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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 OL
	)	50-323 OL
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	
	)	

PETITION FOR REVIEW

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN, Chief
Assistant Attorney General
MICHAEL J. STRUMWASSER, Special
Counsel to the Attorney General
PETER H. KAUFMAN,
SUSAN L. DURBIN,
Deputy Attorneys General
Attorneys for Governor
George Deukmejian

3580 Wilshire Boulevard, Suite 800
Los Angeles, California 90010
(213) 736-2102

8401170249 840109
PDR ADOCK 05000275
PDR

D503

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PETITION FOR REVIEW
OF ALAB-756

Governor George Deukmejian hereby petitions the Nuclear Regulatory Commission (NRC), pursuant to 10 C.F.R. section 2.786, subdivision (b), to review the December 19, 1983, decision of the Atomic Safety and Licensing Appeal Board (Appeal Board) denying the Governor's motion to reopen the licensing record on the issue of construction quality assurance.

In response to the disclosure in the last two years of widespread quality assurance (QA) deficiencies at Diablo Canyon, Governor Deukmejian and his predecessor had moved the Appeal Board to reopen the record on QA. The motion cited the known design and construction errors, independent evidence of programatic QA deficiencies at Diablo Canyon, and the pace and extent of modifications to the facility then taking place. In ALAB-756, which followed a four-day "evidentiary hearing" on the motion, the board denied the Governor's motion and refused to order hearings on the quality of construction at Diablo Canyon.

I. THE APPEAL BOARD HAS ADOPTED A NEW STANDARD FOR A MOTION TO REOPEN THAT, TOGETHER WITH THE PROCEDURE FOLLOWED BY THE BOARD, DISABLES THE COMMISSION FROM EVER DEALING WITH EVIDENCE OF SERIOUS SAFETY CONCERNS

Under established NRC jurisprudence, a party moving to reopen the record on the basis of newly discovered evidence has had to show that the

evidence was "strong enough, in the light of any opposing filings, to avoid summary disposition." (Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Generating Station) ALAB-138 (1973) 6 AEC 520, 523.) Indeed, this same Appeal Board (since reconstituted) has itself characterized the test as "[m]ight a different result have been reach had the newly proffered material been considered initially?" (Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2) ALAB-598 (1980) 11 NRC 876.) Yet the board now announces a new standard:

> "In order for new evidence to raise a 'significant safety issue' for purposees of reopening the record, it must establish either that uncorrected construction errors endanger plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to the plant's capability of being operated safely." (Slip Opinion at 7 (emphasis supplied).)

This deviation is not merely a sterile legal point -- particularly given the procedure employed by the board for ruling on the motion. After the parties had filed their moving and opposing papers, the record, by the Appeal Board's own admission, contained a "number of unanswered questions . . . concerning the nature and significance of the new evidence . . . ." (Slip Opinion at 3.) Instead of granting the motion to reopen on the basis of a plainly sufficient record, the Appeal Board convened an evidentiary hearing to weigh the evidence on the allegations of QA inadequacies. This hearing is precisely what is supposed to follow the granting of a motion to reopen and discovery by the parties into the underlying facts.

Instead, the Appeal Board permitted the applicant to respond to the allegations with self-serving, conclusory testimony from its own personnel extolling the virtues of its QA program, and with evidence culled from its files supporting the claims. While the moving parties were allowed to cross-examine the witnesses, there was no realistic opportunity for effective cross-examination of witnesses who had not been deposed, just as

there was no chance to discover among witnesses under applicant's control potential impeaching testimony nor to offer into evidence documents necessarily in applicant's possession that could rebut the self-serving claims. Thus, the board disposed of evidence entitling the moving parties to a hearing by convening a hollow substitute for the hearing that abrogated the right to procedures necessary for independent parties to represent their interests and to assist this commission in its adjudicatory mission.

