completely ignored the cost and revenue

projections for five years following implementation of the PG&E Plan included in PG&E's application, as discussed above. The projections are based on assumptions inherent to the PG&E Plan and are consistent with the financial projections provided to the bankruptcy court in support of confirmation of that Plan. Accordingly, the County's assertion that there can be no projections prior to Plan confirmation is simply wrong. The Commission's rejection of this sub-issue for lack of basis and failure to raise a material issue was obviously correct.

Second, the County asserted that the financial projections in the license transfer application are based on an allegedly above-market-price PSA,<sup>17</sup> and that it is not clear that such rates would be approved by FERC or the CPUC. Here again, like the similar CPUC contention, this assertion failed to raise a genuine and material dispute for the NRC proceeding. The financial projections provided to the NRC are, as stated above, based on the PG&E Plan. That Plan includes the PSA between Gen and Reorganized PG&E. It is true that the Plan

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<sup>17</sup> The Respondent, citing, *inter alia*, petitioners' brief, states that "[i]f the proposed license transfer is authorized, Gen will sell power generated at Diablo Canyon to the reorganized PG&E under a 12 year contract [*i.e.*, the PSA] at rates well above market price." (NRC Br. at 54, citing ER 0065-67 and JB 32.) The NRC accurately states the petitioners' position. However, Gen will sell power under the PSA only if FERC finds those rates to be just and reasonable based on the benchmark data of comparable market transactions Gen submitted. Therefore, as a matter of law, PSA sales will not be authorized unless FERC finds (as the administrative law judge already has) that the PSA rates are not above market prices.

must be confirmed by the bankruptcy court, and that the PSA must be approved by FERC. The NRC transfer application says as much. Again, the County did not challenge the substance of the projections submitted to the NRC; rather, the County questioned the viability of the Plan and whether FERC should approve the PSA. These questions cannot be decided by the NRC.

In its second and third sub-issues, the County made generalized statements regarding the ability of Gen and Nuclear to withstand difficult financial times, including a six-month DCPD outage. However, the County completely ignored the discussion in the application germane to this precise issue. The application specifically addresses the NRC guidance related to financial qualifications, including an NRC guideline related to demonstrating liquid assets sufficient to cover a six-month nuclear plant shutdown.<sup>18</sup> The application includes financial projections and balance sheets, demonstrating Gen's robustness in terms of assets and revenues, owing to its diversified generation portfolio. The County provided no basis to challenge these facts and conclusions, and therefore no basis to support an admissible contention for hearing. Accordingly, these sub-issues were quite correctly rejected by the Commission.

Finally, the County contended that, in the absence of a bankruptcy court ruling on the competing reorganization plans, Gen and Nuclear cannot

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<sup>18</sup> See SRP, NUREG-1577, Rev. 1, at §§ III.1.b; III.e.

submit sufficient information as to their proposed relationships with their owner to demonstrate that their corporate structure would provide adequate protection of public health and safety. This proposed contention was simply frivolous. The contention did not even address, let alone challenge, the information in the application related to the proposed licensees and the relevant corporate relationships. Neither Plan confirmation nor other endorsement by the bankruptcy court is required to provide this information — which is, of course, based on the Plan itself that has been submitted to the bankruptcy court (and that was provided as an attachment to the NRC license transfer application).

As stated above, NRC petitioners have an “ironclad obligation” to examine the publicly available material relevant to the application with “sufficient care” to discover information that could serve as the foundation for a contention. *Turkey Point*, 54 N.R.C. at 24-25. The County failed to do this, and did not demonstrate any genuine dispute on a material issue of law or fact with respect to the financial qualifications of the proposed licensees.

**2. *The County’s Contention Regarding ETrans Was Properly Rejected for Lack of Demonstrable Basis***

The County also proposed a contention that PG&E’s license transfer application did not provide sufficient information to demonstrate compliance with NRC requirements for ensuring an available source of off-site power to the facility. *See* 10 C.F.R. 50.63; 10 C.F.R. Part 50, Appendix A, General Design Criterion 17.

While off-site power is an issue material to a license transfer review, the County failed to identify and support a genuine issue on the topic. The County made only a conclusory allegation, without articulating a basis therefor, that the license application did not contain reliable detail on the financial strength of ETrans and its ability to maintain transmission lines and facilities necessary to supply off-site power to DCPD. On appeal, the County complains that the Commission did not provide a reasoned basis for rejecting the issue. However, the contention failed because it lacked specificity as well as any factual or regulatory basis.

