

The amendment application submitted by PG&E seeks "to amend Condition 2.K. of [its] license to change the expiration date of the license from one year from the date of issuance to two years from the date of issuance." Application at 1.

For the reasons set forth below, the Staff supports in part and objects in part to the pending motion.

BACKGROUND

On September 28, 1973 Pacific Gas and Electric Company filed an application with the Atomic Energy Commission seeking operating licenses for Diablo Canyon Units 1 and 2.^{2/} The applications were docketed by the Commission and a Notice of opportunity for a hearing on the applications was published in the Federal Register on October 19, 1973. 38 Fed. Reg. 29105. The applications subsequently have been contested by the Joint Intervenors and by Governor Brown of the State of California as an interested State.

During the course of the proceeding, the Applicants filed a motion pursuant to 10 C.F.R. § 50.57(c) requesting authorization to load fuel and conduct low power testing, and at the conclusion of the hearing on this motion, the Licensing Board entered an Order on July 17, 1981 authorizing the Director of Nuclear Reactor Regulation "to issue a license, consistent with the terms of the Partial Initial Decision, to authorize fuel load and

^{2/} As required by the Atomic Energy Act of 1954, as amended, 42 USC §§ 2131-33, PG&E applied to the former U.S. Atomic Energy Commission for an operating license for each unit at the Diablo Canyon Station. Thereafter, the Energy Reorganization Act of 1974 (P.L. 93-438, 88 Stat. 1233, 42 USCA § 5801) abolished the A.E.C., established the Nuclear Regulatory Commission, and transferred the A.E.C.'s licensing functions under the Atomic Energy Act to the new Commission.

low power testing up to 5% of rated power...." LBP-81-21, 14 NRC 107, 145 (1981). On September 21, 1981 this Commission authorized the NRC Staff to issue such a license to PG&E, and the requested license was issued on the following day for a term of one year. License No. DPR-76. Thereafter, an appeal was taken from the Licensing Board's Decision by the Intervenors, and this matter is currently pending before the Appeal Board for decision.^{3/}

DISCUSSION

1. In their request for a hearing, the Joint Intervenors first seek an order referring the pending license amendment "to the responsible NRC adjudicatory panel." Request at 7. While it is unclear as to exactly what relief Intervenors are seeking - the establishment of a new board or the utilization of either the existing Licensing or Appeal Board - the instant request clearly does not require the establishment of a new board to hear this Application. All that is required is the referral of this request to the existing board currently possessing jurisdiction over this matter.

In the present proceeding the Licensing Board's decision authorizing the issuance of a low power license is currently pending before the Appeal Board. Thus jurisdiction to consider new factual matters concerning the low power Partial Initial Decision, including the pending amendment relative to the low power license, lies with that tribunal. C.f. Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-578, 11 NRC 189,

^{3/} On November 19, 1981, following the discovery of serious weakness in PG&E's quality assurance program, this Commission, issued an Order suspending PG&E's license to load fuel and conduct tests at up to 5% of rated power pending satisfactory completion of a design reverification program. CLI-81-30, 14 NRC 950 (1981). The reverification program is continuing.

212, n.69 (1980) and Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-383, 5 NRC 609 (1977). No new board need be established to consider the amendment nor is additional Commission action required to confer the necessary jurisdiction on the Appeal Board. Accordingly, the Staff concurs in the Intervenor's proposal that the request for a hearing be referred to the responsible NRC adjudicatory panel, and further believes that in the present posture of this proceeding the appropriate panel is the Appeal Board currently considering the low power decision.^{4/}

2. With respect to the Intervenor's second request - that a date be set for a prehearing conference - no Commission action is required. Under the provisions of 10 C.F.R. § 2.718(h) the presiding officer shall have all powers necessary to conduct a fair and impartial hearing, to take appropriate action to avoid delay, and to maintain order, including the power to:

"(h) Hold conferences before or during the hearing for settlement, simplification of the issues, or any other proper purpose,"

As discussed above any issues concerning the proposed amendment are encompassed within the Appeal Board's consideration of PG&E's low power operating license for Diablo Canyon.^{5/} Thus, the Commission need not rule

^{4/} While the Licensing Board would traditionally be afforded the opportunity "to consider ab initio whether it is empowered to grant [the requested] relief... (Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741 (1980)), the present Licensing Board has expressly disavowed any continuing jurisdiction over low power issues. August 31, 1982 Initial Decision, Slip Opinion at 8.