The dangers of the board's rulings were amply demonstrated by events that followed the July hearing. At the July hearing PG&E witnesses had sought to limit the damage to their case from alleged serious QA breaches by the H.P. Foley Company by pointing to the superior performance of the other "major" construction contractor at Diablo Canyon, Pullman Power Products. (Tr. 573-74, 605-606.) A September 9 filing by the Joint Intervenors revealed the existence of a 1977 independent audit of Pullman showing that it failed to meet all but one of the commission's 18 QA criteria of 10 C.F.R. part 50, Appendix B (Appendix B) and revealing the falsification of records, absence of any corrective action system, inadequate direction to workers, failure to require the contractor to comply with Appendix B, and numerous examples of construction errors. (See Joint Intervenors' Supplement to Motion to Reopen the Record on Construction Quality Assurance, Attachment 2.) Neither the NRC Staff nor the other parties knew of the existence of the audit, which was conducted at the very time of the 1977 hearings before the Atomic Safety and Licensing Board (Licensing Board) on the PG&E QA program. PG&E neither disclosed the audit in 1977 nor proffered it at the July 1983 hearing before the Appeal Board. Discovery would have revealed the Pullman audit -- and whatever similar evidence remains today undisclosed. Plainly, cross-examination would have been significantly different had that document been discovered before the July hearing. Just

as plainly, neither the parties nor this commission have any idea how many more such documents remain secreted in PG&E's files.

There are numerous similar examples demonstrating that the test for reopening, together with procedure used by the Appeal Board, prevented the board from dealing fairly and correctly with the motion. The board relies on evidence produced after the hearing to resolve issues raised at the hearing.[1] It accepts the claims of PG&E witnesses that the deficiencies infecting the quality of design did not produce like results in construction, dismissing evidence to the contrary as "gross speculation." (Slip Opinion at 9.)[2] This simply demonstrates the wisdom of the established rule that once a party has tendered evidence which, together with the applicant's response, creates a triable issue of fact, the record must be reopened, with a full hearing to follow discovery.

II. THE GOVERNOR HAS SHOWN THAT BOTH THE CONSTRUCTION QA PROGRAM AND THE CONSTRUCTION WORK ITSELF FAIL TO MEET THE COMMISSION'S REGULATIONS

A. The Undisputed Evidence Demonstrates that PG&E Neither Committed Itself to Comply with Appendix B, Nor Complied, in the Construction of Unit 1 After 1970

Warren Raymond, PG&E's Manager of Quality Assurance from 1979 to 1983, testified that PG&E never formally committed itself to comply fully with Appendix B in the construction of Unit 1. (Tr. 462.) Instead, it merely

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1. For example, in responding to allegations that the 1983 work has been deficient, the board cites an October 7, 1983, inspection report. (Slip Opinion at 25, fn. 32.) Similarly, in dismissing the gravity of the Pullman audit, the board relies on evidence tendered after the December 13, 1983, Board Notification 83-188, which contains claims, never subject to discovery, made by witnesses never subject to cross-examination.

2. The motion had cited past testimony by NRC personnel before Congress to the effect that the root cause of past QA problems has been an inadequate commitment by management to quality assurance. On cross-examination, PG&E witnesses testified that PG&E's management had an identical commitment to design and construction QA. (Tr. 403, 407.) The Appeal Board simply chose to accept the same witnesses' self-serving claims that the differences in the details of design and construction QA preclude the natural inference from the known design errors to suspect the efficacy of QA for construction.

agreed to comply with Appendix B "as practicable." (Tr. 465) Mr. Raymond was clear that "as practicable" did not mean PG&E would comply with the regulations for all construction following their adoption in 1970:

> "Q. . . . [D]o you understand the term 'as practicable' to mean that Appendix B applied to all unit 1 construction activities undertaken after Appendix B became effective?
>
> "A. (Witness Raymond) No, I did not.
>
> ". . . .
>
> "Q. . . . You understood, did you not, that there could be could be construction activities in unit 1, after Appendix B became effective, that need not comply with Appendix B?
>
> "A. Yes." (Tr. 465.)

Mr. Raymond was similarly clear that the construction performed after 1970 did not, in fact, fully meet the regulations. (Tr. 465-66.)