As discussed above, the NRC is well within its authority to deny a contention when a proposed issue is not raised with sufficient particularity, or when it lacks any factual or legal basis. *See Vermont Yankee*, 435 U.S. at 553-54. Off-site power is specifically addressed in the PG&E license transfer application. The application explains that, if the reorganization and license transfer is implemented, off-site power will be provided to DCPD, as is presently the case, through transmission facilities operated by the California Independent System Operator ("ISO").<sup>19</sup> Nuclear protocols are currently in place related to the ISO's operation of the transmission system and will remain in place. The fact that the transmission facilities will be owned by ETrans rather than by PG&E does not represent a material change to either the facilities or their operation. The County's

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<sup>19</sup> (PG&E ER 000008-000014.)

thin argument disregarded the application. Rather than take specific issue with it, the County merely disregarded the application, without identifying any specific changes to DCPD operation that would present an appropriate issue for review and relief in a license transfer hearing.

Another problem with the County's argument is that it focuses only on the financial qualifications of ETrans to reliably operate the transmission system. The County, however, provided no legal basis for the proposition that the NRC must review the financial qualifications of a transmission entity. Indeed, none exists. The County also completely disregarded the detailed description of ETrans, including the financial projections for ETrans included in the Plan and Disclosure Statement provided as Enclosure 1 to the transfer application.<sup>20</sup> The allegations raised as to ETrans are also at odds with another position of the Petitioners, because ETrans (unlike Gen) will operate under *cost-of-service rates* approved by FERC. In short, the County did not identify and provide evidentiary support for any substantive issue with respect to the ability of ETrans to fulfill the necessary electric transmission function to assure the continuing ability of DCPD to meet applicable NRC requirements. Accordingly, the Commission did not abuse its discretion in rejecting these superficial issues.

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<sup>20</sup> (PG&E ER 000015-000025.)

**D. THE COMMISSION WAS CORRECT THAT THE CPUC FAILED TO DEMONSTRATE A COGNIZABLE INTEREST AFFECTED BY THE PROPOSED LICENSE TRANSFER**

The Petitioners argue that the Commission erroneously rejected the CPUC's showing of standing to intervene with respect to the proposed license transfer. The CPUC, on appeal, generally alludes to the link between financial qualifications and radiological safety as the basis for its standing. It now argues that, "to the extent that the CPUC's [proposed] contentions were related to the financial qualifications of the entities proposed to be licensed, the NRC's refusal to admit the CPUC to address this statutory requirement was arbitrary and capricious." (CPUC/County Br. at 24.) However, the CPUC's argument still fails to demonstrate the CPUC's standing to raise radiological safety matters. The Commission did not err, much less act arbitrarily, in finding the CPUC's required showing of interest to be lacking.

The CPUC is not a health and safety regulator, and certainly not the regulator of nuclear safety at DCPD. The responsibility to regulate for nuclear safety is one reserved exclusively to the NRC. *See Pac. Gas & Elec. Co.*, 461 U.S. 190 (1983). In its showing of interest below, the CPUC did not present any basis, statutory or otherwise, for any putative authority relating to the protection of public health and safety or the environment with respect to radiological harm. The record

below is clear that the CPUC was instead seeking to protect its own economic jurisdiction and to advocate its own views on purely economic issues.

The CPUC's entire statement of its interest in its petition to the NRC consisted of one paragraph, which stated:

The CPUC is a constitutionally established agency charged with the responsibility for regulating electric corporations within the State of California. In addition, the CPUC has a statutory mandate to represent the interests of electric consumers throughout California in proceedings before the Commission. The CPUC currently exercises regulatory authority over DCPD. As is set forth in detail below, these fundamental interests and responsibilities of the CPUC are directly threatened by the proposed license transfer at issue in this Application.

(ER 0015.) The CPUC made no attempt to explain how any threat to its economic interests and responsibilities falls within the NRC's scope of review or could be remedied in an NRC proceeding on the license transfer. As recognized by the Commission, the economic and jurisdictional matters raised by the CPUC are matters clearly outside the NRC's "zone of interests," and therefore could not be a basis for standing in a license transfer proceeding. *See, e.g., Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 N.R.C. 122, 128 n.7 (1977); *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 N.R.C. 1418, 1421 (1977).

