UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	
PACIFIC GAS AND ELECTRIC COMPANY	Docket No. 50-275
(Diablo Canyon Nuclear Power Plant, Unit No. 1)	(Low Power Proceeding)

REPLY OF PACIFIC GAS AND ELECTRIC COMPANY TO JOINT INTERVENORS' REQUEST FOR HEARING

On August 17, 1982 Joint Intervenors filed a request for a hearing on Pacific Gas and Electric Company's (PGandE) request for a renewal of the low power license for Unit 1 at its Diablo Canyon facility. For the reasons set forth below PGandE submits that Joint Intervenors' request should be denied.

I

FACTS[1/]

On August 3, 1982 PGandE filed a request to extend the term of Facility Operating License DPR-76, the Diablo Canyon Unit 1 low power license, from one year from date of issuance to two

1/ A more detailed statement of facts and status of the proceeding including the Commission-mandated Independent Design Verification Program (IDVP) is set forth at pages 1-6 of PGandE's Response to Governor Brown's Motion To Reopen the Record dated August 16, 1982 and filed in the full power proceeding.

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years from that date. The license expires in accordance with its terms on September 22, 1982. Therefore, PGandE's request for renewal was timely filed to permit the provisions of 10 CFR 2.109 to apply.

II

ARGUMENT

1. The Sholly case is not operative and is about to be expressly rejected by Congress.

Joint Intervenors base their request for a hearing on Sholly v. NRC, 651 F2d 780 (D.C. Cir. 1980). A motion to stay the mandate of the court in that case was granted, and a petition for certiorari was timely filed. Certiorari has been granted (101 S.Ct. 3004; 49 Law Week 3877) which automatically extends the stay until final disposition by the Supreme Court (F.R.A.P. Rule 41(b), 28 U.S.C.A.). Furthermore, each house of Congress has approved language reversing the Sholly case (S. 1207, H.R. 2330) and the Conference Committee now reviewing these bills has agreed upon language to accomplish the reversal (Nuclear Overview, August 9, 1982, p. 2 (copy attached).) Since the mandate never issued the case cannot be viewed as having established a binding precedent as advocated by Joint Intervenors.[2/]

2/ The Sholly court's interpretation of § 189a. as requiring a hearing even upon a finding of "no significant hazards consideration" is also suspect. See Sholly v. U.S. Nuclear Regulatory Commission, Statement on Denial of Rehearing En Banc, 651 F.2d 792, 795 (1980).

2. License renewals are not amendments within the meaning of § 189a. of the Atomic Energy Act of 1954.

§ 189a. of the Atomic Energy Act of 1954 (42 USC 2239) covers only proceedings

> "...for the granting, suspending, revoking, or amending of any license..."

It does not cover license renewals, nor should it. Routine license renewals obviously are merely ministerial acts without safety significance. "Amendments" within the meaning of § 189a. obviously refer to substantive changes in the license with safety significance. If a renewal had safety significance, then the license holder must be in some sort of violation of his license, which would make a proceeding to revoke, suspend, or substantively amend more appropriate. Here, PGandE's pleading in essence is merely a request for a one year renewal of the low power license.

Nor does the case of Brooks v. Atomic Energy Commission[3/] compel a different result. In that case the Court expressly noted that

> "The Commission and the Companies do not argue that the extension of the permit completion dates was not an amendment of the construction permit;..." (Ibid. at 926)

Thus the Court's opinion that a hearing was required in that case is not determinative here.[4/]

3/ 476 F2d 924 (D.C. Cir. 1973.)

4/ The Commission also failed to include in its order extending the construction permits' completion dates a finding as to no significant hazards considerations (Ibid.).

3. A Hearing would accomplish no useful purpose; Joint Intervenors' request is governed by the Commission Order and Staff letter dated November 19, 1981.

It is not clear what a hearing could accomplish other than possible delay. What ruling other than maintenance of the status quo could result from a hearing? A Licensing Board could not issue an order amending or revoking the procedure already mandated by the Commission in its order dated November 19, 1981 (CLI-81-30). Joint Intervenors' instant motion contains nothing which does not already appear in their or Governor Brown's Motions To Reopen.[5/] For the persuasive reasons advanced by PGandE in replying to the pending Motions To Reopen, which are incorporated herein by this reference, since the Commission has already acted in this matter a Licensing Board is without authority to do so. All necessary action to protect the public health and safety will be taken in complying with the Commission order and related Staff directive (letter dated November 19, 1981) obviating the need for duplicative action by a licensing board. In other words, the protection of

