UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT PACIFIC GAS AND ELECTRIC COMPANY'S
RESPONSE TO JOINT INTERVENORS' REQUEST TO
REOPEN OR, IN THE ALTERNATIVE,
REQUEST FOR DIRECTED CERTIFICATION

Joint Intervenors have recently filed a request dated May 9, 1979, with the Atomic Safety and Licensing Board requesting the Board "to reopen the evidentiary hearings . . . to (1) require the Staff to supplement the final environmental impact statement to address the environmental consequences of a Class [9] accident; and (2) determine the adequacy of the emergency response planning." (Request at 1). In the alternative, Joint Intervenors request the Licensing Board to certify to the Commission certain questions pertaining to consideration of Class 9 accidents and emergency plans as set forth in their request. (Request at 1-2). The Certificate of Service indicates that the request was served on May 10, 1979, which is also the date of an errata sheet to the request.[1] Joint Intervenors subsequently filed on May 17, 1979, a statement signed by

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[1] One of the documents submitted by Joint Intervenors in support of their request is a telecommunication sent to Chairman Hendrie of the Commission from Governor Brown of California on May 8, 1979. (Request at 9). The referenced telecommunication bears little relevance to the issues raised by Joint Intervenors in their request to reopen. Applicant would submit that the telecommunication is best put in perspective by the attached letter of Mr. John F. Borner, President of Applicant, to Chairman Hendrie, dated May 11, 1979.

69 physicians of San Luis Obispo County, California, in support of their May 9, 1979 request.

Request to Reopen

Joint Intervenors state that their request to reopen is made pursuant to 10 C.F.R. §2.718(j). (Request at 1). That subsection provides that a proceeding may be reopened to receive further evidence at any time prior to the initial decision. Applicant questions the propriety of Joint Intervenor's invoking that particular subsection for the reason that this Licensing Board has issued a partial initial decision in which it has concluded as a matter of law that "no serious environmental issues remain to be settled." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2) LBP-78-19, 7 NRC 989, 1035 (1978).

Joint Intervenors' request, therefore, at least with respect to the environmental consequences of a Class 9 accident, should be treated as a request to reopen following issuance of an initial decision. The Appeal Board has recently discussed the difficulty faced by one who wishes to reopen a record. Not only must the motion be addressed to a significant safety or environmental issue, but, in addition, it must be established that reopening the record would alter the initial decision in some material respect. Kansas Gas and Electric Company, et al. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). The basis for Joint Intervenors' request is the recent accident at the Three Mile Island Nuclear Station,

Unit No. 2. That accident is currently being evaluated in detail by, among others, the Nuclear Regulatory Commission Staff. While this evaluation may ultimately result in some retrofit and revised operating procedures for nuclear power plants, Joint Intervenors have not established in their request that the Licensing Board's conclusions respecting environmental matters would be altered.

With specific reference to their request concerning consideration of Class 9 accidents, Joint Intervenors argue that the recent accident at Three Mile Island destroys the premise that such accidents need not be considered based on their low probability of occurrence. Joint Intervenors then proceed to allege that "the core melt at Three Mile Island is a Class 9 accident", and even if it does not so qualify, "it came close enough to require rejection of previous probablistic estimates based on theoretical calculations." (Request at 2-3). While Joint Intervenors filed an errata sheet to their request which, among other things, revised "core melt" to read "partial core melt", the simple matter is that Joint Intervenors provided no authority whatsoever to support their allegation that there was any core melting at Three Mile Island. Nor is Applcant aware of any report, testimony or other evidence which indicates that there was any melting of the fuel at Three Mile Island. Even if melting of the fuel cladding occurred, Applicant is not aware that such an occurrence is a "core melt". Most important, however, is that a "core

melt" is not a Class 9 accident. As stated by the Court of Appeals,

> The Class 9 accident, known as a breach-of-reactor containment accident, involves concurrent rupture of the three-foot thick concrete containment vessel and the several inches of steel surrounding the reactor core, resulting in the exposure of the radioactive core to the atmosphere. Carolina Environmental Study Group vs. United States, 510 F.2d 796, 799 (D.C. Cir. 1975).

Accordingly, there is no basis upon which the accident at Three Mile Island can be classified as a Class 9 accident.

Commission policy regarding the consideration of Class 9 accidents in licensing proceedings is clearly set forth in the "Annex" proposed to be added to the Commission's regulations implementing the National Environmental Policy Act. See 36 Fed. Reg. 22851-52 (December 1, 1971). The Commission there stated that there was no need to consider Class 9 accidents for the reason that the likelihood of one occurring is highly improbable. In view of the Commission's published guidance, the Commission Staff's environmental statements on applications to build land-based nuclear power plants have not covered the consequences of such accidents. Offshore Power Sytems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 198 (1978). The Court of Appeals and the Appeal Board have upheld the Staff's position. Porter County Chapter v. Atomic Energy Commission, 533 F.2d 1011, 1017-18 (7th Cir.), cert. denied, 429 U.S. 945 (1976); Carolina Environmental Study Group

v. United States, supra at 798-99; Duke Power Company, (Catawba Nuclear Station, Units 1 and 2), ALAB-355, NRCI-76/10 397, 415 (1976); Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-226, RAI-74-9 381, 407-08 (1974).