Contrary to the CPUC's argument on appeal (CPUC/County Brief at 23-25), the CPUC's "financial qualifications" argument supporting its purported standing was not presented below. As seen from the quotation above, the CPUC never suggested in addressing standing in its petition that its interest in the financial qualifications of Gen and Nuclear was related to any radiological injury and its brief provides no citations to the record that show such a nexus. The CPUC's argument on appeal that it somehow has standing based on nuclear safety interests is clearly a new argument. It is well settled that such an argument is improper at this juncture. *See generally Sears, Roebuck & Co. v. Fed. Trade Comm'n*, 676 F.2d 385, 398 (9th Cir. 1982) (absent exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceeding at the appropriate time) (citing *Getty Oil Co. v. Andrus*, 607 F.2d 253, 256 (9th Cir. 1979)). An administrative agency must have the opportunity to consider a "novel legal or factual argument . . . before it can be brought before a reviewing court." *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 739 (D.C. Cir. 1976); *see also United Transp. Union v. Surface Transp. Bd.*, 114 F.3d 1242 (D.C. Cir. 1997).<sup>21</sup> Moreover, given the CPUC's economic role, the

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<sup>21</sup> As the Commission itself has long held, "[I]t should not be necessary to speculate about what a pleading is supposed to mean." *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 N.R.C. 559, 576 (1975); *cf. Curators of the Univ. of Mo.*, CLI-95-1, 41 N.R.C. 71, 132 n.81 (1995).

CPUC has not demonstrated standing to represent anyone on nuclear safety matters.

In sum, the CPUC's interest in the NRC proceeding related, not to nuclear safety, but to protecting its own economic regulatory jurisdiction and protecting California ratepayers from alleged economic harm. Any such injuries would not be traceable to the license transfer or redressable by the NRC in a transfer proceeding. Moreover, the Commission has consistently held that economic harm, by itself, does not fall within the zone of interests protected by the AEA. Consistent with *Envirocare*, the NRC's conclusion that the injuries asserted were not within the AEA's zone of interests was a permissible construction of the statute. The Commission's finding that the CPUC had failed to demonstrate standing should be upheld.

**E. THE COMMISSION PROPERLY REJECTED THE COUNTY'S LATE-FILED PETITION**

There is no question that the County's intervention petition was exceedingly late. Given 20 days in which to file a petition, the County filed almost 3 months later or over 110 days after publication of the NRC Notice. Pursuant to 10 C.F.R. § 2.1308(b), untimely intervention petitions or hearing requests "may be denied unless good cause for failure to file on time is established." In the license transfer context, the Commission has held that the "good cause" criterion is the most important when considering a late-filed petition. *See Power Auth. of N.Y.*

(James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 N.R.C. 488, 515 (2001). Indeed, NRC tribunals have routinely rejected late-filed petitions submitted without good cause for lateness and without strong countervailing reasons that override the lack of good cause. *See, e.g., N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1, CLI-99-6, 49 N.R.C. 201, 223 (1999)); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 173 (1998); *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 N.R.C. 460, 462 (1977).

The County now argues that: (1) it demonstrated good cause for late filing, based on “new information” in the bankruptcy proceeding; and (2) the Commission failed properly to apply the other factors provided by the regulation. However, the Commission’s determination that the County did not demonstrate good cause for late filing and its weighing of other potentially relevant factors was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Indeed, it was patently correct.

In its petition to intervene, the County based its justification for late filing solely on “recent actions of the Bankruptcy Court.” Specifically, the County pointed out that the CPUC was authorized by the bankruptcy court to file an alternative competing plan of reorganization for PG&E. (As stated above, this alternative plan was filed on April 15, 2002.) As a result, the County, in its May

10, 2002, petition to the Commission, claimed that it could only know whether intervention was desirable after it reviewed the details of the CPUC Plan. The County, however, did not specify how it needed the CPUC Plan to assess the NRC license transfer application or how these developments established good cause for late intervention on an application premised on PG&E's Plan. The Commission properly found that the cited developments did not justify the late filing.

The bankruptcy court developments relied upon by the County for good cause did not (and do not) affect the substance of PG&E's NRC license transfer application. The pending DCPD license transfer application was, and remains, premised upon and in furtherance of the PG&E Plan and *only* the PG&E Plan. The existence of the CPUC Plan simply has no bearing on the question before the NRC of whether PG&E's transfer application satisfies the legal standards for transfer of a nuclear license. The two purported issues the County advances (albeit insufficiently, as discussed above) likewise have nothing to do with the CPUC Plan, and should have been timely raised.

