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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	Docket Nos. 50-275 O.L.
PACIFIC GAS AND ELECTRIC COMPANY	)	50-323 O.L.
	)	
(Diablo Canyon Nuclear Power	)	(Full-Power Proceeding)
Plant, Unit Nos. 1 and 2)	)	

BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY IN SUPPORT OF EXCEPTION TO INITIAL DECISION OF AUGUST 31, 1982

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I

INTRODUCTION

On August 31, 1982, the Licensing Board issued its Initial Decision ("Decision") which authorized the issuance of a full-power operating license for the Diablo Canyon Nuclear Plant Units 1 and 2 subject to certain conditions. On September 15, 1982, Pacific Gas and Electric Company ("PGandE") filed exceptions to certain rulings in that Decision pursuant to 10 C.F.R. § 2.762(a). PGandE, along with the Staff,[1/] requested the Appeal Board to toll the time for the filing of briefs related to the exceptions until the Licensing Board ruled on requests for clarification of the Initial Decision.[2/]

On September 13, 1982, the Appeal Board granted the Staff's motion and tolled the period for filing briefs concerning

1/ The Staff had filed its exceptions to the Decision on September 10, 1982.

2/ The Motions for Clarification of the Staff and PGandE were filed on September 17 and 24, 1982, respectively.

exceptions until the Licensing Board ruled on the motion for clarification of the Decision.

On September 24, 1982, and October 26, 1982, respectively, the Licensing Board issued memoranda in response to the Staff's and PGandE's Motions for Clarification. As a consequence, the Staff, on October 4, 1982, requested leave to withdraw its Exceptions 2 and 3 to the Initial Decision.[3/] PGandE has also filed a request to withdraw its Exceptions 2, 3, and 4.[4/] The net result is that PGandE is now only pursuing its Exception 1 to the Decision dealing with a condition that the Director of Nuclear Reactor Regulation secure Federal Emergency Management Agency ("FEMA") findings on the adequacy of the State Emergency Response Plan prior to issuance of a full-power license. PGandE submits that this condition is not required since the interim FEMA findings satisfy the requirements of 10 C.F.R. § 50.47.

II

ARGUMENT

The Interim Findings of FEMA on the Adequacy of Off-Site Emergency Response Planning for Diablo Canyon Satisfy the Requirements of 10 C.F.R. § 50.47

In its Decision, the Licensing Board ruled that "...there is reasonable assurance that adequate protective measures can and will be taken [on-site and off-site] in the event of a radiological emergency [at Diablo Canyon]."[5/]

3/ This Request was granted on October 28, 1982.

4/ This Request was filed on November 8, 1982.

5/ Initial Decision at 5.

However, later in the Decision, the Licensing Board required as a condition to the issuance of a full-power license that "...the Director of Nuclear Reactor Regulation ["NRR"] must secure FEMA findings on the adequacy of the State Emergency Response Plan."[6/] In response to Motions for Clarification on this point, the Licensing Board issued its Memorandum of September 24, 1982, opining that even though there is reasonable assurance on the record that the State Plan is substantially complete, Section 50.47 [of 10 C.F.R.] explicitly requires FEMA findings of adequacy before an operating license may be issued. The Board went on to conclude that the interim findings of FEMA "do not meet that requirement" and; hence, the record does not contain the necessary findings.[7/]

PGandE disagrees with this conclusion for the following reasons. 10 C.F.R. 50.47(a)(1) provides that:

> No operating license for a nuclear power reactor will be issued unless a finding is made by NRC that the state of onsite and offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

Section (a)(2) of 10 C.F.R. 50.47 goes on to state that:

> The NRC will base its findings on a review of Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented....

In accord with these requirements, FEMA submitted to NRC its interim findings on the adequacy of off-site planning

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6/ Initial Decision at 218.

