IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-72735

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

AND

COUNTY OF SAN LUIS OBISPO

Petitioners-Appellants,

v.

U.S. NUCLEAR REGULATORY COMMISSION,

Defendants-Appellees,

PACIFIC GAS AND ELECTRIC COMPANY, et al.

Intervenors

JOINT BRIEF OF PETITIONERS-APPELLANTS

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INTRODUCTION

This is a petition to review a final order in which the Nuclear Regulatory Commission ("NRC" or "Commission") denied two separate petitions to intervene, one filed by the California Public Utilities Commission ("CPUC") and the other by the County of San Luis Obispo (the "County") (collectively "Petitioners" or "Appellants"), in an NRC proceeding initiated by Pacific Gas & Electric Company ("PG&E") for transferring the NRC licenses for the Diablo Canyon Power Plant, Units 1 and 2 ("DCPP"). The NRC's action definitively denied Petitioners of all opportunities to address significant health and safety issues raised by the proposed license transfer.

PG&E's NRC license transfer application arose from PG&E voluntarily entering into bankruptcy in April 2001.[1] PG&E's bankruptcy proceeding is still pending in the Northern District of California. As part of that proceeding, in September 2001, PG&E presented a bankruptcy reorganization plan ("the PG&E Plan").[2] A key element of the PG&E Plan is the transfer of the DCPP NRC operating licenses to new, financially dubious entities. Such license transfers require approval by the NRC.

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1 *In re Pacific Gas and Electric Co.*, Case No. 01-30923 DM (Bankr. N.D. Cal. filed April 6, 2001).

2 *Id.*

The NRC initiated its review of the PG&E license transfer application when the PG&E Plan was the only one proposed.[3] Accordingly, the NRC's January 2002 Notice of PG&E's filing of its license transfer application was necessarily limited to PG&E's proposal. However, before the NRC even held a pre-hearing conference, the bankruptcy situation changed substantially, and the PG&E Plan is no longer the only bankruptcy reorganization plan pending before the Bankruptcy Court.

After termination of the exclusivity period, on April 15, 2002,[4] the CPUC filed an alternative reorganization plan ("April 15th Plan"). The CPUC has subsequently revised the April 15th Plan, and in conjunction with the Official Committee of Unsecured Creditors, has presented a bankruptcy reorganization plan ("the Joint Plan") that has the support of many other governmental entities, including but not limited to the County, the Attorney General of the State of

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3 *See,* 67 Fed. Reg. 2455 (Jan 17, 2002) (hereinafter "NRC's Notice"). NRC's Notice established February 6, 2002 as the deadline for filing requests for a hearing. A copy of NRC's Notice is set forth in Petitioners' Excerpts of the Record (hereinafter, "ER") at 0005-0006.

4 *See,* Order Terminating Exclusivity with Respect to the California Public Utilities Commission and Authorizing the California Public Utilities Commission to File an Alternate Plan of Reorganization, Case No. 01-30923DM, dated February 27, 2002, filed March 3, 2002. (ER 1078-1079.)

California, the City and County of San Francisco, as well as several other counties.[5]

Neither the April 15th Plan nor the Joint Plan envisions the transfer of DCPP away from PG&E. To the contrary, if the Bankruptcy Court approves the Joint Plan rather than the PG&E Plan, PG&E's NRC license transfer application may be rendered moot: PG&E will remain the licensee of DCPP, and no license transfer will be required. Further complicating the situation is the possibility that the Bankruptcy Court will approve an alternative reorganization plan that modifies the

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[5] The California Public Utilities Commission filed its original Plan for Reorganization under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company on April 15, 2002. On May 15, 2002, the Bankruptcy Court approved the April 15th Plan and set forth a schedule for the creditor vote solicitation process. Subsequent to the close of the initial voting period, the CPUC and the Official Committee of Unsecured Creditors appointed in this case (the "OCC") agreed to certain material modifications to the April 15th Plan. On or about September 3, 2002, the CPUC and the OCC filed their First Amended Plan of Reorganization for the Debtor PG&E containing the agreed upon modifications with the Bankruptcy Court (the "First Amended Plan"). Then, on November 7, 2002, the CPUC and the OCC filed a Second Amended Plan containing certain additional modifications reflecting the anticipated structure of the securities to be issued thereunder. *See*, California Public Utilities Commission's and Official Committee of Unsecured Creditors' Second Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company, [Dated November 6, 2002], filed in Case No. 01-30923 DM (Bankr. N.D. Cal.). Confirmation hearings on the Second Amended Plan commenced on November 18, 2002. The plans jointly supported by the CPUC and OCC are hereafter generically referred to as the "Joint Plan."

identities and capabilities of the entities that will become the final licensees for DCPP to something not contemplated by either the Joint Plan or the PG&E Plan.

Although the identity of the licensee for DCPP after bankruptcy is now uncertain and PG&E remains in bankruptcy, the NRC refused to either stay its proceeding or to admit Petitioners' issues related to the ultimate identity of the licensee. The identity of the licensee is not a mere administrative matter but a matter of public health and safety, because the NRC must determine whether the licensee meets the statutory financial and technical qualification requirements to operate a nuclear power plant. However, the NRC cannot make such determinations until the Bankruptcy Court adopts a reorganization plan that removes the current uncertainties regarding the identities of the entities that will ultimately be licensed to operate DCPP.

The CPUC's petition in response to the NRC's Notice was timely filed. Among other things, the CPUC questioned the NRC's ability to approve a license transfer without considering the legal requirement that PG&E obtain CPUC approval to transfer the DCPP nuclear decommissioning trust funds. CPUC approval of the transfer of these trust funds is a condition precedent to transferring the NRC license for DCPP. Because resolution of this issue has been acknowledged by the NRC to be material to its licensing decision, the NRC's

failure to allow the CPUC to raise this issue in the license transfer proceeding was clear legal error.

The County's petition to intervene was late-filed, but, consistent with the NRC's rules of practice and precedent, the County demonstrated good cause for its late-filed petition based on changed circumstances arising from the filing of the April 15th Plan with the Bankruptcy Court. The County's substantive issues were cursorily denied without the reasoned decisionmaking incumbent on the NRC.

The County and the CPUC also were denied the opportunity to show that even if the PG&E Plan is approved, there would be no reasonable assurance that the entities licensed to operate the DCPP would have the necessary financial strength and qualifications to meet the stringent statutory and regulatory requirements established to operate a nuclear power plant. Because the transfer of a license to operate a nuclear power plant to an unqualified or financially risky business entity poses grave threats to the health, safety and environmental well-being of the populations who live in the vicinity of such a plant, in this case the citizens of San Luis Obispo County, the NRC's denial of Appellants' petitions to intervene deprived the Commission of vital information necessary to a reasoned decision.

Even though the NRC's stated policy is to encourage state and local governments to participate in license proceedings, Appellants were wrongfully

denied opportunities to litigate these important issues in the DCPP license transfer proceeding. Moreover, notwithstanding the uncertainty about whether the requested license transfer is even required, and notwithstanding the crucial uncertainties about PG&E's proposed transferee(s), the NRC initiated its review of PG&E's license transfer application, subsequently excluding Appellants as parties, and excluding the important issues that Appellants raised in their respective petitions to intervene.

Appellants accordingly filed this Petition for Review of the NRC's final Memorandum and Order[6] definitively excluding them from participating as parties in the DCPP license transfer proceeding and excluding their issues from being raised by any party to the DCPP license transfer proceeding.

Contrary to NRC rules and practice, and contrary to sound public policy and the principles of efficient administration of justice, the NRC denied Petitioners' petitions to intervene as parties and denied them the opportunity to present material and potentially dispositive issues in a proceeding whose outcome could significantly affect the health and well-being of the citizens of the State of California and, in particular, the residents of San Luis Obispo County.

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6 *In re Pacific Gas and Electric Co.*, (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC --- (June 25, 2002) (hereinafter, "NRC Order"). (ER 1148-1177.)

For these reasons, this Court should overturn the NRC's ill-advised and illegal Order dismissing the petitions of the CPUC and of the County, and direct the NRC either to: (1) conduct a hearing on the issues raised by Petitioners herein; or (2) hold any hearings on PG&E's license transfer application in abeyance until such time as the Bankruptcy Court issues a ruling indicating whether any license transfer for DCPP is even required.

JURISDICTIONAL STATEMENT

The NRC has exclusive jurisdiction over proceedings involving the transfer of a license that it has granted. *See,* Section 184 of the Atomic Energy Act of 1954, as amended ("AEA"), 42 U.S.C § 2234; 10 C.F.R. § 50.80. Under 28 U.S.C. § 2342(4) (the Hobbs Act), the U.S. Courts of Appeals have jurisdiction to review "all final orders of the [NRC] made reviewable by 42 U.S.C. § 2239." Section 2239 makes reviewable "any final order" in "any proceeding under this chapter, for the suspending, revoking, or amending of any license or construction permit." 42 U.S.C § 2239(a)(1)(A), (b). The Hobbs Act is to be read broadly to encompass all final NRC decisions that are preliminary or incidental to licensing. This appeal is from a final NRC Order that disposes of all of Appellants' claims related to this licensing proceeding.

Under the Hobbs Act, jurisdiction lies either in the U.S. Court of Appeals for the District of Columbia or in the Circuit containing the subject of the NRC's

proposed action. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985); *State of Michigan v. United States*, 773 F.Supp. 997, 1004 (W.D. Mich. 1991) *aff'd.*, 994 F.2d 1197 (6th Cir. 1993).

The Ninth Circuit's jurisdiction includes appeals arising from events taking place within the State of California. Because the subject of this appeal is a licensing proceeding for the DCPP, which is located within San Luis Obispo County, California, this Court has jurisdiction over this matter.

Parties aggrieved by a final agency order have 60 days to file a petition for review after the order is entered. 28 U.S.C. § 2344. An order is entered on the last day on which it is signed, the Commission's seal is affixed, and the order is served. *Energy Probe and Western Reserve Alliance v. United States Nuclear Regulatory Commission*, 872 F. 2d 436 (D.C. Cir. 1988). As the NRC Order under review was entered on June 25, 2002, and the Appellants' petition was received by this Court on August 23rd, and filed on August 25, 2002, this petition for review is timely.[7]

[7] This Court has subsequently granted motions to intervene in this proceeding to PG&E and NCPA. United States Court of Appeals for the Ninth Circuit, Case No. 02-72735, Order filed Oct. 18, 2002.

ISSUES PRESENTED

1. Did the NRC err in refusing to grant standing in the license transfer proceeding to the California Public Utilities Commission?
2. Did the NRC err in rejecting the admissibility of each and every of the hearing issues proffered by the California Public Utilities Commission?
3. Did the NRC err in concluding that the County failed to establish good cause for its late-filed petition to intervene in the license transfer proceeding?
4. Did the NRC err in rejecting the admissibility of each and every of the hearing issues proffered by the County?

STATEMENT OF THE CASE

PG&E filed its application to transfer the DCPP licenses on November 30, 2001. The proposed transferees are two new corporate entities that will be formed if PG&E's plan for bankruptcy reorganization is ultimately approved. In response, the NRC initiated a license transfer proceeding limited to PG&E's proposal and underlying bankruptcy reorganization plan. (ER 0005-0006.)

On February 6, 2002, the CPUC made a timely request to intervene in the NRC proceedings and moved to dismiss the application or, in the alternative, to stay action on it pending a final ruling by the Bankruptcy Court. (ER 0007-0970.) The County did not initially seek to intervene in the proceedings. When the Bankruptcy Court later agreed to also consider an alternative plan for PG&E

reorganization that would not require a transfer of the NRC license for the power plant, the County made a late-filed petition to intervene less than one month later. (ER 1094-1117.)

PG&E vigorously opposed intervention by the CPUC and the County. PG&E also opposed the NRC holding a hearing on any of the contentions raised by the CPUC and the County.

On June 25, 2002, the NRC issued its Order in which it determined not to allow the CPUC or the County to intervene in the proceedings. The NRC Order further determined not to allow a hearing on any of the issues raised by the County or the CPUC. The NRC Order concluded that if it granted a hearing on the anti-trust issues raised by other petitioners, the County and the CPUC could act as non-party government participants on those anti-trust issues. (ER 1148-1177.)

STATEMENT OF FACTS

On November 30, 2001, PG&E filed its Application for License Transfers and Conforming Administrative License Amendments for DCPP with the NRC. (ER 0006.) This application was required because Section 182.a of the AEA, 42 U.S.C § 2232(a), requires licensees to be technically and financially qualified.

On January 17, 2002, the NRC published a notice in the Federal Register indicating that PG&E had applied for the NRC's authorization to transfer its licenses for DCPP, based on a Plan of Reorganization which PG&E had filed

under Chapter 11 of the United States Bankruptcy Code. (ER 0005-0006.) Under the PG&E Plan, DCPP's license would be transferred to a new generating company named Electric Generation LLC ("Gen"), which would operate DCPP, and to a new wholly-owned subsidiary of Gen named Diablo Canyon LLC ("DCLLC"), which would hold title to DCPP and lease it to Gen. (ER 0005.) Regulatory and rate-setting authority over the bulk of PG&E's assets would be transferred from the CPUC to the Federal Energy Regulatory Commission ("FERC").