^{5/} The Staff notes that the Appeal Board has indicated it has some questions concerning the extent of its jurisdiction as to matters relating to the low power license, particularly with respect to quality control and quality assurance issues. In this regard the Appeal Board certified three questions to the Commission. ALAB-681 ___ NRC ___ (July 16, 1982). However, the Staff believes the Appeal Board's jurisdiction encompasses any issues concerning the proposed amendment.

on any prehearing conference date. Rather, if any prehearing conference is to be held, that is an issue specifically delegated by 10 C.F.R. § 2.718(h) to the presiding officer (the Appeal Board) for resolution.

3. As to the Intervenors' request that a notice of hearing be published in the Federal Register, that action has already taken place. Since the responsibility for resolving issues related to the requested hearing falls within the subject matter of the Applicant's operating license application, any notice requirements would be covered by the notice of hearing issued for that application. Notice as to the right to a hearing on issues involving the application was published on October 19, 1973. 38 Fed. Reg. 29105. That notice stated that "any person whose interest may be affected by this proceeding may file a petition to intervene with respect to the issuance of the facility operating licenses." [emphasis added]. Therefore, notice was given that any interested person could request a hearing as to the matters covered by the issuance of the licenses and this would include changes to the licenses which might occur while the matter was still under review by the Commission and its Boards. Past Commission practice supports this view that during the pendency of an application before one of the Commission's adjudicatory boards, licensing actions relating to the application are encompassed in the original notice of hearing. For example, during the course of this proceeding, Applicant filed a motion pursuant to 10 C.F.R. § 50.57(c) for an operating license authorizing low-power operation. No separate notice was required regarding the motion for low-power operation since it was but an aspect of the overall action embraced by the application for the operating license and therefore was encompassed by the October 19, 1973 Federal Register notice. Thus, the notice requirements of 10 C.F.R.

§ 2.105 have already been met by Commission actions and no further action is required as to the Intervenor's third request.

4. Finally, with regard to the Intervenor's request that any hearing on the Applicant's amendment application be held "prior to disposition of the application...(Request at 2), this request, likewise, does not require Commission action. Under the provisions of 10 C.F.R. § 2.717(b), the Director of Nuclear Reactor Regulation is authorized to "issue an order and take any otherwise proper administrative action with respect to a licensee who is a party to a pending proceeding." See North Anna, supra. And, thereafter, "[a]ny order relating to the subject motion of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding." 10 C.F.R. § 2.717(b).

In the present proceeding the question of whether the opportunity for a hearing on the pending amendment application occurs prior to the granting of the amendment or after - if indeed the amendment is granted - will, under the provisions of Section 189 of the Atomic Energy Act of 1954, as amended, turn upon whether the present amendment involves a significant hazards considerations.^{6/} If a significant hazards consideration is involved, action by the Director of Nuclear Reactor Regulation would await the

^{6/} Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), provides in pertinent part:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit * * * 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

(FOOTNOTE CONTINUED ON NEXT PAGE)

outcome of the presiding officer's consideration of these issues. The Intervenor's opportunity for a hearing prior to such action is fully protected by the directive of 10 C.F.R. 50.57(c) that any action by the presiding officer be "taken with due regard to the rights of the parties to the proceeding." If the present amendment does not involve a significant hazards consideration, then consistent with the provisions of Section 189 of the Act the Director of NRR is authorized, under 10 C.F.R. 2.717(b), to issue the requested amendment during the pendency of the proceeding and any required hearing on the amendment would occur thereafter.^{7/}

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

^{6/} publication once in the Federal Register, on each application * * * for a construction permit for a 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 intend 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.

^{7/} The Intervenor's reliance on the decision in *Sholly v. U.S. Nuclear Regulatory Commission*, 651 F.2d 780 (D.C. Cir. 1980) (*per curiam*), cert. granted, ___ U.S. ___, 101 S. Ct. 3004 (1981) is misplaced in arguing that they have a right to a hearing prior to issuance of the amendment if no significant hazards considerations are found. To date the mandate of the Court of Appeals in this case has been stayed. The mandate of the Court of Appeals initially was stayed by an unpublished order of the Court dated April 9, 1981. Subsequently, the government filed a petition for writ of certiorari with the Supreme Court. The petition was granted on May 26, 1981. 69 L.Ed. 2d 387 (1981). The matter remains pending before the Supreme Court.