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5/ Joint Intervenors repeat their tired mischaracterizations of the findings which have been made by the IDVP, referring again to "over 200 additional serious design and construction errors at the plant..." The actual number of errors found is contained in the bimonthly reports filed by PGandE pursuant to the IDVP. Copies of these reports are distributed to the Commissioners and others by means of Board Notifications. Similarly, Joint Intervenors mischaracterize the Brookhaven Report as establishing "significant flaws in the fundamental design basis for Diablo Canyon..." This report, which dealt only with the annulus portion of containment, established no such thing and had nothing to do with PGandE's decision to analyze additional portions of the plant.

the health and safety of the public lies in implementing the Commission decision and related staff directive and not in a proceeding for the renewal of the low power license, which in and of itself has no safety significance.

This case is strikingly similar to the recent Zimmer decision (In the Matter of Cincinnati Gas and Electric Company, Zimmer Nuclear Power Station, Unit No. 1, CLI-82-20, July 30, 1982) in which this Commission directed a Licensing Board to dismiss eight contentions recently allowed by it on the grounds they were being dealt with in the course of an ongoing investigation and in the NRC staff's monitoring of the applicants' quality confirmation program. PGandE submits that this reasoning applies equally here.[6/]

6/ See pp. 8, 9 of PGandE's Response To Governor Brown's Motion To Reopen filed in the Full Power Proceeding. The August 23, 1982 issue of Nucleonics Week at page 17 quotes Commissioners Ahearne and Roberts as follows: "Licensing Board action is not needed because, they said, 'the Commission itself has become heavily involved, receiving numerous briefings on the case and providing substantive guidance to NRC investigators. The allegations will be fully addressed and the appropriate and necessary action taken' they said. Chairman Palladino is quoted as follows: 'The Commission's disagreeing with a board should not be viewed as a repudiation,' he said. 'Decisive for me was the level of staff and commission involvement in the Zimmer quality assurance problems which predated the eight contentions that were advanced by MVPP,' Palladino said."

III

CONCLUSION

For the above reasons, Joint Intervenors' request for a hearing should be denied.

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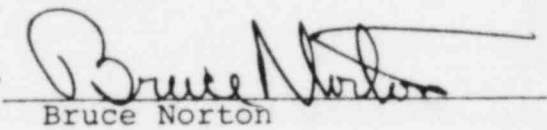
By 
Bruce Norton

DATED: September 1, 1982

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Diablo Canyon Nuclear Power Plant, Unit No. 1	)	
	)	

CERTIFICATE OF SERVICE

The foregoing document of Pacific Gas and Electric Company has been served today on the following by deposit in the United States mail, properly stamped and addressed:

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Date: September 1, 1982

American Nuclear Energy Council

Nuclear Overview

August 9, 1982

NUCLEAR WASTE -- After days of delaying tactics which forced Chairman Dingell (D-MI) to hold a rare evening markup session, the House Energy and Commerce Committee approved, by voice, vote nuclear waste management legislation (H.R. 6598)...in significant action last week, the committee approved (24-18) a Broyhill (R-NC) amendment which largely exempts from the bill's provisions, defense-generated nuclear wastes...the Broyhill amendment is essentially the same as that adopted by the House Armed Services Committee during its consideration of the Interior-approved H.R. 3809...it also stipulates that the state participation procedures of the bill apply to defense-only repositories... Broyhill offered the language as a substitute to a Markey (D-MA) amendment which would have included military waste within H.R. 6598's purview. The adoption of the Broyhill language is likely to avoid a sequential referral to the Armed Services Committee, thus eliminating the chance of a further costly delay.

In addition, last week the committee adopted: a Wirth (D-CO) amendment modified by Moorhead (R-CA) language, which requires consideration of water rights in the selection of a repository site; a Tauzin (D-LA) amendment requiring the study of the monitored retrievable storage concept (this language had been previously approved by the committee, but was mistakenly deleted in a later meeting and had to be reoffered); a Swift (D-WA) amendment which subjects to judicial review the adequacy of environmental assessments; a Madigan (R-IL) amendment which eliminates the requirement that utilities consider the use of private off-site interim facilities prior to the use of a Federal facility; a Wyden (D-OR) amendment to prevent ocean disposal of commercial low-level nuclear wastes; and a Broyhill amendment offered on behalf of Sid Morrison (R-WA) which allows site related work to continue at Hanford while public hearings and other procedural requirements provided by the bill are pursued, thus avoiding a lengthy delay in the site characterization work at Hanford.