The NRC is required to review the qualifications of the proposed new licensees to ensure that the public health and safety will be adequately protected.[8]

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[8] In order to approve the transfer of an operating license pursuant to 10 C.F.R. § 50.80, the NRC must determine that the proposed transferee is qualified to be the holder of the license, and that the transfer is otherwise consistent with applicable provisions of law and regulations issued by the Commission. 10 C.F.R. § 50.80(c)(1) and (2).
The Commission considers the potential impact of the transfer on the licensee's ability to maintain adequate technical qualifications and organizational control over the facility and to provide adequate funds for safe operation and decommissioning. Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44071, 44077 (August 19, 1997).
Thus, the NRC is required to consider the proposed transferee's (1) financial qualifications related to both funding for plant operations and decommissioning funding assurance; (2) technical qualifications; (3) organizational control and authority over the facility; and (4) ability to safely conduct other activities, such as provide off-site power to the facility, emergency planning support, exclusion area control, and insurance coverage. See 10 C.F.R. §§ 50.33(f) and 50.34(b), (g).

In particular, under NRC regulations, the Applicants have the burden of demonstrating that the proposed licensees, "Gen" and "Nuclear," are financially and technically qualified to be licensed to own and operate DCPP. Accordingly, the Commission stated that it would approve the requested license transfer only if the "Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto." (ER 0006.) The Commission also stated that before issuing the license amendments it would have to make the findings required by the Atomic Energy Act of 1954, as amended, and the Commission's regulations. *Id.*

The NRC's January 17, 2002 Federal Register notice necessarily focused exclusively on PG&E's Plan and PG&E's proposed recipients of the transferred licenses. This was because the Bankruptcy Court's exclusivity period was still in effect, and the PG&E Plan was the only plan before the Bankruptcy Court at that time.

The NRC's Federal Register notice required requests for a hearing on the proposed license to be filed by February 6, 2002. (ER 0006.)

Four petitioners, including CPUC, responded initially to the NRC's Notice.[9] Two, TANC and NCPA, raised contentions primarily related to anti-trust conditions in the current DCPP licenses.[10] A third, the OCC, expressed interest in the financial qualifications of the future licensees, but, at the time when only PG&E's reorganization plan was before the Bankruptcy Court, supported that reorganization plan. However, the OCC is now a co-proponent of the Joint Plan.[11]

Only the CPUC raised timely contentions questioning the NRC's ability to review a license transfer before the identity and structure of the transferee was known. The CPUC asked the NRC to suspend or dismiss the license transfer proceeding until the Bankruptcy Court determined the reorganized structure of the company. Among other things, the CPUC questioned the NRC's ability to approve a license transfer without considering the legal requirement that PG&E obtain CPUC approval to transfer the DCPP nuclear decommissioning trust funds. The

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9 The initial four petitioners were the CPUC; the Northern California Power Agency ("NCPA"); the Official Committee of Unsecured Creditors of PG&E ("OCC"); and the following group: 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 (collectively, "TANC"). (ER 1149.)

10 *Id.*

11 See footnote 5 above.

CPUC also raised contentions regarding the resulting removal of authority for a state-sponsored independent safety oversight committee. (ER 0007-0970.)

Almost one month after the NRC's deadline for requesting an opportunity to participate in the license transfer proceeding, on March 3, 2002, the Bankruptcy Court terminated the exclusivity period and granted the CPUC leave to file an alternate reorganization plan. (ER 1078-1079.) On April 15, 2002, the CPUC filed a Reorganization Plan that is quite different from the PG&E Plan. Of crucial importance to the NRC's license transfer proceeding, however, is the fact that the CPUC's April 15th Plan, and now the Joint Plan, do not require a license transfer because they do not include any transfer of ownership or operation of DCPP.

The County promptly reviewed the April 15th Plan and determined that issues related to PG&E's qualifications as an NRC licensee and of importance to the health and safety of its citizens were raised by the NRC's continued review of a license transfer application based solely on the PG&E Plan. Less than one month after the CPUC filed its April 15th Plan, the County submitted its intervention petition and request for a hearing. In light of the April 15th Plan, the County filed contentions regarding both the technical and financial qualifications of the transferees and ETrans (one of the other new companies that would be created if the PG&E Plan were approved). The County also requested the NRC to stay its

proceeding until the identity of the transferee and its financial strength could be determined. (ER 1094-1117.)

However, the NRC Order, CLI-02-16, denied Appellants' intervention petitions and all motions to dismiss or suspend the PG&E license transfer proceeding. (ER 1150.) The NRC granted Appellants an opportunity to participate as interested governmental entities, under 10 C.F.R. § 2.715(c) should there be a hearing and directed the NRC staff to review the County's petition as comments, pursuant to 10 C.F.R. § 2.1305. (ER 1168, 1172-1173.) However, having dismissed the Appellants' contentions, the NRC limited the Appellants' participation to the issues raised by the remaining intervenors in this proceeding. NRC Order at 21and 26 (ER 1168, 1173.)[12] None of those issues address the health and safety matters that Petitioners sought to raise.

SUMMARY OF THE ARGUMENT

By definitively denying Petitioners' their rights to intervene in this proceeding, and by refusing to let any party admitted to the proceeding raise any of the health, safety and financial qualification issues proffered by these governmental Petitioners, the NRC Order has an immediately effective impact on Appellants' substantial legal rights and, therefore, is final and reviewable. This

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[12] The remaining potential parties raised only anti-trust-related issues. (ER 1149.)

finality is not affected by the NRC's offer of limited participation as interested governmental entities who can only comment on the proceeding and participate on issues raised by others or by the Commission's direction to the NRC staff to consider Petitioners' contentions as comments under 10 C.F.R. § 2.1305.

By rejecting every contention proposed by Petitioners, the NRC has applied its rules contrary to established practice thereby erecting an impermissibly high barrier to the admission of material issues in its license transfer proceedings. Also, by dismissing the County's late-filed petition, the NRC has applied its rules of practice contrary to the facts and to its proclaimed interest in hearing from interested governments.

Moreover, by limiting the scope of its proceeding to PG&E's Plan, the NRC has impermissibly and illegally blinded itself to the impacts of subsequent developments out of the NRC's control that affect its ability to make the statutory and regulatory findings required for a transfer of a nuclear power plant license.

STANDARD OF REVIEW

The following standard is applicable to all of the issues presented in this appeal. A court must set aside agency action it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A).

An agency decision may be reversed as arbitrary and capricious where an agency has relied on factors that were not intended by Congress, entirely failed to consider an important aspect of the problem, offered and 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. *Motor Vehicle Mfr. Ass'n. v. State Farm Ins.*, 463 U.S. 29, 44 (1983); *O'Keeffe's, Inc. v. U.S. Consumer Product Safety Comm'n.*, 92 F.3d 940 (9th Cir. 1996).

At a minimum, that standard requires the agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" *Motor Vehicle Mfr. Ass'n.*, 463 U.S. at 43, and that explanation must be sufficient to enable the court to conclude that the agency's action was the product of reasoned decisionmaking." *Id. at 52.*

A "fundamental" requirement of administrative law is that an agency "set forth its reasons" for decision; an agency's failure to do so constitutes arbitrary and capricious agency action. *Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 599 (D.C. Cir. 1980). When faced with a conclusory agency decision, a court will find that the agency has abused its discretion. *Anderson v. McElroy*, 953 F.2d 803 (2nd Cir. 1992); *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 737

(D.C. Cir. 2002). When an agency provides a statement of reasons insufficient to permit a court to discern its rationale, or states no reasons at all, the usual remedy is a "remand to the agency for additional investigation or explanation." *Florida Power & Light Co., supra,* 470 U.S. at 744. Where an agency's reasoning distorts the underlying statutory purpose, its decision is arbitrary and capricious and contrary to law, and such decisions shall be remanded. *Rauenhorst v. U.S.*, 95 F.3d 715 (8th Cir. 1996).

ARGUMENT

I. The NRC Order Denying the CPUC's and the County's Petitions to Intervene is a Final and Reviewable Order

Because the NRC's Order conclusively terminated the Petitioners' ability to participate in the NRC's license transfer proceeding on the health and safety issues they raised, and the NRC will not otherwise consider those issues in the hearing, the NRC's Order is final with respect to Petitioners and, thus, is reviewable by this Court.

The U.S. Courts of Appeals have jurisdiction to review "all final orders of the [Nuclear Regulatory Commission] made reviewable by 42 U.S.C. § 2239." 28 U.S.C. § 2342(4) (Hobbs Act). Section 2239.a makes reviewable "any final order" in "any proceeding under this chapter, for the suspending, revoking, or amending of any license or construction permit." *Seacoast Anti-Pollution League of New*

Hampshire v. Nuclear Regulatory Commission, 690 F. 2d 1025, 1028 (D.C. Cir. 1982). The Hobbs Act is to be read broadly to encompass all final NRC decisions preliminary or incidental to licensing.[13]

Generally, a final NRC Order is one that disposes of all issues as to the parties in that proceeding, *i.e.*, the order granting or denying a license. *See, Commonwealth of Massachusetts v. U.S. Nuclear Regulatory* Commission, 924 F.2d 311, 322 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991) ("*Massachusetts*"); *City of Benton, et al. v. Nuclear Regulatory Commission, et al.*, 136 F.3d 824 (D.C. Cir. 1998). However, NRC orders with an immediate effect on substantive rights are an exception to this rule, *see, Massachusetts*, 924 F. 2d at 322. In particular, a Commission order is final for the purpose of reviewability where the Commission has made a final determination not to take action that is a predicate to holding a hearing on specific issues in a licensing proceeding.[14] That is the case here – the

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[13] *Florida Power & Light Co., supra*, 470 U.S. 729; *General Atomics v. United States Nuclear Regulatory Commission*, 75 F. 3d 536 (9th Cir. 1996).

[14] See, *Seacoast Anti-Pollution League of New Hampshire, supra*, 690 F.2d at 1028 (refusal to conduct revocation proceeding reviewable as necessary first step); *Rockford League of Women Voters v. United States Nuclear Regulatory Commission*, 679 F.2d 1218, 1221 (7th Cir. 1982) (refusal to initiate license revocation proceeding necessary first step in that proceeding); *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 606 F.2d 1261, 1265 (D.C. Cir, 1979) (determination of lack of jurisdiction necessary first step in licensing proceeding).

Commission refused to admit Petitioners' contentions, and, thereby conclusively determined not to hold a hearing on the issues raised in those contentions. Therefore, the Commission's Order is reviewable as a final decision on a necessary first step in this proceeding.

Where a Commission order denies a petitioner all rights to participate as a party, that decision is a final reviewable decision because it has an immediate effect on the petitioner's legal rights.[15] Because the Commission's denial of Appellants intervention petitions resulted in the immediately effective legal consequence of being excluded from the NRC's PG&E license transfer proceeding, this aspect of the Commission's order is reviewable.[16]

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[15] *Massachusetts,* 924 F. 2d at 322 (even where NRC licensing proceeding not concluded, immediately effective order was final and reviewable because significant legal consequences flowed from the Commission's action); *Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc. v. U.S. Nuclear Regulatory Commission, et al.*, 931 F.2d 102, 105 (D.C. Cir. 1991) (immediately effective portion of order reviewable despite pending agency action on remainder of order).

[16] NRC practice is in accord with these legal principles. The NRC uses a practical test of finality. An action is final for appellate purposes where that action either disposes of at least a major segment of the case or terminates a party's right to participate. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983). Both prongs of the test are satisfied here. Because this NRC finality test accords with the judicial principles summarized above, the Commission cannot now to claim that its Order is not final with respect to Appellants.

The NRC offered Petitioners an opportunity for limited participation as governmental entities under 10 C.F.R. § 2.715(c).[17] Such participation, however, is contingent on whether the NRC conducts a hearing on the remaining contentions, all of which address only anti-trust issues. (ER 1149, 1172-1173.) As the NRC has requested additional briefs on certain aspects of the anti-trust concerns, CLI-02-18 (August 1, 2002), it is not clear that the NRC will conduct a hearing on these limited issues. However, even if a hearing is held, it will not address Petitioners' contentions.[18]

Thus, the NRC's offer has no effect on the reviewability of the its Order as a final order denying Appellants' hearing rights under Section 189.a of the AEA, 42 U.S.C § 2239(a). Similarly, the Commission's direction to the NRC staff to consider Petitioners' contentions as comments under 10 C.F.R. § 2.1305 does not

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17 Should there be a hearing, participation as an interested governmental entity would only permit the CPUC and the County to "introduc[e] evidence on admitted issues, submit[] proposed questions to the presiding officer, and fil[e] proposed findings" with respect to those issues. (ER 1168.)

18 The Commission also directed its staff to consider the comments submitted by the CPUC and the County under 10 C.F.R. § 2.1305 and determine whether those comments call into question the proposed license transferee's ability to operate the DCPP safely. (ER 1172-1173.) The Commission will respond to such comments, if "appropriate," but otherwise, they do not constitute part of the decisional record. 10 C.F.R. § 2.1305(a). Such discretionary consideration of only a limited potion of the Petitioners' concerns cannot defeat the finality of the Petitioners' loss of their hearing rights and to meaningfully participate in the NRC's license transfer proceeding.

affect the finality of the Commission's deprivation of hearing rights under Section 189.a of the AEA and, thus, does not affect the reviewability of the Commission's decision.

II. The NRC's Denial of CPUC's and the County's Petitions to Intervene is Contrary to NRC Regulations, Practice and Policy

Section 189.a of the AEA, 42 U.S.C § 2239(a), requires the NRC to grant a hearing on the request of any person whose interest may be affected by the amending of any license. 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. *Union of Concerned Scientists v. United States Nuclear Regulatory Commission*, 735 F.2d 1437, 1451 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985) (*"UCS I"*). Contrary to NRC regulations, practice and policy, the NRC dismissed the CPUC as having no standing in this proceeding, denied the County's late-filed petition to intervene, and summarily dismissed each and every of the contentions that should have been made part of a hearing in this proceeding. This section of the argument will address each of these issues, first for the CPUC, then for the County.