The Staff's review of the present application is continuing, but at this time, the Staff has no reason to believe that the present amendment involves a significant hazards consideration. As soon as a determination and supporting evaluation are final, the Board and the parties will, of course, be so advised.^{8/}

CONCLUSION

For the foregoing reasons, the Staff submits that the present license amendment application should be referred to the Appeal Board currently considering the low power license decision in this proceeding for its consideration as outlined herein. The Intervenors' request for setting of a prehearing conference date in this matter, and for the publishing of a Federal Register notice which would provide an opportunity for hearing on the amendment application should be denied.

Respectfully submitted,

Stan A. Treby
for Bradley W. Jones
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 7th day of September, 1982.

^{8/} The Staff currently anticipates making its determination prior to the September 22, 1982 expiration date of the present license. However, since PG&E timely filed the license amendment for extension of the low power license, the license would nonetheless continue in effect by operation of law, pursuant to the provisions of 10 C.F.R. § 2.109. (Effect of Timely Renewal Application).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
PACIFIC GAS AND ELECTRIC COMPANY)	Docket Nos. 50-275 O.L.
(Diablo Canyon Nuclear Power)	50-323 O.L.
Plant, Unit Nos. 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO JOINT INTERVENORS' REQUEST FOR HEARING" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 7th day of September, 1982:

Samuel J. Chilk
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Leonard Bickwit, Esq.
General Counsel
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Dr. John H. Buck
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Thomas S. Moore
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Elizabeth Apfelberg
1415 Cozadero
San Luis Obispo, CA 93401

John F. Wolf, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Mr. Glenn O. Bright
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Dr. Jerry Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Philip A. Crane, Jr., Esq.
Pacific Gas and Electric Company
P.O. Box 7442
San Francisco, CA 94120

Mr. Frederick Eissler
Scenic Shoreline Preservation
Conference, Inc.
4623 More Mesa Drive
Santa Barbara, CA 93105

David S. Fleischaker, Esq.
P.O. Box 1178
Oklahoma City, Oklahoma 73101

Mrs. Raye Fleming
1920 Mattie Road
Shell Beach, CA 93449

Richard E. Blankenburg, Co-publisher
Wayne A. Soroyan, News Reporter
South County Publishing Company
P.O. Box 460
Arroyo Grande, CA 93420

Mr. Gordon Silver
Mrs. Sandra A. Silver
1760 Alisal Street
San Luis Obispo, CA 93401

Joel R. Reynolds, Esq.
John R. Phillips, Esq.
Center for Law in the Public
Interest
10951 West Pico Boulevard
Third Floor
Los Angeles, CA 90064

Arthur C. Gehr, Esq.
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 85073

Paul C. Valentine, Esq.
321 Lytton Avenue
Palo Alto, CA 94302

Harry M. Willis
Seymour & Willis
601 California St., Suite 2100
San Francisco, CA 94108

Janice E. Kerr, Esq.
Lawrence Q. Garcia, Esq.
350 McAllister Street
San Francisco, CA 94102

Mr. James O. Schuyler
Nuclear Projects Engineer
Pacific Gas & Electric Company
77 Beale Street
San Francisco, CA 94106

Bruce Norton, Esq.
3216 North 3rd Street
Suite 202
Phoenix, Arizona 85102

Mr. Richard B. Hubbard
MHB Technical Associates
1723 Hamilton Avenue - Suite K
San Jose, CA 95125.

Mr. John Marrs, Managing Editor
San Luis Obispo County
Telegram-Tribune
1321 Johnson Avenue
P.O. Box 112
San Luis Obispo, CA 93406

Andrew Baldwin, Esq.
124 Spear Street
San Francisco, CA 94105

Herbert H. Brown
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
1900 M Street, N.W.
Washington, DC 20036

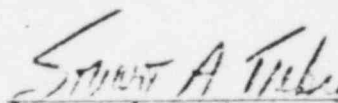
Byron S. Georgiou
Legal Affairs Secretary
Governor's Office
State Capitol
Sacramento, CA 95814

Mark Gottlieb
California Energy Commission
MS-18
1111 Howe Avenue
Sacramento, CA 95825

Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Docketing and Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *


Stuart A. Treby
Assistant Chief Hearing Council