

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1213

FRIENDS OF THE EARTH,
Petitioner,
v.

U.S. NUCLEAR REGULATORY COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

and
PACIFIC GAS AND ELECTRIC COMPANY,
Intervenor.

**FEDERAL RESPONDENTS' MOTION
TO CONTINUE THIS CASE IN ABEYANCE**

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September 15, 2015

I. Introduction.

On April 13, 2015, this Court issued an Order holding this case in abeyance and directing Respondents “to file reports on the status of the petition to intervene and request for hearing filed by petitioner in the Matter of Pacific Gas & Electric Co., Docket Nos. 50-275, 50-323 (Aug. 26, 2014), 60 days after the date of this order, and at 60-day intervals thereafter.” Order at 1. Pursuant to that Order, Respondents filed Status Reports on June 12, 2015 and on August 11, 2015.

The Order also directed the parties “to file motions to govern future proceedings in this case by September 15, 2015.” Order at 1. Pursuant to that Order, the Respondents now move to continue this case in abeyance pending further proceedings by the Commission on the petition to intervene and request for hearing filed by petitioner. Those proceedings are ongoing, and a decision from the Commission's Atomic Safety and Licensing Board is expected to be issued within the next three weeks. As we explained when we moved to defer briefing, and consistent with the Court's April 13th Order, continuing to hold the case in abeyance will further judicial economy and not prejudice petitioner.

II. Background.

The Diablo Canyon Power Plant is a two-unit nuclear power plant located near San Luis Obispo, California, and is owned and operated by Pacific Gas and Electric Company (“PG&E”). As discussed in earlier pleadings, petitioner Friends

of the Earth (“FOE”) has filed a petition to intervene and request for hearing before the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”). FOE asserts that the NRC staff has taken actions that constitute a “*de facto*” amendment to the operating licenses of the Diablo Canyon facility. Specifically, FOE asserts that the NRC staff’s conduct in reviewing seismic issues at the Diablo Canyon facility, including the NRC staff’s “approval” of Revision 21 to the Final Safety Analysis Report (“Safety Report”), increased PG&E’s operating authority, thereby effectively changing the terms and conditions of the facility’s operating licenses. FOE claims that those actions effectively constituted a *de facto* license amendment requiring an opportunity for an administrative hearing under section 189(a)(1)(A) of the Atomic Energy Act, 41 U.S.C. § 2239(a)(1)(A).

FOE has also filed the instant petition for review making some of the same claims pending before the agency. FOE claims in this Court that the NRC staff’s “approval” of Revision 21 constituted a *de facto* license amendment requiring the opportunity for an administrative hearing under section 189(a)(1)(A) of the Atomic Energy Act, 41 U.S.C. § 2239(a)(1)(A). *See* Petitioner’s Non-Binding Statement of Issues To Be Raised (Dec. 1, 2014); Petitioner’s Agency Docketing Statement (Dec. 1, 2014). On April 13, 2015, after Respondents moved to defer briefing in this case, this Court issued the Order holding this case in abeyance pending agency action on FOE’s petition to intervene and request for hearing.

As noted in our initial Status Report, the Commission referred the petition to intervene and request for hearing in relevant part to the Atomic Safety and Licensing Board (“Licensing Board”) for initial consideration. *See In the Matter of Pacific Gas & Electric Co.* (Diablo Canyon Power Plant), CLI-15-14, 81 NRC ____ (May 21, 2015), at 6-9, attached as Exhibit 1 to Respondents’ Status Report (June 12, 2015). The Commission directed the Licensing Board to issue an initial decision within 140 days of the referral order, *i.e.*, by October 8, 2015. *Id.* at 9.