A. The NRC Wrongfully Dismissed the CPUC's Showing of Standing

A petitioner for intervention is entitled to party status if he/she establishes standing and pleads at least one valid contention. *Carolina Power and Light Co.*

and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070 (1982). To demonstrate standing in a Subpart M license transfer proceeding, a petitioner must, among other things, show that its interests in the proceeding lie within the "zone of interests" protected by the governing statute(s). (ER 1154-1155.)

The NRC appears to have concluded that the CPUC lacked standing because all of its contentions related to economic matters, and the CPUC had failed to "articulate a sufficient interest in economic matters *that have a potential to produce radiological harm.*" (ER 1157.) The NRC noted that the CPUC had referred only twice to health and safety in the part of its petition devoted to standing and characterized its concerns as focused on economics. (ER 1156.) The NRC acknowledged that the CPUC addressed safety in the part of its petition devoted to the issues, but would not consider that information because it had not been provided in the section devoted to standing, and the NRC would not "sift" through the CPUC's filing to determine whether it had standing. (ER 1157.) However, the NRC did sift through the CPUC's petition to erroneously determine that none of the CPUC's contentions was admissible.

The NRC erroneously rejected the CPUC's showing of standing. Section 182.a of the AEA, 42 U.S.C § 2232(a), requires the NRC to make a finding of financial qualification. Therefore, issues related to that finding are material to an

NRC decision and must be heard, especially when raised by the unquestioned expert in this area. *UCS I, supra,* 735 F.2d at 1445. There is no doubt that the CPUC, given its statutory mandates and its public responsibilities, is the expert on the financial qualification of electric power companies in California. Thus, to the extent that the CPUC's 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.

Moreover, the explicit showing of a nexus between financial qualification and radiological safety need not be made where the NRC has made this connection itself on many occasions.[19] For the NRC to reject the CPUC's contentions for failing to recite what the NRC itself has said is a clear abuse of discretion. *D&F Alfonso Realty Trust v. Garvey*, 216 F. 3d 1191, 1196 (D.C. Cir. 2000) (an agency

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[19] The Commission clearly established the nexus between financial qualification and safety in its decision in the *Gulf States* proceeding. *In the Matter of Gulf States Utilities Company, et al.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43 (1994). In permitting Cajun Electric Power Cooperative ("Cajun") to challenge a proposed license transfer by Entergy Operations, Inc. ("Entergy") the majority owner of the River Bend station, the NRC agreed that the potential for the majority owner's underfunding of plant operations could lead to a reduction in the margin of safety and, therefore, a diminution of Cajun's property interest. The Commission explicitly stated that its "regulations recognize that underfunding can affect plant safety . . . behind the financial qualifications rule is a safety rationale." *Id.*

acts arbitrarily where it makes a determination inconsistent with established standards).

In light of the clear Commission precedent on the connection between financial qualification and safety, CPUC's contentions were clearly within the zone of interest for NRC proceedings. Accordingly, the Commission's rejection of the CPUC's standing on the hypertechnical basis of a failure to recite this connection is contrary to Commission law and must be reversed. *Motor Vehicle Mfr. Ass'n.*, *supra*, 463 U.S. at 43.

B. The Commission Erroneously Rejected CPUC's Litigable Contentions

The CPUC raised contentions with respect to four issues: (1) financial qualification; (2) decommissioning funding; (3) California's regulatory responsibilities; and (4) public safety and welfare. The following analysis shows that the NRC erroneously rejected CPUC's contentions.

1) The NRC Improperly Rejected Issues Regarding PG&E's Financial Qualification

Under 10 C.F.R. § 50.80, the NRC is required to determine whether "(1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations, and Commission orders," including whether the Applicant is financially and technically qualified to be licensed to own and operate

the DCPP facility. The NRC's need to find an applicant financially qualified is a statutory requirement. Section 182.a. of the AEA, 42 U.S.C § 2232(a).[20]

The NRC has established a connection between financial qualification and the ability to operate a plant safely.[21] The CPUC, as the unquestioned expert on financial qualifications for California power plants, asserted that, in its expert opinion, PG&E's proposed new generating entity, Gen, would have such limited sources of funding that serious questions were raised regarding Gen's ability to meet NRC financial qualification requirements. In particular, the CPUC opined that PG&E's proposal to fund Gen with above-market-price Power Sales Agreements ("PSA") was highly unlikely to be approved by FERC so that Gen would not be financially qualified. PG&E contended that the rates are market based. (ER 1158-1159.)

The NRC recognized that PG&E's PSA requires approval by the Bankruptcy Court and FERC. However, the NRC seized on the CPUC's inability to predict a

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[20] Financial qualification is demonstrated either by ownership of a nuclear facility by an electric utility, which recovers its costs from rates set by a government agency, or by a more complicated analysis of power purchase agreements and other factors for licensees not owned by electric utilities, which is conducted to assure adequate monies are available to maintain and safely operate a nuclear power plant. [NRC] *Final Standard Review Plan on Financial Qualifications and Decommissioning Funding Assurance*, NUREG-1577, Rev. 1 (March 1999).

[21] See footnotes 8 and 19 above.

lack of approval of the PSA to dismiss the CPUC's concerns as mere speculation outside the scope of a license transfer proceeding. In the NRC's view, only the details of the financial adequacy of PG&E's proposal, assuming that all of the necessary approvals are obtained, are appropriate for litigation. The underlying fundamental issue of whether the proposal is even viable would be left to the NRC to incorporate in a condition imposed on the license, *i.e.*, the NRC would require that PG&E obtain approval of the portions of the PSA essential for the demonstration of financial qualification. (ER 1159-1161.)

NRC's decision to exclude the CPUC's issues about the financial qualification of Gen is clearly contrary to law. Under *UCS I, supra,* 735 F.2d at 1444, the NRC, when requested, must provide a hearing on material issues related to the issuance of a license. By making viability of the PSA a licensing condition, by conditioning the grant of a license transfer on its approval, the NRC acknowledged that it is a material issue. Accordingly, the NRC was required to provide a hearing on that issue. *See, also, Union of Concerned Scientists v. United States Nuclear Regulatory Commission*, 920 F.2d 50 (D.C. Cir. 1990) ("*UCS II*").

2) The NRC Improperly Rejected CPUC's Contention Regarding Decommissioning Funding

Each nuclear power plant must establish a fund for its eventual decommissioning. 10 C.F.R. § 50.75(e). The funds to cover the decommissioning of all of PG&E's nuclear plants are currently vested in two Nuclear

Decommissioning Trusts ("Trusts"). Transfer of the DCPP license is necessarily contingent on the new owner of DCPP receiving the portion of the Trusts attributed to that plant. PG&E itself acknowledges that authorization of the assignment of PG&E's beneficial interests in the portions of the Trusts associated with DCPP is "an essential element of the Transaction as the NRC requires Diablo Canyon LLC to have adequate assurance of decommissioning funding."[22]

The Trusts themselves provide that they were established pursuant to the regulatory authority of the CPUC and the NRC. *See also* Cal. Pub. Util. Code §§ 8321-8330 (the California Nuclear Facility Decommissioning Act of 1985).[23]

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[22] *See* PG&E's Section 203 application to FERC, Docket EC02-31-000. (ER 0002-0003.)

[23] In adopting this law, the California Legislature found that the citizens of the state should be protected from exposure to radiation from nuclear facilities, as well as from the risks and costs of decommissioning such facilities. It is noteworthy that under this statute, "decommissioning" includes a wider range of activities, and is more protective of the environment, than the "decommissioning" required under NRC regulations. Specifically, Cal. Pub. Util. Code § 8324 defines "decommissioning" to include the removal of "nuclear facilities safely from service and *to reduce residual radioactivity to a level that permits release of the property for unrestricted use* and termination of license." (Emphasis added.) The NRC will permit termination of its license when radiological levels for either unrestricted or restricted use are achieved. See 10 CFR §§ 50.82(a)(11), 20.1402 and 20.1403. Since California law imposes a higher standard of care in connection with nuclear decommissioning than does the NRC, it is of utmost importance to the State to assure that the decommissioning trusts that the law requires electrical corporations operating nuclear power plants within the state to maintain are properly managed and financially sound. Thus, the potential transfer of the existing trust monies associated with DCPP to

Moreover, any disposition of the Trusts' assets must be pursuant to CPUC order, and to the extent applicable, NRC order. By their own terms, the Trusts explicitly deny PG&E the authority to transfer its interest in them either voluntarily or involuntarily. The only exception is in connection with a sale of PG&E's ownership interest in the plant. However, in such a case, the Trusts specifically provide that "any such transfer shall be subject to the prior approval of the CPUC."[24] PG&E has neither sought nor received CPUC approval for the transfer of these Trusts as required by the terms of the Trust Agreements.

The CPUC has accordingly properly contended that PG&E's ability to meet the NRC's decommissioning funding requirements is an issue to be determined in this proceeding. (ER 0023-0032; 1161-1162.) However, the NRC cavalierly rejected this key contention that bears directly on the feasibility of the proposed license transfer by proposing merely to condition the license transfer on the transfer of Trust funds to PG&E's transferee(s).

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proposed transferees whose financial and other qualifications are at this point uncertain is a matter of the greatest concern to the CPUC, and should also be a matter of concern to the NRC.

[24] See Section 2.07 of PG&E's Nuclear Facilities Qualified CPUC Decommissioning Master Trust Agreement and Section 2.06 of PG&E's Nuclear Facilities Nonqualified CPUC Decommissioning Master Trust Agreement.

Once again, the NRC has illegally failed to provide a required hearing on a material issue.[25] Moreover, the NRC's statement that it will condition the license to ensure that adequate funds are segregated and assigned to the decommissioning of DCPP (ER 1162-1163) is not a basis for denying CPUC's contention. A trust must be actively managed to realize financial appreciation so that all required decommissioning funds will be available when needed. A trust fund managed by Enron would not, hopefully, give the NRC assurance that moneys in that fund would not be squandered. The NRC's complete failure to even acknowledge CPUC's concerns about the identity and, therefore, reliability of the decommissioning trust fund managers is arbitrary and capricious. *A.L.Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491-92 (D.C.Cir. 1995).

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[25] CPUC also contended that PG&E's proposal to transfer regulatory control of the decommissioning trust fund from CPUC to an entity not regulated by the CPUC called into question the NRC's ability to make the predictive finding that the trust fund will be fully funded when the plant is ready to be decommissioned. The NRC responded by observing that, "CPUC's concerns about maintaining its regulatory authority over the decommissioning trusts are not within the NRC's area of expertise and are more appropriately resolved by the bankruptcy court and FERC." (ER 1162.) This is clearly incorrect. The NRC must be concerned with the identity of the regulator of the Trusts in order to make the predictive finding that the Trusts will be appropriately managed to ensure the availability of decommissioning funds when they are needed.

3) *The NRC Improperly Rejected CPUC's Contention Relating to California's Exclusive Regulatory Responsibilities*

The CPUC also contended that the transfer of DCPP's license would result in a major diminution of CPUC's regulatory oversight of DCPP and could lead to adverse impacts on public health and safety as a result of diminished assurance of financial qualification. (ER 0054-0061.) The Commission dismissed this contention by noting that its action was not the "root of CPUC's apparent discomfiture." (ER 1164.) This is clearly incorrect. If the NRC authorizes the transfer consistent with the PG&E Plan, the transfer under the conditions approved by the NRC will directly result in the CPUC having a diminished role over ensuring the financial qualification that is an essential element of safe operation.[26] Thus, this issue is squarely within the NRC's sphere of concern.

The NRC also noted that the CPUC's oversight is not necessary to protect public health and safety from radiological risks. That, said the Commission, is its

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[26] In this regard, see Cal. Pub. Util. Code § 377, which specifically mandates that the CPUC is to retain regulatory authority over plants such as DCPP, which remain the property of the state's regulated electric utilities, "until the owner has applied to the [CPUC] and has been authorized by the [CPUC] under Section 851 to undertake that disposal." This law goes on to recite that "no facility for the generation of electricity owned by a public utility may be disposed of prior to January 1, 2006" and that the CPUC "shall ensure that public utility generation assets remain dedicated to service for the benefit of California ratepayers." There can be no doubt that NRC approval of the requested license transfer for DCPP would directly contravene this state law.

role. (ER 1164.) Again, the Commission refuses to acknowledge that it has explicitly established a link between financial qualification and public health and safety. The CPUC is clearly the expert agency to ensure financial qualification on a day-to-day basis. The NRC's principal focus is active oversight of the safety of nuclear power plant operation, not on the underlying financial condition of the entities running those plants. The state's focus on financial qualifications and the NRC's focus on technical operations are equally important functions that must be coordinated. However, the Commission wrongfully overlooked this important regulatory role that the state plays in its blithe dismissal of the CPUC's financial and state regulatory oversight issues.

