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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

PACIFIC GAS AND ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant
Units 1 and 2)

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Docket Nos. 50-275 OL
50-323 OL

NRC STAFF RESPONSE TO JOINT INTERVENORS' REQUEST FOR HEARING

Henry J. McGurren
Counsel for NRC Staff

Dated: September 19, 1983

9/19/83

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I. INTRODUCTION

On August 29, 1983 the Joint Intervenors^{1/} in this proceeding filed a request with the Commission for an adjudicatory hearing with respect to the application of Pacific Gas and Electric Company (Applicant or PG&E), dated August 17, 1983, for an amendment to its Diablo Canyon Power Plant Facility Operating License DPR-76 (License) "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 three years from the date of issuance." Application at 1. This License authorized fuel loading and the conduct of tests at up to 5% of rated power at the Diablo Canyon Nuclear Power Plant Unit 1. Specifically, the Joint Intervenors state that pursuant to 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a), they request a hearing be held with respect to the August 17, 1983 application, and "that such application be (1) referred to the responsible NRC adjudicatory panel; (2) set for prehearing conference to

^{1/} San Luis Obispo Mothers for Peace, Scenic Shoreline Preservation Conference, Inc., Ecology Action Club, Sandra Silver, Gordon Silver, Elizabeth Apfelberg, and John J. Forster.

establish a schedule for hearing on the application; and (3) noticed in the Federal Register for hearing no less than 30 days after the date of publications." Request at 1-3.

For the reasons set forth below, the Staff objects to the instant hearing request.

II. BACKGROUND

On September 28, 1973 Pacific Gas and Electric Company filed applications 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 have been contested by the Joint Intervenors and by the Governor of the State of California participating as an interested State.

During the course of the proceeding, the Applicant 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, as part of its Initial Decision, 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 low power testing up to 5% of rated power . . ." LBP-81-21, 14 NRC 107, 145 (1981), aff'd,

^{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 § 5814) 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.

ALAB-728, 17 NRC ____ (May 18, 1983). Pursuant to 10 C.F.R. § 2.764(f) the Commission reviewed this decision and on September 21, 1981 authorized the NRC Staff to issue such a license to PG&E for Unit 1, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-22, 14 NRC 598 (1981). The requested license was issued on the following day for a term of one year. License No. DPR-76. On November 19, 1981, following the discovery of weaknesses in PG&E's design quality assurance program, the 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 now bearing completion.

On June 8, 1982, the Joint Intervenors filed a motion requesting the Atomic Safety and Licensing Appeal Board (Appeal Board) to vacate the Licensing Board's July 17, 1981 findings on its sua sponte review of the Diablo Canyon quality assurance program, revoke the low-power license, and reopen the record for hearing and the submission of relevant new evidence.^{3/} On July 2, 1982 Joint Intervenors' motion to reopen the record was supported and joined in by the Governor of the State of California.^{4/} By Memorandum and Order dated April 21, 1983, these requests to reopen the record were granted by the Appeal Board.

^{3/} On July 16, 1982, the Appeal Board certified to the Commission three questions regarding Joint Intervenors' motion. The Commission responses to these questions made clear that the Commission did not intend the issuance of the suspension order and establishment of the IDVP to deprive the adjudicatory boards of jurisdiction to consider and act on motions to reopen. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1714 (1982).

^{4/} Response of Governor Brown in Support of and Joining Joint Intervenors' Motion to Reopen the Record, dated July 2, 1983.

On August 17, 1982, Joint Intervenors filed a hearing request with the Commission similar to the instant request, in connection with Applicant's August 3, 1982, application for an amendment to License No. DPR-76, to extend the expiration date to September 22, 1983. By Memorandum and Order dated December 23, 1982, the Commission denied Joint Intervenors' Request. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1716 (1982).

III. DISCUSSION

The Commission's Memorandum and Order of December 23, 1982, CLI-82-39, supra, is dispositive. The Commission, in that Memorandum and Order, stated: (1) that PG&E's low-power license, then due to expire September 22, 1982 remains in effect following PG&E's timely request for renewal pending a Commission decision on the application for an extension,^{5/} (2) that a request for a low-power license does not give rise to a proceeding separate and apart from a pending full-power operating license proceeding^{6/} and that it follows "that this hearing request is subsumed within the scope of the continuing full-power proceeding, as was the request for a low-power license." Id.

The Commission added that further operations at low-power is within the scope of PG&E's application for a full term full-power license and is controlled by the record to date in the license proceeding. Consequently, there is no section 189a right to a separate hearing and no need for any "significant hazards consideration" finding. Thus, Sholly v. U.S. Nuclear

^{5/} Diablo Canyon, CLI-82-39, supra, 1715. The Commission relied on 5 U.S.C. § 558; 10 C.F.R. § 2.109.

^{6/} Id. The Commission relied on Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362 (1981).

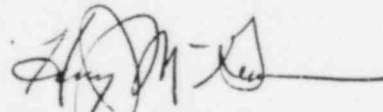
Regulatory Commission, 651 F.2d 780 (D.C. Cir. 1980) (per curiam), cert. granted, 451 U.S. 1016 (1981), does not require a hearing. Accordingly, Joint Intervenors' request for a hearing was denied.^{7/}

There is no substantive difference between the instant request for hearing and the request for hearing denied by the Commission on December 23, 1982. Accordingly, consistent with the Commission's December 23, 1982 decision the instant hearing request must be denied since, like the request for issuance of a low-power license, it is subsumed within the scope of the continuing full-power proceeding.

IV. CONCLUSION

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

Respectfully submitted,



Henry J. McGurren
Counsel for NRC Staff

Dated in Bethesda, Maryland
this 19th day of September 1983

^{7/} Diablo Canyon, CLI-82-39, supra, 1715. The Commission added that the request would be treated as a motion to reopen the low-power record. Since such a motion had already been filed by Joint Intervenors the Commission found the request duplicative. Id. Since the motion to reopen the low-power record has been granted, treating the instant request as a motion to reopen the low-power record would be superfluous.

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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 19th day of September 1983:

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