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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

PACIFIC GAS AND ELECTRIC COMPANY'S
ANSWER IN OPPOSITION TO
JOINT INTERVENORS'
APPLICATION FOR STAY

On July 24, 1985, Joint Intervenors filed with the Appeal Board a document styled "Application for Stay" seeking a stay in anticipation of a decision by this Commission authorizing full power operation of Diablo Canyon Nuclear Plant Unit 2. 1/ By order the Appeal Board has referred the matter to this Commission. This filing

1/ The application was not filed as required by 10 CFR 2.788(a) within 10 days of the date of issuance of ALAB-811, ___ NRC ___ (June 27, 1985).

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constitutes Pacific Gas and Electric Company's (PGandE's) opposition to Joint Intervenors' stay request.

I

BACKGROUND

On June 27, 1985 the Appeal Board issued its decision related to Unit 2 in the reopened design quality assurance hearings. 2/ The Board found that PGandE's Unit 2 verification program "provides adequate confidence that the Unit 2 safety-related structures, systems and components are designed to perform satisfactorily in service." The Appeal Board further concluded that "there was reasonable assurance that the facility can be operated without endangering the health and safety of the public." In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant Units 1 and 2) ALAB-811, _____ NRC _____ (1985) Slip opinion at p. 25.

II

LEGAL STANDARDS FOR A STAY

The four requirements which must be considered in determining to grant a stay are set forth in 10 CFR 2.788(e). They are:

2/ Those reopened hearings were conducted in Avila Beach, California, from October 31, 1983 to November 21, 1983. The Board specifically deferred findings on Unit 2 in its decision relating to Unit 1. (ALAB-763) 19 NRC 571, 619 (1984).

"(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
(2) Whether the party will be irreparably injured unless a stay is granted;
(3) Whether the granting of a stay would harm other parties; and
(4) Where the public interest lies."

As we will show below, Joint Intervenors have not made the requisite showing under these criteria to warrant issuance of a stay.

A. Joint Intervenors Have Not Shown A Likelihood Of Prevailing On The Merits.

In their application Joint Intervenors raised three issues which they contend would be decided in their favor.

1. Earthquake Emergency Preparedness.

Joint Intervenors argue that because the U.S. Court of Appeals, en banc, has granted a rehearing of Joint Intervenors' challenge to the issuance of a full power license of Unit 1, they are likely to prevail on the merits and therefore this Commission should issue a stay.

This argument fails. First, the grounds for rehearing are procedural. Second, even though the full court voted to grant a rehearing, it did not act to reinstate a stay which had initially been granted on August 17, 1984 and had been lifted October 31, 1984.

As is the case for this Commission, under rule 6(j) of the local rules of court of the Washington D.C.

Circuit, for a stay to be granted the likelihood of prevailing on the merits must be established.

Since the circuit court did not see fit to reinstitute the stay, 3/ the act of granting rehearing cannot be considered to establish the necessary strong showing of likelihood of prevailing required by 10 CFR 2.788(e).

In any event, there can be no question but that the Commission's emergency planning regulations are fully satisfied even if the particular emergency plan in question does not give specific consideration to the effects of earthquakes, as comparable effects are already considered for other natural phenomena. As the Commission said in its San Onofre decision:

> The current regulations are designed with the flexibility to accommodate a range of onsite accidents, including accidents that may be caused by severe earthquakes. This does not, however, mean that emergency plans should be tailored to accommodate specific accident sequences or that emergency plans must also take into account the disruption in implementation of offsite emergency plans caused by severe earthquakes. 14 NRC at 1092.

3/ In its May 1, 1985 order granting rehearing, the U.S. Court of Appeals specifically stated, "FURTHER ORDERED, by the Court, en banc, that the full power operating license remains in effect and is not stayed pending the rehearing en banc."

The essential point is that emergency plans are already required to be sufficiently flexible to allow for complications arising from a range of possible causes. In other words, for purposes of implementation of an emergency plan, if a bridge is closed or a communication line is down, it does not matter whether that condition was caused by flooding, by an earthquake or by some other natural disaster. What is important is the ability to respond to the disruption. So long as this flexibility -- which is required by the NRC regulations -- exists, the fact that specific consideration is not given to any particular natural phenomenon is immaterial.