The Appeal Board's startling response to this admission is to pronounce that compliance with the regulation was not required. (Slip Opinion at 21-23.) In defense of this proposition, the board quotes from the Statement of Considerations in the Federal Register accompanying publication of the regulations in 1970 to the effect that the regulations would be "used for guidance" in evaluating the QA programs of then-current permit holders. (35 Fed.Reg. 10498, 10499.) But the full statement makes it clear that the quoted language was intended to have precisely the opposite meaning to that attributed by the board. The statement says that the QA criteria, which "apply to all activities which affect safety-related functions," (id. at 10498) "are intended to assist applicants" for licenses to comply with the requirement of existing regulations that the preliminary safety analysis report document a QA program and that satisfactory management controls be developed. The next paragraph contains the language quoted by the board:

> "The criteria will also be used for guidance in evaluating the adequacy of the quality assurance programs in use by holders of construction permits and operating licenses." (35 Fed.Reg. at 10499.)

The context makes it clear that the paragraph on which the Appeal Board relies was intended to avoid the very inference the board draws from it -- that, having spoken about future applicants, the commission intended to make the regulations prospective only. In fact, the statement shows that Appendix B was intended to apply to current as well as future permitees. Of course, the regulations contain no provision exempting current permitees or limiting application of the regulations. The quoted statement demonstrates that the omission was purposeful. Indeed, had the commission intended to create an exemption to its regulations, it would have had to do so in the regulations themselves; an agency is otherwise without power to excuse noncompliance with its rules. (United States v. Nixon (1974) 418 U.S. 683, 694-96; Thompson v. Spear (5th Cir. 1937) 91 F.2d 430, 434.)[3]

Nothing is more corrosive of the regulatory process than casual suggestions by administrative agencies that their regulations contain exemptions contrary to their express language, which regulatees are at liberty to interpret to their liking. The Governor respectfully submits that the Appeal Board's decision requires correction by the commission.

B. The Board Has Ignored the Evidence of Serious QA Failures in the Ongoing Construction Work that Demonstrate the Recurring Deficiencies in the PG&E QA Program

The Appeal Board's decision glosses over the serious problems in the construction work associated with the current round of modifications and

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3. The Appeal Board also offers the view that the regulations could not have been intended to be "effective 30 days after publication in the Federal Register" (35 Fed.Reg. at 10499), as the notice recited, because "the nature of the construction process for a plant already being built . . . precluded the complete and immediate application of the quality assurance criteria." (Slip Opinion at 21.) In fact, the regulations were first proposed fifteen months before they became effective, giving the industry ample time to prepare to comply. (34 Fed.Reg. 6599 (Apr. 17, 1969.) There is no reason to believe that the commission had to or did intend anything other than what it stated: to make the regulations uniformly effective on July 27, 1970.

utterly fails to recognize the recurring pattern of such failures.

The board heard evidence of the "big push," the push to implement all the modifications required by the design verification program, which had been marked by errors in construction and deficiencies in the QA program. Some of these deficiencies were disposed of by the board on the word of PG&E that they had eventually been resolved. For example, the board accepted the claims of PG&E that specific instances of inspector harrassment and improper removal of red tags by the H.P. Foley Company had been satisfactorily dealt with. (Slip Opinion at 11-15.) But it failed to address the general concern expressed by Foley's discharged QA Manager that he was subject to a general pattern of production pressure and had inadequate independence. (Tr. 219-21, 223, 229-30, 300, 304-305, 342-43, 351-52.) Similarly, the board acknowledged that inspectors had been working 60 to 70 hours a week and more (Slip Opinion at 13) -- yet it accepted without question the PG&E claims that such problems were the unavoidable product of the build-up of the construction staff (ibid.).[4]

Significantly, the Appeal Board points to PG&E's response to the problems with the Foley work as demonstrating "that the applicant's quality assurance program was performing in an acceptable manner." (Slip Opinion at 14.) Yet the NRC inspector who identified some of the same incidents and cited PG&E for them testified precisely to the contrary:

> "Q. [By Judge Johnson] Would it normally be the practice of an NRC inspector to issue a notice of violation regarding such QA defects when the Applicant's quality assurance program had already detected the problem?
>
> "A. If the Licensee had detected the problem and was aware of the broad spectrum of the problem, we would not issue

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4. Among the allegations completely ignored by the board are the hiring of unqualified inspectors, inadequately trained welders, and understaffing of inspectors. (Tr. 567-68.)

an item of compliance. However, in my opinion, they did not make that judgment that there was a widespread serious problem in that area.

