

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD
4

5 In the Matter of)
6 PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275
7 (Diablo Canyon Nuclear Power) 50-323
8 Plant, Units No. 1 and 2) (Reopened Hearing -- Design
Quality Assurance)

9 RESPONSE OF LICENSEE PACIFIC GAS AND ELECTRIC
10 COMPANY TO PROPOSED CONTENTIONS
11 ON DESIGN QUALITY ASSURANCE OF
12 GOVERNOR DEUKMEJIAN AND JOINT INTERVENORS

13 Introduction

14 Governor Deukmejian has proffered five broad and
15 unparticularized contentions^{1/} for this Board to admit in the
16 reopened hearings on design quality assurance. Joint
17 Intervenor's have put forward unnumbered contentions which
18 consist of a narrative series of allegations to the effect that
19 design verification efforts since November 19, 1981 do not
20 provide assurance that the Licensee has met any "applicable
21 regulating standards." For the reasons discussed below,
22 Licensee Pacific Gas and Electric Company ("PG&E") respectfully
23 submits that neither the Governor nor Joint Intervenor's have

24 1. The Governor is not a party to these proceedings,
25 but rather, the representative of an interested State pursuant
26 to 10 C.F.R. § 2.715(c). As such the Governor has previously
been required to file "subject matters on which he desires to
participate" as opposed to contentions.

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1 submitted a single contention which is sufficiently
2 particularized to enable it to be litigated or which meets the
3 requirements of 10 C.F.R. § 2.714(b) of the Commission's Rules
4 of Practice. Accordingly, the contentions must be dismissed.

5 Legal Requirements for Contentions

6 The Commission's Rules of Practice are structured to
7 place the initial burden on a petitioner who comes forward with
8 allegations and requests that a hearing be held on those allega-
9 tions. Under § 2.714(b), the petitioner must provide the "bases
10 for each contention set forth with reasonable specificity"
11 before the contention can become an issue for litigation. Unlike
12 notice pleading in the Federal judicial system, where a
13 plaintiff making allegations generally has the burden of proof
14 of these allegations, the burden of proof is upon the applicant
15 in an NRC hearing once a contention has been admitted. See,
16 Kansas Gas and Electric Co. (Wolf Creek Generating Station Unit
17 No. 1), ALAB-279, 1 N.R.C. 575, n. 32 (1975). Thus, it is not
18 unreasonable that a petitioner should assume some degree of
19 responsibility in demonstrating that his allegations are of
20 sufficient substance to warrant a hearing. That responsibility,
21 under the Commission's Rules of Practice, is the bases
22 requirement in § 2.714(b), which has been judicially sustained.
23 Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519, 553-54
24 (1978); BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974).

25 When the Commission's Rules of Practice were
26 restructured in 1972, the Commission specifically imposed

1 responsibilities on those seeking to have contentions litigated
2 at a licensing hearing. With respect to the intervention
3 requirements of 10 C.F.R. § 2.714, the Commission stated:

4 That opening up of the hearing process . . .
5 implies that intervenors should have correla-
6 tive responsibilities to help define and
7 substantiate the matters that they seek to
8 put in issue after they have had an
9 opportunity to avail themselves of the
10 information that would then be open to them.
11 Definition of the matters in controversy is
12 widely recognized as the keystone to the
13 sufficient progress of a contested
14 proceeding. In order to put a matter in
15 issue, it will not be sufficient merely to
16 make an unsupported allegation. 37 Fed. Reg.
17 15127, 15128 (July 28, 1972) (emphasis
18 supplied).

19 There can be no question that the Governor and the
20 Joint Intervenors have had available to them, for a long period
21 of time, enormous numbers of documents bearing on the issues
22 they seek to raise. Since the proposed contentions do not
23 specify how the quality assurance program has failed to meet the
24 criteria in Appendices A and B, or otherwise document the bases
25 for these allegations, the Governor and the Joint Intervenors
26 have failed to meet the specific and unequivocal Commission
requirement to do more than "make an unsupported allegation."
Id.