In Offshore Power Systems, supra, the Appeal Board stated that in view of the Commission's position expressed in the Annex, the Staff was not free to make agency policy and consider Class 9 accidents for land-based plants. The Commission guidance is also binding on this Licensing Board. The Three Mile Island incident does not make the case for consideration of Class 9 accidents at Diablo Canyon or any other nuclear facility. While the Board might reopen the record in a proper case, it may not reopen this case to take evidence on Class 9 accidents as such would contravene established Commission policy.

As for emergency response planning, Joint Intervenors request that the record be reopened and this Licensing Board take evidence pertaining to the adequacy of such planning for Diablo Canyon. As the basis for this request, Joint Intervenors point to alleged inadequacies in current planning efforts as made evident during the Three Mile Island accident, and also reference two reports -- a joint report prepared by the Environmental Protection Agency and the Nuclear Regulatory Commission, and a report published by the General Accounting Office.

It is first noted that Joint Intervenors level no particular criticisms against the emergency plan for Diablo

Canyon. They cite no specific inadequacies with the Three Mile Island plan which would be applicable to Diablo Canyon, nor any inadequacies with the Diablo Canyon plan. Joint Intervenors ignore the fact that the Diablo Canyon emergency plan was litigated as a contention in the non-seismic safety hearings in these proceedings in October, 1977. (Tr. 3342-3516). At that time Joint Intervenors produced no evidence contravening the evidence offered by the Staff and Applicant that the emergency plan for Diablo Canyon complied with all applicable regulations and guidelines.

Joint Intervenors make unspecified allegations concerning the inadequacy of the Pennsylvania emergency plan and then infer that somehow these proceedings should be reopened because of the allegations. What Joint Intervenors fail to point out is that the radiological emergency plan of Pennsylvania is not the same as California's nor is the licensee's Three Mile Island Plan the same as the Applicant's Diablo Canyon Plan. Supplement No. 1 to NUREG-75/11, March 15, 1977, entitled: "NRC Office of State Programs Standards and Procedures for Concurrence in State and Local Government Radiological Emergency Response Plans" sets forth the standards and procedures by which the NRC Staff concurs with emergency plans which must meet a lengthy and rigorous list of federal requirements. The Pennsylvania plan, with which Joint Intervenors are apparently concerned, has never received the concurrence of the NRC. The NRC, following applicable standards, has, however, concurred in the Radiological

Emergency Response Plan of the State of California, one of less than a dozen states whose plans have been so approved.

It is apparent that Joint Intervenors' argument regarding the emergency plan is a generic attack on existing regulations and guidelines. When Joint Intervenors state that "this Board should reopen the hearing to determine the merits of the GAO recommendations" (Request at 9), they are clearly questioning the requirements for emergency planning as established in 10 C.F.R. Part 50, Appendix E, and 10 C.F.R. Part 100. It is respectfully submitted that, pursuant to 10 C.F.R. §2.758, this Board has no authority to consider questions attacking existing regulations under the facts of this case. Therefore, Joint Intervenors' request to reopen the hearings and take evidence on emergency planning for that purpose should be denied.

Request for Certification

Joint Intervenors' alternative request to the reopening of the evidentiary hearing is that the questions which it has raised should be certified to the Commission under 10 C.F.R. §2.718(i). Under that subsection the Licensing Board is vested with discretion to certify legal issues to a higher tribunal without a ruling having been made on that issue by the Licensing Board.

Section V(f)(4) of Appendix A to 10 C.F.R. Part 2 sets forth guidelines for the exercise by a licensing board of its certification authority. This section provides in

part as follows:

> A question may be certified . . . for determination when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when the prompt and final decision of the question is important for the protection of the public interest or to avoid any undue delay or serious prejudice to the interests of a party.

These guidelines have in general been followed by licensing boards in determining whether certification is warranted. See Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), LBP-76-38, NRCI-76/10 435, 436-37 (1976); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, RAI-74-5 877, 883 (1974).

Application of the above-mentioned guidelines to the questions presented by Joint Intervenors leads to the conclusion that certification is not warranted in this case. Joint Intervenors' first question asks whether the National Environmental Policy Act requires the Staff to consider the environmental impacts of a Class 9 accident prior to issuance of an operating license. The question is not a novel one as parties in several proceedings have unsuccessfully argued in favor of considering the environmental effects of such accidents. See, e.g., Duke Power Company, supra, Commonwealth Edison Company, supra, Long Island Lighting Company (Shoreham Nuclear Power Station), ALAB-156, RAI-73-10 831, 833-36 (1973). Joint Intervenors' reference to the accident at Three Mile

Island does not make their question one which qualifies for certification. As explained in the earlier discussion under the heading "Request to Reopen", there is no basis for classifying the accident at Three Mile Island as a Class 9 event.