Additionally, the developments in the bankruptcy court were not "new" at the time of the County's petition. In January 2002, PG&E moved before the bankruptcy court to extend PG&E's period of exclusivity to propose a plan of reorganization beyond February 4, 2002. In opposing that motion on January 8, 2002, the CPUC outlined the significant provisions of its alternate Plan, clearly

demonstrating its intention not to transfer DCPD.<sup>22</sup> On January 16, 2002, the bankruptcy court authorized the CPUC to submit a term sheet further outlining its alternative plan by February 13, 2002, and indicated that if the term sheet reflected a potential alternate plan, it would grant the CPUC authority to file that Plan. Accordingly, the County, as an active participant in PG&E's bankruptcy, knew of the CPUC's intent and desire to file an alternative plan, including the fact that the plan did not involve a disaggregation and transfer of DCPD, *during the NRC's notice period*, which ended February 6, 2002. (Indeed, the CPUC cited this prospect in its timely NRC filings in February 2002.) The County failed to offer any explanation for its failure to raise at the NRC an alternative plan as a concern in a timely fashion in accordance with publicly available information.

The County argues (CPUC/County Br. at 38-40) that the Commission acted inconsistently by denying the County's stay requests on the basis of "new" developments in the Bankruptcy proceeding, but dismissing the County's petition on the basis that those very developments were irrelevant to the license transfer application. As the NRC discusses in its brief (NRC Br. at 37-38), however, the

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<sup>22</sup> See Objection To Pacific Gas & [sic] Electric Company's Second Motion For Order Further Extending Exclusivity Period For Filing Plan Of Reorganization To Permit The CPUC To File An Alternate Plan Of Reorganization, filed January 8, 2002, at 8 ("PG&E's integrated operations would not be disaggregated" and the CPUC "would continue to regulate PG&E's operations").

NRC acted consistently in that both determinations relied on the same factual finding that the filing of the CPUC Plan was *not* a material new development.

On appeal, the County further contends that the Commission improperly weighted and misapplied the other two factors to be used when considering a late-filed petition: the availability of other means by which the Petition can protect its interest, and the extent to which the issues will be broadened or final action on the application will be delayed.<sup>23</sup> As discussed in detail in the NRC brief (NRC Br. at 38-41, however, this argument has no merit. The Commission properly weighed and assessed all relevant factors.

As with its other operating procedures, the NRC's application of its standards addressing late-filed petitions to intervene is entitled to broad deference. The Commission's "wide discretion to structure its licensing hearings" encompasses the right "to impose enhanced procedural requirements on [late] filings so long as the use of that discretion is consistent with [AEA] section 189."

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<sup>23</sup> NRC tribunals have long held that they are not required to accord equal weight to each factor in the late-filing test. *See Consumers Power Co.* (Midland Plant, Units 1 & 2), LBP-82-63, 16 N.R.C. 571, 577 (1982) (citing *S.C. Elec. & Gas Co.* (Virgil E. Summer Nuclear Station, Unit 1), ALAB-642, 13 N.R.C. 881, 895 (1981)); *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), LBP-82-91, 16 N.R.C. 1364, 1367 (1982). The Commission, in its application of its late-filing standards, places primary emphasis on the "good cause" factor. This is not an abuse of discretion. *See Citizens for Fair Util. Regulation v. United States Nuclear Regulatory Comm'n*, 898 F.2d 51 (5th Cir.), *cert. denied*, 498 U.S. 896 (1990).

*Massachusetts*, 924 F.2d at 334. The Commission's determination that the County had not demonstrated good cause was neither arbitrary, capricious, nor an abuse of discretion. It also was in no way inconsistent with the AEA.

**F. THE COMMISSION WAS NEITHER ARBITRARY NOR CAPRICIOUS IN DENYING THE STAY REQUEST**

The County's third proposed contention for hearing was not an issue for hearing at all; rather, it merely restated the request already made by others that the NRC license transfer proceeding be stayed pending the outcome of the bankruptcy proceeding. The County chiefly complains on appeal that the Commission decision denying the stay requests was, in hindsight, "based on faulty premises;" that is, that the bankruptcy proceeding was moving forward and could end by the close of 2002. However, this argument still does not raise an issue for hearing, and it ignores the Commission's amply stated and reasonable rationale for denying the stay requests.