27 A further purpose of the bases requirement in §
28 2.714(b) is to assure that the other parties are afforded
29 sufficient notice to enable them to know what they will have to
30 defend against or oppose. Philadelphia Electric Company (Peach
31 Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C.

1 13, 20 (1974). The notice aspect of the requirement is a
2 natural outgrowth of fundamental notions of fairness applied to
3 the party with the burden of proof. The Appeal Board has held
4 that:

5 The applicant is entitled to a fair chance
6 to defend. It is therefore entitled to be
7 told at the outset, with clarity and
 precision, what arguments are being advanced
 and what relief is being asked. . . .

8 Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit
9 No. 1), ALAB-279, 1 N.R.C. 559, 576 (1975 (emphasis supplied;
10 footnote omitted)).

11 An additional purpose of the bases requirement,
12 particularly apt in view of the virtually boundless scope of the
13 contentions proffered by the Governor and Joint Intervenors, is
14 to narrow and focus the issues to be litigated, and reduce the
15 hearing to a manageable level. As we note below, the Governor
16 and Joint Intervenors are proposing that compliance with each
17 and every applicable criteria and regulatory standard be
18 litigated, a task which is clearly not contemplated by the
19 Commission's Rules of Practice and far beyond the purview and
20 capability of the hearing process.

21 Governor's Proposed Contention I

22 Proposed contention I is a single sentence containing
23 approximately 85 words and a number of code citations covering
24 three paragraphs. In essence the "contention" is four open-
25 ended contentions, i.e., both (1) the past and (2) the present
26 design quality assurance (DQA) programs fail to comply with any

1 applicable Appendix B criteria and both the past (3) and the
2 present (4) DQA programs do not give reasonable assurances that
3 the Diablo Canyon plant meets any of its "license commitments."

4 Once a contention is admitted the Licensee has the
5 initial burden of proof regarding any such contention. Because
6 of this burden the proponent of a contention must focus on not
7 only the contention, but must also provide the bases for the
8 contention with "reasonable specificity." Here, the Governor
9 offers no bases, let alone a basis with "reasonable specificity
10 for the proposed contention." What is the basis for the
11 Governor's allegation that the Licensee's present DQA program
12 does not meet even a single applicable Appendix B criteria or a
13 single "license commitment"? Does the Governor of California
14 really believe such accusations, or is Governor's counsel simply
15 proffering a contention which would require the Licensee, all
16 other parties, and this Board to waste valuable time and
17 resources preparing to litigate the non-litigable? The Governor
18 does not even give a single indication as to how a single
19 criterion is not being met or even mention one specific license
20 commitment which is not being met. Under any notion of law or
21 equity it is impossible for the Licensee to prepare for such
22 open-ended litigation. Similarly, the broad accusation as
23 respects the past DQA program is not litigable. A contention
24 which alleges simply that the past DQA program did not comply
25 with any criteria of Appendix B and did not provide assurance
26 that the plant was designed in conformance with any license

1 commitments is far wide of the mark required by § 2.714(b) and
2 applicable cases.

3 The Governor's proposed contention I gives absolutely
4 no clue as to how all applicable criteria of Appendix B have
5 been, and continue to be, unmet. The proposed contention gives
6 no clue whatsoever as to which license commitments have not been
7 met. Is it really the Governor's position that every single
8 licensing commitment for every single structure, system, and
9 component remains unmet? What is the possible basis for such an
10 accusation?

11 It is respectfully submitted that the Governor's
12 proposed contention emphatically fails any reasonable test for
13 admissibility. It provides neither the Board nor the other
14 parties an opportunity to prepare for hearings. It must be
15 summarily rejected.

