UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of PACIFIC GAS and ELECTRIC COMPANY Diablo Canyon Nuclear Power Plant Unit 1.	)))))	Docket No. 50-275

OPPOSITION OF PACIFIC GAS AND ELECTRIC COMPANY TO JOINT INTERVENORS' REQUEST FOR HEARING ON REINSTATEMENT OF LOW POWER TEST LICENSE

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I

INTRODUCTION

Joint Intervenors requested, on September 6, 1983, "a formal adjudicatory hearing prior to a Commission decision to lift the suspension" on Facility Operating License No. DPR-76 for Pacific Gas and Electric Company's ("PGandE") Diablo Canyon Nuclear Power Plant ("Diablo Canyon"), Unit 1. However, their supporting arguments, set forth in their September 1, 1983 comments to the Commission on the status of the on-going Diablo Canyon design verification program, provide no factual or legal basis for granting the request, and accordingly it should be denied.

The Joint Intervenors argue that such a hearing is required by section 189(a) of the Atomic Energy Act ("AEA"), and that since a formal adjudicatory hearing was ordered

prior to restart of Three Mile Island ("TMI"), Unit 1, one therefore is required to be held here. 1/ Neither the AEA nor the rationale for the TMI-1 restart hearing, however, mandate a formal hearing in a proceeding for the reinstatement of a previously suspended license.

II

A FORMAL HEARING IS NOT REQUIRED BY LAW OR THE FACTS OF THIS CASE.

The hearing this Commission ordered in the TMI-1 restart proceeding was to determine whether, and, if so, under what conditions, TMI-1 would be allowed to resume

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1/ Joint Intervenors have adroitly, but improperly, attempted to intertwine two independent issues: their request for a formal adjudicatory hearing on (1) the reinstatement of PGandE's authority to load fuel and conduct low power testing; and (2) PGandE's request for an extension of the term of the Facility Operating License from one year from the date of issuance to three years from the date of issuance. These are, however, two separate issues, and the question of whether Joint Intervenors are entitled to a hearing, and, if so, what kind of hearing, on the lifting of the license suspension in no way bears on whether a hearing must be held on the extension to the term of the license. Indeed, most of Joint Intervenors' legal argument in their September 1 comments to the Commission is germane only to their request for a hearing on the extension of the low power license term, and has no bearing whatsoever on their request for a hearing on the reinstatement of that license. The answer to the request for a hearing on the license extension is that there is an ongoing licensing proceeding which Joint Intervenors may seek to reopen to litigate issues they regard as pertinent to the license extension, as this Commission recognized in denying their request. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 16 NRC 1712, 1715-6 (1982).

operation, given the unique circumstances of that case. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), 10 NRC 141 (1979). The situation here is entirely different, involving instead the restoration of a previously suspended low power test license. The safety considerations for fuel loading, pre-criticality testing, initial criticality and low power testing are much less significant than those for full power operation. Moreover, the two-step process for restoring the Diablo Canyon low power license contemplated by the Commission provides even further assurances that protection of the public health and safety will not be compromised by the limited activities which will be authorized.

Under step 1, after certain requirements relative to the Diablo Canyon design verification program ("DVP") are satisfied, the Commission will vote whether to reinstate the license, but the initial authority granted would not be to conduct low power tests, much less to operate the facility. Rather, PGandE would be authorized only to load fuel and conduct pre-criticality tests, involving no irradiation of the nuclear fuel and no generation of fission products. Under step 2, after certain additional DVP requirements are met, the Commission would then vote to authorize criticality and low power tests up to five percent of rated power. Although the vehicle for the Commission's action is a suspended low power test license, the substance of that

action will not be to authorize operation, nor, under step 1, even criticality or low power testing.

Further, there is little safety significance to low power tests, and virtually none as to fuel loading and pre-criticality tests. As the Commission recently stated, "several factors contribute to a substantial reduction in risk and potential accident consequences for low power testing as compared to the higher risk in continuous full power operation." Notice of Proposed Rulemaking, "Emergency Planning and Preparedness for Production and Utilization Facilities," 46 Fed.Reg. 61132 (Dec. 15, 1981). See also Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Nuclear Reg. Rep. (CCH) ¶ 30,629 at 30,067-68 (ALAB, Sept. 14, 1981) ("Nothing in either stay motion [filed by Joint Intervenors and then Governor Brown] suggests to us a basis for any possible safety concern with respect to the carrying out of the pre-criticality preparatory activities."); id., 14 NRC 598, 601 (1981) (endorsing ALAB's September 14, 1981 order). 2/

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2/ We note that the Commission in the Shoreham case stated on a generic basis that any doubts about whether a safety issue may ultimately be resolved so as to allow full power operation cannot operate to deny a low power test authorization when the issue can be resolved adequately for low power tests. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ___ NRC ____, Nuclear Reg. Rep. (CCH) ¶ 30,794 (June 30, 1983).