It has been consistently held that the Commission is entitled to great deference in managing its cases. *See Nat'l Whistleblower Center v. Nuclear Regulatory Comm'n*, 208 F.3d 256, 264 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (NRC had authority, given the "wide latitude" it has to design its proceedings, to expedite case processing in license renewal); *UCS II*, 920 F.2d at 55 (holding, in the context of late-filing rules, that the Commission "can certainly adopt a pleading schedule designed to expedite its proceedings"); *Massachusetts*,

924 F.2d at 333-34. In the license transfer arena, particularly, the Commission has emphasized the importance of streamlined and timely administrative proceedings.<sup>24</sup> With respect to the stay requests below, the Commission relied on its well-established policy that the pendency of parallel proceedings in other forums is not grounds to stay an NRC license transfer proceeding. *See, e.g., Indian Point 3*, CLI-00-22, 52 N.R.C. at 289; *Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 & 2)*, CLI-99-30, 50 N.R.C. 333, 343-44 (1999); *Consol. Edison Co. of N.Y. (Indian Point, Units 1 & 2)*, CLI-01-08, 53 N.R.C. 225, 228-30 (2001). This is particularly true where, as here, the parallel proceedings would not result in “imminent mootness.” *See Nine Mile Point*, CLI-99-30, 50 N.R.C. at 343. Moreover, the Commission specifically instructed the petitioners and parties to promptly inform the Commission of any decision in a parallel proceeding that would directly impact, or render moot, the NRC license transfer proceeding. This decision was well within the Commission’s broad grant of discretion to manage its proceedings.

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<sup>24</sup> *See* 63 Fed. Reg. at 66,721 (“With the restructuring that the energy industry is undergoing, the Commission expects [a] high rate of requests for approval of license transfers to continue. Because of the need for expeditious decisionmaking from all agencies, including the Commission, for these kinds of transactions, timely and effective resolution of requests for transfers on the part of the Commission is essential.”).

The Commission's decision on the stay requests did not turn on any "premises" as to when the bankruptcy proceeding would be complete. It focused on whether or not there were indications from the bankruptcy court that the PG&E Plan could not be approved. The Commission found no indications that the PG&E Plan cannot be confirmed or that the NRC license transfer would become unnecessary as moot. The Commission's approach as articulated in the Order remains appropriate. The NRC license transfer review should continue unless and until the PG&E Plan is not accepted. That has certainly not been the case to date. The NRC is therefore well within its authority and discretion to continue to review the application before it on a schedule that it anticipates will lead to a timely resolution and timely agency action.

Additionally, neither the County nor CPUC articulated any possible harm or injury flowing from the NRC's consideration of the transfer application in parallel with other judicial and regulatory bodies. On the other hand, PG&E, its creditors and others have a substantial interest in PG&E's successful and timely emergence from bankruptcy protection.

Finally, in refusing this stay request, the NRC properly refused to contribute to the regulatory and judicial stalemate that those opposed to the PG&E Plan have sought to create. Several entities recently sought unsuccessfully to stay the bankruptcy court's confirmation hearing on PG&E's Plan, arguing that plan

confirmation should await receipt of all necessary federal regulatory approvals.<sup>25</sup>

Several of those same entities had also urged the FERC to stay its consideration of PG&E's Plan-related applications *pending the bankruptcy court's decision* on PG&E's Plan.<sup>26</sup> The CPUC, along with the California Attorney General, California Resources Agency and the City and County of San Francisco, also asked FERC to dismiss PG&E's FERC filings as premature because it allegedly would be wasteful to move forward unless and until the bankruptcy court confirmed PG&E's plan.<sup>27</sup> Thus, each of the approval processes related to PG&E's Plan has

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<sup>25</sup> See Motion In Limine To Exclude The Testimony Of Donald F. Santa, David P. Boergers, William C. Weeden And William T. Russell And Motion To Stay Proceedings On Confirmation Of Pacific Gas And Electric Company's Plan Of Reorganization Until The Required Regulatory Approvals [sic], filed jointly by Merced Irrigation District, the City of Palo Alto, the City of Santa Clara and the Northern California Power Agency.