7/ Board Memorandum pages 1-2.

for Diablo Canyon in a Memorandum by Richard W. Krimm of FEMA dated November 17, 1981. Those interim findings concluded that the local off-site emergency response planning capability for San Luis Obispo County provided reasonable assurance for the protection of the public in the event of a radiological emergency at Diablo Canyon. In these interim findings and in testimony at the hearing, FEMA noted that in the State of California, basic responsibility for the protection of life and property rests with the County not the State.[8/] This statement was further buttressed by the Board finding that San Luis Obispo County has been assigned lead agency responsibility for developing and implementing local emergency response in the vicinity of Diablo Canyon.[9/] Moreover, the Board recognized that the areas of primary State responsibility are, in fact, addressed in the State Plan and consist of matters that do not deal with life threatening situations. Finally, the Board also found that while the State Plan was still incomplete, it was capable of implementation.[10/]

From the foregoing, it is clear that whether or not FEMA has formally reviewed and approved a final State Emergency Response Plan for radiological emergencies, the

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8/ Initial Decision pages 16, 95, and 96 citing Eldridge Testimony at Tr. 12709-710, 12706-712, and 12708-12710.

9/ Initial Decision page 98 citing Ness Testimony, Tr. 12460-62.

10/ Id. at 97. Eldridge Testimony Tr. 12682 at 5.

public health and safety is adequately protected. With these factual conclusions adequately borne out in the record, it does not appear necessary for the full-power license to be conditioned upon NRR review of formal FEMA findings on the adequacy of the State Plan in order to meet the requirements of 10 C.F.R. 50.47. These requirements have already been met with the FEMA finding of the adequacy of local off-site emergency response capability.

The interpretative position taken by the Licensing Board with regard to FEMA findings on the State Plan when viewed against its findings of overall off-site emergency response capability appear to exalt form over substance.11/

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11/ The Board, in its Memorandum of September 24, 1982, noted that the FEMA review was to have taken place in July of 1982 and that those results should be submitted to the Staff prior to the issuance of a full-power license. However, the FEMA review findings have not been issued as was expected by the Licensing Board.

The Licensing Board's reading of 10 C.F.R. 50.47 does not take into account the provisions of the Nuclear Regulatory Commission Appropriation Authorization Act of 1980, Public Law 96-295 (June 30, 1980), 94 Stat. 780, which in Section 109(b)(1) directed the Commission to establish by rule

> (A) . . .
>
> (B) a requirement that--
>
> (i) the Commission will issue operating licenses for utilization facilities only if the Commission determines that--
>
> (I) there exists a State or local radiological emergency response plan which provides for responding to any radiological emergency at the facility concerned and which complies with the Commission's standards for such plans under subparagraph (A), or
>
> (II) in the absence of a plan which satisfies the requirements of subclause (I), there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned, and
>
> (ii) any determination by the Commission under subclause (I) may be made only in consultation with the Director of the Federal Emergency Management Agency and other appropriate agencies, and
>
> (C) a mechanism to encourage and assist States to comply as expeditiously as practicable with the standards promulgated under subparagraph (A) of this paragraph,

As the foregoing language illustrates, Congress established statutory guidelines for the NRC to issue an operating license ". . . if there exists a state or local radiological emergency response . . . which complies with the Commission's standards" or in the absence of such a plan ". . . there exists a state, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned". This statutory directive provides clear guidance as to what action Congress expected of the NRC in this regard.

The intendment of Congress was then carried out by the NRC in the provisions of 10 C.F.R. 50.47(c)(1) which provide that in the event the standards of 50.47(b) are not technically met an applicant will have the opportunity to demonstrate that the deficiencies are not significant, adequate interim compensating measures have been taken or will be promptly or that there are other compelling reasons to permit plant operation.

PGandE submits that the criteria of § 50.47(c)(1) have been met in that FEMA has found that the failure to have a formal FEMA-approved State Emergency Response Plan does not affect the off-site emergency response capability for Diablo Canyon and that the public health and safety can be adequately protected. Indeed the Licensing Board itself has made such a finding as noted above.

III

CONCLUSION

For the foregoing reasons PGandE urges this Board to delete the condition from the Licensing Board's August 31, 1982 Decision which requires that the Director of NRR secure a finding on the adequacy of the State Emergency Response Plan prior to issuance of a full-power license for Diablo Canyon.

Respectfully submitted,

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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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