Turning to Joint Intervenors' legal argument, stated simply, section 189(a) of the AEA does not confer upon Joint Intervenors a right to a formal hearing in this case. Section 189(a) provides that a hearing must be granted on request "[i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license . . . ." This is not a "proceeding. . . for the . . .suspending" of a license. That proceeding was held in November, 1981, when the license was suspended. This Commission's pending action to reinstate the Diablo Canyon low power test license can at best be characterized as a proceeding to lift the previous license suspension. Accordingly, section 189(a) does not require a hearing upon request.

Contrary to Joint Intervenors' suggestion (Joint Intervenors' letter to Commission at 20 n.21 (Sept. 21, 1983)) the NRC's Executive Legal Director agreed in the TMI-1 restart proceeding with this construction of section 189(a). H. Shapar, Memorandum to Commission re Proceedings On Start-Up of Three Mile Island Unit 1 (July 25, 1979). Joint Intervenors have played fast and loose with Mr. Shapar's advice to this Commission by selectively quoting it out of context. Although the quote is accurate, the thrust of the legal conclusion is precisely the contrary of what Joint Intervenors imply. Mr. Shapar concluded that section 189(a) did not require a hearing prior to Commission action

authorizing restart of TMI-1 because such action would not be a proceeding for the suspending of a license, but would instead be a proceeding to lift a license suspension. Id. at 1-2. The paragraph immediately preceding Joint Intervenors' quote says:

> The immediate license suspension imposed by the Commission in its July 2, 1979 Order could be lifted without any prior hearing if the Commission could find that the public health and safety no longer required license suspension. See Consumers Power Co. (Midland Plant, Units 1 and 2), 6 AEC 1082 (1973). In fact we have so argued in response to a request for a hearing in the proceeding suspending operation of Rancho Seco and Davis Besse. However, the Commission may determine in this case that it will not make the safety findings necessary for reactor restart without having had the benefit of a formal hearing record. This decision is clearly within the Commission's authority -- indeed, licensees concede as much. The Commission could, in theory, adopt some other form of public proceeding prior to start-up. However, as explained more fully below, this could give rise to substantial confusion and, in any event, would not obviate the need for a formal hearing at some stage on the license suspension if an interested person requested one under section [189(a)]. Id. at 1-2 (emphasis in original).

Mr. Shapar then went on to make the statement Joint Intervenors' quoted. But in saying that "[t]he matter at hand involves just such a proceeding," he was not referring, as Joint Intervenors would have this Commission believe, to a proceeding to restore previously suspended operating authority, but instead to the ongoing proceeding

initiated by the Commission's July 2, 1979 order suspending the TMI-1 license. This is made clear by the following:

> As suggested above, the Commission could elect to separate the proceeding to be held prior to reactor start-up (a proceeding that does not necessarily entail a formal hearing) from the proceeding on the suspending of the license (a proceeding that must entail a formal hearing). Id. at 3.

The Diablo Canyon license suspension proceeding has ended. The pending proceeding is one to restore the low power test license, a proceeding which does not require a formal hearing.

This Commission has apparently endorsed such a construction of section 189(a). Sholly v. U. S. Nuclear Regulatory Com'n, 651 F.2d 780, 790-91 (D.C. Cir. 1980), vacated and remanded sub nom. U.S. Nuclear Regulatory Com'n v. Sholly, _____ U.S. _____ , 103 S.Ct. 1170 (Feb. 22, 1983), remand, _____ F.2d ____ (D.C. Cir. April 4, 1983). In Sholly, the Commission argued that section 189(a) did not require a hearing on its order authorizing Metropolitan Edison to vent the atmosphere of the TMI-2 reactor containment building because the venting order "merely lifted a prior suspension of the licensee's authority to vent," and therefore it was not a license amendment which would require a hearing. Id. at 790. After a detailed factual review of the venting order, the prior order prohibiting venting and pertinent provisions of the

operating license, the court of appeals found that "[t]here is no indication that this order [the initial order prohibiting venting] was intended or perceived as a mere suspension of the licensee's existing authority to vent." Id. (emphasis added). The court then found that the venting order was in fact an amendment to the TMI-2 license and that the NRC erred in refusing to hold a prior hearing. Id. at 791. Had the court found, as this Commission urged, that the initial order prohibiting venting was a "mere suspension," presumably it would have sustained the Commission's refusal to hold a hearing on the lifting of the suspension (the venting order).

The TMI-1 restart proceeding lends no support to Joint Intervenors. Nothing in the TMI-1 restart order suggests that the notice of hearing in that case was required as a matter of law. Rather, as discussed above, the Commission focused on the particular facts of TMI, noting that "the unique circumstances at TMI require that additional safety concerns identified by the NRC staff be resolved prior to restart." 10 NRC at 143. Ample authority exists in the Commission's regulations to order a formal hearing when the Commission finds on a case-by-case basis that the public interest so requires (10 C.F.R. § 2.104(a)) or is otherwise appropriate (10 C.F.R. § 2.105(a)(6)). The TMI-1 restart order in no way represents a generic legal conclusion that a formal hearing must be held prior to

resumption of operating authority which the Commission has previously suspended. The contrary is clearly indicated in the memorandum from the Executive Legal Director in the TMI-1 restart proceeding cited by Joint Intervenors. See supra pp. 5-6. There is no comparable reason for requiring a formal hearing prior to restoration of Diablo Canyon's low power test license.