An attempt by Rep. Synar (D-OK) to gut H.R. 6598's away-from-reactor storage provision was defeated (25-17)...in a previous meeting, the committee rejected a Gore (D-TN) amendment to delete the AFR program entirely.

With completion of the Energy and Commerce Committee action, consideration of the waste bill now shifts to the Rules Committee...some members there, most notably Rep. Derrick (D-SC) who is opposed to inclusion of any AFR provision in the waste bill, may press for the Rules Committee to hold legislative hearings on the bills...efforts are underway to reconcile the bills into a single version to go to the Rules Committee. The Senate has already approved waste legislation.

> Please contact your Representatives to urge the House Rules Committee, and the House Leadership to press for immediate and favorable consideration of nuclear waste legislation...a list of Rules Committee members and the House Leadership is reprinted on the back of the enclosed Legislative Update.

BREEDER PROGRESS -- The NRC last week approved (3-1) DOE's request for an exemption which would allow site preparation activities to begin at the Clinch River Breeder Reactor in advance of the granting of a construction permit... voting for the exemption were Chairman Palladino, and Commissioners Asselstine and Roberts...voting against was Commissioner Ahearne...Commissioner Gilinsky was out-of-town, and did not vote.

(over)

NUCLEAR LICENSING -- House-Senate conferees continue to make progress toward achieving agreement between their differing versions of the NRC authorization bills (S. 1207 and H.R. 2330)...in a meeting last week the Conference Committee tentatively agreed to Udall-Simpson compromise language on mill tailings, subject to further consideration by the conferees of final language drafted by staff. The conferees are expected to meet this week to take up the single remaining outstanding issue -- uranium import quotas.

In previous meetings the conferees agreed to the Senate-approved language providing, as an amendment to the Atomic Energy Act rather than a House-approved authorization provision, NRC authority to grant interim operating licenses until December 31, 1982; worked out minor differences in language reversing the Sholly decision which requires NRC to hold public hearings on routine license amendments, if requested by an intervenor; accepted the Hart (D-CO) amendment prohibiting the use of commercially-generated plutonium for military purposes; and approved a Ford (D-KY) amendment requiring a study of quality assurance programs.

INTERNATIONAL NUCLEAR POLICY -- Rep. Marilyn Bouquard's (R-TN) subcommittee held hearings last week on international safeguards research and development...testimony centered on the effectiveness of present safeguards techniques and the prospects for the future development of more effective U.S. techniques ...representatives from the national laboratories testified that safeguards technology must be applied from the outset when dealing with reprocessing...techniques for remote monitoring were also discussed...while it was agreed that these devices will alleviate some of the burden on the inspector, it will not eliminate the need for on-site inspection.

The non-proliferation issue continues to remain in the forefront of congressional debate...Reps. Jonathon Bingham's (D-NY) and Richard Ottinger's (D-NY) bills (H.R. 6032 and H.R. 6318, respectively) to limit the transfer of reprocessing technology were the subject last week of joint House Foreign Relations subcommittee hearings...questioning revolved primarily on the pros and cons of case-by-case consideration of the retransfer of spent fuel for reprocessing as opposed to the "programmatic" approach sought by the Administration under its recent plutonium use policy...during the testimony, Rep. Mo Udall (D-AZ) spoke in favor of a ban on the retransfer of reprocessing technology, while Rep. Edward Markey (D-MA) called for a requirement that NRC make a finding on the adequacy of International Atomic Energy Agency safeguards...Rep. Marilyn Bouquard was on hand to lend balance to the debate calling for a continued policy of international cooperation vs. one of denial in the nuclear export area.

Meanwhile, a recent report critical of international reprocessing effort continues to make waves in international energy circles...the report Bubble, Bubble Toil and Trouble: Reprocessing Nuclear Spent Fuel by the Washington based Health and Energy Learning Project, concludes that reprocessing is "a dangerous operation whose technical and economic feasibility has not been proven"...it is loaded with a variety of technical errors, and the French have responded to its inadequacies noting that the report implies that the average life of a reprocessing plant is six years but their Marcoule facility has been in operation for 24 years ...in addition, the French noted that the report states that the La Hague facility has operated at "about 10% of rated capacity" but, in fact, the facility runs at a substantially higher rate of capacity.

In a related item, Rep. Jonathan Bingham (D-NY) is scheduled to hold hearings this week (8/10) on the subject of reprocessing...among the witnesses invited to testify is the author of the above report.

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