2. Seismic Safety.

Joint Intervenors claim that since ALAB-644, significant new information has arisen out of recent seismic events and subsequent related studies. This claim is a regurgitation of the contents of their motion to reopen on seismic issues filed with the Appeals Board on July 16, 1984. That motion was dismissed by the Appeal Board in ALAB 782 on grounds of lack of jurisdiction. Joint Intervenors then petitioned this Commission for review of that dismissal on procedural grounds alone and the matter remains pending as of this date.

What Joint Intervenors do not show in this application for a stay is that the "new" seismic data 4/ to which they refer would alter the prior decision of the Appeal Board on seismic design adequacy. In fact, the possibility of higher ground motion readings was acknowledged and accounted for in the Board's decision in ALAB 644. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) 13 NRC 903, 933. Consequently, the Joint Intervenors do not make a strong showing that they will prevail on the merits with regard to seismic safety as required by 10 CFR 2.788(e).

3. Quality Assurance.

PGandE has filed with the Commission contemporaneously herewith an answer to Joint Intervenor's petition for review of the Appeal Board's recent decision concerning the design adequacy of Unit 2. ALAB-811, ___ NRC ___ (June 27, 1985). A reading of that 26-page decision in conjunction with ALAB-763 indicates that ALAB-811 is an accurate and comprehensive discussion of all the issues in contest, complete with numerous citations to the evidentiary

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4/ While that data presented in Joint Intervenors' Motion to Reopen was new to some degree, the arguments made had been previously presented to the Appeals Board with either the same data or data which is not significantly different from that which was available to the Board for its decision in ALAB 644.

record. The citations indicate that the overwhelming weight of the evidence supports the Appeal Board's opinion.

B. Joint Intervenors Have Not Shown Any Irreparable Injury If A Stay Is Not Granted.

Joint Intervenors, relying on a one and one half page affidavit of Mr. Bridenbaugh that refers to a nearly 4 year old affidavit of Messrs. Hubbard and Bridenbaugh, argue that when the plant goes to full power the potential risks that were present during low power testing 5/ will be increased by a significant factor since components will become more radioactive and in case of an accident during full power operation there was potential risks to the public. Hence, they argue that there is irreparable harm to them if full power operation is authorized.

Neither argument has merit. Taken to its logical conclusion, the radioactive contamination argument would require the indefinite staying of all licenses pending resolution of any appeal for any plant since the inevitable result of the operation of a nuclear power plant is the existence of radioactivity. However, this is hardly a basis for delaying action as Joint Intervenors request.

As for the argument regarding "fission product hazard" from a hypothetical accident, the short answer is

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5/ On April 23, 1985, this Commission authorized fuel loading and low power testing for Unit 2. Joint Intervenors do not seek a stay of low power operations.

that speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required to justify a stay of a licensing decision. State of New York v. NRC, 550 F.2d 745, 756-57 (2 Cir. 1977); Virginia Sunshine Alliance v. Hendrie, 477 F.Supp. 68, 70 (D. D.C. 1979). Further, the issues of fission product inventory and the potential risk of accidents during full power operation have been implicitly addressed by the Licensing Board and found to be acceptable. In the Matter of Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-82-70, 16 NRC 756, (1982). Accordingly, we see no support for this argument and no need for the Commission to delay full power licensing because of it.

C. PGandE will Be Harmed If A Stay Is Granted And The Public Interest Favors Denial Of A Stay.

With the completion of Commission action, PGandE stands ready to commence full power operation of Diablo Canyon Unit 2. As the Commission is no doubt aware, any delay in the issuance of the full power license impacts the commercial operation date of the facility. Each day that passes causes the total cost of the facility to dramatically increase and further delays the time when the plant can be relied upon to serve the needs of PGandE's customers. Since any delay ultimately harms PGandE's customers, the public interest lies in favor of denying a stay.

III

CONCLUSION

Joint Intervenors have failed to satisfy any of four criteria of 10 CFR 2.788(e) which warrant a stay of PGandE's request for a full power license for Diablo Canyon Nuclear Power Plant, Unit 2. Accordingly, the stay motion should be denied in its entirety.

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DATED: July 26, 1985.

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NUCLEAR REGULATORY COMMISSION

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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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Date: July 26, 1985

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