4) The NRC Improperly Rejected CPUC's Contention Regarding Public Safety and Welfare Concerns

Finally, the CPUC contended that the license transfer could adversely impact public safety and welfare. Specifically, the CPUC pointed out that if the requested license transfer is approved, DCPP will operate on a free market, rather than on a regulated cost-of-service, basis. As a result, in response to market constraints, DCPP will try to downsize its workforce. Even though DCPP will be locked into a 12-year contract to provide power at above market rates, the profits realized will not necessarily be applied towards plant maintenance and safety. Rather, the transferee will most likely follow the industry trend and not hire the full complement of staff from DCPP's current owner, PG&E. Similarly, DCPP will

probably increase its use of overtime. Safety and reliability can only be negatively affected by the likely implementation of such policies. Moreover, after transfer, DCPP will have no rate base to support it in time of financial need. Thus, the proposed license transfer lacks any adequate assurances of DCPP's ability and financial wherewithal to assure safe operation, and a dip in the profitability of the plant could therefore compromise public safety. (ER 0064-0069.) In addition, the Commission dismissed the CPUC's concern that the proposed license transfer would effectively eliminate an important state oversight body, the Diablo Canyon Independent Safety Committee. (ER 408-969, 1167.)

The NRC dismissed the CPUC's concerns as "speculation and suspicions." (ER 1165.) However, the CPUC's concerns are not the idle speculations of a malcontent. They are based on its long experience as an expert regulatory agency. The NRC's denigration of this expertise is contrary to the well-established principle that an agency is presumed to have expertise in the matters over which it has statutory jurisdiction. *Massachusetts v. U.S. Nuclear Regulatory* Commission 856 F.2d 378, 382 (1st Cir. 1988); *Massachusetts, supra*, 924 F.2d at 324. Where, as here, an agency fails to respond cogently to expert criticism but, instead, responds in a conclusory manner, the agency response is arbitrary and capricious. *A.L.Pharma, Inc., supra*, 62 F.3d at 1491-92.

Specifically, the CPUC's petition to intervene expressed concern that after reorganization the newly licensed entity may follow an industry trend in staff reductions. (ER 0066.) The NRC dismissed this as a bare assertion, without supporting documentation and with the observation that "we are reviewing the proposed DCPP license transfer in this proceeding, not the entire nuclear power generation industry." (ER 1166.)

However, the Commission's rationale in this regard ignores common knowledge. The Commission is fully aware that staff reductions have been underway at nuclear power plants for several years. There was no need for CPUC to support its contention with documentation of that common knowledge to the expert regulator. Moreover, the question of the existence of a trend in the industry is highly relevant to the DCPP license transfer proceeding, because it is evidence of competitive pressure that could lead to similar staffing reductions here.

The Commission also notes that if CPUC's concerns should materialize, the NRC will identify that situation and take appropriate action. (ER 1165.) If anything, this statement acknowledges the materiality of the issue raised by the CPUC. Therefore, this issue should not have been excluded from the hearing.

For all of the foregoing reasons, the CPUC's contentions should not have been dismissed.

C. The Commission Wrongfully Rejected the County's Bases for Intervening Late

1) The County's Clearly Recognized Interests in the NRC Proceeding Were Wrongfully Trumped by Procedural Considerations

The County's interests in this proceeding were clearly articulated by the NRC:

> As the Diablo Canyon nuclear units are located within its boundaries, the County, as it points out, has a vital public safety interest in the plants' safe operation and eventual decommissioning. If the licensee is not financially qualified, unsafe conditions could threaten the health and safety of the County's citizens. The County's position is analogous to that of an individual living or working within a few miles of the plant. (Footnote omitted). Nevertheless, we deny the County's intervention petition, as the County has not advanced a legitimate reason for the tardy filing of its petition.

(ER 1170.) Despite recognizing these critical substantive issues, the NRC applied its procedural requirements in a vacuum to mechanically reject the County's justifiably untimely petition to intervene.

2) The County's Petition Clearly Met the Standards for Admitting a Late Filed Petition

NRC regulations provide that a late-filed petition may be granted if good cause is shown for failing to file on time. 10 C.F.R. § 2.1308(b). The NRC also will consider the availability of other means by which the petitioner can protect its interests and the extent to which the issues will be broadened or final action will be

delayed. 10 C.F.R. § 2.1308(b)(1)-(2) ("additional factors"). The County clearly demonstrated good cause and satisfied the additional factors.

(a) The County's Petition Demonstrated that it was Late-Filed for Good Cause in Response to New Information

Good cause is shown by explaining a failure to file on time and showing that a filing was made as soon thereafter as possible. *Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7*, 39 NRC 322 (1994). Good cause depends entirely on the substantiality of the reasons assigned for not having filed at an earlier date. *South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642*, 13 NRC 881, 887 n.5 (1981). The availability of new information has long provided a basis for finding good cause.[27] The petitioner must establish that (1) the information is new and could not have been presented earlier, and (2) the petitioner acted promptly after learning of the new information. *Texas Utilities Electric Co.* (Comanche Peak Seam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-73 (1992). Where contentions are filed late only because the information on which they are based was not available until after the filing deadline; the NRC has ruled that good cause for filing late is by definition met in

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[27] *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), citing *Indiana and Michigan Electric Co.* (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972).

such circumstances. *UCS II, supra*, 920 F.2d at 52, citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-50 (1983).[28]

Both the County's Petition to Intervene and the County's Reply to PG&E's Answer clearly explained that the County determined to file a petition only after the new information in CPUC's April 15th Plan became available, which was after the deadline in the NRC's Notice. The County acted promptly to analyze the April 15th Plan, determine it could have substantial impacts on the County and the NRC's proceeding, and draft an intervention petition in less than one month.[29] (ER 1100-1104, 1122-1130.)

Despite the County's explanation, the NRC seized on a minor aspect of the County's discussion and illogically twisted it to justify failing to find good cause. The County gave an example of a situation in which the NRC had relied on changed circumstances that arose after a deadline for filing a petition. That was a case in which new regulatory developments had been found to justify the late filing of an intervention request. *Cincinnati Gas and Electric Co.* (William H. Zimmer

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28 The NRC has applied the same criteria for determining good cause for late-filed contentions as for late-filed petitions to intervene.

29 *Boston Edison Co.* (Pilgrim Nuclear Power Station) ALAB –816, 22 NRC 461, 468 n.27 (1985) (NRC's assessment of the additional factors may take into account whether the length of the delay is measured in days or years.)

Nuclear Station), LBP-80-14, 11 NRC 570 (1980). (ER 1101.) The Commission faulted the County for relying on this case because it addressed "regulatory developments" and not factual issues. (ER 1171.)

The Commission's hyper-technical reliance on this distinction simply ignores the elaborate discussion of the factual changes presented in the County's Reply to PG&E's Answer. The Commission has relied on only a part of the record and, thereby, reached a clearly erroneous conclusion.[30]

The Commission supported its determination to ignore the new facts and the consequential new issue regarding uncertainty in the identity of the eventual DCPP licensee, by stating that: "Recent developments in the bankruptcy proceeding, while new to the bankruptcy case, simply do not constitute *new information related to the Diablo Canyon license transfer application.*" (ER 1171.) This conclusory argument is inconsistent with the Commission's own reliance on facts in the bankruptcy proceeding.

In response to requests from the Petitioners to hold this license transfer proceeding in abeyance until the Bankruptcy Court had adopted a reorganization

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30 *Alvarado Community Hosp. V. Shalala*, 155 F.3d 1115, 1122 (9th Cir. 1998), *opinion amended by Alvarado Community Hosp. V. Shalala*, 166 F.3d 950 (9th Cir. 1999) (*"Alvarado"*) (agency decision arbitrary and capricious where based on an inadequate explanation and evaluation of the data before it); *Motor Vehicle Mfr. Ass'n., supra*, 463 U.S. at 52 (NRC explanation shows conclusion was not product of reasoned decisionmaking).

plan, on April 12, 2002, the Commission requested further briefing on the issue "Have recent filings and developments in PG&E's bankruptcy proceeding had any effect on the pending motions to hold this license transfer proceeding in abeyance?" (ER 1081, 1150-1151.) Based on this briefing, the Commission made the following factual findings:

> The responses indicate (1) that the bankruptcy court has approved the disclosure statement for PG&E's Plan; (2) that the court heard objections to CPUC's alternate plan in early May; (3) that June 17, 2002 is the target date to send ballots to creditors regarding the two proffered plans of reorganization; (4) that confirmation hearings will probably occur in September, 2002; and that a plan could be confirmed by the end of the calendar year. In short, the bankruptcy matter is progressing and there have been no developments that suggest that PG&E's Plan cannot be confirmed. (*Emphasis added*). (ER 1151.)

It is clearly inconsistent for the Commission, on one hand to make a determination about Petitioners' stay requests based on new developments in the bankruptcy proceeding, while, on the other, to dismiss the County's attempt to intervene based on new developments in the bankruptcy proceeding. Furthermore, the facts demonstrate that the Commission's determination that such factual developments do not constitute new information or demonstrate good cause is arbitrary and capricious and an abuse of discretion. *Alvarado, supra*, 155 F.3d at 1122-23 (inconsistent reliance on relevant data for one analysis but not for another); *Mattis v. U.S. Immigration and Naturalization Service*, 774 F.2d 965, 969 (9th Cir. 1985).

The Commission also stated that, "It is impossible to see how CPUC's submission of a competing bankruptcy plan changes the license transfer plan before us." (ER 1171.) What the Commission refused to acknowledge was that CPUC's submission created a substantial likelihood that PG&E's Plan would not be implemented as proposed, so that continuing the NRC hearing by focusing solely on the PG&E Plan could defeat one of the purposes of the hearing, *i.e.*, determining who will be the licensee and whether it is qualified to operate the DCPP.

Finally, the Commission stated that "Moreover, nothing in the County's petition to intervene depends on the CPUC Plan; all of the County's objections are associated with PG&E's license transfer application, which has been before the Commission for many months." (ER 1171.) This is blatantly incorrect. The County's petition was motivated by the very existence of the April 15th Plan and the fact that it would not require a license transfer. It is this resultant uncertainty in the identity of the final licensee for DCPP that the County sought to raise at the hearing. It is this Commission intransigence in refusing to consider the impact of the CPUC filing that makes its decision arbitrary and capricious. *Menorah Medical Center v. Heckler*, 768 F.2d 292 (8th Cir. 1985) (failure to consider critical aspects of a problem arbitrary and capricious).

(b) The NRC Failed to Apply the Appropriate Weight to the "Additional Factors" Raised by the County's Petition

In considering whether to admit a late-filed petition, the NRC also will consider the availability of other means by which the Petitioner can protect its interests and the extent to which the issues will be broadened or final action will be delayed; the "additional factors." The Commission found that these additional factors cut in opposite directions. In reaching this conclusion, the Commission failed to address the County's arguments and reached the wrong result.

The two additional factors in Subpart M are a modified subset of four comparable factors for the formal adjudicatory proceedings under Subpart G, 10 C.F.R. § 2.714(a)(1)(ii)-(iv).[31] The County suggested that the differences between the lateness criteria in Subpart G and Subpart M indicated a Commission intention to modify the process of weighing the additional factors[32] and that the County's needs to protect the health and well-being of its citizens should be weighed heavily in light of the limited availability of other means by which the petitioner can

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31 Two principal changes are: (1) deletion of consideration of the extent to which the petitioner's participation may reasonably be expected to assist in the development of a sound record; and (2) a recasting of the focus of delay from delaying the proceeding to delaying final action on an application.

32 The County proposed that the formality of a Subpart G adjudication, as compared with the informality of Subpart M proceeding, implied that the weights given to the additional factors in Subpart G proceedings would not be appropriate for Subpart M proceedings, especially when late intervention occurred before the initiation of a hearing.

protect its interests. The Commission completely ignored this request, even though it acknowledged that by rejecting CPUC's intervention petition, no party would represent the County's interests at the proceeding. The Commission did not address any of the County's suggestions or arguments regarding how to weigh the additional factors in a Subpart M proceeding. The Commission's failure to provide a response is arbitrary and capricious. *Beno v. Shalala*, 30 F.3d 1057, 1074-76 (9th Cir. 1994) (where the agency failed to consider the consequences of objections, the decision should be reversed and remanded); *Motor Vehicle Mfr. Ass'n., supra*, 463 U.S. at 46-57 (failure to consider relevant alternatives).

The Commission also misapplied the potential for delay provision in 10 C.F.R. § 2.1308(b)(2). The County had stated that granting its petition at this early stage in the proceeding would not result in substantial delay. (ER 1126.)[33] Contrary to its precedent, the Commission did not consider the posture of the proceeding[34] but simply stated that the issues in the proceeding would be

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[33] *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), LBP-99-03, 49 NRC 40, 49 (1999); *Puget Sound Power and Light Co.*, (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 985 (1982).

[34] *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), AlAB-747, 18 NRC 1167, 1173 (1983). The NRC also has stated that a key public policy consideration for barring late intervenors is one of fairness, *i.e.*, the public's interest in the timely and orderly conduct of NRC proceedings. *Houston Lighting and Power Co.* (South Texas Project, Units

broadened by the County's participation, thereby "possibly resulting in a delay of the final action by lengthening any potential hearing." (ER 1172.) This conclusory statement is arbitrary and capricious, because it presupposes that the County's participation in this proceeding would substantially delay the Commission's review of PG&E's license transfer application. *Arizona Cattle Growers' Association v. United States Fish and Wildlife*, 273 F.3d 1229, 1244 (9th Cir. 2001) (speculation unsupported by the record arbitrary and capricious).