Joint Intervenors also advance the argument that "[t]here is currently no lawful basis for the position that the probability of a Class 9 accident is sufficiently remote to excuse individual consideration of the risks associated with such an event." (Request at 3). Joint Intervenors then refer to the report "Reactor Safety Study: An Assessment of Accident Risks in U.S. Commercial Nuclear Power Plants", WASH-1400 (1975) (the "Rasmussen Study") and "Risk Assessment Review Group Report to the U.S. Nuclear Regulatory Commission", NUREG/CR-0400 (1978) (the "Lewis Report"). Based on the Lewis Report's criticism of the Rasmussen Study respecting the latter's Executive Summary, the procedure followed in producing the final report and some calculations in the body of the report, and the Commission's acceptance of the Lewis Report's findings, Joint Intervenors allege that "[t]here is no other study, analysis or calculation upon which the Commission can rely in order to excuse consideration of Class 9 accidents because they are too remote." (Request at 4). It is unclear to Applicant what Joint Intervenors' reference to the Rasmussen Study and the Lewis Report contributes to its argument that the question pertaining to Class 9 accidents should be certified.

The Commission's guidance respecting consideration of Class 9 accidents was issued in 1971 -- long before the initiation of the Rasmussen Study. Therefore, the basis for the Commission's guidance clearly could not have included the Rasmussen Study. Indeed, in two cases the U.S. Court of Appeals has affirmed the Commission's position and has cited in support of its conclusion a 1957 report entitled "Theoretical Possibilities & Consequences of Major Accidents in Large Nuclear Power Plants", WASH-740 (1957). See Porter County Chapter v. Atomic Energy Commission, supra at 1018; Carolina Environmental Study Group v. United States, supra at 799. In that report the following statement is made respecting assessments by experts of the probability of occurrence of a major nuclear accident:

> [W]hether numerically expressed or not, there was no disagreement [among the experts] with the opinion that the probability of major reactor accidents is exceedingly low. WASH-740 at viii; see Carolina Environmental Study Group v. United States, supra.

Finally, Joint Intervenors' reference to the Diablo Canyon site coupled with their bare allegations respecting uncertainties about safety do not make Joint Intervenors' question one which is appropriate for certification. So long as regulatory requirements are met for a particular site such that the Director of Nuclear Reactor Regulation may find reasonable assurance "that the activities authorized by the operating license can be conducted without endangering the health and safety of the public", 10 C.F.R. §50.57, the site

will fall within the Commission's guidance respecting the consideration of Class 9 events.

The second question posed by Joint Intervenors asks whether the Atomic Energy Act requires consideration of a Class 9 accident "in determining the adequacy of the engineering design features of the Diablo Canyon Nuclear Power Plant and the emergency response plan for the facility." (Request at 2). The Atomic Energy Act, as amended, states that the Commission is authorized to issue licenses subject to such conditions as the Commission may establish by regulation. 42 U.S.C. §2133(a). The Commission's regulations predicate the issuance of a license on the finding that there is reasonable assurance that the activities authorized by the license can be conducted without endangering the health and safety of the public. 10 C.F.R. §50.57. Applicant submits that the Commission is justified in making this finding because potential major accidents at a nuclear power plant are already considered under the Atomic Energy Act.

Under the Act, the Commission has promulgated regulations which employ a defense in depth concept to achieve the required level of safety. Multiple physical barriers, engineered safty features, quality assurance, continued surveillance and testing, and conservative design are all applied to provide and maintain the required degree of assurance that the probability of potential major accidents is exceedingly low. And it is because the probability of

potential major accident [illegible] extremely low that the Commission has determined that Class 9 events need not be considered under the National Environmental Policy Act.

Joint Intervenors' final question is in three parts and asks whether the Commission should require state emergency plans to contain all of the Commission's essential planning requirements, require the Applicant to make agreements with state and local agencies to assure their full participation in annual emergency drills, and establish an emergency planning zone around the Diablo Canyon Plant. (Request at 2).

Joint Intervenors' question clearly is inappropriate for certification. As stated in the discussion under "Request to Reopen", Joint Intervenors are dissatisfied with the Commission's regulations respecting emergency planning. The question which Joint Intervenors are requesting this Licensing Board to certify in essence seeks to have the Commission revise its regulations respecting emergency planning by imposing additional requirements. Certification is not the proper procedure for seeking changes in regulations. Rather, the appropriate procedure for Joint Intervenors would be to file a petition for rulemaking pursuant to 10 C.F.R §2.800 et seq.

Based on the above, Joint Intervenors' request for certification should be denied. In any event, Applicant urges that this Board issue its decision on the safety matters pending before it as soon as practicable. Indeed, even Joint Intervenors have stated that "a decision should be issued as

expeditiously as possible". Joint Intervenors' Request that the Commission Withhold Issuance of an Operating License, at 3, n.2, April 12, 1979.

Respectfully submitted,

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