<sup>26</sup> See Motion To Intervene, Protest, Request For Deferral Or, In The Alternative Request For Hearing Of The Transmission Agency Of Northern California, M-S-R Public Power Agency, Modesto Irrigation District, The California Cities Of Santa Clara, Redding, And Palo Alto, And The Trinity Public Utility District, FERC Docket Nos. EC02-31-000, et al., at 21-22 (filed Jan. 30, 2002); *see also* similar motions filed in FERC Docket No. ES02-17-000 at 21-22 (filed Jan. 30, 2002), FERC Docket No. ER02-456-000 at 22-23 (filed Jan. 30, 2002), FERC Docket No. ES02-17-000 at 20-21 (filed Jan. 30, 2002), FERC Docket Nos. CP02-39-000, et al., at 13-14 (filed Jan. 29, 2002).

<sup>27</sup> See Joint Parties' Motion To Dismiss Applications, Or In The Alternative To Hold Applications In Abeyance And For Extension Of Time To Intervene, Protest, And Comment, And For Expedited Action And Shortened Response Time, FERC Docket Nos. ER02-455-000, et al., at 8-9 (filed Jan. 18, 2002); *see also* Supplement To Renewed Motion To Dismiss Applications, Or In

been met with requests that the relevant body let others go first. Fortunately, although FERC has not formally ruled on those requests, its action in setting one application for expedited hearing indicates that FERC, like the NRC, will consider the applications before it in parallel with others. Similarly, the bankruptcy court denied the stay request and is actively conducting the confirmation trial phase of the proceeding. Thus, the NRC's decision to move forward with the application is consistent with other actors in related proceedings.

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The Alternative To Hold Applications In Abeyance, And Notice Of Bankruptcy Court Ruling, FERC Docket Nos. ER02-455-000, et al., at 1 (filed Mar. 4, 2002) ("FERC should dismiss or stay these proceedings because of the extreme uncertainty that PG&E's proposed bankruptcy reorganization plan – the provisions of which necessitated these proceedings – would ever be confirmed by the bankruptcy court."); Motion To Intervene, Motion To Reject, And Protest Of The City And County Of San Francisco To The Section 205 Filing Of Pacific Gas And Electric Company And ETrans LLC, Docket No. ER02-455-000, at 7 (filed Jan. 29, 2002) ("the [FERC] should not commence proceedings predicated upon a Plan of Reorganization until such time as the Bankruptcy Court has in fact approved that plan.") and similar motions filed in Docket Nos. CP02-39-000, et al., at 5 (filed Jan. 29, 2002), Docket No. ES02-17-000, at 6 (filed Jan. 29, 2002), Docket Nos. EC02-31-000, et al., at 6 (filed Jan. 30, 2002), Docket No. ER02-456-000, at 4 (filed Jan. 30, 2002). The CPUC and others have also requested that the SEC stay consideration of a Plan-related application before the SEC under PUHCA.

**VIII. CONCLUSION**

The Commission acted well within its discretion in denying both the CPUC and County petitions to intervene in the license transfer proceeding. The joint Petition for Review should be denied.

Respectfully submitted,

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February 10, 2003

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CALIFORNIA PUBLIC UTILITIES COMMISSION)  
AND COUNTY OF SAN LUIS OBISPO,  
PETITIONERS,

v.

U.S. NUCLEAR REGULATORY COMMISSION,  
RESPONDENT,

AND

PACIFIC GAS AND ELECTRIC COMPANY,  
ET AL.,  
INTERVENORS.

No. 02-72735

STATEMENT OF RELATED CASES

Respondent-Intervenor Pacific Gas and Electric Company ("PG&E")  
agrees with the Statement of Related Cases appended to the Brief of Respondent  
U.S. Nuclear Regulatory Commission.

Respectfully submitted,



David A. Repka, Esq.  
Counsel for PG&E

Dated in Washington, District of Columbia  
This 10th day of February 2003

**Revised FORM 8**

**CERTIFICATE OF COMPLIANCE  
PURSUANT TO CIRCUIT RULE 32-1**

Case No. 02-72735

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UNITED STATES COURT OF APPEALS  
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CALIFORNIA PUBLIC UTILITIES COMMISSION )  
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RESPONDENT, )  
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AND )  
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PACIFIC GAS AND ELECTRIC COMPANY, )  
ET AL., )  
INTERVENORS. )

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No. 02-72735

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWERING BRIEF OF RESPONDENT-INTERVENOR PACIFIC GAS AND ELECTRIC COMPANY" and the "SUPPLEMENTAL EXCERPTS OF RECORD OF RESPONDENT-INTERVENOR PACIFIC GAS AND ELECTRIC COMPANY" in the captioned proceeding have been served as shown below by United States mail, first class, this 10th day of February 2003.

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