The NRC also did not properly weigh the County's obligations to its citizens and the need for a complete record when the Commission determined that its refusal to let the County present the public's concerns was counterbalanced by the "possibility" of delay. Finally, even if the County's showings on these other additional factors were to be erroneously characterized as limited, where, as here, good cause for lateness has been demonstrated, the showings necessary on the other additional factors is attenuated. *Puget Sound Power & Light Company* (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63 (1979). Therefore, the Commission could not rely on its erroneous determination that the

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1 and 2), ALAB-549, 9 NRC 644, 648-49 (1979). However, in this case, the County's late-filed petition in no way compromised the Commission's timely and orderly conduct of the proceedings, and the NRC Order failed to realistically consider the then-current posture of the case: the NRC had not even issued a ruling on the standing of petitioners that filed timely intervention requests or a final order with respect to the issues those timely requests had presented.

additional factors were in equipoise to overcome the showing of good cause. For all these reasons, when compared with the underlying purposes of a hearing – determining that the license for a nuclear power plant can be transferred without endangering public health and safety – the NRC's unexamined application of the expediency factors and unsupportable application in this case must be vacated. *Motor Vehicle Mfr. Ass'n., supra*, 463 U.S. at 48.

D. The Commission Erroneously Rejected the County's Litigable Contentions

The County raised contentions with respect to three issues: (1) adequacy of the financial qualifications of Gen and Nuclear or any entities that might arise from the bankruptcy; (2) adequacy of provisions for ensuring an available source of off-site power; and (3) the need for a stay until the bankruptcy proceeding is completed. (ER 1110.) Each contention was supported by facts and references to sources and documents and provided sufficient information to demonstrate a material issue that needed to be resolved at hearing, thereby meeting the NRC's criteria for admissibility. 10 C.F.R. §§ 2.1306(b)(2)(ii)-(iv). Nevertheless, as the following analysis shows, the NRC erroneously rejected the County's contentions.

1) The NRC Improperly Rejected the County's Two Substantive Contentions with a Conclusory Dismissal

The NRC addressed the County's first and second contentions (the substantive contentions) together by rejecting them with a two-sentence, conclusory dismissal supplemented by a footnote. The Commission stated that:

> The County, in any event, raises no litigable issues. General concerns about Gen's financial viability and about E-trans' financial ability to provide offsite power at Diablo Canyon do not suffice for intervention. (ER 1172, footnote 83.)

Footnote 83 in the NRC Order (*id.*) purports to support this conclusory statement but does not, as is shown below in the detailed analysis of the NRC's wrongful rejection of each contention. Therefore, the NRC's conclusory rejection of the County's litigable substantive contentions does not provide the reasoned basis that an agency is required to give to support its decision, especially a decision which completely precludes the public that is most likely to be impacted by a license transfer decision from participating in that decision. Moreover, as discussed in detail below, the Commission's conclusory decision did not consider the entire record. Therefore, the decision should be reversed and remanded.[35] *Tourus Records, Inc., supra*, 259 F.3d at 737; *Anderson, supra*, 953 F.2d at 806 (a

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[35] The inadequacy of the Commission's conclusory response to the County is clearly illustrated by a comparison with the NRC's extensive dissection of the contentions proffered by CPUC.

cursory or conclusory order devoid of reasoning is an abuse of discretion and the failure to consider the record as a whole is a reason to reverse and remand).

2) *The Commission Improperly Rejected the County's Contention Regarding Financial Qualifications of the Ultimate Licensees*

The County contended that relevant, material issues of fact were raised regarding whether Gen and Nuclear (or any alternative corporate structure which may be adopted by the Bankruptcy Court) will have adequate financial qualifications to ensure safe operation of DPCC. The County identified four relevant deficiencies in PG&E's claim that the new entities emerging from bankruptcy would be financially qualified under 10 C.F.R. § 50.80. (ER 1111-1113.) First, Gen and Nuclear provided no support for their claims of projected income and costs over the next five years, as required by the NRC, because such projections could not be made without rate-setting directions from either the FERC or the CPUC. (ER 1111-1112.) However, the accuracy of PG&E's assumptions underlying its projections are precisely the factual issues to be resolved at a hearing. (*Id.*) Second, Enclosure 8 of PG&E's application based projected revenues on an excessively priced PSA, which has been filed at the FERC. This contract is prohibited under state law and is contrary to requirements set forth under Section 377 of the California Public Utilities Code. (ER 1112.) The County reiterated its concerns about the validity of these assumptions and whether those

rates would receive regulatory approval. Third, in the absence of a resolution of the bankruptcy proceeding, there was no basis for PG&E to claim that it can fund the maintenance costs associated with a long-term plant shutdown. Until a reorganization plan is selected and funded, neither Gen, Nuclear nor their parent company are in a position to commit that they meet NRC's requirement to have on hand six months of cash or cash equivalents to pay operating costs during an extended outage. (ER 1112-1113.) Fourth, in the absence of an allocation of assets from the bankruptcy proceeding, Gen and Nuclear cannot submit the required information about their corporate structure and how it would adequately protect public health and safety. (ER 1113.)

In footnote 83 of the NRC Order, the Commission purported to support its conclusory denial of this contention by claiming that the County failed to provide an adequate foundation for its contentions and calling into question the County's representation that its experts have reviewed PG&E's application ("its experts have *allegedly* performed a review," (ER 1172, emphasis added.) A late petitioner, said the Commission, "should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." (*Id.*) The County's explanation that the issues are moving targets in light of the ongoing bankruptcy proceeding and the changes to PG&E's Plan was dismissed by the Commission, even though, under the circumstances, the

County's financial qualifications contention meets the Commission's criterion that a petitioner should set out the issues "with as much particularity as possible."

Where it was possible to address an issue with particularity, the County did so. However, the Commission chose not to acknowledge that the County had provided the necessary detail. Under Commission precedent, in a license transfer proceeding, a petitioner is entitled to a hearing if it has raised a genuine issue about the accuracy or plausibility of the applicant's cost and revenue projection submitted to satisfy financial qualification rules. *North Atlantic Energy Services Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 220-21 (1999). A petitioner can challenge the transferee's cost and revenue projections if the challenge is based on sufficient facts, expert opinion, or documentary support. *Power Authority of the State of New York, et al.* (James FitzPatrick Nuclear Power Plant; Indian Point Unit 3), CLI-00-22, 52 NRC 266, 300 (2000). Expert opinion support is not required for a contention if there is other supporting information sufficient to provide the contention with an admissible basis. *Private Spent Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 367 (1998).

The County challenged PG&E's reliance on above-market-price PSAs to demonstrate financial qualification.[36] No additional facts were needed by the Commission to conclude that PG&E's reliance on unapproved PSAs at above-market prices in the current California energy market raise a material, litigable issue. Therefore, the Commission's decision is not supportable and must be vacated and remanded.

3) *The Commission Improperly Rejected the County's Contention Regarding the Availability of Off-Site Power*

The NRC's safety requirements in 10 C.F.R. Part 50, Appendix A General Design Criterion 17 and 10 C.F.R. § 50.63 require licensees to make adequate provisions for ensuring an available source of off-site power to the facility. This is a safety matter because a nuclear power plant must be kept cool by the circulation of massive amounts of water, even when shut down, in order to dissipate the heat

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[36] Similar evidence has been relied upon to call into question PG&E's financial qualifications in an NRC proceeding to license an independent spent fuel storage installation ("ISFSI") at DCPP. In that proceeding, the NRC's Atomic Safety and Licensing Board found that "petitioners . . . have set forth one admissible contention -- relating to PG&E's current financial qualifications in light of its pending bankruptcy . . . ." The contention calls into question the "impact of PG&E's bankruptcy on its continuing ability to undertake the new activity of constructing, operating, and decommissioning an ISFSI by reason of its access to continued funding as a regulated entity or through credit markets." *In the Matter of Pacific Gas and Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-02-23 (December 2, 2002). (ER 1179, 1213-1214.)

generated by the ongoing radioactive decay of elements in the fuel. The County contended that the application did not provide sufficient information to demonstrate compliance with these requirements because, in light of the uncertainties arising from the bankruptcy proceeding, the application did not and could not provide sufficient detail about the ability of ETrans to maintain the transmission lines and facilities necessary to supply off-site power to determine whether ETrans will conform to the NRC's regulations. (ER 1114.)

The Commission rejected this contention for the same conclusory reasons discussed above regarding the financial qualification contention. Therefore, this aspect of the Commission's decision suffers from the same infirmity of not providing a reasoned basis for the Commission's decision. Accordingly, this decision also must be reversed and remanded.

4) The Commission Wrongfully Refused the County's Request to Stay the License Transfer Proceeding

The Commission rejected the County's contention regarding a stay on the basis of the NRC's general policy to expedite adjudicatory proceedings, especially in the time-sensitive license transfer area. In support of applying this general policy, the Commission ignored Appellants' contrary allegations and made a

factual finding that the bankruptcy case was moving forward and could yield a final result at the end of the year. (ER 1152.)[37]

The Commission's decision is based on faulty premises and did not address the issue raised by Appellants. Not only did the NRC erroneously predict the timing of the conclusion of the bankruptcy proceeding based on PG&E's representations but it also ignored PG&E's need to obtain approvals from the FERC and CPUC, among others. Accordingly, the record does not support the NRC's view that its proceeding is the time-sensitive element in the transfer of these licenses. Therefore, the NRC's decision should be vacated and remanded.

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[37] Currently, hearings on the Joint Plan in Bankruptcy Court are not yet concluded, and hearings on the PG&E Plan begin on December 16, 2002. Hearing dates are currently scheduled into February 2003. On February 7, 2002, the Bankruptcy Court issued its Memorandum Decision Regarding Preemption and Sovereign Immunity, which held that section 1123(a)(5) of the Bankruptcy Code does not expressly preempt state law (the "Montali Opinion"). On March 18, 2002, the Bankruptcy Court entered judgment on that decision. PG&E appealed that decision to the District Court. On August 30, 2002, Judge Vaughn Walker reversed the Montali Opinion and entered judgment on September 19, 2002. *In re Pacific Gas and Electric,* No. C-02-1559 VRW (August 30, 2002). The CPUC, the State of California and other appellants filed a notice of appeal to this circuit on September 30, 2002, from the September 19, 2002 judgment entered by the District Court. Currently, this circuit has granted a request for an expedited appeal, and the Appellants therein filed their Opening Brief on November 6, 2002. PG&E's brief is due December 6, and the reply brief is due December 20. *In re Pacific Gas and Electric,* Docket No. 02-16990, United States Court of Appeal for the Ninth Circuit. If this circuit agrees with Appellants' position in support of the Montali Opinion, PG&E would be prohibited from transferring the DCPP license that is at issue in the instant case.

Pacific Coast Federation of Fishermen's Associations, Inc. v. National Marine Fisheries Service, 253 F.3d 1137, 1146, *amended and superceded on other grounds*, 265 F.3d 1028 (9th Cir. 2001) (agency decision based on assumptions that ignore identifiable concerns is arbitrary and capricious).

III. The Commission's Direction to the NRC Staff to Consider Appellants' Petitions as Comments and the Commission's Grant of Government Participant Status to Appellants Does Not Cure the NRC's Abuse of Discretion

Having wrongfully determined that Appellants failed to raise litigable issues, the Commission, nonetheless, referred the petitions to the NRC staff to be considered as comments under 10 C.F.R. § 2.1305.[38] The referral was limited to the "proposed license transferees' ability to operate the Diablo Canyon power plants safely." (ER 1173.)

This referral can have no legal effect on the NRC's wrongful dismissal of Appellants' intervention petitions because the NRC staff has not been directed to review all of Appellants' material issues and a discretionary review of those issues does not provide a legally cognizable alternative to a required hearing. Section 189.a of the AEA, 42 U.S.C § 2239(a)(1)(A).

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[38] 10 C.F.R. § 2.1305 provides that the Commission "will consider and, if appropriate, respond to these comments, but these comments do not otherwise constitute part of the decisional record."

Despite wrongfully dismissing all of Appellants' contentions and refusing to admit them to a hearing as parties, the Commission piously proclaimed its recognition of the benefits of participation in its proceedings by interested governments and offered Appellants opportunities to participate under 10 C.F.R. § 2.715(c), if a hearing is conducted. This offer is a hollow alternative that cannot legally remedy the Commission's errors. The direction to the NRC staff to review the CPUC's and County's petitions as comments similarly fails to address the NRC's legal error.

The right to participate under 10 C.F.R. § 2.715(c) is contingent on the NRC's conduct of a hearing. If no proposed contentions survive the Commission's non-public, internal review of the issues raised below, there will be no hearing on this license transfer application. Also, in its Order, the Commission limited participation by Appellants as of right under 10 C.F.R. § 2.715(c) to the issues that have been accepted in this hearing. (ER 1169.) At the time of the Commission's decision, the only issues on which a hearing might possibly have been held were anti-trust issues. (ER 1149.) These issues do not address the matters of concern to the citizens of San Luis Obispo County or the CPUC. For these reasons, this alternative does not cure a deprivation of hearing rights under Section 189.a of the AEA, 42 U.S.C § 2239(a)(1)(A).

The Commission's rejection of Appellants' petitions to intervene as parties and attempts to litigate significant health and safety issues in the NRC proceeding on PG&E's license transfer proceeding raises the very concern identified in *UCS II* regarding the possibility that the NRC would manipulate its procedural requirement to prevent all parties from raising material issues. *UCS II, supra*, 920 F.2d at 56 (any application of the NRC's late filing rules to prevent all parties from raising material issues which could not be raised earlier will be subject to judicial review, and the validity of the rules as they are applied can be addressed at that time). The NRC has erroneously evaluated the materiality of issues presented in this proceeding, contrary to its legal obligations. *Massachusetts, supra*, 924 F.2d at 335. The NRC's offers to review Appellants' contentions in the back rooms of the NRC and to allow Appellants to participate on other parties' issues does not correct these legal wrongs.