16 Governor's Proposed Contention II

17 Proposed contention II is an allegation that the
18 Independent Design Verification Program (IDVP) does not provide
19 assurance that license commitments have been met. It is the
20 only proposed contention of Governor Deukmejian which is
21 followed by something other than a rewording of the contention
22 or the next contention. It is every bit as broad as any other
23 contention but differs in that it is followed by wholly
24 unsupported, unreferenced, and, in many cases, patently untrue
25 factual allegations. Unfortunately, the Governor's proposed
26 contention II shows a singular lack of understanding of what

1 this hearing process is about. As stated supra, the Licensee
2 must convince this Board that the design of Diablo Canyon meets
3 its license commitments. If the Governor is not convinced that
4 it does, he must come forward with reasonable specificity and
5 propose a contention which, if correct, would prove or tend to
6 prove otherwise. As respects the IDVP, about which proposed
7 contention II is solely concerned, there is absolutely nothing
8 contained in any law, regulation, regulatory guide, standard or
9 elsewhere of concern to this Board that requires the IDVP to do,
10 or not to do, anything. The IDVP is a unique creation of the
11 Commission to assist it in its deliberations regarding
12 restoration of the Licensee's low-power license.

13 Whether the plant meets its design commitments -- not
14 the adequacy of the IDVP -- is the ultimate issue before this
15 Board. If the intervenors feel that design commitments have not
16 been met, they must make specific allegations before the Appeal
17 Board, along with specific bases. If certain activities of the
18 IDVP are relevant to the specific allegation, then certainly
19 those activities could be properly considered by the Appeal
20 Board. But if, as is the situation in this case, the
21 intervenors have made no specific allegations of design
22 deficiencies in the plant, whether the IDVP did or did not do
23 something is simply not the basis for a contention, let alone a
24 contention in and of itself.

25 . . .

26 . . .

1 Governor's Proposed Contention III

2 As with proposed contention II, contention III is an
3 allegation that the Licensee's Internal Technical Program
4 ("ITP"), as opposed to the IDVP, provides no assurance that the
5 Licensee has and will meet all license commitments for seismic
6 design. Again, no specific bases are set forth nor are any
7 individual license commitments identified.

8 As is the case with the IDVP, there is no requirement
9 to be found in the regulations requires an ITP. Whether the ITP
10 (or some other entity) did or did not do something can only have
11 meaning, as evidence, in connection with a specific allegation
12 of a deficiency in the seismic-design of Diablo Canyon.

13 Governor's Proposed Contentions IV and V

14 Proposed contentions IV and V suffer the same
15 deficiency as their predecessors. They totally fail to satisfy
16 the requirements for an admissible contention by reason of their
17 lack of specific bases. In essence, the contentions allege that
18 the Licensee (contention IV) and the IDVP (contention V) cannot
19 assure compliance with General Design Criterion-1 of Appendix A
20 to 10 C.F.R. Part 50. They never refer to even a single
21 structure, system, or component that is "important to safety"
22 but for which no adequate "QA/QC" program exists as a supporting
23 basis for either allegation and, as with contention II, fail to
24 grasp the role of the IDVP as defined by the Commission.
25 Contentions IV and V, like proposed contentions I, II and III
26 must be dismissed.

1 Joint Intervenors' Proposed "Contentions"

2 Joint Intervenors' proposed contentions must be
3 rejected for the same reasons as those set forth above. While
4 the contentions are interlaced with conclusory allegations,
5 no specific factual bases are provided. The Only additional
6 "contention" offered by Joint Intervenors deals with a non-
7 design activity, pre-operational testing, which is clearly
8 outside the scope of these hearings in addition to being as non-
9 specific as all other proffered contentions.

10 Conclusion

11 Both the Governor's and Joint Intervenors' putative
12 contentions should be summarily rejected as not complying with
13 applicable regulations and case law. In addition, both the
14 Governor and Joint Intervenors should be dismissed from the
15 reopened hearings on design quality assurance for their
16 continued refusal to submit particularized contentions capable
17 of being litigated. This Board has given both ample warning and
18 time to the parties to come forward with admissible contentions.
19 Further delay is both inexcusable and extremely prejudicial to
20 the process and the Licensee.

21 Respectfully Submitted,

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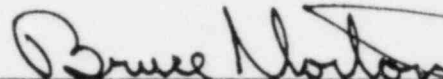
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DATED: August 1, 1983.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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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