"Q. Would you define 'serious'? You just used the word, that it was a serious problem. Could you define that, explain what you mean by that?

"A. By 'serious' I meant that there were several failures to follow procedures, not only in the fact that -- in the welding of the structure, but in the training of the welders -- that was readily apparent -- but also in the inspector qualifications[.] That to me meant it was a serious problem." (Tr. 826-27.)

What the NRC's own inspector called "a widespread serious problem" the board dismisses as "minor welding deficiencies." (Slip Opinion at 14.)

Furthermore, the board completely ignored evidence introduced by the Governor showing that these deficiencies in the Foley program were repetitions of virtually identical problems in each of the two preceeding "big pushes" -- including similar welding problems in the Pullman work stretching back to 1972. (Gov. Exh. CQ-4, CQ-5, CQ-7, CQ-10, CQ-11, CQ-12, CQ-21, CQ-23, CQ-28, CQ-29, CQ-41, CQ-54.) Yet in December 1983 the Appeal Board accepted PG&E's explanation for the findings of the 1977 Pullman audit that the concerns identified were satisfactorily resolved and "did not evidence a significant or systematic failure of the quality assurance program." (Slip Opinion at 26-27, fn. 35.)

III. THE APPEAL BOARD HAS ADOPTED A NON-STANDARD FOR DECIDING WHEN A QUALITY ASSURANCE PROGRAM HAS FAILED OFTEN ENOUGH TO WARRANT REOPENING THE RECORD

In the face of the mountain of evidence of recurring QA failures, the Appeal Board retreats to the familiar observation that nobody's perfect:

"Although a program of construction quality assurance is specifically designed to catch construction errors, it is unreasonable to expect the program to uncover all errors." (Slip Opinion at 7.)

From this modest observation the board leaps to the conclusion that the number of errors is immaterial to the adequacy of a QA program.

"What is required instead is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety." (Ibid.)

While such assurance is certainly a requirement for licensing a plant, it has never before been suggested that the assurance is a substitute for missing compliance with the commission's regulations.[5] The law is quite clear that, in addition to "reasonable assurance" of safety, an applicant must show that

> "the facility . . . has been constructed . . . in conformity . . . with the rules and regulations of the Commission." (42 U.S.C. 2235.)

Presumably to implement its novel licensing standard, the board adopts the further requirement that to reopen a record a moving party

> "must establish either that uncorrected construction errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to the plant's capability of being operated safely." (Slip Opinion at 7.)

The first part of this test a party will scarcely ever be able to meet. Absent unfettered access to the plant, it will be most difficult to point to specific uncorrected errors. As to the second part of the test, the board never says what constitutes a "sufficient breakdown" to merit reopening. Instead, it simply lists some of the known deficiencies and pronounces each insufficient.

In 1981 the Licensing Board found the PG&E QA program for design, construction, and operation of Diablo Canyon "have been and are in compliance with the requirements of . . . Appendix B . . . ." (Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2) LBP-

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5. The authority cited by the Appeal Board makes reasonable assurance of public health and safety a necessary but not alone a sufficient condition of licensing. The board cites section 50.57(a)(3)(i) of the commission's regulations; section 50.57(a)(3) requires both that the public health and safety be assured and that there be reasonable assurance "that such activities will be conducted in compliance with the regulations of this chapter." The record contains uncontroverted evidence that the construction QA program did not comply with the regulations -- specifically with Appendix B. The board ignores the second half of the test under section 50.57(a)(3).

81-21 (1981) 14 NRC 107, 116.) That finding followed a two-page analysis of a two-day record consisting exclusively of PG&E and NRC Staff testimony on the sufficiency of the QA program. It is now clear that the 1981 decision was based on a record wholly inadequate to test the PG&E QA program. Since the July hearing, a torrent of additional allegations of serious safety deficiencies at Diablo Canyon have come to light (see Safety Evaluation Report, Supplement 21), further showing the inadequacy of the record to support a finding that the quality of construction has been assured. The parties are entitled to a full adjudication of these charges on the record.