CONCLUSION

Appellants the California Public Utilities Commission and the County of San Luis Obispo respectfully request that the Court grant this Petition for Review of NRC Memorandum and Order CLI-02-16. The Nuclear Regulatory Commission should be directed to admit both Appellants as parties and to hold hearings on each of their proffered contentions in the Diablo Canyon license transfer proceedings. At a minimum, this Court should direct the NRC to hold in abeyance any ruling on PG&E's license transfer application until such time as the Bankruptcy Court issues a ruling indicating whether any license transfer for DCPP is even required.

Dated, December 5, 2002

Respectfully submitted,

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Docket No. 02-72735

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA PUBLIC UTILITIES COMMISSION

AND

COUNTY OF SAN LUIS OBISPO

Petitioners-Appellants,

v.

U.S NUCLEAR REGULATORY COMMISSION,

Defendants-Appellees.

PACIFIC GAS AND ELECTRIC COMPANY, et al.

Intervenors.

STATEMENT OF RELATED CASES

The following related cases are pending in Bankruptcy Court in the Northern District of California and before the United States Court of Appeal for the Ninth Circuit:

In re Pacific Gas and Electric Co., Case No. 01-30923 DM (Bankr. N.D. Cal. filed April 6, 2001).

In re Pacific Gas and Electric Co., Docket No. 02-16990 (United States Court of Appeal for the Ninth Circuit, filed September 30, 2002)

Dated at San Francisco, California, this 5th day of December, 2002

Laurence G. Chaset, Esq.

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

Addendum Contents

5 U.S.C. § 706(2)(A)

Sec. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

. . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . . .

28 U.S.C. § 2342(4)

Sec. 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

. . . .

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

. . . .

28 U.S.C. § 2344

Sec. 2344 Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

42 U.S.C. § 2232(a)

Sec. 2232. License applications

(a) Contents and form

Each application for a license hereunder shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant, the character of the applicant, the citizenship of the applicant, or any other qualifications of the applicant as the Commission may deem appropriate for the license. In connection with applications for licenses to operate production or utilization facilities, the applicant shall state such technical specifications, including information of the amount, kind, and source of special nuclear material required, the place of the use, the specific characteristics of the facility, and such other information as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public. Such technical specifications shall be a part of any license issued. The Commission may at any time after the filing of the original application, and before the expiration of the license, require further written statements in order to enable the Commission to determine whether the application should be granted or denied or whether a license

should be modified or revoked. All applications and statements shall be signed by the applicant or licensee. Applications for, and statements made in connection with, licenses under sections 2133 and 2134 of this title shall be made under oath or affirmation. The Commission may require any other applications or statements to be made under oath or affirmation.

. . . .

42 U.S.C. § 2234

Sec. 2234. Inalienability of licenses

No license granted hereunder and no right to utilize or produce special nuclear material granted hereby shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this chapter, and shall give its consent in writing. The Commission may give such consent to the creation of a mortgage, pledge, or other lien upon any facility or special nuclear material, owned or thereafter acquired by a licensee, or upon any leasehold or other interest to such facility, and the rights of the creditors so secured may thereafter be enforced by any court subject to rules and regulations established

by the Commission to protect public health and safety and promote the common defense and security.

42 U.S.C. § 2239(a)

Sec. 2239. Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections \1\ 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an

amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

\1\ So in original. Probably should be "section".

. . . .

10 C.F.R. § 2.714(a)(1)(ii)-(iv)

Sec. 2.714 Intervention.

(a)(1) Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene. In a proceeding noticed pursuant to Sec. 2.105, any person whose interest may be affected may also request a hearing. The petition and/or request shall be filed not later than the time specified in the notice of hearing, or as provided by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, or as provided in Sec. 2.102(d)(3).

Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d)(1) of this section:

. . . .

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

. . . .

10 C.F.R. § 2.715(c)

Sec. 2.715 Participation by a person not a party.

. . . .

(c) The presiding officer will afford representatives of an interested State, county, municipality, Federally-recognized Indian Tribe, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate

witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue. Such participants may also file proposed findings and exceptions pursuant to Secs. 2.754 and 2.762 and petitions for review by the Commission pursuant to Sec. 2.786. The presiding officer may require such representative to indicate with reasonable specificity, in advance of the hearing, the subject matters on which he desires to participate.

10 C.F.R. § 2.1305

Sec. 2.1305 Written comments.

(a) As an alternative to requests for hearings and petitions to intervene, persons may submit written comments regarding license transfer applications. The Commission will consider and, if appropriate, respond to these comments, but these comments do not otherwise constitute part of the decisional record.

(b) These comments should be submitted within 30 days after public notice of receipt of the application and addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff.

(c) The Commission will provide the applicant with a copy of the comments. Any response the applicant chooses to make to the comments must be submitted within

10 days of service of the comments on the applicant. Such responses do not constitute part of the decisional record.

10 C.F.R. §§ 2.1306(b)(2)(ii)-(iv)

Sec. 2.1306 Hearing request or intervention petition.

. . . .

(b) Hearing requests and intervention petitions must--

(2) Set forth the issues sought to be raised and

. . . .

(ii) Demonstrate that such issues are relevant to the findings the NRC must make to grant the application for license transfer,

(iii) Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issues, and

(iv) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact;

. . . .

10 C.F.R. § 2.1308(b)

§ 2.1308 Commission action on a hearing request or intervention petition.

. . . .

(b) Untimely hearing requests or intervention petitions may be denied unless good cause for failure to file on time is established. In reviewing untimely requests or 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. § 20.1402

Sec. 20.1402 Radiological criteria for unrestricted use.

A site will be considered acceptable for unrestricted use if the residual radioactivity that is distinguishable from background radiation results in a TEDE to an average member of the critical group that does not exceed 25 mrem (0.25 mSv) per year, including that from groundwater sources of drinking water, and that the residual radioactivity has been reduced to levels that are as low as reasonably achievable (ALARA). Determination of the levels which are ALARA must take

into account consideration of any detriments, such as deaths from transportation accidents, expected to potentially result from decontamination and waste disposal.

10 C.F.R. § 20.1403

Sec. 20.1403 Criteria for license termination under restricted conditions.

A site will be considered acceptable for license termination under restricted conditions if:

(a) The licensee can demonstrate that further reductions in residual radioactivity necessary to comply with the provisions of Sec. 20.1402 would result in net public or environmental harm or were not being made because the residual levels associated with restricted conditions are ALARA. Determination of the levels which are ALARA must take into account consideration of any detriments, such as traffic accidents, expected to potentially result from decontamination and waste disposal;

(b) The licensee has made provisions for legally enforceable institutional controls that provide reasonable assurance that the TEDE from residual radioactivity distinguishable from background to the average member of the critical group will not exceed 25 mrem (0.25 mSv) per year;

(c) The licensee has provided sufficient financial assurance to enable an independent third party, including a governmental custodian of a site, to assume

and carry out responsibilities for any necessary control and maintenance of the site. Acceptable financial assurance mechanisms are--

(1) Funds placed into an account segregated from the licensee's assets and outside the licensee's administrative control as described in Sec. 30.35(f)(1) of this chapter;

(2) Surety method, insurance, or other guarantee method as described in Sec. 30.35(f)(2) of this chapter;

(3) A statement of intent in the case of Federal, State, or local Government licensees, as described in Sec. 30.35(f)(4) of this chapter; or

(4) When a government entity is assuming custody and ownership of a site, an arrangement that is deemed acceptable by such governmental entity.

(d) The licensee has submitted a decommissioning plan or License Termination Plan (LTP) to the Commission indicating the licensee's intent to decommission in accordance with Secs. 30.36(d), 40.42(d), 50.82 (a) and (b), 70.38(d), or 72.54 of this chapter, and specifying that the licensee intends to decommission by restricting use of the site. The licensee shall document in the LTP or decommissioning plan how the advice of individuals and institutions in the community who may be affected by the decommissioning has been sought and incorporated, as appropriate, following analysis of that advice.

(1) Licensees proposing to decommission by restricting use of the site shall seek advice from such affected parties regarding the following matters concerning the proposed decommissioning--

(i) Whether provisions for institutional controls proposed by the licensee:

(A) Will provide reasonable assurance that the TEDE from residual radioactivity distinguishable from background to the average member of the critical group will not exceed 25 mrem (0.25 mSv) TEDE per year;

(B) Will be enforceable; and

(C) Will not impose undue burdens on the local community or other affected parties.

(ii) Whether the licensee has provided sufficient financial assurance to enable an independent third party, including a governmental custodian of a site, to assume and carry out responsibilities for any necessary control and maintenance of the site;

(2) In seeking advice on the issues identified in Sec. 20.1403(d)(1), the licensee shall provide for:

(i) Participation by representatives of a broad cross section of community interests who may be affected by the decommissioning;

(ii) An opportunity for a comprehensive, collective discussion on the issues by the participants represented; and

(iii) A publicly available summary of the results of all such discussions, including a description of the individual viewpoints of the participants on the issues and the extent of agreement or disagreement among the participants on the issues; and

(e) Residual radioactivity at the site has been reduced so that if the institutional controls were no longer in effect, there is reasonable assurance that the TEDE from residual radioactivity distinguishable from background to the average member of the critical group is as low as reasonably achievable and would not exceed either--

(1) 100 mrem (1 mSv) per year; or

(2) 500 mrem (5 mSv) per year provided that the licensee--

(i) Demonstrates that further reductions in residual radioactivity necessary to comply with the 100 mrem/y (1 mSv/y) value of paragraph (e)(1) of this section are not technically achievable, would be prohibitively expensive, or would result in net public or environmental harm;

(ii) Makes provisions for durable institutional controls;

(iii) Provides sufficient financial assurance to enable a responsible government entity or independent third party, including a governmental custodian of a site, both to carry out periodic rechecks of the site no less frequently than every 5 years to assure that the institutional controls remain in place as necessary to meet the criteria of Sec. 20.1403(b) and to assume and carry out responsibilities for any

necessary control and maintenance of those controls. Acceptable financial assurance mechanisms are those in paragraph (c) of this section.

10 C.F.R. § 50.33(f)

Sec. 50.33 Contents of applications; general information.

Each application shall state:

. . . .

(f) Except for an electric utility applicant for a license to operate a utilization facility of the type described in Sec. 50.21(b) or Sec. 50.22, information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with regulations in this chapter, the activities for which the permit or license is sought. As applicable, the following should be provided:

(1) If the application is for a construction permit, the applicant shall submit information that demonstrates that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs. The applicant shall submit estimates of the total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.

(2) If the application is for an operating license, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance

of obtaining the funds necessary to cover estimated operation costs for the period of the license. The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs. An application to renew or extend the term of an operating license must include the same financial information as is required in an application for an initial license.

(3) Each application for a construction permit or an operating license submitted by a newly-formed entity organized for the primary purpose of constructing or operating a facility must also include information showing:

(i) The legal and financial relationships it has or proposes to have with its stockholders or owners;

(ii) Its financial ability to meet any contractual obligation to the entity which they have incurred or proposed to incur; and

(iii) Any other information considered necessary by the Commission to enable it to determine the applicant's financial qualification.

(4) The Commission may request an established entity or newly-formed entity to submit additional or more detailed information respecting its financial arrangements and status of funds if the Commission considers this information appropriate. This may include information regarding a licensee's ability to continue

the conduct of the activities authorized by the license and to decommission the facility.

10 C.F.R. § 50.34(b), (g)

Sec. 50.34 Contents of applications; technical information.

(b) Final safety analysis report. Each application for a license to operate a facility shall include a final safety analysis report. The final safety analysis report shall include information that describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole, and shall include the following:

(1) All current information, such as the results of environmental and meteorological monitoring programs, which has been developed since issuance of the construction permit, relating to site evaluation factors identified in part 100 of this chapter.

(2) A description and analysis of the structures, systems, and components of the facility, with emphasis upon performance requirements, the bases, with technical justification therefor, upon which such requirements have been established, and the evaluations required to show that safety functions will be accomplished. The description shall be sufficient to permit understanding of the system designs and their relationship to safety evaluations.

(i) For nuclear reactors, such items as the reactor core, reactor coolant system, instrumentation and control systems, electrical systems, containment system, other engineered safety features, auxiliary and emergency systems, power conversion systems, radioactive waste handling systems, and fuel handling systems shall be discussed insofar as they are pertinent.

(ii) For facilities other than nuclear reactors, such items as the chemical, physical, metallurgical, or nuclear process to be performed, instrumentation and control systems, ventilation and filter systems, electrical systems, auxiliary and emergency systems, and radioactive waste handling systems shall be discussed insofar as they are pertinent.

(3) The kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter.

(4) A final analysis and evaluation of the design and performance of structures, systems, and components with the objective stated in paragraph (a)(4) of this section and taking into account any pertinent information developed since the submittal of the preliminary safety analysis report. Analysis and evaluation of ECCS cooling performance following postulated loss-of-coolant accidents shall be performed in accordance with the requirements of Sec. 50.46 for facilities for which a license to operate may be issued after December 28, 1974.

(5) A description and evaluation of the results of the applicant's programs, including research and development, if any, to demonstrate that any safety questions identified at the construction permit stage have been resolved.

(6) The following information concerning facility operation:

(i) The applicant's organizational structure, allocations or responsibilities and authorities, and personnel qualifications requirements.