Most importantly, though ignored by Joint Intervenors, the procedural posture of the Diablo Canyon case is not similar in any significant way to the TMI-1 restart proceedings. TMI-1 had already received a full power operating license and all licensing proceedings had long been ended when the TMI-2 accident occurred. In short, there was no pending hearing in TMI-1. Thus, this Commission may have concluded that a hearing was in the public interest to provide meaningful opportunity for public participation in the resolution of the safety concerns raised by the NRC staff resolution of some of which the Commission deemed necessary prior to resumption of operation of TMI-1.

Unlike the TMI-1 restart situation, the Commission need not order a hearing in Diablo Canyon's case to provide the opportunity for public participation. The Diablo Canyon licensing proceedings have not terminated; they are on-going and Joint Intervenors have been participating in them for years. In fact, the adjudicatory record has been reopened

at Joint Intervenors' request and the reopened hearings will commence in late October on any genuine issues of material fact which may inhere in their comments to the Commission regarding the DVP which the Joint Intervenors would make the subject of the additional hearings they now ask this Commission to hold.

It is abundantly clear from a review of their September 1, 1983 comments that the substance of what Joint Intervenors want to litigate in the additional hearings they have requested is the adequacy and scope of the Diablo Canyon design verification program. This they will be able to do in the reopened design quality assurance hearing which will be held before the Appeal Board. It would serve no useful purpose for this Commission to direct that separate hearings be held. Joint Intervenors wholly fail to relate any contentions regarding the DVP to low power testing, much less to fuel loading and pre-criticality tests, which would entitle them to a reopening and a stay of the lifting of the license suspension pending adjudication of any contentions arguably pertinent to those activities. Neither the AEA, the Commission's regulations, nor common sense require such pointless and duplicative hearings.

It bears emphasizing that what the Commission suspended in November 1981 was PGandE's authority to conduct fuel loading and low power testing, not substantial operating authority. As this Commission stated earlier in

properly denying Joint Intervenors' request for a separate hearing on PGandE's request to extend the term of the low power license,

> 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. 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. . . . This request for a hearing would ordinarily be treated as a motion to reopen the low power record. In this instance, Joint Intervenors have already filed a motion to reopen the low-power record with the Appeal Board. Accordingly, the request for a hearing on the extension of the low-power license is duplicative and is hereby denied. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 16 NRC 1712, 1715-16 (1982). See also id., 13 NRC 361, 362 (1981).

Since the low power license is subsumed within the continuing full power proceedings, and the substance of what they wish to litigate in the requested hearing will be the subject of the reopened hearings before the Appeal Board, Joint Intervenors' request as a practical matter has been granted, and as a procedural matter is moot. Joint Intervenors will have their hearing on the Diablo Canyon DVP prior to a decision on operation of Diablo Canyon at substantial power levels, which is parallel to what the Commission ordered in the TMI-1 restart proceedings.

Additionally, Joint Intervenors have been provided the opportunity during the ongoing design verification

program regularly to comment on the progress of the DVP effort and whether it was meeting the Commission's and staff's objectives. They have attended numerous meetings and presented their views to NRC staff. Joint Intervenors have also submitted lengthy comments to the Commission concerning reinstatement of the low power test license and will have the opportunity to orally present their views at a public Commission meeting.

Not only will Joint Intervenors have their formal adjudicatory hearing prior to the granting of any operating authority above five percent power, they are also being provided an informal hearing prior to Commission action to reinstate the low power license. Cf. Kerr-McGee Corporation (West Chicago Rare Earth Facility), 15 NRC 232, 247-56 (1982), aff'd, West Chicago, Ill. v. U.S. Nuclear Regulatory Com'n, 701 F.2d 632, 641-45 (7th Cir. 1983). The Atomic Energy Act requires no more.

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III

CONCLUSION

The Joint Intervenors have set forth no legal or factual basis requiring this Commission to order a formal adjudicatory hearing prior to Commission action to reinstate the Diablo Canyon fuel loading and low power test license. Therefore, their request should be denied.

Respectfully submitted,

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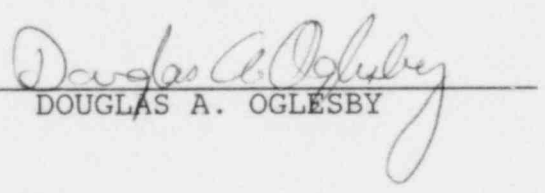
By 
DOUGLAS A. OGLESBY

Dated: September 21, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket No. 50-275
	)	Docket No. 50-323
Diablo Canyon Nuclear Power Plant, Units 1 and 2	)	
	)	

CERTIFICATE OF SERVICE

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

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