When subsequent evidence demonstrates that a prior decision was based on an incomplete or inaccurate record insufficient to establish the facts putatively found, the record must be reopened to permit an informed decision. The Diablo Appeal Board has itself previously found that the record should be reopened when new evidence "may well shed significant additional light upon the correctness" of past findings and "may affect our evaluation" of a safety issue. (Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2) ALAB-598 (1980) 11 NRC 876, 879.) That is what is required here.

Governor Deukmejian respectfully requests that the commission review the refusal of the Appeal Board to reopen the record on construction QA.

Dated: January 9, 1984

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN, Chief
Assistant Attorney General
MICHAEL J. STRUMWASSER, Special
Counsel to the Attorney General
SUSAN L. DURBIN
PETER H. KAUFMAN,
Deputy Attorneys General

By Michael J. Strumwasser
MICHAEL J. STRUMWASSER

Attorneys for Governor
George Deukmejian

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(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that on this date*/ I caused copies of the foregoing "Petition for Review of ALAB-756" served on the following by U.S. Mail, first class, postage prepaid.

Hon. Nunzio Palladino, Chairman
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Hon. Victor Gilinsky, Commissioner
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Hon. Thomas Roberts, Commissioner
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

---

*/ The final date for the filing of this petition was extended by the Secretary of the Commission at the request of counsel for the Governor to and including January 11, 1984.

Hon. James Asselstine, Commissioner
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Hon. Frederick M. Bernthal, Commissioner
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Hon. Thomas S. Moore, Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Hon. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Hon. John H. Buck
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge John F. Wolf, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Glenn O. Bright
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Harold Denton
Director of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Leonard Bickwit, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Lawrence Chandler, Esq.
Henry J. McGurren, Esq.
Office of Executive Legal Director
BETH 042
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Section

Mrs. Elizabeth Apfelberg
1415 Cozadero
San Luis Obispo, CA 93401

Janice E. Kerr, Esq.
Public Utilities Commission
5246 State Building
350 McAllister Street
San Francisco, CA 94102

Mrs. Raye Fleming
1920 Mattie Road
Shell Beach, CA 93449

Mr. Frederick Eissler
Scenic Shoreline Preservation
Conference, Inc.
4623 More Mesa Drive
Santa Barbara, CA 93105

Gordon Silver
Sandra A. Silver
1760 Alisal Street
San Luis Obispo, CA 93401

Joel R. Reynolds, Esq.
Eric Havian, Esq.
John Phillips, Esq.
Center for Law in the Public Interest
10951 West Pico Boulevard, Third Floor
Los Angeles, CA 90064

Bruce Norton, Esq.
Norton, Burke, Berry & French
2002 East Osborn
P.O. Box 10569
Phoenix, AZ 85064

Philip A. Crane, Jr., Esq.
Richard F. Locke, Esq.
Pacific Gas and Electric Company
77 Beale Street, Room 3135
San Francisco, CA 94106

David S. Fleischaker, Esq.
P. O. Box 1178
Oklahoma City, OK 73101

Arthur C. Gehr, Esq.
Snell & Wilmer
3100 Valley Bank Center
Phoenix, AZ 85073

Mr. Richard B. Hubbard
MHB Technical Associates
1723 Hamilton Avenue, Suite K
San Jose, CA 95125

Mr. Carl Neiberger
Telegram Tribune
P. O. Box 112
San Luis Obispo, CA 93402

Virginia and Gordon Brunc
Pecho Ranch
P.O. Box 6289
Los Osos, CA 93402

Nancy Culver
192 Luneta
San Luis Obispo, CA 93401

Maurice Axelrad, Esq.
Lowenstein, Newman, Reis, & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Cheryle Johnson
Five Cities Times Press Recorder
P.O. Box 460
Arroyo Grande, CA 93420

DATED: January 11, 1984

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN, Chief
Assistant Attorney General
MICHAEL J. STRUMWASSER, Special
Counsel to the Attorney General
SUSAN L. DURBIN,
PETER H. KAUFMAN,
Deputy Attorneys General

By 
MICHAEL J. STRUMWASSER

Attorneys for Governor George Deukmejian

3580 Wilshire Boulevard
Suite 800
Los Angeles, California 90010
(213) 736-2102