(ii) Managerial and administrative controls to be used to assure safe operation. Appendix B, "Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants," sets forth the requirements for such controls for nuclear power plants and fuel reprocessing plants. The information on the controls to be used for a nuclear power plant or a fuel reprocessing plant shall include a discussion of how the applicable requirements of appendix B will be satisfied.

(iii) Plans for preoperational testing and initial operations.

(iv) Plans for conduct of normal operations, including maintenance, surveillance, and periodic testing of structures, systems, and components.

(v) Plans for coping with emergencies, which shall include the items specified in appendix E.

(vi) Proposed technical specifications prepared in accordance with the requirements of Sec. 50.36.

(vii) On or after February 5, 1979, applicants who apply for operating licenses for nuclear power plants to be operated on multiunit sites shall include an evaluation of the potential hazards to the structures, systems, and components important to safety of operating units resulting from construction activities, as well as a description of the managerial and administrative controls to be used to provide assurance that the limiting conditions for operation are not exceeded as a result of construction activities at the multiunit sites.

(7) The technical qualifications of the applicant to engage in the proposed activities in accordance with the regulations in this chapter.

(8) A description and plans for implementation of an operator requalification program. The operator requalification program must as a minimum, meet the requirements for those programs contained in Sec. 55.59 of part 55 of this chapter.

(9) A description of protection provided against pressurized thermal shock events, including projected values of the reference temperature for reactor vessel beltline materials as defined in Sec. 50.61 (b)(1) and (b)(2).

(10) On or after January 10, 1997, stationary power reactor applicants who apply for an operating license pursuant to this part, or a design certification or combined license pursuant to part 52 of this chapter, as partial conformance to General Design Criterion 2 of appendix A to this part, shall comply with the earthquake engineering criteria of appendix S to this part. However, for those operating license

applicants and holders whose construction permit was issued prior to January 10, 1997, the earthquake engineering criteria in section VI of appendix A to part 100 of this chapter continues to apply.

(11) On or after January 10, 1997, stationary power reactor applicants who apply for an operating license pursuant to this part, or a combined license pursuant to part 52 of this chapter, shall provide a description and safety assessment of the site and of the facility as in Sec. 50.34(a)(1)(ii) of this part. However, for either an operating license applicant or holder whose construction permit was issued prior to January 10, 1997, the reactor site criteria in part 100 of this chapter and the seismic and geologic siting criteria in appendix A to part 100 of this chapter continues to apply.

. . . .

(g) Conformance with the Standard Review Plan (SRP).

(1)(i) Applications for light water cooled nuclear power plant operating licenses docketed after May 17, 1982 shall include an evaluation of the facility against the Standard Review Plan (SRP) in effect on May 17, 1982 or the SRP revision in effect six months prior to the docket date of the application, whichever is later.

(ii) Applications for light water cooled nuclear power plant construction permits, manufacturing licenses, and preliminary or final design approvals for standard plants docketed after May 17, 1982 shall include an evaluation of the facility

against the SRP in effect on May 17, 1982 or the SRP revision in effect six months prior to the docket date of the application, whichever is later.

(2) The evaluation required by this section shall include an identification and description of all differences in design features, analytical techniques, and procedural measures proposed for a facility and those corresponding features, techniques, and measures given in the SRP acceptance criteria. Where such a difference exists, the evaluation shall discuss how the alternative proposed provides an acceptable method of complying with those rules or regulations of Commission, or portions thereof, that underlie the corresponding SRP acceptance criteria.

(3) The SRP was issued to establish criteria that the NRC staff intends to use in evaluating whether an applicant/licensee meets the Commission's regulations. The SRP is not a substitute for the regulations, and compliance is not a requirement. Applicants shall identify differences from the SRP acceptance criteria and evaluate how the proposed alternatives to the SRP criteria provide an acceptable method of complying with the Commission's regulations.

10 C.F.R. § 50.63

Sec. 50.63 Loss of all alternating current power.

(a) Requirements. (1) Each light-water-cooled nuclear power plant licensed to operate must be able to withstand for a specified duration and recover from a station blackout as defined in Sec. 50.2. The specified station blackout duration shall be based on the following factors:

(i) The redundancy of the onsite emergency ac power sources;

(ii) The reliability of the onsite emergency ac power sources;

(iii) The expected frequency of loss of offsite power; and

(iv) The probable time needed to restore offsite power.

(2) The reactor core and associated coolant, control, and protection systems, including station batteries and any other necessary support systems, must provide sufficient capacity and capability to ensure that the core is cooled and appropriate containment integrity is maintained in the event of a station blackout for the specified duration. The capability for coping with a station blackout of specified duration shall be determined by an appropriate coping analysis. Licensees are expected to have the baseline assumptions, analyses, and related information used in their coping evaluations available for NRC review.

(b) Limitation of scope. Paragraph (c) of this section does not apply to those plants licensed to operate prior to July 21, 1988, if the capability to withstand station

blackout was specifically addressed in the operating license proceeding and was explicitly approved by the NRC.

(c) Implementation--(1) Information Submittal. For each light-water-cooled nuclear power plant licensed to operate on or before July 21, 1988, the licensee shall submit the information defined below to the Director of the Office of Nuclear Reactor Regulation by April 17, 1989. For each light-water-cooled nuclear power plant licensed to operate after the effective date of this amendment, the licensee shall submit the information defined below to the Director by 270 days after the date of license issuance.

(i) A proposed station blackout duration to be used in determining compliance with paragraph (a) of this section, including a justification for the selection based on the four factors identified in paragraph (a) of this section;

(ii) A description of the procedures that will be implemented for station blackout events for the duration determined in paragraph (c)(1)(i) of this section and for recovery therefrom; and

(iii) A list of modifications to equipment and associated procedures, if any, necessary to meet the requirements of paragraph (a) of this section, for the specified station blackout duration determined in paragraph (c)(1)(i) of this section, and a proposed schedule for implementing the stated modifications.

(2) Alternate ac source: The alternate ac power source(s), as defined in Sec. 50.2, will constitute acceptable capability to withstand station blackout provided an analysis is performed which demonstrates that the plant has this capability from onset of the station blackout until the alternate ac source(s) and required shutdown equipment are started and lined up to operate. The time required for startup and alignment of the alternate ac power source(s) and this equipment shall be demonstrated by test. Alternate ac source(s) serving a multiple unit site where onsite emergency ac sources are not shared between units must have, as a minimum, the capacity and capability for coping with a station blackout in any of the units. At sites where onsite emergency ac sources are shared between units, the alternate ac source(s) must have the capacity and capability as required to ensure that all units can be brought to and maintained in safe shutdown (non-DBA) as defined in Sec. 50.2. If the alternate ac source(s) meets the above requirements and can be demonstrated by test to be available to power the shutdown buses within 10 minutes of the onset of station blackout, then no coping analysis is required.

(3) Regulatory Assessment: After consideration of the information submitted in accordance with paragraph (c)(1) of this section, the Director, Office of Nuclear Reactor Regulation, will notify the licensee of the Director's conclusions regarding the adequacy of the proposed specified station blackout duration, the proposed equipment modifications and procedures, and the proposed schedule for

implementing the procedures and modifications for compliance with paragraph (a) this section.

(4) Implementation Schedule: For each light-water-cooled nuclear power plant licensed to operate on or before June 21, 1988, the licensee shall, within 30 days of the notification provided in accordance with paragraph (c)(3) of this section, submit to the Director of the Office of Nuclear Reactor Regulation a schedule commitment for implementing any equipment and associated procedure modifications necessary to meet the requirements of paragraph (a) of this section. This submittal must include an explanation of the schedule and a justification if the schedule does not provide for completion of the modifications within two years of the notification provided in accordance with paragraph (c)(3) of this section. A final schedule for implementing modifications necessary to comply with the requirements of paragraph (a) of this section will be established by the NRC staff in consultation and coordination with the affected licensee.

10 C.F.R. § 50.75(e)

Sec. 50.75 Reporting and recordkeeping for decommissioning planning.

. . . .

(e)(1) Financial assurance is to be provided by the following methods.

(i) Prepayment. Prepayment is the deposit made preceding the start of operation into an account segregated from licensee assets and outside the licensee's

administrative control of cash or liquid assets such that the amount of funds would be sufficient to pay decommissioning costs at the time termination of operation is expected. Prepayment may be in the form of a trust, escrow account, Government fund, certificate of deposit, deposit of Government securities or other payment acceptable to the NRC. A licensee may take credit for projected earnings on the prepaid decommissioning trust funds using up to a 2 percent annual real rate of return from the time of future funds' collection through the projected decommissioning period. This includes the periods of safe storage, final dismantlement, and license termination, if the licensee's rate-setting authority does not authorize the use of another rate. However, actual earnings on existing funds may be used to calculate future fund needs.

(ii) External sinking fund. An external sinking fund is a fund established and maintained by setting funds aside periodically in an account segregated from licensee assets and outside the licensee's administrative control in which the total amount of funds would be sufficient to pay decommissioning costs at the time termination of operation is expected. An external sinking fund may be in the form of a trust, escrow account, Government fund, certificate of deposit, deposit of Government securities, or other payment acceptable to the NRC. A licensee may take credit for projected earnings on the external sinking funds using up to a 2 percent annual real rate of return from the time of future funds' collection through

the decommissioning period. This includes the periods of safe storage, final dismantlement, and license termination, if the licensee's rate-setting authority does not authorize the use of another rate. However, actual earnings on existing funds may be used to calculate future fund needs. A licensee, whose rates for decommissioning costs cover only a portion of such costs, may make use of this method only for that portion of such costs that are collected in one of the manners described in this paragraph, (e)(1)(ii). This method may be used as the exclusive mechanism relied upon for providing financial assurance for decommissioning in the following circumstances:

(A) By a licensee that recovers, either directly or indirectly, the estimated total cost of decommissioning through rates established by "cost of service" or similar ratemaking regulation. Public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing, that establish their own rates and are able to recover their cost of service allocable to decommissioning, are assumed to meet this condition.

(B) By a licensee whose source of revenues for its external sinking fund is a ``non-bypassable charge," the total amount of which will provide funds estimated to be needed for decommissioning pursuant to Secs. 50.75(c), 50.75(f), or 50.82 of this part.

(iii) A surety method, insurance, or other guarantee method:

(A) These methods guarantee that decommissioning costs will be paid. A surety method may be in the form of a surety bond, letter of credit, or line of credit. Any surety method or insurance used to provide financial assurance for decommissioning must contain the following conditions:

(1) The surety method or insurance must be open-ended, or, if written for a specified term, such as 5 years, must be renewed automatically, unless 90 days or more prior to the renewal day the issuer notifies the NRC, the beneficiary, and the licensee of its intention not to renew. The surety or insurance must also provide that the full face amount be paid to the beneficiary automatically prior to the expiration without proof of forfeiture if the licensee fails to provide a replacement acceptable to the NRC within 30 days after receipt of notification of cancellation.

(2) The surety or insurance must be payable to a trust established for decommissioning costs. The trustee and trust must be acceptable to the NRC. An acceptable trustee includes an appropriate State or Federal government agency or an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(B) A parent company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix A to 10 CFR part 30.

(C) For commercial companies that issue bonds, a guarantee of funds by the applicant or licensee for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix C to 10 CFR part 30. For commercial companies that do not issue bonds, a guarantee of funds by the applicant or licensee for decommissioning costs may be used if the guarantee and test are as contained in appendix D to 10 CFR part 30. For non-profit entities, such as colleges, universities, and non-profit hospitals, a guarantee of funds by the applicant or licensee may be used if the guarantee and test are as contained in appendix E to 10 CFR part 30. A guarantee by the applicant or licensee may not be used in any situation in which the applicant or licensee has a parent company holding majority control of voting stock of the company.

(iv) For a power reactor licensee that is a Federal licensee, or for a non-power reactor licensee that is a Federal, State, or local government licensee, a statement of intent containing a cost estimate for decommissioning, and indicating that funds for decommissioning will be obtained when necessary.

(v) Contractual obligation(s) on the part of a licensee's customer(s), the total amount of which over the duration of the contract(s) will provide the licensee's total share of uncollected funds estimated to be needed for decommissioning pursuant to Secs. 50.75(c), 50.75(f), or Sec. 50.82. To be acceptable to the NRC as a method of decommissioning funding assurance, the terms of the contract(s) shall

include provisions that the electricity buyer(s) will pay for the decommissioning obligations specified in the contract(s), notwithstanding the operational status either of the licensed power reactor to which the contract(s) pertains or force majeure provisions. All proceeds from the contract(s) for decommissioning funding will be deposited to the external sinking fund. The NRC reserves the right to evaluate the terms of any contract(s) and the financial qualifications of the contracting entity(ies) offered as assurance for decommissioning funding.

(vi) Any other mechanism, or combination of mechanisms, that provides, as determined by the NRC upon its evaluation of the specific circumstances of each licensee submittal, assurance of decommissioning funding equivalent to that provided by the mechanisms specified in paragraphs (e)(1)(i) through (v) of this section. Licensees who do not have sources of funding described in paragraph (e)(1)(ii) of this section may use an external sinking fund in combination with a guarantee mechanism, as specified in paragraph (e)(1)(iii) of this section, provided that the total amount of funds estimated to be necessary for decommissioning is assured.