As noted in our second Status Report, a three-member panel of the Licensing Board held expedited oral argument on the petition to intervene and request for hearing on July 9, 2015 and, following the oral argument, took the case under advisement. The panel’s Presiding Officer stated that the panel intended to issue a decision by the Commission’s deadline of October 8, 2015. That decision will rule on FOE’s hearing request and would address, *inter alia*, whether the NRC staff’s conduct, including the acceptance or “approval” of Revision 21, effectively changed the terms and conditions of the Diablo Canyon licenses. Any change would have constituted a *de facto* amendment to those licenses requiring the opportunity to request an administrative hearing. Any aggrieved party (*i.e.*, either FOE if the request is denied or PG&E if the request is granted) may appeal the Licensing Board’s decision to the full Commission. *See* 10 C.F.R. § 2.311.

III. Argument.

In response to Respondents' motion to defer briefing, this Court held this case in abeyance, which has now allowed the NRC's administrative process to address petitioner's claims in the first instance on an expedited basis. The Licensing Board will either grant or deny FOE's hearing request. Assuming the Licensing Board complies with the Commission's deadline, it will issue a decision within approximately three (3) weeks from the date of this Motion. (In fact, the Licensing Board may issue its initial decision before this Motion is fully briefed.) Any appeal to the Commission would then follow. If the Commission ultimately grants the petition to intervene and request for hearing, FOE will have obtained the hearing that it seeks, which would moot the instant petition for review.

On the other hand, if the Commission ultimately denies the petition to intervene and request for hearing, FOE will be able to obtain judicial review of that decision in this Court under the Hobbs Act. *See* 28 U.S.C. § 2341, *et seq.* In that case, this Court will be able to review the agency decision with the benefit of an administrative record created by the agency's administrative process and reflecting the agency's technical expertise. As we explained in our motion to defer, the arrangement would both further judicial economy and enable the Commission to resolve – in the first instance – the very issue that FOE has raised in its petition for review. In addition, as we also explained in our motion to defer, continuing the

case in abeyance will allow the Commission (as opposed to the NRC staff) to adopt a position on the effect of Revision 21 to the Diablo Canyon Safety Report.

Moreover, awaiting that decision will allow this Court either to consolidate the instant case with any challenge to the subsequent case or (alternatively) dismiss the instant case as requested in Respondents' Motion to Dismiss, filed December 10, 2014, and referred by a prior panel of this Court to the Merits Panel. Thus, as noted above, the agency's action may moot this case. Depending on the nature of the agency's action on the hearing request, the parties may file appropriate motions governing future proceedings. Accordingly, this Court should continue to hold this case in abeyance.

Furthermore, continuing this case will not prejudice any party. FOE does not claim any specific technical deficiency at the Diablo Canyon facility or present any expert opinion that continued operation of the plant is unsafe, which might argue against this Court continuing to hold this case in abeyance. And FOE has not filed an emergency motion to stay operation of the facility with either the Commission or this Court. Thus, FOE cannot now claim that continuing this case in abeyance creates any threat to the public health and safety or the environment.

In sum, this Court has held the instant case in abeyance awaiting agency action on FOE's hearing request before the agency. Nothing has changed since that date except that the agency has made substantial progress on an expedited

basis in reaching a decision on FOE's petition to intervene and request for hearing. The agency will issue a decision addressing that request based upon an administrative record. That decision will address – or, at a minimum, facilitate the resolution of – the issues raised in both FOE's hearing request before the agency and in the instant petition for review. This Court will then be able to review the NRC's response to FOE's claims related to Revision 21 of the Diablo Canyon Safety Report on the administrative record created by the agency.

IV. Conclusion.

For the foregoing reasons, this Court should continue to hold this case in abeyance and direct the Respondents to file Status Reports every 60 days. The Court may also direct the parties to file motions to govern further proceedings 20 days after the issuance of any final agency action on FOE's hearing request.

Respectfully submitted,¹

¹ Shortly before filing this motion, Respondents received Petitioner's "Motion to Set Briefing Schedule and Order Oral Argument." Respondents intend to respond in opposition to that motion within the time allotted under the Federal Rules of Appellate Procedure.

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September 15, 2015

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on September 15, 2015, I filed “*Federal Respondents’ Motion to Continue This Case in Abeyance*” in Case No. 14-1213 with the U.S. Court of Appeals for the District of Columbia Circuit by filing it with the Court’s CM/ECF system. That method is calculated to serve:

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