(2) The NRC reserves the right to take the following steps in order to ensure a licensee's adequate accumulation of decommissioning funds: review, as needed, the rate of accumulation of decommissioning funds; and, either independently or in cooperation with the FERC and the licensee's State PUC, take additional actions as

appropriate on a case-by-case basis, including modification of a licensee's schedule for the accumulation of decommissioning funds.

10 C.F.R. § 50.80

Sec. 50.80 Transfer of licenses.

(a) No license for a production or utilization facility, or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall give its consent in writing.

(b) An application for transfer of a license shall include as much of the information described in Secs. 50.33 and 50.34 of this part with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and, if the license to be issued is a class 103 construction permit or initial operating license, the information required by Sec. 50.33a. The Commission may require additional information such as data respecting proposed safeguards against hazards from radioactive materials and the applicant's qualifications to protect against such hazards. The application shall include also a statement of the purposes for which the transfer of the license is requested, the nature of the transaction necessitating or making desirable the transfer of the license, and an agreement to limit access to

Restricted Data pursuant to Sec. 50.37. The Commission may require any person who submits an application for license pursuant to the provisions of this section to file a written consent from the existing licensee or a certified copy of an order or judgment of a court of competent jurisdiction attesting to the person's right (subject to the licensing requirements of the Act and these regulations) to possession of the facility involved.

(c) After appropriate notice to interested persons, including the existing licensee, and observance of such procedures as may be required by the Act or regulations or orders of the Commission, the Commission will approve an application for the transfer of a license, if the Commission determines:

(1) That the proposed transferee is qualified to be the holder of the license; and

(2) That transfer of the license is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

10 C.F.R. § 50.82(a)(11)

Sec. 50.82 Termination of license.

. . . .

(a) For power reactor licensees--

. . . .

(11) The Commission shall terminate the license if it determines that--

(i) The remaining dismantlement has been performed in accordance with the approved license termination plan, and

(ii) The terminal radiation survey and associated documentation demonstrates that the facility and site are suitable for release in accordance with the criteria for decommissioning in 10 CFR part 20, subpart E.

. . . .

10 C.F.R. § 50 Appendix A General Design Criterion 17

Criterion 17 – Electric Power Systems.

An onsite electric power system and an offsite electric power system shall be provided to permit functioning of structures, systems, and components important to safety. The safety function for each system (assuming the other system is not functioning) shall be to provide sufficient capacity and capability to assure that (1) specified acceptable fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded as a result of anticipated operational occurrences and (2) the core is cooled and containment integrity and other vital functions are maintained in the event of postulated accidents.

The onsite electric power supplies, including the batteries, and the onsite electric distribution system, shall have sufficient independence, redundancy, and testability to perform their safety functions assuming a single failure.

(i) The remaining dismantlement has been performed in accordance with the approved license termination plan, and

(ii) The terminal radiation survey and associated documentation demonstrates that the facility and site are suitable for release in accordance with the criteria for decommissioning in 10 CFR part 20, subpart E.

. . . .

10 C.F.R. § 50 Appendix A General Design Criterion 17

Criterion 17 – Electric Power Systems.

An onsite electric power system and an offsite electric power system shall be provided to permit functioning of structures, systems, and components important to safety. The safety function for each system (assuming the other system is not functioning) shall be to provide sufficient capacity and capability to assure that (1) specified acceptable fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded as a result of anticipated operational occurrences and (2) the core is cooled and containment integrity and other vital functions are maintained in the event of postulated accidents.

The onsite electric power supplies, including the batteries, and the onsite electric distribution system, shall have sufficient independence, redundancy, and testability to perform their safety functions assuming a single failure.

Electric power from the transmission network to the onsite electric distribution system shall be supplied by two physically independent circuits (not necessarily on separate rights of way) designed and located so as to minimize to the extent practical the likelihood of their simultaneous failure under operating and postulated accident and environmental conditions. A switchyard common to both circuits is acceptable. Each of these circuits shall be designed to be available in sufficient time following a loss of all onsite alternating current power supplies and the other offsite electric power circuit, to assure that specified acceptable fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded. One of these circuits shall be designed to be available within a few seconds following a loss-of-coolant accident to assure that core cooling, containment integrity, and other vital safety functions are maintained.

Provisions shall be included to minimize the probability of losing electric power from any of the remaining supplies as a result of, or coincident with, the loss of power generated by the nuclear power unit, the loss of power from the transmission network, or the loss of power from the onsite electric power supplies.

Cal. Pub. Util. Code § 377

377. The commission shall continue to regulate the facilities for the generation of electricity owned by any public utility prior to January 1, 1997, that are subject to commission regulation until the owner of those facilities has applied to the

commission to dispose of those facilities and has been authorized by the commission under Section 851 to undertake that disposal. Notwithstanding any other provision of law, no facility for the generation of electricity owned by a public utility may be disposed of prior to January 1, 2006. The commission shall ensure that public utility generation assets remain dedicated to service for the benefit of California ratepayers.

Cal. Pub. Util. Code §§ 8321-8330

8321. This chapter shall be known and may be cited as the Nuclear Facility Decommissioning Act of 1985.

8322. The Legislature hereby finds and declares all of the following:

(a) The citizens of California should be protected from exposure to radiation from nuclear facilities.

(b) It is in the best interests of all citizens of California that the costs of electricity generated by nuclear facilities be fairly distributed among present and future California electric customers so that customers are charged only for costs that are reasonably and prudently incurred.

(c) The costs of electricity generated by nuclear facilities, including the costs of their decontamination and decommissioning, should be reduced to the lowest level consistent with public health and safety.

(d) The ultimate costs of the decommissioning of nuclear facilities are of significant magnitude, and introduce an element of financial risk to both electric customers and investors unless prudent provision is made for defraying those costs.

(e) In order to reduce both risk and ultimate costs for all of its citizens, the State of California should establish a comprehensive framework for timely payment of the costs of decommissioning, and provide for allocation of risks and costs among the respective interests.

(f) The principal considerations in establishing a state policy respecting the economic aspects of decommissioning are as follows:

(1) Assuring that the funds required for decommissioning are available at the time and in the amount required for protection of the public.

(2) Minimizing the cost to electric customers of an acceptable level of assurance.

(3) Structuring payments for decommissioning so that electric customers and investors are treated equitably over time so that customers are charged only for costs that are reasonably and prudently incurred.

(g) Decommissioning nuclear facilities causes electric utility employees to become unemployed through no fault of their own, and these employees are entitled to

reasonable job protection the costs of which are properly includable in the costs of decommissioning.

8323. It is the intent of the Legislature in enacting this chapter to protect electric customers, both present and future, from the risks of unreasonable costs associated with ownership and operation of nuclear powerplants. To that end, the commission or board with respect to each electric utility owning or operating a nuclear powerplant, shall develop regulations and guidelines that promote realism in estimating costs, provide periodic review procedures that create maximum incentives for accurate cost estimations, and provide for decommissioning cost controls.

8324. Unless the context otherwise requires, the definitions in this section govern the construction of this chapter.

(a) "Board" means the board of directors or other governing body of a publicly owned public utility owning or operating a nuclear power plant.

(b) "Commission" means the Public Utilities Commission.

(c) "Electrical utility" includes both an electrical corporation subject to the jurisdiction and control of the commission and a publicly owned public utility

subject to the jurisdiction and control of its board, in either case owning or operating nuclear facilities for the generation of electricity.

(d) "Decommissioning" means to remove nuclear facilities safely from service and to reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of license, or as otherwise defined by the Nuclear Regulatory Commission or its successor. Decommissioning includes other activities and costs, if any, which may be included in Internal Revenue Service regulations implementing Section 468A of the United States Internal Revenue Code.

(e) "Nuclear facilities" means the site, building and contents, and equipment associated with any activity licensed by the Nuclear Regulatory Commission, or as may be otherwise defined by the Nuclear Regulatory Commission or its successor.

8325. (a) Each electrical corporation owning, in whole or in part, or operating nuclear facilities, located in California or elsewhere, shall establish an externally managed, segregated fund for the purposes of this chapter. In addition, each electrical corporation may establish other funds, as appropriate, for payment of decommissioning costs of nuclear facilities.

(b) The externally managed, segregated fund established pursuant to subdivision (a) shall be a fund which qualifies for a tax deduction pursuant to Section 468A of

the United States Internal Revenue Code, and applicable regulations of the Internal Revenue Service adopted pursuant thereto, if that tax treatment is determined by the commission to be in the best long-term interests of the customers of the electrical utility.

(c) The commission shall authorize an electrical corporation to collect sufficient revenues in rates to make the maximum contributions to the fund established pursuant to Section 468A of the United States Internal Revenue Code and applicable regulations, that are deductible for federal and state income tax purposes, and to otherwise recover the revenue requirements associated with reasonable and prudent decommissioning costs of the nuclear facilities for purposes of making contributions into other funds established pursuant to subdivision (a).

(d) Notwithstanding any other provision of this section, an electrical utility, which is a publicly owned public utility subject to the jurisdiction and control of its board, shall establish and may manage a separate fund for purposes of this chapter. The board shall provide that the amounts of all payments into this fund are recoverable through the utility's electric rates.

8326. (a) Each electrical utility owning, in whole or in part, or operating a nuclear facility, located in California or elsewhere, shall provide a decommissioning cost

estimate to the commission or the board for all nuclear facilities which shall include all of the following:

(1) An estimate of costs of decommissioning.

(2) A description of changes in regulation, technology, and economics affecting the estimate of costs.

(3) A description of additions and deletions to nuclear facilities.

(4) Upon request of the commission or the board, other information required by the Nuclear Regulatory Commission regarding decommissioning costs.

(b) The decommissioning costs estimate study shall be periodically revised in accordance with procedures adopted by the commission or the board pursuant to Section 8327.

8327. The commission or the board shall review, in conjunction with each proceeding of the electrical utility held for the purpose of considering changes in electrical rates or charges, the decommissioning costs estimate for the electrical utility in order to ensure that the estimate takes account of the changes in the technology and regulation of decommissioning, the operating experience of each nuclear facility, and the changes in the general economy. The review shall specifically include all cost estimates, the basis for the cost estimates, and all assumptions about the remaining useful life of the nuclear facilities.

8328. The expenses associated with decommissioning of nuclear facilities shall be paid from the funds established pursuant to Section 8325. If the money in the funds is insufficient for payment of all decommissioning costs, the commission or the board shall determine whether the costs incurred in excess of the money in the funds are reasonable in amount and prudently incurred. If the commission or the board determines that the excess costs are reasonable in amount and prudently incurred, the commission or the board shall authorize these costs to be charged to the customers of the electric utility.

8329. The commission or the board shall, for purposes of establishing rates or charges, review and approve the estimated service life and estimated retirement date of all nuclear facilities.

8330. Every electrical utility involved in decommissioning, closure, or removal of nuclear facilities, shall provide assistance in finding comparable alternative employment opportunities for its employees who become unemployed as the result of decommissioning, closure, or removal. The commission or the board shall authorize the electrical utility to collect sufficient revenue through electric rates and charges to recover the cost, if any, of compliance with this section.

Pacific Gas and Electric Company, Nuclear Facilities Qualified CPUC Decommissioning Master Trust Agreement for the Diablo Canyon Nuclear Generation Station and Humboldt Bay Nuclear Unit No. 3
§ 2.07

2.07 No Transferability of Interest in Trust. The interest of the Company in the Master Trust is not transferable by the Company, whether voluntarily or involuntarily, nor subject to the claims of creditors of the Company, provided, however, that any creditor of the Company as to which a Disbursement Certificate has been properly completed and submitted to the Trustee may assert a claim directly against the Master Trust in an amount not to exceed the amount specified on such Disbursement Certificate. Nothing herein shall be construed to prohibit a transfer of the Company's interest in the Master Trust upon sale of all or part of the Company's ownership interest in any Plant or Plants; provided, however, that any such transfer shall be subject to the prior approval of the CPUC.

Pacific Gas and Electric Company, Nuclear Facilities Nonqualified CPUC Decommissioning Master Trust Agreement for the Diablo Canyon Nuclear Generation Station and Humboldt Bay Nuclear Unit No. 3
§ 2.06

2.06 No Transferability of Interest in Master Trust. The interest of the Company in the Master Trust is not transferable by the Company, whether voluntarily or involuntarily, nor subject to the claims of creditors of the Company, provided, however, that any creditor of the Company as to which a Disbursement Certificate

has been properly completed and submitted to the Trustee may assert a claim directly against the Master Trust in an amount not to exceed the amount specified on such Disbursement Certificate. Nothing herein shall be construed to prohibit a transfer of the Company's interest in the Master Trust upon sale of all or part of the Company's ownership interest in any Plant or Plants; provided, however, that any such transfer shall be subject to the prior approval of the CPUC.

- Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

__4. Amicus Briefs

- Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less, or is

- Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text, or is

- Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

Dated this 5th day of December, 2002,

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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.	)	No. 02-72735
U.S. Nuclear Regulatory Commission, Respondent	)	NRC No. NRC-50-275-LT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Joint Brief of Petitioners-Appellants have been served upon the following persons by U.S. mail, first class:

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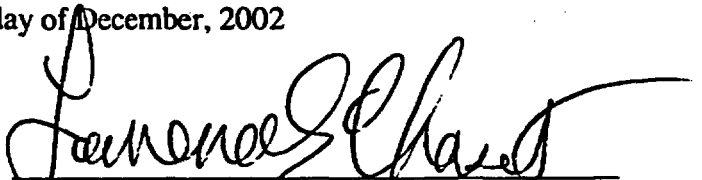
Dated at San Francisco, California, this 5th day of December, 2002



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